

NOTE

FANNING THE FLAMES: GASLIGHTING AS A TACTIC OF PSYCHOLOGICAL ABUSE AND CRIMINAL PROSECUTION

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INTRODUCTION

Jennifer Marchant and her boyfriend argued after a night out.¹ When the argument became loud, the boyfriend called 911.² His object: to report that Jennifer, who was on probation, had been drinking, notwithstanding the fact that he had been drinking with her for hours.³ The 911 operator answered, heard voices and spoke briefly to the boyfriend before the boyfriend hung up.⁴ The operator called back and tried to speak to Jennifer, and the boyfriend hung up.⁵ The operator called again, and he hung up again.⁶ Another operator called; before hanging up again, the boyfriend warned the operator that “there would be trouble’ if she sent the police.”⁷ She sent them anyway.⁸ Meanwhile, the boyfriend chased Jennifer around the apartment, knocking things over.⁹ Jennifer grabbed a knife from the kitchen and locked herself in the bathroom.¹⁰ The boyfriend broke down the bathroom door and physically assaulted her.¹¹ She responded in self-defense, stabbing him once in the chest.¹²

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¹ See *People v. Marchant*, 60 N.Y.S.3d 616, 617 (App. Div. 2017).

² See *id.*

³ *Id.*

⁴ See *id.*

⁵ See *id.*

⁶ See *id.*

⁷ *Id.*

⁸ *Id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.* at 617, 618.

He died,¹³ and then a jury in the Niagara County Court convicted Jennifer of manslaughter in the first degree.¹⁴ This case demonstrates the process by which a victim of domestic violence, once gaslighted¹⁵ through the psychological manipulation of having her reality distorted¹⁶ by her partner and perpetrator, is then subsequently gaslighted by the criminal justice system as she¹⁷ is labeled a criminal defendant, despite being a survivor.

This Note explores the effects of criminal proceedings and societal perceptions in domestic violence cases involving self-defense as a justification and will offer suggestions for how this process can evolve to be victim centered and trauma informed. Part I provides a foundation for understanding domestic violence, an introduction to the concept of psychological abuse, and a definition of *gaslighting* as a tactic of power and control within intimate partner relationships. Part II discusses various aspects of the utilization of self-defense by domestic violence victims in criminal proceedings. Part III analyzes various societal perceptions of female domestic violence victims, which then subsequently impact the outcome of their cases at trial. Finally, Part IV provides suggestions for how to make the criminal justice system more victim centered and trauma informed with respect to cases of domestic violence in order to limit the retraumatization which occurs when a survivor is charged with the murder or manslaughter of her perpetrator.

I. GASLIGHTING

Domestic violence is generally defined as a “pattern of coercive behavior [utilized by a perpetrator] against their intimate partner in an attempt to gain or maintain power and control” through tactics including physical violence, stalking, isolation, sexual abuse, economic abuse, emotional abuse, and psychological abuse.¹⁸

¹³ *Id.* at 617.

¹⁴ *Id.* at 616.

¹⁵ See Katy Waldman, *From Theater to Therapy to Twitter, the Eerie History of Gaslighting*, SLATE (Apr. 18, 2016, 11:17 AM), http://www.slate.com/blogs/lexicon_valley/2016/04/18/the_history_of_gaslighting_from_films_to_pschoanalysis_to_politics.html [https://perma.cc/D62V-W9U7].

¹⁶ *See id.*

¹⁷ This Note will specifically focus on women-identifying victims of domestic violence. One in three women and one in four men have been victims of “some form of physical violence by an intimate partner” within their lifetime, and one in four women and one in seven men “have been victims of severe physical violence . . . by an intimate partner in their lifetime.” *Statistics*, NCADV, <https://ncadv.org/statistics> [https://perma.cc/UD7B-J6DK].

¹⁸ *About Domestic Violence*, NYSCADV, <https://www.nyscadv.org/find-help/about-domestic-violence.html> [https://perma.cc/3QHH-84AW].

Focusing on emotional and psychological abuse, the two terms are distinguished in that the former refers “to conduct that threatens to impair a victim’s ability to access and express his or her emotions,” and the latter refers “to conduct that threatens to impair a victim’s entire mental faculties.”¹⁹ This is a seemingly subtle difference, but is essential for understanding the overwhelming nature of gaslighting.

The Duluth Model “Power and Control Wheel” is a visual tool established to provide context to various types of domestic abuse tactics, as well as specific and recognizable examples of victims’ experiences.²⁰ Notably, the wheel includes tactics such as minimizing, which is achieved through making light of the abuse and not taking the victim’s concerns about it seriously; denying, which occurs through explicitly saying the abuse didn’t happen; and blaming, in which the perpetrator shifts responsibility for the abusive behavior or says that the victim caused the abuse to occur.²¹ These behaviors were understood as tactics under the broad category of psychological abuse until the term *gaslighting* was introduced.²²

The term originated in the 1938 play *Gas Light*, in which “a felonious man seeks to convince his wife that her mind is unraveling.”²³ In the play, the wife notices that her husband has dimmed the gaslights in the house, but he tells her she is “imagining things—they are as bright as they were before.”²⁴ At first, this seems outrageous—how could someone not understand, and be able to validate for themselves, their own reality? But this type of experience has since gained legitimacy in conceptualizing the extent of psychological abuse.²⁵

¹⁹ Claire Wright, *Torture at Home: Borrowing from the Torture Convention to Define Domestic Violence*, 24 HASTINGS WOMEN’S L.J. 457, 467 (2013).

²⁰ See *FAQs About the Wheels*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://www.theduluthmodel.org/wheels/faqs-about-the-wheels/> [<https://perma.cc/9JDQ-6LR2>] [hereinafter *Power and Control Wheel*]; *What is The Duluth Model?*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://www.theduluthmodel.org/what-is-the-duluth-model/> [<https://perma.cc/SP3Q-C3TB>].

²¹ See Wright, *supra* note 19, at 470; see also *Power and Control Wheel*, *supra* note 20 (demonstrating the various aspects of domestic violence contemplated by the power and control wheel tool).

²² See Shahida Arabi, *50 Shades of Gaslighting: Disturbing Signs an Abuser is Twisting Your Reality*, THOUGHT CATALOG (Aug. 30, 2019), <https://thoughtcatalog.com/shahida-arabi/2017/11/50-shades-of-gaslighting-the-disturbing-signs-an-abuser-is-twisting-your-reality/> [<https://perma.cc/S3WZ-FDTZ>].

²³ Waldman, *supra* note 15.

²⁴ *Id.*; see also Mary Kay O’Malley, *Through a Different Lens: Using Film to Teach Family Law*, 49 FAM. CT. REV. 715, 721 (2011) (noting the film *Gaslight* is useful to demonstrate psychological abuse).

²⁵ See Wright, *supra* note 19, at 471–72 (showing that items included in Tolman’s

Gaslighting is a successful tactic because while one person—the perpetrator—“externalizes and projects” their thoughts, feelings, or perceptions, the other person—the victim—“incorporates and assimilates” the reality that is being created for them.²⁶ “Gaslighting equals misdirection, distraction, and the deliberate denial of reality,” which can so easily occur in a relationship based on one partner wielding power and control over another.²⁷

This emotionally and psychologically manipulative tactic²⁸ is undeniably experienced by many victims of abuse within what they believe to be as an intimate partner relationship. Although gaslighting usually involves more specific incidents and events of psychological abuse,²⁹ I suggest that this term can be applied more broadly to the experiences of many victims of domestic violence. This is due to the nature of interpersonal relationships, which should promote love, respect, and equality, but instead are plagued by unhealthy behaviors, abuse, and violence. Having to reconcile these contrasting characteristics within a singular relationship can be disorienting to victims, and therefore creates the gaslighting effect.

The phenomenon then replicates itself when, through the criminal justice process, a victim of domestic violence becomes a criminal defendant: hoping that her justification defense will be accepted, and her innocence validated by the necessary for her to survive.³⁰ The

Psychological Violence Towards Women Inventory are grouped into several categories, of note are “[d]efining her reality” and “getting her to question her own perceptions and judgements”); see also LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 27–28 (1984) (referencing the definition of psychological torture used by Amnesty International which includes eight areas of abuse including monopolization of perception); Richard M. Tolman, *The Development of a Measure of Psychological Maltreatment of Women by Their Male Partners*, 4 *VIOLENCE & VICTIMS* 159, 161–63 & tbls.1 & 2 (1989) (including conceptual framework for organizing the 58 items analyzed in the inventory); Richard M. Tolman, *The Validation of the Psychological Maltreatment of Women Inventory*, 14 *VIOLENCE & VICTIMS* 25, 25 (1999) (including results from a study conducted to affirm the validity of the Psychological Maltreatment of Women Inventory).

²⁶ Waldman, *supra* note 15.

²⁷ See *id.*

²⁸ See *What Is Gaslighting?*, DOMESTICSHELTERS.ORG (Nov. 11, 2015), <https://www.domesticshelters.org/domestic-violence-articles-information/what-is-gaslighting> [https://perma.cc/DE9P-G355]; see also *Gaslighting: Could You Be Missing the Signs?*, DOMESTICSHELTERS.ORG (Aug. 12, 2016), <https://www.domesticshelters.org/domestic-violence-articles-information/gaslighting-could-you-be-missing-the-signs> [https://perma.cc/VBM3-B5JK] (noting red flags that would indicate the presence of gaslighting within an abusive relationship).

²⁹ See *Gaslighting: Could You Be Missing the Signs?*, *supra* note 28.

³⁰ For the purposes of this Note, I am distinguishing the experiences of domestic violence victims who use self-defense from other criminal defendants or vigilantes because they have likely not experienced gaslighting. Therefore, the process of becoming a criminal defendant is not as likely to have the same retraumatizing effects.

current criminal justice system contributes to the continued gaslighting of domestic violence victims by labeling them *criminal defendants* when they are truly *survivors*.

II. CRIMINAL LAW

A. *Self-Defense*

“Self-defense is generally defined as the justifiable use of force upon another when one reasonably believes that such force is necessary to protect oneself from imminent danger of unlawful bodily harm.”³¹ A necessary requirement is that the force must be proportional, and not excessive, in relation to the harm threatened.³² Therefore, justification for the use of *deadly* force only is established “if there is a reasonable belief that such force is necessary to protect herself from imminent, unlawful deadly force by another.”³³ In cases of homicide, the “traditional requirements of self-defense are interpreted narrowly because the defense is being used to justify the taking of a human life.”³⁴ Such narrow interpretation acts to “ensure that only those defendants who have no other choice but to kill are acquitted.”³⁵

B. *Success Rates of Self-Defense*

Over the past few decades, several studies have determined that a large majority of women incarcerated for killing men have been previously battered by those men.³⁶ Often “those who defend themselves against batterers are given no special consideration” and

³¹ Christine M. Belew, *Killing One's Abuser: Premeditation, Pathology, or Provocation?*, 59 EMORY L.J. 769, 773 (2010).

³² *See id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Allison Bass, *Women Far Less Likely to Kill Than Men; No One Sure Why*, BOSTON GLOBE, Feb. 24, 1992, at 27 (“As many as 90 percent of the women in jail today for murdering men had been battered by those men.”); Victoria Law, *How Many Women are in Prison for Defending themselves Against Domestic Violence?*, BITCHMEDIA (Sept. 16, 2014, 2:51 PM), <https://www.bitchmedia.org/post/women-in-prison-for-fighting-back-against-domestic-abuse-ray-rice> [<https://perma.cc/ZWF5-RALJ>] (“In California, a prison study found that 93 percent of the women who had killed their significant others had been abused by them. That study found that 67 percent . . . of those women reported that they had been attempting to protect themselves or their children when they wound up killing their partner. In New York State, 67 percent . . . of women sent to prison for killing someone close to them were abused by that person.”).

in some cases, “face greater punishment than other defendants.”³⁷ A study conducted by The Michigan Battered Women’s Clemency Project³⁸ revealed that

domestic violence victims had higher conviction rates and longer sentences than all others charged with homicide, including those with previous violent criminal records. Overall, a white female defendant with no prior convictions or criminal history who was convicted by a jury of killing a white person could expect an average sentence of 10 to 30 years. However, if the woman was a victim of domestic violence, her predicted sentence increased to life.³⁹

When comparing sentences based on gender, “[w]omen receive harsher sentences for killing their male partners than men receive for killing their female partners.”⁴⁰ “The average prison sentence of men who kill their female partners is 2 to 6 years.”⁴¹ Conversely, “[w]omen who kill their partners are sentenced on average to 15 years, despite the fact that most women who kill their partners do so to protect themselves from violence initiated by their partners.”⁴² Based on these statistics, men who exert the ultimate form of power and control by murdering their female partners receive sentences that are significantly less than women who kill their partners in defense of their lives.⁴³ The injustice of the value placed on the life of a woman killed by her partner is heart-wrenching.

³⁷ Carol Jacobsen et al., *Battered Women, Homicide Convictions, and Sentencing: The Case for Clemency*, 18 HASTINGS WOMEN’S L.J. 31, 32 (2007).

³⁸ The study analyzed homicide convictions and sentences in Oakland County, Michigan, over a three-year period from 1986 to 1988. *Id.* “All of the victims of domestic violence in this study were women.” *Id.*

³⁹ *Id.*

⁴⁰ *Words from Prison – Did You Know . . . ?*, ACLU, <https://www.aclu.org/other/words-prison-did-you-know> [<https://perma.cc/28Z4-8RC3>] [hereinafter *Words from Prison*].

⁴¹ *Id.*; see also ANNABELLE LEVER, A DEMOCRATIC CONCEPTION OF PRIVACY 17 n.32 (2013) (“Michael Dowd, director of the Pace university [sic] Battered Women’s Justice Center, has found that the average sentence for a woman who kills her mate is 15 to 20 years; for a man, 2 to 6.”).

⁴² *Words from Prison*, *supra* note 40; see also LEVER, *supra* note 41, at 17 n.32 (noting the average sentence for a woman who kills her partner is fifteen to twenty years).

⁴³ See *Words from Prison*, *supra* note 40; see also LEVER, *supra* note 41, at 17 n.32.

When considering the intersectionality⁴⁴ of gender and race, the statistics reveal an even deeper bias against women of color.⁴⁵ Black women and other marginalized people are “especially likely to be criminalized, prosecuted, and incarcerated while trying to navigate and survive the conditions of violence in their lives.”⁴⁶ In one of her studies, Sharon Angella Allard determined that the ratio of black women to white women convicted of killing their abusive husbands was nearly two to one.⁴⁷ Allard concluded that the legal system legitimizes racialized stereotypes of black women as “angry,” and therefore there exists “a greater likelihood that a jury would believe a prosecutor’s story that a battered Black woman acted out of revenge and anger, as opposed to fear, in taking the life of her batterer.”⁴⁸

Law, as an inherently patriarchal institution,⁴⁹ has made it extremely difficult for women to navigate the use of self-defense as a justification. Notably, a battered woman’s self-defense claim is most likely to be successful following an acute battering incident.⁵⁰ Death resulting from a violent altercation is likely to produce the severe bodily injury often necessary to “alleviate any difficulty that the defendant might have in establishing that she had a reasonable belief that she was faced with an imminent threat of death or serious bodily harm at the particular instant at which she killed her batterer.”⁵¹ However, this relies on the inherent sexism rooted in the “traditional conception of self-defense, including the fact that the law has been largely driven by male conceptions of violence.”⁵²

⁴⁴ See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (“Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.”).

⁴⁵ See *Fact Sheet on Domestic Violence & the Criminalization of Survival*, FREE MARISSA NOW, <http://www.freemariSSANOW.org/fact-sheet-on-domestic-violence-criminalization.html> [https://perma.cc/VJD4-SUZ8].

⁴⁶ *Id.*

⁴⁷ Sharon Angella Allard, *Rethinking Battered Women Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN’S L.J. 191, 197 n.19 (1991).

⁴⁸ *Id.* at 197.

⁴⁹ See Lynn Hecht Schafran, *Credibility in the Courts: Why is There a Gender Gap?*, JUDGES J., Winter 1995, at 5 (“For most of this country’s history, the law classed women with children and the mentally impaired and forbade us to own property, enter into contracts, or vote.”).

⁵⁰ Rocco C. Cipparone, Jr., *The Defense of Battered Women Who Kill*, 135 U. PA. L. REV. 427, 434 (1987).

⁵¹ *Id.*

⁵² David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 69 (1997); see also CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 49, 51 (1989) (describing that although self-defense law was created without a discriminatory purpose, it ultimately has that effect in practice); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-*

Jennifer Marchant was convicted of manslaughter in the first degree,⁵³ and raised a defense of justification.⁵⁴ Under New York Penal Law section 25.00, “[w]hen a ‘defense,’ other than an ‘affirmative defense,’ defined by statute is raised at a trial, the people have the burden of disproving such defense beyond a reasonable doubt.”⁵⁵ New York Penal Law section 35.15 offers a justification defense for those who use physical force in defense of another.⁵⁶ The opinion of the New York Supreme Court Appellate Division, Fourth Department, referenced⁵⁷ section 35.15(1), which states,

A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person.⁵⁸

Further, the court included reference⁵⁹ to section 35.15(2)(a), which states,

A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless . . . [t]he actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating.⁶⁰

Although the jury in Jennifer Marchant’s case found that the People met that burden, the Appellate Division, after an independent assessment of the proof, concluded that the jury failed to give the

Defense, 15 HARV. C.R.-C.L.L. REV. 623, 631, 632 (1980) (indicating the physical and social factors which implicitly lead to self-defense being utilized differently by men and women).

⁵³ See *People v. Marchant*, 60 N.Y.S.3d 616, 616 (App. Div. 2017).

⁵⁴ See *id.* at 617.

⁵⁵ N.Y. PENAL LAW § 25.00(1) (McKinney 2019).

⁵⁶ See PENAL § 35.15(1).

⁵⁷ See *Marchant*, 60 N.Y.S.3d at 618.

⁵⁸ PENAL § 35.15(1).

⁵⁹ See *Marchant*, 60 N.Y.S.3d at 618.

⁶⁰ PENAL § 35.15(2)(a).

evidence the weight it should be accorded.⁶¹ This outcome, an appeal reversed on the facts resulting in a dismissal of a domestic violence survivor's indictment,⁶² is noteworthy: such a dismissal is the justice denied to many survivors in court.

As in New York,⁶³ most jurisdictions require a defendant to prove a proportional amount of force was used in response to imminent harm or danger.⁶⁴ However, “[t]hese elements are rooted in an idealized version of the way men should combat violent aggressors” and poses a problem for female domestic violence victims who are often physically smaller, and therefore more likely to “respond to a man’s unrelenting physical attacks by using a deadly weapon, since many women are simply unable to fend off assaults with their fists.”⁶⁵

In consideration of the origins of the self-defense jurisprudence, it is no longer as shocking that women who fight back against their male perpetrators often are not found to be justified in their actions. The laws were never meant to reconcile this power dynamic, instead, they were created to maintain patriarchal power and control.⁶⁶

C. Battered Woman Syndrome

“Battered woman syndrome” emerged as theory to address the unique experiences of domestic violence victims while challenging the limitations of self-defense jurisprudence.⁶⁷ Unfortunately, the flaws⁶⁸ of this theory have the potential to contribute to the distortion of survivors’ identities and has therefore encouraged the development of alternative theories recognizing the resilience of survivors.⁶⁹

⁶¹ See *Marchant*, 60 N.Y.S. at 616–17.

⁶² See *id.* at 617.

⁶³ See PENAL § 35.15.

⁶⁴ See Faigman & Wright, *supra* note 52, at 69.

⁶⁵ *Id.*

⁶⁶ See generally Schneider, *supra* note 52, at 628–29 (“In sharp contrast to the sanction accorded woman abuse within marriage, husband killing has historically been viewed as a crime against the state—a form of treason.”).

⁶⁷ See LENORE E. WALKER, *THE BATTERED WOMAN* 17–40 (1979); Melanie Fraeger Griffith, Note, *Battered Woman Syndrome: A Tool for Batterers?*, 64 *FORDHAM L. REV.* 141, 143–44 (1995).

⁶⁸ See Griffith, *supra* note 67, at 196 (“Others have properly noted that evidence of the battered woman syndrome is most relevant in a limited context: to aid jurors in assessing a self-defense claim of a battered woman who has killed her batterer after prolonged abuse. Regardless of how Dr. Walker’s theory has been used in the past, it is important for attorneys, judges, and others in the legal system to regard the battered woman syndrome in the proper context - one theory among many.”).

⁶⁹ See *id.* at 192. While theorists have identified various strengths and flaws of this theory, because this Note focuses on the challenges victims face in maintaining their identities as

Lenore Walker developed the concept of battered woman syndrome to refer to the effects of the physical or psychological abuse of women.⁷⁰ More specifically, it proposes “a ‘pattern of responses and perceptions presumed to be characteristic of women who have been subjected to continuous physical abuse by their mate.’”⁷¹ There are two components of Walker’s theory: First, the “cycle theory of violence,” which proposes an explanation for the behavior of victims of domestic violence within abusive relationships.⁷² Second, “learned helplessness,” which attempts to identify common behavioral responses in victims when faced with unending abuse.⁷³

The cycle theory of violence attempts to conceptualize a predictable cycle of actions and subsequent responses in order to rationalize the behaviors and actions of both men and women in relationships plagued by domestic violence.⁷⁴ The cycle consists of three phases: the tension building phase, the acute battering incident, and the calm and loving respite.⁷⁵ In the first phase, tension gradually increases as minor battering incidents occur and the female partner does everything possible to placate her abusive partner.⁷⁶ Externally, this might include the female partner taking on a more nurturing and calming demeanor, desperately trying not to make her partner angry in order to prevent the escalation of violence, while internally, she might be denying the reality of the situation and rationalizing her abuse.⁷⁷ Phase two sees “uncontrollable discharge of the tensions that have built up,” characterized by lack of control and major destructiveness, which often results in a more extreme act of violence.⁷⁸ For women, the anticipation of this phase has the potential to create severe psychological stress.⁷⁹ Phase three is analogized to the calm after the storm: the batterer becomes aware

survivors, the critique of battered woman syndrome will primarily focus on how the concept has the potential to affect the societal perception of survivors.

⁷⁰ WALKER, *supra* note 67, at 43; see *Developments in the Law—Legal Responses to Domestic Violence: V. Battered Women Who Kill Their Abusers*, 106 HARV. L. REV. 1574, 1578 & n.23 (1993) [hereinafter *Developments in the Law*].

⁷¹ *Developments in the Law, supra* note 70, at 1578 (citing Regina A. Schuller & Neil Vidmar, *Battered Woman Syndrome Evidence in the Courtroom*, 16 L. & HUM. BEHAV. 273, 274 (1992)).

⁷² Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, out of the Battered Woman*, 81 N.C. L. REV. 211, 222–23 (2002).

⁷³ *Id.* at 222–24.

⁷⁴ *See id.*

⁷⁵ *See* WALKER, *supra* note 67, at 55.

⁷⁶ *See id.* at 56, 58.

⁷⁷ *See id.* at 56.

⁷⁸ *Id.* at 59.

⁷⁹ *See id.* at 61.

of the effects of his violence⁸⁰ and he attempts to atone for his actions through “loving, kind, and contrite behavior.”⁸¹ “It is during this phase that the battered woman’s victimization becomes complete.”⁸² Though this theory was instrumental in developing an understanding of the characteristics of domestic violence, it also resulted in unintended consequences,⁸³ which hindered holistic⁸⁴ justice for women.

In contrast to the experience of Jennifer Marchant, who fought back against an immediate attack from her perpetrator,⁸⁵ battered woman syndrome is often invoked when domestic violence victims enact violence on their perpetrators despite the lack of an imminent threat of harm.⁸⁶ “The syndrome theory was [therefore] perceived as enabling domestic violence victims to claim self-defense when the traditional contours of the defense might otherwise preclude its availability.”⁸⁷ However, the use of “[e]xpert testimony on the battered woman syndrome” was never “intended to establish a novel defense for abused women” or demonstrate an impaired mental state akin to insanity.⁸⁸ Instead, expert testimony on the battered woman syndrome “supports several critical elements *within* a claim of self-

⁸⁰ It should be noted that modern theory of domestic violence demonstrates that batterers are aware of the effects of their violence *while* abusing their partners and should be held accountable for their actions. See *Understanding Domestic Violence*, R.I. COAL. AGAINST DOMESTIC VIOLENCE, <http://www.dvonlineguide.org/en/know-more/understanding-domestic-violence> [<https://perma.cc/4TN2-VMKN>]. The original cycle theory of violence insinuates that they are acting uncontrollably which has been disproven. See *id.* (“The difference between domestic violence and a family dispute or argument is that batterers use acts of violence and a series of behaviors to establish ongoing control and fear in the relationship through violence and other forms of abuse.”).

⁸¹ WALKER, *supra* note 67, at 65.

⁸² *Id.*

⁸³ See Elisabeth Ayyildiz, *When Battered Woman’s Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. U. J. GENDER & LAW 141, 144, 146 (1995) (noting that battered woman syndrome has the effect of isolating women whose experiences do not fit the cycle of violence and whose behavior does not fit the stereotypical image of a victim).

⁸⁴ Referencing both the legal implications and social consequences for personal identity development and healing.

⁸⁵ See *People v. Marchant*, 60 N.Y.S.3d 616, 617 (App. Div. 2017).

⁸⁶ See, e.g., Burke, *supra* note 72, at 214–15 (“Judy has been physically and emotionally abused by her husband for two decades. Judy has tried leaving her husband several times, but each time, he finds her, brings her home, and beats her. After a recent beating, police leave without arresting her husband because Judy tells them she is too afraid to sign a complaint against him. When her husband discovers the next day that she is applying for welfare benefits to support herself and is looking into having him committed, he brings her home, beats her, extinguishes a cigarette against her skin, and threatens to kill her. When her husband finally falls asleep, Judy shoots him in the head.”).

⁸⁷ *Id.* at 225.

⁸⁸ See *Developments in the Law*, *supra* note 70, at 1579.

defense.”⁸⁹ Most notably, expert testimony can demonstrate the crucial element of reasonableness of the victim’s belief of imminent danger or harm, even when a jury might initially believe she killed her abuser in a “seemingly nonconfrontational setting.”⁹⁰ Alternatively, critics of this theory argue that battered woman syndrome “perpetuates images of women as helpless, passive or emotionally disturbed.”⁹¹ Further, “while [battered woman syndrome] should emphasize the reasonableness of a woman’s behavior, it actually connotes incapacity and insanity.”⁹²

The arguments against pathologizing domestic violence victims originated in response to Walker’s learned helplessness theory, which was an extension of research conducted by Martin Seligman⁹³ concerned with early-response reinforcement and the subsequent passive behavior that results.⁹⁴ The learned helplessness theory acts as a means of “understanding why battered women do not attempt to free themselves from a battering relationship.”⁹⁵ Through her research, Walker made an attempt to discern a clear process of victimization.⁹⁶ First, repeated battering incidents diminish the victim’s motivation to respond as she realizes her lack of control over her situation and the power of her perpetrator.⁹⁷ Second, “her cognitive ability to perceive success [has] changed” and she eventually comes to believe that she can do nothing to change the situation.⁹⁸ “Finally, her sense of emotional well-being becomes precarious. She is more prone to depression and anxiety.”⁹⁹ In attempting to understand the behavior of victims by characterizing

⁸⁹ *Id.* at 1579–80.

⁹⁰ *Id.* at 1580.

⁹¹ Ayyildiz, *supra* note 83, at 146.

⁹² *Id.*

⁹³ See Burke, *supra* note 72, at 223–24 (“Walker’s theory is an extension of the theory originally proposed by Martin Seligman, who found in experiments that caged dogs subjected to inescapable electrical shock eventually stopped attempting to escape, even when given escape opportunities. Walker borrows Seligman’s research and analogizes the dogs’ predicament to that of a battered woman who suffers repeated and random abuse.”).

⁹⁴ See Lenore E. Walker, *The Psychosocial Theory of Learned Helplessness*, in DOMESTIC VIOLENCE LAW 51, 52 (4th ed. 2013) [hereinafter Walker, *Learned Helplessness*].

⁹⁵ *Id.* at 53. This language, in and of itself, is problematic because it places the burden on the victim to change her circumstances. See Edward Gondolf & Ellen Fisher, *The Survivor Theory, Battered Women As Survivors: An Alternative to Treating Learned Helplessness*, in DOMESTIC VIOLENCE LAW 58, 59 (4th ed. 2013) (“Feminist critics . . . have strongly objected to the implication that battered women provoke or prolong abuse.”).

⁹⁶ See Walker, *Learned Helplessness*, *supra* note 94, at 55.

⁹⁷ See *id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

them as passive, submissive, and helpless¹⁰⁰ actors within their relationships, proponents of learned helplessness have essentially stripped women of their agency and the recognition of the strength it takes to survive such abhorrent violence.

In contrast, theorists have proposed “survivor theory” as a means to empower victims.¹⁰¹ “The alternative characterization of battered women is that they are active survivors rather than helpless victims,” which allows one to view the same actions and behaviors as described by Walker but come to vastly different conclusions about the victims’ agency and power in the situation.¹⁰² The survivor hypothesis proposes that battered women increase, rather than decrease, their help seeking in the face of escalating violence.¹⁰³ More specifically, help seeking is likely to increase as the “positive reinforcements within the relationship decrease[] and the costs of the relationship in terms of abusiveness and injury increase[].”¹⁰⁴ “In this effort to survive, battered women are, in fact, heroically assertive and persistent.”¹⁰⁵

The unfortunate pathologizing of domestic violence victims has left many survivors’ advocates and legal practitioners still grappling with how to ensure justice for individuals struggling to overcome the inherent power dynamics of abusive relationships.¹⁰⁶ Recognizing the characterization of “active victims” validates women’s actions within an abusive relationship, and creates a society where actively trying to escape one’s perpetrator, even by means of asserting self-defense, is rational, accepted, and supported. The survivor theory, in effect, combats the gaslighting of the criminal justice system. In contrast, the characterization of “passive victims” necessitates that victims’ actions must be situated under a different vein in the theory of reasonableness, which contributes to the patriarchal double-standards in self-defense jurisprudence. Ultimately, the tension between these theories can result in a fragmented identity¹⁰⁷ between whether a woman sees herself as a victim or a survivor.

¹⁰⁰ See *id.* at 53.

¹⁰¹ See Gondolf & Fisher, *supra* note 95, at 58 (“Our assertion that battered women are active survivors raises a fundamental theoretical issue. It appears to contradict the prevailing characterization that battered women suffer from learned helplessness.”).

¹⁰² *Id.* at 64.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., *id.* at 67–68.

¹⁰⁷ See *id.* at 59.

Addressing the legal implications of these theories, the fundamental difference in the perception of domestic violence victims, either as passive or active victims, inherently changes the approach to their legal defense. Consequently, as scholars we cannot be so removed as to ignore the life-altering consequences of the choices made by defense attorneys in representing their clients in these challenging cases. Defense attorneys have a narrow path to navigate these two theories and may very well struggle with how to both provide a successful defense while also trying to recognize and validate the identity and actions of their clients. Attorneys have to be strategic in crafting a defense to present to a jury, taking into consideration whether the individuals judging the actions of their client are ready to accept victims as truly active survivors, or if they have been so influenced by limited understandings of domestic violence that presenting the survivor as a helpless, passive victim is the better chance for a finding of not guilty. The legal implications of these theories turn on the education of the community, the prosecution, defense attorneys, judge, and jury. For this reason, as legal advocates, we have a responsibility to survivors to challenge gender bias, both inside and outside the courtroom.

III. SOCIETAL PERCEPTIONS OF WOMEN

A. *Gender Bias*

“At early common law women had no autonomous existence” because they had “historically been viewed as male property.”¹⁰⁸ Unfortunately, “[i]t was and [often] still is assumed that women have men to protect them and need not be able to defend themselves.”¹⁰⁹ “Healthy” women are expected to embody characteristics of dependence, passivity and are to be submissive to their male partners, while in contrast, “healthy” men are raised to be “aggressive, competitive and dominant.”¹¹⁰ Traditionally, women have been “discouraged from learning how to defend themselves because such behavior is ‘unfeminine,’” which has acted as a social deterrent from engaging in violence.¹¹¹ These gender stereotypes have, therefore, cemented in the minds of our society that women should behave in a certain way, especially when in a romantic or

¹⁰⁸ Schneider, *supra* note 52, at 627.

¹⁰⁹ *Id.* at 627–28.

¹¹⁰ *Id.* at 628.

¹¹¹ *Id.*

intimate relationship, and encourages skepticism of their actions when they defy societal expectation.

B. Credibility

“I don’t believe she was beaten. I didn’t see any bruises. Most women bruise pretty easily. My wife tells me I hate women. I don’t hate women; I just hate what they do sometimes.”¹¹² This quote clearly demonstrates the fact that female victims of domestic violence “may face proof problems where there is no evidence of physical abuse.”¹¹³ This necessarily calls into question society’s understanding of domestic violence because it demonstrates an unwillingness to accept any other form of evidence besides a bruised and beaten body. If the allegation of abuse is supported by demonstrative evidence including photos or medical records of the victim’s injuries, weapons or objects that were used to commit the domestic violence, police reports for the incident or for prior incidents of domestic violence, or 911 call recordings, then the victim may have a greater chance of being believed.¹¹⁴

However, in cases where the only available evidence is the testimony of both parties, female domestic violence victims face challenges based on their gender.¹¹⁵ In cases of domestic violence, there are usually just two witnesses¹¹⁶—the victim and the perpetrator—and the outcome is usually based solely on credibility.¹¹⁷ Yet women, who make up the majority of domestic violence victims, are often seen as less credible witnesses in the criminal justice system.¹¹⁸ Domestic violence is usually a “hidden crime” because “[b]atterers often isolate their victims from others, and are not likely to batter the victim in front of witnesses.”¹¹⁹ This

¹¹² Symposium, *Justice Ruth Bader Ginsburg Symposium on International Women’s Rights: Promoting Global Equality for Women Through the Law*, 34 WOMEN’S RIGHTS L. REP. 105, 120 (2013).

¹¹³ N.D. Comm’n on Gender Fairness in the Courts, *A Difference in Perceptions: The Final Report of the North Dakota Commission on Gender Fairness in the Courts*, 72 N.D. L. REV. 1113, 1210 (1996) [hereinafter N.D. Comm’n].

¹¹⁴ See Richard A. DeMichele, Jr., *Domestic Violence Trials: Winning the Case and Minimizing the Impact on Children*, 26 AM. J. FAM. L. 147, 148–49 (2012).

¹¹⁵ See CAROLYN C. HARTLEY & ROXANN RYAN, U.S. DEP’T JUSTICE, PROSECUTION STRATEGIES IN DOMESTIC VIOLENCE FELONIES: TELLING THE STORY OF DOMESTIC VIOLENCE 3 (1998), <https://www.ncjrs.gov/pdffiles1/nij/grants/194074.pdf> [<https://perma.cc/G2P9-3EAU>].

¹¹⁶ See *id.* (“Batterers often isolate their victims from others and are not likely to batter the victim in front of witnesses.”).

¹¹⁷ See DeMichele, *supra* note 114, at 147.

¹¹⁸ See HARTLEY & RYAN, *supra* note 115, at 3.

¹¹⁹ *Id.*

isolation results in an inability of victims to be able to confide in friends and family about their experiences, which ultimately creates a situation where “there is no one to corroborate the victim’s account of the abuse.”¹²⁰

Lynn Hecht Schafran identified three categories of credibility which help to explain the gender gap experienced by women in the justice system.¹²¹ The first category is “collective credibility,” which means “belonging to a group that has credibility.”¹²² The effects of collective credibility are pervasive and inescapable as “[w]omen’s credibility is questioned in the workplace, in courts, by law enforcement, in doctors’ offices, and in our political system.”¹²³ Systematically, our society has used gendered stereotypes¹²⁴ to undermine the credibility of women as a collective group.

The second aspect of credibility is “contextual credibility,” which “depends upon understanding the context of the claim.”¹²⁵ “Coping behaviors of abuse victims . . . when taken out of context, or when evaluated by someone who does not understand the dynamics of domestic abuse, may appear strange or unexplainable.”¹²⁶ Thus, it is imperative for the victim’s testimony to be presented within the larger context of an abusive relationship dominated by power and control dynamics.¹²⁷

The third aspect of credibility is “consequential credibility” which involves “being seen as someone of consequence.”¹²⁸ Schafran explains that “[p]art of being taken seriously is having your harms

¹²⁰ *Id.*

¹²¹ See Schafran, *supra* note 49, at 5.

¹²² *Id.*

¹²³ Soraya Chemaly, *How We Teach Our Kids that Women Are Liars*, ROLE REBOOT (Nov. 19, 2013), <http://www.rolereboot.org/culture-and-politics/details/2013-11-how-we-teach-our-kids-that-women-are-liars> [<https://perma.cc/RV4D-8JZJ>].

¹²⁴ See Tara Culp-Ressler, *When Gender Stereotypes Become a Serious Hazard to Women’s Health*, THINKPROGRESS (May 11, 2015, 12:00 PM), <https://thinkprogress.org/when-gender-stereotypes-become-a-serious-hazard-to-womens-health-f1f130a5e79/> [<https://perma.cc/E9MT-M3TK>] (“In fact, the modern-day stereotype that women are dramatic, irrational, and crazy has its roots in a gendered approach to health.”).

¹²⁵ See Schafran, *supra* note 49, at 40.

¹²⁶ HARTLEY & RYAN, *supra* note 115, at 3.

¹²⁷ See *id.*; see also Melanie Randall, *Domestic Violence and the Construction of “Ideal Victims”*: Assaulted Women’s “Image Problems” in Law, 23 ST. LOUIS U. PUB. L. REV. 107, 129 (2004) (“[W]here the reasonableness of a battered woman’s belief is at issue in a criminal case, a judge and jury should be made to appreciate that a battered woman’s experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a social and legal system which has historically undervalued women’s experiences.”).

¹²⁸ Schafran, *supra* note 49, at 41.

and injuries taken seriously.”¹²⁹ This is demonstrated by the “well-documented gender gap in the treatment of pain.”¹³⁰ In 2011, the Institute of Medicine published a report which revealed that “not only did women appear to suffer more from pain, but that women’s reports of pain were more likely to be dismissed.”¹³¹ Moreover, in 2016, researchers determined that “[b]lack Americans are systematically undertreated for pain relative to white Americans.”¹³² These two studies demonstrate the consequences to a woman’s credibility when her gender and racial identities intersect to impact health and safety concerns. If our medical professionals don’t trust women to be able to accurately report their experiences within their own bodies, why would legal professionals trust women to understand the complex interplay of domestic violence abuse and tactics within their relationships? Ultimately, the systematic denial of credibility to women regarding their abuse contributes to the gaslighting effect of the prosecution of domestic violence survivors.

C. Jury Response

Melanie Randall warns that “the image of the helpless battered woman is potentially tied to the even more dangerous stereotype of the ‘authentic’ and ‘deserving’ battered woman.”¹³³ Women who embody characteristics of strength and empowerment, rather than failing to conform to the stereotype of incapacity, run the risk of being seen as angry, aggressive, or tough.¹³⁴ Unfortunately, this may impact the ability of a jury to understand the applicability and justification of self-defense.¹³⁵ Further, even in cases where there is a possibility that women on the jury might have empathy towards or a personal understanding of the victim’s circumstances, mock jury studies have revealed that male jurors are more often to be perceived as influential and active, with greater leadership qualities, and that female jurors views are often discounted, even when they are able to participate fully in jury deliberation.¹³⁶ The patriarchal “power

¹²⁹ *Id.*

¹³⁰ Culp-Ressler, *supra* note 124.

¹³¹ Laurie Edwards, Opinion, *The Gender Gap in Pain*, N.Y. TIMES, Mar. 16, 2013, at SR8.

¹³² Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 PROC. NAT’L ACAD. SCI. 4296, 4296 (2016).

¹³³ Randall, *supra* note 127, at 123.

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *See* Lorrie L. Luellig, *Why J.E.B. v. T.B. Will Fail to Advance Equality: A Call for Discrimination in Jury Selection*, 10 WIS. WOMEN’S L.J. 403, 432 (1995).

structure in our society limits women's ability to participate fully in jury decisions," especially when there is a gender divide in the understanding and perception of rape and spousal abuse.¹³⁷

It is suggested that a "jury should be made to appreciate that a battered woman's experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a social and legal system which has historically undervalued women's experiences."¹³⁸ Without this foundation, the criminal justice system challenges jurors to utilize inaccurate¹³⁹ and overly simplistic characterizations of domestic violence victims when they should instead be educated on the complexity of these abusive relationships.¹⁴⁰ Lack of knowledge and understanding by jurors further facilitates the gaslighting of domestic violence victims. If we don't believe victims, if we twist and manipulate their realities while they testify to the horrific abuse and imminent threat to their lives which caused them to kill their perpetrators, how are they supposed to believe their own reality which had been warped by their abuser, and is now being challenged by the system?

D. Victim Blaming

"Victim blaming may be more accurately described as misplaced emphasis on the victim's actions."¹⁴¹ In essence, "[v]ictim blaming places the responsibility on the victim for her predicament."¹⁴² There are no better examples than the statements of those sitting on the bench: "These cases always present difficulties for the court. And sometimes the difficulties are created by the parties themselves. [The victim] . . . found it quite tolerable to continue to live without the benefit of matrimony with somebody who beat her up while she was pregnant holding another child";¹⁴³ "[t]his case is the result of [the victim 's] failure to exercise reasonable judgment with respect to

¹³⁷ *Id.*

¹³⁸ See Randall, *supra* note 127, at 129.

¹³⁹ See A. Renee Callahan, *Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome*, 3 AM. U. J. GENDER & L. 117, 122 (1994) ("Walker's analysis [of learned helplessness] extends this theory to battered women in an effort to explain why they frequently do not leave their abusers, decline to prosecute them, or behave in a manner inconsistent with what society deems normal.").

¹⁴⁰ See *id.* at 121.

¹⁴¹ N.D. Comm'n, *supra* note 113, at 1208.

¹⁴² *Id.*

¹⁴³ *Blaming the Victim, Again Judge Dudley: Remark by Howard Jurist Reveals Need for Education on Sexual Assaults*, BALT. SUN (Dec. 4, 1997), http://articles.baltimoresun.com/1997-12-04/news/1997338069_1_blaming-the-victim-judge-real-culprit [<https://perma.cc/6NGK-8PGU>].

her previous beating by the same defendant”;¹⁴⁴ “[t]he system rarely receives the total cooperation of the victims”;¹⁴⁵ “[t]he victim is rarely clear and unequivocal about what she wants . . . [t]he victim is often responsible in that he or she has made a bad choice of companions”;¹⁴⁶ “[t]his was not someone who was, and I hate to use the phrase, ‘asking for it.’ There are girls out there that seem to be tempresses. And this does not seem to be anything like that.”¹⁴⁷ This clear and explicit bias from the bench makes it even more unlikely that a jury of peers would be able to counter these victim-blaming remarks to come to a victim-centered resolution of the case. For this reason, understanding the foundation of victim-blaming is critical, so that it can be challenged within the criminal justice system.

Many individuals result to blaming victims for their abuse as a means of self-preservation. According to the “Just World Theory,” individuals have a “strong desire or need to believe that the world is an orderly, predictable, and just place, where people get what they deserve.”¹⁴⁸ This belief plays an important function because it reinforces the assumption that “our actions will have predictable consequences.”¹⁴⁹ In the event that we encounter evidence challenging these beliefs that the world is just, such as systemic inequality, “we quickly act to restore justice by helping the victim or we persuade ourselves that no injustice has occurred.”¹⁵⁰ Victim blaming falls into the latter category of actions. Therefore, operating under the assumption that every prosecutor, judge, or jury member is not purposefully engaging in gaslighting, by denying the victim’s reality and experiences in the context of her abuse, we can understand why individuals subconsciously want to find a reason for the extreme violence perpetrated against the victim. In the end, it’s about protecting one’s own reality and understanding of the world. Unfortunately, the consequence of self-protection by members of the criminal justice system is the denial of justice for survivors of abuse.

¹⁴⁴ *Id.*

¹⁴⁵ Dianne Williamson, *Raphaelson Under Fire for Essay; Judge Lays Part of Blame on Victims of Battering*, TELEGRAM & GAZETTE (Mass.), Mar. 19, 1996, at B1.

¹⁴⁶ *Id.*

¹⁴⁷ Cleve R. Wootson, Jr., *I’m Planning to Populate Hell: Judge is Disciplined for ‘Undignified’ Comments in Court*, WASH. POST (Aug. 17, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/08/17/im-planning-to-populate-hell-judge-disciplined-for-undignified-comments-in-court> [<https://perma.cc/6VVJ-84HV>].

¹⁴⁸ Claire Andre & Manuel Velasquez, *The Just World Theory*, MARKKULA CTR. FOR APPLIED ETHICS (Nov. 13, 2015), <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/the-just-world-theory/> [<https://perma.cc/ZRQ4-WVU6>].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

IV. VICTIM-CENTERED AND TRAUMA-INFORMED JUSTICE

According to Judith Herman, “psychological trauma is characterized by feelings of ‘intense fear,’ ‘helplessness,’ ‘loss of control,’ and ‘threat of annihilation.’”¹⁵¹ In dealing with victims of trauma, it then becomes necessary for the criminal justice system to operate in a way which recognizes and validates this trauma.¹⁵² This requires believing survivors of abuse and taking steps to effectively aid in their healing and recovery.¹⁵³ A system that is trauma-informed “[r]ealizes the widespread impact of trauma and understands potential paths for recovery[,] . . . [r]ecognizes the signs and symptoms of trauma in clients, families, staff, and others involved with the system[,] . . . [r]esponds by fully integrating knowledge about trauma into policies, procedures, and practices[,]” and seeks to actively “[r]esist[] re-traumatization.”¹⁵⁴ Critics of this approach might argue that the deference given to the experience and identity of survivors would result in lethal self-defense being incentivized.¹⁵⁵ Instead, I argue that it acts as a means to promote justice for women under circumstances where the use of lethal self-defense must be legitimized.

A. Legislation

New York State has taken actions to contemplate incorporating trauma-informed and victim-centered practices into court proceedings. In May 2015, the New York State Assembly passed the Domestic Violence Survivors Justice Act (DVSJA).¹⁵⁶ “Under the

¹⁵¹ SONIA D. FERENCIK & RACHEL RAMIREZ-HAMMOND, TRAUMA-INFORMED CARE: BEST PRACTICES AND PROTOCOLS FOR OHIO’S DOMESTIC VIOLENCE PROGRAMS 3, http://stoprelationshipabuse.org/wp-stoprelationshipabuse/wp-content/uploads/2017/09/ODVN_Trauma-InformedCareBestPracticesAndProtocols.pdf [<https://perma.cc/LC2F-SA3T>] (referencing Judith Herman’s *Trauma and Recovery*).

¹⁵² See SUSAN WELLS & JENIFER ÜRFF, ESSENTIAL COMPONENTS OF TRAUMA-INFORMED JUDICIAL PRACTICE 1 (2013), https://www.nasmhpd.org/sites/default/files/DRAFT_Essential_Components_of_Trauma_Informed_Judicial_Practice.pdf [<https://perma.cc/3GQB-PWVB>].

¹⁵³ See *id.* at 3.

¹⁵⁴ *Trauma*, SAMHSA, <https://www.integration.samhsa.gov/clinical-practice/trauma-informed> [<https://perma.cc/9U3G-VLP2>] (emphasis added).

¹⁵⁵ Cf. Sarah Lustbader, *Spotlight: Incarcerated Women Helped Draft New York Law to Free Domestic Violence Survivors*, THE APPEAL (June 6, 2019), <https://theappeal.org/spotlight-incarcerated-women-helped-draft-new-york-law-to-free-domestic-violence-survivors/> [<https://perma.cc/55WJ-QRR6>] (discussing how the law does not consider the rights of the crime victims).

¹⁵⁶ Melissa Jeltsen, *Should Domestic Violence Victims Go to Prison for Killing Their Abusers?*, HUFFPOST (May 26, 2016, 7:30 AM), https://www.huffingtonpost.com/entry/domestic-violence-prison-legislation_us_573deaa3e4b0ace7b8e94236 [<https://perma.cc/CE8A-BUVW>].

legislation, judges could consider the role of domestic abuse in a case during sentencing, and bypass mandatory minimums set by the state,” which could result in shorter sentences for survivors.¹⁵⁷ “This bill also provides domestic violence survivors currently in prison the opportunity to apply to the courts for resentencing, for those who pose no threat to public safety.”¹⁵⁸ It should be noted, though, that the bill would not permit the vacation of a judgment of conviction.¹⁵⁹ Instead, the bill would afford a more nuanced approach to the sentencing of survivors of domestic violence, one which is victim-centered and trauma informed.¹⁶⁰

In making these determinations, judges would utilize a three-part standard of eligibility, taking into consideration whether: the defendant, at the time of the offense, was the victim of “domestic violence and subjected to substantial physical, sexual or psychological abuse inflicted by” a member of the same family or household as defined by Criminal Procedure Law section 530.11;¹⁶¹ whether the abuse was a significant contributing factor to the defendant’s criminal behavior;¹⁶² and if a sentence within the generally applicable “statutory range would be unduly harsh.”¹⁶³

It would also provide the option of alternative sentencing, such as community-based alternative programs, which have been found to be “far more effective than prison in allowing survivors to rebuild relationships with their families, recover from abuse, and take responsibility while positively participating in their communities.”¹⁶⁴

¹⁵⁷ *Id.*

¹⁵⁸ Sital Kalantry, *Senate Should Take Up Domestic Violence Justice Act*, ITHACA J. (Sept. 19, 2016, 12:06 PM) <https://www.ithacajournal.com/story/opinion/2016/09/19/guest-viewpoint-senate-domestic-violence/90692630/> [<https://perma.cc/T7ER-CUP3>].

¹⁵⁹ See N.Y.C. BAR, REPORT ON LEGISLATION BY THE CRIMINAL JUSTICE OPERATIONS COMMITTEE DOMESTIC VIOLENCE COMMITTEE 3 (2019), <http://documents.nycbar.org/files/2019489-DVSurvivorsJusticeBudget.pdf> [<https://perma.cc/V7G5-XEJJ>] [hereinafter N.Y.C. BAR REPORT].

¹⁶⁰ See *id.*

¹⁶¹ *Id.* at 1, 3, 4; see also Jeltsen, *supra* note 156 (“To be eligible for alternative sentencing, the survivor needs to pass a three-part test.”).

¹⁶² N.Y.C. BAR REPORT, *supra* note 159, at 2, 4 (“Many incarcerated survivors have committed criminal activity to protect themselves from further violence, and others have convictions stemming from acts taken as a result of an abuser’s coercion. One study found that of 525 abused women evaluated at a mental health center who had committed at least one crime, nearly half had been coerced into committing crimes by their batterers as ‘part of a structural sequence of actions in a climate of terror and diminished, violated sense of self.’”).

¹⁶³ *Id.* at 4.

¹⁶⁴ Tamar Craft-Stolar & Jaya Vasandani, *Comment: The Domestic Violence Survivors Justice Act: How You Can Help Stop the Criminal Justice System’s Unjust Response to Survivor-Defendants in New York*, CORNELL UNIV., <https://www.lawschool.cornell.edu/womenandjustice/Domestic-Violence-Survivors-Justice-Act.cfm> [<https://perma.cc/2PCE-4VYT>].

Further, “[a]llowing mothers to live in the community while serving sentences also permits them to maintain ties to children and lessen the trauma of separation,” which promotes a rehabilitative model for addressing the widespread effects of domestic violence within a family.¹⁶⁵ These programs have also been found to be “particularly appropriate” for survivors of domestic violence, “as they have demonstrated extremely low recidivism rates and often have no prior felony record or history of violence.”¹⁶⁶

On May 14, 2019, Governor Andrew M. Cuomo signed the DVSJA, providing hope for advocates seeking alternative forms of justice for survivors.¹⁶⁷

B. *Actions of the Judiciary*

The New York Supreme Court Appellate Division, Fourth Department, also deserves recognition for their decision to dismiss the indictment of Jennifer Marchant.¹⁶⁸ The court reexamined the factual findings of the jury along with their decision to convict Jennifer Marchant of manslaughter, and utilized the opportunity to reaffirm Jennifer’s survivor status.¹⁶⁹ At every level, courts should be encouraged to analytically consider the unique nature of domestic violence cases involving self-defense. Without such review, the state risks responsibility for widespread violations of due process and human rights.¹⁷⁰ Intense scrutiny of the facts and context of the relationship between the parties may very well result in further

¹⁶⁵ *Id.*; see also N.Y.C. BAR REPORT, *supra* note 159, at 2 (“The consequences to children and society are especially severe when victims of domestic violence are incarcerated due to actions taken as a direct result of the violence they have experienced. Healing the scars of domestic violence and affirming the relationships between parents and children is particularly difficult when the survivor and her children are separated by prison walls.”).

¹⁶⁶ N.Y.C. BAR REPORT, *supra* note 159, at 3.

¹⁶⁷ See Press Release, Governor Andrew M. Cuomo, N.Y. State, Governor Cuomo Signs Domestic Violence Survivors Justice Act (May 14, 2019), <https://www.governor.ny.gov/news/governor-cuomo-signs-domestic-violence-survivors-justice-act> [<https://perma.cc/ZV44-WS5L>].

¹⁶⁸ See *People v. Marchant*, 60 N.Y.S.3d 616, 616 (App. Div. 2017).

¹⁶⁹ See *id.* at 616, 618 (quoting *People v. Tubbs*, 21 N.Y.S.3d 799, 800 (App. Div. 2015), *leave denied*, 62 N.E.3d 130 (N.Y. 2016)) (citing *People v. Morgan*, 952 N.Y.S.2d 556, 556–57 (App. Div. 2012); *People v. Svitzer*, 381 N.Y.S.2d 257, 257–58 (App. Div. 1976)).

¹⁷⁰ See Carol Jacobsen & Lynn D’Orio, *Defending Survivors: Case Studies of the Michigan Women’s Justice & Clemency Project*, 18 U. PA. J.L. & SOC. CHANGE 1, 42–43 (2015) (“The failure to provide equal protection to women who are battered, the overcharging and over-sentencing of them after they are forced to defend themselves, the hiding or ignoring of exculpatory evidence in their cases, and the denials of their right to present expert testimony or evidence of abuse in court and post-conviction hearings are just a few examples of the widespread violations of due process and human rights perpetrated by the state that we have seen in women’s cases over the years.”).

findings that convictions against survivors are against the weight of the evidence.¹⁷¹ In Jennifer's case, the court dismissed her indictment, simultaneously providing clarity as to Jennifer's identity within these proceedings:¹⁷² she is not a criminal.

C. Clemency

In jurisdictions which have not yet recognized the bias of the criminal justice system towards those suffering the effects of domestic violence, executive clemency has developed as a procedural alternative to circumvent the injustice faced by women who kill their abusers.¹⁷³ Notably, “[i]t is against this backdrop of the current state of pardoning in the United States that battered women who have killed their abusers are considered for clemency today.”¹⁷⁴ As a policy, clemency derives from concepts of equity, based on the ability of the state “to both punish and forgive.”¹⁷⁵ Clemency, as a procedural method, “is justified both as an act of kindness, mercy, and leniency directed at a deserving individual, and as a safety valve which assures that flaws or errors in the criminal justice system will receive attention and correction.”¹⁷⁶

“Advocates for battered women are not asking for leniency or a lowered standard, but rather for” the guarantee of equal treatment under the law, which contemplates the need for specialized treatment of survivors of domestic violence.¹⁷⁷ This justification for “tailored treatment of battered women who kill include the fault of society itself in the creation of the problem of battered women and the historic discrimination against women claiming self-defense in the criminal justice system.”¹⁷⁸ Addressing issues of gender bias in the criminal justice system, Elizabeth Schneider notes that “clemency is necessary and will continue to be necessary as long as individuals are denied rights to present an adequate defense at trial and until society

¹⁷¹ *Marchant*, 60 N.Y.S.3d at 617; see also Christine Noelle Becker, *Clemency for Killers? Pardoning Battered Women Who Strike Back*, 29 LOY. L.A. L. REV. 297, 312–13 (1995) (“Of course, while not all battered women act in self-defense when they kill their abusers, a substantially higher reversal rate on appeal is an additional indicator that they are often deprived of a fair trial.”).

¹⁷² See *Marchant*, 60 N.Y.S.3d at 616.

¹⁷³ See Becker, *supra* note 171, at 306.

¹⁷⁴ *Id.* at 311.

¹⁷⁵ Jacqueline St. Joan & Nancy Ehrenreich, *Putting Theory into Practice: A Battered Women's Clemency Clinic*, 8 CLINICAL L. REV. 171, 179 (2001).

¹⁷⁶ *Id.*

¹⁷⁷ See Becker, *supra* note 171, at 313.

¹⁷⁸ *Id.* at 312.

responds adequately to the problem of woman abuse.”¹⁷⁹ While the hope of advocates and legal practitioners working with survivors of domestic violence is to see the development of legal theories and jurisprudence which more accurately reflects the lived experiences of these women, the reality is that the patriarchal institution of law is slow in its progress towards gender equality, which is why clemency represents victim-centered and trauma-informed justice.

In New York, executive clemency “provides the Governor ‘the power to grant reprieves, commutations and pardons after convictions for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he may think proper’,”¹⁸⁰ but will only be granted in the most compelling of circumstances.¹⁸¹

In 2017, Governor Cuomo¹⁸² established “a first-in-the-nation partnership between a state and a coalition of legal organizations¹⁸³ to expand New York’s pro bono clemency program,” which had been founded to provide pro bono clemency petition services to individuals with criminal records or incarcerated in state prison.¹⁸⁴ Even with the passage of the DVSJA, clemency provides an additional opportunity for the governor of New York to utilize clemency as “one

¹⁷⁹ Linda L. Ammons, *Why Do You Do the Things You Do? Clemency for Battered Incarcerated Women, A Decade’s Review*, 11 AM. U. J. GENDER SOC. POL’Y & L. 533, 535 (2003).

¹⁸⁰ *Executive Clemency*, N.Y. STATE DEP’T CORRECTIONS & COMMUNITY SUPERVISION, <http://www.doccs.ny.gov/clemency.html> [<https://perma.cc/E84Z-U6UU>].

¹⁸¹ See Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor’s Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL’Y 2, 74–75 (1994) (“[T]he chief executive should decide to what extent granting clemency is a matter of justice, mercy, or both. Being clear on this issue will facilitate explaining her actions to various constituencies. A governor’s definition of justice can be broader than just what the law requires and under such circumstance she could use her power of clemency to reflect a justice as fairness stance. However, if a governor’s position is that clemency is a merciful act, and mercy is separate and distinct from justice, granting clemency to women, who often have survived inexplicable brutality and a system of justice that has ignored them, is warranted. Even if a governor’s traditional view has been not to grant clemency at all, these types of cases are so compelling, that she could justify a departure from that position.”).

¹⁸² Press Release, Governor Andrew M. Cuomo, N.Y. State, Governor Cuomo Announces First-in-the-Nation State Partnership with National Organizations to Expand Successful Pro Bono Clemency Initiative (Aug. 21, 2017), <https://www.governor.ny.gov/news/governor-cuomo-announces-first-nation-state-partnership-national-organizations-expand> [<https://perma.cc/H9ES-8GNH>] (“Since 2011, Governor Cuomo has commuted the sentences of 10 individuals, and granted pardons to 114 individuals as a part of an ambitious clemency agenda that seeks to identify individuals demonstrating evidence of rehabilitation and self-development amounting to a true change in character or circumstance since incarceration, to help ensure that clemency is a more accessible and tangible reality.”).

¹⁸³ Organizations include the National Association of Criminal Defense Lawyers with support from the Foundation for Criminal Justice and Families Against Mandatory Minimums. See *id.*

¹⁸⁴ *Id.*

pathway toward restoring a fair and equitable system of justice”¹⁸⁵ in order to reconcile the deeply rooted prejudice and bias facing survivors of domestic violence.

CONCLUSION

Currently, the criminal justice system actively re-traumatizes victims of domestic violence who utilize self-defense against their perpetrators. Just as perpetrators gaslight their victims by distorting their reality, the system gaslights the survivor by distorting their sense of justice. These women are survivors who have experienced trauma not only in the form of the domestic abuse, but also through the process of having to kill another human being in protection of their own life. A system that continues to utilize self-defense standards created with male aggression and violence in mind, that blames women for their own victimization, and questions victims’ credibility based on the sole fact that they identify as a woman, cannot provide justice to survivors. Instead, survivors who kill their perpetrators in self-defense must have some confidence that they can endure the legal prosecution of their actions without becoming convicted criminals. Their identities as *survivors* must remain.

¹⁸⁵ Jacobsen & D’Orio, *supra* note 170, at 43.