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## **Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform**

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# TELLING STORIES, SAVING LIVES: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform

Leigh Goodmark<sup>†</sup>

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## I. INTRODUCTION

This human rights report documents and analyzes instances in which the Massachusetts family courts are violating internationally accepted human rights laws and standards. The report focuses specifically on cases involving child custody and visitation issues where there is a history of partner abuse. In the vast majority of examples discussed in the report, the family courts also are violating Massachusetts law and policy.

Our findings are based primarily on the in-depth testimonies of 40 battered mothers who experienced family court litigation in 11 of the 14 counties in Massachusetts.<sup>1</sup>

In November of 2002, the Battered Mothers' Testimony Project at the Wellesley Centers for Women released *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts*. The report told the stories of forty battered mothers who had been involved in litigation in the Massachusetts family courts and argued that these courts had violated the human rights of the battered mothers and their children.<sup>2</sup> Specifically, the report argued that Massachusetts' family courts had committed six distinct human rights violations:

1. Failure to protect battered women and children from abuse.
2. Discrimination and bias against battered women.
3. Degrading treatment of battered women.
4. Denial of due process to battered women.
5. Allowing the batterer to continue the abuse through the family courts.
6. Failure to respect the economic rights of battered women and children.<sup>3</sup>

While battered women's advocates applauded the study and a mainstream media outlet in Massachusetts noted that "if only a fraction of what these women say is true, it's bad news for Massachusetts,"<sup>4</sup> the official

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1. CARRIE CUTHBERT ET AL., *BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS* iv (Wellesley Centers for Women 2002) [hereinafter *BATTERED MOTHERS SPEAK OUT*].

2. *Id.* To be included in the study, a woman had to: be a mother; have experienced violence from an intimate partner with whom she had children and with whom she no longer resided; have engaged in custody litigation with that abusive former partner in the Massachusetts family courts; express grievances about family court processes and/or actors and/or perceive that her human rights might have been violated by family court actors; and be willing to speak with a documenter. *Id.* at 6.

3. *Id.* at 14.

4. Editorial, *Witnesses to Abuse*, BOSTON GLOBE, May 9, 2002, at A18.

response from the court system was discouraging.<sup>5</sup> Chief Justice Sean M. Dunphy of the Massachusetts Probate and Family Courts stated that the study's "methodology is flawed," because "the study relied on testimony only from women with complaints about custody decisions and not from those satisfied with rulings."<sup>6</sup> While Dunphy said he respected the report, he suggested that the women's accounts of their experiences did not justify the report's conclusions, believing that "the women's testimony would have been strengthened if it were verified by thorough review of court records and interviews with lawyers in the cases."<sup>7</sup>

Although it initially generated a great deal of attention, the report of the Battered Mothers' Testimony Project did not prompt the Massachusetts family court system to institute reforms based on its findings and recommendations.<sup>8</sup> But why not? Why have the stories of the forty women involved, bolstered by the accounts of advocates for battered women and their children, failed to persuade the Massachusetts court system that serious reform is needed to safeguard the rights, dignity, and safety of battered women and their children?<sup>9</sup>

One possible answer to that question lies in the way in which the data collected and relied upon by the Battered Mothers' Testimony Project was

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5. Privately, however, some judges expressed concern about the points raised by the report. One judge asked one of the authors what she should do to change her court; other judges circulated "what do we do now?" memos. Mark F. Massoud, *The Influence of International Law on Local Social Movements* 26 (2004) (unpublished manuscript, on file with the author).

6. Rhonda Stewart, *Advocates Attest to Abuse Study Findings Call for Overhaul of Family Courts*, BOSTON GLOBE, Dec. 5, 2002, at 1. Not all of the criticism came from women who received adverse rulings, however. Moreover, some of the human rights violations found by the project—most notably, the degrading treatment of battered women in the court system and the system's permitting the batterer to use the court as a forum to continue his abuse—are not complaints about specific rulings, but about court processes. BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 48, 64.

7. Patricia Wen, *Report Assails Family Courts*, BOSTON GLOBE, Nov. 26, 2002, at B2. Carrie Cuthbert, the lead author of the report, noted that such fact checking had been done in roughly twenty-five percent of the cases. *Id.* In those ten cases, the women's accounts were verified. Kristen Lombardi, *Custodians of Abuse*, BOSTON PHOENIX, Jan. 9–16, 2003, <http://www.unitedforjustice.com/custodians1.htm>.

8. Carrie Cuthbert, *Battered Mothers vs. U.S. Family Courts*, 2 HUM. RTS. DIALOGUE 12, 13 (Fall 2003), available at <http://www.carnegiecouncil.org/printerfriendlymedia.php/prmID/1047>. However, the report apparently prompted the court system to engage in a self-study. In August 2003, the Administrative Office of the Trial Court released *Progress and Challenges: Viewpoints on the Trial Court's Response to Domestic Violence*. The report employs a similar methodology and reaches many of the same conclusions as *Battered Mothers Speak Out* and will be discussed further *infra*.

9. Narratives have proven a powerful force for change in other contexts—for example, the legislative arena. See generally Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243 (1993).

presented—as the narratives of battered women.<sup>10</sup> Dunphy based his dismissal of the report on his belief that the report did not constitute “good” social science (“the methodology is flawed”) because it relied on the stories of women and because those women’s stories did not convince him that the courts truly had problems that needed to be addressed. By relying on narrative, or “qualitative” research, the Battered Mothers’ Testimony Project gave state actors a convenient excuse for disregarding its findings—the report simply wasn’t scientific enough to be believed.

This article challenges the assumption that narrative constitutes “bad” science and argues that narratives can illuminate problems in court systems, justifying reforms. The article begins by examining the methodology, findings and conclusions of the Battered Mothers’ Testimony Project. The article then examines the use of narrative in social science, human rights investigations, and the law and argues that qualitative work is valued in all of those settings. Why, then, the unwillingness to credit the narratives of these battered mothers? The article illustrates that the unwillingness to see these narrative accounts as indicative of larger problems within the court system is tied to a tendency to discount women’s voices, by looking to both the social science and legal literature on this topic and the gender bias studies conducted by many courts in the 1980s and 1990s.<sup>11</sup>

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10. This is, of course, only one possible answer, although I believe a very plausible one. The authors of the report believe that the judges were upset that the report failed to acknowledge the work that the court had done to improve its handling of family law cases involving domestic violence—a criticism that surprised the authors, given that “the report did include a section highlighting past achievements.” Kim Slote, *Assessing the Impact of the Battered Mothers’ Testimony Project 3* (2004) (unpublished manuscript on file with the author). Slote also believes that people were surprised that they did not produce a typical policy paper or neutral review of the system and sought to distance themselves from it for political reasons. Telephone interview with Kim Slote, Human Rights Consultant, U.S. Human Rights Network, in Naples, Fla. (Sept. 29, 2004). Other possible reasons could include that the narratives came from poor women or women of color. *See infra* note 174 and accompanying text.

11. The Battered Mothers’ Testimony Project grew, in part, from a study commissioned by Massachusetts’ Supreme Judicial Court in 1989 that found that gender bias in the courts was largely being ignored. Stewart, *supra* note 6, at 1. As Dorothy Roberts notes, focusing on gender as the primary reason for oppression “forces women of color to fragment their experience in a way that does not reflect the reality of their lives.” Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1424 (1991) (footnote omitted). My choice to focus on the gender-specific dimensions of the response to the Battered Mothers’ Testimony Project is not meant to create such fragmentation, or to ignore the role that race likely played in the discounting of these narratives. Indeed, *Battered Mothers Speak Out* documents bias the mothers experienced based on race, ethnicity, socioeconomic class, and sexual orientation. BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 37–39. While the intersection of gender bias and bias based on factors other than gender is touched on in this article, the article does not purport to thoroughly examine those issues.

Finally, the article asks whether the weight given to narratives about the operation of the court system is changed by the identity of the reporter or the type of report, comparing the effectiveness of first and third person narrative reports and qualitative and quantitative court reports. While third person or quantitative reports may initially be more credible to judges and decision-makers, using such strategies denies battered women the opportunity to tell their stories and denies judges the opportunity to develop empathy by hearing them. Ultimately, silencing women's voices in order to gain widespread acceptance further undermines attempts to reinforce women's credibility. The discounting of women's voices may continue to impede projects like the Battered Mothers' Testimony Project from achieving meaningful change; nonetheless, collecting and disseminating the narratives of women affected by the system should be a crucial component of court reform.

## II. THE BATTERED MOTHERS' TESTIMONY PROJECT

*Battered Mothers Speak Out*, the report of the Massachusetts Battered Mothers' Testimony Project, was the first family court report to view the difficulties faced by battered mothers in the court system through a human rights lens.<sup>12</sup> Using human rights norms articulated in documents like the United Nations' Universal Declaration of Human Rights, the report catalogued the human rights violations committed against battered mothers by the Massachusetts family courts.<sup>13</sup>

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12. While Massachusetts' study was the first, it is not the only Battered Mothers' Testimony Project in existence. In June 2003, the Arizona Coalition Against Domestic Violence released a report entitled *Battered Mothers' Testimony Project: A Human Rights Approach to Child Custody and Domestic Violence*. Modeled on the Massachusetts report, the Arizona study collected the stories of fifty-seven women to support its claim that battered mothers involved in custody actions in the Arizona Superior Court system were being subjected to human rights abuses. Arizona's study reports its findings in a more traditional, qualitative way, providing statistics based on the answers given by respondents in the study, augmented by quotes that are not linked to particular mothers and short anonymous case descriptions.

Because the study does not primarily rely on narrative to bolster its arguments about the presence of human rights abuses, it will not be a major focus of this article. The short stories that are relayed at various points in the report, however, echo the stories told by the mothers in Massachusetts. See ARIZ. COAL. AGAINST DOMESTIC VIOLENCE, BATTERED MOTHERS' TESTIMONY PROJECT: A HUMAN RIGHTS APPROACH TO CHILD CUSTODY AND DOMESTIC VIOLENCE at 60–61 (failure to take partner abuse seriously), 75 (denial of due process right to be heard), 76–77 (bias against battered women) (2003). The study concludes that “domestic violence in Arizona is torture and . . . the failure of Arizona's legal system to prevent torture places the state in non-compliance with international laws and norms that condemn torture.” *Id.* at 86.

13. BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 9–12.

*Battered Mothers Speak Out* begins by establishing the government's responsibility to respect, protect and fulfill the human rights of its citizens.<sup>14</sup> In the context of the Massachusetts family courts, respecting, protecting, and fulfilling these rights requires that courts not only "refrain from directly violating the human rights of women and children through their actions" but also "take positive steps to protect children and women from abuse by non-state actors such as ex-husbands, ex-boyfriends, and fathers."<sup>15</sup> "Respect" centers on the actions that the court system takes directly through its "laws, agents, and systems;" respect includes the requirement that courts not discriminate against battered women.<sup>16</sup> To "protect" battered women and their children, the Massachusetts family courts must ensure that private individuals (batterers) are not permitted to violate women's and children's human rights—for example, by using the court system to continue their abuse or by exposing women and children to danger through unsafe visitation arrangements.<sup>17</sup> To "fulfill" their human rights, the court system must take active measures to ensure that battered women "have the opportunity to obtain satisfaction of their needs (where recognized in human rights laws and instruments) that cannot be secured by their own personal efforts."<sup>18</sup> Examples of fulfilling battered women's human rights include providing battered women with "access to shelter and the economic resources needed to flee their abusers and establish an independent, safe life."<sup>19</sup> The report locates the courts' responsibility to respect, protect, and fulfill battered women and their children's rights in several sources: the human condition,<sup>20</sup> documents binding the United States as a condition of its membership in the United Nations, including the Universal Declaration on Human Rights and the Declaration on the Elimination of Violence Against Women ("which defines violence against women as a human rights violation and delineates governments' obligations to end and prevent it"),<sup>21</sup> and treaties that the United States has signed but not ratified, including United Nations Conventions on the Rights of the Child and Elimination of All Forms of Discrimination Against Women.<sup>22</sup> Using this framework, the report investigated three broad questions:

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14. *Id.* at 10.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 10–11.

21. *Id.* at 11.

22. *Id.*

(1) Are the Massachusetts family courts respecting, protecting, and fulfilling battered mothers' and their children's fundamental human rights to: [b]odily integrity and freedom from violence; [n]on-discrimination and equal protection of the law; [f]reedom from torture and degrading treatment; [d]ue process; [f]reedom of speech and a fair hearing; and [a]dequate standard of living[?]

(2) Are the Massachusetts family courts exercising due diligence with respect to violence against women and children?

(3) Are the Massachusetts family courts acting in children's best interests in child custody and visitation cases where there is a history of partner and/or child abuse?<sup>23</sup>

The answer to all of these questions, according to *Battered Mothers Speak Out*, is no. The report found that the family courts committed human rights violations in the following areas:

1. Failure to protect battered women and children from abuse
2. Discrimination and bias against battered women
3. Degrading treatment of battered women
4. Denial of due process to battered women
5. Allowing the batterer to continue the abuse through the family courts
6. Failure to respect the economic rights of battered women and children.<sup>24</sup>

The report examines each of these violations in turn, using the narratives of battered mothers to bolster its findings.<sup>25</sup>

According to the report, the Massachusetts family courts fail to protect battered women and children from abuse in a number of ways: by granting or recommending unsafe custody or visitation to batterers; by ignoring or minimizing battered mothers' reports of partner and/or child abuse, failing or refusing to investigate such reports, and failing to examine or credit documented evidence of partner and/or child abuse; and by mishandling child sexual abuse allegations.<sup>26</sup> The report tells the stories of Karen, Marsha, Beth, Janice, Jane, Sonia, Gabby, and others to illustrate how the

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23. *Id.* at 11–12.

24. *Id.* at 14.

25. *Id.* at 15–71. As previously mentioned, the report relies primarily on the narratives of the forty women interviewed for the project. The report notes, however, “the BMTP [Battered Mothers Testimony Project] received (and continues to receive) far more requests from battered women who want to give testimony to the project than we have been able to interview and therefore include in this report.” *Id.* at 28.

26. *Id.* at 15.



courts have failed to protect battered women and children.<sup>27</sup> These narratives range from quotes to detailed case descriptions relating the women's experiences with the courts. Karen's story, for example, involves a lengthy description of how both the judge and the children's attorney involved in her case denied her requests to curtail her former partner's visitation, despite evidence that he was abusing alcohol and his new wife after having been released from jail for assaulting Karen (an assault witnessed by the older child).<sup>28</sup> The visitation did not change until her ex-partner was arrested for drunk driving, which prompted the children's attorney to remark to Karen, "I guess you're happy now."<sup>29</sup> The judge continued to allow Karen's former partner unsupervised visitation.<sup>30</sup> Karen's story highlights how the court system grants inappropriate visitation, ignores or minimizes mothers' concerns about their children's well-being, and fails to credit documented evidence of partner abuse.<sup>31</sup>

Sonia begged the judge and *guardian ad litem* in her case to look at police reports documenting her ex-partner's violence towards his new partner.<sup>32</sup> She remembered,

When we went into court and when Michael was looking for sole custody, I told [the judge] that I felt that Luke was in a violent home and was in danger of being harmed, and [the judge] wouldn't have anything to do with it. He wouldn't listen to me. I had documents there that I wanted to show him but he refused to

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27. *Id.* at 15–24. In each section of the report, the narrative accounts, which are the primary source material for the report, are supported by the observations of battered women's advocates and followed by information derived from interviews with state actors (who were chosen because two or more women involved in the study had complained about them or because they were identified as handling partner abuse and child custody issues well, or because of their specific knowledge of various aspects of the family court system). *Id.* at 6–7. Not surprisingly, "the statements that state actors made to us about their beliefs and their approaches to cases sharply contrasted with what we had learned about how these same individuals had handled the cases we investigated." *Id.* at 24.

28. *Id.* at 15–16.

29. *Id.* at 16.

30. *Id.* Given the criticism that the report was invalid because of its reliance on the women's subjective retellings of their experiences, it is noteworthy that a representative from the Battered Mothers' Testimony Project was present at two of Karen's hearings to confirm her recollections and her impressions. *Id.*

31. Cassie's example of how court actors minimized reports of partner abuse is more direct:

In my first meeting with the *guardian ad litem*, I had told him that there was a significant history of domestic violence, [that] my ex-partner had been to [a batterer's intervention program] and that I was disabled as a result of the abuse, and he told me, 'No one cares about that abuse crap.'

*Id.* at 19.

32. *Id.* at 22.

look at them . . . . [A] few weeks later, [he] gave Michael sole legal and physical custody of Luke.<sup>33</sup>

Their inability to make themselves heard in the court system was devastating for these mothers. As Marsha explained, “I don’t think there is a worse thing in the world than not being able to protect your children. Like someone’s got my hands tied behind my back and I’m watching them beaten up, and I can’t protect them.”<sup>34</sup> Using the stories of Karen and her counterparts, the report argues that the courts are ignoring international human rights laws and standards requiring them to protect battered women and their children from further abuse.<sup>35</sup>

Similar stories illustrate the report’s other major conclusions. Sandy described the gender bias she faced when trying to explain her partner’s history of domestic violence against her to a *guardian ad litem*.<sup>36</sup> The *guardian ad litem* told Sandy that depending on where her bruises were, he might deem her the offender, despite documents from the emergency room detailing her injuries as the result of an assault, and a judge’s findings that Sandy’s reports of abuse were credible.<sup>37</sup> Lorie explained how state actors’ failure to understand the effects of abuse colored their assessments of the parties’ credibility or stability.

[The *guardian ad litem*] was saying [that I] was psychologically unstable and, you know, irrational, emotional, and angry. It’s like, yeah, if you’ve been through 10 years of what I’ve been through . . . . You go through hell and try to get out of hell and they punish you, saying, ‘Oh, you cry too much and you’re upset, so you know, the kids are more stable with the father, there’s no emotion.’<sup>38</sup>

Lorie further detailed degrading treatment by judges, a custody evaluator, and a *guardian ad litem*.<sup>39</sup>

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33. *Id.*

34. *Id.* at 16.

35. *Id.* at 27. The report contends that the courts’ failures constitute violations of the right to be free from violence, torture, and degrading treatment, the right to non-discrimination, and the government’s obligations to exercise due diligence and to act in children’s best interests, as articulated in international treaties. *Id.* at 15, 27–28. The courts’ failures also constitute violations of United States and Massachusetts law. *Id.* at 29–31.

36. *Id.* at 33.

37. *Id.* Other forms of bias documented by the report include biased investigations, evaluations and reports; holding battered mothers to higher standards of parenting and behavior than fathers; stereotyping women as hysterical and unreasonable; and discrimination on the basis of race and ethnicity, socioeconomic class, and sexual orientation. *Id.* at 33–39.

38. *Id.* at 36.

39. *Id.* at 46. Lorie described judges who did not let her speak at hearings, did not pay attention to the testimony of her witnesses, and seemed to be almost sleeping during trial. *Id.*

Fran was denied due process at hearings by a judge who refused to allow her to speak in court and by a probation officer who circumvented court orders.<sup>40</sup> Most of the women described how their batterers were permitted to continue their abuse using the court system. Sonia's story was typical: "He's forced me to go back to court endlessly. I can't remember how many motions we have on our docket. There's got to be 150. Every time I turned around for years, there was another piece of paper coming in the mail from the courts."<sup>41</sup> Marsha described how the courts permitted her ex-husband to deprive her and her children of their economic rights, both through decisions on child support and by permitting her ex-husband to litigate baseless custody challenges, leaving Marsha and her children scraping by; "[a]ll [of] her savings have gone to lawyers."<sup>42</sup> June recalled, "I remember my son having a 103-degree fever one night and having to get to the pediatrician, and I didn't have a dime on me 'cause [sic] he wasn't paying any child support."<sup>43</sup> All of the actions described by these women, according to the report, violated international human rights laws and norms, Massachusetts standards, and, in some cases, United States law.<sup>44</sup>

Given the numerous human rights violations documented by the Battered Mothers' Testimony Project, the report concludes with a call for Massachusetts to "take positive steps to remedy the human rights violations

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Other denials of due process included pressure to engage in mediation or other forms of alternative dispute resolution, denial of access to *guardian ad litem* reports, and ethical issues, including conflicts of interest and misrepresentations that operated to deny due process. *Id.* at 50–54.

40. *Id.* at 50. The probation officer permitted Fran's ex-husband to attend private therapy with a counselor with no expertise in domestic violence in lieu of participating in batterer's intervention counseling. *Id.* General therapy is not an appropriate substitute for a batterer's intervention program.

41. *Id.* at 59. In addition to being permitted to file multiple harassing or retaliatory motions, batterers were allowed to continue their abuse via the court system by making false allegations against their victims; manipulating the court process to avoid or reduce their child support; and using parallel actions in courts with different jurisdictions to gain advantage. *Id.* at 59–62.

42. *Id.* at 65. Women's and children's economic rights are jeopardized by the cost of family court litigation, family court actions (like requiring battered women to pay visitation supervisors or *guardian ad litem*s needed because of their partners' abusive behavior), courts' willingness to allow batterers to use the courts to financially drain their victims, missing work or losing jobs as a result of court dates, and hampering their ability to find affordable, competent representation (needed both to secure their economic rights and to oppose baseless litigation). *Id.* at 66–69.

43. *Id.* at 68.

44. *Id.* at 42–45 (discrimination and bias against women), 48–49 (degrading treatment), 56–58 (denial of due process), 62–63 (allowing batterers to abuse women through family courts), 70–71 (failure to respect economic rights).

against battered mothers and their children . . . .”<sup>45</sup> Such steps include increased training for state actors on partner and child abuse, a reform of the *guardian ad litem* system, increased economic and legal resources for battered mothers and their children, and the creation of a system to hold the family courts accountable for their actions.<sup>46</sup> While the authors believe that their findings are sufficient to create an understanding of the problems faced by battered mothers and their children in family court litigation, establish human rights abuses, and propose recommendations for change, the authors caution that they make “no claim regarding statistical significance, ability to generalize to a larger population, or the overall extent of the reported problems either in Massachusetts or elsewhere.”<sup>47</sup>

*Battered Mothers Speak Out* presents a compelling picture of battered women and their children denied justice by a court system that ignores their needs, treats them with disdain, and is generally insensitive to their plight. Or, *Battered Mothers Speak Out* presents nothing more than the subjective perceptions of a disgruntled handful of the thousands of litigants who engage with the Massachusetts family court system each year. In large part, the way that the study’s findings are interpreted depends on the reader’s willingness to accept the first person narratives of forty individual battered mothers<sup>48</sup> as a sufficient basis for concluding that the Massachusetts family courts are violating battered mothers’ human rights. Even the study itself is ambivalent on this point, drawing conclusions and making recommendations pertaining to the Massachusetts family court system as a whole while warning that the study “does not purport to represent all battered mothers who have experienced litigation in the Massachusetts family court system . . . .” and “makes no claim regarding . . . [the] ability to generalize to a larger population.”<sup>49</sup> Ultimately, the persuasiveness of *Battered Mothers Speak Out* is directly tied to its use of the narratives of battered women, a characteristic cited as a strength by the researchers but dismissed by state actors. The next section of this article examines the value placed on narrative research in the social science, human rights, and legal

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45. *Id.* at 74.

46. *Id.* at 73. As Carrie Cuthbert notes, in many cases, the recommendations do not call for major change or new laws—only for the application and enforcement of existing laws designed to protect women and children. E-mail from Carrie Cuthbert, Amherst, Massachusetts, (May 12, 2005) (on file with author).

47. BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 8.

48. Case reviews were conducted by researchers in about one-quarter of the cases, but which cases were verified is not clear from the report. *See* Lombardi, *supra* note 7.

49. BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 8. Note, however, that stories were collected from battered mothers in eleven of Massachusetts’ fourteen counties, making it somewhat easier to make statewide claims. *Id.* at 6.

communities. Given the willingness of all of the relevant communities to credit narrative research, the section concludes that the identity of the storytellers—battered mothers—rather than the use of the narrative form is what caused *Battered Mothers Speak Out* to be largely ignored.

#### A. *The Value of Narrative*

Chief Justice Dunphy suggested in his comments at the time of publication that the methodology employed in *Battered Mothers Speak Out* was “flawed,”<sup>50</sup> leading him and other state actors to disregard the study’s findings. In the section entitled “Project Documentation and Research Strategies,” the authors of *Battered Mothers Speak Out* describe their methodology as combining human rights fact-finding with qualitative and quantitative social science research methods.<sup>51</sup> They address their decision to rely primarily on narratives in the report, explaining:

The goal of human rights fact-finding is to identify human rights violations as reported by the victims of the violations and those who witnessed them . . . .

As in human rights fact-finding, the driving force behind qualitative research is the prominence of the voices of the people under study (project participants). Qualitative research methodology is especially strong in enabling researchers to document the lived experiences of individuals and to give participants the opportunity to describe, in their own words, the social, cultural, and political phenomena affecting them.<sup>52</sup>

Was this decision to rely primarily on narrative methodologically valid given the current state of thinking in the fields of social science, human rights documentation, and law? The following sections address this question.

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50. Stewart, *supra* note 6, at 1.

51. BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 5.

52. *Id.* at 5. Note that the project also used quantitative research methods to collect “sociodemographic information and event data about participants’ lives during a specified period of time related to the abusive relationship with an intimate partner and subsequent litigation in the family courts.” *Id.*

### III. QUANTITATIVE AND QUALITATIVE INVESTIGATION IN SOCIAL SCIENCE RESEARCH

#### A. *The False Dichotomy*

“Valid” social science research is frequently equated with “quantitative” research—at the most basic level, research that relies on numbers, rather than words (the province of qualitative research).<sup>53</sup> While quantitative research was the “dominant” approach of social scientists in the United States for many years, “since the 1960s there has been a revival in the fortunes of qualitative types of research in these disciplines, to the point where their legitimacy is widely accepted.”<sup>54</sup> Nonetheless, social scientists continue to battle the perception that qualitative research is not as scientifically rigorous or objective as quantitative, which has implications for the use of such research in developing social policy.<sup>55</sup>

To flesh out the differences between the two a little more fully, quantitative research “implies the application of a measurement or numerical approach to the nature of the issue under scrutiny as well as to the gathering and analysis of data,” while qualitative research:

[R]elies upon case studies or evidence gleaned from individuals or particular situations . . . [and] explores the processes behind observed associations between factors, charts individual outcomes and explores the meanings and contexts of individuals’ behaviour. Thus, quantitative and qualitative approaches differ not only in the

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53. Martyn Hammersley, *Deconstructing the Qualitative-Quantitative Divide*, in MIXING METHODS: QUALITATIVE AND QUANTITATIVE RESEARCH 39, 41 (Julia Brannen ed., 1992). Hammersley suggests that the real issue between the two schools of thought is precision, with quantitative researchers arguing that sufficient precision can be achieved only through quantification. *Id.* at 42. Hammersley cautions, however, that precision can be expressed in ways other than numerically, and that accuracy is more important than precision, particularly when numbers are used to “imply a greater degree of precision than their likely accuracy warrants.” *Id.*

54. *Id.* at 40.

55. Roger Bullock et al., *The Relationships Between Quantitative and Qualitative Approaches in Social Policy Research*, in MIXING METHODS: QUALITATIVE AND QUANTITATIVE RESEARCH, *supra* note 53, at 81, 89; see also Julia Brannen, *Combining Qualitative and Quantitative Approaches: An Overview*, in MIXING METHODS: QUALITATIVE AND QUANTITATIVE RESEARCH, *supra* note 53, at 3, 18; Virginia L. Olesen, *Feminisms and Qualitative Research At and Into the Millenium*, in HANDBOOK OF QUALITATIVE RESEARCH 215, 217 (Norman K. Denzin & Yvonna S. Lincoln eds., 2d ed. 2000).

methods employed but also in the perception of the problem and the type of data they produce.<sup>56</sup>

Quantitative research provides social scientists with “authoritative survey data . . . assess[ing] the incidence, epidemiology and boundaries of problems of the situation under scrutiny.”<sup>57</sup> Qualitative research, in contrast, provides “greater understanding of the meaning and context of behaviours and the processes that take place within observed patterns of interrelated factors” and enables researchers to examine the perceptions different participants have of the same situation.<sup>58</sup>

Although researchers stress that best practice frequently requires that both quantitative and qualitative methods be used to study a problem,<sup>59</sup> the type of problem being studied generally dictates which type of research strategy should take the lead in a given project. For example, in a study of parents caring for young adults with mental handicaps and behavior problems, the researcher explains, “[t]he problem area itself was socially defined and therefore might be differently constructed by different actors, and its more severe manifestations were known to be likely to be distressing to those involved. This suggested that there would be value in a qualitative approach.”<sup>60</sup> Because it “blurs easily into advocacy and efforts to find solutions to problems,”<sup>61</sup> qualitative research is also well-suited to address “flaws and faults in society and in so doing promote actions that eliminate problems.”<sup>62</sup>

### B. Narrative Research as a Subset of Qualitative Research

Narrative research, like the type used by *Battered Mothers Speak Out*, is one form of qualitative research, an approach that often seems “heretical to

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56. Bullock et al., *supra* note 55, at 85; *see also* Ruthellen Josselson & Amia Lieblich, *A Framework for Narrative Research Proposals in Psychology*, in UP CLOSE AND PERSONAL: THE TEACHING AND LEARNING OF NARRATIVE RESEARCH 259, 260 (Ruthellen Josselson, Amia Lieblich & Dan P. McAdams eds., 2003) [hereinafter UP CLOSE AND PERSONAL]; HERBERT J. RUBIN & IRENE S. RUBIN, *QUALITATIVE INTERVIEWING: THE ART OF HEARING DATA* 32–34 (1995) (describing the “positivist” or quantitative model of research).

57. Bullock et al., *supra* note 55, at 85.

58. *Id.* at 86.

59. *See, e.g., id.* at 86–87.

60. Hazel Qureshi, *Integrating Methods in Applied Research in Social Policy: A Case Study of Careers*, in MIXING METHODS: QUALITATIVE AND QUANTITATIVE RESEARCH, *supra* note 53, at 101, 120. The similarities between the factors used to determine that qualitative research was appropriate in this case and the challenges posed by research on battered mothers will be examined in detail later. *See infra* Part III.C.

61. RUBIN & RUBIN, *supra* note 56, at 13.

62. *Id.* at 35.

those reared in a positivistic, scientific atmosphere.”<sup>63</sup> Narrative researchers contend that experiences have little value when left unconnected to the stories told by the participants because stories are the means by which we understand and relate those experiences.<sup>64</sup> Narrative research distinguishes itself both from the methods and the goals of quantitative research by stressing an examination of a subject’s life experiences and the connection of those experiences to historical, social, and cultural contexts.<sup>65</sup> Narrative analysis, then, has two goals: to understand how people and/or groups make sense of their experiences and to describe the social worlds they inhabit and social resources “they draw on, resist, and transform as they tell their stories.”<sup>66</sup> Narratives are not simply offered in a vacuum, but rather used to construct theory.<sup>67</sup>

Narrative researchers reject the assertion that neutrality is either desirable or achievable in social science research.<sup>68</sup> While students are trained to think of research in terms of “objectivity” and “truth,” lacking in “personal connection and passion,” narrative researchers claim that research is always affected by the researcher’s “goals, plans, beliefs, and practices.”<sup>69</sup>

63. Ruthellen Josselson et al., *Introduction to UP CLOSE AND PERSONAL*, *supra* note 56, at 3, 4. As June Price notes, however, “[t]he very act of posing a research question will influence and shape the answer,” regardless of whether the method used to answer the question is quantitative or qualitative. June Price, *In Acknowledgment: A Review and Critique of Qualitative Research Texts*, in *MAKING MEANING OF NARRATIVES* 1, 2 (Ruthellen Josselson & Amia Lieblich eds., 1999).

64. Guy A.M. Widdershoven, *The Story of Life: Hermeneutic Perspectives on the Relationship Between Narrative and Life History*, in *THE NARRATIVE STUDY OF LIVES* 1, 7 (Ruthellen Josselson & Amia Lieblich eds., 1993).

65. Colette Daiute & Michelle Fine, *Researchers as Protagonists in Teaching and Learning Qualitative Research*, in *UP CLOSE AND PERSONAL*, *supra* note 56, at 62–63. The editors of *UP CLOSE AND PERSONAL: THE TEACHING AND LEARNING OF NARRATIVE RESEARCH* describe the differences:

In considering people as constructors of their experience, such research takes a giant step away from parsing human experience into predefined ‘variables’ and requires of the researcher an equally major shift in perspective and approach. Rather than forming hypotheses, the researcher frames questions for exploration; in place of measurement are the challenges of deeply listening to others; and instead of statistics are the ambiguities of thoughtful analysis of texts.

Josselson et al., *supra* note 63, at 3.

66. Susan E. Chase, *Learning to Listen: Narrative Principles in a Qualitative Research Methods Course*, in *UP CLOSE AND PERSONAL*, *supra* note 56, at 79–81.

67. See Blythe McVicker Clinchy, *An Epistemological Approach to the Teaching of Narrative Research*, in *UP CLOSE AND PERSONAL*, *supra* note 56, at 29, 46.

68. See Daiute & Fine, *supra* note 65, at 64–65.

69. *Id.* at 64. They explain that “social research is always constructed and contingent, that no construct or life or community preexists language or social relations; that research is about evidence, framing, and reframing.” *Id.* at 65.



The relationships developed between subjects and researchers using narrative research methodology help those researchers to better understand their own “biases, assumptions, and social reactions,”<sup>70</sup> allowing narrative researchers to be more honest about the operation of these factors on their research than quantitative researchers, who maintain (erroneously, according to narrative researchers) that their numerical methods protect them from the influence of such factors. In fact, some narrative researchers maintain that “[n]eutrality is probably not a legitimate goal in qualitative research,” both because it is impossible to achieve and because it impedes the development of the empathetic connection between researcher and subject needed to elicit personal stories and probe for details.<sup>71</sup> Despite these connections, however, narrative researchers argue that their results can be as easily generalized as those attained in quantitative research—more so, if the questions being asked require more than simple “yes or no, approve or disapprove” responses.<sup>72</sup>

### C. Battered Mothers Speak Out in the Context of Social Science Research

The main criticism leveled against *Battered Mothers Speak Out* involves its use of the narratives of battered women to support its assertion that these women’s human rights were violated.<sup>73</sup> The use of such narratives is entirely appropriate in social science research, particularly when, as in *Battered Mothers Speak Out*, those narratives are supported by other kinds of information, including interviews and surveys of other actors within the system, case reviews, and external documentation of abuse.<sup>74</sup> The procedure

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70. Annie G. Rogers, *Qualitative Research in Psychology: Teaching an Interpretive Process*, in UP CLOSE AND PERSONAL, *supra* note 56, at 49, 55.

71. RUBIN & RUBIN, *supra* note 56, at 13. The authors caution, however, that balance is necessary; “too much sympathy can . . . be blinding.” *Id.*

72. *Id.* at 72–73. Narrative researchers have questioned whether the use of such standards is appropriate for evaluating their work. Traditionally, “reliability, validity, objectivity, and replicability” were considered the prime criteria for evaluating research. AMIA LIEBLICH ET AL., NARRATIVE RESEARCH: READING, ANALYSIS AND INTERPRETATION 171 (1998). Narrative researchers have suggested, however, that these criteria are inappropriate for evaluating their work, and in fact, are contradictory to the narrative approach. *Id.* They suggest, instead, that the following criteria be used to evaluate their research: width (comprehensiveness of the evidence); coherence (how the parts create a complete and meaningful picture); insightfulness (innovation or originality in presentation and analysis); and parsimony (providing analysis based on a small number of concepts). *Id.* at 173.

73. Wen, *supra* note 7, at B2.

74. Sixteen state actors, including seven family court judges and four *guardians ad litem* were interviewed. Most of these state actors were contacted because of complaints against them. BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 7–8. Thirty-one advocates for battered

followed by the interviewers conformed to social science research principles as well; trained interviewers used a semi-structured instrument to conduct the interviews, which were later transcribed and analyzed using practices accepted in the field.<sup>75</sup>

The authors of *Battered Mothers Speak Out* acknowledge limitations of their research. As the authors note in a companion study,

It is important that these data be recognized as documentation of a set of issues based on reports of affected individuals (i.e. battered women referred to the project based on their dissatisfaction with family court outcomes or processes) rather than an attempt at definitive research into the prevalence and nature of the types of cases discussed.<sup>76</sup>

In fact, the authors suggest, *Battered Mothers Speak Out* provides a starting point for future quantitative research into the scope of the problems it identifies, the long-term implications of custody and visitation decisions on children in cases involving domestic violence, and the utility of the various solutions for improving the court suggested by the report.<sup>77</sup>

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women and children completed surveys consisting of nineteen open-ended questions. *Id.* at 6–7. As previously noted, case reviews were conducted in about one quarter of the battered mothers' cases to verify their claims. Wen, *supra* note 7, at B2. All of the participants had some form of documentation of the violence they had experienced. Jay G. Silverman, Cynthia M. Mesh, Carrie V. Cuthbert, Kim Slote & Lundy Bancroft, *Child Custody Determinations in Cases Involving Intimate Partner Violence: A Human Rights Analysis*, 94 AM. J. PUB. HEALTH 951, 952 (2004).

75. Interview transcripts were read initially to identify emerging themes. Coding schema were then developed to define and identify particular problems faced by participants; schema were modified to reflect new understanding of emerging patterns throughout the coding process. Interrater reliability was verified through secondary review of all coded passages. Coded data were managed with a customized relational Microsoft Access 2000 database and the “[f]requency of defined problems across transcripts was assessed, and human rights violations implicated were identified.” Silverman et al., *supra* note 74, at 952; *see also* BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 8. The project staff included social science researchers as well as lawyers and experts on domestic violence. Telephone Interview with Kim Slote, *supra* note 10.

76. Silverman et al., *supra* note 74, at 956. In fact, while in the footnotes the report quantifies the number of women reporting a particular problem, it does not use those “statistics” to argue that any percentage of the family court population is experiencing similar problems. BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 8.

77. *See* Silverman et al., *supra* note 74, at 956. Using qualitative evidence to produce hypotheses that can be tested by using quantitative methods, as suggested by the authors, is an accepted social science research practice. Bullock et al., *supra* note 55, at 87. The Boston Globe called for such a review after hearing only a portion of the evidence amassed by the researchers. *Witnesses to Abuse*, *supra* note 4, at A18 (“A full report on this project will be issued in October. But state officials should act now. A systematic review of court cases involving domestic violence and custody could reveal ways to improve policies and procedures.”).

One particularly pointed criticism that deserves greater attention is the argument that the failure to incorporate competing narratives (those of the alleged perpetrators, lawyers, judges and/or *guardians ad litem* involved in the cases of the women interviewed) renders the women's stories unbelievable.<sup>78</sup> While the request for this information seems reasonable on its face, in fact it creates a circular argument through which the battered women's narratives are silenced. The critics seek external validation of the battered women's claims from the very persons identified as having committed the abuse,<sup>79</sup> having been biased, or having discounted evidence of domestic violence presented to them—all of whom bring their own experiences, perspectives and biases to the stories they tell. When, predictably, the actors in question deny these claims, the critics at best will throw up their hands and say, “[t]he evidence is in equipoise,” and at worst, will use these stories to drown out those told by battered women—the very phenomenon the mothers describe in the report.<sup>80</sup> While some of the battered mothers' claims are externally verifiable using means other than alternate narratives—for example, by quantifying the frequency with which custody is awarded to those alleged or found to have committed domestic violence or inappropriate referrals to mediation are made—others are about the process itself and cannot be verified using case reviews or other external measures. This is particularly true in those cases where those with whom you would check such claims have their own reasons for insisting that the system is fair.<sup>81</sup> No record would exist, for example, of Cassie<sup>82</sup> or Lorie's<sup>83</sup> out-of-court conversations with the *guardians ad litem* representing their children, and the *guardians ad litem* are unlikely to verify claims that cast them in an unprofessional light.

Moreover, asking for external validation of these types of unverifiable claims misses the point of the report. The relevant inquiry here is not how many battered mothers received poor treatment on a number of dimensions

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78. See Wen, *supra* note 7, at B2.

79. Note, too, that the purpose of the project was not to prove whether the women were battered or not, but to gauge their treatment by the courts and other state actors when they claimed that they had been battered. As the authors note, “[b]ecause the main focus of this work was accountability of the government rather than of abusive partners, documentation and descriptions of abuse suffered by participating women and their children provide a context for examining actions or inactions of family court state actors as possible human rights violations . . .” Silverman et al., *supra* note 74, at 952.

80. See BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 19–20.

81. As Anthony Amsterdam explains, “I suppose each one of us sees pretty much what his or her own head is screwed on to see . . .” Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLINICAL L. REV. 9, 19 (1994).

82. See *supra* note 31 and accompanying text.

83. See *supra* note 37 and accompanying text.

at the hands of state actors. Instead, the question being asked is how and why battered mothers perceived that they were being mistreated by the family court system.<sup>84</sup> Only the narratives of the battered mothers involved with the system can answer that question.<sup>85</sup>

The battered mothers' narratives are used to understand their individual stories as well as to examine the context in which those stories are being told—the family court system.<sup>86</sup> Qualitative research generally, and narrative research specifically, are accepted and acceptable methods of exploring, reporting, contextualizing and generalizing the experiences of discrete populations,<sup>87</sup> like the women studied in *Battered Mothers Speak Out*. The methodology used by the project allows for generalization, but the project makes no claims of quantitative statistical significance, and in fact, uses the narratives generated to suggest both policy changes and future research.<sup>88</sup>

#### IV. NARRATIVE EVIDENCE IN HUMAN RIGHTS INVESTIGATIONS

##### A. *Narratives and Human Rights Investigations*

Human rights investigations have long been used throughout the world to document state abuses of power resulting in violations of international law. The use of human rights investigation is a less common method of documenting domestic human rights violations, however.<sup>89</sup> As Justice Dunphy opined, human rights investigations “may work well for systems in Third World countries, but not for a court in the United States.”<sup>90</sup> But a

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84. Ensuring that the public perceives the court system as fair should be a major concern for the court. See Robert J. Aalberts, Thomas Boyt & Lorne H. Seidman, *Public Defender's Conundrum: Signaling Professionalism and Quality in the Absence of Price*, 39 SAN DIEGO L. REV. 525, 527 (2002) (arguing that “[i]f the American people lose confidence in the court system, its role in protecting legal rights and creating meaningful and effective public policy could be greatly undermined.”).

85. See BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 5.

86. See *id.*

87. See LIEBLICH ET AL., *supra* note 72, at 45.

88. BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 8.

89. Some have argued that the reluctance to employ these techniques is related to “a deliberate, long-standing effort by the federal government to deny the legitimacy of human rights and, in particular, their application to situations internal to the United States.” EUNICE CHO ET AL., *SOMETHING INSIDE SO STRONG: A RESOURCE GUIDE ON HUMAN RIGHTS IN THE UNITED STATES* 6 (2002).

90. Lombardi, *supra* note 7, at 6. Despite Justice Dunphy's skepticism, the Massachusetts House recently held hearings on a bill which would create a special commission “to investigate

growing number of organizations, particularly those working on behalf of women in the United States, are using international human rights norms to analyze the actions of domestic institutions.<sup>91</sup> The Ford Foundation report *Something Inside So Strong* provides several justifications for the use of domestic human rights documentation:

Documenting human rights violations can be a powerful way to make the abuses faced by your community visible and credible, and can help to expose and challenge the perpetrators of the abuse. By collecting information about human rights violations in your community, it is possible to introduce a human rights perspective to your work, while empowering community members to speak for themselves in confronting human rights abuses. Documentation of abuse also provides a quantifiable, yet human face to a situation, providing a tool for further action.<sup>92</sup>

The authors of *Battered Mothers Speak Out* echoed these themes in an article written after the report was released. The authors explained, “[t]he human rights framework helped us to demonstrate the linkages and overlap between the violations, the economic issues battered mothers face after separation, and the multiple forms of discrimination many battered women experience.”<sup>93</sup> Additionally, the human rights framework helped battered women see their own experiences in a broader rights-based context and highlighted the severity of the abuses they alleged.<sup>94</sup>

Collecting the stories of those alleging human rights abuses is a cornerstone of this work. “It is through individual complaints that human rights are given concrete meaning . . . . When applied to a person’s real-life situation, the standards contained in international human rights treaties find

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the integration of international human rights standards into Massachusetts state law and policies.” See H.B. 706, 184th Gen. Ct. (Mass. 2005).

91. See Elizabeth M. Schneider, *Transnational Law as a Domestic Resource: Thoughts on the Case of Women’s Rights*, 38 NEW ENG. L. REV. 689, 689 (2004) (“International human rights treaties, human rights documents, and international and comparative legal norms are increasingly viewed as relevant sources of law for United States domestic lawmaking in a wide range of fields, including the death penalty, affirmative action and women’s rights.”) See generally MOLLY BEUTZ ET AL., THE GOVERNMENT RESPONSE TO DOMESTIC VIOLENCE AGAINST REFUGEE AND IMMIGRANT WOMEN IN THE MINNEAPOLIS/ST. PAUL METROPOLITAN AREA: A HUMAN RIGHTS REPORT (2004); CHO ET AL., *supra* note 89, at 40; Shruti Rana, *Restricting the Rights of Poor Mothers: An International Human Rights Critique of “Workfare,”* 33 COLUM. J.L. & SOC. PROBS. 393 (2000).

92. CHO ET AL., *supra* note 89, at 75; see also JULIE MERTUS ET AL., WOMEN’S HUMAN RIGHTS STEP BY STEP 111 (Margaret A. Schuler & Dorothy Q. Thomas eds., 1997) (offering rationales for creating “national human rights systems”).

93. Cuthbert, *supra* note 8, at 13.

94. *Id.*

their most direct application.”<sup>95</sup> The narratives of victims are an essential, perhaps the most important, component of a human rights investigation.<sup>96</sup> As the authors of *Battered Mothers Speak Out* note:

[H]uman rights documentation’s central source of information is first-hand testimonies of the survivors of such violations. Typically, these are the very voices that are muted or silenced by the government and society. In human rights documentation, survivor accounts are corroborated by witnesses, fact-checking, secondary research, and interviews with state actors. Still, survivors’ voices remain paramount to the process of investigation.<sup>97</sup>

Human rights organizations, from non-governmental organizations like Human Rights Watch and Amnesty International to the United Nations High Commissioner for Human Rights, collect the stories of individuals in order to document claims of human rights abuses throughout the world. Investigations into human rights claims of battered refugee and immigrant women in Minneapolis/St. Paul,<sup>98</sup> women raped during the war in the former Yugoslavia,<sup>99</sup> Afghani women,<sup>100</sup> Nigerian victims of war crimes<sup>101</sup> and countless others have been supported by the testimony of the affected individuals. The narratives contained in *Battered Mothers Speak Out* fall squarely within this tradition.

How should such narratives be compiled? In *Women’s Human Rights Step by Step*, Margaret Schuler and Dorothy Thomas provide a blueprint for conducting a human rights investigation.<sup>102</sup> They separate the process into three steps: preparation, fieldwork/investigation, and follow-up and analysis.<sup>103</sup> In their discussion of fieldwork/investigations, Schuler and Thomas explain that while “[t]he type of evidence to be gathered depends

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95. OFFICE FOR THE HIGH COMMISSIONER FOR HUMAN RIGHTS, FACT SHEET NO. 7/REV.1, COMPLAINT PROCEDURES, <http://www.unhchr.ch/html/menu6/2/fs7.htm>.

96. MERTUS ET AL., *supra* note 92, at 146.

97. KIM SLOTE ET AL., BATTERED MOTHERS SPEAK OUT: PARTICIPATORY HUMAN RIGHTS DOCUMENTATION AS A MODEL FOR RESEARCH AND ACTIVISM IN THE U.S. 13–14 (unpublished report on file with author).

98. *See generally* BEUTZ ET AL., *supra* note 91.

99. *See generally* Women in the Law Project, International Human Rights Law Group, *No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia*, 5 HASTINGS WOMEN’S L.J. 89 (1994).

100. *See generally* Sonali Kolhatkar, *The Impact of U.S. Intervention on Afghan Women’s Rights*, 17 BERKELEY WOMEN’S L.J. 12 (2002).

101. Okechukwu Oko, *Confronting Transgressions of Prior Military Regimes Towards a More Pragmatic Approach*, 11 CARDOZO J. INT’L & COMP. L. 89 (2003).

102. MERTUS ET AL., *supra* note 92.

103. *See* MERTUS ET AL., *supra* note 92, at 140–54.

on the investigation's objectives," collecting narratives is crucial.<sup>104</sup> They state, "[w]hatever the investigation's objective, the *testimony of the victims* of the abuse is very important."<sup>105</sup> Such testimony should be detailed and can be supplemented by the testimony of others with first-hand knowledge of the abuse being studied as well as secondary information from other sources.<sup>106</sup> Evidence should be collected from all sides to "assure[] balance and impartiality and provide[] a more thorough representation of what occurred."<sup>107</sup> Because "[t]he value of the evidence depends on its accuracy, reliability, and specificity," investigators should also seek to corroborate what they have learned through direct testimony; methods of corroboration include interviewing other witnesses or collecting similar complaints from other sources.<sup>108</sup>

### B. Battered Mothers Speak Out as Human Rights Investigation

While critics of *Battered Mothers Speak Out* doubt whether the use of human rights investigation was an appropriate framework for addressing a domestic issue, no one has questioned whether the authors of the study followed an established process for collecting narratives in such an investigation. The human rights community generally seems to agree that collecting the stories of victims is an acceptable, even essential, component of building a human rights documentation case; the value of those narratives as justification for policy change does not seem to spark the same academic debates as in the social science and legal worlds.<sup>109</sup> The process for collecting such narratives seems fairly uncontroversial as well; in fact, little has been written about how human rights documentation should be conducted (as opposed to why).<sup>110</sup>

The authors of *Battered Mothers Speak Out* adhered to the general principles set forth by Schuler and Thomas in *Women's Human Rights Step by Step*. They collected the stories of victims and made those stories the

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104. *Id.* at 146.

105. *Id.* (alterations in original).

106. *Id.*

107. *Id.* at 147.

108. *Id.*

109. International human rights lawyers I contacted saw the collection of victim stories as such a given in human rights investigations that they had not sought and could not come up with protocols for engaging in such work. E-mail from Sarah Paoletti, Practitioner-In-Residence, American University, Washington College of Law (Aug. 4, 2004) (on file with author). Kim Slote, one of the authors of the study, verified that they had a very difficult time finding such materials. E-mail from Kim Slote, Co-Founder and Former Co-Director, Women's Rights Network and the Battered Mother's Testimony Project (May 12, 2005) (on file with author).

110. See E-mail from Kim Slote, *supra* note 109.

focal point of their investigation.<sup>111</sup> They supplemented the stories with accounts of other first hand witnesses—advocates for battered women and their children.<sup>112</sup> Researchers also interviewed state actors, many of whom disagreed with the victims about the way in which the Massachusetts family courts operated;<sup>113</sup> including these perspectives allowed researchers to provide a more balanced account. Researchers sought to corroborate the victims' stories through the use of secondary documentation.<sup>114</sup>

The Battered Mothers' Testimony Project has been recognized as a model for conducting domestic human rights investigations. In its publication *Something Inside So Strong: A Resource Guide on Human Rights in the United States*, the Ford Foundation calls the Project a "case in point" for conducting human rights documentation in the United States.<sup>115</sup>

### C. Narratives and the Law

#### 1. The Role of Narratives in Legal Scholarship

While lawyers are, fundamentally, storytellers,<sup>116</sup> until recently legal scholarship did not embrace the use of narratives.<sup>117</sup> But as scholars examining issues of race,<sup>118</sup> gender,<sup>119</sup> poverty,<sup>120</sup> and sexual orientation<sup>121</sup>

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111. See BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 5.

112. SLOTE ET AL., *supra* note 97, at 16.

113. BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 24.

114. Lombardi, *supra* note 7.

115. CHO ET AL., *supra* note 89, at 49. Criticism from the human rights community centered not on the project's process, but on its aggressive stance. Mindy Roseman questioned whether the project would have done more good if it had "constructively engage[d]" the courts "rather than confront[ing] them." Mindy Roseman, *Beyond Name and Blame*, 2 HUM. RTS. DIALOGUE 10, ¶ 5 (Fall 2003), available at <http://www.cceia.org/viewMedia.php/prmTemplateID/8/prmID/1110>.

116. See John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85, 87–88 (1999).

117. As Binny Miller notes, Karl Llewellyn was emphasizing the importance of stories in his work in 1941. Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1 (2000). Miller distinguishes stories from narratives, however, explaining, "[a] story describes an account of a happening, while a narrative denotes a broader theme or meaning. Stories are the raw material of personal experience; narratives are a construction from those stories." *Id.*

118. See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

119. See generally Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).



have increasingly come to rely on their own stories, as well as the stories of clients and others, in their scholarship, a conversation about the worth of narrative legal scholarship has emerged.

Narratives in legal scholarship describe the experience of individuals and groups with the legal system and provide context for these experiences.<sup>122</sup> Using narratives in legal scholarship is appealing, in part, because it mirrors what lawyers do.<sup>123</sup> Proponents of narrative legal scholarship also stress how narratives bring the voices of those traditionally deprived of power within the legal system to the forefront.<sup>124</sup> Arguing that while it may appear neutral, the law itself is a story, structured around narratives developed by the powerful, proponents of narrative theory offer alternative narratives to illustrate the ways that the law excludes these voices and advocate for the need to reform the law to address “outsider” voices.<sup>125</sup> Narratives help to create common ground, allowing individuals to understand and empathize with the experiences of individuals and groups who are, or seem to be, different.<sup>126</sup> Narratives can bridge the gap between the abstractions of the law and the individual experiences of the humans involved in legal proceedings.<sup>127</sup> As in social science, narratives permit feminist scholars to challenge “the jurisprudential insistence on a fictional abstract discourse of

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120. See generally Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

121. See generally William N. Eskridge Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994); Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739 (1999).

122. Mitchell, *supra* note 116, at 88–89.

123. “In other corners of the legal world, we find tasks that immerse lawyers in the concrete, require us to be sensitive to the particularities of voice, demand that we find meaning in the nonlinear or ambiguous—require that we exercise, in short, many of the same skills necessary to comprehend legal narratives.” Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1043 (1991).

124. See generally *id.* (examining the use of narratives in feminist legal scholarship); Dana Raigrodski, *Breaking Out of “Custody”: A Feminist Voice in Constitutional Criminal Procedure*, 36 AM. CRIM. L. REV. 1301, 1310–11 (1999).

125. Abrams, *supra* note 123, at 984; Mitchell, *supra* note 116, at 96–97. Dana Raigrodski, looking at this issue from the feminist perspective, notes, “[t]o the extent that personal experiences may differ according to gender, these different ‘women’s’ experiences are often not accounted for within prevailing legal doctrines and discourses.” Raigrodski, *supra* note 124, at 1306.

126. See Mitchell, *supra* note 116, at 95–96; Murphy, *supra* note 9, at 1253. *But see* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 848–49 (1993) (arguing that people are unlikely to learn from stories that do not resonate with their own experiences).

127. See Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2105 (1989); Elizabeth J. Samuels, *Stories Out of School: Teaching the Case of Brown v. Voss*, 16 CARDOZO L. REV. 1445, 1446–48 (1995).

objectivity and reasonableness” resulting from the imposition of these “masculine values as the norm.”<sup>128</sup> Even critics of the use of narrative agree that narratives featuring these “stories from the bottom” have an important role to play in legal scholarship.<sup>129</sup>

## 2. Evaluating Legal Narratives

Critics of narrative scholarship have noted a number of concerns about this type of work: that the stories told by narrative scholars lack normative legal content; are not persuasive; are not trustworthy; are not typical; and curtail further discussion.<sup>130</sup> Even if the narratives are sufficiently “valid,” an additional concern arises about the quality of the scholarship itself.<sup>131</sup> Each of these concerns will be addressed in turn.<sup>132</sup>

Some critics contend that narratives lack normative legal content. This argument is generally framed in one of two ways: either the narrative fails to “shed[] . . . even descriptive light on a particular legal problem” or implicate a legal rule or the narrative does not “contribute to the formulation of a legal response” to the legal issue or problem identified in the narrative.<sup>133</sup> This concern about normative legal content is tied to the question of whether the narrative is (or can be) sufficiently persuasive to justify challenging or changing existing norms.<sup>134</sup> The persuasiveness of a

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128. Raigrodski, *supra* note 124, at 1324. Raigrodski argues further that employing narratives in judicial decision-making could create more just results, affirm the justice of the law for the public, and decrease stereotypical thinking about women. *Id.* at 1326–27.

129. Farber & Sherry, *supra* note 126, at 827–30.

130. Abrams, *supra* note 123, at 978–980.

131. Farber & Sherry, *supra* note 126, at 831.

132. The bulk of the critique of narrative legal scholarship discussed in this section comes from the Farber and Sherry piece *Telling Stories Out of School*. See Farber & Sherry, *supra* note 126. Defenders of narrative scholarship have questioned the legitimacy of the standards articulated by Farber and Sherry, and made powerful arguments that narrative scholars need not have their scholarship judged by those standards. See, e.g., Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994); see also Arthur Austin, *Evaluating Storytelling as a Type of Nontraditional Scholarship*, 74 NEB. L. REV. 479 (1995) (offering an alternative set of criteria for assessing the worth of narrative scholarship). While I agree with many of the arguments made in response to Farber and Sherry’s article, I have chosen to use their standards as the benchmark for measuring narrative scholarship precisely because they are the harshest critics; showing that BATTERED MOTHERS SPEAK OUT addresses their concerns bolsters the argument that gender bias, not bad scholarship, is the reason for the report’s rejection. See BATTERED MOTHERS SPEAK OUT, *supra* note 1.

133. Abrams, *supra* note 123, at 978.

134. *Id.*

narrative is, in turn, affected by whether the narrative is perceived as true, as typical, and whether the narrative can create understanding in a listener who has not shared the experience.<sup>135</sup>

For Daniel Farber and Suzanna Sherry, discovering and communicating “truths about the legal system” is the function of legal scholarship.<sup>136</sup> While narratives are an integral part of the legal system, critics note that the “truth” derived from competing narratives is generally established through the adversarial process.<sup>137</sup> Without a judicial declaration of “truth,” critics argue, the credibility of the narrative must be accepted on faith, a difficult task for readers whose experiences do not resonate with those described by the author.<sup>138</sup> A skeptical reader’s credulity may be further tested by the emotional content of some narratives; the discomfort of sharing personal revelations may lead readers “to discount, discredit, or otherwise distance themselves from such discussions.”<sup>139</sup> Moreover, critics argue that relying on readers to determine whether a story is truthful or not is problematic, given that social science research indicates that humans are poor judges of truthfulness.<sup>140</sup>

Even if a narrative is truthful, the critics contend, it should not serve as the basis for policy change unless it is also typical. The argument is that one person’s experience should not serve as the basis for change that affects many others, unless the experience related in the narrative is common to a

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135. *Id.* at 979–80.

136. Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dmitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647, 648 (1994).

137. Abrams, *supra* note 123. See Austin, *supra* note 132, at 525 (“[A]bsent a confession or a trial, it is impossible to determine truthfulness.”).

138. Abrams, *supra* note 123, at 978–80. As Farber and Sherry note, however, “[o]ne of the staples of feminist literature is that women’s assertions are treated as presumptively unreliable and lacking in credibility.” Farber & Sherry, *supra* note 126, at 834. Farber and Sherry discount this notion, arguing, “[i]t would be disastrous to reinforce the idea that women . . . do not adhere to the same standards of ‘truthfulness’ as white men.” *Id.* Farber and Sherry misstate the feminist position, however. The argument is not that women do not adhere to the same standards of truthfulness, but that despite adhering to those standards, women are nonetheless viewed as not being as truthful or credible. See *infra* Part V.

139. Abrams, *supra* note 123, at 979.

140. Farber & Sherry, *supra* note 126, at 837. Nonetheless, they state, “[w]e do not mean to assert that legal scholars should consider only evidence meeting formal social science standards.” *Id.* at 838. Abrams counters that argument by noting that in various other disciplines—like, as discussed earlier, social science—the notion that an objective truth exists is being challenged. In the law, as in social science, “the problems scholars choose to study and the methods by which they investigate and assess claims . . . are shaped by language, personal or cultural experience, historical context, or intellectual tradition.” Abrams, *supra* note 123, at 1014. While objectivity may remain the “dominant paradigm,” it is no longer the only means by which claims can be supported. *Id.* at 1015.

significant number of others.<sup>141</sup> Determining typicality can be as challenging as ascertaining truth; “people are too quick to assume the presence of a pattern from a small number of cases.”<sup>142</sup>

Finally, narrative scholarship must be good scholarship. Simply telling an evocative story is insufficient to constitute quality legal scholarship. As with social science research, that story must be tied to some kind of analysis to assure the reader both that the story is “credible and representative” and to place the story in the context of the wider legal debate with which the story is concerned.<sup>143</sup> As Farber and Sherry explain, “[a] legal story without analysis is much like a judicial opinion with ‘Findings of Fact’ but no ‘Conclusions of Law.’”<sup>144</sup>

### 3. *Battered Mothers Speak Out* as Legal Narrative

Determining whether *Battered Mothers Speak Out* constitutes sound legal scholarship according to the standards set forth by critics of narrative legal scholarship depends on the answers to the questions posed above. Do the narratives have normative legal content? Are they persuasive? Trustworthy? Typical? Analytical? Each of these questions is considered below.

Normative legal content refers both to the narrative’s ability to highlight a legal problem and to suggest a legal solution to that problem. Certainly *Battered Mothers Speak Out* meets both of those objectives. The report highlights the range of negative experiences battered mothers had with the family courts of Massachusetts<sup>145</sup> and suggests ways that family court personnel, judges, probation officers, *guardians ad litem* and others with roles in the functioning of the family court could address these problems.<sup>146</sup> While the changes recommended relate to process, rather than doctrine, they nonetheless require a legal system response and therefore have normative legal content.<sup>147</sup>

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141. Abrams, *supra* note 123, at 980; Farber & Sherry, *supra* note 126, at 838–39.

142. Farber & Sherry, *supra* note 126, at 839.

143. *Id.* at 852–54.

144. *Id.* at 854.

145. See generally BATTERED MOTHERS SPEAK OUT, *supra* note 1.

146. Recommendations were made for the courts, legislature, non-governmental organizations and the legal profession and included reforming the *guardian ad litem* system; training for family court personnel; practice standards for judges and probate probation officers; and administrative changes to enhance accountability of family court system actors. BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 74–83.

147. Doctrinal changes are largely unnecessary because adequate statutory and case law exists to protect battered mothers in Massachusetts, if that law is followed. The family court system’s failure to comply with existing state law is a mainstay of the report. *Id.* at 14.

Are the narratives contained in *Battered Mothers Speak Out* persuasive and trustworthy? These are harder questions to answer, partly because few have weighed in on these questions, and partly because answering those questions requires deciding whose observations to accept. The narratives seemed to resonate with the *Boston Globe*,<sup>148</sup> as well as with battered women's advocates throughout the country; the project has been or is being replicated in a number of other states.<sup>149</sup> Battered mothers identified with the stories, calling lead author Carrie Cuthbert to tell her, "[t]his is my story. Your project made me feel like I'm not alone."<sup>150</sup> Fathers' rights groups, however, disagreed, describing the report as "one-sided."<sup>151</sup> The court, too, tacitly challenged the veracity of the reports by suggesting the need for external validation of the claims.<sup>152</sup> Very little other documentation sharing perceptions of the narratives exists.<sup>153</sup> It is likely that most of the readers of the report were people with a stake in the debate, and their views are represented in the comments above.

Kathryn Abrams argues that individuals can determine the validity of narratives based on a number of factors:

[I]f I read the particularized accounts of each, and if I find that they have an acceptable degree of internal consistency, create a plausible account of a particular set of events, and do not seem suspicious in tone, I begin to have a belief that is not based on my own experiences . . . .

I believe [narratives], in other words, in the same way and for many of the same reasons that I would believe an effective witness in the courtroom.<sup>154</sup>

But Farber and Sherry contend that those standards (although largely the same as those relied upon by the Supreme Court) are not themselves trustworthy enough to employ.<sup>155</sup>

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148. See *Witnesses to Abuse*, *supra* note 4 and text accompanying note.

149. Silverman et al., *supra* note 74, at 955.

150. WELLESLEY CENTERS FOR WOMEN, *BATTERED MOTHERS FIGHT TO SURVIVE THE FAMILY COURT SYSTEM: RESEARCH AND ACTION REPORT* (Fall/Winter 2003), <http://www.wcwonline.org/o-rr25-1b.html>.

151. Wen, *supra* note 7, at B2.

152. *Id.*

153. In a heated listserv debate on the American Bar Association Center on Children and the Law's Child-DV listserv, battered women's advocates, custody evaluators, and others debated the merits of the report. While some of the debate had to do with these questions, the debate largely centered on the validity of the report as social science research. E-mails from Listserv on file with author.

154. Abrams, *supra* note 123, at 1002.

155. Farber & Sherry, *supra* note 126, at 836-37.

Ultimately, the problem with using the standards of persuasiveness and trustworthiness to evaluate narrative legal scholarship is that they are largely unattainable. The different life experiences, preferences, and biases that color narratives also color responses to narratives. As a result, few narratives will create the kind of consensus around persuasiveness and trustworthiness that critics of narrative scholarship would require, especially when those narratives involve subjects as emotional and hotly contested as domestic violence and child custody. It seems unreasonable, then, to judge the validity of the narratives found in *Battered Mothers Speak Out* by these standards.

Are these narratives typical? Farber and Sherry stress that “typicality is unrelated to any commitment to ‘objectivity’ as a philosophical position. Instead, we are merely asking, ‘If we checked with more people in the same situation, how many of them would tell similar stories?’”<sup>156</sup> The difficulty with this standard is defining the phrase “people in the same situation.” The responses from other battered mothers and advocates for battered women strongly suggest that these narratives are typical, so long as “other people in the same situation” is defined as “other battered mothers in the family court system.” If the definition is “other mothers in the family court system” or “other individuals in the family court system,” the answers would obviously be very different. Again, the subjectivity of the inquiry makes determining whether the standard has been attained almost impossible.

*Battered Mothers Speak Out* does contain the kind of analysis Farber and Sherry deem necessary for narrative scholarship to be “good” scholarship. The report ties the issues raised by the battered mothers in their narratives to provisions in international, federal, and state law and argues that state actors have violated these international norms, United States laws, and Massachusetts laws in the cases of these forty women. Whether the reader agrees with the argument is not dispositive under Farber and Sherry’s schema; the report provides the type of rigorous legal analysis—the conclusions of law to accompany the findings of fact—required for quality narrative legal scholarship.

*Battered Mothers Speak Out* falls squarely within the tradition of using narratives to make change in social science research, human rights investigation, and the law. The stories very clearly illustrate how the legal and human rights of the forty women interviewed were violated by the actions and inactions of various state actors.<sup>157</sup> The fact that narratives were

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156. *Id.* at 839.

157. Interestingly, a great deal of debate has centered on the validity of the claims that the report never makes, i.e., that a certain percentage of batterers is awarded custody inappropriately. These claims were part of the argument discussed previously. *See supra* note

used to illuminate the problems in the Massachusetts family courts should not have precluded state actors from crediting its allegations.

The problem with these narratives is not that they are the stories of individuals. Instead, their credibility is compromised by who is telling the stories—battered women. Women’s voices have historically been discounted by the legal system, and battered women are particularly suspect. The next section looks at the legacy of silenced women and gender bias in the courts to argue that the storytellers, not the stories themselves, were what kept *Battered Mothers Speak Out* from achieving the kind of policy change it should have prompted.

## V. NARRATIVE AND GENDER

The effectiveness of *Battered Mothers Speak Out* as an impetus for court change depends largely on whether the narratives of the forty battered mothers it contains are believed. The willingness to believe these stories is tied to assumptions about the credibility of women’s testimony. This section asks whether women’s stories—particularly battered women’s stories—are generally deemed credible by judges and other state actors, or, alternatively, whether women face an uphill battle in having their stories believed. Social science research and legal scholarship on the credibility of women, reinforced by reports studying gender bias in the courts in the 1980s and 1990s, suggest that the latter is true.

### A. Devaluing Women’s Stories

For women’s stories to be believed, they must first be heard. Elizabeth Schneider, building on the work of Carol Gilligan, has suggested that being heard is a two-step process.<sup>158</sup> Schneider explains:

The first stage is to recognize women’s different voice, or voices, and to make it possible for these voices to be heard. The second stage is to recognize all the ways women’s voices can be heard

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153 and text accompanying note. Carrie Cuthbert finds it ironic that father’s rights organizations have effectively advanced their agenda in terms of organizing, legislative change, and media attention, without any kind of empirical data (let alone methodologically rigorous studies) supporting their claims that fathers are denied equal access to their children. E-mail from Carrie Cuthbert, Co-Founder and Former Director, Women’s Rights Network and the Battered Mother’s Testimony Project (May 12, 2005) (on file with author).

158. ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 102–03 (2000).

and yet not *really* heard—to identify what I call the complexities of voice.<sup>159</sup>

While Schneider believes that women's voices are beginning to be incorporated into American law, those voices nonetheless "may not really be heard" for a number of reasons.<sup>160</sup>

Listeners may find it difficult to sort through the plurality of women's voices, as there is no singular "women's voice."<sup>161</sup> Moreover, the stories that battered women tell are stories of violence, from which men "disconnect" and women "dissociate;" "both responses might be understood as forms of denial."<sup>162</sup>

Gender bias further muffles the voices of women in the legal system. Bias against women continues to pervade American society<sup>163</sup> and the legal system is no exception.

"That women have voluntarily engaged law at all is a triumph of determination over experience. It has not been an act of faith."<sup>164</sup> Bias against women has long been an issue for courts, in part because women operate in a legal system developed by men, for men.<sup>165</sup> While women

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159. *Id.*; see also Elizabeth M. Schneider, *Hearing Women Not Being Heard: On Carol Gilligan's Getting Civilized and the Complexity of Voice*, 63 *FORDHAM L. REV.* 33 (1994).

160. SCHNEIDER, *supra* note 158, at 103.

161. *Id.*

162. *Id.*

163. See, e.g., Philip N. Cohen & Matt L. Huffman, *Individuals, Jobs and Labor Markets: The Devaluation of Women's Work*, 68 *AM. SOC. REV.* 443 (2003) (examining gender bias in employment); Diane E. Hoffmann & Anita J. Tarzian, *The Girl Who Cried Pain: A Bias Against Women in the Treatment of Pain*, 29 *J.L. MED. & ETHICS* 13, 21 (2001) (arguing that women's reports of pain are taken less seriously by doctors than men's); Bernice Lott, *The Devaluation of Women's Competence*, 41 *J. SOC. ISSUES* 43, 47–51 (1985) (outlining research on women's competence as measured through external evaluation); Theodore W. McDonald, Loren L. Toussaint & Jennifer A. Schweiger, *The Influence of Social Status on Token Women Leaders' Expectations About Leading Male-Dominated Groups*, 50 *SEX ROLES* 401, 402–03 (2004) (describing studies on women's lower social status); see also Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 *FAM. L.Q.* 247, 263 n.52 (1993) (citing gender bias studies); Lynn Hecht Schafran, *Gender Bias in the Courts: Time Is Not the Cure*, 22 *CREIGHTON L. REV.* 413, 416–17 (1988–89) (citing studies).

164. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1285 (1991).

165. As Catharine MacKinnon notes, "[n]o woman had a voice in the design of the legal institutions that rule the social order under which women, as well as men, live. Nor was the condition of women taken into account or the interest of women as a sex represented." *Id.* at 1281; see also SCHNEIDER, *supra* note 158, at 104–05; Christy Gleason, *Presence, Perspectives and Power: Gender and the Rationale Differences in the Debate Over the Violence Against Women Act*, 23 *WOMEN'S RTS. L. REP.* 1, 9 (2001) (describing the judiciary as "an institution steeped in male tradition and dominated by male perspectives on the bench and in chambers . . ."); Regina Graycar, *The Gender of Judgments: Some Reflections on "Bias,"* 32 *U. B.C. L. REV.*



involved with the courts are devalued<sup>166</sup> in any number of ways, one crucial manifestation of this bias is the tendency of legal system actors to doubt women's credibility.<sup>167</sup> Studies of jurors reveal the belief that women are "less rational, less trustworthy, and more likely to exaggerate than men."<sup>168</sup> These doubts about credibility stem from the prevailing consensus of how a credible witness sounds: "like a man."<sup>169</sup> Judges may even require more evidence from women than men to prove the same claims.<sup>170</sup> Questions about women's truthfulness have long been raised in the context of rape and sexual assault;<sup>171</sup> such doubts now surface in cases where women allege

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1, 4 (1998) (arguing that if "'gender' [is] when something is done by or pertains to women, and 'bias' connotes deviation from a norm that is never articulated, but is in fact a white, male norm, then a case can be made for the proposition that judging is, or is perceived as, a white male activity.").

166. Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 755–56 (2001) (describing devaluing as "bias that may or may not be legally prohibited."). Devaluing "operates to affix a 'gender' or 'race' to a neutral activity or category and simultaneously to place it on a hierarchy of value"-- for example, women's credibility or women's testimony. *Id.* at 772. One notable feature of devaluation is that it is "masked," making it difficult to determine whether it is operating within the system. *Id.* at 774–75.

167. Lynn Hecht Schafran suggests that there are three forms of credibility: collective credibility, or credibility resulting from membership in a group; contextual credibility, or credibility which depends on an understanding of the context of the claim; and consequential credibility, or being taken seriously, especially having harms done to you taken seriously. Lynn Hecht Schafran, *Credibility in the Courts: Why Is There a Gender Gap?*, in *SUBTLE SEXISM: CURRENT PRACTICE AND PROSPECTS FOR CHANGE* 216–225 (Nijole V. Benokraitis ed., 1997). Schafran argues that women lack all three forms of credibility in the legal system. *Id.*; see also Kathy Mack, *Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process*, 4 CRIM. L.F. 327, 332 (1993).

168. Linell A. Letendre, Comment, *Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 WASH. L. REV. 973, 981 (2000) (citations omitted).

169. Women are more likely to exhibit speech features associated with powerlessness (high pitch, frequent smiling, less numerical specificity) and speak hesitantly, even if certain, while men are more likely to use more numerical specificity, although less accurately, and to speak confidently even if unsure or wrong. Judges may be more likely to ascribe blame to a person using a powerless speech style. Mack, *supra* note 167, at 330–31.

170. Karen Czapanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1, 4 (1990) (citing Maryland's gender bias study).

171. See, e.g., Brief of Petitioner: Brzonkala v. Morrison; U.S. v. Morrison, 9 S. CAL. REV. L. & WOMEN'S STUD. 315, 334–35 (2000) (describing how judges and other state actors subject rape victims to excessive scrutiny, casting doubt on their credibility) (citations omitted); Jan Jordan, *Beyond Belief? Police, rape and women's credibility*, 4 CRIM. JUSTICE 29, 30–31 (discussing how women's credibility is doubted by police and judges in rape cases). See generally Mack, *supra* note 167, at 332–38. These questions persist even in the absence of studies confirming that women lie about rape more frequently than other victims lie about other crimes. See, e.g., State v. Guenther, 854 A.2d 308 (N.J. 2004); Susan Estrich, *Palm Beach Stories*, 11 L. & PHIL. 5, 13 (1992).

other forms of injury, like sexual harassment or sex-based discrimination.<sup>172</sup> The wishes expressed by women in right-to-die cases are routinely discounted, while those of men are respected.<sup>173</sup> The stories of women of color have been subject to especially harsh scrutiny.<sup>174</sup> So have the stories of battered women.

Battered mothers confront the same skepticism about their credibility as other women, but their testimony is further shadowed by myths and stereotypes about victims of domestic violence.<sup>175</sup> Because stories about

172. The Honorable Diane Wood explained why who makes credibility determinations is important, stating:

[A]ll cases begin with a story: a story told by the potential plaintiff about something that happened to her that she believes may have violated her legal rights. Who hears those stories? Who believes them? What difference does it make if someone thinks they are plausible or not? On what will the listener draw in making that crucial initial determination? . . . Who created that law, which I remind you must be followed under the principles of *stare decisis*? In a word, men. Now you well might ask—indeed, you have an obligation to ask—why that should make any difference . . . [T]here is still an experiential gap between the finest man and the average woman when it comes to sex discrimination. [This gap] has an impact on a trial judge's assessment of a record . . ."

Diane P. Wood, *Sex Discrimination in Life and Law*, 1999 U. CHI. LEGAL F. 1, 4–5 (1999). Judge Wood concludes that “these stories are still falling on deaf, or partially deaf, ears.” *Id.*

173. Ronald L. Ellis & Lynn Hecht Schafran, *Achieving Race and Gender Fairness in the Courtroom*, in THE JUDGE'S BOOK 91, 110 (2d ed. 1994) [hereinafter THE JUDGE'S BOOK] (citing study on decision-making in right-to-die cases where no living will exists). *The Judge's Book* concludes about the findings of that study, “[i]n other words, men are rational, independent beings whose moral agency must be respected even when they become incompetent, but women are only children.” *Id.*

174. See, e.g., Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, Remarks before the National Forum for Women State Legislators (Nov. 15, 1991), in 65 S. CAL. L. REV. 1467, 1470 (1992) (describing how perceptions of black women's chastity affect their credibility); THE JUDGE'S BOOK, *supra* note 173, at 113 (discussing bias against black victims of domestic violence). See generally Maria L. Ontiveros, *Rosa Lopez, David Letterman, Christopher Darden, and Me: Issues of Gender, Ethnicity, and Class in Evaluating Witness Credibility*, 6 HASTINGS WOMEN'S L.J. 135 (1995) (examining how the failure to understand class, race, and gender issues affected determinations of a witness's credibility).

175. Studies show that:

[J]urors construct stories based on the evidence presented and the jurors' own life experiences . . . [J]urors may 'fill in the blanks' of the story, consciously or unconsciously, based on their own life experiences . . . Thus, if jurors accept the commonly held myths about domestic violence and the defense further reinforces these misconceptions at trial, they may 'fill in the blanks' with an unrealistic view of the violent relationship, and their evaluation of the evidence may be based on misconceptions and prejudices unsupported by scientific research.

Carolyn Copps Hartley, *“He Said, She Said”*: *The Defense Attack of Credibility in Domestic Violence Felony Trials*, 7 VIOLENCE AGAINST WOMEN 510, 539 (2001) (citations omitted). Judges are likely subject to the same thought processes. In fact, *The Judge's Book* warns,

domestic violence “often appear to judges as problems relating to personality flaws, relationships gone bad, anger and jealousy,” and therefore as deviations by both parties from the standards of acceptable behavior between intimate partners, judges can more easily discount the credibility of the women telling the stories.<sup>176</sup> Battered women frequently respond to violence in ways that are suspect to those who place their faith in the legal system: refusing to turn to police and courts,<sup>177</sup> delaying the telling of their stories, minimizing or underestimating harms, and revising stories as they recover from the abuse.<sup>178</sup> Moreover, judges who lack experience with domestic violence may rely on courthouse assumptions about the dubious legitimacy of such claims and the pretextual reasons women have for filing them.<sup>179</sup> Judges question the ulterior motives of women bringing domestic violence claims—“they are often considered manipulators and liars intent on using the court to achieve some wrongful purpose, such as revenge or advantage in a divorce case”—further calling their credibility into doubt.<sup>180</sup>

*Battered Mothers Speak Out* documents how state actors question the truthfulness of battered mothers’ allegations of abuse in the context of

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“Judges should be careful not to project their own powerful positions in life onto battered women and assess or direct these women’s actions in the context of their own vastly different life situations.” THE JUDGE’S BOOK, *supra* note 173, at 111.

176. Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between “The Truly National and the Truly Local,”* 42 B.C. L. REV. 1081, 1116 (2001); *see also* Susan Scott, Judge, Super. Ct. of N.J., Panel Discussion: Advocating for Victims of Domestic Violence (Oct. 7, 1998), in 20 WOMEN’S RTS. L. REP. 73, 76–77 (1999). This particular judge had difficulty discerning which claims were true because the “word around the underground” was that domestic violence claims were being fabricated to evict men from their homes. *Id.* at 76. The judge noted a recent case in which a judge denied a restraining order, finding “on the basis of the record, it seemed like the allegations were fabricated,” only to have the abuser kill his victim and himself shortly thereafter. *Id.* at 77.

177. For reasons why battered women might avoid the legal system, see generally 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 (2004).

178. SCHNEIDER, *supra* note 158, at 106–07. One study of simulated sexual harassment trials suggests that women are deemed most credible when they are emotional and their harassers are not; when both the victim and perpetrator are emotional, the credibility of the victim declined. Margaret Gibbs et al., *Factors Affecting Credibility in a Simulated Sexual Harassment Hearing*, 1 VIOLENCE AGAINST WOMEN 366, 376 (1995).

179. Weissman, *supra* note 176, at 1120–22; *see also* Graycar, *supra* note 165, at 14–16 (arguing that courts use the concept of judicial notice to “incorporate into their judgments commonsense ideas about the world, common assumptions or, indeed, widely held misconceptions” and asking “whose knowledge ‘common knowledge’ is and whose version of reality has authority.”)

180. Weissman, *supra* note 176, at 1122.

custody decision-making.<sup>181</sup> The report's finding that actors in the Massachusetts family courts believe that women fabricate claims of abuse is consistent with other discussions on the perceived credibility of battered women. In fact, judges are often skeptical—and encouraged to be skeptical—of battered women's claims,<sup>182</sup> particularly when custody is at issue. As Martha Fineman notes in her discussion of the National Interdisciplinary Colloquium on Child Custody's *Legal and Mental Health Perspectives on Child Custody Law: A Deskbook for Judges* (the "Deskbook"):

[T]he *Deskbook for Judges* appears to anticipate that disbelief is to be not only expected but also encouraged as the initial judicial response. The *Deskbook's* chapter on domestic violence devotes an entire section (one out of only five in total) to credibility. Titled 'Problems of Proof; Determining Credibility,' the section begins with the statement of 'common knowledge that, for a variety of reasons, psychological as well as familial, determining the truth when allegations of domestic violence emerge is a difficult business.'<sup>183</sup>

The *Deskbook* admonishes judges not to allow abusive spouses to offer excuses for their conduct, but also instructs them to take a "similarly firm stance" against parents who complain of "common (if hardly exemplary) behavior" or who make false claims of abuse.<sup>184</sup> Fineman asks, "[w]hat are judges to make of this series of statements, particularly since actual violence is equated with exaggeration and misrepresentation of violence for purposes of provoking judicial wrath?"<sup>185</sup> Fineman concludes:

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181. BATTERED MOTHERS SPEAK OUT, *supra* note 1, at 41. Joan Meier argues that this skepticism makes any claim of judicial neutrality inherently suspect; "those who are predisposed to believe that women often fabricate or exaggerate domestic violence allegations are likely to be harder to persuade of the truth of such allegations, than those who are predisposed to believe that men frequently beat women." Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 682 (2003).

182. Social science research has found that men and women perceive domestic violence differently: "[w]hat some men may see as normal and ordinary behavior, many women consider potentially violent." Renee L. Jarusinsky, *Gender Difference in Perceiving Violence and Its Implication for the VAWA's Civil Rights Remedy*, 27 FORDHAM URB. L.J. 965, 984–85 (2000) (citing Russell P. Dobash et al., *Separate and Intersecting Realities: A Comparison of Men's and Women's Accounts of Violence Against Women*, 4 VIOLENCE AGAINST WOMEN 382 (1998)). This "gender gap" in perception necessarily colors the way in which a legal system constructed on the male experience looks at claims of domestic violence.

183. Martha Albertson Fineman, *Domestic Violence, Custody, and Visitation*, 36 FAM. L.Q. 211, 212, 218–19 (2002) (citations omitted).

184. *Id.*

185. *Id.* Fineman further notes that the *Deskbook* treats acts of violence as less serious when they "arise in the context of divorce in marriages without a long-standing history of prior

The *Deskbook* suggests that judges look for collaboration from other credible witnesses or police reports or else reasons why a woman did not complain earlier. The inference is that many women are likely to lie or exaggerate about the men with whom they find themselves entangled within the legal system . . . . The commentary and approach of the *Deskbook* is couched in the belief that men need protection from the lies of women, who are vindictive and unscrupulous and who will say and do anything at the expense of their children.<sup>186</sup>

Encouraging judges and other state actors to be skeptical of claims of domestic violence creates a Catch-22 for a battered mother: if she doesn't raise the issue, the court has no context for considering her actions and her reluctance to permit unsupervised visitation or share custody with her former partner. If she discloses the abuse, the attitudes of judges and others make it:

highly unusual for a battered woman in private litigation to be recognized by a court to be sincerely advocating for her children's safety. Rather, her very status as a litigant, a mother, and battered, seems to ensure that she will be viewed as, at best, merely self-interested, and at worst, not credible.<sup>187</sup>

Given the skepticism with which judges approach individual litigants' claims of domestic violence, it is hardly surprising that the collective stories in *Battered Mothers Speak Out* were dismissed by the Massachusetts judges.

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incidents," which ignores the frequency with which separation triggers domestic violence. *Id.* at 220.

186. *Id.* at 222–23. These inferences are made despite the understanding of professionals working with domestic violence victims that women are actually reluctant to disclose abuse to legal system professionals, particularly in custody cases, because of fear of both the abuser and the system's perception of women who make such claims. *Id.* at 218; *see also* Meier, *supra* note 181, at 684. This skepticism about battered women's claims, Meier notes, is exacerbated because "common assumptions about witness credibility backfire when applied to victims and perpetrators of domestic violence." *Id.* at 690. Battered women often appear angry or emotional or display inappropriate affect (a symptom of post-traumatic-stress disorder); judges and evaluators may be more inclined to believe the calm, charming, and vehement denials of the abuser instead. *Id.* at 690–92. Judges who lack an understanding of domestic violence may have difficulty squaring the picture of the composed and persuasive litigant before them with the abusive father described by the battered woman. As the California Judicial Council Advisory Committee on Gender Bias in the Courts noted in the context of child sexual abuse allegations, "it is much easier and more in accordance with our images of the world to regard a mother as crazy or hysterical than to recognize an otherwise seemingly rational and caring father as capable of the behaviors described." THE JUDGE'S BOOK, *supra* note 173, at 123–24 (citations omitted).

187. Meier, *supra* note 181, at 686.

## VI. GENDER BIAS STUDIES

Gender bias<sup>188</sup> lurks in the shadows of the legal landscape confronting battered mothers. The limited acknowledgment of the existence of gender bias in the courts is directly attributable to the work of the gender bias task forces formed in thirty-nine states and a number of federal circuits in the 1980s and 1990s.<sup>189</sup> Not surprisingly, one of the major findings of the gender bias task forces was “that state court systems are seriously compromised by gender bias, and most frequently and dramatically, the victims are women”<sup>190</sup>—particularly battered women. Jeanette Swent summarizes the reports as follows: “[w]omen receive unfavorable substantive outcomes in cases because of their gender, and men do not. Women’s complaints are trivialized and their circumstances misconstrued more often than men’s, and women more often than men are victims of demeaning and openly hostile behavior in court proceedings.”<sup>191</sup>

Both the federal and state task forces found that the credibility of women litigants was regularly questioned.<sup>192</sup> In the Ninth Circuit, questions about women’s credibility arose in the context of Social Security disability cases.<sup>193</sup> Both male and female claimant representatives reported that women’s disability claims were less likely to be believed than men’s.<sup>194</sup> Women’s claims were more often seen as “complaints about life” than “legally-cognizable harms.”<sup>195</sup> New York’s task force stated, “[j]udges, attorneys and court personnel do not give as much credibility to women as to men, and perceive women as acting differently from men.”<sup>196</sup> Missouri and Georgia’s task forces acknowledged the body of social science

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188. While the task forces looked at bias against both men and women, “‘women’ are the relevant category . . . in much of the work of Gender Bias Task Forces. Officially, court-based task forces embrace concerns about discrimination against anyone based on gender. In practice, ‘gender-bias’ task forces inquire principally about and document discrimination against women in the legal system.” Judith Resnik, “*Naturally*” *Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1691–92 (1991).

189. Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity?*, 32 IND. L. REV. 1167, 1168–70 (1999) (providing the history of the task force movement).

190. Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN’S STUD. 1, 34 (1996).

191. *Id.* at 55.

192. *Id.* at 61.

193. Ninth Circuit Task Force on Gender Bias, *Report of the Ninth Circuit Gender Bias Task Force: Executive Summary of the Preliminary Report of the Ninth Circuit Task Force on Gender Bias*, 45 STAN. L. REV. 2153, 2168 (1993).

194. *Id.*

195. *Id.* at 2173.

196. See Unified Court System of the State of New York, *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 11, 31–35 (1986).

literature suggesting that women are perceived as less credible; Missouri's report notes that male and female attorneys disagreed as to whether judges found male witnesses more credible than females.<sup>197</sup>

Some state reports specifically addressed credibility in the context of domestic violence cases. Karen Czapanskiy notes that although every gender bias study found women litigants were treated as less credible than men, "[t]he problem seems particularly acute when the issue is a woman's accusation that a man has been violent toward her."<sup>198</sup> Jeannette Swent's analysis of the gender bias task force reports suggests that a victim of domestic violence may "find[] her toughest adversary on the judicial bench."<sup>199</sup> In Virginia, "female family law attorneys, female prosecutors and those who provide services to victims of family abuse believe that judges do not know enough about the dynamics of family abuse" and minimize the claims of victims both in the context of protection order and custody cases.<sup>200</sup> Missouri's report documented how victims of domestic violence felt the merits of their claims were ignored. These victims felt disbelieved, blamed, and belittled by the questions asked by judges and the perception of other system actors that women were misusing the protective order process to "harass men or to obtain an advantage in domestic relations proceedings," despite the absence of any evidence to support that contention.<sup>201</sup> Missouri's report admonishes, "[c]oncern for system abuse should not cause judges to overlook the fact that, in a violent relationship,

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197. Missouri Task Force on Gender and Justice, *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 641–42 (1993). This difference in perception may be based on the different experiences of men and women, or on different interpretations of those experiences. Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2206 (1993).

198. Czapanskiy, *supra* note 170, at 253–54.

199. Swent, *supra* note 190, at 58.

200. Gender Bias in the Courts Task Force, *Gender Bias in the Courts of the Commonwealth Final Report*, 7 WM. & MARY J. WOMEN & L. 705, 750–54 (2001). More than 70% of female attorneys and almost 70% of service providers surveyed said that judges in Virginia handling domestic violence cases were "almost never, rarely, or only sometimes knowledgeable" about their dynamics. Philip Trompeter, *Gender Bias Task Force: Comments on Family Law Issues*, 58 WASH. & LEE L. REV. 1089, 1090 (2001). The report tells the story of a woman who requested protection from the local magistrate, who told her, "[l]ittle girl . . . you don't really want to do anything to your husband. I'm not going to do anything. I want you to just go and drive around for awhile. He's sure to cool down." Gender Bias in the Courts Task Force, *supra* at 753.

201. The Missouri Task Force on Gender and Justice, *supra* note 197, at 504–06, 519–20. The Task Force noted the conclusion of the Maryland Task Force Report that "[f]ar from overusing, abusing and manipulating the court system, women are, by and large, intimidated by the system and are underutilizing it in vast numbers." *Id.* at 522 (citing GENDER BIAS IN THE COURTS: REPORT OF THE MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS 3 (1989)).

the filing of a divorce action can trigger additional violence.”<sup>202</sup> In Maryland, the task force heard how a judge’s inability to connect his own experience to that of a battered woman led him to deny the woman a protective order despite her allegation that her husband had threatened her with a gun:

[The judge] took a few minutes to decide on the matter and he looked at me and he said, “I don’t believe anything that you’re saying . . . . The reason I don’t believe it is because I don’t believe that anything like this could happen to me . . . . Therefore, since I would not let that happen to me, I can’t believe that it happened to you.”<sup>203</sup>

Responses to the gender bias task forces were mixed. The studies made some professionals uncomfortable and others angry. As the Ninth Circuit’s Task Force on Gender Bias noted:

Many men and women share a feeling that these issues are close, and sometimes too close for comfort. While much of our other work at some level implicates one personally, questions of gender are so plainly about ourselves, about the construction of our lives and our relationships, that the protective veneer of professionalism often fades. In practical terms, this proximity translates into a reticence, a nervousness, and sometimes even a hostility to approaching the issues raised here.<sup>204</sup>

When Karen Czapanskiy presented her study of the gender bias task forces, she noted that “a number of the comments fell into two categories: I don’t believe you because your numbers are inconsistent with my experience, or I don’t believe you because your experience is inconsistent with what I think the numbers are.”<sup>205</sup>

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202. *Id.* at 525.

203. MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS, GENDER BIAS IN THE COURTS: REPORT OF THE MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS 2–3 (1989). The woman described her reaction to the experience; “to sit up in court and make myself open up and recount all my feelings and fear and then have it thrown back in my face as being totally untrue just because this big man would not allow anyone to do this to him, placed me in a state of shock which probably hasn’t left me yet.” *Id.* at 3. *See also* Czapanskiy; *supra* note 170, at 255 (quoting a Florida lawyer who was told by a judge that he and his client were “overreacting”; a day later, the client’s husband tied the woman up, locked her in a room, threatened to kill her, and then killed himself outside her door). While the task force reports certainly prompted change, recent commentators note that much progress is still needed. *See infra* note 212, at 745.

204. Ninth Circuit Task Force on Gender Bias, *supra* note 193, at 2175.

205. Czapanskiy, *supra* note 170, at 248.



Some of the comments, however, hinged on the methodology that the studies had used to reach their conclusions of widespread gender bias in the courts. The task forces used a variety of methods to collect data on gender bias;<sup>206</sup> collecting the narratives of those who had experienced gender bias (mainly women) was one of the primary methods used.<sup>207</sup> Hearing the women's stories helped task force members to understand the challenges women faced in engaging the courts and enhanced the credibility of the victims.<sup>208</sup> And while "a particular story might be unverifiable, masses of consistent testimony gathered from a variety of sources and using various research methods persuaded members that gender bias did infect the courts."<sup>209</sup> The task forces debated how to present their findings. Early task forces worried that their conclusions and recommendations could not be sufficiently bolstered by the stories of women alleging gender bias; later task forces relied more heavily on the voices of those who testified to give their reports "life" and "passion."<sup>210</sup> Such attention to information gathering techniques and presentation did not impress everyone, however. Applauding a decision to deny further federal funding to gender bias studies, Senator Orrin Hatch called the studies "ill-conceived, deeply flawed and divisive . . . methodologically biased and flawed"<sup>211</sup>—ironically, the same charges leveled against *Battered Mothers Speak Out*.

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206. As Barbara Babcock noted, "[t]he mixture of quantitative data and experiential testimony that has been a fixture of task force reports is the lawyer's form of consciousness-raising, the recounting of individual stories is the paradigmatic feminist method." Barbara Allen Babcock, *Introduction: Gender Bias in the Courts and Civic and Legal Education*, 45 STAN. L. REV. 2143, 2148 (1993).

207. Some questioned the use of narratives not because of their reliability, but because of the strain placed on those testifying. The Honorable Philip Trumpeter wrote:

I recall a woman who was scheduled to speak at the public hearing in Roanoke, but because she was so intimidated by the tone of the participants, mostly fathers who were very strident at that hearing, she did not testify. She testified a few days later, traveling a good distance to a hearing in Abingdon, in which I participated. She delayed her testimony because she just did not feel comfortable. I simply do not feel that any adult should be expected to bear his or her soul or suffer embarrassment by speaking about a highly personal and possibly traumatic life experience in front of a group of strangers . . . . [A]lthough I support the methodology and I would not have changed it, I did not feel that the public hearings were that beneficial in this area.

Trumpeter, *supra* note 200, at 1094. *But see* Massoud, *supra* note 5, at 30–32 (arguing that women are empowered by the opportunity to tell their stories publicly).

208. *See* Swent, *supra* note 190, at 46–47.

209. *Id.* at 47.

210. *Id.* at 63–64.

211. 141 CONG. REC. S14, 691–92 (Sept. 29, 1995) (*quoted in* Swent, *supra* note 190, at 3.)

Massachusetts' task force made findings similar to those of other states. The Gender Bias Study Committee:

found gender bias to be in operation when decisions made or actions taken were based on preconceived or stereotypical notions about the nature, role, or capacity of men and women. We observed the effect of myths and misconceptions about the economic and social realities of men's and women's lives and about the relative value of their work.<sup>212</sup>

Specifically, the study found that "female litigants . . . are faced with unnecessary and unacceptable obstacles that can be explained only in terms of their gender."<sup>213</sup> Such gender-biased treatment of female litigants "undermines credibility and confidence and thereby places unwarranted burdens" on them.<sup>214</sup> The gender bias in the Massachusetts courts "weaken[s] female litigants' testimony. When women . . . are denied credibility because of their gender, the courts are seriously impaired in their ability to deliver justice to anyone in our society."<sup>215</sup> The issue of credibility is of particular concern in the context of domestic violence. The Gender Bias Study Committee explained, "[t]he tendency to doubt the testimony of domestic violence victims and to 'blame' them for their predicament not only hampers the court's ability to provide victims with the protection they deserve, it also has a chilling effect on victims' willingness to seek relief."<sup>216</sup> A sizeable number of judges believed that female victims were deemed less credible in cases of domestic violence and sexual assault.<sup>217</sup> The Committee found that victims were asked what they had done to deserve the abuse, why they were seeking protection in the absence of physical injuries, why they waited to seek relief from the courts, and why

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212. Gender Bias Study Committee, Massachusetts Supreme Judicial Court, *Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745, 745 (1990).

213. *Id.* at 757.

214. Gender Bias Study Committee, Supreme Judicial Court of Massachusetts, *Report of the Gender Bias Study of the Supreme Judicial Court*, 23 SUFFOLK. U. L. REV. 575, 635 (1989).

215. Gender Bias Study Committee, *supra* note 212, at 758. The study found that 14% of judges, 20% of counsel and 14% of court employees had observed the statements of female victims, litigants, or witnesses being given less weight than those of similarly situated men. Gender Bias Study Committee, *supra* note 214, at 669.

216. Gender Bias Study Committee, *supra* note 214, at 585–86. One Massachusetts judge, who subsequently retired, unabashedly told the press that he doubted the credibility of women who filed for protective orders. *Id.* at 594. Another yelled at women seeking restraining orders, "[y]ou are worse than my wife," and refused to allow female victims to fully testify, making decisions without hearing their stories. *Id.* at 662.

217. *Id.* at 670. A smaller number of judges responded that women's testimony is given less credibility than men's regardless of the type of case. *Id.*

they were bothering the courts with their problems.<sup>218</sup> The study also found that judges and family service officers were not adequately considering violence against women in making custody decisions,<sup>219</sup> and that a majority of judges believed that “[m]others allege child sexual abuse to gain a bargaining advantage in the divorce process.”<sup>220</sup> The study made a number of recommendations to address these findings of bias against women in the Massachusetts courts.<sup>221</sup>

The Massachusetts Committee for Gender Equality, charged with implementing the task force recommendations, created a widely praised eight-page brochure containing rules for avoiding gender bias.<sup>222</sup> But as Jeannette Swent notes, the simplicity of the product “is also its downfall. While the pamphlet may reduce the number of ‘honey’ stories, it will not produce meaningful insight into how gender bias works. Neither will it discourage anything more subtle than a pat on the fanny in open court.”<sup>223</sup> The stories of the women in *Battered Mothers Speak Out* bear out Swent’s prediction.

While some progress has been made since the gender bias task force reports were issued, a follow-up study in Maryland revealed that “‘no group perceives gender . . . bias as non-existent or even close to non-existent’ . . . . Gender problems persist in the treatment of domestic violence victims and the application of laws.”<sup>224</sup> *Battered Mothers Speak Out* verifies that the gender bias identified by the Massachusetts Supreme Judicial Court in 1990 continues to exist in Massachusetts as well, particularly for battered mothers seeking custody of their children. In the face of gender bias, questions about women’s credibility, and the legacy of skepticism about battered women’s claims, it is hardly surprising that the narratives contained in the report

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218. *Id.* at 602.

219. *Id.* at 599. The Committee recommended the passage of legislation to “provide guidance to the probate courts on how to consider the existence of serious or repeated spousal abuse when making orders for the custody and visitation of children.” *Id.* Massachusetts subsequently enacted such legislation, but how effective that legislation has been in Massachusetts or the other states that have adopted it is subject to debate. See Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do For Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 254–75 (1999); see generally Nancy K. D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601 (2001).

220. Gender Bias Study Committee, *supra* note 212, at 843.

221. *Id.* at 849–50

222. Swent, *supra* note 190, at 74.

223. *Id.*

224. Janet Stidman Eveleth, *Strides in Gender Equality*, XXXV MD. BAR JOURNAL 51, 52–53 (2002).

failed to sway state actors in Massachusetts.<sup>225</sup> Given the difficulties in making battered women's stories audible to decision-makers, should the authors of *Battered Mothers Speak Out* have chosen a different method to document the human rights abuses they found? The next section considers that question.

## VII. WHO (OR WHAT) SHOULD TELL THE STORY?

The credibility of women, particularly battered women, in the courts is so compromised that using the narratives of battered women to convince state actors that change in the courts is needed may be a futile endeavor. How, then, can those seeking change convince those in power that change is needed? Should battered women's stories be told in the third person, rather than the first? Should the experiences of battered women be conveyed by statistics, rather than words? Both of those approaches are considered below.

### A. *Third Person Narratives: Court Watch*

One method that investigators working on *Battered Mothers Speak Out* used to verify the claims of their subjects was to attend hearings with the battered mothers and document what they saw and heard.<sup>226</sup> Volunteers and professionals in a number of states have performed similar services through court monitoring projects.<sup>227</sup> Court monitoring, or court watch, programs "help the system reach its potential by identifying flaws, recommending solutions, and advocating for change" based on the cases that court monitors observe.<sup>228</sup> Court watch programs also help communities enhance

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225. Even the credentials of the investigators, many of whom graduated from and worked at elite institutions, and the respect in Massachusetts for the organization that sponsored the report, Wellesley Centers for Women, were insufficient to trump the suspicion with which battered women are heard. E-mail from Carrie Cuthbert, Co-Founder and Former Director, Women's Rights Network and the Battered Mother's Testimony Project (May 12, 2005) (on file with author).

226. See generally BATTERED MOTHERS SPEAK OUT, *supra* note 1.

227. See, e.g., *infra* note 228.

228. WATCH, *Developing a Court Monitoring Program*, <http://www.watchmn.org/pdfs/order-form.pdf>; see also Bergen County Commission on the Status of Women, *Community Court Watch II: A Study of Bergen County Family Court System and the Enforcement of the State of New Jersey Prevention of Domestic Violence Act*, 17 WOMEN'S RTS. L. REP. 79, 82 (1995) ("Above all things, the Community Court Watch Project is an instrument of change. Observation, recommendation and action have been blended together to impact positively the way in which domestic violence cases are addressed in court.").

their understanding of the court process. As one court watch participant explains,

The courts exist on behalf of the community, but the community is not educated enough to know what is going on, nor are they in a position to be able to tell the courts what they think they ought to be doing . . . . [O]ur calling is to be able to bring back to the community as a whole, anecdotal information; here is what is happening in the courts, these are the kinds of sentences that people are getting, this is the way judges are treating victims, this is the way judges are treating perpetrators.<sup>229</sup>

When state actors are skeptical about reports coming from those who use the courts, “a ‘court watch’ program may provide the necessary documentation of dubious behavior” and give judges the impetus to change their ways.<sup>230</sup> “Court watch” programs can also help to dispel myths about the way litigants use the court process.<sup>231</sup>

Judges are acutely aware of the scrutiny of those who report on the proceedings in their courtrooms.<sup>232</sup> In one infamous Maryland domestic violence case, the judge noted that “because no one was present from the victim’s family or a victim’s advocacy group, he could sentence ‘in anonymity.’”<sup>233</sup> He also alluded to the influence that Mothers Against Drunk Driving has had in pressuring judges to sentence drunk drivers severely.<sup>234</sup> His comments imply that had someone been watching him when he considered the case of a man who pled guilty to voluntary manslaughter for shooting his wife in the head with a hunting rifle after finding her with

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229. Symposium, *Panel Discussion: Morning Session*, 23 N. ILL. U. L. REV. 439, 455 (2003) (comments of Pam Wiseman, Executive Director, Safe Passage Shelter, DeKalb, Illinois).

230. Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L.Q. 719, 739–40 (1999) (describing the success of a court watch conducted by women in a small fishing village in Alaska after a judge refused to take abuse against one woman’s granddaughter seriously); see also *System Shouldn’t Victimize Battered, Too*, LANSING ST. J., May 20, 2004, at 15A (describing how Ingham County’s court watch program has increased awareness of legal system actors).

231. See Bergen County Commission on the Status of Women, *supra* note 228, at 83, 87 (arguing that court watch findings that only 11-16% of women seeking protective orders had pending divorces dispelled myth that women used protective order process to bolster settlements and custody claims in divorces).

232. Court watch programs may also be unpopular with judges who perceive that “court watchers are ‘out to get’ them.” Paige Akin, *Keeping Watch Over Justice: Program Aims to Protect Abuse Victims, But Some Fear It Will Disrupt Courts*, RICHMOND TIMES DISPATCH, Sept. 13, 2004, at A-1.

233. Lynn Hecht Schafran, *There’s No Accounting for Judges*, 58 ALB. L. REV. 1063, 1079 (1995) (discussing *State v. Peacock*, 94-CR-0943 (1994)).

234. *Id.* at 1064.

another man, the sentence might have been more severe than eighteen months of work release and fifty hours of community service.<sup>235</sup> The judge might also have refrained from referring to the man as a “noncriminal” and speculating that most married men would have inflicted some “corporal punishment” in that situation.<sup>236</sup> After a group of grandmothers in Alaska sat in court for a few days to watch a judge handling domestic violence cases, the judge asked the women what they wanted; they told him exactly what he needed to do differently to comply with state law.<sup>237</sup> Within six months, the court had changed its practices, a change the women reinforced with occasional return visits.<sup>238</sup>

Why might the results reported from “court watch” programs be more credible than the first person narratives of the women who use court systems? “Court watch” programs use “objective” volunteers who have no stake in the proceedings,<sup>239</sup> although many participate specifically because they have concerns about how justice is being administered.<sup>240</sup> Court watchers may be able to articulate concerns about the treatment of battered women, concerns which, coming from battered women, would be easy to dismiss as self-serving.<sup>241</sup> The reports of court watchers are imbued with a credibility that first person accounts from battered women seem to lack, answering the claims of bias leveled at the narratives battered mothers tell of their interactions with the family court system.

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235. *Id.* at 1063–64.

236. *See id.*

237. Buel, *supra* note 230, at 739–40.

238. *Id.*

239. A study of Bergen County, New Jersey’s Court Watch II raised concerns about “solicitousness on the part of the judges . . . . However, monitors did express confidence in their ability to remain objective and generate valid findings.” Bergen County Commission on the Status of Women, *supra* note 228, at 90.

240. One court watch organization focusing its efforts on cases involving violence against children and women describes its volunteers as follows: “WATCH volunteers are civic-minded people who come from a wide variety of backgrounds,” and are “motivated by their concern for the safety and welfare of abused and neglected children in our community.” REBECCA KUTTY, WATCH’S MONITORING OF OPEN CHIPS CASES IN HENNEPIN COUNTY JUVENILE COURT 1A (2001). In Richmond, Virginia, one defense attorney noted a concern that a court watch program was “really an advocacy group in disguise,” noting the large red buttons reading “Safe at Home” that court watch volunteers wear in the courtroom. Akin, *supra* note 232, at A-1.

241. WATCH documented how a victim seeking a protective order was interrogated about why she remained with her batterer, while the batterer was largely ignored. KUTTY, *supra* note 240, at 5C. If the victim had articulated her discomfort with these questions, she might easily have been told that the questions were appropriate, and her concerns about the judge’s demeanor—and its effect on her—dismissed.

B. “Objective” Reports on Family Courts

Conveying the experiences of battered mothers through numbers rather than words is another option. Although quantitative research is subject to some of the same criticisms about objectivity and bias as qualitative research, policymakers and state actors nonetheless might accept statistical information about problems with the court process that they refuse to hear when conveyed in narrative form.

A recent study of the Philadelphia family courts supports this hypothesis. *Justice in the Domestic Relations Division of Philadelphia Family Court: A Report to the Community* details the challenges faced by families who seek the assistance of the Philadelphia Family Court to address their family crises.<sup>242</sup> The study, written by Philadelphia’s Women’s Law Project (WLP), was created in response to the numerous accounts received by the Project “from women who have had difficulties navigating the domestic relations judicial process and negative experiences trying to present their cases.”<sup>243</sup>

The Women’s Law Project’s report is self-consciously quantitative; as its authors began their work, “[they] recognized the necessity of using objective standards to guide both the collection and evaluation of the information about the Court.”<sup>244</sup> The central component of this quantitative study was a court observation project. The WLP developed two survey instruments, one for use in custody cases and one for protection from abuse cases and “developed the forms to be neutral and objective, particularly because [their] other sources of information were more subjective in nature.”<sup>245</sup> Using those tools, volunteers collected data in various courtrooms; the data was later entered into a computer system and analyzed for reliability by testing the correlations between the reports of primary and secondary observers.<sup>246</sup> The courtroom reports were supplemented by the narrative accounts of volunteer telephone counselors and courtroom observers, surveys of callers to the Women’s Law Project Telephone Counseling Service, test calls to the Customer Service Unit of the Domestic

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242. See generally WOMEN’S LAW PROJECT, JUSTICE IN THE DOMESTIC RELATIONS DIVISION OF PHILADELPHIA FAMILY COURT: A REPORT TO THE COMMUNITY 2 (2003), available at <http://www.womenslawproject.org/> (follow “Philadelphia Family Court: A Report to the Community” hyperlink under “Reports”).

243. *Id.* at 2.

244. *Id.* at 17.

245. *Id.* at app. a, at 1.

246. *Id.* at app. a, at 2.

Relations Division and a review of court materials.<sup>247</sup> While the Women's Law Project collected the narratives of individual litigants using a variety of tools, that information was generally presented in collective, numerical form. The "experience" of using the Domestic Relations Division is presented "from the consumer's perspective,"<sup>248</sup> but not in the consumers' own words.

The reception the Philadelphia report received could not have been more different than the response to *Battered Mothers Speak Out*. Although the report found a number of pervasive problems with the Domestic Relations Division that threatened the quality of justice afforded litigants, and questioned whether, given "[t]he prevalence of women as petitioners in family law matters . . . gender bias contributes to the Court's low prestige and insufficient resources,"<sup>249</sup> there was no public outcry. Instead, "[t]he domestic relations division issued a written thanks to the WLP after the report was released,"<sup>250</sup> and the Board of Governors of the Philadelphia Bar Association adopted a resolution detailing the report's findings and pledging its support to "improving the delivery of justice in the Domestic Relations Division . . ." <sup>251</sup> The study also spurred Supreme Court Justice Sandra Newman to seek a new building for the Domestic Relations Division.<sup>252</sup>

What accounts for this difference? While it could be any number of different factors, the depersonalization of the information provided in the report is one possibility to consider. Instead of confronting the court with the names and first person accounts of aggrieved women, the Philadelphia report offers numbers and statistics to reach a conclusion remarkably similar to the one reached in *Battered Mothers Speak Out*. Opting for a quantitative report may have made those conclusions easier to hear and spurred the local legal establishment to action to relieve the conditions documented in the report.<sup>253</sup> A California group working on its own

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247. *Id.* at app. a, at 3–5.

248. *Id.* at 38.

249. *Id.* at 5.

250. Jennifer Batchelor, *Report: Domestic Relations Division Overburdened*, THE LEGAL INTELLIGENCER, May 15, 2003, at 7.

251. Board of Governors, Philadelphia Bar Association, *Resolution on Improving the Delivery of Justice in the Domestic Relations Division of Philadelphia Family Court*, (July 24, 2003), available at <http://www.philbar.org/member/governance/resolutions/resolution.asp?pubid=85877282003>.

252. See generally Jill Porter, *At Last! New Digs Eyed for Family Court*, PHILA. DAILY NEWS, Jan. 30, 2004, available at <http://www.philly.com/mld/dailynews/news/local/7831944.htm>.

253. Not all quantitative reports of women's interactions with the courts are persuasive to state actors, however. When quantitative reports have a distinctly feminist agenda, they are



Battered Mothers' Testimony Project certainly seems to share that belief. Instead of soliciting the stories of affected women, the California Protective Parents Association is randomly reviewing 270 files in custody cases involving domestic violence for its replication of the Battered Mothers' Testimony Project. Researcher Linda Bernard explains, "[w]e wanted to avoid the methodological criticisms of projects such as the [Massachusetts] BMTP and others that it's a biased sample . . . ." <sup>254</sup> The California project is committed, however, to maintaining the human rights focus. <sup>255</sup>

### VIII. WHY ARE NARRATIVES SO IMPORTANT?

Given the obstacles created by the use of narratives, and the existence of other ways of presenting evidence in support of court reform, why should advocates continue to collect and disseminate the narratives of those affected by problems with the family courts?

Collecting narratives, particularly in the context of a human rights investigation, gives battered women an opportunity to share their experiences and have their stories validated. As one BMTP participant explained, "[j]ust to have someone believe my story literally saved my life." <sup>256</sup>

Using narratives to highlight systemic problems can give courts and state actors the opportunity to develop empathetic understanding of the problems faced by litigants in the family court. Hearing narratives helped Maryland's legislators to understand the problems confronted by battered women seeking protective orders and led directly to reform of the state's domestic violence laws. <sup>257</sup> Jane Murphy describes the impact of the women's testimony:

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received in much the same way that BATTERED MOTHERS SPEAK OUT was. The Arizona Battered Mothers' Testimony Project relies far more heavily on quantitative data than the Massachusetts report. But, as author Diane Post noted,

So far the report has been met with resounding silence. The major media that we worked with for a year to do the story pulled it the day before it was to run, allegedly from judicial pressure. The governmental committees that are to consider such policy issues give it five minutes, or, after the presentation, have no comments and go immediately to the next agenda item. The primary author has been vilified and the report denigrated.

Diane Post, *Arizona Battered Mothers' Testimony Project: A Human Rights Approach to Child Custody and Domestic Violence*, DOMESTIC VIOLENCE REPORT, Dec.-Jan. 2004, at 21, 29.

254. Slote, *supra* note 10, at 6.

255. *Id.*

256. *Id.* at 2; *see also* Massoud, *supra* note 5, at 31.

257. *See supra* note 218 and accompanying text.

Ultimately, this is a story about domestic violence victims and their advocates, who forced decision-makers to listen after decades of inattention to the problem. They listened, not only to the experts, and not only to the statistical and fiscal impact testimony—they listened to the stories of the women and children who have been devastated by the legal system's historical tolerance of violence in the home.<sup>258</sup>

Courts and state actors can distance themselves from problems described by numbers or impartial observers far more easily than they can from the individual accounts of experiences in their courtrooms.<sup>259</sup>

Finally, abandoning the use of narratives in favor of more “objective” evidence tacitly accepts the premise that women are not credible, and in so doing, further undermines women’s credibility. Because we believe that courts and state actors won’t believe women’s stories, we choose not to tell them. By making that choice, we deprive those entities of the chance to examine or to change their opinions about women’s credibility. We can never hope to change the perception that battered women are not credible if we stop offering those who we seek to persuade an opportunity to see these women in a different light.

## IX. CONCLUSION

Almost three years have passed since *Battered Mothers Speak Out* was first issued and little has changed in the Massachusetts family courts. The work of the Battered Mothers’ Testimony Project has been slowed by a lack of funding. And yet, week after week, battered mothers call the project to tell their stories: stories of discrimination, humiliation and, as the Project would argue, human rights abuses perpetrated by judges and other state actors in the Massachusetts family court system. If only judges could hear these stories—without the pretext of “junk science” or the blinders of gender bias—perhaps the family courts could better protect the battered women and children who seek their assistance.

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258. Murphy, *supra* note 9, at 1293. This quote also points to the power of combining narrative with other types of evidence.

259. This analysis begs the question of whether judges really care about the problems articulated by those using the system. Is satisfaction of litigants part of their mission? Are other issues more important to the judges? Mark Massoud’s study of the Battered Mothers’ Testimony Project suggests that even as they publicly dismissed the mothers’ claims, the judges did care about the issues raised by the report. Massoud, *supra* note 5, at 29.

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