

# Journal of Law and Policy

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Volume 10  
Issue 2  
SYMPOSIUM

Article 1

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2002

## *Battered Women & Feminist Lawmaking: Author Meets Readers*

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### Recommended Citation

Elizabeth M. Schneider, Christine Harrington, Sally Engel Merry, Renee Romkens & Marianne Wesson, *Battered Women & Feminist Lawmaking: Author Meets Readers*, 10 J. L. & Pol'y (2002).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol10/iss2/1>

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***BATTERED WOMEN & FEMINIST  
LAWMAKING: AUTHOR MEETS READERS,  
ELIZABETH M. SCHNEIDER, CHRISTINE  
HARRINGTON, SALLY ENGLE MERRY,  
RENÉE RÖMKENS, & MARIANNE WESSON\****

PANELISTS

*Author*

**ELIZABETH M. SCHNEIDER\*\*** is the Rose L. Hoffer Professor of Law and Chair of the Edward V. Sparer Public Interest Law Fellowship Program at Brooklyn Law School. She is the author of *Battered Women and Feminist Lawmaking* (Yale University Press 2000), which won the 2000 Professional/Scholarly Publishing Award of the Association of American Publishers, Legal Category. She is the coauthor of the law school

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\* This article is a transcribed version of the Author Meets Readers panel discussion of Elizabeth M. Schneider's book, *Battered Women and Feminist Lawmaking*, at the 2001 International Law and Society Conference in Budapest, Hungary on July 6, 2001. Both the readers who participated in the formal program and audience members who participated in the informal discussion and who were known to the panelists because of their work on issues of domestic violence are identified by name. Other audience members who participated in the informal discussion are not identified by name because they were not known to the panelists.

\*\* Thanks to Christine Harrington for chairing and organizing this panel, to Sally Merry, Renée Römken, Mimi Wesson, Isabel Marcus, Elizabeth Rapaport and Betsy Stanko for participating in the program and for their generosity in helping to put the panel transcript together in publishable form. Special thanks go to Caroline Nadal, Audrey Woo, Angela Calcagno and the staff of the *Journal of Law and Policy* for their extraordinary commitment and superb work in putting this article together.

casebook, *Battered Women and the Law* (Foundation Press 2001) (with Clare Dalton), and has published many articles on gender, law, civil rights, and civil procedure. She has also been a Visiting Professor at Harvard and Columbia Law Schools. Before becoming a law teacher, she clerked for District Judge Constance Baker Motley in the Southern District of New York, and was a staff attorney at the Center for Constitutional Rights in NYC, and the Constitutional Litigation Clinic at Rutgers Law School-Newark, where she litigated many landmark cases and did pioneering work on women's rights. A graduate of Bryn Mawr College, she has an M.Sc. from The London School of Economics and a J.D. from New York University Law School.

*Chair of Panel*

**CHRISTINE HARRINGTON** is Associate Professor of Politics at New York University, and founding Director of the Institute for Law and Society and the Law and Society Program. Her research interests are in the areas of public law and law and society. She has published in *Law & Society Review*, *Law & Policy* and other journals on dispute processing (mediation and regulatory negotiation) and litigation (federal regulatory and federal appellate civil) as forms of political participation and sites of ideological production. Her book, *Lawyers in a Postmodern World: Translation and Transgression* (New York University Press 1994), examines the role of lawyers and professional power in American political development and state formation, as does *Administrative Law and Politics* (Addison-Wesley Publishing Co. 2000). Professor Harrington is currently researching and writing about the cultural politics of rights as they materialize in global preservation movements, indigenous entitlement and reparation claims in an article entitled *Untouchable Entitlement* (forthcoming).

*Readers*

**SALLY ENGLE MERRY** is Professor of Anthropology at Wellesley College and Co-director of the Peace and Justice

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Studies Program. Her work in the anthropology of law focuses on law and culture, law and colonialism, and the legal construction of race. She has written *Colonizing Hawai'i: The Cultural Power of Law* (Princeton University Press 2000), *The Possibility of Popular Justice: A Case Study of American Community Mediation* (co-edited with Neal Milner, University of Michigan Press 1993), *Getting Justice and Getting Even: Legal Consciousness Among Working Class Americans* (University of Chicago Press 1990), and *Urban Danger: Life in a Neighborhood of Strangers* (Temple University Press 1981). She is currently studying the regulation of violence against women within the international human rights system, analyzing it as an example of an emergent global legal order. She is past-President of the Law and Society Association and the Association for Political and Legal Anthropology.

**RENÉE RÖMKENS** is a criminologist who is Visiting Professor in the Institute for Research on Women and Gender at Columbia University and Associate Professor in the Department of General Social Sciences at Utrecht University in the Netherlands. She also holds a Ph.D. in Psychology from the University of Amsterdam. She has a long record of research in the field of domestic violence, including the first national survey in Western Europe (Netherlands), which she conducted in the late 1980s on prevalence, social risk markers and psychological consequences of violence against women. Her recent research in the United States is in the socio-legal domain and focuses on how the powers of law operate in a criminal justice system that increasingly cooperates with other disciplines.

**MARIANNE WESSON** is Professor of Law, Wolf-Nichol Fellow, and President's Teaching Scholar at University of Colorado. She has published articles about domestic violence, the pornography debate, and criminal law and procedure. In addition to her academic work, she provides regular legal commentary for National Public Radio's Weekend Edition Sunday and has written two novels, *Render Up the Body* (Harper Mass Market Paperbacks 1998) and *A Suggestion of Death* (Pocket Books

2000). Professor Wesson received her J.D. from the University of Texas School of Law. She served as law clerk to Judge William Wayne Justice of the Eastern District of Texas as well as Assistant United States Attorney for the District of Colorado.

#### AUDIENCE MEMBERS / DISCUSSION PARTICIPANTS

**ISABEL MARCUS** is Director of the Institute for Research and Education on Women and Gender and Chair of Women's Studies at the University of Buffalo, and Professor of Law at University of Buffalo School of Law. She holds a Ph.D. in political science and a J.D. from the University of California-Berkeley. Her writing has focused on women's issues, most recently on domestic violence. She has traveled and lectured extensively in Eastern Europe, including Lithuania and Poland, as well as the People's Republic of China, India, and Pakistan. In 1997, she was a Fulbright Lecturer on the Faculty of Law at Babes-Bolyai University, Cluj, Romania. She has written a book, *Dollars for Reform: The OEO Neighborhood Health Centers* (Lexington Books 1981), and is working on a second, *Dark Numbers: The Emergence of Domestic Violence as a Law and Public Policy Issue in Eastern Europe and Russia*.

**ELIZABETH RAPAPORT** is the Dickason Professor of Law at University of New Mexico School of Law. She teaches criminal law, criminal procedure, and jurisprudence. Her scholarship reflects a longstanding interest in women in the criminal justice system and a more recent interest in executive clemency. She is currently at work on a book tentatively entitled *Capital Punishment and the Domestic Discount: Gender, Family and the Death Penalty*. Professor Rapaport received her J.D. from Harvard Law School and her Ph.D. from Case Western Reserve University. She taught philosophy at Boston University for ten years before attending law school.

**BETSY STANKO** is Director of ESRC Violence Research Programme and Professor of Criminology in the Department of Social and Political Science, Royal Holloway, University of

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London. She is the author of over sixty papers and books exploring gender and violence and decision-making of public officials. Most notable of these are *Intimate Intrusions* (Routledge 1985) and *Everyday Violence* (Pandora Press 1990). She has studied police and policing since the mid 1970s. Her most recent research on domestic violence, an area in which she has been both an activist and a researcher for twenty-five years, includes *Counting the Costs: Estimating the Impact of Domestic Violence in the London Borough of Hackney* (1998) and *Domestic Violence and Social Housing: Southwark* (2000). Last autumn, she conducted the first day count on incidents of domestic violence known to police in the U.K. In January 2002, she joined the Office of Public Services Reform, Cabinet Office, as a Principal Advisor. She is also currently the project leader of *Responding and Understanding Hate Crime*, a study examining the use of routine information about the Hate Crime for the Metropolitan Police. Funded by the Home Office, this project is the first of its kind in the U.K. and is located inside the Metropolitan Police's Diversity Unit.

## DISCUSSION

*Christine Harrington*

We are here today to discuss Liz Schneider's book *Battered Women and Feminist Lawmaking*<sup>1</sup> and the issues this book raises

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<sup>1</sup> ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (Yale University Press 2000). The book examines the pathbreaking legal process that has brought the pervasiveness and severity of domestic violence to public attention and has led the United States Congress, the Supreme Court, and the United Nations to address the problem over the last thirty years. Schneider explores how claims of rights for battered women have emerged from feminist activism, and assesses the possibilities and limitations of feminist legal advocacy to improve battered women's lives and transform law and culture. The book chronicles the struggle to incorporate feminist arguments into law, particularly in cases of battered women who kill their assailants and battered women who are mothers. With a broad perspective on feminist lawmaking as a vehicle of social change, Schneider examines a range of subjects including criminal prosecution of batterers, the

for law and society scholars.<sup>2</sup> I will first sketch out two important themes in the book and then moderate the discussion among our panelists and with the audience. Our panelists are Professor Sally Merry, who teaches anthropology at Wellesley College, Professor Marianne (“Mimi”) Wesson, who is at the University of Colorado Law School, and Professor Renée Römken, Visiting Professor at Columbia University and Professor at Utrecht University in the Netherlands. The author of the book is Professor Liz Schneider from Brooklyn Law School. Professor

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civil rights remedy of the Violence Against Women Act of 1994, the O.J. Simpson trials, and a class on battered women and the law that she taught at Harvard Law School. Feminist lawmaking on woman abuse, Schneider argues, should reaffirm the historic vision of violence and gender equality that originally animated activist and legal work.

For reviews of *Battered Women and Feminist Lawmaking*, see, e.g., Katherine K. Baker, *Dialectics and Domestic Abuse: Battered Women and Feminist Lawmaking*, 110 YALE L.J. 1459 (2001) (book review); Suzanne J. Groisser, *Battered Women and Feminist Lawmaking*, 10 COLUM. J. GENDER & L. 385 (2001) (book review); Sally J. Scholz, *Battered Women & Feminist Lawmaking*, 7 VIOLENCE AGAINST WOMEN 10 (2001) (book review); Marianne Wesson, 18 WOMEN’S REVIEW OF BOOKS 23 (2000) (book review); Liza Featherstone, *Book World: Getting Even*, WASH. POST, Oct. 22, 2000, at X10; Peter Glick, *Battered Women & Feminist Lawmaking*, N.Y.L.J., Oct. 14, 2000, at 2; Julie Goldscheid & Mary McGowan Davis, *Beyond Victimization: New Approaches to Gender Violence and Law Reform*, *Battered Women & Feminist Lawmaking*, at <http://www.jurist.law.pitt.edu/lawbooks/revmar01.htm> (book review); Cynthia G. Hawkins-Leon, *Battered Women & Feminist Lawmaking*, 11 LAW & POLITICS BOOK REV. 80, 80-82 (Feb. 2002), at <http://www.polsci.wvu.edu/lpbr/subpages/reviews/schneider.htm> (book review). See also Recent Publications, *Battered Women and Feminist Lawmaking*, 114 HARV. L. REV. 1829 (2001); *Book Notes*, 26 L. & SOC. INQUIRY 296, 296 (2001); Symposium, *Confronting Domestic Violence and Achieving Gender Equality: Evaluating Battered Women and Feminist Lawmaking*, AM. U. J. GENDER SOC. POL’Y & L. (forthcoming).

<sup>2</sup> Law and society scholars examine the function of law in society and the symbiosis between law and society. Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN L. REV. 763, 775 (1986). The Law and Society Association was founded in 1964 and publishes the Law and Society Review. See The Law and Society Association, at <http://www.lawandsociety.org>. Its members are comprised of scholars in the areas of law, sociology, political science, anthropology, economics, and history. *Id.*

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Schneider will have an opportunity to make some remarks about her book, then we will hear from each panelist. Finally, we will open the discussion up to the audience.

It is hard to be systematic in my comments because I have been engaged with Liz's argument about the dialectic between rights and politics from the time she first introduced dialectics as a feminist methodology and as a feminist epistemology for legal reform.<sup>3</sup> This argument has made a profound feminist contribution to research areas in law and society, such as law and social policy, law and social change, and feminist legal theory. In the beginning of the book, Liz says, "I examine both the accomplishments and contradictions through the lens of feminist legal advocacy efforts on violence against women in the United States."<sup>4</sup> Her theoretical approach is not concerned with measuring the successes or failures of the movement. She does something more methodologically sophisticated than "gap studies," which repeatedly (and inevitably) find that there is a "gap" between reform ideas and implementation of policy.<sup>5</sup> The book examines the interrelationship between law and social movement practices in order to understand a larger problem for law and social policy—the interrelationship between rights and politics viewed in terms of the dialectic between consciousness and social change. In the case of the U.S. movement against domestic violence, Liz employs dialectics to deconstruct familiar categories in law and in society (e.g., public/private; male/female; civil/criminal; mother/child; husband/wife; etc.). She argues that these binary categories are themselves the focus of consciousness raising in the feminist movement and in feminist lawyering. In so doing, the book systematically unravels the complexity of lawmaking for feminist lawyers. She writes, "lawmaking and rights assertions can be understood as forms of

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<sup>3</sup> See Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

<sup>4</sup> SCHNEIDER, *supra* note 1, at 5.

<sup>5</sup> See CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* (Greenwood Publ'g Group 1985) (examining the legal formalism that results in a gap between socio-legal reform ideology and institutional practice).



the philosophical concept of praxis.”<sup>6</sup> If consciousness-raising is itself a form of praxis, then the work of transcending gendered social and legal dichotomies, such as those to which I just referred, may in turn explain how new and perhaps even more emancipatory social practices for women are forged in intimate, as well as state relationships. While her analysis gives particular weight to “historical contingency” as a key factor in shaping the politics of rights, the dialectical method she employs makes a compelling argument that “rights” and “politics” are best understood as praxis.

The book examines over thirty years of work on social constructions of “violence against women”—social constructions produced by the state, by feminist scholars, by lawyers, by battered women and children, by the courts and by other social forces like economics, psychology, politics, etc.<sup>7</sup> The book synthesizes disparate bodies of research from an array of disciplines on how and why particular social constructions of domestic violence dominate at particular periods in U.S. history. This aspect of the book makes another important contribution to law and society work. For here, in the deconstruction of gendered battery, Liz carves out new social space, new social understanding of law, for the survivors of domestic violence. I am referring to the survivors who did not have advocates, the survivors who did not have feminist lawyers, the survivors Professor Linda Gordon writes about in *Heroes of Their Own Lives*.<sup>8</sup> The interdisciplinary approach Liz develops makes better

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<sup>6</sup> SCHNEIDER, *supra* note 1, at 34 (citing Karl E. Klare, *Lawmaking As Praxis*, 40 *TELOS* 123, 132 n.28 (1979)); Schneider, *supra* note 3, at 600 (explaining that “[t]he fundamental aspect of praxis is the active role of consciousness and subjectivity in shaping theory and practice, and the dynamic interrelationship that results . . . . [L]awmaking can be a form of praxis; it can be constitutive, creative, and an expression of the ‘embeddedness of action-in-belief and belief-in-action.’”) (quoting Klare, *supra* at 132 n.28).

<sup>7</sup> SCHNEIDER, *supra* note 1, at 13-28; *see also infra* note 25 (regarding the ever-expanding and unstable definition of violence against women).

<sup>8</sup> LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 250-88 (Viking Penguin 1988) (delineating the gender-based causes of spouse abuse, describing difficulties of mothers in

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sense of law and social policy for those of us who have survived domestic violence in the pre-1970s period—for those of us who have our stories recorded in police records as “family disturbances” or “family quarrels.” The approach provides a way to understand more fully how these social constructions operated in law and society and in women’s lives.<sup>9</sup> While the book may make sense for/to survivors of domestic violence, it does not portray them as heroic or super human. To do so would embrace an individualist explanation of domestic violence and lend support to volitional policies. Instead, Liz’s analysis suggests that the survivors are representative of a human condition that moves them and us to struggle for emancipation. That condition, that vision of emancipation, is made present in how Liz writes about the detailed practices of feminist lawyering in which she is implicated.

With these two contributions in mind, one more classically academic—her analysis of the dialectic of rights and politics—and the other more general—her view of what motivates social change—I turn to Liz for her introductory comments.

*Liz Schneider*

Let me provide some background. The book comes out of thirty years of my work in a variety of different contexts: as a lawyer, as an activist, as a theorist, and as a law teacher. In the book I offer a critical perspective on the last thirty years of feminist legal advocacy, in which I have been involved both as a lawyer and as a theorist. The link between theory and practice has been something that has been very much a part of my life and my own work, my approach to law, my teaching. The book not

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procuring relief from abuse, and examining the pattern of battered women’s resistance from 1880 to 1960).

<sup>9</sup> *Id.* at 278, 285-86, 294 (showing that wife beating has been sanctioned and controlled throughout history by cultural influences such as religion, law, family and friends, evidenced by a history of female subordination and passivity, the reluctance of the state through legal means to interfere with family privacy, and the protection sought in the refuge of supportive family members’ homes).

only talks about activism and experience in a number of different areas of lawmaking, but it talks about the process of change. For example, in addition to problems of litigation and lawyering, I discuss the importance of bringing some of these insights and perspectives around domestic violence into law schools and other academic fields, and the difficulty in teaching issues of domestic violence.<sup>10</sup>

The book is intended to be a kind of insider self-critical reflection—critical in raising hard questions for those of us who have been involved in this work, struggling with these questions more broadly. Since I know there are many of you in the room who have not read the book, the most important theme is that while domestic violence has been recognized as a more serious public problem, public thinking and legal work around domestic violence have become decontextualized from issues of gender. The notion of gender is what originally shaped activism and law reform on domestic violence—it is the way in which activists framed it. Domestic violence was a moment, a part of a broader problem of gender inequality. But now domestic violence has become unmoored from those issues of gender, for a whole variety of reasons, which I develop in the book.<sup>11</sup> The book argues that it is necessary to reaffirm the original impetus of activism and advocacy on domestic violence, the inextricable link

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<sup>10</sup> See SCHNEIDER, *supra* note 1, at 105-11, 211-12, 223-27.

<sup>11</sup> See *id.* at 6, 21-28, 96-97, 101-11, 182-88, 228-32. Traditionally, feminists have argued that systemic societal female subordination produces gender violence. *Id.* at 5, 22-23, 228. Feminists who began the battered women's movement, many of whom were themselves battered, viewed battered women as sisters in the larger struggle towards gender equality. *Id.* at 22-23, 96. They worked not only to alleviate the threat of violence, but also to address social and economic disparities that subordinate women and make them susceptible to gender-motivated violence. *Id.* at 22-23, 96. As the movement has gained legitimacy, Schneider argues that the link between battering and gender bias has become increasingly subverted and that lawmakers approach violence against women as if it can be solved in isolation from its historical and social contexts. *Id.* at 6, 27-28. Broader issues of gender such as socialization, lack of education, child care, employment discrimination, and poverty are frequently excluded from consideration in legal reform concerning domestic violence. *Id.* at 23-26, 183, 229-30.

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between violence and equality.

*Sally Merry*

I was delighted to have a chance to read and comment on this book. Liz Schneider has provided us an invaluable overview of the key elements of feminist legal thinking about battered women. The book is well-grounded in past struggles,<sup>12</sup> so there is a clear sense of development and change in the field. It is also rooted in feminist analysis,<sup>13</sup> resisting the increasingly pervasive psychological and family systems models, which are coming to

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<sup>12</sup> SCHNEIDER, *supra* note 1, at 15-23, 39, 42-45, 88-97. Schneider notes that domestic violence has been part of practically every culture throughout history. *Id.* at 13. For example, Anglo-American common law and early Roman law provided that a husband could treat his wife as property, and it was his prerogative to chastise her. *Id.* at 13.

An initial wave of advocacy in the United States during the nineteenth century achieved measured success by focusing primarily on domestic violence instead of attacking male dominance generally or asserting the woman's inherent right to freedom and equality. *Id.* at 16, 18, 43. However, achievements did not translate into real progress, as the movement's initial success in prohibiting public violence against women could not protect violence against women in the marital context, which courts felt was beyond their capacity to adjudicate. *Id.* at 17-18, 88-97. For example, family court judges often failed to provide a battered woman with physical protection if she filed a complaint against her batterer, asserting that family preservation was necessary and the abuse could be cured or corrected. *Id.* at 18.

The second wave of advocacy during the twentieth century was premised on the notion of a woman's inherent right to be free from violence and led to the development of social services and increased social and economic opportunities for women. *Id.* at 21-22, 39, 42-43. Domestic violence survivors still struggle within a social framework of gender inequality, leading to their economic dependence on the batterer, the absence of social support networks to aid in mothering, lack of educational opportunities, lack of child care and, in general, their social and economic vulnerability. *Id.* at 12-13, 23.

<sup>13</sup> Schneider's feminist analysis encompasses not only gender-based descriptions explicitly linking gender, violence and women's equality, but also broad descriptions of battering that explore interrelationships between coercion, power and control, and political descriptions of battering using statist imagery (such as terrorism and torture) to detail the experience of battering. *Id.* at 46-49.

dominate this field. One of its values is its commitment to this feminist approach, an approach to a large extent on the defensive in the U.S. today. I also appreciated the book because it is grounded in legal questions. What are the evidentiary difficulties of these cases? What are the preconceptions of judges? What are the biases in the way the categories of law privilege men's experiences? There is clearly a sense of looking back in this book, of assessing the past thirty years of this movement and confronting some of its ironies and the areas of resistance it has encountered.

Schneider recognizes that despite major advances in the battered women's movement,<sup>14</sup> there is still a great deal of resistance and some indication that resistance is increasing. The story is one of good intentions and good interventions poorly carried out by police, judges and legal officials who are often too ambivalent about prosecuting men who are violent with their partners. The public/private divide that relegated this problem to the bedroom rather than the courtroom seems to have remained intractable, relatively unchanged despite enormous pressure to change.<sup>15</sup>

I found the situation of the defense of women who kill their batterers among the most important ironies in the book. It seems to me that this problem more than any other engaged feminist legal scholars in the early part of the movement. But this problem led to a very productive reexamination of the concept of self-defense, the way it was applied to women rather than men, and

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<sup>14</sup> Schneider argues that the development of a battered women's movement has advanced and improved women's self-determination, self-organization, and democratic participation as citizens. *Id.* at 20-27.

<sup>15</sup> *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1965) (exemplifying judicial reluctance to encroach on the marital bedroom); Soto v. Flores, 103 F.3d 1056 (1st Cir. 1997), *cert. denied*, 522 U.S. 819 (1997) (affirming the dismissal of an abused woman's § 1983 suit against local police, who refused to arrest her abusive husband days before he killed himself and her children, and holding that the woman had not been deprived of her constitutional right to due process and that no constitutional duty exists for police to protect citizens from private violence). *See generally* Reva B. Siegel, "The Rule of Love": *Wife Beating As Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

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the nature of male identity presumed by reasonable man concepts.<sup>16</sup> The irony lies in the development of the explanatory framework of “battered women syndrome.” As Schneider shows well, this particular framework has reinforced images of battered women as passive, helpless victims.<sup>17</sup> I think it was so successful precisely because it was so compatible with existing gender ideologies. Much as the right to abortion founded on privacy arguments has served to reinforce the domain of the family as private,<sup>18</sup> this argument reinforced images of women’s passivity, even as it may have succeeded in freeing the women who killed their batterers.

Schneider also asks about the implications of using a rights approach for this problem.<sup>19</sup> This is a key question, both for the United States movement, which began with some ambivalence about rights, and for the international violence against women movement. As she points out, early activists recognized the problem of using rights, but they had to rely on the law as a way to define the problem and intervene in it.<sup>20</sup> As the global

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<sup>16</sup> Gender bias has long plagued the application of self-defense laws to battered women who kill; judges and attorneys tended to categorize these women as “mentally ill” or “temporarily insane” rather than to view their actions as taken in self defense and to apply a reasonableness standard. *See* SCHNEIDER, *supra* note 1, at 79-83, 113-15, 121-22. The traditional doctrine of self-defense was based on the experience of men and did not account for women’s different perceptions. Feminist legal scholars have attempted to introduce evidence to help juries understand that women who kill their batterers may act in reasonable and justifiable self-defense. *Id.* at 121-26.

<sup>17</sup> *Id.* at 62. Schneider argues further that defining battered women as helpless victims is also dangerous because it revives the concept of excuse by “focus[ing] on the woman’s defects, the woman as subject to the ‘syndrome,’” thus implying the woman is “inherently deficient instead of affirming the circumstances of her act.” *Id.* at 135. The term “battered woman syndrome” triggers stereotypes for lawyers and judges and plays into the patriarchal attitudes of courts. *Id.* at 137. Consequently, the term “battered woman survivor” has begun to be used instead of “victim.” *Id.* at 76.

<sup>18</sup> *See generally* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>19</sup> SCHNEIDER, *supra* note 1, at 34-45 (discussing the development and shortcomings of the rights approach to feminist lawmaking).

<sup>20</sup> *Id.* at 38-45.

movement expands in the wake of the Vienna Conference of 1993<sup>21</sup> and the Beijing Conference of 1995,<sup>22</sup> a rights approach is

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<sup>21</sup> The World Conference on Human Rights, Vienna, Austria, 1993, addressed a broad spectrum of human rights activities and specifically addressed women's human rights issues. Office of the United Nations High Commissioner for Human Rights, World Conference on Human Rights (June 1993), at <http://www.unhchr.ch/html/menu5/wchr.htm>. The Vienna Declaration and Programme of Action provided in part that the equal participation of women in all aspects of life and the elimination of sexual discrimination were priorities of the international community. *Vienna Declaration and Programme of Action*, U.N. Commission on Women, 39th Sess., U.N. Doc. E/CN.6/1995/5/Add.7 (1995), available at <http://www.un.org/esa/gopher-data/esc/cn6/1995/1995-5.en7>. The declaration specifically called for the appointment of a Special Rapporteur on violence against women and for the drafting of a declaration eliminating violence against women. Hanna Roberts, *The Human Rights of Women in the United Nations: Developments 1993-1994*, available at <http://www.amnesty.se/women/23ae.htm>. In late 1993, the United Nations General Assembly adopted the Declaration on the Elimination of Violence Against Women, which defines violence against women broadly to include physical, sexual, and psychological harm and calls for member states to eliminate violence against women through preventive, investigative, and punishing measures. *Id.* In 1994, the United Nations appointed the first Special Rapporteur, Radhika Coomaraswamy, who collects information relating to violence against women, recommends remedial measures, and works with other critical members of the Commission on Human Rights. See SCHNEIDER, *supra* note 1, at 53; United Nations Department of Public Information, *Women and Violence* (1996), at <http://www.un.org/rights/dpi1772e.htm>.

<sup>22</sup> The United Nations held its Fourth World Conference on Women in Beijing in September 1995, during which officials drafted the Beijing Declaration and Platform for Action. The declaration acknowledged the advancement of the status of women, but, noting persisting gender inequalities, called for governments worldwide to take positive steps to ensure peace for the advancement of women, to promote women's economic independence, and to eliminate all forms of discrimination. "Beijing Declaration and Platform for Action, Fourth World Conference on Women" U.N. Doc A/Conf. 177/20 (1995). For more detailed discussion, see Elizabeth L. Larson, *United Nations Fourth World Conference on Women: Action for Equality, Development, and Peace (Beijing, China: September 1995)*, 10 EMORY INT'L L. REV. 695 (1996); Margaret Plattner, *The Status of Women Under International Human Rights Law and the 1995 UN World Conference on Women, Beijing, China*, 84 KY. L.J. 1249 (1996). One hundred eighty-nine governments adopted the Platform for Action, including the United

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becoming increasingly central. Yet, it is contested in many of the same ways that rights are ambivalent and contested in the U.S. A fundamental theme that arises throughout this book is the discussion about individual or collective rights, how these rights are to be defined, and whether rights can be maintained in a more collective sense.<sup>23</sup>

I want to emphasize three major points from the book that I found valuable, although there were many others. The first is the difficulty of defining the problem itself. There are so many labels, with so many different implications. The term “battered woman” itself is one among many, and Liz talks about which term to use.<sup>24</sup> Does this mean woman as victim? Does this ignore attention to the perpetrator? What is the meaning of gender-neutral terms like “spouse assault”? I think defining the problem is critical because the solution depends on how the problem is defined. If the problem is defined as “patriarchy,” there is one set of solutions; if defined as “spouse assault,” solutions depend on family functioning. I think that this book, which begins by foregrounding that problem, is very important. Much of the struggle in the movement has actually been to create a stable definition.<sup>25</sup> I think a definition is elusive because so much is at

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States, and United Nations Secretary-General Kofi Annan reported that women’s lives had improved as a result. *See* Press Release, United Nations, Secretary-General in Address to Women’s International Forum Says Shaping UN’s Future in New Century “Vital Exercise” (Jan. 14, 2000). In June 2000, the United Nations held a Special Session to reaffirm member states’ 1995 commitments and held panel discussions examining the role of men and boys in ending gender-based violence, on promoting dialogue between government and non-government organizations, and on mainstreaming gender perspectives in peacekeeping operations. *See* Special Session of the General Assembly, Beijing + 5, *Women 2000: Gender Equality, Development and Peace for the Twenty-First Century* (2000), at <http://www.un.org/womenwatch/daw/followup/beijing+5.htm>.

<sup>23</sup> SCHNEIDER, *supra* note 1, at 62-65, 103.

<sup>24</sup> SCHNEIDER, *supra* note 1, at 45, 60-62.

<sup>25</sup> There has been wide variety in the definition of “domestic violence.” *See* CAL. FAM. CODE § 6211 (West 1994) (defining domestic violence as abuse of a spouse, former spouse, cohabitant, former cohabitant, dating partner, fiancée, person with whom the abuser has a child, child of the abuser,



stake—whether this is a movement against institutions that reinforce male power and the family, or whether this is a movement about psychologically dysfunctional men or women. The continuing definitional instability is symptomatic of the importance of the problem. And because the definition of a problem inexorably points to the solution and the particular mode of intervention, the difficulty of defining the problem leads to complexity in the kinds of responses and solutions that we are seeing on the ground, which vary between psychotherapeutic approaches to much more culturally transformative ones that may begin to address problems of patriarchy. Batterer intervention programs for men provide an interesting example. Here we see the tension between the individual and the collective understanding of rights. Is battering defined as an individual violation of rights or as a violation of a collective body of individuals such as women, whose rights are being systematically denied?

This problem appears in the human rights international level as well. One of the interesting issues on the international level is the wide variation in the definition of the problem in different national and sub-group contexts. This is related to differences in the way the problem is conceptualized based on different kinship

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or other person related by consanguinity or affinity); John M. Burman, *Lawyers and Domestic Violence: Part I*, 24 WYO. LAWYER 36, 38 (2001) (defining domestic violence as “a pattern of coercive behavior . . . perpetrated by who was or is in an intimate relationship with the victim”); *see also* Health Resource Center on Domestic Violence/Family Violence Prevention Fund, *Health Care Responses to Domestic Violence Fact Sheet*, available at <http://endabuse.org/programs/display.php3?DocID=25> (describing domestic violence as a pattern of coercive and assaultive behaviors, such as physical, psychological or sexual attacks, or economic coercion used by individuals against their partners); National Coalition Against Domestic Violence, *What is Battering?*, available at <http://ncadv.org/problem/what.htm> (asserting that battering is a pattern of behavior employed to exert power and control over another individual via fear and intimidation); New York State Office for the Prevention of Domestic Violence, *A Power and Control Perspective*, available at [http://www.opdv.state.ny.us/about\\_dv/wheeltext.html](http://www.opdv.state.ny.us/about_dv/wheeltext.html) (explaining how domestic violence entails a range of behaviors with maintenance of power and control as the goal).

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systems and different ideologies about how societies are organized. For example, I just spent a little time in China interviewing practitioners and scholars working on the problem of violence against women. Although the Chinese take inspiration from Seoul,<sup>26</sup> Beijing<sup>27</sup> and the U.S. movement,<sup>28</sup> the concern, at least in some of the literature I read, is that the problem needs to be defined differently in the context of the Chinese kinship system.<sup>29</sup> One argument is that the U.S. model, which is also the European model, tends to focus on sexual relationships across a

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<sup>26</sup> South Korea has addressed problems of domestic violence through family law reform. The government first recognized decades of work by women's rights advocates by enacting major family law revisions in January 1991, which somewhat improved women's rights in the areas of marriage, divorce, child custody, and property inheritance. See Rosa Kim, *The Legacy of Institutionalized Gender Inequality in South Korea: The Family Law*, 14 B.C. THIRD WORLD L.J. 145, 149-53 (1994). See also U.S. DEPARTMENT OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA (Feb. 25, 2000), available at [http://www.state.gov/www/global/human\\_rights/1999\\_hrp\\_report/southkor.html](http://www.state.gov/www/global/human_rights/1999_hrp_report/southkor.html); Erin Cho, *Caught in Confucius' Shadow: The Struggle for Women's Legal Equality in South Korea*, 12 COLUM. J. ASIAN L. 125 (1998) (tracing the evolution of Korea's family law revision movement).

<sup>27</sup> See *supra* note 22 (describing the 1995 Beijing Conference).

<sup>28</sup> The United States addresses problems of domestic violence using a legal rights and legislative approach. SCHNEIDER, *supra* note 1, at 34-54; compare the battered women's movement in Great Britain, *infra* notes 71-72 and accompanying text. See also *infra* note 64 (describing the Violence Against Women Act).

<sup>29</sup> The Chinese kinship system is centered on the Confucian belief that emphasizes the importance of a societal "moral order expressed through the five cardinal relationships." William P. Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915, 941 (1986). These five cardinal relationships are "those between ruler and subject, father and son, husband and wife, elder and younger brother, and older and younger friend," *Id.* at n.205. Many Chinese traditions, including certain aspects of its legal system, are rooted in the traditional Chinese kinship system. Janice A. Lee, Note, *Family Law of the Two Chinas: A Comparative Look at the Rights of Married Women in the People's Republic of China and the Republic of China*, 5 CARDOZO J. INT'L & COMP. L. 217, 219 (1997).

wide variety of settings—relationships such as boyfriend/girlfriend, husband/wife, same-sex partners, and various romantic relationships—whereas in China, the grounding is in the kinship system, but the victim can be the wife, the infant girl, or the old father or mother.<sup>30</sup> There is a different array and structure of kin that can be part of these battered relationships, given the nature of the patrilineal, patrilocal family structure. This kind of instability at the heart of the problem is an interesting issue to consider as the definition of the problem crosses national boundaries.

The second point in the book that I thought was very instructive and interesting is the difficulty of lawyering in this field—the really painful dilemmas and dichotomies for feminist lawyers trying to use the courts. Especially trenchant is the analysis of the struggle to move past the dichotomy between victims and agents. Again, the explanatory framework of “battered women’s syndrome” exacerbated this problem by creating women as deserving protection only if they are defined as victims. This dichotomy exists despite efforts to redefine women as survivors, which I have found in my own research is clearly the preferred term.<sup>31</sup>

I was thinking about this in light of David Garland’s recent book called *The Culture of Control*<sup>32</sup> in which he talks about the shift in criminal justice theory that took place in the 1970s in the United States from a focus on protecting the defendant and the defendant’s rights to a focus on defending the victim and prosecuting the perpetrator. This shift has led to longer and

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<sup>30</sup> See Yuhong Zhao, *Domestic Violence in China: In Search of Legal and Social Responses*, 18 UCLA PAC. BASIN L.J. 211, 218-19 (2001) (advocating a broader definition for the term “domestic violence” in China to include other family members such as children and grandchildren). See generally Paula C. Littlewood, *Domestic Child Abuse Under the U.N. Convention on the Rights of the Child: Implications for Children’s Rights in Four Asian Countries*, 6 PAC. RIM L. & POL’Y 411, 426-431 (commenting on the state of child abuse in China).

<sup>31</sup> See, e.g., SCHNEIDER, *supra* note 1, at 61, 76.

<sup>32</sup> DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (Univ. of Chi. Press 2001).

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longer periods of incarceration, more severe punishments, and more punitive attitudes towards defendants; yet the transition was partly engineered by a focus on the victim, who became much more central to our theorizing in the late twentieth century than he or she had been before. Ironically, the success of the feminist movement in foregrounding the victim has, in fact, contributed in some ways to this more punitive, less rehabilitative approach towards offenders of all sorts, not just batterers. I think this is one of the painful dilemmas of trying to do lawmaking in this domain. Indeed, as Schneider points out, it is only as victims that women get help in court, and even within that framework, their inability to be heard is severely circumscribed.<sup>33</sup> At the same time, by emphasizing the image of this vulnerable, undeserving victim, the battered women's movement itself may have contributed to the refocus of the criminal justice system.<sup>34</sup> This is clearly one of those ironies of social transformation.

A second unintended and undesired consequence of the criminalization of battering has been the continued legal surveillance and incarceration of men of color. In my research, it turned out that the vast disproportion of men who end up in batterer's treatment programs are poor and men of color.<sup>35</sup> These are not, of course, the only men who batter, but they are the ones who end up in the criminal justice system. And, as Angela Davis asked at the first Color of Violence Conference last year, is the

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<sup>33</sup> SCHNEIDER, *supra* note 1, at 186 (explaining arguments that mandatory prosecution and no-drop policies can "re-victimize women by subjecting them to further coercion at the hands of the state; they increase the risk of retaliation against the victim by the batterer; and finally, they disempower women by taking their autonomy away from them").

<sup>34</sup> See SCHNEIDER, *supra* note 1, at 74-86 (regarding the issues relevant to victimization of women in feminist lawmaking and arguing that gender subordination should be understood as a process in which women can both be oppressed and offer resistance simultaneously). See also *id.* at 186 (regarding arguments of those who believe that "shifting the decision to prosecute from the victim to the state disempowers batterers and prevents them from further manipulating justice and endangering victims' lives").

<sup>35</sup> Sally Engle Merry, *Gender Violence and Legally Engendered Selves*, 2 IDENTITIES: GLOBAL STUDIES IN CULTURE AND POWER 49 (1995).

criminal justice system the only way to go?<sup>36</sup> Did white feminists who pursued this route really think about the dilemmas for women of color, whose partners have already been disproportionately subject to police and judicial surveillance? Schneider notes that this was early recognized as a problem in the feminist movement,<sup>37</sup> and yet, it is one of those painful dilemmas that is hard to escape. In my more cynical moments, I wonder if the success of the battered women's movement in bringing these cases to court and achieving at least minimal standards for arrest, prosecution, and even occasional incarceration is in part because it dovetailed with these other agendas, both the refocus on victims and the increase of control and surveillance over men of color. I am not making any claims about intentionality. I am only saying that this convergence of conservative and feminist interests may have facilitated feminist successes, although not in a way advocated or desired by feminists.

Although the whole book is very strong, one of the strongest chapters discusses the dilemmas of motherhood and battering.<sup>38</sup> It has long been clear to me that there is an image of a good victim as one who calls the police, who prosecutes the case, who testifies, and who leaves. But it seems clear that there is also an image of a good mother, and this is a similarly constrained identity. Only if one behaves a certain way does one really merit the support of the criminal justice system. The good mother is the person who immediately leaves the partner, protects her children at all costs, puts the interests of her children before her own, and is the person who deserves help, not the others.<sup>39</sup> It is a very constraining identity. I thought that this analysis was really fascinating and full of painful dilemmas for lawyering in this sphere of work.

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<sup>36</sup> Angela Davis, Keynote Address at The Color of Violence: Violence Against Women of Color (Oct. 25, 2000), in 3 COLORLINES, Fall 2000, available at <http://csf.colorado.edu/soc/m-fem/2000/msg01004.htm>.

<sup>37</sup> SCHNEIDER, *supra* note 1, at 63-64, 184, 196.

<sup>38</sup> *Id.* at 148-78.

<sup>39</sup> *See, e.g., id.*; LINDA GORDON, HEROES OF THEIR OWN LIVES 252-64 (Viking 1988) (describing certain traits of mothers that are detrimental to receiving social agency relief).

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The third point I wanted to discuss is the implication of the growing international human rights movement against violence against women. I agree with Liz that the international movement has very significantly re-politicized the problem, taken it back out of the domain of psychological definitions of individual malfunction—the Post-Traumatic Stress Disorder (“PTSD”) discussions—and moved it to a new, more political domain.<sup>40</sup> Schneider makes this point clear, and I think it is a critical one. It is interesting that in the international debates, the definition of violence against women has become increasingly expansive. It now includes trafficking, rape in wartime, violence against women in refugee camps, the effects of poverty, armed conflict, globalization, and structural adjustment programs.<sup>41</sup>

People talked about this very issue at the Beijing Plus Five Conference<sup>42</sup> and have talked about it at other international meetings. I heard one woman from Nigeria ask at Beijing Plus Five, “Can you consider polygamy violence against women?” This was in a non-government organization (“NGO”) discussion about violence against women. The organizer said, “Sure, why

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<sup>40</sup> SCHNEIDER, *supra* note 1, at 28, 53-56. See generally Rhonda Copelon, *Bringing Beijing Home*, 21 BROOK. J. INT’L L. 599 (1996) (quoting the Beijing Declaration that “women’s rights are human rights”); Berta Esperanza Hernandez-Tryol, *Sex, Culture, and Rights: A Re/Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 629 (1997) (noting that at the 1993 World Conference on Human Rights in Vienna, women participants insisted that because the “disempowerment of women is based on the public/private dichotomy,” violence against women must be included on the agenda).

<sup>41</sup> See Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, ¶¶ 112-17 (Oct. 1995), available at <http://www.un.org/womenwatch/daw/beijing/platform/violence.htm>.

<sup>42</sup> In June 2000, the United Nations held a five-year implementation review of the Fourth World Conference on women (Beijing Plus Five). For a detailed summary, see International Policy UN Conferences: Fourth World Conference on Women + 5, 2000, available at <http://www.iwhc.org/index.cfm>. (stating that “feminist advocates and activists from more than 1,000 nongovernmental organizations met with government delegates from 148 countries to review progress made since the 1995 Fourth World Conference on Women and to agree on further actions needed to accelerate implementation of the *Beijing Declaration* and the *Platform for Action*”).

not.” So, now we have polygamy as well. I heard another talk about widowhood rituals as violence against women. This is again a very large, growing, and hopefully not ultimately incoherent category of behavior. The drawback of expanding the definition of violence against women is potential incoherence.

I think the human rights framework offers another advantage that Liz suggests, and that I would like to underscore. You can think about problems as human rights violations that can then become gendered. It is a way of expanding the definition of the problem. She gives the example of Maquiladora export processing zones in Mexico where there is a human rights concern about excluding pregnant women from the workplace.<sup>43</sup> This provides an opportunity to reexamine questions of equality in workplaces and exclusionary legislation concerning pregnancy elsewhere in the U.S. I have watched this in other human rights debates where issues that are not always thought of in gender terms become re-gendered. For example, there is a lot of talk about effects of conflict on populations that become refugees in armed conflict, and there is now an effort to look at the fact that this is disproportionately affecting women and children.<sup>44</sup> So you can gender the effects of armed conflict. Refugees, women and children are disproportionately victims.<sup>45</sup> Women are subject to violence in refugee camps; their partners have nothing to do; they have no protection; they are living under plastic sheets. Thus, they are in a sense more vulnerable to this problem.

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<sup>43</sup> SCHNEIDER, *supra* note 1, at 56 (using “the legal treatment of pregnant workers in the *maquiladora*” as an example of a problem that exists in this country as well but is not currently a focus of advocacy).

<sup>44</sup> See, e.g., Amy Beth Abbott, *Child Soldiers—The Use of Children As Instruments of War*, 23 SUFFOLK TRANSNAT’L L. REV. 499, 504 (2000); Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?*, 46 INT’L & COMP. L.Q. 55 (1997); Judith Gardam & Michelle Jarvis, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, 32 COLUM. HUM. RTS. L. REV. 1 (2000); Stuart Maslen, *Relevance of the Convention on the Rights of the Child to Children in Armed Conflict*, 6 TRANSNAT’L L. & CONTEMP. PROBS. 329 (1996).

<sup>45</sup> See generally Gardam & Jarvis, 32 COLUM. HUM. RTS. L. REV. 1, 11 (highlighting the impact of landmines in armed conflict and their effect on the world’s refugee population, the majority of which are women and children).

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Globalization is increasing poverty in rural areas of the global south, and it is often women and girls who fall disproportionately into poverty.<sup>46</sup>

One of the recent interesting discussions is about the effect of AIDS, looked at in a gendered way. The rate of increase of AIDS among teenagers in southern Africa is five or six times as high for girls as for boys.<sup>47</sup> This is probably because girls marry older, more sexually experienced men, and as wives, they cannot really ask for safe sex.<sup>48</sup> To look at the gender dimension of these problems and to think about them globally as violence is quite interesting. In discussions of racism, again it is women of color who are more often victims. Trafficked women are often women of color.<sup>49</sup> Those who have difficulty with exclusion from work

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<sup>46</sup> See Press Kit, Fact Sheet No. 1: The Feminization of Poverty, Special Session of the United Nations General Assembly, Women 2000: Gender Equality, Development and Peace for the Twenty-First Century (June 2000), at <http://www.un.org/womenwatch/daw/followup/session/presskit/fs1.htm>. See also Zillah Eisenstein, *Stop Stomping on the Rest of Us: Retrieving Publicness from the Privatization of the Globe*, 4 IND. J. GLOBAL LEGAL STUD. 59, 87 (1996).

<sup>47</sup> The United Nations Program on HIV/AIDS found that there are roughly 13.3 million women living in Sub-Saharan Africa with HIV/AIDS compared to 10.9 million men. Moreover, around twelve to thirteen million women become newly infected with HIV for every ten million men. *Gender and HIV*, United Nations Programme on HIV/AIDS (Mar. 2001), available at [http://www.unaids.org/fact\\_sheets/files/GenderFS\\_en.doc](http://www.unaids.org/fact_sheets/files/GenderFS_en.doc). See also R.W. Johnson, *Analysis: Infant Rape Captures AIDS Crisis*, United Press International, Nov. 24, 2001 (stating that "statistics show that women catch HIV far more easily than men and because men tend to be attracted to younger women, the HIV rates among teenage girls are far higher than among boys," and asserting that this knowledge of young women in their early twenties dying of AIDS has become quite common, making girls of younger and younger ages vulnerable to men who believe that only sex with a virgin will cleanse them of the spell of AIDS).

<sup>48</sup> See WHO, *Fact Sheet No. 242: Women and HIV/AIDS* (2000), at <http://www.who.int/inf-fs/en/fact242.html> (reporting that African women are expected to marry or have relations with older men). See also Tina Susman, *Staggering Numbers in Africa/Young Women Losing AIDS Battle*, NEWSDAY, July 13, 2000, at A38 (reporting that girls in male-dominated societies are afraid to demand use of condoms).

<sup>49</sup> See, e.g., Berta Esperanza Hernandez, *Latinas, Culture & Human*



are not just people of color but often women of color.<sup>50</sup> Again, you can see what adding gender does to this issue. I think this is a very productive way to think about a range of issues of violence against women, which brings us back to the larger, more structural kind of analysis where feminism began.

In a sense, this is the upbeat part of the book, this is the hope for the future. I wish I could be quite as optimistic as this little description of mine has just sounded, and as I think Liz wants to be, but I find reasons for some pessimism, as I said earlier. There is a lot at stake here; there is a lot of resistance globally to undermining marriage structures.<sup>51</sup> I see a strong tendency to introduce the same kinds of individual rights-based approaches that we have tried and found difficult and problematic in the United States. Among others, there are efforts to establish

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*Rights: A Model for Making Change, Saving a Soul*, 23 WOMEN'S RTS. L. REP. 21, 24 (2001) (asserting that, along with dire social, political, civil and cultural biases for mistreatment, race becomes a significant factor often resulting in disparately high occurrences of trafficking amongst women of color). See generally Anita Sinha, *Domestic Violence and U.S. Asylum Law: Eliminating the "Cultural Hook" for Claims Involving Gender Related Prosecution*, 76 N.Y.U. L. REV. 1562 (2001).

<sup>50</sup> See generally Mary K. O'Melveny, *Playing the Gender Card: Affirmative Action and Working Women*, 84 KY. L.J. 863, 891 (1995); Deborah L. Rhode, *Perspectives of Professional Women*, 40 STAN. L. REV. 1163, 1173, 1179 (1988); Symposium, *Civil Rights Legislation in the 1990s: Mirror, Mirror, on the Wall, Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775, 779 (1991).

<sup>51</sup> Global efforts by women activists in this area have led to international conferences in Nairobi in 1985 and Beijing in 1995. In addition, activists' efforts resulted in the appointment of a United Nations Special Rapporteur on Violence. SCHNEIDER, *supra* note 1, at 53-54. However, there has been widespread criticism of the lack of concrete results. *Id.* at 54. The United Nations Special Rapporteur on Violence recently issued a report criticizing foreign governments for a "lack of strategies of implementation on commitments to eradicate violence" and their overwhelming failure to meet international obligations to prevent, investigate, and prosecute domestic abuse. *Id.* See also Gustavo Capdevila, *Gov't Indifferent to Domestic Violence*, U.N. SAYS, INTERPRESS SERV., Apr. 19, 1999; Hilary Charlesworth, *The Mid-Life Crisis of the Universal Declaration of Human Rights*, 55 WASH. & LEE L. REV. 781, 794 (1998).

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shelters, to have mandatory arrests, no-drop prosecution, and to mount legal defenses for women who kill their batterers. I recently found myself sitting in a room in Beijing talking to a group of women who asked me, "How do I start a shelter?" On the one hand, this is very important; on the other hand, we have been through a lot of issues around what makes shelters work, and it is going to be a complicated problem to make one work in Beijing. I think this makes Schneider's book important to the global movement. It is valuable to show how these mechanisms have and have not developed and functioned in the U.S. from the perspective of a legal scholar and activist. This book is invaluable for the global movement, and I think activists in different parts of the world would benefit from it.

*Christine Harrington*

On that note of instability and hope and transition, we will turn to Renée.

*Renée Römken*

My existence is one of transition from the Netherlands to the United States, going back and forth between the two countries. In this context, with all its inherent disruptions, my comments reflect this condition.

Let me first and foremost compliment Liz Schneider on her book; it is unique and important in its presentation and analysis. It is timely in the sense that it presents a thorough and comprehensive history of the development of the many various legal battles that have been fought in the American battered women's movement at a moment in history that feminist legal politics in the domain of domestic violence seem to have entered mainstream politics, certainly in the United States.<sup>52</sup> The book contains a wealth of information, and one of the many things I really like about it is that it is written in a very accessible way. When covering both developments in academic theoretical

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<sup>52</sup> SCHNEIDER, *supra* note 1, at 12-20, 42-45.

debates and developments in legal practice and activism in the U.S., it is a laudable accomplishment to present the material in such a way that makes it accessible to a wide audience without simplifying its complexity. In that respect, Liz Schneider's work in general, not only this book, provides important and valuable resources to activists as well as scholars. I want to thank her for that. I very much agree with Sally that this book deserves to be read widely, both in the United States and internationally! It provides important insights about the gains and the losses that legal struggles inevitably imply.

As a feminist academic coming from the Netherlands, who has worked as a researcher in the field of domestic violence for a good part of the last twenty years, and now lives in the U.S., I will comment on Schneider's book from a Western European perspective. What can we in a European context learn from American feminist-inspired legal developments where the topic of domestic violence has been subject to elaborate law-making as well as policy development? What kind of inspiration does the American experience offer, given that American feminist legal developments take place in a different socio-legal context compared to Western Europe? Is more legal regulation actually an advantage? Besides my praise for Schneider's book, which is admittedly too brief, I will focus on the two issues from the book that have inspired me to critical reflection.

The first point that is particularly appropriate to raise in a law and society context concerns the relationship between social and legal developments. What are the implications of the shift that the concept of the battered woman seems to have made from a social category in the early 1970s, launched by a social and political feminist movement, to a legal category in the 1990s (particularly in the U.S.) that has entered mainstream politics? This first point touches upon Schneider's discussion of the dialectical relationship between law and its social and educational effects.<sup>53</sup> The second point is an issue that Schneider herself addresses throughout the book, but especially toward the end: what are the limits and the possibilities of the kind of political or social transformation that

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<sup>53</sup> *Id.* at 199-200.

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law can bring about? And, most importantly, what are the dilemmas that feminist law reformers confront? In that respect, my comments might overlap with some of Sally Merry's remarks. I will concentrate on what I consider to be the unintended consequences of legal regulation.

My first point concerns what Schneider labels the dialectical process of lawmaking. We are at the point in history when the category of the battered woman seems to have shifted in a political-strategic context from a primarily social to a predominantly legal category. The battered woman is the subject (and object) of increasing regulation that, in theory, is intended to support and/or protect victims. This regulation often has law as its basic vehicle, certainly in the U.S. What struck me throughout the book is Schneider's emphasis on the positive facts of that shift. And she has valid reasons for so doing. The problem of wife abuse in the U.S. has definitely shifted—no matter how ambiguously—from a private problem to be dealt with in shame, if not in silence, by the individuals concerned to a social concern that receives public attention and is the subject of various public interventions. There has been a development of public concern and responsibility to intervene in which legal change has acted as an important vehicle. In that respect the book illuminates the dialectical relationship between the social and the legal domain. At the same time, Schneider presents an impressive collection of data that illustrates the underlying tension inherent in this shift. Despite the fact that battering has moved into the public domain and that the public discourse, as rhetoric and as praxis, has expanded, particularly through the invocation of law, the implementation of law to address domestic violence often relegates it to the private sphere. The *DeShaney* case is a very tragic example of this problem.<sup>54</sup> In other words, the implementation of legal regulation of wife battering turns out to be very ambiguous and full of resistance against taking public

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<sup>54</sup> See *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 195-97 (1989) (ruling that the state lacks any affirmative obligation to prevent domestic violence or to protect individuals against it if the source of harm is private).

responsibility. Schneider emphasizes that traditional notions of privacy as justification for non-intervention sustain violence.<sup>55</sup> But I think that the underlying public-private analysis disadvantages battered women in more complex and paradoxical ways than Schneider lays out in her book.

First, emphasizing the negative consequences of the ideology of privacy, i.e. as justifying non-intervention and leaving victims of battering without *de facto* and *de jure* protection, has paradoxically also led to a social and legal climate in the U.S. where legally-based criminal justice interventions in the private domain are currently advocated as necessary and legitimate, even against the wishes of the victim. The most obvious example is the institutionalization of mandatory arrest laws or no-drop policies. Mandatory arrest is critiqued as too blunt an instrument to demonstrate the state's commitment to take responsibility for responding to wife abuse and too problematic an intervention into private life, disproportionately affecting women of color.<sup>56</sup>

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<sup>55</sup> SCHNEIDER, *supra* note 1, at 15-20, 88-94, 97.

<sup>56</sup> A number of commentators have noted the problems inherent in mandatory arrest laws. *See, e.g.*, Donna Coker, *Shifting the Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1042-49 (2000) (noting inappropriate arrests and prosecution of battered women under mandatory arrest laws, poor women's exposure to state control when jurisdictions require police to report each domestic violence call as suspected child abuse, and mandatory arrest policies creating backlash against low-income women); Linda Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 555, 565 (1999) (arguing that the very state interventions designed to help battered women often replicate the emotional abuse of the battering relationship, and that studies on mandatory arrests have shown that the frequency of repeat violence against battered women increased when those arrested were unemployed, African-American, or high school dropouts); Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, UMKC L. REV. 33, 71-78 (2000) (noting the various criticisms of mandatory arrests as paternalistic, disempowering, and likely to increase violence for women who are African-American or whose abusers are unemployed); Joan Zorza, *Must We Stop Arresting Batterers? Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 930-31 (1994) (noting that the issue of mandatory arrest cannot be seen in isolation and is impacted by prosecutorial decision-making and

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Nevertheless, these critiques are considered of secondary importance, and they have not changed the increasing implementation nationwide of these policies.<sup>57</sup> Advocates argue that it is the responsibility of the state to unequivocally and firmly sanction and punish criminal, violent behavior in the family.<sup>58</sup> The argument that the offender's arrest and prosecution might entail an intervention in the victim's private life that she did not intend or want is considered to be understandable at best, but irrelevant in the process of legal implementation. This is a direct consequence of the shift of wife abuse from the private to the public domain and illustrates how the underlying binary of the public and the private is upheld and has, in the implementation of its consequences, been simply turned into its opposite. In other words, the complexity and nuance in analysis, in which wife abuse is perceived as a public *and* private problem simultaneously, with all the complexities and ambiguities that that brings for both victims and lawmakers, has hardly been

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follow-through subsequent to arrest).

<sup>57</sup> See Somini Sengupta, *Domestic Violence Law Set for Renewal*, N.Y. TIMES, June 11, 2001, available at <http://college3.nytimes.com/guests/articles/2001/06/11/851359.xml> ("Over the last decade . . . most states have instituted mandatory-arrest laws, according to the National Coalition Against Domestic Violence, an umbrella group of advocates."). See also ROBERT L. SNOW, *FAMILY ABUSE: TOUGH SOLUTIONS TO STOP THE VIOLENCE*, 260-61 (Plenum Trade ed., Plenum Publ'g Corp. 1997).

<sup>58</sup> Some advocates argue that domestic violence is a public crime and therefore the state has a responsibility to "intervene aggressively" in order to "communicate[] and follow[] through on the message that the state will not tolerate violence of any sort." Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1865 (1996). Some further argue that the state condones and promotes violence when it refuses to intervene. *Id.* See also Matthew Litsky, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149 (1990) (arguing for state intervention through the coordination of the legislature, police, prosecutors, and judiciary); Kathleen Waits, *The Criminal Justice System's Response to a Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267 (1985) (contending that "[f]ull-scale, vigorous legal response to battering remains the exception and not the rule" and recommending stronger intervention by police, prosecutors, and judiciary).

acknowledged. The problem with mandatory interventions in wife battering is that political recognition of this as a public problem risks eclipsing the private interests that women, as agents, maintain. As a response to the claim that wife battering is a social problem that requires the state to take public responsibility, the baby is sometimes thrown out with the bath water. The fact that law, notably criminal law, has been used as a major vehicle to materialize this public responsibility, only exacerbates this dynamic. Law, as the motor of regulation based on general rules and principles that operate within an either/or paradigm, is by definition not well suited to address the messy complexities of public violence in the private home.<sup>59</sup>

Secondly, this shift to defining the battered woman as a public identity—in the United States as a legal identity<sup>60</sup>—deserves to be analyzed in an American socio-legal context. Maybe we are facing a typical American development given America's "love affair with law," a phenomenon that is quite striking from a Western European perspective and not as prominently developed in Western Europe.<sup>61</sup> Battering has entered the public domain in the U.S. through a rights regime. In Europe—not only in the Netherlands, but also in the U.K., where there is even more of a rights regime than in the Netherlands, Germany, France, or other European countries—we see a different approach than that used in the United States. Without wanting to sound too optimistic, in Western European countries there is more of a balance between the legal and the social category and the social policy strategies that the battered

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<sup>59</sup> See also Renée Römken, *Protecting Prosecution*, CRIME & DELINQUENCY (forthcoming 2002).

<sup>60</sup> See *supra* note 11 (regarding the United States battered women's movement); *infra* note 64 (regarding the Violence Against Women Act of 1994).

<sup>61</sup> See, e.g., Susan L. Miller & Rosemary Barberet, *A Cross-Cultural Comparison of Social Reform: The Growing Pains of the Battered Women's Movements in Washington, D.C. and Madrid, Spain*, 19 L. & SOC. INQUIRY 923 (1994) (concluding that criminal justice respondents in the United States advocated arrests in conjunction with social services, while in Spain, these respondents were more reluctant to endorse criminal sanctions).

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women's movements have pursued in trying to devise supportive policies, such as obtaining funding for shelters and hot lines.<sup>62</sup> In Western Europe the issue of battering has been a much more effective domain of socio-political struggle than in the U.S. It is an important point to bear in mind that when reflecting on the relevance of American feminist legal achievements in an international context. These achievements need to be socially and culturally contextualized. We have to assess critically how successful the political strategy has been to focus on legalizing the identity of the battered woman as a vehicle to gain, among other things, political and community support, public attention, and state intervention.

That brings me to the second and more general point: what are the limits and the possibilities of law? In her book, Schneider focuses on the possibilities of law. Obviously, law is an important and sometimes necessary instrument in the sense that it can facilitate the translation of a social problem into a subject of public concern and even public responsibility that provides citizens with an entitlement to public care, concern, protection or support. Schneider's book stimulates us to think about what we need and want from law from a feminist social justice perspective. In addition to important issues that Schneider raises, we need a better understanding of the structural limitations that are inherent in law. Law is inevitably an instrument of governance, a powerful instrument in the hands of legislators, administrators, governments and their representatives, deployed in order to regulate society and its citizens. What is particularly

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<sup>62</sup> The European Union has established three priorities in combating violence: the enactment of legislation; the enforcement of that legislation; and the modification of societal attitudes and stereotypes. *See EU Reaffirms Commitment to Punishing Violence Against Women*, XINHUA GENERAL NEWS SERV., Mar. 7, 2002. The European Union has enacted Daphne, an action program that does not focus predominantly on criminal legal projects, unlike most VAWA grants in the United States. The E.U. program, Daphne, funds forty-seven projects aimed at "combating violence against women and children." *See* Press Release, Commission of the European Communities, The European Commission Supports Fight Against Violence to Women and Children (Dec. 20, 2000).



telling is that the legalizing tendency discussed before is so profoundly dominated by criminal law. Is the feminist social movement to be remembered for its influence on criminal law, as Sanford Kadish recently indicated?<sup>63</sup> The question then becomes, if this is a victory, might it resemble a Pyrrhic victory, one that implies substantial damage? The overinvestment in criminal legal interventions within the Violence Against Women Act (“VAWA”) and the grants that flow from VAWA—millions of dollars going to support pilot projects and fund research into criminal justice interventions, notably mandatory arrest, and lack of support to the civil rights remedy—is more than just an unfortunate side effect.<sup>64</sup> A criminal rights regime is by definition focused on control and punishment. It might reflect a tendency that represents the increasingly punitive attitude toward social ills and problems that is prominent in the United States.<sup>65</sup> Domestic

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<sup>63</sup> In his recent essay on changes in the past fifty years in criminal law, Sanford Kadish views the influence of feminism on criminal law as a “social development to be remembered.” Sanford Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 981 (1999). He points in particular to changes in rape law and in the law of self-defense. *Id.* at 975-79.

<sup>64</sup> Violence Against Women Act (“VAWA”), Pub. L. No. 103-322, Title IV, 108 Stat. 1941 (codified as amended in various sections of 42 U.S.C.). VAWA, passed as part of the Violent Crime Control and Law Enforcement Act of 1994, is a comprehensive effort to address the problem of violence against women through a variety of mechanisms, including increased funding for women’s shelters, a national domestic abuse hotline, rape education and prevention programs, and training for federal and state judges. SCHNEIDER, *supra* note 1, at 188-98. It provided for reform of remedies available to battered immigrant women, development of an innovative civil rights remedy, and a host of other provisions including criminal enforcement of interstate orders of protection. VAWA’s civil rights remedy created a federal civil rights cause of action so that all women who had been physically abused because of their gender could sue their attackers in federal court. It permitted compensatory and punitive damages as well as equitable relief. This provision, however, was held unconstitutional under *United States v. Morrison*, 529 U.S. 598, 627 (2000) (concluding that Congress lacked constitutional authority under the Commerce Clause to enact VAWA since gender-motivated crimes were not considered economic activity). For a more thorough discussion of *Morrison*, see *infra* note 84.

<sup>65</sup> See GARLAND, *supra* note 32, at 52-60 (discussing a reversion to a

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violence is more the subject of post-hoc, mostly criminal legal interventions and control of perpetrators than of prevention or support of victims.<sup>66</sup>

We need to be aware of the limits of law, as well as of its contradictory effects, when it comes to bringing about social transformation, or bringing about social justice, in this case for battered women. Schneider's work points out consistently that law, most notably criminal law, is not an easy tool with which to work. Its accessibility is limited, and, as Sally Merry mentioned already, lawyering in this domain is problematic. The legal process itself brings about many subversions of the original intentions of the law. From that perspective the term "feminist lawmaking," although relevant on a descriptive level, sounds somewhat optimistic. The law in this domain does not just provide rights as trumps to be cashed in while struggling against violence against women and for social justice. Rights are equally, if not more, instruments to control, to monitor, and to subject the rights bearers to a regime that constitutes legal identities that do not necessarily serve the interests of the rights bearers who are initially looking for support. In this domain there are many compelling examples of how laws subvert their intended support.

The "battered woman's syndrome,"<sup>67</sup> for example, is a very clear example, as are mandatory arrest laws. The term "feminist lawmaking" as the project that motivates this book pictures leading developments in this field as a politically emancipatory

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more punitive criminal justice system).

<sup>66</sup> Domestic violence is another example of a social problem that has become subjugated through criminalization in the current "culture of control" as analyzed by David Garland. See GARLAND, *supra* note 32. For a critical analysis of the rights regime in the field of domestic violence, see Renée Römkens, *Law As a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women*, 13 YALE J.L. & FEMINISM 265 (2001). See also Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 802-05 (2001) (arguing that the litmus test for measuring effective laws or policies for battered women should be whether legal or social service interventions enhance women's access to material resources).

<sup>67</sup> See *supra* notes 16-17 and accompanying text (discussing "battered woman syndrome").

project. In doing so, it pictures the law from a slightly modernist perspective as a mechanism that brings about progress. Laws in the domain of battering certainly bring a civilizing message that it is morally wrong and illegal. Of course, I agree with the message. But using the law as an instrument to bring that message across means the invocation of an instrument that demands a considerable price. In that respect, the book appears to reflect an optimism about what law can accomplish. This same optimism that I read in it, seductive as it is, has inspired me to reflect on the limitations of law and how this might be related to politics of rights.<sup>68</sup> From an international perspective it is important to learn lessons from these achievements in addition to the counterproductive effect of feminist legal struggles in the United States and elsewhere. This book documents a crucial part of that history and inspires us to engage in global dialogues!

*Christine Harrington*

I have a question, Renée. When you stated that from the European perspective the relationship between social categories and legal categories is more balanced in contrast to the American viewpoint, I wondered whether politics regarding services have experiences similar to or different from changes in the United States. For example, has there been a professionalization of anti-domestic violence services? Liz commented that one objective she had in writing the book was to reconnect gender to violence.<sup>69</sup> This is also part of her argument on refueling social movements and the challenges faced as a result of professionalization. Would you comment on the professionalization of services from a European view? I tend to think that in the U.S. legalization is often confused with and coupled with professionalization.

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<sup>68</sup> For a more elaborate discussion of the flipside of the politics of rights for battered women, see Römken, *supra* note 66.

<sup>69</sup> See SCHNEIDER, *supra* note 1, at 232 (arguing for the need to link violence to gender inequality).

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If you do not mind, Chris, as an audience member I would like to respond to your question. One of the observations I have made after living in London for the last twenty years (after previously living in the U.S.) is about the differences between a U.S. and European perspective on the use of law in domestic violence situations. I have asked myself about the impact of the decline of the welfare state in the U.S. on the emergence of law as the primary remedy to many harms. In the U.K., for example, we still have a welfare state. The government not only believes in the public sector but also has a real desire to respond to the needs of people.<sup>70</sup> Much of the activist feminist politics in and around the violence against women movement in the U.K. expects to engage the entire public sector, not only the arm of the law.<sup>71</sup> Campaigns to involve the public sector in responses to domestic violence include a second layer of government, such as the local authority or the local health authority, in the provision of help and assistance.<sup>72</sup>

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<sup>70</sup> The British government established a Social Exclusion Unit in Downing Street to create cross-departmental, integrated solutions to the problems of those who fall through the welfare net. The unit has established eighteen policy action teams to address the problems, including homelessness, poor education, crime, inner city regeneration, and drug addiction. See *Social Security: Government Policy*, UK: MEDIUM-TERM POLITICAL OUTLOOK, Jan. 30, 2002.

<sup>71</sup> In the U.K. methods to cope with domestic violence engage the entire public sector. Several examples include public awareness campaigns about sexual and physical violence against women, training programs for public services providers, and distribution of leaflets and good practice guidelines instructing women and service providers on handling domestic violence. See Betsy Stanko, *A Profile of Violence Against Women*, Criminal Justice Conference-Violence Against Women (Nov. 24-25, 1999), available at [www.homeoffice.gov.uk/domesticviolence/stanko.htm](http://www.homeoffice.gov.uk/domesticviolence/stanko.htm). Such public efforts have not infringed on law enforcement reform. *Id.*; see also *infra* note 72 on the high degree of police involvement in Britain's domestic violence movement. Improving law enforcement's understanding of domestic violence issues remains a critical objective for feminist politics in the U.K. See *generally infra* note 72.

<sup>72</sup> Great Britain's approach to domestic violence also utilizes a high

I find myself appalled by the lack of social safety net in the United States. In European life, the law and the police are only one part of a solution to domestic violence. In the U.K. we cannot even mandate arrest in domestic violence situations. But under European rights legislation, we can begin to re-conceptualize the need—indeed the duty—to protect people from harm.<sup>73</sup> I now hear police officers saying we have to do something more in domestic violence situations because we have a duty to protect. It is a new discourse. This is one hook that the police in particular are using to make the health service devise plans to protect people from domestic violence. So the police, as one agent of law, are challenging others in the public sector to take notice of domestic violence. This makes a huge difference in

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degree of involvement by the centralized government through its criminal justice system. See Rebecca Morley & Audrey Mullender, Police Research Group, *Preventing Domestic Violence to Women*, in CRIME PREVENTION UNIT SERIES: PAPER NO. 48, at 36 (Gloria Laycock ed., 1994). The hallmark 1990 Home Office Circular recommending police forces to develop strategies to take positive, pro-arrest action against assailants of domestic violence victims resulted in the proliferation of domestic violence units (“DVUs”); furthermore, the police were the first statutory agencies created to achieve accountability to the community with respect to domestic violence. See *id.* at 16-17. In addition, police policies are encouraged to maintain a pro-charge attitude when prosecuting domestic violence offenders, although these policies may not be entirely effective. Carolyn Hoyle & Andrew Sanders, *Police Response to Domestic Violence*, 40 BRIT. J. CRIMINOL. 14 (2000) (writing that pro-arrest and pro-charge policies do not necessarily achieve results preferred by victims themselves of cessation of violence). Community support through refuges, support groups, and crisis services has also been emphasized. See Morley & Mullender, *supra* at 30-34. Government policies continue to emphasize close relationships between crime-fighters and social welfare agencies, as well as police involvement. Jalna Hanmer & Sue Griffiths, *Reducing Domestic Violence . . . What Works? Policing Domestic Violence*, CRIME REDUCTION RESEARCH SERIES (Jan. 2000), at <http://www.homeoffice.gov.uk/rds/prgpdfs/poldv.pdf>.

<sup>73</sup> See generally Subrata Paul, *Combating Domestic Violence Through Positive International Action in the International Community and in the United Kingdom, India, and Africa*, 7 CARDOZO J. INT’L & COMP. L. 227 (1999); Susan Smolens, *Violence Against Women: Consciousness and Law in Four Central European Emerging Democracies—Poland, Hungary, Slovakia, and the Czech Republic*, 15 TUL. EUR. & CIV. L. F. 1 (2001).

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finding additional space from law as a solution to domestic violence.

*Marianne Wesson*

There are so many wonderful things about this book I could spend my whole few minutes just talking about the things I admire. But I do not want to do that, in part because I have said many of those things in print,<sup>74</sup> and in part because I would like to engage with you today on two particular issues: the question of privacy and the point both Liz and Renée have made about Americans seeming to think of legal solutions and legal remedies first before we consider other solutions to social problems. To take the second point first, I think you are quite right in this book, Liz, about the primacy Americans have placed on legal rather than other solutions, and I have wondered why that is so. The suggestion—a very useful observation—has been made that it has something to do with the sort of social safety net that exists in other countries but is increasingly dwindling in the United States. I have been thinking about this because we have been traveling around a little bit in Eastern Europe before landing here in Budapest. Everywhere we have been, we have seen castles. We visited several and were shown, among other things, treasure troves of ancestral monarchies. I kept thinking, why is it I have gone for years without seeing a castle (at least since my kid got too old to go to Disneyland), and now that I am in Europe, I spend every other day in one? We do not have such a tradition in the U.S. We have never had a king; we do not have much of a shared history.

The United States is an enormous country; it is increasingly diverse; it is very violent. Many people who live in it consider they do not share a great deal with all of their fellow countrymen. The one thing that we do share, on the whole, is a commitment to what we rather grandly call the Rule of Law. It is not always such a grand thing, and it is not always benign. Nevertheless, I think that is why we think of the law first, Renée,

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<sup>74</sup> Wesson, *supra* note 1, at 23.

because we do not have anything else to appeal as a source of our commonality or our national identity. We have this phrase—it is a sexist phrase, but it is still useful—“We are a nation of laws, not men.”<sup>75</sup> The phrase implies that leaders and dynasties—we undeniably still have those—will come and go, but the one thing that will remain at bedrock is the rule of law. Of course, we still struggle over its meaning. But I believe that is the reason we think of the law so constantly and insistently, in a way a European finds, no doubt, peculiar.

I want to say that one of the things I admire so much about Liz’s book is her optimism. I know it is hard to share it all the time. But I like reading something that reflects that “glass-is-half-full” attitude, especially after being at this conference. I have been at quite a few panels, which I felt were all good, some brilliant; however, it occurred to me that the official attitude of this conference is pessimism. There might be a generic title applicable to every panel that would be something like “an exquisitely nuanced and profoundly insightful discussion of a confessedly insoluble problem.” They mostly conclude, “Huh, nothing can be done.” Or perhaps the more optimistic panels conclude, “There is a great deal of work that remains to be done.”

It is refreshing to encounter a divergence. I rarely encounter a piece of writing that makes me feel like I want to go *do* this work. Yes, of course there is a great deal of work remaining, and Liz’s book serves as a useful inventory of what it might be. But it is not said in a passive voice. It is said this way: “Look, let us roll up our sleeves. There is a lot that remains to be done.” So I like the way reading this book renewed in me the spirit of commitment to the solution of this problem, even though the path to a solution is not always clear.

I can only talk about this problem from my own position as an American, a lawyer, and a former prosecutor. I tend to think

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<sup>75</sup> John Adams, *Thoughts on Government*, Jan. 1776, available at <http://odur.let.rug.nl/~usa/P/ja2/writings/tog.html> (“[N]o good government [exists] but what is republican . . . [and] the very definition of a republic is ‘an empire of laws, and not of men.’”).

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of those immediately as the aspects of my own identity that I can mobilize in thinking about solving this problem, although those are not the only helpful identities.

Now let me turn to the question of privacy and privatization. Catharine MacKinnon once said—I think she was quoting someone else—“Privacy is an injury got up as a gift.”<sup>76</sup> She was talking about the interest of women, of course. I have thought about that phrase often. Usually, when people talk about privacy they are talking about the gift—something desired, something sought after. Do not get me wrong. I like my privacy as much as the next person. I have never understood why for a few years teenagers wanted to be Madonna, the woman who never has any privacy. Even when she goes to the dentist, there is someone there with a camera to record it. That just never appealed to me at all. But I do think that the regime of privacy and the increasing privatization of things once regarded as matters in the public sphere carries with it many dangers for the vulnerable, and especially for women.

I have heard a lot about privatization in attending various panels at this conference. For example, speaking globally—and I can only speak in a very general way because I do not have a lot of expertise here—I have heard a lot of talk about growing national deference to private economic arrangements. There is an entire regime of international agreements that seek to institutionalize and make permanent this deference by governments to private economic arrangements,<sup>77</sup> a kind of privatization of the international economy coupled with measures designed to discourage regulation that might make it less of a brutal capitalistic enterprise. Whether that is good or bad, I do not think anyone can deny that that we are seeing a trend. It is in

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<sup>76</sup> CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 10 (Harv. Univ. Press 1987).

<sup>77</sup> See generally Gordon A. Christenson, *Federal Courts and World Civil Society*, 6 J. TRANSNAT'L L. & POL'Y 405, 431 (1997) (explaining that treaties are interpreted as self-executing when private economic or commercial interests are protected); Neil Munro, *Cybercrime Treaty on Trial*, NAT'L J., Mar. 10, 2001 (discussing an anti-crime treaty being drafted in Europe and how privacy advocates feel this may undermine economic growth).



part the product of a kind of utilitarian argument that seems to be at its maximum influence these days, the proposition that government is less efficient than private institutions at the promotion of certain kinds of social goods.

At this conference I have also heard about the proliferation of a regime of private decision-making, frequently by arbitration. In the United States, for example, if you sign a contract for the purchase of goods, it is very likely that, if there is any kind of formality at all to the agreement, you sign away your right to bring litigation against the manufacturer or seller of those goods.<sup>78</sup> You are required, if there is a dispute, to submit to arbitration.<sup>79</sup> And the agreement might even provide that the seller of the goods will designate the arbitrator. As a result, you as the consumer give away your right to a public remedy in favor of an agreement (which is extorted from you because it is the only way you can buy the camera or whatever it is you want). The purchasing public has no other choice but to submit to the privatization of dispute resolution.

Privatization arrangements also prevail in many sorts of employment agreements.<sup>80</sup> We have seen in the United States

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<sup>78</sup> See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (stating that the Federal Arbitration Act, 9 U.S.C. § 2, establishes a federal policy favoring arbitration and requires courts to rigorously enforce agreements to arbitrate).

<sup>79</sup> See, e.g., *Taubman v. Prospect Drilling & Sawing, Inc.*, 469 N.W.2d 335 (Minn. App. 1991) (discussing how the Minnesota Sales Representative Act, Minnesota's version of the Uniform Securities Act, requires disputes to be submitted to arbitration); *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 492 (Tex. 2001) (discussing the requirement to submit to arbitration in the context of sales of goods). See also Richard A. Bales, *A New Direction for American Labor Law*, 30 HOUS. L. REV. 1863, 1912 (1994) (surveying Supreme Court cases demonstrating judicial receptiveness to arbitration clause enforcement in commercial sales contracts and judicial interpretation of the Federal Arbitration Act, 9 U.S.C. § 1-14).

<sup>80</sup> See, e.g., John-Paul Motley, *Compulsory Arbitration Agreements in Employment Contracts*, 51 VAND. L. REV. 687, 688 (1998) (stating that employment lawyers began encouraging employers to insert binding arbitration clauses into all employment contracts and other agreements). See generally *Cole v. Burns Int'l Secretary Serv.*, 105 F.3d 1465 (D.C. Cir. 1997)

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Supreme Court within the last couple of years an endorsement of the legality and propriety of these kinds of arrangements, in which people sign away their right to seek a public remedy in favor of a privatized remedy.<sup>81</sup> Our president has initiated a discussion about the desirability of privatizing much or all of our Social Security system,<sup>82</sup> which is the system of old age pensions for people in the United States. It has always been organized as a public agency, administered by public servants who were answerable, as governmental agencies are, but powerful interests promote to substitute this public system for a private one by making security in one's old age an individual matter of accumulating money, investing it, and then moving one's investment around in an entrepreneurial manner. So I see a lot of evidence that this trend toward privatization is continuing and accelerating, and I wonder what that means for the movement for the protection of battered and vulnerable women and children.

One of the things that Liz talks about in her book is the Violence Against Women Act of 1994.<sup>83</sup> But as Renée mentions, in a development that came after the book was published, the

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(discussing the Federal Arbitration Act in relation to employment contracts).

<sup>81</sup> See *E.E.O.C. v. Waffle House, Inc.*, 122 S. Ct. 754, 762 (2002) (stating that the language of the Federal Arbitration Act manifests a policy favoring arbitration agreements); *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (ruling that employer's action to compel employee into arbitration was proper and not exempt from the Federal Aviation Act); *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) (affirming the district court's compelled arbitration); *Cortez Byrd Chips v. Bill Harbert Construction Co.*, 529 U.S. 193 (2000) (ruling that the Federal Arbitration Act's venue provisions are permissive and allow a motion to confirm, vacate, or modify an arbitration award).

<sup>82</sup> See David W. Chen, *The Social Security Debate Plays San Diego*, N.Y. TIMES, Sept. 7, 2001, at A12. In May 2001, President George W. Bush created the commission to develop proposals to overhaul the social security program including private investment accounts. See President's Commission to Strengthen Social Security, at <http://www.csss.gov> (last visited Apr. 21, 2002).

<sup>83</sup> The Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1941 (codified as amended in scattered sections of 42 U.S.C.). See *supra* note 64.

United States Supreme Court in *United States v. Morrison* declared unconstitutional the civil rights remedy of the Violence Against Women Act, the portions that would have given women who were victims of gender-motivated violence a right to seek a private remedy in the federal courts of the United States.<sup>84</sup> One can put forth various explanations of this decision, but to me it represents a rather subtle statement of the old premise that this kind of violence really is a private matter. It is not important enough, and it does not have significant enough nation-wide effects for the federal courts to have any jurisdiction to consider it. It has to be considered (if at all) by local courts, by local authorities. State courts are all right for those cases, but the federal courts—the big courts, the important courts, the courts that deal with momentous matters significant to the nation and the nation's health—really do not have any jurisdiction over this rather small private matter. I am being perhaps a bit sarcastic,

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<sup>84</sup> *United States v. Morrison*, 529 U.S. 598 (2000). The plaintiff in *Morrison*, Christy Brzonkala, a freshman at Virginia Polytechnic Institute, alleged rape by two defendant varsity football players. After the university judicial committee failed to find sufficient evidence to punish them, the plaintiff brought civil suits against the university under Title IX, 20 U.S.C. §§ 1681-88, for the handling of her complaint and against both varsity football players under 42 U.S.C. § 13981, *codifying* § 40302 of the Violence Against Women Act of 1994, 108 Stat. 1941-42, which provides that persons may receive compensatory, punitive, declarative, or injunctive relief from those who have deprived them of their right to be free from gender-motivated violence. *Morrison*, 529 U.S. at 604. The district court dismissed the plaintiff's case against the university for failure to state a claim, concluding that Congress lacked the power under the Commerce Clause or Section 5 of the Fourteenth Amendment. *Id.* at 604-05. In *Morrison*, the case against the football players, the Supreme Court held that Congress lacked constitutional power under the Commerce Clause even to provide a civil remedy for gender-motivated violence, which the Court said constituted intrastate non-economic activity not substantially related to interstate commerce. *Id.* at 613-18, *relying on* *United States v. Lopez*, 514 U.S. 549 (1995). The Court explicitly left open the possibility of Congress' Commerce Clause powers to regulate non-economic activities affecting interstate commerce, but declined to place gender-motivated violence within Congress' power to regulate, fearing that permitting federal regulation of such an attenuated relationship to interstate commerce would over-broaden Congress' regulatory powers. *Id.* at 614-16.

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but I think that is a defensible reading of what the court was saying in *Morrison*.<sup>85</sup> And if I am right in my reading of this case together with other developments in United States constitutional law, I see a gradual but relentless enlargement of this sphere of privacy, inside of which the government may not or will not be inclined to look. I do not think that is a good thing for vulnerable people or for battered women.

You may know that the President of the United States, George W. Bush, when asked whom he would appoint to vacancies on the United States Supreme Court, if any should arise (as it is very likely that they will during his term), said he would like to appoint more justices like two of the present members of the court—Justice Thomas and Justice Scalia.<sup>86</sup> So I am always interested in what these two jurists are saying and doing because it seems likely that they may be replicated before long. When I look at their decisions across a broad range of subject matters, I find that this concern with privacy, the protection of someone's right to keep certain matters private and away from the gaze of the government, is a pervading theme, even when the question is one on which a person George W. Bush admires would take a different view. For example, Justices Scalia and Thomas are quite willing to vote against the government in matters involving criminal prosecution and in

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<sup>85</sup> *Id.* For further discussion of *Morrison*, see Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109 (2000); Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States V. Morrison*, 114 HARV. L. REV. 135 (2000); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001); Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000).

<sup>86</sup> Laurie Kellman, *Bush, Gore Touted Different Justices*, A.P. ONLINE, Dec. 11, 2000 (“Throughout the year, Bush tried to frame the issue in terms of philosophy, saying his ideal nominees would base their judgments strictly on the words of the Constitution. Pressed to name a justice who fits that mold, Bush pointed to Scalia and Thomas.”); Stephen B. Presser, *How Bush Would Fix the Supremes*, CHIC. TRIB., Nov. 5, 2000 (“Bush said he wants more justices like them [Scalia and Thomas].”).

favor of the defendant when they feel that the right to privacy is implicated.<sup>87</sup> I am thinking especially of a recent decision addressing whether the police could use what is called a thermal imaging device to look—not look, literally, but to sense what was going on—inside the walls of a house.<sup>88</sup> Thermal imaging devices are law enforcement tools used to detect activities like the cultivation of marijuana, which uses growing lamps that generate a certain amount of heat. Prior to this decision, the Court had found that, in some remarkably similar situations, there was no violation of our Constitution's prohibition against unreasonable searches and seizures.<sup>89</sup> In this matter, however, the Court found differently, and Justices Scalia and Thomas were careful to state their view that—they did not quite put it this way, but they might as well have—a man's house is his castle. And inside one's

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<sup>87</sup> See *Minnesota v. Olson*, 495 U.S. 91 (1990) (Scalia & Thomas, JJ., joining majority) (holding that overnight guest who stays in another's house with the owner's permission legitimately shares the owner's expectation of privacy under the Fourth Amendment). *But see Indianapolis v. Edmond*, 121 S. Ct. 447, 458, 460-62 (2000) (Rehnquist, C.J., Scalia & Thomas, JJ. dissenting) (joining Chief Justice Rehnquist in rejecting the majority's finding that City of Indianapolis' use of drug-sniffing dogs at traffic checkpoints violated the Fourth Amendment; finding, instead, a lowered level of Fourth Amendment protection in a car, as opposed to a private residence); *Minnesota v. Carter*, 525 U.S. 83, 91-99 (1998) (Scalia & Thomas, JJ., concurring) (concurring with majority's reasoning in denying Fourth Amendment protection from discovery of illegal activities by police officer who looked through window of the house where defendants were bagging cocaine).

<sup>88</sup> *Kyllo v. United States*, 533 U.S. 27 (2001) (finding warrantless thermal imaging searches in violation of the Fourteenth Amendment when used to detect emanations from the home).

<sup>89</sup> *Florida v. Riley*, 488 U.S. 445 (1989) (holding that defendant had no reasonable expectation that his curtilage was protected from naked eye observation from a helicopter four-hundred feet above); *California v. Ciraolo*, 476 U.S. 207 (1986) (holding no Fourth Amendment violation when police officers trained in marijuana identification took aerial photographs of defendant's property from a private plane prior to securing warrant); *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986) (holding that the EPA's surveillance of defendant's premises from a plane using an aerial mapping camera to enhance human vision did not constitute a Fourth Amendment violation).

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house, one is entitled to keep what is happening away from the view of the authorities.<sup>90</sup>

There was another very overlooked decision about a year ago, a case called *United States v. Hubbell*,<sup>91</sup> which involved a rather technical question. But in their concurring opinion in that case, Justices Thomas and Scalia declared a remarkably broad view of the prohibition against unreasonable searches and seizures, suggesting that a person has a right to refuse, for example, the drawing of blood or the taking of fingerprints, or speaking for voice print analysis, very standard techniques of law enforcement.<sup>92</sup> This is a position that the Court has not taken or even considered seriously in about forty years.<sup>93</sup> So I see all of these decisions as presaging a trend in our Supreme Court toward greater protection of the right of privacy, at least in one's home and one's person.

Now this leads me to another point. Privacy is not a good that is lying around on the ground waiting for all of us to pick it up if we only are attracted to it. Privacy must be purchased like anything else. If you are not convinced, just try traveling around Europe for a while and staying some nights in lodgings that cost \$25 a night and other nights in lodgings that cost \$250 a night, and compare the amount of privacy you enjoy in those two kinds of lodgings. They are not the same because privacy is expensive. Privacy is far more available to those who have money to buy it than those who do not. The trend toward the enlargement of the sphere of privacy couples with my view that privacy is a good

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<sup>90</sup> *Kyllo*, 525 U.S. at 28, 34.

<sup>91</sup> 530 U.S. 27 (2000).

<sup>92</sup> *Id.* at 49-56 (arguing the term, "witness," has a broader meaning than that given by the majority, such that the Fifth Amendment privilege against self-incrimination would protect against the compelled production of not only incriminating testimony but also any other incriminating evidence, thus interpreting protection against searches and seizures to include a person's refusal to comply with certain standard techniques of law enforcement).

<sup>93</sup> *See Fisher v. United States*, 425 U.S. 391, 408 (1976) (permitting the prosecution to compel production of self-incriminating evidence that lacked testimonial character). *Cf. Hubbell*, 530 U.S. at 56 (Scalia & Thomas, JJ. concurring).

that can be purchased by the well-off, but is unaffordable to the poor, which deepens my concern about these developments.

In conclusion, there are various developments in American constitutional law that point toward an increasing emphasis on the preservation of a private sphere behind an impenetrable veil. The analysis Liz provides in her book of the role that privacy has played in denying protection to battered women makes these developments especially troubling to me. At one point Liz recounts going to a demonstration, I think it was in Washington, D.C., and seeing a young woman holding a sign that said, "The power to stop violence against women begins with me."<sup>94</sup> Liz points out that this is in one way an inspiring message, because it is empowering; it suggests that each of us has the opportunity as individuals to do things to better our lives and protect ourselves.<sup>95</sup> It is also to some extent a discouraging message because it suggests that it is purely the responsibility of each woman to protect herself, and that public agencies and public officials have no obligations in that regard. Suppose that sign had said something just a little bit different. Suppose it had said, "The responsibility to stop violence against women belongs to you." Or suppose it said, "The responsibility to stop violence against a woman belongs to that woman." Now imagine that sign being held up not by a young girl but by the justices of the United States Supreme Court. I am afraid we are going in that direction. As Liz points out, we have been there, and we do not want to go back.

*Christine Harrington*

Liz, would you like to make a few comments, and then we will open the discussion?

*Liz Schneider*

Yes. Thanks to all of you for really full, rich readings of the

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<sup>94</sup> SCHNEIDER, *supra* note 1, at 231.

<sup>95</sup> *Id.*

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book. I really appreciate the closeness of your analysis, and I am really interested in your reactions. It is always this amazing feeling when you write something. You have your own sense about what it is that you have sent out into the world. There then are all these different reactions to it and readings of it. People bring their own perspectives to it. Many of you saw the film yesterday, "Live Nude Girls Unite."<sup>96</sup> People watched this ninety-minute film, and everybody brought something different to the discussion afterwards. Some people brought labor history, and some people brought issues of motherhood, and some people brought questions of sexuality. It is always so interesting to hear people's responses to what one has put "out there."

A lot of the issues that each of the readers have raised are issues about which I am continuing to think. Let me just try to highlight some of those issues. First, the point that both Sally and Renée made about criminalization is a question that I try to address in the book.<sup>97</sup> I definitely see criminalization as a serious, serious issue, and the move to criminalize domestic violence in this country is very troubling. Indeed, the thesis of the book is that without a broader comprehension of a social welfare framework for understanding the interrelationship between violence and welfare, and women's economic situation, and socialization, and sexual harassment, and all those things, we cannot really address the violence.<sup>98</sup> Criminalization as a solution in itself is a big problem, and I discuss this problem in the book. Sally's point about the convergence of issues that are coming together around criminalization is very valuable, and I agree with it. It is a very problematic move. It is a move that manifests the problem that I try to address in the book, that domestic violence is viewed as a problem in and of itself and not linked to the larger issues of women's economic situation, gender socialization, sex segregation, reproduction, and women's subjugation within the family. But I also think understanding the other forces that both Sally and Mimi are highlighting, which

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<sup>96</sup> LIVE NUDE GIRLS UNITE! (Julia Query & Vicky Funari, 2000).

<sup>97</sup> SCHNEIDER, *supra* note 1, at 6, 181-98.

<sup>98</sup> *Id.* at 6-8.



converge in that move towards criminalization, is very valuable.

The international human rights piece that Sally brings up here is really fascinating. It is particularly wonderful, Sally, because this is something that I am working on in a new paper.<sup>99</sup> In the book, I leave open the way in which these issues are reframed in the international human rights context. By coincidence, I have also been in China since I wrote the book and also experienced some of the inappropriateness of the American context. But there are ways in which the human rights frame (although there is resistance to CEDAW<sup>100</sup> and the human rights framework) can move beyond an individual psychological criminalizing perspective. That was a particularly important aspect of your comments, Sally. As you were speaking, I felt like we were reading each other's minds.

To address Sally and Renée's comments about the cultural context, I have a colleague, Judi Greenberg, who teaches at New England School of Law and who is teaching a course this summer in Ireland on Comparative Domestic Violence Law in the United States, Ireland, India and South Africa. Not only are there law school casebooks now, one of which Clare Dalton and I just published,<sup>101</sup> but there are courses on comparative domestic violence. Judi just left to teach this course in Ireland for two weeks, and we talked before she left. She observed that all four

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<sup>99</sup> Elizabeth M. Schneider, *Battered Women, Feminist Lawmaking, and International Human Rights*, NEW ENG. L. REV. (forthcoming).

<sup>100</sup> The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), adopted in 1979 and otherwise known as the international bill of rights for women, is an international human rights treaty reaffirming and defining equal rights between men and women in all respects and specifically with respect to sex, political and public life, education, employment, health, marriage, and law. See United Nations General Assembly, The Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979), available at [gopher://gopher.un.org/00/ga/cedaw/convention](http://gopher://gopher.un.org/00/ga/cedaw/convention).

<sup>101</sup> CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* (Foundation Press 2001). See also BEVERLY BALOS & MARY L. FELLOWS, *LAW AND VIOLENCE AGAINST WOMEN* (Carolina Academic Press 1994 & Supp. 2000); NANCY K.D. LEMON, *DOMESTIC VIOLENCE LAW* (West Publ'g Co. 2000).

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countries rely on protective orders and criminalization remedies despite the diversity of contexts and explanations of domestic violence in each country. I do not know whether that just reflects the primacy of American frameworks in other countries or even whether it is true, but I think it is an interesting observation.

Renée's comments and Betsy's responses regarding the greater social-welfare context, for example, of the Netherlands and the U.K., suggest the significance of cultural specificity.<sup>102</sup> Of course, there is always cultural specificity, and it is important to recognize this and integrate it into our analysis. Betsy did not mention this, but the history of the battered women's movement in the U.K., for example, has historically been a more explicitly political and activist movement than what has developed in the United States.<sup>103</sup>

*Renée Römken*

Very briefly, I think part of the answer to the question of differences in Western Europe is CEDAW (the Convention of the Elimination of All Forms of Discrimination Against Women).<sup>104</sup> CEDAW is a treaty by the U.N. in 1979. Various countries use the international human rights perspective more and more as a framework to say what they are doing and whether they are complying with this document. The focus of CEDAW, however, is clearly on legislation, so it has a unifying influence internationally.

*Liz Schneider*

As I discuss in the book, CEDAW and other international human rights documents see violence as linked to other aspects of women's lives in ways that I think are very important.

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<sup>102</sup> See *supra* notes 71-72 and accompanying text.

<sup>103</sup> See *supra* notes 71 (describing the battered women's movement in the U.K.).

<sup>104</sup> See *supra* note 100.

*Sally Merry*

Can I just intervene quickly? The thing about CEDAW is that it is not just about legislation; it is also about substantive equality. It is about media, ritual, and the spread of cultural stereotypes, education, and jobs. It actually has a very broad structural analysis about gender and equality. So I think it is really more about social transformation than just about legislation.

*Liz Schneider*

CEDAW raises the question of the implications of international human rights. This is an area where there is a lot of activism and writing. Many people are doing activist work around the world and bringing knowledge and experience home regarding the difference an international human rights framework makes.

On the mandatory arrest issue, I am sympathetic with the concerns that Renée raises.<sup>105</sup> I think that it is not surprising that the Supreme Court struck down the civil rights remedy of VAWA,<sup>106</sup> which was the non-criminal aspect. There are other sections of the Violence Against Women Act that still stand—renewed money for shelters and other things that are being used in an affirmative way.<sup>107</sup> There is no question in my mind that the

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<sup>105</sup> See *supra* text accompanying notes 52-68.

<sup>106</sup> See *supra* note 64 (discussing Violence Against Women Act).

<sup>107</sup> Congress views violence against women as a national problem and has resolved to continue to fund Violence Against Women Act programs, to which it appropriated close to \$1,800,000,000 from 1995 to 2000. H.R. Con. Res. 290, 106th Cong. (2000) (enacted). On October 28, 2000, President Clinton signed the Victims of Trafficking and Violence Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000), which strengthened and expanded VAWA programs and authorized funding. Press Release, White House (Oct. 28, 2000) (LEXIS, News Library, U.S. Newswire file); see also Jan Erickson, *Legislative Update*, NAT'L NOW TIMES (Winter 2001), at <http://www.now.org/nnt/winter-2001/legupdate.html>. Congress passed a bill appropriating over \$400,000,000 to VAWA programs for the fiscal year ending September 2001 and enacted Violence Against Women Act of 2000, which reauthorized

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federal VAWA programs. Pub. L. No. 106-386, 114 Stat. 1464, Division B (2000); S. 2787, 106th Cong. (2000); H.R. Res. 4690, 106th Cong. (2000). Nevertheless, fiscal year appropriations for the year 2001 fell \$200,000,000 short of authorized levels. *Testimony Criminal Charges for Harm to a Fetus: Hearing Before the House Judiciary Comm., Constitution Subcomm.*, 106th Cong. (2001) (statement of Juley Fulcher, Public Policy Director, National Coalition Against Domestic Violence); Editorial, *Fetus Bill a Devious Way to Attack Abortion Rights*, ATL. J. & CONST., May 4, 2001, at 20A. The proposed 2002 budget increases VAWA funding by more than 35% from 2001. *Testimony of the Commerce, Justice, State & Judiciary Subcomm. of the House Appropriations Comm. Appropriations for the Justice Dep't*, 106th Cong. (2001) (statement of John Ashcroft, Attorney General, United States).

Despite this substantial 2002 budget increase, it still falls over \$100 million short of congressional authorized funding levels for VAWA. Jan Erickson, *Legislative Update: Bush and Congress Reach Out to Rich White Guys*, NAT'L NOW TIMES, Summer 2001, available at <http://www.now.org/nnt/summer-2001/legupdate.html>. This shortfall includes approximately half the authorized VAWA budget for rape prevention and education programs and less than authorized funding for battered women's shelters. David M. Heger, *Violence Against Women Policy Trends Report 19*, NATIONAL VIOLENCE AGAINST WOMEN PREVENTION RESEARCH CENTER, July 5, 2001, at <http://www.vawprevention.org/policy/trends/trends19.shtml>. Additionally, the budget continues to provide no funding to a transitional housing program for victims despite a National Coalition Against Domestic Violence survey indicating that such a program is priority for domestic violence service providers. *Id.* However, the Bush Administration announced in April 2001 that it would request from Congress the additional funding of \$102.5 million authorized for VAWA. Erickson, *supra*. In April 2001, the Senate proposed that the month of April be designated as National Sexual Assault Awareness Month, encouraging efforts to eliminate sexual violence and provide justice to sexual assault victims. S. Res. 72, 107th Cong. (2001). The House introduced the Victim's Economic Security and Safety Act in July 2001 providing workplace protections for domestic and sexual assault victims requiring time off for physical or emotional health care and legal assistance. H.R. 2670, 107th Cong. (2001). The House, Senate, or President has not acted on either of these bills. More recently, the Bush Administration received criticism from women's organizations alleging that his nominees for United States Attorney and the Third Circuit Court of Appeals are not capable of enforcing VAWA. See Audrey Hudson, *2nd Judicial Nominee Hit in Senate; Democrats Criticize Smith, GOP Cries Foul Over Pattern*, WASH. TIMES, Feb. 27, 2002, at 1 (noting that the Third Circuit Court of Appeals nominee openly criticized VAWA on federalism grounds); Janet McConnaughey, *NOW Says President's Nominee "Inappropriate" for U.S. Attorney*, BATON ROUGE STATE

privatization Mimi discussed is something that we will see only get worse. I would argue that the decontextualization of the broader gender framework in domestic violence that I discuss in the book is an example of this re-privatization, in a most problematic sense.

It is also fascinating to me that some of you read this book as so optimistic. I see the book as much more textured, describing a glass half full but also half empty. Indeed, in the book I try to struggle with what I think are some of the real limitations of law, which I now see more clearly than when I began this work. For example, many of us who began this work thirty years ago thought that getting expert testimony in on battering was going to change the rules of the game. We may not have fully appreciated the tenacity of law to reverse those insights—the way that law is one step forward and three steps backward. That is very much my own view in the book. So it is very interesting to me that it is read more optimistically by several of you. Maybe that is just the difference between the mind of the author and the minds of readers. This is the very reason that it is wonderful and valuable to have this kind of conversation.

So with that, again, thanks.

*Christine Harrington*

I, too, take exception to the view that Liz's book is simply "optimistic." In fact, I think that her theoretical analysis puts to rest this naïvete about law. There may be a tendency among lawyers to look for a fix, and if the fix does not cure the problem, they are viewed as "pessimistic"; if the fix does, they are called "optimistic." This pessimist/optimist analysis, I think, belies the theoretically informed dimensions of this book. If there is something that is optimistic for me in reading the book, it is Liz's continual development of the social relations and human conditions, which place people in positions of struggling for emancipation. This comes through in her own voice as author, in her description of her own life as a younger person at the

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beginning of her movement experience all the way to today. It is this spirit we so often put into our imagined world of feminist lawmaking that gives us an angle, or standpoint, for comprehending the dialectic of rights and politics from a feminist perspective. I take exception to the optimist/pessimist debate because I do not find it fruitful in understanding the praxis.

Are there comments or questions from the audience?

*Elizabeth Rapaport*

I would like to ask Renée to amplify what she means by “the social category,”<sup>108</sup> and by her critique that the social category offers a better alternative to legal strategies. Renée argues that European social democracies have adopted strategies of addressing feminist issues that are preferable to the legal strategies American feminists have adopted. I am not sure that I understand why there is an opposition or wherein it lies.

There was a time in the early history of Second Wave Feminism in the United States when many of us thought that classical socialism contained sufficient understanding of the “Woman Question,” when we believed that social reform embracing equality for women would more or less automatically achieve feminist goals.<sup>109</sup> This classical socialist view might be a version of “the social category.” As Friedrich Engels often told working class and socialist audiences about the socialist future: when the first free man meets the first free woman, transformed social relations between the sexes would begin to appear in the new world of freedom and equality.<sup>110</sup> Our movement revealed that issues of power and ideology are much stickier and more

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<sup>108</sup> See *supra* notes 11, 24-28, 55, 67, 97-98 and accompanying text (referring to the shift in classifying battered women as a social category in the 1970s to a legal category in the 1990s).

<sup>109</sup> For recent discussions of Second Wave Feminism, see generally DEAR SISTERS (Rosalyn Baxandall & Linda Gordon eds., Basic Books 2000); THE FEMINIST MEMOIR PROJECT (Rachel Blau DuPlessis & Ann Snitow eds., Three Rivers Press 1998).

<sup>110</sup> See FREDERICK ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE (Int'l Publishers Co. Aug. 1995).

recalcitrant than we had initially understood. Renée, do you disagree with this reading of the history of the women's movement in the United States or draw other lessons from European experience? Do you see the solution to problems of domestic violence as lying solely in a decent public commitment of resources to people in trouble, and the treatment of abusers and abused within the family in accordance with a pathologizing, medical model? What is the social category? For me it is an interesting and provocative notion, but raises the uneasy feeling that it ignores crucial lessons of our movement.

*Renée Römken*

My intent when I made the dichotomy—and of course every dichotomy does not give a full spectrum of the facts—was to use a provocative hypothesis about the dichotomy between social and legal categories to highlight a tendency that I see in the U.S., in this case domestic violence—how a social problem becomes the subject of legalization that may exclude other political strategies. What are we doing as feminists, as people who are committed to social justice, when law seems to become a central strategy to achieve change? What kind of strategies do we look for? I certainly do not mean to use the social category to refer to battering as a medical or psychological issue, nor do I use it as a normative category in the sense that it implies or describes a certain approach or strategy that would necessarily be better or more effective. It is a descriptive distinction at this point to highlight what I consider to be a difference in the way law operates on a social and cultural level in the U.S. and in Europe,<sup>111</sup> and the kinds of foci that are subsequently created in political strategies.

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<sup>111</sup> See *supra* notes 61-62, 71-73 and accompanying text (comparing the approach of the American battered women's movement to that of similar activists in Western Europe, who have developed a method that provides a more equal balance between the legal and social strategies used in aiding battered women).

*BATTERED WOMEN & FEMINIST LAWMAKING* 367*Isabel Marcus*

I want to raise the question of going beyond caselaw and legislation. Most countries have some form of legislation that deals with the question of defining injury and the appropriate court's jurisdiction, and I don't think that the existence of a statute is the issue. Rather the focus should be on how law, lawyers and people hold public officials accountable. In one sense law has very limited ways to achieve accountability. In the United States, there are class action lawsuits and endless litigation, but law is a rough though necessary framework for accountability. Within bureaucracies, accountability is a much more complicated issue; the sledgehammer of the law does not achieve accountability. For example, in Eastern Europe there is no notion of suing the police for violations of civil rights, including for failure to protect battered women if prosecutorial discretion is abused.<sup>112</sup> If judges pressure parties to settle cases by asking whether a battered woman forgives the perpetrator, or if doctors will not give a medical certificate, a gate-keeping device to allow the woman to file a lawsuit or a complaint with the police, separate criminal code provisions will be mere law on the books. It seems to me that as one starts thinking about accountability, the grass roots activism occurring in many countries is not about rewriting the law. Rather, it is a search for institutional and cultural mechanisms and transformations for developing accountability.

*Christine Harrington*

That calls for greater public transparency and is more

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<sup>112</sup> See Christian Boulanger, *Constitutionalism in East Central Europe? The Case of Slovakia Under Merciar*, 33 EAST EUROPEAN QUARTERLY 21 (Mar. 1999); Virginie Guiraudon, *Third Country Nationals and European Law: Obstacles to Rights' Expansion*, 24 J. ETHNIC & MIGRATION STUDIES 657 (Oct. 1998); Meltem Muftuler-Bac, *The Impact of the European Union on Turkish Politics*, 34 EAST EUROPEAN QUARTERLY 159 (June 2000) (explaining that the law on prosecuting public officials is a major obstacle to the trial and punishment of public officials for human rights violations).



complex than the simple question of how privacy is situated as a value for Justice Scalia. New legal mechanisms or accountability for violent behaviors can be enacted. Liz's involvement in writing an amicus brief in support of Hedda Nussbaum, who sued Joel Steinberg for tort damages,<sup>113</sup> provides one example of this. Liz argued against civil assault statutes of limitation laws to enable battered women to exercise a legal right to sue in a civil context.<sup>114</sup> I also think Isabel's points are quite good in terms of showing the life of law and the continuing, unfolding dimensions of law. This perspective gives a richer analysis of state power and NGOs and these other factors.

### *Renée Römken*

You emphasize, Chris, the need for recognition of the importance of options other than law. And I find very interesting, for example, what has been happening in Australia, where activists are looking for alternative remedies that are more about developing social structures to hold agencies accountable.<sup>115</sup>

### *Audience Member*

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<sup>113</sup> Nussbaum v. Steinberg, 703 A.D.2d 32 (N.Y. 2000).

<sup>114</sup> See SCHNEIDER *supra*, note 1, at 94, 181-82.

<sup>115</sup> In Australia, a report entitled *Key Directions in Women's Safety—A Co-ordinated Approach to Reducing Violence Against Women* was released on February 8, 2002 by the Office of Women's Policy recognized the need for a specific strategy to address violence against women. See *Family Violence: Victorian Update*, at <http://www.dvirc.org.au/resources/DVUpdateVictoria.htm> (last visited Apr. 21, 2002). It proposed to focus government efforts in four key areas to reduce violence against women: (1) protection and justice (focusing on reform of the criminal justice system and police response), (2) options for women (including strategies to allow women to remain in the home rather than fleeing), (3) prevention of violence (including early intervention programs targeting young men), (4) community action and coordination (including a move toward an integrated response for family violence based on the "Duluth Model," which incorporates the criminal justice system, programs for victims, perpetrators and other services. See *Domestic Abuse Intervention Project*, at <http://www.Duluth-model.org/daipmain.htm> (last visited Apr. 21, 2002).

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I am from Turkey. One thing that you brought up is human rights texts and other texts like CEDAW. I do not think it is right to imply a lack of creativity on the part of people in other countries—for not enough people care about human rights. Even if people do care, many issues exist that have to be addressed. In discussing the private/public issue you first address privacy from a social aspect. And then you address privacy in terms of economics, for example the privatization of social securities. I guess there is a benefit in this.

In Turkey, we have virginity exams.<sup>116</sup> In the first sense of privacy, we cannot get rid of them. Constitutionally we are entitled to some level of privacy, but is privacy good for us? We cannot just turn it into gender equality. So the argument against privatization falls under one of economics. We are for privacy, however, because we do not want vaginal exams. In that sense, there is a certain use for privacy. I am not willing to give it up. It depends upon the particular cultural and political context.

*Liz Schneider*

I agree. One thing I want to clarify, because it is important that it not be misunderstood, is that in the book, I also discuss some of the ways in which it is important to think affirmatively

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<sup>116</sup> In Turkey, as in other societies, women are expected to be virgins until marriage, and those accused of not being virgins must consent to virginity exams under tremendous family and police pressures. REGAN RALPH, *A MATTER OF POWER: STATE CONTROL OF WOMEN'S VIRGINITY IN TURKEY* 6 (Human Rights Watch 1994). If rumors suggest a young woman is not a virgin, her family will often bring her to a state or private physician to establish either that her hymen is intact, or, if not, that it was damaged in an accident and not broken through sexual activity. *Id.*

In 1999, the government banned virginity testing of female students, but in 2001, Turkey's conservative health minister introduced regulations permitting principals in state schools that train nurses, midwives, and other health workers to expel girls who are not virgins. Susan Fraser, *Virginity Tests Spark Outrage: Turkish Teens in Nurse School Must Submit*, CHARLESTON GAZETTE, July 19, 2001, at 5C. Once again, however, the practice has been halted. *Turkey Rescinds Law on Virginity*, RECORD, Feb. 28, 2002, at A8.

about privacy.<sup>117</sup> Privacy is not just this terrible thing for battered women; it is important that privacy can also offer safety, integrity, and autonomy for women generally, as well as women who are battered. Many legal issues and many political questions have merged around these issues of privacy. Some examples include confidentiality of battered women's names and addresses, privacy regarding the forwarding of mail, confidentiality and privacy regarding shelters and conversations with battered woman counselors. Thus, there are many contexts in which privacy for battered women is important and should be understood in that affirmative way.

None of this is simple. Sally's first point—that the definition of the problem is so central—is the reason I start with the definition of the problem in the book. Other points that have not been mentioned in the conversation are the incredible difficulties in integrating and absorbing the lessons of the feminist arguments around domestic violence over a long period of time, the tremendous struggles judges face to do the job that they need to do, and the immense challenge to train lawyers to listen to the problems of battered women and not immediately move into a pathological perspective. I have been teaching specialized courses on domestic violence in law schools for ten years and have been training lawyers for many years on issues of domestic violence. Even lawyers who are incredibly thoughtful and sophisticated and who have done really good work have to engage in a continual process of self-reflection and self-criticism. This book is written in that spirit. I do not say this is the end of the conversation about our accomplishments and mistakes, but that a process of ongoing self-criticism and reflection is part of what it means to do this work. One constantly has to examine the new forms and manifestations of subversion, whether it is privatization or the ways in which—and I am sure Sally would agree—even the international human rights framework can be turned into its own contradiction. It is really about this as a long haul struggle, a long-term process of having to think and evaluate and rethink.

Having said that, I do want to go back to the issue that Renée

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<sup>117</sup> See SCHNEIDER, *supra* note 1, at 89-90.

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raised about feminist lawmaking. The term “feminist lawmaking” is intended to be descriptive, not normative. Feminist legal advocates have helped develop new legal harms where they did not exist before. The law would not recognize sexual harassment<sup>118</sup> or domestic violence as a harm if not for feminist lawmaking. Has that meant victory or even linear progress? Not at all! It has meant new struggles, new problems, new directions, and new twists in the road. But to not recognize that there has been something that has changed is, I think, not to really acknowledge the power and importance of feminist legal work over the last thirty years. We have not done enough, but we have made some incredibly important inroads. Law is not enough, but it is a start, and it can be very meaningful to many women on the ground.

*Audience Member*

What are those lessons you mention? And what about looking toward the future and seeing what coordination is being done within the feminist movement or movements?

*Liz Schneider*

Well, I think it is a worldwide movement now. There is an extraordinary amount of important work being done everywhere on these issues.<sup>119</sup> The lessons involve recognizing the impact of

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<sup>118</sup> See *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399 (1986).

<sup>119</sup> See *supra* notes 21-22, 26-30, 40-42, 51, 61-62, 70-73 (discussing the international battered women’s movements). See also *supra* note 100 and accompanying text (discussing the United Nations’ Convention on the Elimination of Discrimination Against Women (“CEDAW”)). See generally Berta Esperanza Hernandez-Truyol, *Conceptualizing Violence: Present and Future Developments in International Law*, 60 ALB. L. REV. 607 (1997) (chronicling the evolution of the international movement to combat violence against women); Stacy R. Sandusky, *Women’s Political Participation in Developing and Democratizing Countries: Focus on Zimbabwe*, 5 BUFF. HUM. RTS. L. REV. 253, 270-80 (discussing women’s movements in Uganda, Tanzania, Kenya, Namibia and South Africa).

feminist legal advocacy around the world in transforming our understandings, and yet recognizing that that work has to be done in a self-critical way, that it has to be subject to, in a sense, the dialectics of practice, of seeing what works, of going back to theory, and going back to practice. Finally, the lessons show that this is really a long and slow process.

***Audience Member***

Is the book based on an American model?<sup>120</sup>

***Liz Schneider***

It certainly focuses largely on that American experience, but it does not suggest that the American experience can or should be imported to other countries or cultures. I have done some work on violence in other parts of the world like South Africa and China. I think it is important to link this process in the U.S. with others around the world and to see the resonances and differences in other places. It would be wonderful if similar reflection and evaluation were done in other parts of the world and in other culturally-specific contexts to consider the victories, obstacles and lessons that we have to learn to do better work for women who are battered and link violence to women's equality.

***Christine Harrington***

Thank you all, both panelists and audience members, so much for your participation in this stimulating conversation.

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<sup>120</sup> See *supra* notes 28 (discussing the legal rights and legislative approach to domestic violence that is used in the United States), 64 (discussing how VAWA functions) and accompanying text.