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THE EXIT MYTH: FAMILY LAW, GENDER ROLES,
AND CHANGING ATTITUDES TOWARD FEMALE
VICTIMS OF DOMESTIC VIOLENCE†

Carolyn B. Ramsey*

This Article presents a hypothesis suggesting how and why the criminal justice response to domestic violence changed, over the course of the twentieth century, from sympathy for abused women and a surprising degree of state intervention in intimate relationships to the apathy and discrimination that the battered women's movement exposed. The riddle of declining public sympathy for female victims of intimate-partner violence can only be solved by looking beyond the criminal law to the social and legal changes that created the Exit Myth.

While the situation that gave rise to the battered women's movement in the 1970s is often presumed to be part of a long history of state tolerance or even approval of violence against women, the real history is actually much more complicated. Indeed, at least until 1930, wife beaters were routinely brought to criminal court and fined or sentenced to a jail term. Whereas wife killers often faced life imprisonment or even the death penalty, juries acquitted many women who used lethal violence against their abusive husbands.

What happened between the 1920s and the later decades of the twentieth century that changed how the public and the criminal justice system responded to domestic violence? This Article offers the following hypothesis: As women gained the vote and sought easy access to divorce, and as mothers of minor children began to compete for jobs formerly held exclusively by men, society and the criminal justice system less often saw abused wives as frail beings who needed protection against their violent husbands. Changes in employment opportunities, family and property law, and psychosocial under-

† © 2013, Carolyn B. Ramsey.

* Professor of Law, University of Colorado Law School. I would like to thank Joanna Grossman for commenting on an early draft of this Article at the 2012 Law & Society Association Annual Meeting and fellow panelists Rebecca Probert, Gail Savage, and Danaya Wright for their insights and encouragement. Thanks, too, to Aya Gruber for inviting me to present my ideas at a conference on "The Feminist Influence on Criminal Law: Past, Present, and Future" at the University of Colorado Law School. This Article also benefitted from helpful editing and cite-checking by my research assistant Ashley Beck and the staff of the *Michigan Journal of Gender & Law*.

standings of intimate relationships combined to create a false sense of the ease with which women could exit an abusive marriage. This overestimation of women's ability to leave, paired with the new view that women did not need to be protected in paternalistic ways, contributed to waning sympathy for female victims of intimate-partner violence. In the second half of the twentieth century, such women were presumed—often unfairly and incorrectly—to be capable of safely leaving their relationships and supporting themselves. As gender roles changed to allow greater female autonomy, the criminal justice response may have become more punitive and less sympathetic toward women trapped in violent intimate relationships.

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I. INTRODUCTION

This Article proceeds from two premises. First, experts in law and criminology maintain that, in the second half of the twentieth century, police approached domestic violence cases in an apathetic, discriminatory manner,¹ and women who killed their batterers had difficulty obtaining self-

1. SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 157–61 (1982); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 239, 269–70, 276–77 (2005); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47–48 (1992); See also, e.g., EVE S. BUZAWA, CARL G. BUZAWA, & EVAN STARK, RESPONDING TO DOMESTIC VIOLENCE: THE INTEGRATION OF CRIMINAL JUSTICE AND HUMAN SERVICES (4th ed., 2012); James B. Halsted, *Domestic Violence: Its Legal Definitions*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 143, 155 (Eve S. Buzawa & Carl G. Buzawa eds., 1992); Isabel Marcus, *Reframing "Domestic Violence." Terrorism in the Home*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DO-

defense acquittals.² Second, archival research by the Author and other historians shows that, in the nineteenth and early twentieth centuries, the state intervened more aggressively in violent intimate relationships, from assault and battery cases to homicides, than scholars have previously recognized.³ In the late 1800s and early 1900s, a variety of actors in the criminal justice system responded with sympathy to the plight of female victims of domestic violence,⁴ whereas they tended to condemn and punish men who transgressed prescriptive norms of masculinity by battering or killing their female

MESTIC ABUSE 11, 21–22 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

2. See, e.g., SCHECHTER, *supra* note 1, at 170–74; ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 112–47 (2000); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 83–93 (1991).
3. For the author's extensive archival research on this subject between approximately 1860 and 1930, see generally Carolyn B. Ramsey, *Domestic Violence and State Intervention in the American West and Australia*, 86 IND. L.J. 186 (2011) [hereinafter Ramsey, *Domestic Violence and State Intervention*] (discussing state intervention in murder and assault and battery cases). See Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880–1920*, 77 U. COLO. L. REV. 101, 141–56 (2006) [hereinafter Ramsey, *Intimate Homicide*] (discussing the prosecution, conviction, and punishment of men who killed their wives and girlfriends in New York and Colorado in the late 1800s and early 1900s). Scholarship on England and Australia harmonizes with the author's findings on the United States. E.g., MARTIN J. WIENER, *MEN OF BLOOD: VIOLENCE, MANLINESS AND CRIMINAL JUSTICE IN VICTORIAN ENGLAND* (2004) (documenting the increasingly punitive legal outcomes for men accused of killing their wives or girlfriends in Victorian England). Carolyn Strange similarly contends that jealousy and wounded pride were usually considered insufficient to justify femicide in Australia around the turn of the twentieth century. Carolyn Strange, *Masculinities, Intimate Femicide, and the Death Penalty in Australia, 1890–1920*, 43 BRIT. J. CRIMINOLOGY 310, 333–34 (2003).
4. See Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 237–38, 241–43, 249–54; Carolyn B. Ramsey, *A Diva Defends Herself: Gender and Domestic Violence in an Early Twentieth-Century Headline Trial*, 55 ST. LOUIS U. L.J. 1347, 1347–67 (2011) [hereinafter Ramsey, *A Diva Defends Herself*] (analyzing the self-defense acquittal of an abused woman charged with murdering her abusive husband in Nevada in 1909); Ramsey, *Intimate Homicide*, *supra* note 3, at 118–40 (discussing acquittals and lesser offense convictions of female murder defendants who killed violent, male intimate partners). Jeffrey Adler and Marianne Constable have also noted that juries in Chicago tended to apply “unwritten” law to spare wronged women who used lethal force against abusive spouses. See Jeffrey S. Adler, *“I Loved Joe, But I Had to Shoot Him”: Homicide by Women in Turn-of-the-Century Chicago*, 92 J. CRIM. L. & CRIMINOLOGY 867, 883–84 (2002); See also Marianne Constable, *Chicago Husband-Killing and the “New Unwritten Law”*, 124 TRIQUARTERLY 85, 89–91 (2005) (discussing how the unwritten law spared women in Chicago, especially when they acted out of fear of their batterers).

partners.⁵ Assuming the empirical validity of the first premise,⁶ this Article explores how and why attitudes toward female victims of intimate-partner violence became less sympathetic in the mid twentieth century.

From the late 1800s through the early 1900s, the state intervened in the family to enforce an ideal of separate spheres. The home was only treated as a sanctuary if both husband and wife played their proper roles. When they didn't, they were called to account in the criminal courts. At least until 1930, most of this intervention focused on men who transgressed norms of protectiveness toward women: men were prosecuted for battering and murdering their female intimates, while women's use of self-defensive violence against their male partners was often deemed justifiable. Rather than ignoring violence that occurred behind a veil of family privacy, the state and the public condemned abusive husbands for misusing their power—and often for violating prescriptive ideals of temperance and hard work, as well.⁷ Around the middle of the twentieth century, the tables seem to have turned, and women's campaign for political, social, and economic independence was blamed for the demise of the traditional family.

This Article presents the riddle of declining public sympathy for female victims of intimate-partner violence and suggests that it can only be solved by looking beyond criminal law to the social and legal changes that created the Exit Myth. What happened between the 1920s and the later decades of the twentieth century that altered how domestic violence was viewed by the public and handled by criminal justice personnel? This Article offers the following hypothesis: as women gained the vote and sought easy access to divorce and as mothers of minor children began to compete for jobs formerly held by men, society and the criminal justice system less often saw abused wives as frail beings who needed protection against their violent husbands. Changes in employment opportunities, family and property law, and psychosocial understandings of intimate relationships combined to create a false sense of the ease with which women could exit an abusive marriage.⁸ This overestimation of women's ability to leave, paired with the new view that women did not need to be protected in outmoded Victorian ways, contributed to waning sympathy for female victims of intimate-partner violence.

5. Ramsey, *Intimate Homicide*, *supra* note 3, at 141–56; See Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 199–204, 206–30.

6. The Author is currently conducting archival legal history research to test such a premise, but in this Article, she primarily relies on other scholars' work and suggests a hypothesis to explain differences between their findings on the later twentieth century and her work on the criminal justice response to domestic violence before 1930.

7. See *infra* notes 15–21, 132.

8. See *infra* Parts III, IV, and V.

In the second half of the twentieth century, the media popularized “disease” theories of why marriages fail that blamed women for domestic abuse.⁹ Police officers began to view domestic violence calls as annoyances occasioned by unsympathetic women who wasted state resources on problems of their own creation.¹⁰ Abuse victims lost the paternalistic sympathy of the public and the legal system. The “why didn’t she leave?” question became an impediment to self-defense and other legal arguments that abused women had formerly made with success, and the state became more reluctant to intervene by arresting and prosecuting male batterers before a homicide resulted.¹¹ When female defendants stood trial for killing their batterers, they could no longer assume that social attitudes would compensate for deficiencies in the formal doctrine of self-defense. Ironically, as gender roles changed to allow greater female autonomy, the criminal justice response may have become more punitive and less sympathetic toward women trapped in violent intimate relationships.

Part II of this Article describes changes in the criminal justice system’s response to domestic violence—from surprising efforts to intervene in intimate relationships in the late 1800s and early 1900s to the unresponsiveness and unfairness which battered women’s advocates started to address in the 1970s. Part III discusses how the rise of popular divorce and the reform of laws governing child custody and the division of property in the second half of the twentieth century impoverished divorced women and caused them to be blamed for the demise of the traditional family. At the same time, they were erroneously thought to have gained easy avenues of escape from intimate-partner violence. Part IV explores the history of paid work by women and contends that female employment did not seriously challenge the status quo until the mid 1900s, when middle-class mothers of young children began to take jobs outside the home. This new type of female worker was both celebrated and criticized for her independence in a manner that belied the formidable impediments to pay equity, affordable childcare, and freedom from job discrimination that remained. Despite women’s growing autonomy, paid employment did not provide an unobstructed exit for abused wives. Part V explains that, in the late 1800s and early 1900s, women who stayed in violent intimate relationships were often viewed as rational actors. Yet, in the second half of the twentieth century, psychological theories pathologized broken marriages and victims of intimate-partner abuse and cast battered wives as diseased, masochistic, and even irrationally violent toward their husbands.

9. See *infra* notes 180–183 and accompanying text.

10. See *infra* notes 26–30, 184–188 and accompanying text.

11. See *infra* notes 26–34 and accompanying text.

In short, this Article offers a historical hypothesis about the Exit Myth that explains how the late nineteenth-century state's intervention in intimate relationships to protect abused women and punish violent men transformed, by the middle of the twentieth century, into the familiar script of apathy and discrimination that battered women's advocates criticize. It provides an analytical and theoretical road map that the Author is using to guide her research for a book project on the legal history of intimate-partner violence, and it encourages other scholars to delve deeply into the complex and often surprising legal history of an issue that has generated important policy analysis in our own time.

II. CHANGES IN THE CRIMINAL JUSTICE SYSTEM'S RESPONSE TO DOMESTIC VIOLENCE

The standard narrative about public responses to domestic violence describes a history of apathy and discrimination toward abused women. Much of the relevant scholarship refers to cases and policies from the 1960s, 1970s, and 1980s that indicate widespread reluctance to arrest men for assaulting their female intimates or acquit women on self-defense grounds when they killed their abusers.¹² But those findings cannot be generalized to the early part of the century. In the United States during the late 1800s and early 1900s, male perpetrators of domestic violence from all social classes were treated more severely than is often assumed,¹³ while women successfully introduced evidence of past abuse to make their claims of self-defense credible to juries when they stood trial for killing their batterers.¹⁴ Male defendants who were convicted faced substantial sentences.¹⁵ When they killed their wives or girlfriends, they were often sentenced to life imprisonment or even the death penalty.¹⁶

Close analysis of cases from this earlier period demonstrates that, although the state failed to prevent intimate-partner violence from occurring,

12. See, e.g., SCHECHTER, *supra* note 1, at 157–61; Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, at 2 [hereinafter Goodmark, *Autonomy Feminism*]; Mahoney, *supra* note 2, at 83–93; Miccio, *supra* note 1, at 276–77; Zorza, *supra* note 1, at 47–48.

13. See *infra* notes 15–21. For further discussion of how domestic violence cases “crossed class lines to implicate otherwise respectable families,” see Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 201 & nn.85–86.

14. See *infra* notes 22–24.

15. See Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 206–213 (discussing substantial fines and prison terms for wife beaters).

16. Ramsey, *Intimate Homicide*, *supra* note 3, at 141–56; See Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 222–30 (discussing prison sentences and capital punishment for men who killed their female intimate partners).

it did not ignore the problem. Police responded to calls for help, and courts routinely forced violent men to pay fines or spend time in jail for wife beating.¹⁷ Legal materials and newspaper reports on such cases reveal widespread condemnation of male violence against women and the repudiation of husbands' claims to a right to use corporal punishment on disobedient wives.¹⁸ The failure of state efforts to prevent recidivism and the escalation of intimate-partner violence was likely attributable to the general disorganization of early police departments and the reluctance of abused women to prosecute their husbands, rather than to widespread misogyny.¹⁹

Nevertheless, women's inability to escape intimate-partner abuse was connected to their subordination and the absence of a social safety net to protect them. Then as now, victims who lacked viable options for exit from an abusive relationship often resisted the incarceration of their batterers, even if they had initially sought the assistance of the criminal justice system. Far from allowing domestic violence to occur behind a wall of family privacy, however, courts in the late 1800s and early 1900s tried various approaches, including contempt sanctions, to encourage victims to cooperate with state efforts to prosecute and punish violent men.²⁰ Although many assault and battery cases were dismissed, these dismissals generally occurred despite police and prosecutorial efforts to impose criminal liability on wife beaters, not because of tacit approval of domestic violence.²¹

Scholars have also overestimated the extent to which female defendants had to rely on insanity claims.²² Sympathy for abused women, including willingness to believe their self-defense arguments, was a common feature of intimate murder cases in the late nineteenth and early twentieth centuries. Abused women could and did present evidence of past abuse to help juries understand why they used lethal violence against their male intimate partners.²³ Even in non-confrontational cases, the unwritten law justifying a wronged woman's retaliation for abuse allowed many female

17. See Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 199–204, 206–13.

18. See *id.* at 202–03, 212–13.

19. Ramsey, *Intimate Homicide*, *supra* note 3, at 165–76 (attributing the failure to prevent intimate-partner homicide to a variety of factors, including the corruption and brutality of the early police departments, as well as to battered women's reluctance to call upon the state for help); see Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 213–220 (discussing victims' reluctance to prosecute and state efforts to respond to that dilemma).

20. See Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 213–20.

21. *Id.* at 220.

22. See *id.* at 237 n.305 (collecting citations).

23. Ramsey, *A Diva Defends Herself*, *supra* note 4, at 154–56, 163–65; See Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 236–54.

defendants to obtain acquittal when the facts of their cases did not comport with black letter self-defense doctrine.²⁴

The picture presented in this Article is not a static one. If accounts of the criminal justice system's apathy toward intimate-partner violence in the 1960s, 1970s, and even the 1980s are believed,²⁵ then sympathy for abused women must have declined as the twentieth century proceeded. In the second half of the twentieth century, police training manuals discouraged officers from making arrests in domestic violence cases.²⁶ When Tracy Thurman successfully sued the City of Torrington, Connecticut, for \$2.3 million in damages in 1984,²⁷ alleging that the local police department facilitated her husband's vicious stabbing of her by failing to respond to her numerous past requests for protection, her case put the spotlight on police apathy toward intimate-partner violence and forced legal settlements in Oakland, California and New York City.²⁸ One California case involved an abused wife who sued police for refusing to arrest her batterer, failing to offer her medical assistance, and failing to protect her over a three-year period during which she reported several violent and harassing incidents, obtained a restraining order, and got a divorce.²⁹ Newspaper reports from the second half of the twentieth century also provide anecdotal evidence of such discrimination and apathy.³⁰

24. Constable, *supra* note 4, at 88–89, 91; Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 249–54; Ramsey, *A Diva Defends Herself*, *supra* note 4, at 1363–65. See Adler, *supra* note 4, at 883–84.

25. See *supra* note 1.

26. Zorza, *supra* note 1, at 47–49 (discussing policies in Michigan and in Oakland, California); see SCHECHTER, *supra* note 1, at 157–61 (providing a similar account of how police in several cities in the 1970s avoided arresting batterers or even responding to domestic violence calls). Leigh Goodmark notes that the American Bar Association actually discouraged police from bringing domestic violence cases to court to reduce docket pressure on “harried and overworked judges.” Goodmark, *Autonomy Feminism*, *supra* note 12 (citing Jaffe et al., *The Impact of Police Laying Charges*, in *LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION* 62, 69 (N. Zoe Hilton ed., 1993)).

27. Thurman v. City of Torrington, 595 F.Supp. 1521 (D. Conn. 1984).

28. Bruno v. Codd, 393 N.E.2d 976 (N.Y. 1979); Goodmark, *Autonomy Feminism*, *supra* note 12, at 2; Miccio, *supra* note 1, at 276–77; see, e.g., Balistreri v. Pacifica Police Dept., 855 F.2d 1421 (9th Cir. 1988), *amended on other grounds*, 901 F.2d 696 (9th Cir. 1990).

29. *Balistreri*, 901 F.2d at 698.

30. See, e.g., Carol Honsa, *Prosecutor Brushed Off Wrong Wife Beating Complaint*, WASH. POST, Sept. 22, 1966, at E21 (reporting on the stabbing of a woman who “told of six years of unsuccessful attempts to have her husband arrested for beating and threatening to kill her”). The same article further stated that prosecutors frequently “tell the women to return home and try to reconcile domestic problems, or suggest they see a clergyman or social welfare agency for counseling.” *Id.* Even cases that led to criminal charges often resulted in acquittal because “many of our jurors don’t feel

Finally, in the infamous case *State v. Norman*,³¹ the defendant Judy Norman called the police to her home to complain that her husband J.T. had beaten her all day. Saying they could not arrest J.T. without a warrant, the officers advised the defendant to file a complaint; she declined to do so, out of fear that J.T. would retaliate.³² She fatally shot her husband—who had beaten, tortured, and humiliated her throughout their twenty-five-year marriage—only after she had repeatedly asked for police assistance, tried to get J.T. committed to a mental hospital, and sought welfare benefits so she could leave him.³³ In her case and others like it, the judge refused to instruct the jury on self-defense.³⁴

Battered women's advocates hailed mandatory arrest laws passed in twenty states and pro-arrest policies adopted throughout the country after the *Thurman* case as "a victory for every woman [like Tracy Thurman and Judy Norman] who had begged for police protection from her abuser to no avail."³⁵ Yet, even when the legal system of the late twentieth century acknowledged abuse survivors' cries for help, mandatory arrests and mutual orders of protection sometimes obscured the fact that the man was the predominant aggressor or, at best, thrust the woman into a system that put separation and prosecution ahead of her own priorities.³⁶

that knocking your old lady around is grounds for locking up a working man." *Id.* John Theban, Director of Family and Child Services, told the *Post* that "the woman's story illustrates the lack of legal protection for women in domestic violence cases." *Id.* Two years later, the daughter-in-law of a police chief leveled similar allegations against officers in Prince George's County, Maryland, claiming that "police deliberately avoided arresting her husband, James Panagoulis, though she swore out a warrant last week for his arrest" and had made repeated complaints against him in the past. See *Panagoulis In-Law Raps Police Force*, WASH. POST, Oct. 1, 1968, at C7.

31. *State v. Norman*, 378 S.E.2d 8 (N.C. 1989).

32. *Norman*, 378 S.E.2d at 10.

33. *Norman*, 378 S.E.2d at 10–11.

34. *Norman*, 378 S.E.2d at 10, 12 (affirming the trial court's refusal to give jury instructions on perfect or imperfect self-defense on the grounds that the defendant did not honestly or reasonably believe that using lethal force was necessary to save herself from imminent death or great bodily harm). See Mahoney, *supra* note 2, at 85–93 (discussing *State v. Stewart*, 763 P.2d 572 (Kan. 1988) and *State v. Norman*, 378 S.E.2d 8 (N.C. 1989)).

35. See Goodmark, *Autonomy Feminism*, *supra* note 12, at 3; Leigh Goodmark, *Law Is the Answer? Do We Know that for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 15 (2004).

36. Mahoney, *supra* note 2, at 76. See Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal*, 31 WASH. U. J. L. & POL'Y 39, 46–47 (2009) (criticizing modern domestic violence policy for emphasizing "a narrowly defined set of options for women who have been battered: arrest, prosecute, secure a protective order, go to a shelter, get a divorce"); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 750–51 (2007) ("Reformers have embraced carcera-

III. HOW THE REFORM OF DIVORCE, CHILD CUSTODY, AND MARITAL PROPERTY LAWS CONTRIBUTED TO THE CREATION OF THE EXIT MYTH

The rise of unsympathetic attitudes and policies toward female domestic violence victims in the mid twentieth century stemmed from misperceptions of women's growing independence. The reform of divorce and marital property laws contributed to the erroneous view that all wives could safely leave their marriages and support themselves by working outside the home. In fact, such reforms actually proved detrimental to the socioeconomic position of many divorced women.³⁷

Starting in the late 1800s, a few states began to liberalize their divorce laws in response to the emerging ideal of companionate marriage and practical pressures to give abused wives an escape hatch,³⁸ make remarriage possible, legitimize the birth of additional children, and enable women whose husbands had deserted them to sell land.³⁹ By 1857, fault-based divorce was available in California on grounds of "mental cruelty," as well as physical violence.⁴⁰ Similar legal developments occurred in other Western states, including Nevada, before the beginning of the twentieth century.⁴¹ Permissible reasons for divorce were also expanded to include a spouse's habitual drunkenness, impotence, narcotics addiction, non-support, felony conviction, or adultery.⁴²

tion and separation models, despite a plethora of gender and race-based scholarly critiques.".)

37. See *infra* notes 89–96 and accompanying text.

38. J. HERBIE DiFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 13–14, 44 (1997); LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW* 41 (2004); HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 27–28 (1988); Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 195.

39. FRIEDMAN, *PRIVATE LIVES*, *supra* note 38, at 32–33.

40. ROBERT GRISWOLD, *FAMILY AND DIVORCE IN CALIFORNIA, 1850–1890: VICTORIAN ILLUSIONS AND EVERYDAY REALITIES* 19–20 (1982); see JOANNA L. GROSSMAN & LAWRENCE FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 163 (2011).

41. PAULA PETRIK, *NO STEP BACKWARD: WOMEN AND FAMILY ON THE ROCKY MOUNTAIN MINING FRONTIER, HELENA, MONTANA, 1865–1900* 106 (1990); Kathryn Dunn Totten, "They Are Doing So to a Liberal Extent Here Now": *Women and Divorce on the Comstock, 1859–1880*, in *COMSTOCK WOMEN: THE MAKING OF A MINING COMMUNITY* (Ronald M. James & C. Elizabeth Raymond eds., 1998).

42. Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice before No-Fault*, 86 VA. L. REV. 1497, 1501–02 (2000) [hereinafter, Friedman, *A Dead Language*]; see GROSSMAN & FRIEDMAN, *supra* note 40, at 161–62. Despite laws that were facially gender-neutral, however, courts in many states continued to allow divorce

Lawrence Friedman and Joanna Grossman maintain that, after 1870, most divorce cases were collusive—that is, the spouses agreed to get a divorce, and then the wife filed suit accusing the husband of a major breach of the marriage contract, such as extreme cruelty. The husband waived his right to respond, and the judge granted the divorce.⁴³ This was “common, ordinary, typical, and everybody—certainly all the judges and lawyers—knew it,” Friedman argues, even though statute and case law made such collusion illegal.⁴⁴ While real cases of extreme cruelty occurred, many were fabricated.⁴⁵

Such accounts may underestimate the amount of wife beating that occurred in the late 1800s and early 1900s and overstate social and legal tolerance for it, however.⁴⁶ Turning from faked cruelty as grounds for divorce to the criminal courts’ struggle with the very real problem of domestic violence, a somewhat different picture emerges. Cruelty was an accepted basis for divorce because physically attacking, or even mentally tormenting, a spouse was widely considered wrongful. Judges may have winked at the invented nature of many extreme cruelty allegations, but that does not mean that society or the courts trivialized domestic violence. Indeed, in the early decades of the twentieth century, newspapers and law enforcers thought that many divorce cases involved the same kind of contemptible assaults that brought injured women and their batterers into police court.

For example, the *Los Angeles Times* noted in 1908 that four wife-beating cases had been reported to the city’s police department during a two-week period and commented, “[s]imilar stories, told in the divorce courts, show that there are scores of such affairs [i.e. beatings] that are never made public until the long enduring women seek relief by separation.”⁴⁷ Frustrated with the ineffectiveness of fines, jail sentences, and public condemnation to deter recidivism, the L.A. police chief joined the captain of

due to adultery only when the wife was the offending party. Friedman, *Private Lives*, *supra* note 38, at 30.

43. See GROSSMAN & FRIEDMAN, *supra* note 40, at 167; Friedman, *A Dead Language*, *supra* note 42, at 1504.

44. Friedman, *A Dead Language*, *supra* note 42, at 1506–07. See FRIEDMAN, PRIVATE LIVES, *supra* note 38, at 34.

45. GROSSMAN & FRIEDMAN, *supra* note 40, at 165 (citing MAXINE B. VIRTUE, FAMILY CASES IN COURT 90–91 (1956)); Friedman, *A Dead Language*, *supra* note 42, at 1530.

46. See Friedman, *A Dead Language*, *supra* note 42, at 1530 (“There were violent husbands, husbands who beat their wives, drunk or sober, night and day. Yet the law paid little attention to *real* domestic violence.”).

47. *Give Lash to Such Brutes*, L.A. TIMES, Sept. 27, 1908, at 110. The same article stated that during an eight-month period, the police had responded to reports of “scores of wife beating cases in this city.” *Id.*

detectives and a prosecutor in advocating the whipping post for wife beaters.⁴⁸

Newspapers echoed such sentiments,⁴⁹ and journalists also argued that “[d]ivorce is sometimes the only way to safeguard the family idea.”⁵⁰ Feminist writer Rheta Childe Dorr pointed out that men who abused their wives had already destroyed the marriage before the divorce occurred.⁵¹ The media thus encouraged a vigorous criminal justice response, in tandem with easier access to divorce.

Nevertheless, legally terminating a marriage remained difficult prior to the mid twentieth century, and, even thereafter, it offered no panacea for victims of intimate-partner violence. Several scholars place the rise of an alternative system of divorce at the trial-court level later in American history than Friedman does. J. Herbie DiFonzo locates the beginning of intense cultural pressure to make divorce more accessible in the 1920s and 1930s, rather than in the late nineteenth century.⁵² According to Herbert Jacob, divorce remained an anomaly associated with scandal in the early 1900s, unless the divorcée was an entertainer “where the stigma added to an artist’s mystique.”⁵³ Most states waited until the 1920s to expand the statutory grounds of cruelty to include mental anguish, in keeping with new psychological research.⁵⁴ In any event, legal historians agree that the infiltration of no-fault concepts into the statutory divorce scheme—which Friedman dubs “creeping no-fault”⁵⁵—did not occur until the middle of the twentieth century, when a substantial minority of states began to allow divorce based on incompatibility after separation for a specified amount of time.⁵⁶ Thus, un-

48. *See id.*

49. For example, the writer of the article discussed above stated: “The police have arrested these men, the justices have fined them, or sent them to prison, the newspapers have denounced them as ruffians and in many cases they have lost their positions, but their punishment has not been a lesson to others.” *Id.* For further examples of journalistic condemnation of wife beaters, see Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 202–03.

50. DiFONZO, *supra* note 38, at 13 (quoting Margaret Deland, from a 1910 article in the *Atlantic*).

51. *Id.* at 14.

52. *Id.* at 11.

53. JACOB, *supra* note 38, at 27.

54. DiFONZO, *supra* note 38, at 11.

55. Friedman, *A Dead Language*, *supra* note 42, at 1525–27 (stating that nineteen or twenty states had adopted “creeping no fault” statutes by 1950); *see* GROSSMAN & FRIEDMAN, *supra* note 40, at 172–76 (discussing the “creeping decay” of the fault-based system from the 1930s to the 1960s).

56. *See* DiFONZO, *supra* note 38, at 11, 67–87; JACOB, *supra* note 38, at 169–70 (indicating that most changes were low-risk moves that involved grafting concepts of irretrievable breakdown onto statutes listing fault-based grounds).

til at least the mid 1900s, it was commonly understood that abused women felt trapped in their marriages by social pressures as well as by the substantial threat of violent retaliation if they left.⁵⁷

“In the second half of the twentieth century,” Friedman writes, “the demand for divorce grew even stronger, and the political and social forces opposed to divorce reform grew weaker.”⁵⁸ Voices sympathetic to battered or simply unhappy spouses were not the only ones heard, however. While opponents could not stem the rising tide of divorce, they generated a significant backlash that had a lasting, deleterious effect on the way American society viewed abused wives. At mid-century, powerful people and institutions, especially the Catholic Church, opposed the expansion of statutory grounds for divorce,⁵⁹ and polls in the 1940s indicated significant distaste for the easy, migratory divorces obtainable in Nevada.⁶⁰ Most importantly, the conservative opposition tried strenuously to reassert the trope of separate spheres—this time not to police violent men, but to attack the new roles and avenues to independence that women sought.

Critics of divorce in the 1940s and 1950s blamed women for the “demoralization” of modern marriage and contended that the wife’s “greed for alimony marked her as the responsible party in the now unseemly rush to the divorce court.”⁶¹ In fact, though, women rarely sought, and courts rarely granted, alimony. At the turn of the century, alimony was requested in only 13.4% of all divorce cases and granted in only 9.3%.⁶² In the 1910s and 1920s, it was granted in about 15% of cases.⁶³ Although those numbers rose slightly in the post-war period, “[a]ttacks on alimony achieved a vituperative

57. As criminal cases and newspaper reports document, men often stalked, attacked, and even killed their estranged wives after these women sought to leave their marriages, and judges and jurors often sympathized with the female victims. See, e.g., Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 241–43 (analyzing the self-defense acquittal of Bridget Waters, a California woman, whose estranged husband threatened her with a gun); Ramsey, *Intimate Homicide*, *supra* note 3, at 147–50 (discussing the conviction of men who committed separation murders). Moreover, courts looked beyond victims’ expressions of love and forgiveness to the other reasons abused women feared pressing domestic violence charges, such as their concern that they would be unable to feed and care for their children if they left their husbands or got them imprisoned. Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 215.

58. Lawrence M. Friedman, *Family: United States Law*, in 3 THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 53 (Stanley N. Katz ed., 2009).

59. DiFONZO, *supra* note 38, at 32–33.

60. Friedman, *A Dead Language*, *supra* note 42, at 1504.

61. DiFONZO, *supra* note 38, at 11.

62. *Id.* at 62.

63. *Id.* at 63.

tone entirely out of kilter with [its] economic impact.”⁶⁴ Alimony was seen as “a windfall for recipients and a crushing burden on those forced to pay,” despite the fact that courts ordered it in only one-quarter of divorce cases after World War II, and the awards remained modest.⁶⁵ Indeed, leaving a marriage was extremely risky for the wife, not the least because the common-law system of distributing property according to title, which the husband typically held, meant that a divorce could leave the wife destitute.⁶⁶ Still, “greedy” women who instigated divorce became scapegoats for the breakdown of marriage.⁶⁷

The woman-blaming tenor of anti-divorce rhetoric also suffused efforts in the 1940s, 1950s, and 1960s to get estranged couples to sign conciliation agreements. During this period, the therapeutic divorce movement sought to “recast the divorce court as a psychoanalytic institution, modeled after the juvenile court”⁶⁸ and to cure sick marriages by reestablishing a strict gender-based division of labor.⁶⁹ Under a typical agreement imposed by the Los Angeles Conciliation Court, for example, the couple admitted that they needed professional help to heal their diseased relationship. To achieve reconciliation, they reiterated their allegiance to a gendered social order in which the wife would take care of housework, childcare, and meal preparation, while the husband would do exterior maintenance on the home and yard and provide for the family financially.⁷⁰ The court’s contempt power could be used to reinforce the conciliation agreement, and offenders who breached it could be imprisoned and fined.⁷¹ Under this therapeutic approach, modeled after the recommendations of Ohio Judge Paul Alexander, marital problems became “medicalized.” While the family court might ostensibly allow divorce without a showing of fault, it, and “not the impulsive couple, would decide when the marriage was beyond repair.”⁷² Thus, at least in theory,⁷³ the state became not only the arbiter of divorce,

64. *Id.* at 107.

65. *Id.* at 107.

66. See GROSSMAN & FRIEDMAN, *supra* note 40, at 193.

67. DIFONZO, *supra* note 38, at 111.

68. *Id.* at 12.

69. *Id.* at 113. See GROSSMAN & FRIEDMAN, *supra* note 40, at 174; FRIEDMAN, *A Dead Language*, *supra* note 42, at 1531–33.

70. DIFONZO, *supra* note 38, at 130.

71. *Id.* at 132. See GROSSMAN & FRIEDMAN, *supra* note 40, at 174; Friedman, *A Dead Language*, *supra* note 42, at 1532–33.

72. DIFONZO, *supra* note 38, at 118.

73. Grossman and Friedman indicate that few couples actually reconciled in California, in contrast to the success of Judge Alexander’s court in Toledo, Ohio, in the 1950s. GROSSMAN & FRIEDMAN, *supra* note 40, at 175–76.

but also a stern hand imposing gender stratification in the family, in the name of science, rather than legal precedent.

Although the therapeutic divorce movement had spread widely throughout the United States by the 1960s, it was ultimately subsumed by no-fault divorce. The no-fault movement got its first foothold in California, a state where therapeutic approaches had been in vogue.⁷⁴ Proponents of the California law sought to replace the fault-based charade with a system more closely linked to a clinical model and to address a variety of procedural concerns, including the frequent occurrence of perjury.⁷⁵ Signed in 1970 by then-Governor Ronald Reagan (himself a divorcé), the California law eliminated the traditional fault grounds and instead permitted divorce on a showing of incurable insanity or “irreconcilable differences which have caused the irremediable breakdown of the marriage.”⁷⁶ It also mandated the equal division of property and made alimony only temporary support.⁷⁷ By 1974, forty-five states had a no-fault procedure.⁷⁸

Several scholars have noted that proponents of the California law neither espoused radical aims, nor associated themselves with any of the social movements of the 1960s.⁷⁹ But as no-fault laws took root around the country, what started as essentially a technocratic reform acquired an unexpected potency: Sweeping away the separation period that many states’ “creeping no-fault” statutes had required, the new laws made possible relatively quick, unilateral divorce based simply on one spouse’s feeling that the marriage was unsatisfactory.⁸⁰ In contrast to the fault system, in which a party who wanted to defeat the divorce suit could raise defenses, such as

74. JACOB, *supra* note 38, at 45, 65.

75. See DiFONZO, *supra* note 38, at 137, 145–47.

76. JACOB, *supra* note 38, at 59–60.

77. *Id.* at 60.

78. *Id.* at 80. However, only fifteen states completely eliminated fault provisions from their divorce laws and adopted irretrievable breakdown as the sole grounds for divorce. The other thirty simply added a no-fault procedure to their laws to give couples a choice between irretrievable breakdown and one of the traditional grounds, and some of these states actually allowed divorce after a very short separation, instead of making the change explicit. *Id.* at 80–81. In other words, the adoption of no-fault divorce across the country occurred incrementally. *Id.* at 102.

79. *Id.* at 50–51, 60. Jacob makes a similar point about the adoption of the Uniform Marriage and Divorce Act, a model statute, endorsed by the American Bar Association in 1974, that was influential in spreading no-fault divorce beyond California. *See id.* at 65–68, 70, 77.

80. “No longer did conjugal dissolutions have to be bargained for in the shadow of the formal law. No longer did the parties have to negotiate at all.” Rather, the passage of the California no-fault statute “resulted in boundless divorcing . . .” DiFONZO, *supra* note 38, at 170.

recrimination and forgiveness,⁸¹ no-fault laws extended the promise of individualism and an unobstructed exit. They did so by creating the impression that a wife could leave her marriage with relative ease and sufficient financial means to begin a new life, apart from her ex-husband.

For battered women, however, this proved to be a myth. The failure of the divorce “revolution” to provide more than an illusory exit for abused wives arose, in part, from formal-equality changes to alimony and the division of property at divorce, which Martha Fineman argues “were separate from and cannot be considered merely part of no-fault legislation.”⁸² After the Supreme Court’s invalidation of gender-based alimony statutes in *Orr v. Orr*,⁸³ courts reduced or eliminated already meager awards on the theory that the ex-wife should not be encouraged to “live a life of physical and mental indolence.”⁸⁴ Increased job opportunities for women and new rules for distributing property at divorce theoretically made alimony outdated.⁸⁵ By the 1980s, the common-law allocation of property based solely on legal title had disappeared. Courts in most states tended to order a roughly equal division of marital property, whether they followed equitable distribution rules or community property rules. In some equitable distribution states, factors like fault and the wife’s non-economic contribution might be considered.⁸⁶ However, because the value of most marital estates was small, simply dividing the property, rather than providing for ongoing support, often caused the primary caregiver in the broken marriage great financial distress.⁸⁷ Courts began routinely to impose child support obligations in the 1970s, but such awards were not mandatory, and they varied widely. Moreover, many husbands did not pay.⁸⁸

Some feminist scholars have contended that these changes resulted in unfairness, inconsistency, and the impoverishment of many divorced mothers.⁸⁹ According to Martha Fineman, for example, the new property rules

81. *See id.* at 55–56. *See also* Friedman, *A Dead Language*, *supra* note 42, at 1508–09.

82. Martha L. Fineman, *Neither Silent Nor Revolutionary*, 23 L. & SOC’Y REV. 945, 946 (1989) (reviewing HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988)).

83. *Orr v. Orr*, 440 U.S. 268 (1979).

84. GROSSMAN & FRIEDMAN, *supra* note 40, at 202.

85. *See id.* at 202–03.

86. *See id.* at 196–200, 206–09.

87. *See id.* at 203–04.

88. *Id.* at 224, 229–30.

89. Mary Ann Glendon, *Family Law Reform in the 1980s*, 44 LA. L. REV. 1553, 1556 (1984) (criticizing equitable distribution schemes for allowing too much judicial discretion). *See* MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 120 (2004) (noting that, after the rise of no-fault laws, “women found themselves and their children destitute at divorce”); DEBORAH L. RHODE,

[R]emove[d] economic security for women by abolishing the common law obligation of a husband to support his wife and children (even after the marriage end[ed]). Women now share[d] an equal obligation in regard to children, and a divorced wife . . . [might] be saddled with her 'equal' share of family (or husband's) debts even though she . . . [was] far from 'equal' in job and salary prospects.⁹⁰

By the late 1980s, half of all single-parent families were living below the poverty line, and divorced or separated women headed the vast majority of them.⁹¹ While marital property provisions symbolically acknowledged the increased contribution of women, especially middle-class women, to the family economy through paid work, the practical reality was much bleaker. Women who got divorced found that they had little property in their own names and that their earning capacity had been damaged by their prioritization of care-giving. The gender pay gap, which exists at all wage and skill levels, was (and still is) particularly great for women of color.⁹² Hence, although African-American women often have greater financial independence from their partners than white women do, “[b]reaking up the family means breaking up potential resources” that are already scarce, due to the relative poverty of many black couples.⁹³ This may lead some African-American women to stay in abusive relationships, rather than separating or seeking a divorce.⁹⁴

The presence of children complicates the problem. From the late 1800s through the 1940s, the “tender years” doctrine gave custody to the

JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 149 (1989) (contending that, although many women greeted no-fault procedures and the equal division of property at divorce as a boon to women's status, “what apparently escaped notice were the inequalities in men's and women's status following divorce”). In a study widely criticized on methodological grounds, Lenore Weitzman argued that no-fault divorce improved men's standard of living, while drastically harming women's standard of living. LENORE WEITZMAN, *THE DIVORCE REVOLUTION* 339 (1985); Lenore Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony, and Child Support Awards*, 28 UCLA L. REV. 1181, 1249–53 (1981). Yet, despite skepticism about Weitzman's use of data, many studies indicate that divorce has a harsher impact on women and children than it does on men. See GROSSMAN & FRIEDMAN, *supra* note 40, at 203 & n.74.

90. Fineman, *Neither Silent nor Revolutionary*, *supra* note 82, at 948.

91. RHODE, *supra* note 89, at 149.

92. See GROSSMAN & FRIEDMAN, *supra* note 40, at 198–99.

93. Zanita Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 50 (1998).

94. See Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 104 (2008).

mother due to her presumptively greater purity and domesticity.⁹⁵ However, the cultural assumptions underlying this doctrine also burdened her with unpaid childcare responsibilities, and hence financial dependency, that made separation or divorce from her violent husband difficult. Conditions of dependency on abusive spouses were perhaps especially great for middle-class, white women who historically had a brief or limited role in the work force, if they worked outside the home at all.⁹⁶ The paternalistic policies of the late nineteenth and early twentieth centuries at least had the limited virtue of acknowledging such women's predicaments.

For example, in 1914, a Los Angeles Police Court judge proposed sentencing wife beaters to compulsory labor on public projects so that the state could provide their families with financial support.⁹⁷ In his view, such a proposal addressed the reason so many wives sought probation, rather than incarceration, for their breadwinning husbands: "Why does she do it? Just because she has to have the money that the man can earn and take home to her. The real punishment in these cases falls on the helpless ones already wronged by the man's act."⁹⁸

Sex discrimination suits in the 1970s made maternal preference in custody awards unconstitutional, but divorced women continued to be the primary caretakers of children in most cases. If they sought to work full-time or to go back to school to improve their earning potential, they risked losing custody of their children.⁹⁹ And, as we shall see, although societal attitudes gradually became more accepting of mothers' employment outside the home, women continued to be paid less and to have fewer employment opportunities than men.¹⁰⁰ Thus, the image of the liberated woman that began to suffuse American culture in the 1970s masked residual impediments to leaving a violent relationship.

Moreover, no-fault divorce allowed courts to ignore one spouse's mental and physical abuse of the other¹⁰¹—a failing that states have only

95. JACOB, *supra* note 38, at 128–30.

96. *See infra* notes 114–115, 118–126, 135–144, 149–151 and accompanying text.

97. *Would Lessen Wife's Burden: Labor Not Imprisonment, for Brutal Husbands*, L.A. TIMES, Mar. 25, 1914, at II7.

98. *Id.* (quoting Police Court Judge White). Another judge, who usually treated wife beaters severely, suspended a sentence of 50 days in jail for defendant John Ryan when his wife begged for her husband's release on the grounds that "if the husband went to jail their little ones would go hungry." *Gave Him a Chance*, L.A. TIMES, Aug. 1, 1901, at 10.

99. *See* GROSSMAN & FRIEDMAN, *supra* note 40, at 217–19.

100. *See infra* note 161 and accompanying text.

101. *See* Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2554–56 (1994). *But cf.* GROSSMAN & FRIEDMAN, *supra* note 40, at 206–07 (noting that although the Uniform Marriage and

recently begun to remedy at the behest of battered women's advocates.¹⁰² Starting in the mid 1970s, divorce statutes brushing aside fault were often combined with state laws that favored the joint custody of children. By the late 1980s, thirty-four states had made joint custody an option, and some even had a presumption in favor of it.¹⁰³ Such laws, which fathers' rights groups spearheaded in California and elsewhere,¹⁰⁴ constituted a backlash against working mothers and their call for fathers to take on a greater role in child-rearing.¹⁰⁵ In cases of domestic violence, joint custody facilitated abusive men's continued control over (and physical attacks on) their ex-wives and children, even after the ink had dried on the divorce papers.

Joint custody provisions—adopted under the guise of formal equality—still allow a batterer to use violence and coercion against his ex-wife and to withhold child support payments if he is deprived of his children's companionship. Even states like Colorado, which have adopted statutory provisions requiring judges to use caution in allocating mutual decision-making authority over minor children when one divorcing spouse has abused the other,¹⁰⁶ often retain "friendly parent" provisions.¹⁰⁷ Such provisions may cause the court to see a battered mother as vindictive and obstructive if she insists on supervised visitation or sole custody without revealing the history of domestic violence, or if that history is misinterpreted as one of mutual conflict.¹⁰⁸

Divorce Act of 1970 urged property division without regard to fault, some states continued to consider the divorcing spouses' behavior, including domestic violence).

102. *E.g.*, Colorado law now requires the judge to take into account whether one parent has been a perpetrator of spousal abuse in allocating decision-making authority (i.e. legal custody), over the objections of the other spouse or the child's legal representative, unless "the court finds that the parties are able to make shared decisions about their children without physical confrontation and in a place/manner that is not a danger to the abused [party]." COLO REV. STAT. § 14-10-124(1.5)(b)(V) (Westlaw through Second Regular Sess. and First Extraordinary Sess. of the 68th General Assembly). Colorado statutes also require the court to consider whether one spouse has engaged in child abuse or child neglect in allocating both decision-making and parenting time (i.e. physical custody or visitation). *See* COLO REV. STAT. §§ 14-10-124(1.5)(b)(IV), 14-10-124(1.5)(a)(IX), & 14-10-124(1.5)(a)(X).
103. GROSSMAN & FRIEDMAN, *supra* note 40, at 222; JACOB, *supra* note 38, at 140, 142–43.
104. *See* JACOB, *supra* note 38, at 137, 142.
105. *See* Fineman, *supra* note 82, at 947–48.
106. *See supra* note 102.
107. Under COLO REV. STAT. § 14-10-124-1.5(a)(VI)(Westlaw through Second Regular Sess. and First Extraordinary Sess. of the 68th General Assembly), for example, Colorado courts are directed to consider "the ability of the parties to encourage the sharing of love, affection, and contact between the child and the other party."
108. According to Clare Dalton, for example:

In short, changes in laws governing divorce, child custody, and marital property division contributed to a re-framing of the narrative of domestic violence. Pity for abused women trapped in marriages to brutal men morphed into a presumption that wives should simply end the relationship. In the no-fault era, women were blamed not only for the abuse they suffered, but also for their self-defensive violence.¹⁰⁹

The illusion of easy divorce-on-demand merged with two other myths to require abused women to exit the marriage to establish their credibility: 1) an overestimation of their ability to support themselves and their children through paid work and 2) psychosocial trends that associated their behavior with masochism and irrationality. In the types of cases that police, prosecutors, judges, and jurors had once regarded with paternalistic sympathy, abused women now faced apathy, skepticism, and a tendency of criminal-justice personnel to empathize with their batterers.

IV. WORKING MOTHERS, WORKPLACE DESEGREGATION, AND THE ILLUSION OF ECONOMIC INDEPENDENCE

The changes in family law described in Part III occurred in the context of a larger reshaping of gender roles, including women's increased participation in the labor market. Waning protectiveness toward women must be viewed against the backdrop of women's new claims about work in the second half of the twentieth century. Yet, despite a few feminist victories in the workplace, survivors of intimate-partner abuse still possessed limited prospects for independence and safety.

Some American women have always worked, whether in the field or factory, as domestic servants or as the operators of taverns and boarding

Mediators, guardians ad litem, custody evaluators, and judges confusing abuse with conflict may . . . conclude that the parents who oppose shared parenting are acting vindictively and subordinating the interests of the children to their own rather than expressing their legitimate anxieties about their own and their children's ongoing safety. Ironically, within the friendly parent framework, a mother's proper concern about her abusive partner's fitness to parent will negatively affect her chance to win custody, not his. At the same time, the abuser's willingness to share the children, which assures his ongoing access to his partner and allows him to continue to manipulate and intimidate her, will . . . make him appear the more attractive candidate for custody.

Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273, 277 (1999).

109. See *infra* notes 184–188 and accompanying text and *supra* notes 31–34 and accompanying text.

houses.¹¹⁰ Immigrants, free blacks, the very poor, and those lacking male support toiled for subsistence wages in gender-segregated jobs throughout the nineteenth century,¹¹¹ but white women seeking to maintain their respectability had limited employment options. Before the mid twentieth century, married white women generally worked only if the family was destitute, while single girls might hold a job until marriage. The vast majority of female employees remained in low-paid, gender-segregated positions that had cultural connections to nurturance or domesticity.¹¹² Despite the symbolism of Rosie the Riveter, it was not until after World War II that middle-class mothers entered the workforce in large numbers. In the Cold War era, working women challenged assumptions about traditional gender roles, but simultaneously created a veneer of equality in employment that hid the disturbing reality of mother-headed, single-parent families below the poverty line. Increasing pressure for women to leave violent relationships to prove their credibility and rationality must be seen in this context.

When commercial production eclipsed household manufactures, including homespun cloth, in the early nineteenth century, single “working girls” migrated to the mills to seek employment. Yet they maintained ties to domesticity by living in supervised boarding houses, such as those Francis Cabot Lowell established in Massachusetts, and by following paternalistic regulations.¹¹³ Subsequent generations of women were even more constrained by the nineteenth-century domestic code, which “held that the home required [a] woman’s moral and spiritual presence far more than her wage labor.”¹¹⁴ Only the most destitute married women worked for pay outside the home.¹¹⁵ After the Lowell mill system disintegrated, single girls seeking employment were limited to feminine occupations like teaching and nursing,¹¹⁶ or targeted by middle- and upper-class reformers who sought to provide factory girls with the discipline, domestic skills, and the morality of an “alternate family” through club membership.¹¹⁷

110. ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES* 3–19 (1982).

111. *Id.* at 46, 72; LYNN Y. WEINER, *FROM WORKING GIRL TO WORKING MOTHER: THE FEMALE LABOR FORCE IN THE UNITED STATES, 1820–1980* 4 (1985).

112. *See infra* notes 121–127, 140–143 and accompanying text.

113. KESSLER-HARRIS, *supra* note 110, at 20–38 (describing how household production declined and young, single women entered the labor force in the heavily-supervised Lowell-style mills of the 1820s and 1830s).

114. *Id.* at 49.

115. *See id.* at 51 (“For his wife to be earning income meant that the husband had failed.”).

116. *Id.* at 56–57, 76.

117. *Id.* at 93–94 (discussing the efforts of Grace Hoadley Dodge, who founded the first Working Girls’ Society in New York City in 1885); *see* PRISCILLA MUROLO, *THE COMMON GROUND OF WOMANHOOD: CLASS, GENDER, AND WORKING GIRLS’*

After 1890, married women entered the labor force in greater numbers.¹¹⁸ A minority did so to afford new consumer items, but due to the resilience of the social stigma attached to the working wife, most took paid work only as “a final defense against destitution.”¹¹⁹ More affluent single women sought employment when labor-saving innovations like washing machines and store-bought bread freed them from helping with household tasks.¹²⁰ Yet these educated women who found jobs during the Progressive Era tended to do so in occupations like social work, which were “loosely construed as nurturing.”¹²¹ The professions remained stratified by gender, and newly-trained female home economists “spent their best efforts trying to convince less privileged women to perform housework more productively and childcare more efficiently.”¹²² Women of every class were thus constrained by social attitudes privileging marriage and family and denying female workers equal wages¹²³ and entrance into certain occupations in the name of preserving their respectability.¹²⁴

Although the temporary opportunities that opened during World War I and the achievement of women’s suffrage in 1920 gave female workers new aspirations beyond mere subsistence, “a careful look at what was happening to women in [the 1920s] provided no grounds for assuming they were on their way to equality.”¹²⁵ Alice Kessler-Harris estimates:

[B]etween 1910 and 1940, from 86 to 90 percent of all women worked in only ten occupations—an occupational concentration that contributed to the ability to assign low wages and poor status to these jobs. . . . [It] was understood that women would stay in the lower ranks and drop out after marriage. To be sure, ambitious women and married career women flourished among the

CLUBS, 1884–1928 9–76 (1997) (discussing the relationship between the club members and their sponsors); WEINER, *supra* note 111, at 5, 52–63.

118. KESSLER-HARRIS, *supra* note 110, at 109, 122.

119. WEINER, *supra* note 111, at 84–85; see KESSLER-HARRIS, *supra* note 110 at 109.

120. KESSLER-HARRIS, *supra* note 110, at 112–13.

121. *Id.* at 116.

122. *Id.* at 119; see *id.* at 117.

123. By the end of the 1920s, “women’s wages averaged only 57 percent of men’s.” *Id.* at 230. Minimum wage laws for women were struck down or allowed to lapse during this decade. WEINER, *supra* note 111, at 78. The ratio of female to male wages actually improved during the Great Depression, but National Recovery Administration codes in some sectors, such as the garment industry, still openly provided lower rates for female workers. KESSLER-HARRIS, *supra* note 110, at 262. Trade unions tended to argue for equal pay for women only when women’s lower wages threatened men’s jobs. *Id.* at 289.

124. KESSLER-HARRIS, *supra* note 110, at 128, 140–41.

125. *Id.* at 236.

privileged and the well-educated. Still, by the end of the [1920s], only one out of every fifteen married women worked for a living, and most of these were still poor and black.¹²⁶

The wartime influx of new female workers was small, and, despite temporary increases in pay, women's wages declined after the armistice.¹²⁷ Moreover, whether a mother worked outside the home or not, she remained exclusively responsible for childrearing.¹²⁸ Thus, although the popular press emphasized the independence of the "new woman" and her contribution to the war effort,¹²⁹ female socioeconomic self-sufficiency was still largely an illusion in the 1910s and 1920s.

The continued protectiveness of the criminal justice system toward female victims of intimate-partner violence during the Progressive Era indicates that police, courts, and jurors recognized this reality.¹³⁰ Of course, many battered women did try to leave, and those who stayed sometimes found work to support husbands who failed to provide for them. Despite rhetoric depicting the abused wife as a pathetic, helpless figure, intimate-partner abuse victims were often quite resourceful. They ran boarding houses, worked in the garment industry, and took other jobs available to women at the time.¹³¹ However, rather than challenging patriarchy, the employment of abused wives was perceived to arise from desperation; their need to work simply confirmed contemporary associations of wife beating with idle, drunken men. A typical complaint to the court emphasized this stock narrative:

Mrs. Abbott states that Abbott is a shiftless man, unwilling to work, and as they have no means she is compelled to support herself. Abbott has been in the habit of making frequent demands upon her for money, and becoming tired of having to

126. *Id.* at 249.

127. DIFONZO, *supra* note 38, at 20.

128. *Id.* at 25.

129. *Id.* at 18–19.

130. *See supra* notes 48–49 and accompanying text (discussing proposals in the early decades of the twentieth century to whip wife beaters or sentence them to hard labor because fines and jail terms had proved ineffective).

131. Bridget Waters, acquitted of murdering her estranged husband in 1888 on self-defense grounds, had separated from the decedent and supported herself by running a boarding house. *See Ramsey, Domestic Violence and State Intervention, supra* note 3, at 241–42. Many women who ultimately died at the hands of abusive spouses made ends meet through paid work. *See Carolyn B. Ramsey, The Discretionary Power of 'Public' Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1376 & n.364 (2002) (discussing several intimate-murder victims who supported themselves and their violent husbands by working at low-paid jobs, such as sewing pantaloons).

support herself and him too, she at last refused to accede to his demands, whereupon, she states, Abbott threatened her life.¹³²

Two crises in twentieth-century America—the Great Depression and World War II—failed to change either the gender segmentation of the work force or the dominant ideology that required women to excuse their employment as conditioned on family (or patriotic) need. Although women's proportion of the work force crept up to about 25% in the 1930s,¹³³ female industrial employees worked apologetically, out of economic necessity, to provide food and shoes for their children.¹³⁴ Those who were married often hid that status to preserve their jobs in the face of heightened opposition to the employment of wives.¹³⁵

Despite hostility to female workers in a period of vast male unemployment, married women were able keep their jobs or obtain new ones because they worked in traditionally female occupations or in new unskilled production processes that were replacing the skilled positions formerly held by men.¹³⁶ Yet, “[w]orking class women themselves generally agreed with the prevailing sentiment that married women should not have jobs while male breadwinners were desperate for work, and they were often reluctant to replace men directly.”¹³⁷ The Depression experience thus disrupted neither the sexual division of labor nor the ideology of a “woman’s place”; indeed, the latter was actually strengthened by the resurgence of cultural norms censuring married women for employment outside the home.¹³⁸

Both scholarly and popular understanding of women’s economic mobilization during World War II conjure the ubiquitous image of Rosie the Riveter, a housewife in factory clothing displaying her muscled arm. Indeed, the U.S. government conducted a propaganda campaign designed to convince wives to take their husbands’ places in the factory and the mill when the men went to battle.¹³⁹ However, historians of female workers during this period have shown that the sexual division of labor did not end in the

132. *A Husband's Threats*, DAILY EVENING BULL. (S.F.), Feb. 22, 1890, at 3, col. D.

133. KESSLER-HARRIS, *supra* note 110, at 258. See RUTH MILKMAN, GENDER AT WORK: THE DYNAMICS OF JOB SEGREGATION BY SEX DURING WORLD WAR II 33 (1987) (“The depression increased both women’s need for employment and employers’ need for low-wage labor. Thus, married women were more likely to work for pay in the 1930s than ever before, despite the backlash against this.”).

134. MILKMAN, *supra* note 133, at 33.

135. *Id.*; see WEINER, *supra* note 111, at 109–10.

136. KESSLER-HARRIS, *supra* note 110, at 251, 260–61, 271; MILKMAN, *supra* note 133 at 28.

137. MILKMAN, *supra* note 133, at 32.

138. *Id.* at 8, 28, 33.

139. KESSLER-HARRIS, *supra* note 110, at 275; WEINER, *supra* note 111, at 110.

1940s. Ruth Milkman contends, for example, that “Rosie the Riveter did a ‘man’s job,’ but more often than not she worked in a predominantly female department or job classification.”¹⁴⁰ Even when wartime women took on specific tasks thought to be men’s work, such gains were temporary.¹⁴¹ The resurgence of domesticity, the use of seniority systems to oust women in favor of returning veterans, and an ideology depicting trading “factory goggles for an apron” as the “patriotic” thing to do contributed to the reconstruction of a strict sexual division of labor.¹⁴² But perhaps most importantly, management wanted to end its wartime experiment with female substitution by purging women from “men’s jobs,” and male unionists abetted this aim.¹⁴³

When World War II ended, many women quit their jobs or were laid off.¹⁴⁴ Moreover, while both the government and private industry had recognized the social need for childcare centers to allow women to participate in the labor force during the war, more than a thousand centers closed when the war ended.¹⁴⁵ The number of working mothers did not just return to pre-war levels, but in fact continued to rise; yet, in the 1950s, their problems were defined as individual, not social, and relatives had to step in to care for children pejoratively labeled “daytime orphans.”¹⁴⁶

Before the Depression and World War II eras, working-class mothers, who could not afford servants or for-profit day nurseries, turned to kin and neighbors. If they were widowed or deserted, they might benefit from charity or state pensions inadequately designed to keep women home. At worst, they faced the threat of child removal.¹⁴⁷ During the national crises of the 1930s and 1940s, government-funded daycare and child supervision offered by private employers, such as the Kaiser ship-building firm, offered welcome but still insufficient respite.¹⁴⁸ Yet, like gender-based job segregation and unequal pay, the childcare dilemma was a problem for which the partial solutions reached during the Great Depression and World War II proved ephemeral.

140. MILKMAN, *supra* note 133, at 9.

141. *See id.* at 10, 100–01, 126.

142. WEINER, *supra* note 111, at 110–11; *see* KESSLER-HARRIS, *supra* note 110, at 286–87, 295–99.

143. *See* MILKMAN, *supra* note 133, at 100–01. Management had this aim in large part because sex-based differentials in wages had narrowed during World War II. *See id.* at 101.

144. *See* KESSLER-HARRIS, *supra* note 110, at 286–87.

145. *See* WEINER, *supra* note 111, at 135–36.

146. *Id.* at 136.

147. *See id.* at 119–34.

148. *Id.* at 135.

Indeed, World War II heralded less of a sea change than is often thought. Three-quarters of women who had paid employment during the war had worked before, and the majority of wives who entered the labor force for the first time during this period were more than thirty-five years old.¹⁴⁹ Indeed, official policy during the war years discouraged mothers of small children from working.¹⁵⁰ It was not until the second half of the twentieth century that married mothers of infants and pre-school children entered the workplace in appreciable numbers¹⁵¹ and that equality claims were widely used to challenge gender-based employment segregation and wage disparities.

In sum, until the middle of the twentieth century, the dominant social ideology encouraged husbands to be breadwinners and wives to take care of the home and family. Working-class women rarely fit this image; yet, as long as they apologetically claimed financial need or patriotic duty and worked in so-called “feminine” jobs that preserved their ties to domesticity, they did not pose a serious threat to the foundations of either the home or the labor market. Thus, prior to mid-century, the main targets of punitive state intervention in intimate relationships were men who failed to play properly industrious and protective roles. Battered women were not presumed capable of easily leaving a violent marriage because neither employers, nor the state, nor society supported the idea of wives and mothers being paid to work.

The biggest shift in both social attitudes and actual numbers of women in the workforce came in the second half of the twentieth century. Driven by a desire for consumer goods and services, the dual-income family began to emerge in the 1950s, despite a post-war feminine mystique that exalted the role of the full-time housewife and mother.¹⁵² Whereas women constituted only 29% of the labor force in 1950, their numbers had reached 40% by 1975. Only about a third of all women worked in 1950, about half of them at part-time jobs; by contrast, nearly half of all women worked in 1975, and more than 70% of them had full-time positions.¹⁵³ Indeed, by the 1970s, more than 40% of wives had jobs, many of them younger women with children—a dramatic change that “stunned analysts.”¹⁵⁴

New attitudes on the part of employers and the state meant that, in the second half of the twentieth century, women were actually encouraged

149. KESSLER-HARRIS, *supra* note 110, at 276, 278.

150. WEINER, *supra* note 111, at 111.

151. *Id.* at 6–7.

152. See KESSLER-HARRIS, *supra* note 110, at 301–02; WEINER, *supra* note 111, at 112–13.

153. KESSLER-HARRIS, *supra* note 110, at 301.

154. *Id.* at 312.

to move into the labor market.¹⁵⁵ Popular sentiment changed, too. In 1976, a Gallup Poll reported that 68% of those surveyed approved of women working, even if their husbands could support them—an increase of fifty percentage points from responses to the same question in 1936.¹⁵⁶ Myriad publications in a variety of fields urged that women be allowed to find a truer perception of self by choosing from a range of options, including both marriage and a career.¹⁵⁷ Yet the demands did not stop with a right to employment. As the majority of women moved into wage work, they began to challenge assumptions about their primary role as caregivers—assumptions that had entrenched wage inequality and job segregation, as well as a traditionally gendered division of work within the family.¹⁵⁸

Two conflicting features of this altered society and economy are noteworthy. First, the feminist campaign for an Equal Rights Amendment, reproductive freedom, the acceptance of two-career families, and the ability of women to live independently from men produced a vigorous backlash.¹⁵⁹ Second, resentment and fear, and even *acceptance*, of women's new place in the work force involved a presumption that women had actually achieved a degree of autonomy that, in fact, remained elusive. Whereas two wage earners had once enabled a family to afford more luxurious forms of consumption, by the late twentieth century, one wage earner could scarcely make ends meet. Women were locked into paid work by the changing economy, despite the traditionalists' fantasy of turning the clock back to a time when the majority of wives stayed home.¹⁶⁰ But in the early 1980s, most women "still occupied limited kinds of jobs with limited opportunities; and a disproportionate degree of poverty still characterized female-headed families."¹⁶¹ While the traditional ideal of the father as the sole breadwinner had declined, the reality of mothers' entry into the work force had not produced any solution or consensus regarding the childcare dilemma.¹⁶²

To summarize: just as no-fault divorce failed to offer a silver bullet for women in violent marriages, the rise of female employment did not erase the pay gap, the need for affordable childcare, or the existence of sex discrimination and harassment in the workplace. Despite such lingering obstacles to autonomy, the increased availability of female employment opportunities made a battered woman's claim that she could not escape

155. See *id.* at 303, 308.

156. WEINER, *supra* note 111, at 117.

157. *Id.* at 116.

158. See KESSLER-HARRIS, *supra* note 110, at 300–01, 312–16.

159. See *id.* at 316–18.

160. See *id.* at 318.

161. *Id.*

162. WEINER, *supra* note 111, at 140.

abuse by her male intimate partner—at least not without assistance and perhaps not without self-defensive violence—seem less sympathetic and less credible than in the past. Police, prosecutors, jurors, and judges imposed the often unrealistic expectation that she choose an avenue of exit. Hence, changes in gender roles created a “why didn’t she leave?” question that had rarely been asked when the dominant social assumption was that wives and mothers should not seek paid work.

V. PSYCHOSOCIAL UNDERSTANDINGS OF DOMESTIC VIOLENCE

The real and perceived changes in women’s economic independence and ability to obtain a divorce did not alone reshape attitudes to domestic violence cases. In the second half of the twentieth century, the popularization of psychological theories linking intimate-partner abuse to female masochism also contributed to a new era of assigning blame to victims both for the domestic violence they suffered and for failing to separate from their abusers. This trend had repercussions in criminal cases.

Prior to the mid twentieth century, women who used violence were sometimes depicted as insane or hysterical.¹⁶³ Yet, despite the focus in feminist scholarship on sexist images of female mental instability,¹⁶⁴ nineteenth- and early twentieth-century women who killed their abusers often obtained acquittals on self-defense grounds, rather than being forced to plead insanity. Abused women could and did present evidence of past abuse to help juries understand why they used lethal violence against their male intimate partners.¹⁶⁵ Even in non-confrontational cases, the unwritten law justifying a wronged woman’s retaliation for abuse allowed many female defendants to obtain acquittal when the facts of their cases did not comport with the black letter self-defense doctrine.¹⁶⁶ Indeed, the dilemma of wives who depended financially on and feared physical retaliation by abusive men was commonly understood as a rational one, as opposed to being associated with a syndrome.¹⁶⁷

163. For example, defense attorneys and other observers often attributed the killing of a child by its mother to her insanity. See Ramsey, *Intimate Homicide*, *supra* note 3, at 126–27. More rarely, women who killed their husbands were deemed so completely delusional that their cases were dismissed before trial. See Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 52 & n.81 (2010) (discussing Australian cases).

164. See *supra* note 22.

165. Ramsey, *A Diva Defends Herself*, *supra* note 4, at 154–56, 163–65; see Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 236–54.

166. Constable, *supra* note 4, at 88–89, 91; Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 249–54; see Adler, *supra* note 4, at 883–84.

167. See Ramsey, *Domestic Violence and State Intervention*, *supra* note 3, at 236–43, 252–54; Ramsey, *A Diva Defends Herself*, *supra* note 4, at 1355–56, 1363–65.

The influence of psychological theories blaming the victim for intimate-partner violence became most pronounced in the middle of the twentieth century. Writing in the 1940s, Helene Deutsch, a disciple of Freud, theorized that a young girl's relationship with her father might result in a split between an active, masculine approach to life and sexual fantasies of "an extraordinarily passive and masochistic character."¹⁶⁸ As adults, "active" women might "display particular resistance and aggressiveness in the struggle for life," but in their sexual behavior, "either they remain erotically isolated, avoiding all dangers, or fall victims to brutal men."¹⁶⁹ Deutsch also theorized the existence of a "masculinity complex" that was "characterized by the predominance of active and aggressive tendencies that lead to conflicts with the woman's environment and above all with the remaining feminine inner world."¹⁷⁰ Normal femininity could be achieved only if the woman subordinated her own goals and pursuits to those of her husband or son.¹⁷¹ In some women—female revolutionary leaders, for example—masochistic tendencies combined with the masculinity complex and resulted not only in the woman's self-sacrifice for her ideas, but also in her association with tyrannical lovers.¹⁷²

Deutsch attributed abused women's inability to leave their batterers to their "masochistic ties" and described social-welfare cases involving victims who insisted upon returning to brutal drunks, despite agency efforts to assist them. In Deutsch's analysis, "[t]heir psychic dependence is concealed behind the economic one; all attempts to help them fail because, even when freed of their external dependence, they again and again find skilfully [sic] rationalized ways of falling under the subjection of brutal, weak, or undesirable men."¹⁷³ Assessing the case of a young woman who came to Hull House after being beaten almost to death by her lover, for example, Deutsch concluded that the woman subsequently returned to her abuser because "[s]he was enslaved by her masochism, the strongest of all forms of love."¹⁷⁴

The greatest harm of such psychological theories came from their popularization and dissemination in books and magazines consumed by the general public.¹⁷⁵ Penis envy and the masculinity complex became the prevailing explanations for feminism, for women's entry into the workplace to

168. 1 HELENE DEUTSCH, *THE PSYCHOLOGY OF WOMEN* 247 (1944).

169. *Id.* at 252 ("The feminine woman is evidently much better equipped to control her feminine masochism than is the active type.")

170. *Id.* at 289.

171. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 121 (1974) (summarizing Deutsch's theory).

172. DEUTSCH, *supra* note 168, at 274–75.

173. *Id.* at 270.

174. *Id.* at 269.

175. FRIEDAN, *supra* note 171, at 124.

achieve freedom and equality with men, and for the dissatisfaction of housewives who worried that their role had declined in social esteem.¹⁷⁶ As described in Part IV, conciliation courts associated with the therapeutic divorce movement often blamed wives for their marital problems and prescribed a return to traditional gender roles as a solution obviating the need for divorce in individual cases.¹⁷⁷ Moreover, the popular press of the 1940s, 1950s, and 1960s reflected and entrenched societal resentment both of changing gender roles and of legal mandates like alimony that erroneously came to symbolize female emancipation.¹⁷⁸

Betty Friedan was most concerned about the way “uncritical acceptance of Freudian doctrine in America” produced the “feminine mystique”—that is, the reassertion, in the postwar era, of the prescriptive ideal of wife and mother.¹⁷⁹ But the effect on public responses to intimate-partner violence may have been equally pronounced. Newspaper articles, advice columns, and cartoons in popular magazines like *Harper's* attributed domestic violence inflicted on wives to female masochism and assaults perpetrated by women to female mental instability.¹⁸⁰ When “Beaten and Bruised” sought advice from Abigail Van Buren in 1962, for instance, the “Dear Abby” columnist smugly retorted: “A man who would repeatedly give his wife a crack across the jaw is sick. And a woman who would stick around for a repeat performance is sicker than the guy who hits her. Find a psychiatrist with two couches.”¹⁸¹ Two years later, in 1964, the *Washington Post* reported on a study by three psychiatrists who claimed that “wife beating . . . may serve to fill a wife’s needs even though she protests it.”¹⁸² According to the *Post*, the psychiatric study further described battered women as “aggressive, masculine, masochistic and frigid,” and concluded that “[a] domineering wife . . . has a sense of guilt that is relieved by occasional beatings.”¹⁸³

No-fault divorce supplanted the therapeutic approach, and second-wave feminism and the influx of middle-class, white mothers with small children into the work force challenged the feminine mystique. Nevertheless, the popularization of psychological theories blaming women for intimate-partner abuse made its mark: by the 1960s and 1970s, the widespread acceptance of such theories had contributed to the apathetic criminal justice

176. See FERDINAND LUNDBERG & MARYNIA F. FARNHAM, *MODERN WOMAN: THE LOST SEX* 201–41 (1947).

177. See *supra* notes 68–73 and accompanying text.

178. See DiFONZO, *supra* note 38, at 106–08.

179. FRIEDAN, *supra* note 171, at 122–24.

180. See, e.g., DiFONZO, *supra* note 38, at 101–02, figs. 11, 13.

181. *Dear Abby: Should a Wife Hit Her Husband?*, L.A. TIMES, Nov. 19, 1962, at A6.

182. *Marriage Going to Pot? Ever Try Beating Your Wife to Save It?*, WASH. POST, Nov. 28, 1964, at A5.

183. *Id.*

response to domestic violence that battered women's advocates and feminist scholars so frequently criticize.¹⁸⁴ Police and prosecutors may have really believed that domestic violence arose from "gendered maladies such as menopause," as one NYPD training manual from the 1970s suggested,¹⁸⁵ and that wives needed a beating now and then to keep them in line.¹⁸⁶ In any event, law enforcers increasingly favored so-called "therapeutic" modes of crisis intervention, such as separating the couple and walking the man around the block, for what were by then perceived to be "family squabbles," rather than crimes.¹⁸⁷ Judges referred male defendants to diversion programs, or at most gave them lenient sentences, and blamed domestic battery on the wife's provocative behavior or simply on marital stress.¹⁸⁸ Whereas battered wives had once been perceived as rational actors by a paternalistic yet sympathetic system, their inability to escape their batterers had been pathologized and their use of self-defensive violence condemned by the second half of the twentieth century.

VI. CONCLUSION

The standard feminist narrative about the refusal of police, prosecutors, and courts to intervene in intimate-partner violence was effective as a political message undergirding the battered women's movement, but it belies the origins of the Exit Myth. Adhering to a static picture of unrelenting, state-sponsored misogyny and a virtual wall of privacy shielding intimate-partner violence in the home neither helps scholars develop a more sophisticated understanding of gender relations nor encourages them to explore the nuanced history of efforts to balance aggressive governmental action against domestic abuse with concerns about victim well-being and autonomy. The time has come to reexamine the legal history of intimate-partner violence. Scholars need to achieve a better understanding of the complex relationship between the criminal justice system and such violence, which second-wave

184. See Miccio, *supra* note 1, at 254–55.

185. *Id.* at 282–83 (citing criticisms leveled at NYPD training by family law attorney Marjory Fields in her testimony before the U.S. Commission on Civil Rights in 1978).

186. See, e.g., Gordon Grant, *Family Fights Tough and Messy, Say Police*, L.A. TIMES, Feb. 12, 1967, at SF_C1 (indicating that officers attributed some "family fights" to female masochism).

187. See *id.* (describing how one officer in a Los Angeles suburb would routinely separate a couple in response to a domestic violence call and tell the wife that she should not press charges because her husband was "the breadwinner . . . the guy who brings home the paycheck"); see also Miccio, *supra* note 1, at 275.

188. SCHECHTER, *supra* note 1, at 22–23 (discussing a psychiatrist's study of the criminal justice response to twenty-three intimate-partner violence cases in the early 1970s).

feminism sought to combat as part of its campaign against gender-based dominance.

Second-wave feminists were not the first to identify and try to remedy the problem of battering, however. Prior to the mid-twentieth century, the state intervened in intimate-partner violence to censure men for abusing their marital authority and for failing to perform the role of the sober breadwinner who protected and provided for his wife and children. The state thus tried to use its power to enforce the ideology of the separate spheres, while, at the same time, its intervention blurred the boundary between the family and the public.

When the separate spheres ideology waned, the paternalistic assumption that a battered wife lacked few practical avenues to escape domestic violence gave way to a new prescription for women to use their expanded opportunities for divorce and employment outside the home to leave their abusers. Psychological theories dismissed women who stayed with their batterers as masochistic. Yet changes in gender roles were resented and less far-reaching than many Americans presumed, and many victims of intimate-partner abuse remained trapped in violent relationships and ignored by the legal system. Indeed, as a result of women's incomplete gains in the workplace and in divorce courts, abuse victims from the mid 1900s through the 1970s (and even into the 1980s) may have encountered a less sympathetic criminal-justice response than their predecessors in the early twentieth century had. ❖