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Feminism and Defending Men on Death Row Symposium: Thoughts on Death Penalty Issues 25 Years after Furman v. Georgia.

Phyllis L. Crocker

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ESSAYS

FEMINISM AND DEFENDING MEN ON DEATH ROW

PHYLLIS L. CROCKER*

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“just circles and circles of sorrow”¹

I. INTRODUCTION

In this Essay I explore the relationship between being a feminist and representing men on death row. It is appropriate to engage in this inquiry in considering how the law has developed in the twenty-five years since *Furman v. Georgia*.² During that time both *Furman* and the advent of feminist legal theory have required a restructuring in the way we think

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1. TONI MORRISON, *SULA* 149 (Plume 1982) (1973).

2. 408 U.S. 238 (1972).

about two fundamental legal questions: for death penalty jurisprudence, how and why we sentence an individual to death; and for feminist jurisprudence, how the law views crimes of violence against women. The relationship between these two developments becomes apparent when we consider the appropriateness of the death penalty for a man who murdered a woman in the course of a sexually violent felony or as part of a history of abuse. For many feminists, the focus is on the crime and insuring that the punishment acknowledges the gravity of the harm inflicted upon the female victim. For those defending a man in these circumstances, the crime, as it informs the punishment decision, is of less importance than explaining the background and character of the defendant. While these two positions may appear to conflict, this Essay will examine their similarities.

This Essay grows out of my own experience confronting a particular question: "How can a feminist represent a man who was convicted and sentenced to death for murdering a woman he sexually assaulted and/or toward whom he was abusive?" I focus on the question of representing men who battered their partners because that is the context in which I was faced with this dilemma.³ The dissonance for a feminist occurs because, on the one hand, the law has for so long trivialized women's experience of being battered,⁴ and on the other hand, she is asked, as a lawyer, to defend a man whose actions exemplify the very real consequences a battered woman faces.⁵ Thus, when the State seeks the most extreme punishment for a man charged with killing a woman he physically abused, it provides a reason to feel vindicated because the State is demonstrating

3. *See infra* Section II. This issue is a particularly poignant one for me because prior to representing men on death row I worked in a battered women's shelter and wrote an article about the legitimacy of battered women's self-defense claims. *See generally* Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121 (1985).

My conclusions about how a feminist may begin to understand a man on death row who battered and killed his partner may also apply to thinking about a man who rapes and kills a woman. For example, a similarity exists in the way that our culture addresses the problem of rape and battery as a legal issue after the fact, rather than as a social problem to be prevented in the first place. However, I also recognize that differences may exist that alter this analysis. For example, the repetitive nature of abuse may give the social service and legal systems the opportunity to address the problem in ways that are different from the singular circumstances of rape. Considering these differences is beyond the scope of this Essay.

4. *See infra* Section III.A.

5. While my remarks focus on the question of a feminist lawyer representing a man on death row, they are equally applicable to any feminist for whom this issue is problematic. An important difference, however, is that the feminist lawyer cannot avoid the conflict because it will affect her representation of her client. *See infra* Section II.

that it takes seriously the problem of violence against women.⁶ To then ask a feminist to represent the defendant creates a conflict between approving of the State's strong response to the violence against the woman, and yet, in defending the man who committed that violence, fighting

6. Not all men who physically abuse and kill their partners may be charged with capital murder. The death penalty is only available as a punishment for certain aggravated first-degree murders, for example, a murder that occurred in the course of a felony such as an aggravated sexual assault, or where more than one person was murdered, or a murder for hire. See, e.g., TEX. PEN. CODE § 19.03(a) (Vernon 1994). A relatively small portion of the men on death row murdered someone with whom they were intimately involved. See Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 SMU L. REV. 1507, 1517 (1996) (reporting in her study comparing the crimes of men on death row in six states, that only 12% of them killed an intimate which included kin and sexual intimates while nearly one-half of those men killed a woman in retaliation for leaving the relationship). Based on a review of the state court decisions for the 372 men on death row in Texas as of July 1997, only 4 appeared to have killed a wife or girlfriend, but in each case the killing occurred after the woman separated from the man. See NAACP LEGAL DEFENSE FUND, DEATH ROW, U.S.A. 1, 41-44 (Summer 1997); see also Eldridge v. State, 940 S.W.2d 646 (Tex. Crim. App. 1996) (en banc) (murdering ex-girlfriend and her daughter); Broussard v. State, 910 S.W.2d 952 (Tex. Crim. App. 1995) (en banc) (slaying his wife and their son, after she left him because he beat her); Alba v. State, 905 S.W.2d 581 (Tex. Crim. App. 1995) (en banc) (killing wife who had fled and was staying with neighbors); Narvaiz v. State, 840 S.W.2d 415 (Tex. Crim. App. 1992) (en banc) (murdering his former girlfriend and three of her siblings). Notably, one of the early United States Supreme Court death penalty cases involved an abusive husband who murdered his wife and mother-in-law after his wife left him. *Godfrey v. Georgia*, 446 U.S. 420, 424-26 (1980); see Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 SMU L. REV. 1507, 1519 (1996) (discussing *Godfrey* as an example of courts not treating seriously domestic murder). The small percentage of domestic murder cases is part of the larger phenomenon that those who kill strangers are much more likely to be sentenced to death than those who kill non-strangers. See SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION 48 (1989) (reporting that in Georgia one who kills a stranger is ten times more likely to be sentenced to death, Florida, four times, and Illinois, six times).

The significance of the relationship between the men who murder and the women they murder has been rarely explored. See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 94-114 (1992) (analyzing how law on wife-murder, e.g., heat of passion murders, fails to incorporate modern understandings about wife battering). Similarly, only a few authors have focused on the cultural and political significance of the fact that primarily men, not women, commit sexual serial murders. See DEBORAH CAMERON & ELIZABETH FRAZER, THE LUST TO KILL *passim* (1987) (analyzing how the cultural and scientific discourse on sex-killers is unsatisfactory because it ignores the gender of the killers); JANE CAPUTI, THE AGE OF SEX CRIME *passim* (1987) (providing a feminist analysis of sexualized serial killers); Michael Mello, *On Metaphors, Mirrors, and Murders: Theodore Bundy and the Rule of Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 887, 925-36 (1990-91) (discussing how the cultural depiction of serial killer Theodore Bundy did not include the relevance of the fact that all of his victims were women).

against the ultimate punishment. The challenge arises in understanding that representing such a defendant does not discount the very real horror faced by women who are physically abused by their partners.

I posit that the answer to this dilemma lies in recognizing the interrelatedness of two factors, one personal and the other political. The phrase "the personal is the political" is at the heart of what feminism is about: What occurs to a woman on a personal level is not merely individual but informed by and part of political, social, and cultural beliefs and forces.⁷ Thus, when a man repeatedly batters his wife, it is not simply a private matter arising out of their unique circumstances, but instead reflects a broader dynamic of the relationship between men and women in this culture and the way the law responds to that situation.

The fusion between personal experience and its political/social context carries over to the death penalty. Representing a man on death row is intensely personal for me as a lawyer, but more important, it is personal because it is about the life of the defendant, the woman he killed, and the circumstances surrounding the crime. These factors also make it very political because how the defendant came to be the person who committed this kind of murder, and why he is on death row, are intimately affected by the social and legal policies of this country.

Understanding the inseparability of the personal and the political allows me to reconcile two seemingly incompatible phenomena: outrage at the defendant for committing the murder, and compassion for the defendant when considering his deserved punishment. This Essay describes how I reached this point of reconciliation. I begin by explaining the circumstances under which I was first confronted with the dilemma of representing a man on death row for murders that involved sexual violence as well as a history of abuse against a woman. I then consider the connections between feminism and representing men on death row by exploring what death penalty jurisprudence and feminist legal theory teach us about how the law acknowledges individual stories of violence. I contend

7. See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 119–20 (1989) (stating "The personal as political is not a simile, not a metaphor, and not an analogy. It does not mean that what occurs in personal life is similar to, or comparable with, what occurs in the public arena. . . . It means that women's distinctive experience as women occurs within that sphere that has been socially lived as the personal—private, emotional, interiorized, particular, individuated, intimate—so that what it is to know the politics of women's situation is to know women's personal lives, particularly women's sexual lives."); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 602–03 (1986) (explaining that the phrase 'the personal is political' "reflects the view that the realm of personal experience, the 'private' which has always been trivialized, particularly for women, is an appropriate and important subject of public inquiry, and that the 'private' and 'public' worlds are inextricably linked").

that each shows us the necessity of placing both the woman's experience of battering and the man's perpetration of abuse and murder in the broader social and legal context of how our society addresses, or fails to address, family violence. I conclude that together they demonstrate not only the inadequacy of the criminal justice system's response to family violence, but, more important, the dire need to reorder our social and legal priorities so that they emphasize prevention more than punishment. By focusing on these fundamental issues, we may begin to uncover the similarities rather than the conflicts between the way the law responds to female victims of violent crimes and to men on death row who committed some of those crimes.

II. PERSONAL STORIES ABOUT DEATH AND VIOLENCE

I begin with the story of my first client at the Texas Resource Center.⁸ Mario Marquez was on death row for the aggravated sexual assault and murder of his niece and wife.⁹ Initially, these minimal facts were enough to make me question whether I could effectively represent Marquez. Based on my feminist beliefs, I was predisposed to fault him. Since I was new to the death penalty practice, I was just beginning to understand the import of Justice Stewart's statement that every murder could be characterized as "outrageously or wantonly vile, horrible or inhuman,"¹⁰ the question is, which defendants are deserving of death instead of life imprisonment as the appropriate punishment.¹¹ That distinction is important in death penalty jurisprudence, and it was critical to me as I began representing Marquez. Over the next two years I learned more about the crime Marquez committed, but I also learned a great deal more about

8. I was a staff attorney at the Texas Resource Center in Austin, Texas from 1989 to 1994. The Texas Resource Center was a federally-funded community public defender office charged with ensuring that all individuals on death row in Texas were represented in their post-conviction appeals.

9. Technically, Marquez was on death row for murdering, in the course of an aggravated sexual assault, his fourteen-year-old niece, and not his wife. *Marquez v. State*, 725 S.W.2d 217, 220-22 (Tex. Crim. App. 1987) (en banc). I assume that the State did not seek the death penalty against Marquez for killing his wife because, at the time of these murders, it was not a crime to sexually assault one's wife. See John Schmolesky, *Criminal Law*, 38 SOUTHWESTERN L.J. 497, 521-22 (1984) (explaining that when Texas modified its sexual offense statutes in 1983, it retained the spousal exemption for aggravated sexual assault). Thus, although he sexually assaulted and murdered his wife, it did not qualify as a capital murder. See TEX. PEN. CODE § 19.03(a)(2) (Vernon 1994) (defining capital murder to include murder in the course of aggravated sexual assault). This situation is a vivid example of the law discounting the seriousness of sexual violence against a spouse.

10. *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980).

11. See *id.* at 427-28 (commenting that a capital sentencing scheme must provide a basis for distinguishing between cases where death is imposed and where it is not).

Marquez that bore directly on the question of whether the death penalty was his proper punishment.

Mario Marquez was a Mexican-American raised on the far south side of San Antonio, Texas.¹² He was the tenth of sixteen children in a family that worked as migrant farm workers for parts of every year. He was mildly mentally retarded and brain damaged. As a child, his father regularly and severely physically abused him: he beat him with hammers, 2 x 4 boards, and extension cords, and strung him up like a piñata over a tree limb, whipping him until he lost consciousness. Marquez's siblings described him as receiving the brunt of their father's abuse. Marquez rarely attended school—he often missed one-half of a year due to migrant work, and even when in town he would miss many days. The elementary schools did not address Marquez's mental retardation. Rather than being taught to read, he was given a coloring book. Throughout his education he received failing grades. He was held back in third grade, socially promoted from sixth to seventh grade, and then dropped out.

When Marquez was twelve, both of his parents abandoned him and his five younger siblings. Marquez then began using drugs heavily, including inhaling toxic spray paint every day for the next twelve years. Undoubtedly, the drugs were a way of trying to cope with the pain of desertion and the overwhelming responsibility of being left in charge. His father continued to beat Marquez when, on a random basis, he would return to the house with bags of groceries. If the house was in disrepair, Marquez's father would beat him. After the children were alone in the house for a year, the police took the younger siblings to a shelter and eventually they

12. The facts pertaining to the Marquez case have been compiled from the following sources of information, which are on file with the *St. Mary's Law Journal*: Testimony by family, neighbors, and mental health experts at an evidentiary hearing, *Ex parte* Marquez, No. 84-CR-0905-W2 (226th Dist. Ct., Bexar County, Tex. Aug. 13-17, 1990); Robert Geffner, Ph.D., *Neuropsychological and Psychological Evaluation*; Mary F. Smith, *Social History Evaluation*; Interviews with Mario Marquez at Ellis Unit One, in Huntsville, Tex. (Sept. 9, 1989 through Apr. 1992); Interview with Rosalinda Avila and Mary Trevino in San Antonio, Tex. (Nov. 18, 1989); Interview with Albert Casillas in San Antonio, Tex. (July 23, 1990); Interview with Virginia Marquez in San Antonio, Tex. (Nov. 28, 1989); Interview with Nicholas Marquez in San Antonio, Tex. (Dec. 11, 1989); Interview with Antonio Marquez in San Antonio, Tex. (Dec. 11, 1989); Interview with Epifanio Marquez in San Antonio, Tex. (Dec. 4, 1989); Interview with Deacon Forencio Moreno in San Antonio, Tex. (Aug. 7, 1990); Interview with Elida Vasquez in San Antonio, Tex. (Dec. 3, 1989); and author's review of the Bexar County District Attorney's file in *State v. Marquez* (No. 84-CR-0905). See also *Ex parte* Marquez, No. 84-CR-0905 (226th Dist. Ct., Bexar County, Tex. Dec. 10, 1990) Findings of Fact and Conclusions of Law and Order on Applicant's Second Petition for Post Conviction Writ of Habeas Corpus, at 2-6 (on file with the *St. Mary's Law Journal*).

went to live with older siblings. Marquez, now thirteen, continued to live alone in the house.

Marquez began living with a series of women after he turned seventeen. Over the next nine years he lived with three women in a row, and considered each one his common-law wife. He married the last, Rebecca, whom he later killed. Marquez had children with the first two women. His second common-law wife told me Marquez beat her; police reports documented repeated calls to the house for “family disturbances” during the time Marquez lived with his second and third wives. His second wife reported that Marquez pushed her out of a speeding car and then dragged her for several hundred yards as she held on to the door. According to Marquez, the night he killed Rebecca and his niece, Rebecca told him she was leaving him for another man. I believe that, at this moment, Marquez lost complete emotional and psychological control. The woman he married was abandoning him, just like his parents had. This brain-damaged, mentally retarded individual did not have the skills to respond to this information in any rational or otherwise appropriate manner.

I uncovered this story by talking to my client and his mother, father, siblings, family friends, employer, and priest, and by reading a host of school, police, and hospital records. Each provided a piece of the story about Marquez’s life. He had an unimaginable and horrific existence—there is no other way to describe it.¹³

Since I was preparing a petition for writ of habeas corpus that would raise claims about the constitutionality of his conviction and sentence, my investigation included not only learning about my client’s life, but also the State’s case against him. One morning, I drove from Austin to San Antonio to review the district attorney’s files. One file contained pictures of the crime scene, of Rebecca Marquez, age thirty-two, and of Rachel Gutierrez, his fourteen-year-old niece. I thought about not looking at the pictures, about not giving in to my curiosity, that lurid fascination we have but do not always like to admit. I reasoned that the pictures were

13. None of this information was presented to the jury at his capital murder trial. At the time of Marquez’s trial the Texas death penalty statute limited the jury to considering evidence as it related to the two questions the jury had to answer at the penalty phase: was the defendant’s conduct deliberate and is it probable he will commit violent acts in the future. *See Penry v. Lynaugh*, 492 U.S. 302, 310 (1989) (citing the Texas statute). A “yes” answer to both questions resulted in a death sentence for the defendant. Several years after Marquez’s trial the United States Supreme Court recognized that in certain situations, where the defendant presented evidence such as childhood abuse or mental retardation, these questions prevented the jury from considering the mitigating aspects of this kind of evidence. *See id.* at 322–28. Nonetheless, the effect at the time of trial was that defense attorneys frequently did not present such evidence because it would provide “yes” answers to the two questions, *id.* at 322–27, adversely sealing their client’s fate.

not why I was there—they were relevant to Marquez's guilt, which was not really in dispute, but the pictures were not relevant to his punishment. But, of course, they were important to my understanding of the crime for which he was sentenced to death. The pictures were simply, and shockingly, pictures of the double murder my client had committed; so I looked at them.

I fought having any kind of emotional reaction. When reading death penalty cases I usually avoided dwelling on the facts of the crime. Court opinions describing the murder often serve to evoke anger at the perpetrator;¹⁴ how could they not? However, when I was intent on zealously representing my client, I did not want to dwell on the facts of the murder; consequently, I avoided looking at the 8 x 10 glossy color photographs of the victims. A violent death is a terrible scene of carnage; this was no less true here. Rebecca Marquez was "killed by ligature strangulation and had bite marks to the pubic area and right breast. [The medical examiner] also found a bottle of cologne inside Rebecca Marquez's rectum. Testing revealed the presence of sperm in Rebecca Marquez's vagina."¹⁵ The pictures showed these violations in graphic detail—they were bloody, frightening, and horrible.

Despite my intention to look at the pictures quickly and dispassionately, I sat and wept. Looking at the pictures, I hated my client, not only for what he had done, but for who he was. I had exactly the reaction the prosecution anticipates jurors will have when they see photographs of the murder.

When I left the District Attorney's office I drove to the county jail to visit Marquez. I thought about not going—I was not over the pain of the photographs. But, I had promised him I would see him, and I knew that mattered to him, so I went. It was probably a mistake. I sat there talking to him, seeing him as a brutal killer, yet hearing his halting, frightened voice tell me the problems he was having adjusting to the routine of the Bexar County Jail (compared to the death row prison) and how his family members had not yet kept their promises to come visit. I did not tell him I saw the pictures of his crimes. I did not see the point in divulging this information, except perhaps, to unleash my anger. I was not prepared or able to reconcile the murderer with the person I knew as my client. Yet, as his lawyer, that is exactly what I had to do.

14. See Robin West, *Narrative, Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161, 168–72 (1990) (analyzing how the conservative majority on the United States Supreme Court uses "the powerful rhetorical force of narrative as a means of assigning responsibility for the violent crime . . . [A]cts that in their brutality are almost impossible to fathom.").

15. See *Marquez v. State*, 725 S.W.2d 217, 221–22 (Tex. Crim. App. 1987) (en banc) (describing Marquez's autopsy results).

These are the stories of violence that inform my thinking about the connection between feminism and the death penalty. One story tells of the violence inflicted on Marquez as a child, including the incessant abuse from his father; both parents abandoning him as an adolescent; his own massive drug use to block the pain of his frightening circumstances; and his brain damage and mental retardation that compounded his difficulty in reasonably coping with daily living. The other story consists of the violence Marquez inflicted on others as an adult: beating and abusing the women he lived with, killing his niece and his wife. The first story of violence does not excuse the second. But to consider the appropriateness of the death penalty for someone like Marquez, we cannot ignore his history and how it contributed to his commission of the crime. To understand the connection between his past and the murder, we need to examine the way the law recognizes and responds to his history of violence, both as a child and as an adult. Drawing this connection will explain how, as a feminist, one can both despise the crimes of violence Marquez committed but also believe that he should not be sentenced to death for them.

III. LEGAL CONSIDERATIONS OF INDIVIDUAL EXPERIENCES OF VIOLENCE

Feminist legal theory and death penalty jurisprudence both address how the law responds to individual stories of personal violence perpetrated by a man against a woman. Twenty-five years ago each theory was in a nascent stage, poised to define new ways of looking at central legal issues in our culture: the appropriate imposition of the death penalty and the proper response to crimes of violence against women. Although each has had a different focus—feminist legal theory with changing the law, and death penalty jurisprudence with identifying the constitutional contours of existing law—they both teach us important lessons about the need to situate individual experiences of violence in their broader social context.

A. *Feminist Legal Theory and Lawmaking*¹⁶

Feminism has instigated dramatic changes in how the legal system regards violence against women, especially battering. In the main, these

16. I borrow this phrase from Elizabeth M. Schneider who uses it to refer to the practice by which feminist advocates seek to transform the law. See Elizabeth M. Schneider, *Feminist Lawmaking and Historical Consciousness: Bringing the Past into the Future*, 2 VA. J. SOC. POL'Y & L. 1, 7 (1994) (describing how feminist lawmaking has shaped the law differently). This terminology provides an important way to recognize that feminism affects not only the theory but also the practice of law. See Hon. Karen Burstein,

acts are no longer considered private disputes or the woman's fault, but criminal violations of public laws. These changes have been brought about through two related endeavors: feminists actively working to change the laws and how they are enforced, and the development of feminist legal theory that has challenged the presumed gender-neutrality of the law.¹⁷ At the same time, the progress made has been limited by a narrow view of who battered women are and what is needed to end their abuse.

Twenty-five years ago, it was not a crime in most states for a husband to rape his wife.¹⁸ Physical abuse of a woman by her husband was rarely seen as a matter that the police should investigate, that the prosecutor should charge, or that the courts should punish.¹⁹ Often when a woman was beaten by her husband, society considered it a "private" matter in which the law should not interfere.²⁰ Women who were beaten by their husbands were encouraged, or expected, to stay in the marriage despite the abuse.²¹ When a woman managed to leave her abusive husband, few

Naming Violence: Destroying the Myth, 58 ALB. L. REV. 961, 968 (1995) (describing the role of feminism in the 1970s in effecting state-wide legislation on spousal abuse in New York).

17. See Elizabeth M. Schneider, *The Dialectics of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 642-48 (1986) (describing the inter-relationship of feminist politics and the development of feminist legal theory regarding the legal treatment of battered women); D. Kelly Weisberg, *Introduction to FEMINIST LEGAL THEORY* at xv, xvii-xviii (D. Kelly Weisberg ed., 1993) (observing that feminist legal theory has "two major components," a critique of gender and law and the application of that critique to specific areas of the law).

18. See Leigh Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170, 185 (1980) (noting that in the mid-1970s all states sanctioned the common law marital rape exception). In 1977, Oregon became the first state to repeal the spousal exemption. See *id.* (commenting that this change took place only after reform lobbyists and advocates pressured the lawmakers).

19. See, e.g., DEL MARTIN, BATTERED WIVES 87-118 (1976) (discussing the failure of the legal system to address spousal abuse); Sue E. Eisenberg & Patricia L. Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RTS. L. REP. 138, 156-59 (1977) (illustrating the barriers an abused wife faces from the time she calls the police until a possible criminal trial); Laurie Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. L. REP. 7, 9-11 (1978) (explaining how the police, the prosecutors, the judge, and the court itself "play a part in keeping these [abused] women prisoners of their violent husbands").

20. See DEL MARTIN, BATTERED WIVES 15-24 (1976) (characterizing wife-abuse as a publicly taboo issue by the news media, governmental, and social agencies in the 1970s); Sue E. Eisenberg & Patricia Mickow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RTS. L. REP. 138, 145 (1977) (explaining that domestic violence was seen as an issue between the spouses and not a criminal matter).

21. See DEL MARTIN, BATTERED WIVES 79-86 (1976) (discussing social expectations and financial pressures that cause a woman to stay with her husband); Rev. Katherine Hancock Ragsdale, *The Role of Religious Institutions in Responding to the Domestic Vio-*

shelters existed for her to seek protection.²² If the abuse caused a woman to fear for her life, and she killed her husband, the law did not recognize how her experience as a woman, and as a battered woman, might affect her perceptions of the danger.²³

The situation today is quite different from twenty-five years ago.²⁴ It is a crime in many states for a husband to rape his wife.²⁵ Many police departments and prosecutor's offices recognize that physical violence within a family is a serious crime against which women should be protected and for which men should be prosecuted.²⁶ More shelters exist where women and their children may seek protection when they flee their abusive husbands.²⁷ The experience and perspective of a battered wo-

lence Crisis, 58 ALB. L. REV. 1149, 1152–56 (1995) (describing how theology has been used to sanction battering).

22. DEL MARTIN, BATTERED WIVES 197–216 (1976) (describing the only seven shelters that existed in this country in 1976).

23. Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 606–10 (1986) (describing the development of the theory of a woman's "equal right to trial" that challenged the sex-bias of the law in self-defense cases); Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149 *passim* (1978) (explaining how to challenge the state of the law at trial).

24. See generally Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. REV. 79 *passim* (1994) (providing an historical background on the treatment of battered women including America in the colonial period, nineteenth and twentieth centuries, in order to focus on the current legal and social status of women who are victims of domestic violence); Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 976–78 (1995) (discussing the progress since the 1970s in the social and legal response to battered women).

25. See Linda Jackson, Note, *Marital Rape: A Higher Standard Is in Order*, 1 WM. & MARY J. WOMEN & L. 183, 194–97 (1994) (reporting that as of 1994, seventeen states had completely abolished the marital rape exemption; except for two that are silent on the issue, the others retain some form of the exemption based on, for example, limiting marital rape to lesser degrees of sexual assault or requiring that the victim sustain serious physical injury).

26. See *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1515–18, 1535–41 (1993) (discussing the development of local programs that coordinate police, prosecutors and court responses to battered women and the use of mandatory arrest and "no-drop" policies for prosecuting batterers). *But see* Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171, 191–94 (1994) (analyzing racist application of mandatory arrest policies).

27. Compare, for example, the fact that in 1976 seven shelters existed in the country, and that in 1995 over 1000 shelters existed nationwide. See DEL MARTIN, BATTERED WIVES 197–216 (1976) (focusing on a handful of shelters for women in the early 1970s); Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 977 (1995) (recognizing that since the early 1970s, "[o]ver 1000 shelters have opened and are currently receiving public funds").

man is more often recognized as a legitimate factor if she claims self-defense when charged with killing her husband.²⁸

An important part of creating these changes has been the flourishing of feminist legal scholarship that questions and exposes the sex-based bias of the law.²⁹ In the domestic violence area, feminist scholars' theoretical work has transformed the legal recognition given to a battered woman's claim of self-defense used against her husband's threat of imminent bodily harm.³⁰ Scholars have exposed the fallacy of the assumption that a woman may safely escape the abuse if she would only leave the abuser. In a ground-breaking article, Martha R. Mahoney documented and analyzed the phenomenon of men pursuing, terrorizing, and often killing women who tried to leave them, in addition to discussing the legal system's inability to protect women in that situation.³¹

Despite the progress that has been made, the protection of women from violence by an intimate is still woefully inadequate.³² Although we

28. See, e.g., Holly Maguigan, *Battered Women and Self Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 *passim* (1991) (analyzing how battered women's self-defense claims may be considered under traditional self-defense doctrine, but also examining how judicial attitudes may not properly understand the claim).

29. See D. Kelly Weisberg, *Introduction to FEMINIST LEGAL THEORY* at xv, xvii (D. Kelly Weisberg ed., 1993) (suggesting that "[f]eminist jurisprudence . . . provides an analysis and critique of women's position in patriarchal society and examines the nature and extent of women's subordination. It explores the role of law in maintaining and perpetuating patriarchy."); *APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES passim* (D. Kelly Weisberg ed., 1996) (presenting articles and cases exploring sex bias in areas of sexuality, violence, employment, and reproduction).

30. See Holly Maguigan, *Battered Women and Self Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 406-37 (1991) (analyzing battered women's self-defense claims); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 607-10 (1986) (describing the development and legal recognition of battered women's self-defense claims); see also *APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES* 277-401 (D. Kelly Weisberg ed., 1996) (discussing the development of feminist theories of violence and excerpting leading articles about the law and battered women).

31. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 *passim* (1991) (discussing the legal implications of domestic violence as well as some of the surrounding issues). Mahoney created the phrase "separation assault" to describe an "attack on the women's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return." *Id.* at 67 (citing *Godfrey v. Georgia*, 446 U.S. 420 (1980), as an example).

32. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1* (Aug. 1995) (reporting that "[w]omen were about six times more likely than men to experience violence committed by an intimate"). One commentator characterizes the problem as an epidemic. See Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1017;

now recognize the harm of abuse, the primary focus is on protecting women once they are battered, not on keeping men from battering in the first place.³³ Even that protection is not enough: too few shelters exist;³⁴ law enforcement is not consistent or effective,³⁵ and women who try to leave may still be killed by their husbands.³⁶

see also Isabel Marcus, *Reframing "Domestic Violence": Terrorism in the Home*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 11, 23 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) (reporting that in court-ordered education classes for batterers, men continue to express belief that they are "in charge," and surprise that they were arrested for beating their partners).

33. See Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 52-57 (arguing that the legal system should change its focus from assuming that the way to protect a woman is for her to leave her home, to addressing how to stop the abuse in the first place); Evan Stark, *Re-presenting Women Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 981 (1995) (arguing that Battered Woman Syndrome assumes violent acts occur and "discourages theorizing about 'why does he do it?'").

34. See Cal Streeter, *Texas Domestic Violence Needs Assessment Project* (last modified Sept. 29, 1997) <<http://www.utexas.edu/depts/sswork/faculty/streeter/tdvna.html>> (reporting that in 1996 sixty-four Texas state-funded shelters denied 5,359 requests for shelter from adults and children fleeing domestic violence due to a lack of space); see also S. REP. NO. 101-545, at 38-39 (1990) (noting that as a nation we invest more in pets than women, evidenced by the existence of three times as many animal shelters than battered women shelters); Joyce Klemperer, *Programs for Battered Women—What Works?*, 58 ALB. L. REV. 1171, 1179 (1995) (discussing insufficiency of shelters in New York where "[i]n 1992, 12,305 women were served and 25,000 women were turned away for lack of space"); Donna E. Shalala, *Domestic Violence Is Not a Private Matter: A Comprehensive Approach to Preventing and Ending the Violence*, 26 U. WEST L.A. L. REV. 29, 35 (1995) (noting the dearth of shelters in big cities like Los Angeles as well as in rural communities).

35. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 4* (Aug. 1995) (stating that "[i]n 1992 approximately 28% of female victims of homicide (1,414 women) were known to have been killed by their husband, ex-husband, or boyfriend"); see also H.R. REP. NO. 103-395, at 27-28 (1993) (citing reports studying gender bias in state courts that document prosecutors who continue to refuse to pursue complaints of battering and judges who regard such complaints as trivial); Joyce Klemperer, *Programs for Battered Women—What Works?*, 58 ALB. L. REV. 1171, 1178-79 (1995) (noting that in New York, incarceration of batterers is still the exception); Lynn Hecht Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1066-68 (1995) (discussing judges who are dismissive of domestic violence and efforts to educate judges about the issue); Donna E. Shalala, *Domestic Violence Is Not a Private Matter: A Comprehensive Approach to Preventing and Ending the Violence*, 26 U. WEST L.A. L. REV. 29, 34 (1995) (citing example of model coordinated program in Quincy, Massachusetts, but noting the rarity of such programs).

36. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 71-75 (1991) (discussing cases where the husband killed the wife after she left him); Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 SMU L. REV. 1507, 1517 (1996) (reporting that in six states studied, "nearly one-half of the men killed in retaliation for a woman's leaving a sexual relationship").

Even within feminist legal theory, some have questioned the extent of progress made in addressing domestic violence.³⁷ These critiques recognize the value of the work that has been done in changing the legal position of domestic violence while at the same time identifying critical ways in which cultural and legal barriers continue to hinder the protection of women.

One of these critiques identifies the ways in which those seeking legal reform, as well as the legal system itself, fail to acknowledge how race differently affects a woman's experience of battering.³⁸ Kimberle Crenshaw revealed how feminist reform efforts have marginalized women of color.³⁹ She examined how those working for legal change have ignored structural barriers such as racial discrimination in employment and housing that may compound the difficulties a woman faces in leaving her abusive home;⁴⁰ cultural beliefs that may work to suppress the idea that it is acceptable to leave;⁴¹ and policies of domestic violence programs that may exclude women, for example, when a shelter refuses to admit a woman because she is not fluent in English, thus leaving her without a place of protection.⁴² Linda L. Ammons has explored how racial stereotypes may preclude a battered African-American woman's self-defense claim

37. See Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 975-1026 (1995) (positing that Battered Woman Syndrome should focus on the coercion and control that batterers exercise because the standard psychological trauma model fails to account for many women's experiences of abuse). See generally Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992) (arguing that the feminist legal framework on battered women needs to reconceptualize the experience of battered women within the context of violence in other intimate relationships and as part of the general societal subordination of women).

38. See, e.g., Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191 *passim* (1991); Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003 *passim*; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 *passim* (1991); Jenny Rivera, *Domestic Violence Against Latinas By Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 *passim* (1994); Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171 *passim* (1994).

39. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1251-65 (1991).

40. See *id.* at 1245-46.

41. See *id.* at 1253-57 (explaining that minority communities' attempts to maintain community integrity and to minimize political costs of exposing gender violence have stymied minority women's efforts to leave abusive homes).

42. See *id.* at 1262-63.

from being considered legitimate.⁴³ She demonstrates how cultural and historical myths about African-Americans in general, and women in particular, as being inherently violent, or enjoying violence, may affect a juror's ability to properly judge an African-American woman defendant when her defense includes Battered Woman Syndrome testimony.⁴⁴ The importance of understanding the ways in which sex and race intersect in the context of domestic violence cannot be underestimated—as Crenshaw pointed out, “it is sometimes a deadly serious matter of who will survive—and who will not.”⁴⁵

While the physical abuse of women in the home has moved from a private to a public concern, from a matter ignored to one worthy of intervention by the police and prosecution by the state, the lives of women are still at risk at the hands of their intimate partners. A major part of the problem is that our priorities do not seek to prevent the problem of abuse; rather, society seeks to punish the perpetrator after the fact, and then not always successfully.⁴⁶ Yet, until we focus on stopping abuse from occurring in the first place, we will not put an end to this kind of life-threatening violence against women. A critical part of that necessary change of focus is understanding what contributed to the man becoming violent, not as an excuse for any given instance of abuse, but for what it may reveal about the origins of violence in our culture.

B. *Death Penalty Jurisprudence and Defense Practice*

In death penalty jurisprudence it is constitutionally indispensable for the sentencer to consider the individual circumstances of the defendant in determining whether to sentence him to life imprisonment or death.⁴⁷ As

43. See Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003 *passim*.

44. See *id.* at 1045–70. Ammons proposes that voir dire should include asking potential jurors about their racial and gender biases, and experts should address not only the psychology of abuse but also the cultural myths that surround African-American women and violence. See *id.* at 1074–75.

45. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1265 (1991).

46. See, e.g., *Symposium on Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1 (1992) (presenting results of experiments across the country that studied the effects of mandatory arrests for batterers and critiques of the experiments' narrow focus on arrest, including lack of follow through in the criminal justice system, and failure to take into account the broader legal and social context of the violence).

47. See *Eddings v. Oklahoma*, 455 U.S. 104, 112, 113–15 (1982) (noting that “consistency produced by ignoring individual differences is a false consistency,” and holding that the jury may not be precluded from considering an individual defendant's character and record); *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (holding that the Constitution re-

the United States Supreme Court recognized in 1976, a process that excludes consideration of "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind" fails to treat each defendant as a "uniquely individual human being."⁴⁸ Much of defense practice in the past twenty-five years has been devoted to taking seriously the import of examining the mitigating aspects of a defendant's character and background. Despite the Court's retrenchment on how the jury may consider mitigating evidence, defense attorneys have persisted in bringing the reality of defendants' lives into the punishment calculus. The investigation of individual defendants' lives has resulted in the identification of similar histories and experiences; these similar histories should have far-reaching ramifications for how we address violence in our society.

The requirement of individualized consideration of the appropriateness of the death penalty arose in response to *Furman v. Georgia*⁴⁹ in which a majority of the Court held that then-existing death penalty statutory schemes violated the Eighth Amendment because the death penalty was applied arbitrarily and capriciously.⁵⁰ In response to *Furman*, some states adopted new death penalty statutes that attempted to remove the arbitrariness of the decision by making the death penalty mandatory for certain specified crimes.⁵¹ When the Court revisited the constitutionality of the death penalty in 1976 it held that these statutes were unconstitutional for several reasons, including the fact that they did not comport with contemporary social values that acknowledged that not all crimes warranted the same punishment; did not eliminate the possibility of arbitrary decisions at the guilt phase that would operate to exclude the imposition of the death penalty; and did not allow for consideration of the proper pun-

quires the consideration of the "character and propensities of the offender"); *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976) (holding that the death penalty is unconstitutional if it is mandatory).

48. *Woodson*, 428 U.S. at 304. To ensure that the defendant's individual character and background receive their proper consideration, the decision about the appropriateness of the death penalty is made in a separate hearing from that in which the jury determines the defendant's guilt. See *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (recognizing that a bifurcated proceeding is the best method to protect against arbitrary and capricious death sentences).

49. 408 U.S. 238 (1972).

50. See *Furman*, 408 U.S. at 240-374 (concurring opinions of Douglas, Brennan, Stewart, White, Marshall, JJ.).

51. See, e.g., *Roberts*, 428 U.S. at 331-32 (describing the circumstances under which the Louisiana statute automatically imposed death); *Woodson*, 428 U.S. at 286 (describing the North Carolina mandatory death penalty statute).

ishment for the individual defendant.⁵² The Court recognized that because death is a punishment different from all others, the jury's determination of whether it was appropriate punishment required greater reliability.⁵³ Thus, as a constitutional matter, the death penalty may not be mandatory and its imposition must allow for the consideration of the defendant's individual character, record, and background.

In the years following *Furman* and *Woodson*, the Court has significantly eroded the principle of individualized consideration. Most recently, the Court in *Buchanan v. Angelone*,⁵⁴ held that the Constitution does not require the trial court to instruct the jury on the meaning of mitigation or on the particular mitigating circumstances that are present in an individual case.⁵⁵ While a state may not limit what the jury considers as mitigating evidence, the Court has held that no constitutional restrictions exist on how the state may instruct the jury to consider that evidence.⁵⁶ All that is constitutionally required is that a juror be able to give *some* mitigating weight to the evidence.⁵⁷ Moreover, it is not unconstitutional to require that the jury consider only mitigating evidence that it finds the defense has proved by a preponderance of the evidence.⁵⁸ Jurors need not even consider whether the defendant deserves the death penalty—it is constitutional for a statute to require the imposition of the death penalty if the jury finds one aggravating circumstance but no mitigating circumstances.⁵⁹ Finally, jurors may hear evidence about the impact of the victim's death on the family and the community.⁶⁰

52. See *Roberts v. Louisiana*, 428 U.S. 325, 334–36 (1976) (explaining that the Louisiana death penalty statutes were unconstitutional for similar reasons as found in *Woodson*); *Woodson v. North Carolina*, 428 U.S. 280, 288–304 (1976) (summarizing why mandatory death penalty statutes are unconstitutional).

53. See *Woodson*, 428 U.S. at 305 (determining that due to the qualitative difference between life sentences and the death penalty, there is a corresponding need for reliability in determining death is the appropriate punishment).

54. 118 S. Ct. 757 (1998).

55. See *id.* at 761–63.

56. See *Johnson v. Texas*, 509 U.S. 350, 373 (1993) (concluding that the Court has consistently rejected the proposition that a state cannot “structure the consideration of mitigating evidence”).

57. See *id.* at 372.

58. See *Walton v. Arizona*, 497 U.S. 639, 649–50 (1990) (plurality opinion) (reasoning that “a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency”).

59. See *Blystone v. Pennsylvania*, 494 U.S. 299, 306–08 (1990) (holding that the Eighth Amendment does not require jurors to consider “whether the severity of [the defendant's] aggravating circumstance warranted the death sentence”; as long as the death penalty statute limits who is death eligible and allows consideration of mitigation, it is constitutional).

60. See *Payne v. Tennessee*, 501 U.S. 808, 825–26 (1991) (holding that a state may decide that the jury should hear about “the specific harm caused by the defendant”).

However beleaguered, the concept of individualization remains a core principle of death penalty jurisprudence and one that is important for thinking about representing a man on death row for killing a woman with whom he had a history of abuse. Mandating individualized consideration of the defendant is a rather extraordinary, and yet critical, requirement. Just at that moment when jurors are probably least inclined to consider who the defendant is, and would rather immediately impose punishment for the awful crime of which they convicted the defendant, the Court requires them to listen to evidence about the defendant's life.⁶¹ While the guilt phase of a capital trial is about whether the defendant committed the crime, the punishment phase entails a broader inquiry about what punishment is appropriate in light of the circumstances of the crime as well as the defendant's history, character, and uniqueness as a human being.⁶² It is, in many ways, about the meaning and value of the defendant's life.⁶³ As the Court has observed, "the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character and crime."⁶⁴

In the years since *Furman*, the requirement of individualization has resulted in the development of extraordinary information about the characteristics and backgrounds of those who are sentenced to death.⁶⁵

61. See *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.10 (1982) (noting that "the sentencer must listen" to mitigating evidence).

62. See, e.g., Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 *FORDHAM L. REV.* 21 *passim* (1997) (explaining the difference between the guilt and punishment phase inquiries and analyzing how courts conflate the two).

63. See, e.g., Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 *N.Y.U. L. REV.* 299, 303 (1983) (characterizing the penalty phase as a "trial for life"); Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 *SANTA CLARA L. REV.* 547, 561 (1995) (describing a capital penalty trial as a unique legal forum "to tell the truth about the lives of capital defendants"); Robert Weisberg, *Deregulating Death*, 1983 *SUP. CT. REV.* 305, 361 (stating that "[t]he overall goal of the defense is to present a human narrative, an explanation of the defendant's apparently malignant violence as in some way rooted in understandable aspects of the human condition").

64. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 543 (1987) (O'Connor, J., concurring) (emphasis deleted)).

65. Unfortunately, this information is often not discovered prior to trial or presented to the jury. Rather, it is uncovered after the defendant has been sentenced to death and his new lawyers on post-conviction review engage in the kind of investigation that should have been done by his trial lawyers. The reasons for this neglect largely have to do with the poor quality of trial counsel and the limited resources they are provided. See, e.g., A.B.A. SEC. IND. RTS. AND RESP., Report in Support of A.B.A. Recommendation calling for a moratorium on carrying out the death penalty (the report cites the widespread lack of properly funded, competent counsel as one reason for the moratorium; the recommendation was approved Feb. 3, 1997); Stephen B. Bright, *Counsel for the Poor: The Death Sen-*

Disturbing patterns have emerged as lawyers have investigated their clients' backgrounds and worked with experts to understand the significance of these histories. Craig Haney, a professor of psychology and a leading expert on the social histories of capital defendants, has observed that, while twenty years ago little was known about capital defendants, we now know that "the nexus between poverty, childhood abuse and neglect, social and emotional dysfunction, alcohol and drug abuse, and crime is so tight in the lives of many capital defendants as to form a kind of social historical 'profile.'"⁶⁶ Other researchers have found similar patterns among individuals on death row, including histories of severe child abuse, mental illness or retardation, neurological impairments, and poverty.⁶⁷ In this context, Mario Marquez's life history is not an aberration but an all too common reality for defendants sentenced to death.

The significance of information about the backgrounds of defendants like Marquez is not simply that it exists factually, but that it provides insight into the factors and experiences that contributed to an individual defendant's violent behavior.⁶⁸ Social scientists tell us that the interac-

tence Not for the Worst Crime but for the Worst Lawyer, 103 YALE L.J. 1835, 1837-41 (1994) (presenting numerous examples of inadequate lawyering at capital trials); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 377-412 (1995) (examining how systemic underfunding of indigent defense services negatively affects death penalty trials nationwide).

66. Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 580 (1995).

67. See, e.g., Marilyn Feldman et al., *Filicidal Abuse in the Histories of 15 Condemned Murderers*, 14(7) BULL. AM. ACAD. PSYCHIATRY & L. 345 *passim* (1986) (describing the family characteristics of fifteen death row inmates and exploring the ways in which physical and/or sexual abuse may contribute to their violent behaviors); Dorothy Otnow Lewis et al., *Psychiatric, Neurological and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143(7) AM. J. PSYCHIATRY 838 *passim* (1986) (documenting the results from a clinical evaluation of fifteen death row inmates and concluding that "many condemned individuals probably suffer unrecognized severe psychiatric, neurological, and cognitive disorders relevant to considerations of mitigation"); Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145(5) AM. J. PSYCHIATRY 584, 588-89 (May 1988) (explaining that "homicidal adolescents sentenced to death have had to cope with brain dysfunction, cognitive limitations, severe psychopathology, and violent, abusive households"); Michael Mello, *On Metaphors, Mirrors, and Murders: Theodore Bundy and the Rule of Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 887, 919 n.162 (1990-91) (citing authorities documenting that most defendants on death row grew up in poverty and many are illiterate, mentally retarded, and/or mentally ill); see also Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. (forthcoming Mar. 1999) (manuscript at 15-24 on file with the *St. Mary's Law Journal*) (discussing social science literature on the long-term consequences of childhood abuse and the prevalence of childhood abuse among death row inmates).

68. See Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 561-62 (1995) (explaining that "these

tion of childhood abuse, mental illness, mental retardation, and/or brain damage may impair a person's ability to make appropriate decisions, rational judgments, or reasoned choices, especially in stressful situations.⁶⁹ At the punishment phase in an individual case, this kind of information may explain, without excusing, why the defendant committed the crime, by placing it in the context of his background and character.⁷⁰

Individual stories of a defendant's life history of violence and despair may move a juror to believe that a life sentence is a sufficient punishment. At the same time, the prevalence of these kinds of devastating histories among defendants on death row should make us question the role of our criminal justice system, social services, and educational institutions.⁷¹ When so many individuals who are subjected to childhood vio-

stories—and what they tell us about the roots of violence—can assist our understanding of capital murder, provide a framework for comprehending a single, violent social history. . ."); see also Pamela Y. Blake et al., *Neurologic Abnormalities in Murderers*, 45 NEUROLOGY 1641, 1646 (1995) (concluding that the "interaction of abuse, paranoia, and neurologic dysfunction provides a matrix of violence"); Dorothy Otnow Lewis, *From Abuse to Violence: Psychophysiological Consequences of Maltreatment*, 31(3) J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 383 (1992), reprinted in ANNUAL PROGRESS IN CHILD PSYCHIATRY AND DEVELOPMENT 507, 519 (Margaret E. Hertzog & Ellen A. Farber eds., 1993) (positing that the presence of neuropsychiatric and cognitive deficits in a person who was abused as a child create a "matrix for violence").

69. See, e.g., Pamela Y. Blake et al., *Neurologic Abnormalities in Murderers*, 45 NEUROLOGY 1641, 1646 (1995); Dorothy Otnow Lewis et al., *Toward a Theory of the Genesis of Violence: A Follow Up Study of Delinquents*, 28(3) J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 431 (1989), reprinted in ANNUAL PROGRESS IN CHILD PSYCHIATRY AND DEVELOPMENT 547, 557-59 (Stella Chess & Margaret E. Hertzog eds., 1990). See generally Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. (forthcoming Mar. 1999) (manuscript at 15-24 on file with the *St. Mary's Law Journal*) (discussing long-term consequences of childhood abuse and their interaction with other disabilities that negatively affect a person's judgment and behavior).

70. See, e.g., Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 560-61, 608-09 (1995) (discussing how social histories of capital defendants help explain why they should not be sentenced to death); Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 31-33 (1997) (describing how mitigating evidence seeks to explain, not excuse, the defendant's conduct).

71. See Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 562 (1995) (observing that individual stories do more than tell us about the defendant's violent history, they "serve as the basis for the development of a responsible social policy of violence prevention in lieu of the mindless punitiveness with which our society has become recently enamored"); Margaret Jane Radin, *Proportionality, Subjectivity, and Tragedy*, 18 U.C. DAVIS L. REV. 1165, 1174-75 (1985) (arguing that the tragedy of violence represented by the death penalty cannot be separated from "other circumstances that might just as readily be seen as tragic: the persistence of racism, the persistence of a poverty-stricken underclass, and much else about our society").

lence, who suffer from mental impairments or brain damage, and who are not diagnosed or treated for those disabilities, come to the same grievous fate of committing murder, we should be galvanized to reorder our social and legal priorities. Rather than resorting to the death penalty as punishment, we should focus on changing the identifiable conditions of others similarly situated to those now on death row, to try to prevent them from reaching the point of killing. In other words, we should not ignore what the individual histories are telling us about the failures of our current priorities and policies.

IV. RECONCILING VIOLENCE, OUTRAGE, AND COMPASSION

When a man kills a woman as part of a history of abuse, we are all outraged and saddened by her death. The woman's death is tragic on a personal level, but it also speaks directly to hearts of feminists on a political level because it exemplifies a broader reality about the violence that women suffer in our culture. A woman's death at the hands of her husband confirms our fears about the full extent of harm women face from men who beat them and it demonstrates the legal and social service systems' inability to deal effectively with the persistent problem of abuse until it is too late.

These same impulses resonate in the hearts and minds of those of us who represent the man who killed the woman. We understand the personal anguish of the victim's family, but we also see the individual tragedy of the man who committed the murder.⁷² Far too often, the individual defendant is someone who, like Mario Marquez, was brutally beaten as a child, and as a consequence, may suffer long-term behavioral and perceptual impairments, or may be disabled by mental illness or mental retardation. None of these conditions necessarily provide a legal defense to his conduct, but they help explain important aspects of his character and

72. Often, concern for the defendant is seen as eviscerating sorrow for the loss of the victim's life. See, e.g., Stephen B. Bright, *Address to the City Club of Cleveland, Ohio* (WVIZ, November 7, 1997) (videotape on file with the *St. Mary's Law Journal*) (observing that in the crime debate, "being for fairness [for the defendant] does not mean we're not sympathetic to people who've lost a loved one or people who've been violated in some way"). See generally SISTER HELEN PREJEAN, *DEAD MAN WALKING* (1994) (describing her experience of working with men on death row and families of murder victims and the emotional tension and confusion that created especially for victims' families who thought she could not do both). A fundamental challenge to both those who seek the death penalty and those who are opposed to it should be to find a way to treat with equal seriousness the defendant's commission of the murder and his mitigating circumstances. See *id.* at 145 (identifying her own emotional confusion over thinking about the victim's family's needs and the victim's murderer at the same time); see also *id.* at 175 (discussing the difficulty in "not wavering intellectually" in her opposition to the death penalty while also wanting to comfort the victim's family but "feeling guilty" that she was only "adding to their pain").

background that are relevant to whether he should be sentenced to life imprisonment or death. Moreover, these factors suggest a powerful indictment of our legal, social, and educational systems that failed to recognize and treat these disabilities at a point in time when it could have made a difference.

These two views of the violence associated with the killing of a woman who was physically abused by her partner may be reconciled by taking seriously the imperative of individualization and by placing the murder in the broader social context of our society's failure to address decisively family violence and mental disabilities. These must be considered together: Contemplating individual circumstances of violence alone ignores the substantial role our social and legal systems play in affecting individual lives; yet, viewing the role of society alone fails to acknowledge the importance of individual responsibility for one's violent actions. Separately, neither is complete nor satisfactory; in unison, they contribute to a deeper understanding of violence in our culture.⁷³

A. *Considering Men on Death Row As Individuals*

Individualization allows for the consideration of "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."⁷⁴ In a death penalty case, defense attorneys investigate the defendant's background, record, and character to uncover the explanation for the defendant's behavior.⁷⁵ They seek to learn the critical details

73. See Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 580 (1995) (maintaining the importance in death penalty cases of emphasizing "something lost sight of in most legal analyses of criminal behavior: context"); Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433, 459 (1996) (arguing that "we must insure that our assessments of criminal responsibility are not completely disconnected from the context in which people commit crime"). This linkage is consistent with feminist theory. See Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 603 (1986) (explaining "Feminist theory thus reveals the social dimension of individual experience and the individual dimension of social experience. . . . It values the dynamic relationship of the individual and the community.").

74. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

75. See, e.g., Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 317-37 (1983) (discussing how investigation of a defendant's life is critical to the entire case, in particular the punishment phase where the defendant must show how his crime was understandable in light of his history); Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 560-83 (1995) (demonstrating the importance of explaining the crime in light of the defendant's history and positing, "I know of no psychological principle that disconnects past from the present within a single social history"); David C. Stebbins & Scott P. Kenney, *Zen and the Art of Mitigation Presentation, of the Use of*

of the defendant's life that can assist the jury in making comprehensible the incomprehensible commission of the murder. It is often difficult for many people to see beyond the crime itself in thinking about the punishment the defendant deserves,⁷⁶ even though it is constitutionally necessary.⁷⁷ In the context of a man killing a woman as part of a history of physical violence, it may be especially hard for a feminist to do so.

Yet, feminist scholarship itself provides ways for thinking about the male defendant in a different light. First, recall Crenshaw's critique that by marginalizing women of color, domestic violence reforms are inadequate and at times detrimental.⁷⁸ Crenshaw argued that the analysis of battering had to be more inclusive.⁷⁹ I suggest that the spirit of inclusivity should be extended to include considering the individual circumstances of the man who batters. In the death penalty context this does not mean excusing the defendant's conduct such that he would not be found guilty, but it does mean thinking seriously about whether life imprisonment is his appropriate punishment.⁸⁰ In the long run, our ability to consider the

Psycho-Social Experts in the Penalty Phase of a Capital Trial, CHAMPION, Aug. 1986, at 14, 16, 18 (explaining that the defendant must explain how and why events in a defendant's life connect to the crime); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 361 (noting that mitigating evidence should explain the crime). *But see supra* note 65 and accompanying text (discussing some of the reasons why mitigating evidence may not be investigated or presented to the jury).

76. *See, e.g.*, William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1074-75 (1995) (citing studies that found jurors focused on the crime in making their sentencing decisions); *see also id.* at 1087-92 (reporting that preliminary results of the Capital Jury Project show that many jurors contemplate punishment when deciding guilt and that about one-third believed that if they found that certain factors existed, e.g., the murder was heinous, they were required to sentence the defendant to death).

77. *See supra* note 47 and accompanying text.

78. *See supra* notes 39-42 and accompanying text.

79. *See supra* notes 40-42 and accompanying text.

80. I intentionally draw the line here between guilt and punishment because I believe it is important to acknowledge that a defendant's criminal responsibility for the murder does not determine his sentence. *See* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 28-55 (1997) (analyzing how the defendant's deathworthiness is broader than his guilt-phase culpability). Some might see it as skirting the issue of whether a defendant's circumstances might not be relevant to his guilt, even though that might result in his acquittal. That is a critical question, and one with which other authors have struggled. *See* Cookie Ridolfi, *Statement on Representing Rape Defendants*, in LEGAL ETHICS 304, 304-05 (Deborah L. Rhode & David Luban eds., 1995) (explaining basis for her "growing discomfort" representing rape defendants); Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433, 447-48 (1996) (analyzing how an individual's and society's responsibilities for a crime should be relevant in criminal trials, against backdrop of her own "mixed feelings" as a feminist and a criminal defense lawyer).

man's life history will also further our understanding of violence against women.⁸¹ If we are willing to acknowledge the circumstances of a man's life that played a role in his becoming the kind of man who beats a woman, and not just punish him for the acts of abuse, then we may better appreciate the importance of addressing those incipient conditions. This change of focus would contribute mightily to preventing the abuse instead of sentencing the abuser to death when the abuse escalated to murder.

Second, a willingness to consider the individual history of the man who batters and kills a woman may be a way to further establish the legitimacy of feminist claims about the destructiveness of domestic violence. In *Feminist Legal Methods*, Katharine T. Bartlett argued that feminists need to pay attention to the methods we use when analyzing the perceived inadequacies and biases of the law.⁸² She maintained that feminists must be willing to question the basis of their beliefs in order to better identify the truth behind women's experience, for these experiences inform one's politics.⁸³ In other words, we must be willing to consider and seek to understand perspectives contrary to our own. She suggested, for example, that those who urge reform of rape laws must be willing to consider the position of men who believe that some women "invite" the sexual encounter.⁸⁴ By listening to this differing perspective we may maintain our beliefs, but also "consider the truths upon which [we] act subject to further refinement, amendment, and correction."⁸⁵

81. This view may also, on a broader political scale, provide a way to change the focus of the question from why the woman stays to why the man beats a woman in the first place.

82. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 *passim* (1990).

83. See *id.* at 884 (noting "Positionality reconciles the existence of reliable, experience-based grounds for assertions of truth upon which politics should be based, with the need to question and improve these grounds."); see also *id.* at 880 (explaining "The positional stance acknowledges the existence of empirical truths, values and knowledge, and also their contingency. It thereby provides a basis for feminist commitment and political action, but views these commitments as provisional and subject to further critical evaluation and revision."); cf. Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 527 (1992) (maintaining that to create more effective change, the feminist critique of domestic violence must connect to the larger issue of violence in society and women's subordination in society).

84. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 882 (1990).

85. *Id.* at 883. Admittedly, understanding the opposing perspective may not be easy, but it is still necessary. See, e.g., *id.* at 887 (stating "A goal central to feminism [is] to be engaged, with others, in a critical transformative process of seeking further partial knowledges from one's admittedly limited habitat. This goal is the grounding of feminism, a grounding that combines the search for further understandings and sustained criticism to-

When Bartlett introduced the example of rape reform she asked rhetorically, “can it get worse?”⁸⁶ This question suggested that of all her examples⁸⁷ it might be most difficult for someone involved in rape reform to listen to someone who still believes that a woman “asks for it.” Arguably, the question I struggle with in this Essay may be an example of how it can get worse, and yet, why it is still necessary to engage in the dialogue.

B. *Placing Their Murders in Context*

In addition to acknowledging the individual background and character of the defendant, it is critical to consider the broader legal and social context of the murder. Seeking the death penalty for the murder of a woman that involved a history of abuse by the defendant shows that the government is serious about prosecuting and punishing crimes of violence against women to the full extent of the law. This action is important because often the apprehension exists that prosecutors and courts are more lenient in their enforcement of the laws when presented with crimes of violence against women.⁸⁸

ward those understandings.”); Kimberle Crenshaw, *Mapping the Margins: Intersectionality Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1299 (1993) (asserting “With identity thus reconceptualized, it may be easier to understand the need for and summon the courage to challenge groups that are after all, in one sense, ‘home’ to us, in the name of the parts of us that are not made at home. This takes a great deal of energy and arouses intense anxiety.”); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 527 (1992) (characterizing her argument about placing woman-abuse in a broader social context as “controversial perhaps even heretical” but still necessary).

86. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 882 (1990).

87. Bartlett’s two other examples involve prochoice advocates making an effort to understand the views of those who are offended by the notion of unlimited choice and those who debate joint custody appreciating that some fathers want to be “responsible, co-equal parents.” *Id.*

88. See, e.g., H.R. REP. NO. 103-395, at 27-28 (1993); Donna E. Shalala, *Domestic Violence Is Not a Private Matter: A Comprehensive Approach to Preventing and Ending the Violence*, 26 U. WEST L.A. L. REV. 29, 34 (1995) (observing that the legal system does not always consider battering as a serious crime); Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE, 433, 492 (1996) (questioning whether judges treat crimes of violence against women with the same degree of seriousness as crimes of violence against men). Rapaport argues that this concern is specifically justified with respect to murders within the domestic violence context. Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 SMU L. REV. 1507, 1519-30 (1996) (showing that in domestic murder cases where the husband killed the woman who left him, appellate courts consider the murder “ordinary” and therefore not deserving of the death penalty).

It is also necessary to observe, however, that the seriousness displayed once a woman is dead masks the lack of genuine attention to preventing the crime from occurring in the first place. The allocation of resources in this country favors prisons over social and educational programs⁸⁹ that could help a child like Marquez when he was beaten by his father, abandoned by his parents, or identified as mentally retarded, and an adult like Marquez when he beat the women with whom he lived. We devote more resources to prosecuting death penalty cases than providing shelter and resources for women who want to leave their abusive husbands.⁹⁰ Basic law enforcement programs that coordinate the arrest and prosecution of batterers are still the exception.⁹¹ Inadequate resources for a battered

89. For example, in Texas, the 1995 budget for the Texas Department of Criminal Justice (the state prison system) was approximately \$3 million, while the 1995 budget for the Department of Protective and Regulatory Services was approximately \$500,000. See *Summary of the 1996-97 State Budget by Agency, Function and Fiscal Year Compared to the 1994-95 Spending Level All Funds* (last modified Dec. 8, 1995)

<<http://www.lbb.state.tx.us/lbb/members/reports/fiscal/appendix/FSB5.htm>>. Eighty-five percent of the DPRS budget is allocated to Protective Services for Families and Children (providing services to abused and neglected children and their families, foster and adoptive parents, runaways, and other children at risk). See *Department of Protective and Regulatory Services* (last modified Nov. 27, 1995)

<<http://www.lbb.state.tx.us/lbb/members/reports/fiscal/fshhs/FS530.htm>>; see also D. Stanley Eitzen, *Violent Crime: Myths, Facts, and Solutions*, in *TAKING SIDES* 331, 334 (Kurt Finsterbusch & George McKenna eds., 1996) (observing that "eight years ago [in 1988] Texas spent \$7 on education for every dollar it spent on prisons. Now [in 1995] the ratio is 4 to 1. Meanwhile Texas ranks 37th among the states in per pupil spending.").

90. Direct comparisons are difficult to make. However, Texas spends approximately \$2.3 million on each death penalty case. Christy Hoppe, *Executions Cost Texas Millions*, *DALLAS MORNING NEWS*, Mar. 8, 1992, at 1A (illustrating that the cost of life imprisonment is less than the cost of execution), available in 1992 WL 7103212. As of December 31, 1996, 438 persons were on death row in Texas, compared to 408 one year earlier (a year in which seven were executed). BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *CAPITAL PUNISHMENT* 1996 tbl. 5, at 6. In contrast, the State of Texas appropriated \$1.8 million in FY 1998 to family violence shelters and programs. Fax Letter from Karen Parker, Family Violence Program Administrator, Texas Department of Human Services, to the author (Feb. 12, 1998) (on file with the *St. Mary's Law Journal*). Additionally, federal funding of approximately \$12 million was also allocated in FY 1998 for family violence programs in Texas. See *id.*

91. See, e.g., Donna E. Shalala, *Domestic Violence Is Not a Private Matter: A Comprehensive Approach to Preventing and Ending the Violence*, 26 U. WEST L.A. L. REV. 29, 34 (1995); *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1540 (1993) (emphasizing that prosecutors are reluctant to pursue domestic violence cases due to the victim's tendency to drop the charges against the abuser).

woman seeking protection may literally mean the difference between her life and her death.⁹²

The ability of the government to seek the death penalty against an abusive husband who kills his wife should not assuage our outrage that the murder occurred. It should, instead, offend us that our priorities do not value the woman's life enough to make the investment in the kinds of social, educational, and legal programs that might have kept her from being abused and killed. We should be ashamed if we believe that imposing the death penalty even begins to make up for our inattention not only to the woman's abusive circumstances but also to the defendant's neglected past.

V. CONCLUSION

The resolution of the conflict between being a feminist and representing a man on death row who killed a woman he had physically abused lies in the importance of seeing the personal as political. A case like Mario Marquez's tears at my heart because he brutally killed his wife and niece, because his own life was so wretched, and because nothing in our legal or social systems intervened, at any point, to stop the collision between his disastrous impairments and his wife's life. Justice Brennan once wrote, "the way in which we choose those who will die reveals the depth of moral commitment among the living."⁹³ He wrote those words in the context of a case about the racist application of the death penalty, but they apply here as well. We should not isolate our anger at the violence against a woman by thinking it impossible to represent, or understand, a man on death row who killed that woman. The tragedy of the woman's death and the tragedy of the defendant's life together reflect the devastating toll we take when, as a society, we fail to protect our children and we fail to protect each other.

92. *See, e.g.,* *Alba v. State*, 905 S.W.2d 581, 586 (Tex. Crim. App. 1995) (en banc) (noting that on the day before she was killed, the defendant's wife had tried to find shelter or treatment center for her and her children).

93. *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

