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**LEGAL ARCHAEOLOGY AND FEMINIST LEGAL THEORY:
A Case Study of a Violation of a Protective Order**
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Introduction

As a legal academic, I am committed to the dual projects of teaching and scholarship. Although the two can sometimes seem to be in conflict, opponents in the zero-sum world of finite time and energy, it is a well-accepted tenet of the legal academy that the two nourish each other: teaching inspires scholarship; scholarship enriches teaching. This article is an example of that synergy. What began as a scholarly agenda became a pedagogical tool that ended up being a research project.

For about a decade now, my scholarship has been in the field of legal archaeology.²

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²Debora L. Threedy, *A Fish Story: Alaska Packers Assn. v. Domenico*, 2000 UTAH L. REV. 185; *Unearthing Subversion with Legal Archaeology*, 13 TEX. J. WOMEN & L. 133, 136-38 (2003); *Contracts in Labor Disputes: The Past and Present of Alaska Packers*, 10 TEX. WES. L. REV. 65 (2003); *Legal Archaeology: Excavating Cases, Reconstructing Context*, TULANE L. REV. (forthcoming 2006); U.S. v. Hatahley, *A Case Study in Legal Archaeology* (work-in-progress).

In 2000, when I organized a symposium entitled "Legal Archaeology," the term was not widely used. I took the term from Brian Simpson, who used the idea of archaeology as a metaphor for the work of reconstructing a historical case study. A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* 12 (1995). With the recent focus on case studies, including the

Legal archaeology is a type of qualitative empirical work that focuses on creating a thick, contextual case a study of a single case.³ It begins with a reported opinion and works backward and outward from there. By examining the trial record and investigating the broader social and economic milieu, legal archaeology considers the relevance of the case as a historical artifact in society, as well as in the development of the law.

Hearing from other scholars how legal archaeology had proved a fruitful methodology in their teaching as well as their scholarship,⁴ I was inspired to create a perspective class⁵ on legal archaeology. Last year, in the spring of 2005, I offered the class for the first time. In addition to examining published legal archaeology projects, I had the class “do” legal archaeology.

I choose the case for the class to “dig into.” My requirements were fairly straightforward. I wanted a case that resulted in an appellate opinion, that had a trial transcript available which was fairly modest in length (100-200 pages), and that involved issues that had both a legal and a

Foundation Press “Law Stories” series, I am pleased to see that there is now a “legal archaeology movement.” Kim David Charbonpin, *How the Border Crossed Us: Filling the Gap Between Plume v. Seward and the Dispossession of Mexican Landowners in California After 1848*, 52 Clev. St. L. Rev. 297 (2005).

³ See *Legal Archaeology*

⁴See, e.g., Letter from Charles L. Knapp, Professor of Law, University of California, Hastings College of Law, to Debora L. Threedy (Oct. 5, 2001) (on file with author); Patricia A. Cain & Linda K. Kerber, *Subversive Moments: Challenging the Traditions of Constitutional History*, 13 TEX. J. WOMEN & L. 91 (2003).

⁵At Utah we have a first year perspective requirement. In the second semester of their first year, students are given a limited elective that allows them to choose between one of several perspective classes. A perspective class is meant to be a primarily non-doctrinal exploration of some aspect of the law. Other perspective classes we have offered have focused on legal theory, law and economics, legislative process, and legal history.

sociological aspect. A colleague⁶ suggested *State v. Jensen*⁷, which satisfied all three criteria: there was a published opinion, the trial transcript was available and consisted of 149 pages, and the case implicated the social problem of domestic violence.

I come back to the pedagogical uses of legal archaeology in the last section of this paper; here I simply point out that as the class and I worked on the case together, I saw aspects of the case above and beyond the issues that attracted my first year law students. When I chose this case for the class project, it was not my intent to write on the case myself. As the class and I dug into the case, however, I became convinced that there were gender issues that were worthy of further study. This article is the result.

The article has four sections. In the first section, I discuss what this specific project adds to the larger legal archaeology project. This is an example of using legal archaeology on an “ordinary” case, rather than one of the leading, canonical cases that have to date been the focus of legal archaeology.⁸ It is also an example of “bottom up” theorizing, a hallmark of legal archaeology as a methodology. Finally, this project illustrates the overlap between legal archaeology and feminism.

In the second section, I provide the thick description of the case. There is a wealth of material contained in every litigated case file but for the most part that material is not used by

⁶See note one, supra.

⁷76 P. 3d 188 (Utah App. 2003).

⁸Recently, there has been much attention paid to “the genre of classic-case studies.” Kevin M. Clermont, *Teaching Important Civil Procedure Concepts: Teaching Civil Procedure Through Its Top Ten Cases, Plus or Minus Two*, 47 ST. LOUIS L. J. 111 (2003). See also the “Law Stories” Series from Foundation Press.

legal scholars. In part, it may be that legal scholarship has not yet figured out what to do with this all this material.⁹ I argue that, among other purposes, it is fruitful to consider how a thick description of a case can provide insights into systemic weaknesses and vulnerabilities in our system of justice.

In the fourth section of the paper, I explore the jurisprudential insights into law and feminism that I see arising out of that thick description in this case. In particular, I use the case to illustrate what has been called the “recursive nature of resistance”¹⁰ to gender bias in the legal system. The case both exemplifies advances in the social and legal recognition of the problem of domestic abuse and raises a cautionary flag for a potential backlash against those advances.

In the final section, I return to the pedagogical uses of legal archaeology and assess the positive and negative consequences of that pedagogical choice.

I. What This Project Adds to Legal Archaeology

Elsewhere I have described points of convergence between legal archaeology and feminism.¹¹ Here I explore two such points of convergence. I see legal archaeology and feminism sharing an epistemological preference for contextualization and grounded theory, and sharing a critical interest in how gender bias is embedded in our legal system.

⁹See, e.g., William Twining, *Reading Law*, in LAW IN CONTEXT.

¹⁰This phrase also came from the FLT Workshop but unfortunately my notes did not record who said it.

¹¹Debra L. Thredy, *Unearthing Subversion with Legal Archaeology*, 13 TEX. J. WOMEN & L. 133, 142-44 (2003).

Both legal archaeology and feminism focus on contextualization¹² and share a commitment to grounded theory, that is, bottom up theorizing.¹³ Bottom-up theorizing, because it begins with the messy, individualistic facts, often faces the charge of being mere anecdote or entertainment. Indeed, when I first presented this project in an informal brown bag, one of my colleagues challenged me to explain why the project was anything more than an anecdote.¹⁴

On the one hand, comments such as that reflect the centrality of abstraction and theory to legal analysis, and how qualitative empirical work such as legal archaeology challenges that centrality by refocusing our attention on the “bottom” of legal analysis, that is, on the individual facts of the case. On the other hand, the challenge is a valid one, and each scholar doing qualitative empirical work must grapple with it. The struggle is to “rise above pure experientiality”¹⁵, to impose some level of analytical structure while remaining true to the facts on the ground. This struggle has been described as the tension between “getting all the facts and

¹²Debra L. Thredy, *Legal Archaeology: Excavating Cases, Reconstructing Context*, Tulane L. Rev. (forthcoming 2006)

¹³“If we have learned anything from this long academic history of realism, it is, I repeat, that we must also study law from the bottom up if we want to understand anything important about it.” Stewart Macaulay, *The New Versus The Old Legal Realism: “Things Ain’t What They Used to Be,”* 2005 Wis. L. Rev. 365, 390. Bottom-up theorizing is also a feature of feminist legal theory, critical race theory, queer theory, and other outsider jurisprudence.

Of course, what constitutes the “bottom” can be debatable. *Id.*

¹⁴At the FLT Workshop, Professor Mary Ann Case shared a similar experience: one of her colleagues, in commenting on her work, opined that “the plural of anecdote is not data.” I have since heard this phrase used in other contexts.

¹⁵Professor Elizabeth Mertz used this phrase in her presentation at the FLT Workshop, June 23, 2005.

drowning in them.”¹⁶

Using the *Jensen* case as the subject of this legal archaeology project is an example of “bottom up” work in two ways. First of all, the case itself is an ordinary, everyday sort of case: a misdemeanor prosecution for violation of a protective order. Although one never knows¹⁷, it is unlikely that the case will become one of the canonical, leading cases studied by generations of law students. Nevertheless, it is worthy of study. In a parallel development with anthropological archaeology, the focus of study in legal archaeology should not be limited to “major” cases.¹⁸

At the dawn of anthropological archaeology in the nineteenth century, archaeologists focused on major sites, such as Roman and Greek ruins and Egyptian royal tombs.¹⁹ Over the next century, it was recognized that even humble, ordinary sites, such as prehistoric Native American hunting camps, had much to teach us about human development and adaptations. Similarly, the first legal archaeology projects tended to focus on canonical cases such as *Hadley*

¹⁶Another participant at the FLT Workshop made this observation; unfortunately my notes fail to record the participant’s name.

¹⁷See Richard Danzig & Geoffrey Watson, *THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES* (2d ed. 2004?)(discussing how none of the individuals involved in the case of *Webb v. McGowin* expected it to become part of the first year Contracts canon).

¹⁸See Tulane article

¹⁹“A century and a half ago an excavator would choose a site – perhaps a burial mound – and dig into it in hopes of a spectacular discovery. The modern archaeologist is concerned not only with the spectacular but also with the prosaic...” Brian M. Fagan, *THE ADVENTURE OF ARCHAEOLOGY* 9 (1985).

*v. Baxendale*²⁰ and *Pennoyer v. Neff*.²¹ The recognition is only now coming that humble, ordinary cases, such as this one, have much to teach us about law.

The second way in which this case is an example of “bottom up” work is that the case study becomes the basis for theorizing about gender bias in the legal system. One legal realist has suggested that the way to impose a structure on contextual case studies is to establish “touchstones of relevance.”²² He gives as an example Stephen Landeman’s work investigating criminal cases that resulted in suspect verdicts; based on the surrounding circumstances in the cases he studied, Landeman developed a theory as to the factors that lead to miscarriages of justice.²³

A number of legal archaeology projects have explored similar systemic weaknesses. Within the legal archaeology literature, systemic weaknesses are called capability problems²⁴ or litigation incapacities.²⁵ They refer to such things as fact-finder or witness bias, limitations on available remedies, faulty memories, and inequality of access and resources. They have been called the “frictions” between the engines, which are the values we as a society hold, and the

²⁰Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEG. STUDIES 249 (1975).

²¹Wendy Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer*, 62 WASH. L. REV. 479 (1987).

²²William Twining, *Reading Law* 198, 206, in *LAW IN CONTEXT: ENLARGING A DISCIPLINE* (1997).

²³Stephen Landsman, *When Justice Fails*, 84 MICH. L. REV. 824 (1986).

²⁴Danzig & Watson, note X *supra*.

²⁵Judith L. Maute, *Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 501 (1995).

road, which is our adversarial system of justice.²⁶

This focus on systemic weaknesses, specifically gender bias in the judicial process, constitutes a second point of convergence between legal archaeology and feminist legal theory, in addition to a shared commitment to bottom-up theorizing.²⁷ Legal archaeology and feminist legal theory overlap in that both are interested in examining the effect of gender bias, whether explicit or implicit, whether on the part of individual participants in the system or embedded within the rules and processes of the system itself. The feminist legal literature has addressed everything from the exclusion of women from the judicial system, whether as participants²⁸ or in the formulation of legal doctrines,²⁹ to whether law itself should be considered as gendered.³⁰ But it is somewhat surprising that I have been able to find few published legal archaeology projects that have focused on cases involving gender issues.³¹

In this paper I explicitly invoke the intersection between legal archaeology and feminist legal theory. I examine, using the methodology of legal archaeology, a very “ordinary” case that

²⁶Danzig & Watson, note X, *supra*.

²⁷See also Debora L. Threedy, *Unearthing Subversion with Legal Archaeology*, 13 *Tex. J. Women & L.* 133, 142-44 (2003).

²⁸KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA: 1638 TO THE PRESENT* (1986).

²⁹CAROLINE FORELL & MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* (2000).

³⁰Fran Olsen, *The Sex of Law*

³¹See, e.g., Patricia L. Bryan, *Stories in Fiction and in Fact: Susan Glaspell's A Jury of Her Peers and the 1901 Murder Trial of Margaret Hossack*, 49 *STANFORD L. REV.* 1293 (1997); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 *BUFFALO L. REV.* 1 (1990).

turns out to be provocative when placed in a fuller context. The case, *State v. Jensen*,³² involves a criminal misdemeanor prosecution of Lavar Jensen, a white man, for violation of a protective order obtained by his girlfriend, a white woman. Thus, the gendered issue of domestic violence³³ forms the backdrop against which the case is played out.

Moreover, the litigation itself produces a gender issue when the prosecutor, a woman, uses her peremptory challenges to strike three men from the jury panel. The public defender, a man, raises a *Batson*³⁴ challenge to the prosecutor's use of the peremptories. On appeal, the court upholds the *Batson* challenge, vacates the conviction, and remands for a new trial.³⁵

By looking at these gendered issues within the context of a thick account of the litigation, my underlying purpose is to question the ability of the legal system, a system created by men in the first instance, to fully account for the institutionalized remnants of patriarchy. This case had women playing a number of significant roles in the administration of justice³⁶, a circumstance that would not have occurred a generation ago, and yet the result still seems to be somehow

³²76 P. 3d 188 (Utah App. 2003).

³³As Elizabeth Schneider has pointed out, it is important to “see violence squarely linked to gender, and situate the problem of abuse within broader problems of gender subordination.” Elizabeth M. Schneider, *BATTERED WOMEN & FEMINIST LAWMAKING* 232 (2000). It can be difficult for some to conceptualize domestic violence as a gender issue. “The deeply gendered nature of domestic violence...is something that is easy for judges to deny without substantial education, particularly in light of the new move toward seeing intimate violence in the context of gender neutrality.” *Id.* at 192.

³⁴*Batson v. Kentucky*, U.S. (Holding that peremptory challenges could not be exercised in a racially discriminatory manner).

³⁵*State v. Jensen*, 76 P. 3d 188 (Ut. App. 2003).

³⁶The Domestic Relations Commissioner (akin to a magistrate in the federal system) who signed the protective order, the prosecutor, a majority of the jurors, and two of the three appellate judges were women.

unsatisfying. The jury does convict for violation of the protective order, evidence that as a society we have learned to take domestic abuse seriously, but the process by which the defendant is convicted is ultimately deemed as flawed because of the absence of (more) men from the jury. More significantly, the defense strategy of arguing that the petitioner was “abusing” the system may be prophetic of a potential backlash against the prevalence of protective orders.

In the next section of the paper, I paint a detailed picture of the case. In the section after that, I explore how gender bias and assumptions in this case create a “capability problem,”³⁷ that is, a point in the litigation process where systemic flaws or weaknesses become apparent. I explore how this very ordinary case becomes a lens with which to examine the role of gender in the legal system today. Like a pebble tossed into a pond, the issues in the case have a ripple effect which, when followed outward, produce insights that go beyond the specifics of the case itself.

II. The Case Narrative

In this section, I provide a detailed examination of the history of the case. I examine the legal and demographic context of domestic violence in Utah, the biographies of the participants, the trial record, and the fate of the case on appeal.

Utah’s Legal Framework for Domestic Violence

“Domestic violence is one of the fastest growing and most serious violent crimes in Utah

³⁷Richard Danzig & Geoffrey Watson, *The Capability Problem in Contract Law* (2d ed. 2004).

today.”³⁸ Utah’s substantive law pertaining to domestic violence is found in the Cohabitant Abuse Act.³⁹ The Act gives any cohabitant⁴⁰ or child residing with a cohabitant who has been subjected to abuse or domestic violence⁴¹ the right to seek a protective order.⁴² The Act prohibits court-ordered mediation.⁴³ The Act mandates the creation of a statewide network that contains all protective orders within twenty-four hours of their issuance and that is available to courts, law enforcement, and relevant agencies.⁴⁴

Each protective order contains two portions, one of which contains provisions, such as a no-contact provision, the violation of which constitutes a criminal offense, and the other of which contains provisions, such as child custody or child or spousal support, the violation of which

³⁸2005 Domestic Violence Report at 3

³⁹U.C. Ann. 30-6-1 through 30-6-14.

⁴⁰One critique of the Act is its limitation of the remedy of a protective order to a cohabitant, which is defined as a spouse, one living as if a spouse, one related by blood or marriage, one who has a child or is expecting a child with the abuser, or one who resides or has resided in the same residence as the abuser. 30-6-1(3). Dating violence and stalking are thus not covered by the Act.

⁴¹Abuse is defined as intentionally or knowingly causing physical harm or intentionally placing another in fear of imminent physical harm. 30-6-1 (1). Domestic violence has a more involved definition that includes stalking as well as “any criminal offense involving violence or physical harm or threat of violence or physical harm.” 77-36-1(2). Stalking is defined as intentionally or knowingly causing fear of bodily injury or emotional distress to the victim or a member of the victim’s immediate family. 76-5-106.5

⁴²30-6-2. Protective orders can be ex parte. 30-6-4.2(2). In that case, a hearing on the petition must be held within 20 days. 30-6-4.3. The Act prohibits mutual protective orders unless each party has filed an independent petition, there is a showing that both parties committed abuse or domestic violence, and each petitioner demonstrates that the other’s abuse or domestic violence did not occur in self-defense. 30-6-4.5.

⁴³30-6-4.6.

⁴⁴30-6-8

constitutes a civil violation.⁴⁵ A criminal violation of a protective order is a class A misdemeanor, while a civil violation is subject to contempt proceedings.⁴⁶

A separate act, entitled the Cohabitant Abuse Procedures Act⁴⁷ provides that a subsequent violation of a protective order within five years of a prior conviction or plea in abeyance is subject to enhancement to a felony.⁴⁸ It also establishes a mandatory arrest policy whenever a law enforcement officer has probable cause to believe a violation of a protective order has occurred.⁴⁹ Utah has not adopted a no-drop policy, so prosecutors have the discretion to go ahead or not when the victim repudiates the criminal proceedings.⁵⁰ As a practical matter, if the victim refuses to co-operate, it can be impossible to prosecute successfully.

The Legal Aid Society of Salt Lake provides a no cost service to anyone seeking a protective order.⁵¹ Legal assistance is provided on a walk-in basis at the state courthouse in Salt Lake City. In 2003, the last year for which data are available, with a state population of XXX, in Utah 4,792 ex parte and 2,263 post-hearing protective orders were issued statewide.⁵²

Recently released statistics from the Bureau of Justice suggest that while the rate of

⁴⁵30-6-4.2(5)(a)

⁴⁶30-6-4.2(5)(b) & (c).

⁴⁷Utah Code Ann. 77-36-1 - 77-36-10

⁴⁸77-36-1.1

⁴⁹77-36-2.4

⁵⁰Cf. 77-36-7, which provides that a prosecutor must notify the victim, if requested, of the decision whether to prosecute the case.

⁵¹See www.lasslc.org (Last visited June 21, 2005)

⁵²2005 Domestic Violence Report

domestic violence has decreased between 1993 and 2000, the proportion of domestic violence in all violent crimes has remained constant.⁵³ Utah's experience with domestic violence differs from national trends in some respects. For example, Utah exceeds the national average for the most serious domestic violence, homicides; in 2001, the state ranked sixteenth for the number of domestic violence homicides per capita.⁵⁴

Explanations for the national drop in reported instances of domestic violence vary from fears that fewer are reporting such instances to hope that increased attention, funding and services in the last ten years are making a difference.⁵⁵ For example, the use of protective orders in Utah has skyrocketed in the last ten years or so.

Exploring the Participants

From the trial transcript, as well as the appellate opinion, we get hardly any sense of who the two people are whose relationship triggered the litigation. Neither of them testified during the trial, the petitioner on the protective order because she ignored the subpoena and the defendant because he invoked his constitutional right not to testify. Thus, we have a situation, not unusual in litigation, where the voices of those most directly affected are completely absent.

Almost nothing is known about the petitioner, Jolynn Thomas, other than that on May 25,

⁵³“In 1993, an estimated 5.4 victims per 1,000 people age 12 or older were victimized by a family member, such as a spouse or parent. In 2002, however, that had fallen to 2.1 family violence victims per 1,000 people 12 or older.” Lisa Rosetta, *Domestic Violence Cut by Half*, Salt Lake Tribune, June 13, 2005, A-1.

⁵⁴Id. at A-5.

⁵⁵Id. at A-1-A-5.

1999, she obtained a protective order against the defendant.⁵⁶ When Ms. Thomas obtained the protective order in May of 1999, she was assisted by Legal Aid, indicating that she was not financially well off. In speaking of her, defense counsel made a point of stressing that she was about twenty years older than Jensen.⁵⁷ That would put her in her mid-to-late-forties at the time. The prosecutor explained her failure to appear as a result of her fear of the defendant⁵⁸ while defense counsel suggested that her absence called into question the legitimacy of her allegations of abuse and was indicative of her manipulative use of the legal system.⁵⁹

Similarly, little is known of the defendant, Lavar T. Jensen. At the time, he was in his late-twenties.⁶⁰ The prosecutor described him as a genuinely scary person.⁶¹ Although this did

⁵⁶T. at 62. A legitimate question that could be raised at this point is why I have made no attempt to contact Ms. Thomas and obtain her views on the case. In part, the answer is methodological. I am not trained in the social sciences and by inclination my preference is for the historian's way, i.e., examination of primary documentary sources. In part, my point is that the legal process often ignores or excludes the voices of those most interested in the outcome of litigation. But I suspect that in part the answer lies in Lucie White's insight into her own examination and reconstruction of the hearing in which she represented Mrs. G. In considering why she did not invite Mrs. G's participation in that examination, Professor White could not discount the possibility that it had something to do with her prerogative as sole author to control the content of the work product, i.e., the scholarly article. 38 Buffalo L. Rev. at x n.x.

⁵⁷On April 5, 2005, both the prosecutor, Kimberley McKinnon Crandall, and the defense counsel, Rudy Bautista, spoke to my class about the case [hereinafter cited as Class Interview]. My notes, and some of my students' notes, are on file with the author.

⁵⁸T. at 48.

⁵⁹T. at ??; Class Interview.

⁶⁰SL Trib article 7/26/03.

⁶¹Class Interview. Ms. Crandall volunteered the following observation: "I believe he was convicted because he was creepy. There was a Ted Bundy vibe going on." (Ted Bundy was a serial killer of young women who was eventually executed in Florida. Bundy had lived in Salt Lake City for a time, even attending the University of Utah law school. He is thought to be responsible for at least one murder in Utah. Because of his connection with the community,

not come out at trial, he has a criminal record, from both before and after this case.⁶² At trial, Jensen was represented by the public defenders office, which indicates that at the time he did not have significant economic means.

From how others described their relationship, it was an on-again/off-again type of thing. Back in 1999, Jensen appeared at the protective order hearing and stipulated to its issuance.⁶³ Thus, no judicial officer ever inquired into the existence, type, or extent of the domestic violence between the two.

Both of the trial attorneys were relatively inexperienced at the time of trial. The public

especially the law school, he is something of an iconic figure among lawyers here.) Ms. Crandall noted that Jensen's original public defender, a woman, reported that she had trouble controlling him and found him scary.

⁶²In the late nineties he had been charged with a DUI and two instances of receiving a stolen vehicle; all of these charges were dropped. On August 8, 2001, there was a preliminary hearing on a separate charge of violating a protective order (also involving Jolynne Thomas as the petitioner); at that point he was taken into custody until trial which was set for October 30, 2001. At the beginning of October, Judge Fratto had several cases pending against Jensen, all involving violations of protective orders; Fratto ordered the prosecutor to choose one for trial and to delay the others. The trial of this case, the one chosen for trial, occurred on October 16, 2001. On October 29, 2001, Jensen pled guilty to a second violation of a protective order and a charge of tampering with a witness and the other cases were dismissed. On April 4, 2002, he was sentenced to a year in jail on the two cases (the guilty verdict in this case and the guilty plea in the other case). With credit for time served, he was released by mid-October, 2002, and in October and November 2002, he was charged with two more violations of protective orders. He was subsequently convicted on a third violation of a protective order (after the conviction and plea in October 2001) and a charge of criminal mischief. He had been released from jail less than two weeks before the prosecutor and defense counsel spoke to my Legal Archaeology class at the beginning of April 2005. Class Interview. My thanks to Carrie Towner and Dallin Creswell, two students in that class, who reconstructed this history from court dockets.

⁶³Authority?

defender had graduated from law school two years prior to the trial.⁶⁴ The prosecutor had even less experience, still being in her first year of practice at the time. She noted that this was only the second or third trial she had worked on and the first she had handled totally on her own.⁶⁵ No trial is “perfect” from a litigator’s point of view and hindsight has 20/20 vision, but their lack of experience no doubt contributed to some missteps each made along the way.

The trial judge was Joseph C. Fratto, Jr. He described himself to the jury as having lived all his life in Salt Lake City, having attended South High School and then the University of Utah both undergraduate and law school, and being married for 28 years to “a beautiful woman” named Peggy who works in the Granite School District in the Special Education Department, with whom he has three daughters.⁶⁶ Judge Fratto is described by attorneys as an exceedingly “nice” person.⁶⁷ Unlike many judges, he has a background as a criminal defense attorney.⁶⁸

The Jury

The trial took place in Murray, Utah. Murray is a suburb of Salt Lake City with a

⁶⁴At trial Rudy Bautista described himself being originally from California, graduating from the U.S. Merchant Marine Academy in New York, serving for five years as a naval officer, moving to Utah where he attended BYU law school, and as single with no kids.

He had a colleague with him, Monte Sleight, whom he described as a native Utahn, a graduate of the University of Utah, both undergraduate and law school, married with two boys. T at 11.

⁶⁵Class Interview [nimm].

⁶⁶T. at 12.

⁶⁷Class Interview.

⁶⁸When first out of law school, he spent several years with the public defenders office before going into private practice with his father. Utah Bar Journal article?

population at the time of about 34,000.⁶⁹ Like most western states, the majority of Utah's population lives within a few urbanized areas. In 2000, the urban corridor surrounding Salt Lake City contained approximately 1.7 million of the state's 2.2 million residents, and Murray is centrally located within that urban corridor.⁷⁰ The population is overwhelmingly white and the predominant religion is the Church of Jesus Christ of the Latter Day Saints, often referred to as the LDS Church.⁷¹ About two-thirds of Murray's households are owner-occupied and a third are rentals.⁷²

It was notable that almost half of the venire members responded affirmatively to questions asking whether they, a relative, or a close friend had been somehow involved with a protective order or domestic violence dispute.⁷³ Both the prosecutor and defense counsel noted that, in their experience, this was an unusually high percentage.⁷⁴

The jury that heard the case was made up of five women and one man. All of them were long time residents of Utah, and five of them had lived in Utah their entire lives. None of them had a college degree.

⁶⁹At the time, Salt Lake City's population was about 182,000. 2000 Census data. Utah Population Ranking, www.ci.murray.ut.us/economic-development.asp?ID=679 (Last visited June 2, 2005) See also www.census.gov/census2000/states/ut.html

⁷⁰Id.

⁷¹Non-members often refer to the church as the Mormon Church and refer to members as Mormons. The name Mormon comes from the title of one of the church's foundational texts, The Book of Mormon.

⁷²See www.ci.murray.ut.us

⁷³ Eight out of the seventeen venire persons responded affirmatively. T at

⁷⁴Interview (nimn)

The first two jurors selected, both women, were older, 76 years old and 67 years old, and both retired.⁷⁵ One, who was the first juror asked to answer some questions about herself, did not mention any children or grandchildren; she was ultimately selected to be the foreperson for the jury because, she said, she was the first in line.⁷⁶ The second woman stated that she had seven grandchildren and five great-grandchildren. The third juror selected, the sole male, works as a plumber and is married with three children.⁷⁷ He was forty-three at the time of trial. The fourth juror, another woman, did not give her age but was probably the youngest juror. She had worked as a teacher's assistant but was now a homemaker taking care of a young baby.⁷⁸ The fifth juror, who had lived in Salt Lake for fifteen years, at the time worked as an account executive in employee benefits for an insurance company, had six children and three grandchildren, and was recently remarried.⁷⁹ She did not give her age, but the information about her children and grandchildren suggests she was middle-aged, probably at least in her mid forties.⁸⁰

⁷⁵T. at 13-14.

⁷⁶T. at 144

⁷⁷T. at 15.

⁷⁸T. at 15.

⁷⁹T. at 16-17.

⁸⁰I am assuming this juror had her first child in her late teens and had her sixth child in her late twenties or early thirties. Assuming her oldest children also married young, she could easily be in her forties.

It may strike some readers as unusual that half of the jurors described families larger than average for the United States, but such families are not unusual for Utah. Given that five of the six jurors said they had lived in the Salt Lake area all their life, and given the demographics of Salt Lake a generation ago, it is likely that most of these life-long residents were members of the LDS Church. The church stresses family, particularly large families, and encourages marriage at

The last juror selected, another woman, said she worked for a golf course and had been married for ten years. She also did not give her age, but given that she said she had two sons and “almost” three grandchildren, she was probably in her late thirties or early forties at the time of trial.⁸¹ She is noteworthy because she was the only juror selected who indicated that she, a relative or a close friend had been involved in a protective order as either a petitioner or a respondent.⁸² All of the other potential jurors ahead of her who had responded affirmatively to this question had been struck through peremptory challenges. I suspect she was not because both sides had exhausted their peremptories by the time they came to her.⁸³

The Trial

The case of *State of Utah v. Lavar T. Jensen*⁸⁴ came up for trial on October 16, 2001.⁸⁵

a young age. Consequently, Utah has one of, if not the, highest birth rates in the nation. See, e.g., Lesley Mitchell, *Utahns supersize their families, too*, Salt Lake Tribune, May 17, 2005, A1, A8 (three out of the top five counties for filers claiming the most exemptions are in Utah). The 2000 Census “showed Utah with the largest families of any state.” Id. at A8.

⁸¹T. at 18.

⁸²T. at 23.

⁸³X-ref to discussion of peremptories.

⁸⁴Case No. 011200642MS, Third Judicial District, Salt Lake County, Utah.

⁸⁵T. at 1. It did not occur to me until it was pointed out by a student in my class that this was just a little more than a month after the attack on the World Trade Center and the Pentagon. The judge made an indirect reference to this when he said “We’re selecting a jury in Murray today, and they’re not selecting one in Kabul, Afghanistan. I think that says something.” T. at 35. On ???, President George W. Bush had announced retaliatory attacks on Afghanistan, which

The entire trial lasted one day. The prosecutor had been assigned this misdemeanor case and seven others the week prior; all eight cases were set for trial on the same day.⁸⁶ She was not expecting this case to actually go to trial, however.⁸⁷ From speaking with the petitioner before trial, the prosecutor suspected that she might not appear in court, despite the fact that she had been subpoenaed. A next door neighbor had witnessed the confrontation that formed the basis for the violation of the protective order, but the subpoena addressed to him had been returned unserved.⁸⁸ Similarly, defense counsel assumed when the petitioner did not show up that the case would be dismissed.

The neighbor, however, did appear.⁸⁹ In speaking with him in the courtroom (the first time she had the opportunity to interview him), the prosecutor determined that she could go forward with his testimony, even in the absence of the petitioner, as he would testify to his observation of a confrontation between the defendant and the petitioner in the driveway of the petitioner's home. Consequently, when the trial judge called the case and asked the state if it was ready to proceed, she answered affirmatively.⁹⁰

was believed to be sheltering Osama bin Laden, the purported mastermind behind the attacks. The timing of the trial and the judge's comment lead me to wonder whether the jury might have been predisposed to lean toward an outcome that supported "law and order."

⁸⁶Class Interview, supra note x..

⁸⁷Id.

⁸⁸Id.

⁸⁹The prosecutor says that to this day she is unsure how he found out about the trial. Id. One possibility is clerical error by the process server. Another possibility is that the petitioner prevailed upon her neighbor to go in her place.

⁹⁰T. at 3.

When the judge asked defense counsel whether he was ready to proceed, he answered “For picking a jury, yes. We did have another motion, but for right now, the jury.”⁹¹ This may have been a misstep on the defense counsel’s part, as the motion he made after the jury had been impaneled was for a continuance due to the absence of the petitioner.⁹² If he was aware prior to selecting the jury, that the petitioner was not in the courtroom, he should have moved for a continuance before the judge became invested in the jury selection, which took a lot of time in this case. When he did move for a continuance, the judge denied it.

The jury selection process became very involved, as the defense attorney raised a *Batson* challenge after the prosecutor used her three peremptories to strike three men from the jury.⁹³

⁹¹T. 3. This may have been a strategic mistake. When defense counsel protested the absence of the petitioner and requested a continuance, the jury had already been picked. T. at 42-43. The judge told defense counsel that he ought “certainly to bring this to my attention prior to actually impaneling the jury” and denied the continuance. T. at 44.

⁹²In an example of another kind of capability problem, the trial transcript does not record the full discussion of the defense motion. There was no court reporter present in the courtroom; the proceedings were only audiotaped. The transcript indicates that “Court tape comes back on in mid-sentence of Mr. Bautista.” T. at 42. Defense counsel is saying “– out of Court because it would be hearsay. If she was to testify, I could get them in because they would be inconsistent statements, or I might even get her to acknowledge that she in fact made those statements.” Id. In context, defense counsel appears to be referring to the alleged statements by the petitioner that the protective order had been dismissed, as he refers to the statements going to the defendant’s state of mind. He then asks for a continuance. Id.

⁹³Ironically, given that her use of the peremptories eventually resulted in Jensen’s conviction being overturned and the case dismissed, the prosecutor’s use of her peremptory challenges to exclude men may have been a misstep due to her inexperience. Some experts suggest that in fact women are more likely to acquit in domestic violence cases than men. In a subsequent Utah case, the court of appeals found that the prosecutor’s use of peremptories to strike women from the jury was unconstitutional. See Valdez. It is thought that the dynamic operating here is that women are deeply resistant to acknowledging the extent of domestic violence because it is so threatening. See, e.g., Schneider at 208 (discussing Simpson criminal trial).

When defense counsel raised an objection based upon *Batson*, the prosecutor explained her use of the three peremptories as follows:

I didn't even realize that all three of them were men, all three of my challenges were men until Mr. Bautista [defense counsel] just pointed it out. I have on my notations that the three struck were part of the protective order, and logically I assumed that usually they would be on defendant's side, since more than likely than not men are the respondents to protective orders, other than women.⁹⁴

The trial judge found that the involvement of the potential jurors "in some capacity with protective orders" constituted "a basis other than gender" for the prosecutor's peremptory challenges and so allowed them to stand.⁹⁵

The prosecutor called three witnesses, two police officers and the neighbor. The first police officer testified that the petitioner had come into the station on May 29, 2001, looking upset, and reported that her former boyfriend had violated a protective order.⁹⁶ The police officer further testified that he confirmed the existence of the protective order. The prosecutor used the second police officer to lay a foundation for the admission of the protective order.⁹⁷

The final prosecution witness was the petitioner's next-door neighbor, Jeremy Johnson.⁹⁸ Johnson lived in the right-hand side of a rambler duplex and the petitioner lived in the left-hand side.⁹⁹ He testified that on May 29th, he had just walked out onto his front porch to smoke a

⁹⁴T. at 32.

⁹⁵T. at 34.

⁹⁶T. at 66-67

⁹⁷T. at 69-73

⁹⁸T. at 75-82.

⁹⁹T. at 78

cigarette when he saw Jensen knocking on the petitioner's door.¹⁰⁰ When no one answered the door, Jensen walked over and began to chat with Johnson.¹⁰¹

Johnson testified that the petitioner then came out of her home and got into her car. Jensen walked over to her car and they began arguing through the window.¹⁰² Then the petitioner drove away. Jensen got into his car and drove off in the same direction.¹⁰³

On cross-examination, Johnson admitted that he had seen Jensen at the petitioner's house "a few other times."¹⁰⁴ Jensen watered her lawn one or two times when she was not there,¹⁰⁵ and in the two months the witness had lived in the duplex on some unspecified number of occasions he "had seen him [Jensen] there with her [the petitioner]."¹⁰⁶

The defense also called three witnesses, Jensen's sister, his nephew, and a long time friend. All three testified to the existence of a romantic relationship between the petitioner and Jensen.¹⁰⁷ Of the three, the friend's testimony was the most significant. The friend, Brandon

¹⁰⁰T. at 76, 78.

¹⁰¹T. at 78

¹⁰²T. at 78, 79, 81

¹⁰³T. at 78, 81

¹⁰⁴T. at 80

¹⁰⁵T. at 80-81

¹⁰⁶T. at 82

¹⁰⁷T. at 106, 114, 119

Monthey, also known as Hoffhein¹⁰⁸, had known Jensen since junior high school.¹⁰⁹ He testified that in December of 1999 he was at a party at Jensen's house when the petitioner was present. Because Monthey had had "run-ins" with the law previously, he questioned whether the petitioner ought to be there if she had a protective order against him, and the petitioner said that the protective order had been lifted.¹¹⁰

The jury returned a verdict of guilty. At the sentencing hearing, the petitioner again did not show up, but she did write a letter to Judge Fratto in which she said that she wasn't coming out of fear of the defendant.¹¹¹ In the same letter she wrote that "what I would like to see happen for Lavar Jensen is that he get more counseling for his anger & alcohol drug abuse."¹¹² Jensen was sentenced to a year in jail with credit for time served.

¹⁰⁸T. at 100

¹⁰⁹T. at 106

¹¹⁰T. at 108-110. I have wondered whether the witness's use of an alias and hisself-described "run-ins" with the law made him less credible with the jury. That could explain the jury's rejection of the defense argument that Jensen did not know the protective order was still in effect.

¹¹¹She wrote:

This person has caused me great stress, pain & total fear - sometimes to the point of unable to function in my life. Lavar has threatened my life in so many instances...Justice is that now possibly [sic] he does know he will be stopped for the inhuman torment, verbal & all physical abuse he has given me.

I am too afraid of Lavar Jensen to ever appear in court & face him.

Letter from Jolynn Thomas to Hon. Joseph C. Fratto, October 23, 2001. My thanks to Wes Oates, a student in the Legal Archaeology class where we studied the *Jensen* case, who located this letter in the court files.

¹¹²Id.

On Appeal

The court of appeals panel of three judges was made up of Judges Judith Billings, who wrote the opinion for the court, Pamela Greenwood, and Gregory Orme.¹¹³ On appeal, the defendant raised three issues: 1) whether the state established that the defendant had been properly served with the protective order; 2) whether the state's exercise of its peremptory challenges was gender-discriminatory in violation of the fourteenth amendment's guarantee of equal protection and 3) whether the absence of the petitioner at trial denied the defendant his right to confront the witnesses against him.¹¹⁴ The appellate court took up the first two issues, but as it found the second issue to be dispositive it did not address the third issue.¹¹⁵

Service

The misdemeanor with which Jensen was charged was violation of a protective order. The applicable statute¹¹⁶ provides a person who "intentionally or knowingly" violates a protective order "after having been properly served" with the order is guilty of a class A misdemeanor. The State argued that proper service was not an element of the offense, but the appellate court held, based upon an earlier Utah Supreme Court case¹¹⁷, that it was.¹¹⁸

¹¹³State v. Jensen, 76 P.3d 188 (Ut. App. 2003).

¹¹⁴Brief cite

¹¹⁵76 P.2d at 191 and 193 n.6.

¹¹⁶Utah Code Ann. § 76-5-108 (1999).

¹¹⁷State v. Rudolph, 970 P. 2d 1221, 1233 (Utah 1998).

¹¹⁸At trial, the prosecutor had not argued that proper service was not an element of the offense; she had even proposed a jury instruction, which the judge gave to the jury, stating that the state had to prove the defendant had been properly served. 76 P. 3d at 191 n.2.

The closer issue was whether the certified copy of the protective order placed in evidence by the state constituted sufficient proof of proper service.¹¹⁹ The copy of the protective order consisted of five pages. The State’s seal and the clerk’s signature appear on page four. On page five, it states that the signatory accepts service of the protective order and waives personal service. A signature purporting to be Jensen’s appears on this page five.¹²⁰

The trial judge admitted all five pages of the copy under Rule 902 of the Utah Rules of Evidence.¹²¹ Under the rule, a certified copy of a public record, bearing a seal and authorized signature, is self-authenticating and admissible. Jensen argued that only the first four pages came within the ambit of this rule, that page five is a separate document not within the rule, and that the fifth page was therefore not admissible without extrinsic evidence of admissibility, of which there was none at trial.¹²² Without the final page, Jensen concluded, the state had no evidence that the protective order had been properly served.¹²³

The appellate court held that the fifth page had been properly admitted into evidence, adopting a rule enunciated by the Indiana Supreme Court: a document that is “readily identifiable” as part of the certified document can be included within the certification and thus be

¹¹⁹In discussing the case, Judge Billings said in her opinion the question of proof of service could have gone either way. Interview with Judge Billings, April 4, 2005. [nimn]

¹²⁰76 P. 3d at 192.

¹²¹Utah R. Evid. 902(1)(4).

¹²²76 P. 3d at 192.

¹²³X-ref to cap prob re potential for abuse

admissible.¹²⁴ The court concluded that page five was “readily identifiable” as part of the certified document, relying on the first page of the protective order, which had a box checked indicating Jensen’s presence at the protective order hearing.¹²⁵

Peremptory Challenges

The second issue the appellate court addressed was whether the state had exercised its peremptory challenges in a discriminatory fashion in violation of Jensen’s, and the prospective jurors’, constitutional right to equal protection.¹²⁶ In *Batson v. Kentucky*¹²⁷ the United States Supreme Court held that the state could not exercise its peremptory challenges in a way that violated the fourteenth amendment’s guarantee of equal protection. While *Batson* dealt with peremptory challenges that were exercised in a racially discriminatory manner, the principle was extended to gender in *J.E.B. v. Alabama*.¹²⁸

In exercising her peremptories, the prosecutor struck three men from the panel.¹²⁹

¹²⁴Miller v. State, 563 N.E. 2d 578, 584 (Ind. 1990).

¹²⁵76 P. 3d at 192. Although this does not appear in the appellate opinion, court records indicated that Jensen consented to the issuance of the protective order. Interview with former-Domestic Relations Commissioner Lisa Jones Reading, April 6, 2005. For a discussion of how there is no process in place for confirming that the person who signs the protective order is who he or she purports to be, see the text accompanying note x infra.

¹²⁶76 P. 3d at 192.

¹²⁷476 U.S. 79 (1986).

¹²⁸511 U.S. 127 (1994).

¹²⁹T. at 31. The three jurors were Mr. Jolley, Mr. Smith, and Mr. Nielsen. The appellate opinion refers to the prosecution striking “two potential jurors on the basis of gender.” 76 P. 2d at 192. The court had earlier noted that “the prosecutor used all three of her peremptory challenges on men,” id. at 190, and does not suggest that the prosecutor had articulated a gender-neutral explanation for one of the strikes. However, the appellant’s brief, while noting that the prosecutor used all three peremptories to remove men, see Appellant’s Brief at 6 (“prosecutor

Although the trial judge had found that she had articulated a gender-neutral reason for striking the three men, namely, that they or a relative or close friend were involved in a protective order in some capacity, the appellate court disagreed. The court held that the prosecutor's assumption that men would be favorable to the defendant because men are more likely to be the respondents to protective orders was "unavoidably linked to the jurors' gender."¹³⁰

The State then argued that because statistics show that "95% of domestic violence perpetrators are male"¹³¹ the prosecutor's challenges were based on "a gender-associated probability grounded in fact"¹³² rather than gender stereotypes and so should be permissible. The court rejected this argument as well. First, the court relied on language from *J.E.B.* in which the Supreme Court stated that "even if a measure of truth can be found in some gender stereotypes ... even when some statistical support can be conjured up" that cannot justify gender-based discrimination.¹³³ Second, the appellate court noted that "the prosecution did not simply challenge all venire members belonging to a predominantly male ... classification,"¹³⁴ namely all persons involved in a protective order regardless of their gender, but admitted that she was

used all three of her peremptory strikes to eliminate men"); and 36 (using one hundred per cent of three peremptories to strike men), stated that the defense was not appealing the striking of one juror because the prosecutor had also said he seemed analytical. T. at 32. See also Appellant's Brief at 2, 12, 29, 33, 34. As the appellate court later rejected the "dual motivation" analysis, this was perhaps premature on the part of the defense.

¹³⁰76 P. 3d at 193.

¹³¹Id.

¹³²Id.

¹³³Id., quoting *J.E.B.*, 511 U.S. at 139 n.11.

¹³⁴76 P. 3d at 193.

striking men because she assumed that men involved in protective orders were likely respondents.¹³⁵ Because the prosecution failed to give a “facially neutral explanation” for the peremptory strikes, the appellate court reversed Jensen’s conviction and remanded for a new trial.¹³⁶

Because the court found the *Batson* issue to be dispositive, it did not address the defendant’s final argument, which was that the trial judge’s failure to grant a continuance to allow the defendant to compel the petitioner’s presence violated his constitutional rights.¹³⁷

¹³⁵In discussing the case with my class, defense counsel suggested that the prosecutor’s problem was that she was “too honest.” In a sense, he is correct. Analysis of how the prosecutor exercised her peremptory challenges reveals that she struck the potential jurors who had said they had some prior involvement with protective orders or domestic abuse in the order they came up: she did not skip women to focus on the men. Thus, on their face, her actions were gender neutral. In her explanation, if she had stopped after she said she struck the three because of the involvement with protective orders or domestic abuse, that would have been a gender-neutral explanation, which coincidentally had impacted only males, and her peremptory challenges would probably have been upheld on appeal.

¹³⁶76 P. 3d at 194.

¹³⁷*Id.* at 194 n.6. A number of students in the legal archaeology class were intrigued by this argument and disappointed that the court had not addressed. After much deliberation, however, they determined that the defense had focused on the wrong constitutional right. The defense arguments framed the issue as one of the defendant’s right to confront the witnesses against him – but as the trial judge pointed out, the petitioner did not testify against the defendant and so this right did not come into play. My students concluded that the better argument was that the failure to grant a continuance frustrated defendant’s right to compel a witness to testify in his favor, which is also protected by the sixth amendment. See Presentation ? Although the defense had not subpoenaed the petitioner, there is an argument that they were entitled to rely upon the prosecutor’s subpoena. As noted above, the defense believed that the petitioner would testify that she told the defendant that the protective order had been lifted. Assuming she had so testified, the jury might have found her more credible than the third party defense witness, see n X *supra*, and thus been more sympathetic to the defense argument that the defendant lacked the requisite mental state of knowingly or intentionally violating the protective order.

After the Appeal

After remand, the prosecutor dismissed the case.¹³⁸ It would probably not have been cost efficient for the state in any event to devote additional resources to what after all was only a misdemeanor, but in this case it made no sense at all to retry the case, as Jensen had served his sentence prior to the appellate court's decision.¹³⁹ In April 2002 Jensen had been sentenced to a year in jail; with credit for time served he was released in October 2002.¹⁴⁰ The appellate opinion is dated July 25, 2003.

By that time, Jensen was back in jail again. Shortly after he was released after serving his sentence on the original conviction of the protective order, the petitioner alleged two more violations in October and November 2002. By June 2003, Jensen had been convicted of another violation, this time as a felony due to Utah's enhancement rule for multiple domestic violence offenses, and was sentenced to "no more than five years" in jail.¹⁴¹ He was released in late March 2005.¹⁴² In the opinion of the prosecutor, Jensen is a likely candidate for recidivism: "we haven't heard the last of him" she says.

¹³⁸Bautista/McKinnon interview, April 5, 2005.

¹³⁹Id.

¹⁴⁰See n.36 supra for a detailed discussion of his criminal record.

¹⁴¹His comes from Dallin Creswell's report.

¹⁴²Interview McKinnon April 2005.

III. Where the Rubber Meets the Road: Gender Bias as a Capability Problem in *Jensen*

There are two gender-related capability problems operating in the *Jensen* case. The first is a capability problem relating to the process: the use of peremptory challenges to exclude men from the jury. The second capability problem involves the legal system's limited ability to address the problem of domestic violence against women.¹⁴³

Gender and Jury Selection

Jensen's conviction is reversed because the appellate court (two thirds of whom are women) find that the prosecutor discriminated against men in her use of her peremptory challenges. In other words, gender bias against men is determined to have so corrupted the process that the verdict in the trial must be thrown out.

This result is problematic, for several reasons. First, the court's analysis of the gender bias in the prosecutor's use of her peremptories reveals the analytical bankruptcy of the *Batson-J.E.B.* rules prohibiting discrimination in the use of peremptories. When the prosecutor's peremptories are analyzed, that analysis reveals that the challenges can be justified on the basis of prior involvement with domestic abuse.

The prosecutor explained to the trial judge that she had just gone down the list, deleting those involved in a protective order.¹⁴⁴ Her explanation is consistent with how the peremptory

¹⁴³[either x ref to textual discussion of why domestic violence should be considered a gender problem, a male violence against women problem, even though there is woman on man, man on man, woman on woman domestic violence or expand on that in this n]

¹⁴⁴Id. The appellate court opined that she should have asked the trial judge to inquire into whether those who responded affirmatively were involved as behalf of petitioners or respondents. 76 P.3d at 193 n.4. According to the prosecutor she did request the judge pose such a question and he refused. Interview. Such an exchange does not appear in the trial transcript, although some gaps do appear in the transcript, which was transcribed from an audiotape.

challenges were exercised.¹⁴⁵ Under Utah criminal procedure, the parties are to exercise their peremptories “in regular turn” beginning with the prosecutor.¹⁴⁶ In this case, each had three peremptories.¹⁴⁷ As the two attorneys went down the list of venirepersons in order, the prosecutor struck each person who had responded affirmatively to involvement with a protective order or domestic violence dispute. It just so happened that all were men, but she did not skip

¹⁴⁵The prosecutor used her first challenge to strike Venireperson No. 7, a man. He had answered affirmatively to questions asking whether he, a relative or a close friend had been accused of an assault or violation of a protective order, had been either a petitioner or respondent on a protective order, or had been involved as a victim, witness or defendant in a domestic violence dispute. The defense used its first challenge (the second in all) to strike Venireperson No. 6, a woman, who had responded affirmatively only to the question about someone being accused of assault or violation of a protective order but none of the other questions about domestic violence, suggesting that the prior incident involved an assault not related to domestic violence.

The prosecutor used her second challenge to strike Venireperson No. 8, another man, who had also responded affirmatively to the questions about whether he, a relative or close friend had been involved in a protective order or domestic violence dispute. The defense used his second challenge (the fourth in all) to strike Venireperson No. 12, another woman, who was the only venireperson to state that she or he had been a victim of an assault or protective order violation.

The prosecutor skipped over Venireperson No. 10, a man, because he had not answered affirmatively to any of the questions. She used her last peremptory to strike Venireperson No. 13, another man, who had also responded affirmatively to the questions about accusations of assault or violation of a protective order, involvement with protective orders, and involvement with domestic violence. The defense used his last peremptory to strike Venireperson No. 16, a man, who had responded affirmatively to the questions about he, a relative or a close friend being accused of an assault or protective order violation and being involved in a domestic violence dispute, but did not respond to the question about involvement in some capacity with a protective order.

The only person who responded affirmatively to any of the questions on voir dire meant to reveal involvement with domestic violence but was nevertheless selected to serve on the jury was Venireperson No. 17, a woman – and by the time her name came up both sides had used all of their peremptories.

¹⁴⁶Utah R. Crim. P. 18(a)(2); Appellee’s Brief at 30 n.5.

¹⁴⁷T. at 5.

over any women¹⁴⁸, as the one woman who responded affirmatively¹⁴⁹ was struck by the defense first. Moreover, she did not strike the married male plumber who had not responded affirmatively to any of the questions about protective orders or domestic violence; she allowed him to remain on the jury and used her last peremptory challenge to strike another man who had responded affirmatively to some of those questions.¹⁵⁰ Thus, the record supports her argument that she was just striking those involved in domestic violence situations without reference to gender.

It was only in attempting to articulate her reasoning that the prosecutor fell into political incorrectness. This reduces the *Batson-J.E.B.* rules to a trap for the unwary: had she been better prepared, she could have articulated a non-gender-related rationale. At the same time, a well-prepared attorney can usually come up with a gender neutral explanation that can mask actual bias. Thus the rules can be seen as both over- and under- inclusive: rational use inartfully explained can run afoul of the rules (so the rules are over-inclusive) while actual bias artfully concealed does not (so they are under-inclusive).

¹⁴⁸At trial, defense counsel had argued that the prosecutor had skipped over a woman venireperson, Venireperson No. 6, who was “involved in domestic violence situations,” but this was not accurate. The prosecutor did not challenge that venireperson but she had answered affirmatively to only one question: whether she, a relative or close friend had been accused of an assault OR violation of a protective order. She did not answer affirmatively to any of the other questions focused solely on protective orders or domestic abuse. This pattern of responses suggests that the incident she was referring to in the answer to the first question was a simple assault, rather than a domestic abuse situation. That did not constitute the prosecutor’s “skipping over” a person involved in domestic violence.

¹⁴⁹This was Venireperson No. 12 who was removed by the defense’s second challenge.

¹⁵⁰See n. 145 supra for a detailed discussion of how both sides’ peremptory challenges had been exercised.

Finally, the assumption underlying the *Batson-J.E.B.* rules is that bias is a conscious act; recent studies call that basic assumption into question.¹⁵¹ If bias is unconscious, a litigator may think they have legitimate reasons for striking someone; their actual but unconscious bias would be invisible to them.

Second, the case raises questions about the appropriateness of extending *Batson* from the context of racial minorities to the context of gender where, at least demographically, no significant minorities exist. In Utah, we now have appellate opinions finding a violation of the *Batson-J.E.B.* rules where the peremptories in a domestic violence case were used against men or women. As long as the number of peremptory challenges is uneven, a litigator will always be using the majority of the challenges against one gender or another, which will always give the opposing attorney the opening to question the use of peremptories.

And finally, the case raises the question whether the “reverse *Batson*” situation that we see in the *Jensen* case should give us pause. By “reverse *Batson*” I am referring to the circumstance of bias being alleged against members of the “privileged” gender class (men), rather than against members of the subordinated gender class (women).¹⁵² Some feminists and critical race scholars have argued that the legal goal should not be gender (or race) neutrality, but rather anti-subordination. They argue that the evil *Batson* was meant to address was the exclusion of members of a subordinated class and that gender and race neutrality, when the background fabric of society continues to privilege one gender or race, can actually reinforce

¹⁵¹Article

¹⁵²I am thus analogizing this situation to what has been called the “reverse *Bakke*” or reverse discrimination situation when a white applicant argues that minorities are given preferential treatment, thus discriminating against whites.

inequality.¹⁵³

Legal Responses to Domestic Violence as a Gender-Related Capability Problem

In the foregoing section, I sketched some of the questions arising from the holding that gender bias infected the jury selection process in *Jensen*. In this section, I am going to delve more deeply into an examination of the gendered problem of domestic violence and the legal system's limitations in responding to that problem. I will begin by explaining why I call domestic violence a gendered problem. Then, borrowing from Reva Siegle and others, I will describe the pendulum-like dynamic of social change and the law's role in that dynamic. And finally I will discuss the *Jensen* case as revealing how that pendulum swing plays out in the context of the gender-related problem of domestic violence.

The starting premise for what follows is that we should think of domestic violence as a gender issue, even though it is not exclusively a gender issue. By this I mean that although violence between intimates comes in all possible gender configurations – male against female, female against male, female against female, male against male – in our society there is a well-documented history of domestic violence by men against their women intimate partners, as a means of enforcing the woman's subordination. Under coverture, as the man was responsible for the woman's actions, he was entitled to discipline her by reasonable means; for example, the "rule of thumb" which allowed him to beat her with a rod as long as it was no bigger than his thumb. For most of our society's history, such domestic violence received the law's imprimatur, whether explicit or implicit.

¹⁵³My thanks to my colleague, Laura Kessler, for sharing this insight.

Today, our legal system no longer condones violence between intimates. I would now like to consider the dynamic by which progressive social change, such as the move from social and legal acceptance of domestic violence to social and legal condemnation, occurs. The dynamic of social change seems to operate like a pendulum. Pressure builds for change as a subordinated group chafes under its subordination; the pendulum of law and public opinion begins to swing toward change. But the push for progressive change encounters a “push-back” from entrenched privilege defending the status quo of its privileged status; the pendulum swings back the other way in a retrograde move, until pressure for progressive change again builds sufficiently for the pendulum to swing once more towards change.

Focusing on the “push- back” by entrenched privilege, Reva Siegle became aware of the mechanism by which privileged status justifies and maintains its privilege when that privilege comes under attack; she describes this mechanism as a sort of shape-shifting. She writes:

The ways in which the legal system enforces social stratification are various and evolve over time. Efforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric – a dynamic I have elsewhere called “preservation-through-transformation.” In short, status-enforcing state action evolves in form as it is contested.¹⁵⁴

So long as we view status law in static and homogenous terms...it is plausible to imagine ourselves at the end of history, finally and conclusively repudiating centuries of racial and gender inequality. But if we consider the possibility that the kinds of rules and reasons employed to enforce status relationships change as they are contested, then it is possible to see contemporary ... law in a different light.¹⁵⁵

[A]ttempts to dismantle a status regime can discredit the rules and reasons employed to enforce status relations in a given historical era, and so create pressure for legislators and

¹⁵⁴Reva Siegle, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan. L. Rev.* 1111, 1113 (1997)(footnote omitted).

¹⁵⁵*Id.* at 1114.

jurists to reform the... law enough so that it can be differentiated from its contested predecessor. Assuming that something of value is at stake in such a struggle, it is highly unlikely that the regime that emerges from reform will distribute material and dignitary “goods” in a manner that significantly disadvantages the beneficiaries of the prior, contested regime.¹⁵⁶

In other words, domestic violence was once justified and explained in terms of hierarchy: the man had dominion over the wife. When pressure built for recognition of women’s rights, that reasoning became discredited. But although the law legalizing domestic abuse changed, the practice of domestic abuse continued, now shielded behind the justification of privacy: the law had no business interfering in the intimate relationship between a man and his wife. The privileged status of the man continued but the justificatory rhetoric and legal rules had “shifted shape” from dominion to privacy.

Elizabeth Schneider has also noted this push/push-back relationship in the context of domestic violence:

Although there have been dramatic strides in the way the law on intimate violence has incorporated these [feminist] insights, in the process of lawmaking, feminist ideas about the relationship between violence and gender have been simultaneously transformed, depoliticized, subverted, and contained: the broader link between violence and gender inequality that animated them has, to a large degree, been lost, or at least undermined. For example, widespread use of the term “battered woman syndrome” has reinscribed notions of female pathology, provocation, and victim blaming into legal discourse. In the very process of change, systemic analysis of gendered violence consistently meets with ambivalence and resistance. Each step forward provokes efforts to dilute and contain the original theoretical framework.¹⁵⁷

Every entrenched privileged class contains opportunities for resistance, which open a way for progressive change, but every progressive change also contains opportunities for resistance,

¹⁵⁶Id. at 1119.

¹⁵⁷Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* 6 (2000).

which open a way for co-option.¹⁵⁸

The push/push-back dynamic can be seen in the *Jensen* case. We can interpret the case as a victory in several ways. First of all, from the perspective of this specific case, despite the absence of any testimony that the petitioner received any physical injury from the defendant¹⁵⁹, the jury was willing to convict him for mere violation of the protective order. Some critics of the reliance on criminalization of the violation of protective orders, rather than their enforcement through contempt proceedings, have worried that juries would be unwilling to convict persons such as the defendant whose conduct would not be criminal in the absence of the protective order.¹⁶⁰ In this case the only testimony concerning the defendant's conduct was that he and the petitioner had argued through the car window, hardly criminal conduct but for the pre-existing no-contact order; nevertheless, the jury was willing to convict. This willingness could be read to indicate that as a society we have come to see domestic violence as a serious matter worthy of criminal consequences.¹⁶¹

¹⁵⁸Cf. Brenda Cossman, *Canadian Same Sex Relationship Recognition Struggles and the Contradictory Nature of Legal Victories*, 48 *Clev. St. L. Rev.* 49, 51 (2000) (discussing a similar dynamic in the context of queer rights).

¹⁵⁹The only two suggestions of physical violence in the case arose from the language of the protective order itself, which prohibited the defendant from assaulting or threatening the petitioner, and from a passing comment by the judge during *vire doir*, that the case would involve an assault. *T. at.* Several of my students were bothered by this comment and wondered if it had prejudiced the jury against the defendant.

¹⁶⁰See, e.g., David Slotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protective Orders*, 56 *Ohio St. L. J.* 1190 (1995).

¹⁶¹There are of course alternate explanations. One is that offered by the prosecutor: Jensen was a scary, creepy-looking person who appeared capable of violence. Another is the fact that at least one woman on the jury had prior involvement with a domestic violence situation, although in what capacity is unknown. Finally, as has been noted, this case went to trial barely a

Moreover, the jury did not give credence to the defense theory that the petitioner was as blameworthy as the defendant: they did not hold the petitioner's absence at trial against her; they did not hold against her the undisputed testimony that she continued to see the defendant after obtaining the protective order; and either they did not believe the defense witness who testified that the petitioner had told the defendant that the protective order had been lifted or, if they did believe the testimony, they thought it did not relieve the defendant from responsibility. All of these can be seen as victories in the battle against domestic violence.

More generally, we can read the prevalence and ease of obtaining protective orders today as a victory for progressive change. As discussed above, feminist legal writers have argued that the historic reluctance of the justice system to address the problem of domestic violence is a type of gender bias.¹⁶² Thus, the fact that 7,000 protective orders a year are issued in Utah can be seen

month after the 9-11 attacks and that might have contributed to a generalized societal emphasis on law and order.

¹⁶²Reva Siegel. See also the lyrics to the Tracy Chapman song:

Last night I heard the screaming
Loud voices behind the wall
Another sleepless night for me
It won't do no good to call
The police
Always come late
If they come at all

And when they arrive
They say they can't interfere
With domestic affairs
Between a man and his wife
And as they walk out the door
The tears well up in her eyes

Last night I heard the screaming
Then a silence that chilled my soul

as a victory in that it shows that the legal system is now taking the problem seriously.

Nevertheless, a victory is never just a victory, but inevitably spawns a backlash.¹⁶³ The *Jensen* case subtly illustrates this. The case contains hints of how these victories could spawn the seeds of their own demise. In general, the prevalence of protective orders presents two opportunities for backlash. The first is an attack on their effectiveness. The second, which appears in the *Jensen* case, is the charge of abuse.

Because the existence of a protective order never stopped any one intent on harming a partner or former partner, the way is opened for dismissing them as ineffective and discouraging women from obtaining them. Domestic abuse unfortunately continues to plague us, despite the prevalence of protective orders. In Utah in 2002, forty-five per cent of convicted domestic violence offenders had been subject to a protective order.¹⁶⁴ In one recent week in Salt Lake City, there were two homicides in which a man killed a former partner; in at least one case the victim had previously obtained a protective order.¹⁶⁵ One limitation of the legal system's

I prayed that I was dreaming
When I saw the ambulance in the road

And the policeman said
"I'm here to keep the peace
Will the crowd disperse
I think we all could use some sleep"

Tracy Chapman, "Behind the Wall" (1983 SBK April Music, Inc./Purple Rabbit Music).

¹⁶³Cossman, *supra* n. at

¹⁶⁴June 13th Trib article at A-5.

¹⁶⁵One was a murder suicide where a man killed his former wife and then killed himself, Michael N. Westley, *Cops say man killed ex-wife, then self*, Salt Lake Tribune, C2, May 11, 2005; Michael N. Westley, *Friends say shooter was 'pushed' by situation*, Salt Lake Tribune, B1-B5, May 12, 2005. The other was an instance of a man killing a woman shortly after she

response to such violence is sadly obvious; in the words of the Dixie Chicks, someone intent on battering can “walk[] right through that restraining order”¹⁶⁶ because ultimately it is just a piece of paper.

The *Jensen* case, however, involves the other prong of a potential backlash: the prevalence of protective orders creates the opportunity for arguing they are being abused, which could open the way for making them more difficult to obtain or for reluctance to enforce them. That is, allegations that a petitioner is abusing the protective order can be interpreted as symptomatic of a backlash against the success of protective orders.

According to the defense attorney, he sees many examples of what he calls “bogus” protective orders.¹⁶⁷ In most of those cases, he was of the opinion that both parties were being mutually abusive. That was his view of this case; he pointed out that there were no medical records of the petitioner receiving any injuries, no photos of her with bruises, and no testimony at trial or at the hearing on the protective order that she had ever been injured. As was mentioned above, Jensen stipulated to the issuance of the protective order, so no judicial officer ever made a determination that in fact he had been physically abusive. Moreover, his conviction rested on violation of the no-contact order, not that any assault had been committed.

As Reva Siegle reminds us, we are not at the end of history; perhaps allegations of

ended the relationship, Lisa Rosetta and Justin Hill, *Woman’s ex jailed on suspicion of murder*, Salt Lake Tribune, B1-B2, May 18, 2005.

¹⁶⁶ Dennis Linde, *Goodbye, Earl* © 1999 EMI Blackwood Music Inc./Rising Gorge Music (BMI), recorded on Dixie Chicks, *Fly* (1999).

¹⁶⁷Id. A contrary view was expressed by a former Domestic Relations Commissioner; she saw few instances of a petitioner using a protective order strategically. Lisa Jones Reading Interview, April 6, 2005.

abusing protective orders are an indication of how status regimes evolve, the rule structure and rhetoric shifting as they are contested. The *Jensen* case may be an example of such a shift as it is occurring

If we look at the legal system's response to domestic violence on a continuum, we can see the push/push-back dynamic at work. We begin with legal dominion as the justification for domestic violence. With the push for women's rights, that justification is discredited, but that is followed by a push-back move: domestic violence is shielded from legal intervention by a theory of privacy putting the domestic relationship outside the law. With the second wave of feminism, there is another push for legal protection from abuse and we see the growth of protective orders. Perhaps allegations of women abusing the law's protection will be the next push-back move.

. The defense made use of two circumstances that are fairly common in domestic violence cases to raise the suggestion of the petitioner abusing the system: the on again/off again nature of their relationship, and the failure of the petitioner to appear at trial.

The defense made much of the fact that the petitioner continued to see the defendant after the issuance of the protective order. The picture the defense wanted to paint was that of a vindictive woman who was abusing the protective order as a tool for maintaining control of the relationship. According to this portrait, she reported Jensen for violation of the order whenever he threatened to terminate the relationship.¹⁶⁸ Her failure to appear at trial was pointed to as evidence of the lack of merit to her complaint. Without the petitioner's testimony, the defense had little evidence to offer in support of this argument, however, and it was not successful with the jury. Although the argument did not succeed in swaying the jury in this case, it might in

¹⁶⁸Interview with Rudy Bautista, April 5, 2005.

another.

The accusation that the petitioner was abusing the protective order raises the question as to what constitutes abuse of a protective order. Accepting in part¹⁶⁹ the defense's characterization of this case as an example of a woman using a protective order as a means of controlling the relationship, I would like to explore whether that should be considered an abuse of the system.

For some women involved in relationships with men who are abusive¹⁷⁰, what the women say they want is not for the relationship to end, but for the man to stop being abusive.¹⁷¹ Given that the prevailing view is that violence in a relationship is usually more about power and

¹⁶⁹I am accepting here the characterization of the petitioner as maintaining a relationship with Jensen after the issuance of the protective order, but not that she reported him for violations whenever he threatened to terminate the relationship. Reporting him for violations whenever he threatened to end the relationship does not seem to comport with the few facts we have: that Jensen came to the petitioner's house; that she did not answer the door; that when Jensen left to go next door, she left her home and got into her car; that Jensen approached the car and they had an exchange; and then she drove off, apparently to a nearby police station where she reported him for violation of the protective order. T. at 108-110. It seems unlikely that Jensen would be so persistent in attempting to contact the petitioner if what he wanted to say was that he was breaking off the relationship; it seems more likely that she was the one who did not want to see him, at least at that time, and he was the one who would not take no for an answer. Accordingly I am hypothesizing that she was attempting to use the protective order to keep Jensen's behavior in line with what she considered acceptable.

¹⁷⁰I do not mean to imply that abusive relationships are only configured with women as victims and men as aggressors. Certainly, abusive relationships come in all configurations: men as victims with women as aggressors; women abusive to their female partners; men abusive to their male partners. Defense counsel in this case portrayed the two as mutually abusive.

¹⁷¹"Assertion of rights requires that women takes action to end the relationship, when what they may really want is the 'connection but without the violence.'" Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* 51 (2000), quoting Sally Engle Merry, *Wife Battering and the Ambiguities of Rights* in *Identities, Politics, and Rights* 271, 300 (Austin Sarat & Thomas R. Kearns, eds., 1995). See also, Schneider at 77-78.

control than it is about anger management¹⁷², such a woman might perceive a protective order as a means of giving her some control over her partner.¹⁷³ I am not talking about a woman getting a protective order without any grounds for it whatsoever¹⁷⁴; rather I am hypothesizing a more nuanced situation where the man has indeed been abusive but the woman in effect wants the relationship to continue, but on her terms of no abuse.

This situation suggests that a woman's staying in an abusive relationship is not simply learned helplessness, as indicated by the rhetoric of the battered woman's syndrome, but can be seen as an act of agency. It has been noted that there is a false dichotomy between victim or agent in the context of domestic violence; either a woman is a victim because she is in an abusive relationship, or she is an agent because she has ended the relationship – but she can't have it both ways.¹⁷⁵ A woman who uses a protective order to exercise some control in a relationship where the man is using violence or the threat of violence as a means of exercising control can be seen as claiming that she is both a victim of domestic abuse and an agent acting affirmatively to get what

¹⁷²Lisa Jones Reading, Interview April 6, 2005. See also Evan Stark, *Re-presenting Woman Battery: From Battered Woman Syndrome to Coercive Control*, 58 Alb. L. Rev. 973,981 (1995); Joan Erskine, *If It Quacks Like a Duck: Recharacterizing Domestic Violence as Criminal Coercion*, 65 Brook. L. Rev. 1207, 1216 (1999).

¹⁷³We will put to one side whether a protective order is effective when used in this way.

¹⁷⁴Nor is that the case here. Even defense counsel only suggested that this relationship was mutually abusive. Interview.

¹⁷⁵“Women's victimization and agency are each understood to exist as the absence of the other – as if one must be either pure victim or pure agent – when in fact they are profoundly interrelated.” Schneider at 76. “Portrayal of women as *solely* victims or agents is neither accurate nor adequate to explain the complex realities of women's lives.” Id. at 82 (emphasis in original). See also Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence and Agency in The Public Nature of Private Violence* 59 (Martha Albertson Fineman & Roxanne Mykitiuk, eds. 1994).

she wants – the relationship without the violence.

This is not the way in which protective orders are supposed to work. Symptomatic of the dichotomous thinking¹⁷⁶ that underlies much of law, the structure of protective orders presumes one of two situations: either there is an extant relationship into which the law does not interfere (at least in theory) or the relationship is over and the petitioner is soliciting the law’s assistance in terminating the relationship. Off-again/on-again does not fit into this framework. From this perspective, a petitioner using a protective order to monitor an ongoing relationship is doing

¹⁷⁶Stephen Jay Gould gives a pithy description of one theory about the source of dichotomous thinking in the context of science. He is speaking of how the British philosopher Francis Bacon (1561-1626) metaphorically spoke of psychological barriers to knowledge as “idols”; Gould quotes Bacon: “Idols are the profoundest fallacies of the mind of man...[T]hey deceive...from a corrupt and crookedly-set predisposition of the mind... rather like an enchanted glass, full of superstitions, apparitions, and impostures.” Stephen Jay Gould, *The Lying Stones of Marrakech: Penultimate Reflections in Natural History* 55-56 (quoting a 1674 translation of Bacon’s *Great Instauration*). Bacon identifies four types of idols; the type that is relevant here is what Bacon called the “idols of the tribe,” which Gould describes as “those foibles and errors of thinking that transcend the peculiarities of our diverse cultures and reflect the inherited structures and operations of the human brain.” *Id.* at 55. Within this category of tribal idols, Gould identifies the one that causes the most trouble as the human tendency to divide everything into two opposite groups. (I am reminded of the old joke: “There are two kinds of people in the world – those who divide everything into two groups and those who don’t.” Of course, if Gould is right, there is no one in the second group.) He explains how this tendency causes problems:

Thus, we start with a few basic divisions of male versus female and night versus day – and then extend these concrete examples into greater generalities of nature versus nurture, spirit versus matter, the beautiful versus the sublime; and thence (and now often tragically) to ethical belief, anathematization, and, sometimes, warfare and genocide (the good versus the bad, the godly who must prevail versus the diabolical, ripe for burning). *Id.* at 57 (parenthetical references omitted). Gould speculates on the evolutionary basis for our tendency to dichotomous thinking:

I rather suspect that dichotomization represents some “baggage” from an evolutionary past of much simpler brains built only to reach those quick decisions – fight or flight, sleep or wake, mate or wait – that make all the difference in a Darwinian world. Perhaps we have never been able to transcend the mechanics of a machinery built to generate simple twofold divisions and have had to construct our greater complexities upon such a biased and inadequate substrate.

Id.

something subversive, refashioning a legal tool for her own purposes. She is using the master's tools to remodel the master's house. Some would say such a woman is abusing the system.¹⁷⁷

We could, however, think of this as empowering the victim, not abusing the system.¹⁷⁸

If, as seems likely, the petitioner continued to see Jensen even after she obtained a protective order against him, she would not be the only woman to have continued a relationship in the shadow of a protective order. In *City of North Olmstead v. Bullington*¹⁷⁹, when police stopped a vehicle for a routine traffic violation, they discovered that the passenger in the car was both the wife of the driver and the petitioner on a protective order against him. There was no suggestion in the case that she was in the car against her will. Similarly, in *Ohio v. Lucas*¹⁸⁰, the petitioner on a protective order continued to have contact with the respondent, her ex-husband. That case highlights what may sometimes account for a continued relationship despite the protective order: the two had children together.¹⁸¹ In *Lucas*, the ex-wife/petitioner had invited the ex-husband/respondent to her house for one of their children's birthday party.

Using a protective order to monitor an ongoing relationship, however, is a risky maneuver on several counts. As mentioned above, a protective order will not stop any abuser who is intent

¹⁷⁷This was the opinion of one of my colleagues.

¹⁷⁸At the FLT Workshop, one participant wondered how common is the situation of the petitioner using a protective order not to end the relationship but to police it. This is of course a quantitative question and, as I pointed out at the time, while it is certainly a valid and important question, it is not one I am interested in exploring. The question I am interested in exploring is how we should be thinking about such use and what it says about the legal system.

¹⁷⁹744 N.E. 2d 1225 (Ohio App. 2000).

¹⁸⁰770 NE.2d 114 (Ohio App. 2002).

¹⁸¹See also recent Utah case

on causing harm so the petitioner's belief in the efficacy of the order to police her partner's behavior may be misplaced.

Moreover, the petitioner's initiating or consenting to contact with the respondent may cause a subsequent attempt to enforce the order to be ineffective. In Utah, for example, where the mens rea for culpability in violating a protective order is intentional or knowing and the protective order itself contains no language putting the respondent on notice that the petitioner cannot waive or nullify the order¹⁸², such conduct may be found sufficient to negate the respondent's mens rea.¹⁸³

In addition, some judges have punished petitioners who initiated or consented to contact with their abusers.¹⁸⁴ In both the *Bullock* and *Lucas* cases mentioned above, the petitioners were

¹⁸²Cf. *Olmstead v. Bullington*, 744 N.E. 2d 1225, 1226 (Ohio App. 2000)(language in protective order stating that it "cannot be waived or nullified" by the petitioner).

¹⁸³This was the substantive defense in the *Jensen* case. It was not a successful defense with the jury and the legal sufficiency of this defense was never reached in the appellate process. Defense counsel tended to mis-categorize the defense as one of mistake of fact, although a belief that the protective order was dismissed is most likely a mistake of law, not fact, and thus not legally sufficient. What defense was arguing, though, was that Jensen could not have acted intentionally or knowingly to violate the order if he honestly, albeit mistakenly, thought it had been dismissed. This issue was implicitly raised on appeal when defense argued that the absence of the petitioner violated the defendant's sixth amendment rights. The petitioner's testimony was wanted to show that she had told him the order was dismissed; the absence of that testimony could only be relevant to the defendant's sixth amendment rights if it was legally relevant, and it could only be legally relevant if it negated his mens rea. The appellate court did not reach this issue as it found the *Batson* issue dispositive.

¹⁸⁴See, e.g., *Ohio v. Lucas*, 770 N.E.2d 114 (Ohio App. 2002)(holding that a petitioner who had invited the respondent to their child's birthday party was guilty of aiding and abetting a violation of the protective order), rev'd 795 N.E.2d 642 (Ohio 2003). See also Marya Kathryn Lucas, *An Invitation to Liability?: Attempts at Holding Victims of Domestic Violence Liable as Accomplices When They Invite Violations of Their Own Protective Orders*, 5 *Geo. J. Gender & Law* 763 (2004)(collecting reports of such petitioners being held criminally liable as accomplices, being held in contempt, or fined).

charged with aiding and abetting a violation of the protective order due to their being voluntarily in the respondent's presence. The willingness of at least some law enforcement officers, prosecutors, and judges to accuse and convict women of a crime for continuing to see their former partner after the issuance of a protective order is persuasive evidence of push-back.

In other areas of human interactions, we have no trouble thinking of law as a tool to police behavior in a relationship. We could describe a contract (especially a contract of adhesion or form contract) in those terms.¹⁸⁵ Looking at the contract from the point of view of the party who wishes to enforce the contract's terms, the agreement, like a protective order, specifies what the other party's obligations are and what its behavior should be. A contract, like a protective order, is of course not self-enforcing, but the power of the state stands behind each. Most pertinently, a contracting party may waive enforcement of a contract term.¹⁸⁶

If we are willing to allow parties to use a contract to enforce private ordering but we are not willing to allow such use of a protective order, what accounts for the difference? Perhaps it is the difference between criminal and civil liability; we no longer throw debtors in prison.

If the problem is the difference in consequences between criminal and civil violations,

¹⁸⁵At the FLT workshop, Mary Ann Case suggested that property may be a better analogy than contract. She was concerned about the problem of criminal liability for violation of a contract and pointed out that there is an analogous enforcement tool in the property toolkit: a trespasser can be subject to criminal liability. Moreover, an invitee's privilege to enter the property is limited in scope, and if the scope of the privilege is exceeded, the invitee becomes a trespasser. She hypothesized a protective order that made the respondent a trespasser in the petitioner's home, at least temporarily, even if the respondent had a property interest in that home. She noted, however, that this would limit the remedy to a petitioner who had a pre-existing property interest and would only protect the petitioner while in the home.

¹⁸⁶Of course, in the case of serial waivers, the party runs the risk of having the waiver interpreted by a court as a modification. Moreover, waivers must be exercised in good faith.

that may argue in favor of giving petitioners the choice of obtaining a criminal protective order or a civil order. The criminal protective order would be enforceable on the basis of anyone reporting contact, while under the civil order only the petitioner would have standing to seek redress for a violation. But of course foregoing criminal liability for violations of protective orders to a great extent removes the “teeth” from those orders, which in turn frustrates the original concept, which was to allow the petitioner a measure of power – the ability to invoke the police power of the state – to counter the respondent’s use of force or the threat of force.

Perhaps, however, the reluctance to allow legal enforcement of private ordering in intimate relationships is a remnant of the privacy rhetoric that for so long shielded domestic violence from legal remedy; that is, perhaps the underlying rationale is that the law may legitimately be used to police market behavior but it may not legitimately be used to police intimate behavior. In that case, we would be seeing what could be called one of the “deep structures” of patriarchy: gender privilege that is built into the underlying legal structure.

I have argued elsewhere that one of the most significant contributions of feminist thought to the area of contracts is to challenge the traditional boundaries of contract’s domain, to ask why so many areas that are important to women – marriage, procreation children – are positioned outside of contract law.¹⁸⁷ It seems logical that, if women had been meaningfully participating in the formation of contract law during all those centuries prior to the nineteenth, women’s interests would now be part of the foundational structure of contract law. Perhaps by now we would have solved the puzzle of how to invoke state power to enforce private ordering of intimate relationships.

¹⁸⁷Debra L. Thredy, *Feminism and Contract Law*, INDIANA L. REV.

IV. Epilogue: Legal Archaeology and Pedagogy

Because the genesis for this article was a class project, it seems appropriate to return now to the pedagogical uses of legal archaeology as shown by the class study of the *Jensen* case. In the first instance, the case provided an opportunity for the class to discuss the issue of domestic violence and the law's response to it. Not surprisingly, there were divergent views on this.

But studying the case in depth also encouraged these first year law students to engage with other aspects of the law and litigation not usually studied in the first year. Many were intrigued by the process of picking a jury, the voir dire, the peremptory challenges, and the *Batson* issues. More surprisingly, some students became interested in the concept of admissibility of evidence and engaged with the rules of evidence, particularly the rule for self-authenticating documents that was argued on appeal.

The case became a wonderful vehicle for discussing issues of judicial and attorney competence.¹⁸⁸ The class was horrified when they read the transcript and discovered that neither the prosecutor nor the judge seemed at all familiar with the *Batson* jurisprudence. The day that I had the two attorneys, the prosecutor and defense, come speak to the class was literally an eye-opening experience for them; when I looked around the room I saw eyes as big as dinner plates as they heard about the realities of practice.¹⁸⁹ It was sobering for them to hear about the substantial

¹⁸⁸See Judith Maute, *The Values of Legal Archaeology*, 2000 UTAH L. REV.

¹⁸⁹My favorite moment occurred when the defense attorney was discussing how he had asked for a continuance when he realized the petitioner was not going to be available and how the judge had denied his request even though it eviscerated his planned defense. From the back of the room a student blurted out "He can do that?"

caseloads carried by both the district attorney and the public defender. Many were taken aback to realize how little control litigating attorneys had over the process. Despite the subpoena, the petitioner did not show up in court and the judge denied the defense's request for a continuance.¹⁹⁰

They were also impressed with how the two attorneys could disagree about the case without being disagreeable, and I was thankful that both attorneys proved to be excellent role models for how one comports oneself in an adversarial situation as a professional and an officer of the court. Although it was perfectly obvious that the two had completely different assessments of the merits of the case, and both were passionate and committed in defense of their respective assessments, not even a hint of an ad homine attack crept into their discussion – in fact, both went out of the way to point out the professional worthiness of their opponent.

Unsolicited feedback from the students was overwhelmingly positive and supported a pedagogical theory I had advanced about the benefits of legal archaeology: it restores the human dimension to legal education.

However, the formal student evaluations told a different story. They were one of the worst sets of evaluations I have ever received. Now, there were some systemic problems that do call into question the overall validity of that set of evaluations: we are in the process of switching from in-class administered evaluations to a web-based system and, whereas in the past a large majority of the students in the class would have filled out the evaluation form, less than half the class, only 18 out of 45 students, filled in the electronic form. I am left to wonder whether the

¹⁹⁰My favorite moment occurred when the defense attorney told the class he had objected to the case going forward without the petitioner and that the judge had ordered him to proceed: a voice at the back of the room gasped in disbelief, “He can do that?”

unsolicited laudatory emails were from students who neglected to fill out a formal evaluation and thought that a personal email to me would be an acceptable alternative.

Nevertheless, the negative evaluations reflect a concern that I and others have voiced about the dangers of using a pedagogy that departs from traditional doctrinal analysis and also departs from recognized skills training.¹⁹¹ Students can be very traditional in their educational expectations. Such pedagogical experimentation would be particularly risky for an untenured professor.

The comments from the students, moreover, echo some of the scholarly dubiousness about qualitative empirical work. Some students were unsure of what they were supposed to have learned from the class. More troubling, however, were comments from students who grasped the concept of a capability problem but found those insights to be depressing.

I remain convinced, however, of the value of legal archaeology as a pedagogical tool. I again offered the class in the spring of 2006. This time around I have tried to be more explicit about the purposes of the perspective class and about the reasons for doing this kind of work. I have also reminded students that every criticism contains an affirmation: we criticize the system not to undercut its legitimacy but to envision ways it can better serve the ends of justice.

¹⁹¹See *Unearthing Subversion*