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# Domestic Violence in Legal Education and Legal Practice: A Dialogue Between Professors and Practitioners

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# **DOMESTIC VIOLENCE IN LEGAL EDUCATION AND LEGAL PRACTICE: A DIALOGUE BETWEEN PROFESSORS AND PRACTITIONERS\***

## **PANELISTS\*\***

**KRISTIN BEBELAAR** is an Associate with Gulielmetti & Gesmer, P.C., where she practices family law, real estate law, and general civil litigation. Prior to law school, she was the Children's Program Coordinator at La Casa de las Madres, a San Francisco shelter for battered women, and she later worked in a special project of the San Francisco District Attorney's Office to improve child sexual abuse investigations. She graduated from Brooklyn Law School in 1996. After law school, she worked as a staff attorney at the HIV Project of South Brooklyn Legal Services, where she represented low-income, HIV-positive clients in family, housing, health, discrimination and estate law matters.

**STACY CAPLOW** is Professor of Law at Brooklyn Law School and the Director of the Law School's Clinical Education Program. Since 1976, she has taught diverse clinics at Brooklyn

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\* This article is a transcription of a program held at Brooklyn Law School on April 15, 2002. The event was sponsored and coordinated by Brooklyn Law Students Against Domestic Violence (BLSADV), a feminist student organization at Brooklyn Law School, to address the importance of incorporating gender issues, including domestic violence, into law school curriculum.

\*\* Professor Chantal Thomas, Professor of Law at Fordham University School of Law, participated in this program; her remarks are not reproduced in this article.

Law School, including a criminal defense clinic, an inmate counseling clinic, a prosecutors clinic, and several externships. A former staff attorney with the Legal Aid Society, she currently teaches the Safe Harbor Clinic. She has taught Criminal Law and Criminal Procedure II for many years, as well as seminars and classes in White Collar Crime and Federal Criminal Law. During the 1980s, she was the Chief of the Criminal Court Bureau of the Brooklyn District Attorney's Office, as well as their Director of Training. She has also served as a Special Assistant U.S. Attorney in the Civil Division of the Eastern District of New York. She recently taught the Prosecution Clinic at New York University School of Law as an Adjunct Professor and is active in various organizations relating to clinical legal education. Her scholarship interests range from gender issues to portrayals of women lawyers in popular culture.

**PATRICIA FERSCH** is the founder of the Family Law Center in New York City. Law is her second career. She was previously a retail buyer, merchandise manager and a wholesaler/manufacturer in costume jewelry in the retail trade. She returned to school for her undergraduate degree in 1983 for the purpose of finding a new career that would enable her to help people. Her new career goals were solidified in December 1990 after she saw a 60 Minutes piece called *Grandmothers at Law*. She interned with the organization in the summer of 1991 and decided to start a similar practice in New York. She volunteered at the Legal Aid Society when she started the Family Law Center as a low-fee legal office serving the working poor in the five boroughs. She is committed to serving individuals who are in need of legal services but are unable to pay conventional attorneys' fees. Because of the importance of her internship experience, she works with summer interns every year and has recently expanded her practice by hiring one of her former interns as an associate.

**BETTY LEVINSON** is a Partner at Levinson & Kaplan, and her primary practice areas are litigation and family law. She graduated from Brooklyn Law School in 1973 and was admitted to the Bar of the State of New York in April 1974. After two

years as a criminal defense attorney at the Legal Aid Society in New York County, she began working exclusively in private practice. In addition to teaching and lecturing on gender, family law, lesbian and gay, and domestic violence issues, she has been counsel in a number of novel cases. In 1975, she was counsel for amici in *Bruno v. Codd*, a successful challenge of the mistreatment of battered women by the Family Court, Police Department, and the Probation Department. In 1985, she represented the defendant in *People v. Green*, described in her article, *Using Expert Testimony in the Grand Jury to Avoid a Homicide Indictment for a Battered Women: Practical Considerations for Defense Counsel*, *Women's Rights Reporter* (Fall 1986). In 1992, she was co-counsel in *Matter of Evan*, New York's first lesbian adoption case. She also served as counsel for the plaintiff in *Nussbaum v. Steinberg*, obtaining a ruling which for the first time tolled New York's one-year statute of limitations for a civil assault action brought by a battered woman.

**JENNIFER L. ROSATO** is Professor of Law at Brooklyn Law School. Her area of interest focuses on ethical and legal issues related to healthcare decisions made on behalf of children. Recent articles on this subject have appeared in the *Journal of Law, Medicine and Ethics*, *Temple Law Review*, and op-ed articles in several newspapers across the country. She also writes in the area of gender and the law and other family law. She frequently lectures on family law issues and is active in a variety of bar committees and organizations devoted to these issues. She served as a Law Clerk to Judge Thomas O'Neill, Jr. of the U.S. District Court of the Eastern Pennsylvania and was an Associate with the firm of Hangle, Connolly, Epstein, Chicco, Foxman & Ewing. After teaching at Villanova University School of Law, she joined the Brooklyn Law School faculty in 1992.

**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 author of the prize-winning book *Battered Women and Feminist Lawmaking* (Yale University Press 2000) and co-author of the

law school casebook *Battered Women and the Law* (Foundation Press 2001) with Clare Dalton, Professor at Northeastern University Law School. A national expert on gender and law, she has written numerous articles on civil rights, women's rights and civil procedure, and has lectured around the world on these issues. She has also been a Visiting Professor at Harvard and Columbia Law Schools. In June 2000, she was recognized by the National Organization of Women-NYC with a "Women of Power and Influence" Award. She has been active in legal education reform, serving as a member of Association of American Law Schools (AALS) Executive Committee and on the Board of Governors of the Society of American Law Teachers (SALT). She joined the faculty of Brooklyn Law School in 1983, after clerking for Judge Constance Baker Motley of the United States District Court for the Southern District of New York, serving as a staff attorney with the Center for Constitutional Rights and a staff attorney with the Rutgers Law School-Newark Constitutional Litigation Clinic.

**ANTHONY J. SEBOK** is Professor of Law at Brooklyn Law School, specializing in tort law and tort theory. He has authored articles concerning handgun litigation, punitive damages, and the differences between European and American tort systems, and has lectured widely on American tort law. He has also published *Legal Positivism in American Jurisprudence* (Cambridge University Press 1999) and numerous law review articles on jurisprudence, as well as co-edited the *Philosophy of Law: A Collection of Essays* (Garland Publishing 1994). He was awarded a Berlin Prize Fellowship by the American Academy of Berlin in 1999, enabling him to spend a semester abroad as a Visiting Scholar at Humboldt University, where he began work on a series of articles examining tort theory and punitive damages. He returned to Berlin in 2001 as the DAAD Visiting Professor at the Freie Universitat. Professor Sebok is also a regular columnist at FindLaw. He received his Ph.D. in politics and was Law Clerk to Chief Judge Edward N. Cahn of the United States District Court for the Eastern District of Pennsylvania before joining the faculty of Brooklyn Law School in 1992. His current research

interests concern the way in which tort law is used to resolve and remedy social problems.

**LISA C. SMITH** is Assistant Professor of Clinical Law at Brooklyn Law School and is an expert in the area of domestic violence. She served for many years as Executive Assistant District Attorney for Domestic Violence, Sex Crimes and Child Abuse in the King's County District Attorney's Office. She is a member of the New York State Governor's Advisory Council on Domestic Violence and the Chairperson of the Brooklyn Domestic Violence Fatality Review Team. She has initiated several innovative programs to combat domestic violence that have garnered national attention, lectures frequently on domestic violence issues, and is often quoted in the media on this subject. She has directed the Prosecutors Clinic at Brooklyn Law School for more than a decade and recently broadened the clinic's scope to include federal misdemeanors in the Eastern District of New York. Before joining the faculty at Brooklyn Law School in 1987, she served in the King's County District Attorney's Office in the Narcotics Bureau, the Sex Crimes Bureau and as Deputy Chief of the Criminal Court Bureau.

## INTRODUCTION

Good afternoon. My name is Candace Sady and I'm one of the coordinators of this event from Brooklyn Law Students Against Domestic Violence (BLSADV), a feminist student organization here at Brooklyn Law School.<sup>1</sup> We planned this symposium to address the importance of incorporating gender issues, including the issue of domestic violence, into the law school curriculum.

The origin of this idea was a discussion during my Spring 2001 Battered Women and the Law class with Professor Elizabeth Schneider. We were talking about domestic violence through the lenses of sociology and psychology. A member of the class said that law school should teach students to be lawyers, not social workers or psychologists. She proceeded to say that she had come to law school to become the former.

Basically, this comment made me think about the manner in which a person who would not pre-select to learn about the issue of domestic violence might respond when confronted with it in practice. It made me consider how an attorney's lack of understanding or interest in a client's needs, experiences or background might affect that attorney's perceptions, and how that could negatively impact their legal practice.

Too often students graduate from law school without an understanding of how domestic violence impacts the lives and legal claims of their clients—without a clear understanding of the link between theory and practice. This panel, consisting of law professors who teach criminal law, torts, family law and contracts, each paired with a practitioner practicing in that area, will address this omission.

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<sup>1</sup> Candace Sady is a graduate of Brooklyn Law School, 2002, Oberlin College, 1996, and is currently an Associate in the litigation and dispute resolution department at Proskauer Rose LLP. She would like to thank Professor Elizabeth Schneider for her assistance in organizing the symposium, Jennifer L. Cohen-Vigder for her endless contributions to the event and the Executive Board and all members of Brooklyn Law Students Against Domestic Violence.

I'd like to thank everyone in the audience for attending, and the panelists for taking the time to prepare for this discussion. At this time I'd like to introduce the moderator, Professor Elizabeth Schneider.

#### DISCUSSION

##### *Professor Elizabeth Schneider*

First, I want to say how wonderful it is to have a panel like this that was organized by the students in BLSADV. Thanks to all of you and special thanks to Candace, who took tremendous initiative in putting this program together. This is what you dream about as a teacher, that issues come to the fore in your classes and that students in those classes are so engaged that they take the initiative to educate the legal community more broadly.

Today, we have an impressive group of speakers, both colleagues on the Brooklyn Law School faculty and other law schools, and a great group of practitioners. Our topic is legal education and domestic violence—the need for integration of issues of domestic violence more broadly into the law school curriculum. Our focus is on criminal law, torts, contracts, and family law.

This subject of domestic violence and legal education is very close to my heart. I've been working for many years now with a group of law teachers around the country on these issues and with the American Bar Association Commission on Domestic Violence. The ABA Commission has published important reports on legal education and domestic violence and organized a series of conferences around the country on legal education and domestic violence.<sup>2</sup> We now have specialized courses—what I

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<sup>2</sup> DEBORAH GOELMAN & ROBERTA VALENTE, A.B.A. COMM. ON DOMESTIC VIOLENCE, WHEN WILL THEY EVER LEARN? EDUCATING TO END DOMESTIC VIOLENCE: A LAW SCHOOL REPORT (1997) (describing the need to integrate domestic violence issues into law school curricula in order to train lawyers to better handle domestic violence issues), *available at* <http://www.ojp.usdoj.gov/ovc/publications/infores/etedv/welcome.html> (last visited Apr. 3, 2003); A.B.A. COMM. ON DOMESTIC VIOLENCE, TEACH YOUR



call “stand-alone courses”—courses on Battered Women and the Law, that I teach here at Brooklyn Law School, and that I’ve taught at Harvard, Columbia, and Florida State University Law Schools. These specialized courses are taught at many law schools around the country.<sup>3</sup> But there are also law teachers around the country who are integrating issues of domestic violence into their mainstream law school courses. And of course there are also specialized advocacy programs on domestic violence, clinics on domestic violence, and other upper-level courses that integrate these issues.

Almost every course in law school could and should integrate these issues—first-year courses, clinics, specialized courses like health law, family law, or poverty law, international human rights, and employment law. If you look at the casebook on domestic violence that Clare Dalton and I have written, you’ll get a sense of the range of different issues and courses which are affected.<sup>4</sup>

We have a critical responsibility here in the law school to train lawyers. As many of you probably know, there are far too few lawyers to assist battered women on the many issues for which they need representation.<sup>5</sup> Even lawyers who practice in

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STUDENTS WELL: INCORPORATING DOMESTIC VIOLENCE INTO THE LAW SCHOOL CURRICULUM: A LAW SCHOOL REPORT (forthcoming 2003).

<sup>3</sup> For a comprehensive review, *see generally* A.B.A. COMM. ON DOMESTIC VIOLENCE, TEACH YOUR STUDENTS WELL, *supra* note 2 (examining efforts by law schools nationwide to incorporate domestic violence into law school curricula).

<sup>4</sup> CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW (Foundation Press 2001) [hereinafter DALTON & SCHNEIDER] (examining domestic violence in relation to family law, criminal law, civil protection orders, tort liability, civil rights, employment law, insurance law, immigration and asylum law, and international human rights).

<sup>5</sup> *See id.* at 339-49, 1062-92 (discussing legal representation in domestic violence cases). *See also* Justice Suarez, Decision of Interest, N.Y. L.J. (Feb. 11, 2003) at 18 (emphasizing that inadequate compensation has produced an insufficient number of panel attorneys resulting in the denial of counsel to family court litigants, and the courts are forced to proceed, on a regular basis, without attorneys in domestic violence, foster care placement and review, child protective and juvenile delinquency proceedings).

the field of family law do not have knowledge or experience with intimate violence so that they can even recognize when they have a case that involves these issues.<sup>6</sup> Issues involving domestic violence can arise in almost every area of practice. So we have a tremendous obligation to educate ourselves and younger lawyers about issues of domestic violence.

I want to give special thanks both to my colleagues on the faculty of Brooklyn Law School who will be speaking today: Stacy Caplow, Lisa Smith, Tony Sebok, Jennifer Rosato, and to others who are not speaking, who have been terrifically supportive and enthusiastic about this curricular work. And I want to thank other colleagues, such as Chantal Thomas from Fordham Law School<sup>7</sup> and Betty Levinson from Levinson & Kaplan, who are participating in this program.

It is also particularly special to have Kristin Bebelaar with us today. Kristin, now a lawyer in practice with Gulielmetti & Gesmer, who previously worked at South Brooklyn Legal Services, is a Brooklyn alum who worked closely with me as a research and teaching assistant when I was beginning to teach *Battered Women and the Law* and write these books. I know that as a lawyer she is now making a huge difference in the lives of many battered women. She's an example to me of the enormous impact that learning about domestic violence as a law student can make to legal practice.

We will now begin the program.

We start with criminal law, with Stacy Caplow, who teaches criminal law here as the professor. Lisa Smith, although she is both professor and practitioner in the Prosecutor's Clinic here, will be speaking from the practitioner perspective. Then, we will go to torts with Tony Sebok, who teaches torts here, as the professor and with Betty Levinson from the practitioner's perspective. Then, we will move to contracts with Chantal Thomas talking from the contracts professor's perspective, and Kristin Bebelaar from the contracts practitioner's perspective.

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<sup>6</sup> DALTON & SCHNEIDER, *supra* note 4, at 806-79 (examining domestic violence and the law of torts).

<sup>7</sup> The remarks of Professor Chantal Thomas are not reproduced in this publication.

And then finally family law, with Jennifer Rosato who teaches family law here, speaking from the perspective of the professor, and Pat Fersch from the perspective of the practitioner. We'll then open it up to all of you for questions, comments and discussion.

### *Professor Stacy Caplow*

I enter this conversation with a disclaimer: I do not hold myself out to be a model for teaching or incorporating domestic violence into first-year criminal law classes. To say otherwise would be false advertising in front of the many people present today who were students in that class. On the other hand, I make a determined effort to deal with these issues as a distinct part of the curriculum. I probably represent a fairly typical example of the difficulties that arise when people with good intentions try to integrate this subject into a basic first-year course. In addition, having taught criminal law for many years, I also appreciate how the topic of domestic violence has metamorphosed over this time period with this course and how it has seeped into other classes.<sup>8</sup>

Criminal law seems like an obvious place to begin this discussion. It is *the* course where issues of domestic or intimate violence recur in so many of the cases read, even without

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<sup>8</sup> Other commentators have made similar observations. See, e.g., Martha Albertson Fineman, *Domestic Violence, Custody, and Visitation*, 36 FAM. L.Q. 211, 215 (2002) (explaining that domestic violence is no longer considered strictly a criminal law concern). The treatment of domestic abuse in areas like tort law changed dramatically in the past decade. *Id.* In addition, because of feminists and women's rights advocates, laws were changed and policies and programs developed to address the dilemmas of women often referred to as battered. *Id.* This evolution is also present in practice, outside of the academic realm. See, e.g., M. Mercedes Fort, *A New Tort: Domestic Violence Gets the Status It Deserves In Jewitt v. Jewitt*, 21 S. ILL. U. L.J. 355, 372 (1997) (explaining that a major change in domestic violence laws is the ability of plaintiffs to recover for damages from an abusive relationship under the theory of a new tort of domestic violence/battered women's syndrome); Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 341-43 (1999) (describing the extension of domestic violence protection to same-sex couples).

necessarily being labeled as such. You do not need a casebook that is called "Domestic Violence and the Law" to read about forcible rape, abuse and neglect of children, or to encounter cases involving battered women raising justification defenses, or to study cases involving provocation or extreme emotional disturbance defenses in which male defendants essentially claim "she drove me crazy so I killed her." These are a few of the innumerable topics in criminal law where sex and violence are linked.

Before I begin my brief remarks, I want to acknowledge someone in the audience who was one of the first people to bring to light the lack of coverage of domestic violence and other gendered topics in the criminal law course particularly. Nancy Erickson, who now works for Legal Services of New York here in Brooklyn, taught family law for many years at Ohio State and at New York Law School, and as a law teacher really was the first person to ask the questions, "What are we teaching about domestic violence?" and "What are we teaching about sex bias in criminal law?" Nancy published two articles in 1990 examining sex bias issues in criminal law courses and did a survey of criminal law professors concerning what they teach about these issues.<sup>9</sup>

There has always been an obvious relationship between intimate and family violence and criminal law, so it should be inevitable that these topics pervade that course.<sup>10</sup> Yet more than ten years ago Nancy looked at the standard criminal law casebooks, and found them seriously lacking in any kind of in-depth coverage of these topics; some were even devoid of any

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<sup>9</sup> Nancy S. Erickson (with the assistance of Nadine Taub), *Final Report: "Sex Bias in the Teaching of Criminal Law"*, 42 RUTGERS L. REV. 309 (1990) [hereinafter Erickson, *Final Report*]; Nancy S. Erickson & Mary Ann Lamanna, *Sex-Bias Topics in the Criminal Law Course, A Survey of Criminal Law Professors*, 24 MICH. J. L. REFORM 189 (1990) [hereinafter Erickson & Lamanna, *Sex-Bias*].

<sup>10</sup> See, e.g., Franklin E. Zimring, *Legal Perspectives on Family Violence*, 75 CAL. L. REV. 521 (1987) (discussing the intersection between privacy law, in both civil and criminal contexts, and family violence).

coverage.<sup>11</sup> She also reported the paucity of attention paid by faculty to these topics.<sup>12</sup>

Taking a leaf from her work and thinking that this was a good way to begin my remarks, I re-read her articles and then looked at the most recent editions of six casebooks in my office, one of which I now use,<sup>13</sup> and two others which are familiar to me.<sup>14</sup> The remainder were books I had never examined closely before.<sup>15</sup>

Progress over the past decade has been mixed. These newer editions contain more topics, expand familiar topics, and generally give at least lip service to the notion that domestic and intimate violence issues present complicated questions that deserve a distinct place in the study of criminal law. With the exception of the clearly recognizable issues of battered woman's syndrome and rape, most texts often include cases involving domestic and intimate violence simply to illustrate broader doctrines without acknowledging the underlying concerns that

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<sup>11</sup> Erickson, *Final Report*, *supra* note 9, at 316-17, 327-28 (noting that despite growing interests regarding topics that concern women such as marital violence and property distribution, "traditional casebooks has been evidenced by the failure to include, or by superficial coverage, of [such] topics . . . in the criminal law course").

<sup>12</sup> *Id.* at 223, 242-43. The study revealed that the topics least likely to be covered in a criminal law class were the common law doctrine of coverture, spousal-conspiracy doctrine, and issues of sexual harassment. *Id.* at 223. Some of the many reasons cited by professors for not teaching these topics were the belief that the doctrines were no longer relevant, lack of casebook coverage, the thought that such topics were more relevant to other courses, and the perceived unimportance of the subject matter compared to others in criminal law. *Id.* at 213, 223-24.

<sup>13</sup> JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* (2d ed. 1999).

<sup>14</sup> JOHN KAPLAN ET AL., *CRIMINAL LAW: CASES AND MATERIALS* (4th ed. 2000); SANFORD KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* (7th ed. 2001).

<sup>15</sup> RICHARD J. BONNIE ET AL., *CRIMINAL LAW* (1997); GEORGE E. DIX & M. MICHAEL SHARLOT, *CRIMINAL LAW: CASES AND MATERIALS* (5th ed. 2002); STEPHEN A. SALTZBURG ET AL., *CRIMINAL LAW: CASES & MATERIALS* (1994).

prompt the crime.<sup>16</sup>

Several basic topics are included in all of the books, with varying degrees of thoroughness. Some books have expanded their coverage noticeably since their earlier editions. Predictably, in every book there are materials about the battered woman's syndrome defense that address issues that are far more complicated and treat developments over the past decade with a fair amount of depth.<sup>17</sup> This is not surprising since this particular topic has been one of the leading gendered issues in criminal law—along with rape—for a long time.<sup>18</sup> Equally unsurprising, in

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<sup>16</sup> Cf. BONNIE, *supra* note 15, at 792 (citing *People v. Casassa*, 49 N.Y.2d 668 (1980)). *Casassa* involved a man who killed the woman with whom he was in love simply because she did not love him in return; it is included in the section discussing when provocation can be used to reduce murder charges to manslaughter. *Id.* See also KADISH, *supra* note 15 at 197 (citing *Kuniz v. Montana*, 995 P.2d 951 (Mont. 2000)). In *Kuniz*, the defendant stabbed her live-in boyfriend with a knife after he became physically abusive towards her. *Id.* Kadish includes the case in the section discussing what constitutes culpable conduct and, specifically, whether the defendant had a duty to seek medical assistance for the victim in light of the fact that she caused the situation.

<sup>17</sup> Cf. DRESSLER, *supra* note 13, at 486-506; KAPLAN ET AL., *supra* note 14, at 581-610, 763-75; BONNIE ET AL., *supra* note 15, at 360-74; DIX ET AL., *supra* note 15, at 786-801; SALTZBURG ET AL., *supra* note 15, at 751-67. Almost all of the books feature the same two cases: *State v. Kelly*, 478 A.2d 364 (N.J. Sup. Ct. 1984) (noting that whether expert testimony on battered woman's syndrome is admissible evidence depends on whether it is relevant to the defendant's claim of self-defense; however, the use of force in self-defense is only justifiable when "the actor reasonably believes that such force is immediately necessary to protect himself against death or serious bodily harm," therefore, the expert must testify carefully so as not to determine whether the defendant's fears and actions were reasonable since that is a question only the jury is permitted to answer) and *State v. Norman*, 378 S.E.2d 8 (N.C. 1989) (disagreeing with the idea that evidence of battered woman's syndrome is sufficient, without more, to justify killing as perfect self defense, and therefore, the defendant, who was continuously abused by her husband, was not entitled to a charge of perfect self defense since her husband was sleeping when she shot him and there was no justifiable fear of imminent bodily harm). The differences appear in the discussion in the notes following the lead case.

<sup>18</sup> Cf. Albert R. Roberts, *The Criminal Justice System Can Reduce*

every casebook there is an extensive chapter on rape and sexual violence offenses, all of which have expanded demonstrably over the past decade.<sup>19</sup>

Rape and battered woman syndrome are obvious subjects that could trigger class discussion about the underlying social and psychological issues of domestic violence as well as enforcement policies. Probably most criminal law teachers engage in some form of historical or sociological conversations in their courses. However, there are other less obvious topics which should not be ignored but are often sacrificed in the name of doctrinal analysis. For example, in every book, there are some cases relating to the reasonableness standard in either or both the self-defense and provocation sections in which gender differences arise.<sup>20</sup> Often the cases in these sections are factually based on violence against women, wives, girlfriends or objects of male fantasy. Some, but certainly not all, of the casebooks have attempted to go beyond the usual questions related to the heat of passion doctrine such as "Are mere words sufficient?" and have added note material about the reasonableness standards based on gender.<sup>21</sup> Domestic and/or

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*Violence Against Women*, in VIOLENCE AGAINST WOMEN 163 (James D. Torr ed., Greenhaven Press 1999) (explaining that in the last two decades all fifty states have passed criminal statutes to protect battered women and that prosecution of spousal abuse as well as rape cases has steadily increased); KADISH ET AL., *supra* note 14, at 313 (noting that few areas of criminal law have attracted as much controversy and attention as rape over the past two decades); STANLEY G. FRENCH ET AL., VIOLENCE AGAINST WOMEN: PHILOSOPHICAL PERSPECTIVES 57 (1998) (discussing that a woman is more likely to be battered than raped and acknowledging long standing debate of battered woman's syndrome as an imperfect defense) [hereinafter VIOLENCE AGAINST WOMEN].

<sup>19</sup> DRESSLER, *supra* note 13, at 353-434; KAPLAN ET AL., *supra* note 14, at 313-86, 1077-160; BONNIE ET AL., *supra* note 15, at 268-322; DIX ET AL., *supra* note 15, at 571-613; SALTZBURG ET AL., *supra* note 15, at 381-458.

<sup>20</sup> Cf. BONNIE ET AL., *supra* note 15, at 354 (noting that the reasonableness standard is an objective standard, thus, "jurors must decide whether the defendant's beliefs would be held by a reasonable person in the defendant's 'situation.'").

<sup>21</sup> Cf. DRESSLER, *supra* note 13, at 238-63; KAPLAN ET AL., *supra* note 14, at 385-415 (including several key cases involving violence by man against woman); KADISH ET AL., *supra* note 14, at 405-25 (highlighting cases

intimate violence is at the heart of the facts of most of these cases, but they are studied to illustrate traditional doctrinal issues, and follow-up notes rarely raise more complicated questions of gender or sex-bias. Other examples of a category of cases that offer opportunities to consider domestic and intimate violence are those dealing with omissions in the criminal act—*actus reus*—section, or relating to the standard of negligence in unintentional killings, or causation. In almost all of these cases, the death of a child results in a caregiver or parent being charged with some form of either negligent homicide or assault for either directly harming, or failing to prevent harm to the child.<sup>22</sup> Yet, aside from their very disturbing facts describing violence towards children, these cases are rarely used to spark any discussion beyond straightforward doctrinal analysis.

I did note some new topics in the more recently published texts. A few books acknowledged the so-called “cultural defenses,” which often pose sex-linked issues about how men and women behave under certain circumstances when they import cultural norms and behavior to the United States and then find themselves criminally accountable.<sup>23</sup> Sometimes, but not always, the charges involve what Americans would consider domestic or

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involving killing by jealous male partner); *BONNIE ET AL.*, *supra* note 15, at 776-801 (illustrating Model Penal Code approach, citing *People v. Casassa*, 404 N.E.2d 1310 (N.Y. 1980) (involving a rejected suitor)); *DIX ET AL.*, *supra* note 14, at 473-94 (including a case where the defendant and victim were “romantically involved”); *SALTZBURG ET AL.*, *supra* note 14, at 284-304 (including a case involving the killing of a “paramour”).

<sup>22</sup> *DRESSLER*, *supra* note 13, at 277-80 (citing *People v. Williams*, 484 P.2d 1167 (Wash. 1971) (convicting parents of manslaughter for failing to obtain medical treatment for their child)), 196-200 (citing *Oxendine v. State*, 528 A.2d 870 (Del. 1987) (involving brutal child abuse in context of causation-in-fact)); *KAPLAN ET AL.*, *supra* note 14, at 472-75 (citing *State v. Williams*, 484 P.2d 1167 (Wash. Ct. App. 1971) (holding parents liable for failing to provide medical attention to baby when a man of reasonable prudence would have done so under similar circumstances)). *See also* *KADISH ET AL.*, *supra* note 14, at 431-33.

<sup>23</sup> *See, e.g.*, *DRESSLER*, *supra* note 13, at 419 n.6, 683-94; *KAPLAN ET AL.*, *supra* note 14, at 415-26 (noting the relevance of cultural norms on mother’s killing of child), 599 n.11 (noting the various battering and cultural defenses).



family violence or abuse.

There are also limited references to extending the battered spouse defense to include other victims of violence, notably children.<sup>24</sup> There was only one book that had a separate section on any kind of feminist legal theory.<sup>25</sup> Every so often, there might be a snippet from something written by some notable and recognizable feminist scholars such as Liz Schneider, Susan Estrich or Nancy Erickson. However, other than those occasional excerpts tucked into the notes in the chapters on rape or the battered spouse defense, there is very little overarching theory at all.

Why are casebooks important? As Nancy realized years ago, they basically structure what is taught in the course.<sup>26</sup> In her survey, Nancy asked many criminal law teachers why a certain subject was not covered. The most common response was "Because it is not in the textbook."<sup>27</sup> Therefore, if something is *not* in the book, chances are teachers will be restricted by those editorial—and possibly ideological—choices, unless they have the energy and the creativity to supplement the materials.

Casebooks do not just limit the subjects taught; they flag certain perspectives based on which cases are chosen and how those particular cases are edited. By the language used, cases reveal what the judge is thinking about the particular facts of the case. However, to impressionable first-year students, in particular, who tend to accept uncritically the perspective presented in the case, the cases shape the very way in which the issues are internalized. Even the teacher who is willing and

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<sup>24</sup> See, e.g., DRESSLER, *supra* note 13, at 505-06 n.5 (discussing the use of battered woman syndrome as a defense for the domestic partner who participated in a crime spree because she felt compelled to); KADISH ET AL., *supra* note 14, at 775 (stating, "[m]any courts that permit the use of battered woman's syndrome to support a claim of self-defense accept similar evidence in cases involving a battered or abused child who kills the abusive parent"); BONNIE ET AL., *supra* note 15, at 374 n.4 (discussing the analogy between the battered wife syndrome and the battered child syndrome as defenses for murder).

<sup>25</sup> SALTZBURG ET AL., *supra* note 15, at 90-96.

<sup>26</sup> Erickson & Lamanna, *Sex-Bias*, *supra* note 9, at 311.

<sup>27</sup> *Id.* at app. A.

desirous of incorporating more materials faces the limitations posed by case selection and editing. It is worth observing, however, that case selection particularly in the chapters or sections on rape and the battered woman's syndrome defense were practically identical in all of the books I examined. There are only a finite number of cases that raise the central issues effectively.

We have been asked to talk about our concerns and inhibitions about raising domestic violence topics in a course not expressly dedicated to those issues and that purports to examine the law "objectively." Probably anything I could say about this would be true for any course with the possible exception of *Women and the Law*. Principally, there is the coverage tension, the challenge all of us face in every course to finish the materials. Because issues concerning domestic violence are so rich and so controversial, emphasis on them may exacerbate the coverage dilemma. Students will want to talk about them in class and no instructor would want to cut off discussion. Having raised provocative questions, it would be unfair to say, "Okay, that was our five minutes on that hot topic." You want to see the conversation develop, yet whenever you dedicate a lot of time to one issue you detract from others. Therefore, these choices present their own controversies given the expectations of the students about the course coverage and approach.

Another characteristic of criminal law that is less true about other courses is that the course is loaded with emotional land mines throughout the semester. You never know when there is somebody in the class for whom a case resonates, who has had a personal experience or similar event in their lives, whether directly as a crime victim, or whether they identify with either the victim or the defendant in some way. These are very touchy issues and can be flashpoints during class discussions. I am sure all of us teaching criminal law or family law have had students come up to us to say, "I'm not participating in this discussion . . . I hope you'll understand." They will describe something that happened to them, or to a relative or friend, that makes them uncomfortable about participating, or perhaps even attending class.

In addition to the land mines, there are also considerable gendered reactions to many criminal law issues. The criminal law course offers myriad opportunities for very exciting and lively, but often uncomfortable, debates about rape and other issues that reveal the differences between the women and men in the class concerning certain values and conduct. These topics create class divisions at the outset, and, for the instructor, it is very hard to steer tactfully and diplomatically through the class's turbulent discussion. Moreover, it is difficult to remain objective about many of these subjects in front of the room. It is particularly hard to refrain from either discrediting or sanctioning certain deeply held points of view. Ideology and partisanship always create a risk of alienating a portion of the students. Because the semester will outlast any single class or discussion, there may be a big price to pay for taking sides or even appearing biased. This is especially true for a woman professor whom the students undoubtedly assume has a "female" perspective on sex crimes and gender related issues.

In my first-year class, the anxiety students already feel about speaking out is compounded by the nature of the subject matter. Some students are silenced by the sad and violent facts of the cases and their emotional content, while others are emboldened to speak out about their beliefs even though their comments have a tenor that departs from typical classroom atmosphere. Either way, they often speak or fail to speak for reasons largely related to emotions or feelings. This compounds the stress of the class. Not only are students concerned about whether they understand the material, they also worry about how they are reacting to it emotionally, and how their classmates are reacting to them. Moreover, during their first-year adjustment period, they generally struggle with the basic question of whether and to what degree their personal beliefs, past histories and feelings can and should play a role in their legal studies. As they try to learn to "think like a lawyer," they often overcompensate by being too objective and neutral. In a criminal law class, this suppression of genuine feelings and beliefs contributes to the self-doubt experienced by many first-year students during their first semester.

Whatever divisions result from students' experiences, their politics, or their beliefs, those differences intensify during discussions like this, and it is very hard to steer a steady course without jeopardizing the good will of some, if not many students, both on that day and in the future. In addition, I am not convinced—and here I speak from my own experience—that all teachers have the same ability to navigate these issues without a shipwreck. I certainly do not hold myself out as an expert on domestic violence, and I know that I cannot teach these topics as skillfully as somebody who knows more than I do. Although I do claim a degree of sensitivity and self-awareness that perhaps not all criminal law teachers possess, I still do not feel confident about my ability to handle these volatile subjects. I have convinced myself that sincerity and tact will save the day. Perhaps that is wishful thinking.<sup>28</sup>

It is hard to be all things to all people. It is especially hard to be all things to all students. They microscopically examine everything we say, reading meaning into remarks when none is intended, and are quick to find fault. As any of us who have read student course evaluations know, they are full of inconsistencies: either you let them talk too much or you cut them off too soon; you let some students dominate and other people feel put upon or ignored. All of these difficulties are just exacerbated in the context of these provocative topics.

Usually, criminal law is a required course and students cannot

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<sup>28</sup> For example, on an anonymous evaluation form, one student recently criticized me for being tactless during our discussion of rape because I asked the class to tell me about personal experiences before the whole class and when no one did, assuming that no one had any experiences, I questioned women about how they would react. This comment dramatized for me just how tricky these discussions can be since this description is radically different from what I believe occurred. I actually have a script that I use in the beginning of this section every year which specifically tells the students that they do not have to talk about personal experiences, that they have to treat this subject and others' viewpoints with respect, and that they have to appreciate that some students may have had personal experiences that inform their opinions. Despite this admonition, this student apparently heard something completely different from what I said, probably because of his or her own expectations and discomfort.

pick their professor. Teaching about domestic violence in this setting, then, poses the problem that the student is participating in something without having chosen it. For some students—of course—this emphasis is perfectly acceptable, but for others it could be objectionable or—if not objectionable—at least they question what this emphasis is costing in the coverage of other topics: “Are we missing something if we spend so much time on this?”

I have a few thoughts about how I might try to improve my own class. One is to try to unlink domestic violence issues from gender identification. If perceived as a woman’s issue, male students—many of whom already feel alienated from the topic or intimidated about speaking out by the strength of many women’s views—will further shut down. Consistent with this, I would prefer a more integrationist approach. In other words, instead of labeling an issue “domestic violence,” identify how the case is really about domestic violence disguised as a more neutral doctrinal voice.

I also think at the same time I would re-link domestic violence to more universal issues that come up in criminal law—link sex and violence more directly to seemingly objective doctrines like reasonableness. Many of the texts provide some tools for achieving this. Link the causes of domestic violence and its emotional roots to issues that we all question in criminal law, at least from time to time, about where and how emotion and passion matter. The many ways in which men and women engage in intimate violence provide vivid and depressing examples of the kind of human behavior that the criminal law addresses. By using domestic violence as an example rather than a focal point, a more successful conversation might ensue.

Also, I think when we examine court decisions we should prod students to consider what is omitted from the text. When, instead of just saying “Miss So-and-So is the mother of a seven-year-old child,” the judge writes, “Miss So-and-So is the mother of an *illegitimate* seven-year-old child”—a fact that has nothing to do with the case—we should ask what this signals about the resulting outcome. This kind of blatant editorializing within a judicial decision is something that we all think about

occasionally.<sup>29</sup> Why not think about it even more, bring it up in other topics in relation to all of the cases we read, and to consider how the people and the parties in the cases are being portrayed and the assumptions these portrayals produce?

Another suggestion is to encourage students to create their own stories about what is missing from the facts of a case. For example, there is a one-paragraph case in the Dressler casebook called *Martin v. State*, in which a man is dragged out of his house by the police and charged with public intoxication.<sup>30</sup> The question is whether he committed a voluntary act. The class can have a nice conversation about voluntariness, and it is a good case for using a conventional Socratic technique. But we read it in the beginning of the semester, so I often ask my students, “What’s going on here? Why were the cops even at the house? Was there something else happening besides this man being drunk and pulled out of the house?” I ask them to write a more detailed statement of facts. Many students come up with a domestic violence story, “He was drunk, and was being abusive to his wife. A neighbor called the police.” Sometimes you can see how domestic violence is the hidden text of many seemingly more neutral stories.

In terms of techniques, if students tell stories, particularly if they experiment with role reversal a little more, they may be able to see how stereotypes determine our thinking. Even more importantly, I think we ought to take a chance on bringing more of the world back into the classroom—something I try to do in many ways including in the context of domestic violence. Read newspaper articles and relate them to cases in the text so that the

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<sup>29</sup> This is not to suggest that all judges are biased or derisive in domestic violence cases, although the potential ought to be noted. Cf. Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1353 (1993) (stating that “judges in family court frequently express disrespectful attitudes towards the parties and the cases.”). In fact, the situation in the District of Columbia was so severe that an incoming presiding judge of the family division of the local courts suggested that training for the bench include psychological consultation so judges could separate their personal views from their professional duties. *Id.* at 1353 n.176.

<sup>30</sup> 17 So. 2d 427 (Ala. Ct. App. 1947).

issues introduced by cases in the book feel more contemporary and real. Have guest speakers. Go to court and see what is happening in the real world. Nothing in the classroom will resemble what is going on in family or criminal court and the real stories of the people caught up in these systems. I encourage people to do more of that in their regular classrooms.

All professors are role models in some way. What students learn, how they learn it, and what is emphasized in law school will follow them into the real world, and factor into the choices they make in practice. We have to acknowledge the responsibility of shaping the consciousness of our students. To the extent that we have a commitment to exposing this particular topic—and take care to include it more in our courses—we will leave a legacy.

### *Professor Lisa Smith*

I'm Professor Lisa Smith, and I teach a variety of the criminal clinical programs here at Brooklyn Law School. I've been asked to speak as a practitioner, and I just want to say that anything I speak about as a practitioner, the clinical students here at the law school have all worked in exactly the same capacity. So I'm speaking as a practitioner and also as a clinical professor.

The first question is how does domestic violence affect criminal practice? I'm going to speak about that from three perspectives: the prosecution perspective; the defense perspective; and then quickly about the policy and planning perspective.

From the prosecution perspective, the impact is so dramatic that it's really hard to describe. So I'm just going to tell you a little bit about statistics for one moment to give you a sense of impact.

Some of the changes that have occurred over the last few years, and the reason that we've had this tremendous impact change can be attributed to one thing, which is the mandatory arrest law in New York State.<sup>31</sup> Most of you are aware of that

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<sup>31</sup> N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 2003). New York's mandatory arrest law requires, generally, that a police officer perform a mandatory arrest when the officer has reasonable cause to believe that a

fact, but mandatory arrest also applies in domestic violence situations<sup>32</sup> and this has increased the number of arrests dramatically.<sup>33</sup> Additionally, and I think probably more importantly, a lot of the work done by people like Professor Schneider and many of you in the audience has brought much attention to domestic violence and increased awareness and the number of arrests.<sup>34</sup> These are obviously some of the reasons

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person has committed a crime against a member of the same family or household, or has an order of protection in effect. *Id.* It also addresses arrest without a warrant by police officer, when and where it is authorized. *Id.*

<sup>32</sup> This practice has been met with varying sentiments. Compare Alison B. Veerland, *The Criminalization of Child Welfare in New York City: Sparing the Child or Spoiling the Family?*, 27 *FORDHAM URB. L.J.* 1053, 1060-61 (2000) (asserting that the mandatory arrest law has given endangered women a reliable source of assistance because the police no longer ask the woman whether or not she wants to press charges before arresting the alleged abuser), with Kevin Walsh, *The Mandatory Arrest Law: Police Reaction*, 16 *PACE L. REV.* 97, 105-06 (1995) (stating that the mandatory arrest law brings an influx of arrests into the criminal justice system, many of which prosecutors fail to aggressively prosecute, resulting in charges being dropped and, consequently, less incentive for officers to arrest in domestic violence situations).

<sup>33</sup> See ADRIANA FERNANDEZ-LANIER ET AL., NEW YORK DIVISION OF CRIMINAL JUSTICE SERVICES, DOMESTIC VIOLENCE: RESEARCH IN REVIEW, COMPARISON OF DOMESTIC VIOLENCE REPORTING AND ARREST RATES IN NEW YORK STATE: ANALYSIS OF THE 1997 AND 2000 DOMESTIC INCIDENT STATISTICAL DATABASES (2001), available at [http://criminaljustice.state.ny.us/crimnet/ojsa/domviol\\_rinr/index.htm#15](http://criminaljustice.state.ny.us/crimnet/ojsa/domviol_rinr/index.htm#15) (last visited Apr. 3, 2003) (finding that in jurisdictions without pro-arrest policies the arrest rate ranged from 4 to 12 percent whereas in newly legislated pro-arrest jurisdictions the range was 15 to 30 percent); NEW YORK DIVISION OF CRIMINAL JUSTICE SERVICES, FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1994: EVALUATION OF THE MANDATORY ARREST PROVISIONS, SECOND INTERIM REPORT TO THE GOVERNOR AND THE LEGISLATURE (1998).

<sup>34</sup> See DALTON & SCHNEIDER, *supra* note 4 (surveying the first legal casebook on domestic violence and exploring domestic violence's relationship with family law, criminal law, tort liability, civil rights and international human rights); Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 *WOMEN'S RTS. L. REP.* 149, 153-63 (1978) (advising attorneys representing battered women who have committed homicides after sexual or physical abuse of ways in which to effectively defend the women); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex-Bias in the Law of Self-Defense*, 15



why we have the mandatory arrest law.<sup>35</sup>

So to give you a sense of impact, in 1996, and I think these statistics are approximately correct, there were maybe about 5,000 domestic violence prosecutions in Brooklyn and maybe a little less in Manhattan, Bronx, and Queens.<sup>36</sup> After that, in 1997, 1998, 1999, you were looking at about 12,000 prosecutions.<sup>37</sup> As you can see, there was an incredible change and obviously that change has significantly impacted the criminal justice system in a tremendous way.

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HARV. C.R.-C.L. L. REV. 623, 635-42 (1980) (arguing that individualization of self-defense law can help to equalize treatment for battered women raising self-defense claims); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 198-200 (1986) (suggesting that homicide cases in which expert testimony is offered to support a battered woman's self-defense claim "pose a dilemma of how we describe both victimization and agency in women's lives"). See generally NATHAN A. ROSEN, NATIONAL CENTER FOR WOMEN & FAMILY LAW, BATTERED WIVES: A COMPREHENSIVE ANNOTATED BIBLIOGRAPHY OF ARTICLES, BOOKS AND STATUTES IN THE UNITED STATES OF AMERICA (1988) (listing and briefly describing numerous works on the subject of domestic violence); Nancy Egan, *The Police Response to Spouse Abuse: A Selective, Annotated Bibliography*, 91 LAW LIBR. J. 499 (1999) (documenting bibliographically the trends in the ongoing research and debate in the area of the police response to spouse abuse).

<sup>35</sup> See, e.g., Symposium, *Women, Children and Domestic Violence: Current Tensions and Emerging Issues*, 27 FORDHAM URB. L.J. 567, 629-72 (2000) (explaining the judicial and legislative origins of the Mandatory Arrest Law). See also Lawrence W. Sherman & Richard A. Berk, *The Minneapolis Domestic Violence Experiment*, POLICE FOUNDATION REPORTS (1984), available at <http://www.policefoundation.org/pdf/minneapolisdve.pdf> (last visited Apr. 3, 2003) (finding that mandatory arrest was most effective of three standard police methods for reducing domestic violence, which created an increase in mandatory arrest legislation in several states).

<sup>36</sup> Statistics provided by Office of the Kings County DA Domestic Violence Bureau.

<sup>37</sup> Statistics provided by Office of the Kings County DA Domestic Violence Bureau, available at <http://www.brooklynda.org/Domestic%20Violence/DV.htm> (last visited Apr. 3, 2003) (reporting nearly 500 felony and 12,000 misdemeanor domestic violence cases prosecuted in 1998 by the Kings County DA Domestic Violence Bureau, and over the past two years, the felony dismissal rate has averaged 4.7 percent).

Years ago, when domestic violence cases came into the system and even though there weren't that many, in fact, very few, they were routinely disposed of immediately.<sup>38</sup> When I say disposed of, I mean dismissed. What you would see in every criminal court across the entire country was this exact scenario.<sup>39</sup> They would call the case to the calendar. The defendant would be there and he would come up with his attorney. You would also see the prosecutor there. Somebody would say, "Your Honor, this is a D.V. case." The next person you would see is the victim—who was always in the audience—approach. The judge

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<sup>38</sup> During the 1980s, studies reported that 50 to 80 percent of domestic violence cases were dismissed. See RICHARD R. PETERSON ET AL., NEW YORK CITY CRIMINAL JUSTICE AGENCY, COMPARING THE PROCESSING OF DOMESTIC VIOLENCE CASES TO NON-DOMESTIC VIOLENCE CASES IN NEW YORK CITY CRIMINAL COURTS, NEW YORK CITY CRIMINAL JUSTICE AGENCY FINAL REPORT 3 (2001), available at <http://www.nycja.org/research/reports/dv01.pdf> (last visited Apr. 3, 2003) (listing common reasons for the high dismissal rate, including prosecutors' perceptions of domestic violence as a private matter and less serious than crimes against strangers, the reluctance of victims to cooperate by pressing charges or testifying against the batterer either before or during prosecution, and the difficulty in establishing strong evidence in domestic violence cases where the abuse often takes place in the home with no witnesses other than the parties to the incident).

<sup>39</sup> The prevalence of this scenario has been noted elsewhere, cf. Elizabeth Barravecchia, *Expanding the Warrantless Arrest Exception to Dating Relationships*, 32 MCGEORGE L. REV. 579, 582 (2001) (noting that while many battered women who summon police while under an attack later recant their stories once the officers arrive, those that allow an arrest to occur will often drop the charges soon after); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 39 (1999) (stating that victims in domestic violence cases frequently drop their suits); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM & MARY L. REV. 1505, 1520 (1998) (reasoning that the lack of domestic violence prosecution stems from several factors, including a victim's refusal to testify against her abuser); Nancy James, *Domestic Violence: A History of Arrest Policies and a Survey of Modern Law*, 28 FAM. L.Q. 509, 513 (1994) (noting that if a woman does insist that her abuser be arrested, she will frequently telephone the jail the following day and ask that he be released from custody, or, if prosecution has already commenced, she commonly requests that the charges be dropped).

would say usually, "Is the victim in the audience?" She would come up. The judge would say, "Why are you here?" And the victim would respond, "I want to dismiss the charges."<sup>40</sup> The judge's response would surprise many of you because you're very young, and so it is going to sound ridiculous but this is exactly how the scenario would go. The judge would respond by saying, "Has anybody threatened you to force you to drop the charges?" And she would, of course, say "No." The judge would then say, "Is there any reason other than your own willingness to drop the charges that you're dropping the charges?"<sup>41</sup> And she would say, "No, it's my free will." The judge would then ask, "Has anybody forced you to drop the charges?" She would again say, "No." The judge would say, "Case dismissed," and that was the end of it.

So from that scenario you can see that even if there was an

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<sup>40</sup> Barravecchia, *supra* note 39, at 582; Epstein, *supra* note 39, at 39; Hanna, *supra* note 39, at 1520; James, *supra* note 39, at 513.

<sup>41</sup> Others have noted domestic violence victims' unwillingness to press charges against their abusers. *See, e.g.*, Gena L. Durham, *The Domestic Violence Dilemma: How Our Ineffective and Varied Responses Reflect Our Conflicted Views of the Problem*, 71 S. CAL. L. REV. 641, 651 (1998) (noting that domestic violence victims are often overwhelmed with feelings of guilt relating to the prospect of putting their husbands or boyfriends in jail and are therefore less likely to cooperate with prosecutors); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996) (discussing that prosecutors have begun to implement mandatory victim participation policies in domestic violence cases as a response to the high number of dismissals that occur when a victim is asked whether or not she would like to proceed and that victim non-cooperation, reluctance or outright refusal to proceed are the major reasons for lack of criminal prosecution); Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W. ST. U. L. REV. 1 (2000) (pointing out that unlike victims of random attacks, battered women often have compelling reasons for dismissing the charges against their attackers including fear, economic dependence, and affection, which makes these cases difficult to prosecute); Julia Weber, *Courts Responding to Communities: Domestic Violence Courts Components and Considerations*, 2 J. CENT. CHILD. & CTS. 23 (2000) (arguing that a "no-drop" policy of domestic violence prosecution recognizes that the dynamics of domestic violence are such that perpetrators may try to coerce their partners into not cooperating with partners).

arrest, the case was gone by the first court date.<sup>42</sup> So those cases had no impact in criminal justice—and none in prosecution—for many, many years. So from the prosecution standpoint, there has been a sea change because you have this tremendous increase in arrests and, more importantly, you don't have that dismissal scenario anymore.<sup>43</sup> Therefore, not only are there arrests but also there's a lot of work put into the cases in a lot of courts.

You now see that in the criminal courts it's very common to have domestic violence cases represent about fifteen percent of the court's caseload.<sup>44</sup> So you can see that that has made a

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<sup>42</sup> See Randal B. Fritzler & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, 37 CT. REV. 28, 29 (2000) (stating that domestic violence cases have had higher dismissal rates and less serious sentences compared to other violent crimes); Donna Wills, *Mandatory Prosecution in Domestic Violence Cases: Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 177 (1997) (noting that the "great majority of domestic violence victims have one characteristic in common: after making the initial report, they have neither the will nor the courage to assist prosecutors in holding the abusers criminally responsible" and that they frequently recant their charge, minimize the abuse or simply fail to appear in court).

<sup>43</sup> See FERNANDEZ-LANIER, *supra* note 33 (describing the increase in arrest rates resulting from implementation of mandatory arrest laws). See also Press Release, New York State Unified Court System, *\$1 Million in Federal and State Grants Allow Expansion of Domestic Violence Courts in New York City* (June 25, 1998). As of 1997, Brooklyn Supreme Court Domestic Violence Part had a dismissal rate of 3.7 percent, a considerably low rate since domestic violence cases are typically dismissed because the witnesses are reluctant to testify. *Id.* See also *supra* note 37-38 and accompanying text (reporting the decline in dismissals of domestic violence cases in the Kings County DA Domestic Violence Bureau).

<sup>44</sup> Judge Morgenstern stated that "in the Brooklyn Criminal Court, we arraign over 100,000 cases every year. One out of every five cases is a domestic violence case. . . . In New York City, in 1997, there were over 250,000 Domestic Incident Reports (DIRs) filed. In 1998, we had almost 300,000 DIRs," although not all of these resulted in arrest and prosecution. See Symposium, *Women, Children, and Domestic Violence: Current Tensions and Emerging Issues*, 27 FORDHAM URB. L.J. 565, 684 (2000). At the end of 2002, there were more than 110,000 cases pending citywide in the criminal courts. Of that number, 22,166 were domestic violence prosecutions. Statistics provided by the Office of the Administrative Judge of the Criminal Courts of

significant change for the courts and for everybody. So it's a change in the courts, and additionally, because of that—and all of this sort of follows—there are now quite a few specialized courts. So there are specialty felony domestic violence courts.<sup>45</sup> There are specialized misdemeanor domestic violence courts.<sup>46</sup> So additionally, the court system has moved all of these cases out of the general court calendar and they are now in special parts. So that's also a change. Actually, with the exception of drugs in some jurisdictions, there isn't any other substantive field that has its own court part in the same way that domestic violence does.<sup>47</sup>

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the City of New York.

<sup>45</sup> See NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, NEW YORK STATE'S DOMESTIC VIOLENCE COURTS PROGRAM FACT SHEET (2000), available at <http://criminaljustice.state.ny.us/ofpa/pdfdocs/domviolcourt.pdf> (last visited Apr. 3, 2003). The increasing number of domestic violence cases filed prompted the establishment of special courts to adjudicate these issues, and Felony Domestic Violence Courts currently exist in Brooklyn, Bronx, and Queens. *Id.* The Brooklyn Domestic Violence Court, which opened in June 1996, served as a model for other domestic violence courts in New York state. *Id.* See also Center for Court Innovation, Brooklyn Domestic Violence Court, available at [http://www.courtinnovation.org/demo\\_04bdvc.html](http://www.courtinnovation.org/demo_04bdvc.html) (last visited Apr. 3, 2003).

<sup>46</sup> See NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, NEW YORK STATE'S DOMESTIC VIOLENCE COURTS PROGRAM FACT SHEET (2000), available at <http://criminaljustice.state.ny.us/ofpa/pdfdocs/domviolcourt.pdf> (last visited Apr. 3, 2003). Misdemeanor Domestic Violence Courts were established in Brooklyn, Bronx, Queens and Manhattan; these courts focus attention on the victim, assessing the level of potential danger that an offender may pose since the charges may not reflect the gravity of harm that the victim may be exposed to. *Id.* See also Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285 (2000) (describing the staffing and composition of domestic violence courts with the goal to ensure that the judge and the prosecution teams are promptly aware of any crisis and facilitate a rapid and stringent measure to protect the victims).

<sup>47</sup> See, e.g., OFFICE OF COURT OF DRUG TREATMENT, THE FIRST YEAR REPORT TO THE CHIEF JUDGE (2002), available at <http://www.courts.state.ny.us/1styrdc.pdf> (last visited Apr. 3, 2003) (documenting the achievements of the Office of Court of Drug Treatment in New York, created to address cycle of addiction and recidivism in drug-related crime). See also OFFICE OF NATIONAL DRUG CONTROL POLICY, SUMMARY OF DRUG COURT ACTIVITY BY

So that's also a very significant change.

Now, those changes have obviously impacted everything. For instance, in almost every prosecutor's office there are separate domestic violence bureaus.<sup>48</sup> Therefore, if you're a student and you're interested in working in domestic violence—and this again applies to all the students in the clinics—and you want to do domestic violence as a prosecutor, you can volunteer to be in the domestic violence bureau. It's interesting because for some people that's the first thing they want to do when they get to a prosecutor's office. For others, they'd rather stay as far away from that as possible because, of course, they want to do something really interesting like vehicle and traffic law cases. So I always find that dichotomy very odd. But that's the truth.

I'm here as a practitioner. So I'm going to tell you about practice. You have that in almost every prosecutor's office across

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STATE AND COUNTY, OJP DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT (2002) (providing detailed information about the number of drug courts that have been operating for over two years, have recently been implemented, or are being planned in each state).

<sup>48</sup> See Office of the Bronx District Attorney, *available at* [http://www.bronxda.net/about\\_the\\_office/organizational\\_glossary.html](http://www.bronxda.net/about_the_office/organizational_glossary.html) (last visited Apr. 3, 2003); Office of the Brooklyn District Attorney, *available at* <http://www.brooklynda.org/domestic%20violence/dv.html> (last visited Apr. 3, 2003) (“the Domestic Violence Bureau handles prosecution of all misdemeanor and felony domestic violence cases as well as domestic violence homicides.”); Office of the Manhattan District Attorney, *available at* [http://manhattanda.org/office\\_overview/trail/legal/fam\\_violence\\_right.html](http://manhattanda.org/office_overview/trail/legal/fam_violence_right.html) (last visited Apr. 3, 2003) (describing its Family Violence and Child Abuse Bureau as in charge of investigating and prosecuting crimes involving domestic violence); Office of the Nassau District Attorney, *available at* [http://www.nassauda.org/DAWebpage/AnnualReports/sex\\_offense\\_and\\_domestic\\_violence\\_bureau.html](http://www.nassauda.org/DAWebpage/AnnualReports/sex_offense_and_domestic_violence_bureau.html) (last visited Apr. 3, 2003) (explaining that the Sex Offense and Domestic Violence Bureau prosecutes all felony domestic violence cases and selected misdemeanors); Office of the Queens District Attorney, *available at* <http://www.queensda.org/DivisionsandBureaus.html> (last visited Apr. 3, 2003) (stating that the “Domestic Violence Bureau prosecutes misdemeanor and felony cases involving domestic partners”); Office of the Suffolk District Attorney, *available at* <http://www.co.suffolk.ny.us/da/about.html> (last visited Apr. 3, 2003) (“Family Crime Bureau is responsible for the prosecution of all cases involving intimate partner and family violence”).

the country now. Another thing that's very interesting to think about—in the way this has changed everything dramatically—is that domestic violence has really inspired the criminal justice system to think about cases in a different way, which simply is something called evidence-based prosecutions.<sup>49</sup> This is something I'm going to address very, very quickly.

Now, you're all familiar with the fact that many victims in domestic violence prosecutions do not want to press charges. That used to be the really easy way to get rid of your caseload. If somebody gave you ten domestic violence cases and you just wrote on each case, "complaining witness doesn't wish to prosecute," it was dismissed. That was the way it was.

That is not the way it is anymore.<sup>50</sup> In the clinic that I teach—

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<sup>49</sup> One example of the Nassau County District Attorney's policy of "evidence based prosecution" is a case in 2000 where a defendant was indicted "through the use of audiotapes of 911 calls and police observation testimony," even though the complainant did not cooperate. See Office of the Nassau District Attorney, Sex Offense and Domestic Violence Bureau, available at [http://www.nassauda.org/DAWebpage/AnnualReports/sex\\_offense\\_and\\_domestic\\_violence\\_bureau.html](http://www.nassauda.org/DAWebpage/AnnualReports/sex_offense_and_domestic_violence_bureau.html) (last visited Apr. 3, 2003) (stating that the bureau responsible for domestic violence cases "prosecutes to the fullest extent possible even when the complainant refuses to cooperate."). See also Office of the Queens District Attorney, available at <http://www.queensda.org/DivisionsandBureaus.html> (last visited Apr. 3, 2003) (stating that Assistant District Attorneys "have proceeded to trial on cases without the cooperation or testimony of the victim, where there existed other adequate and admissible evidence to support the charges."). See RICHARD R. PETERSON, NEW YORK CITY CRIMINAL JUSTICE AGENCY, CROSS-BOROUGH DIFFERENCES IN THE PROCESSING OF DOMESTIC VIOLENCE CASES IN NEW YORK CITY CRIMINAL COURTS (2002), available at <http://www.nycja.org/research/reports/boro2r36.pdf> (last visited Apr. 3, 2003). In the Bronx, the Assistant District Attorneys (ADAs) primarily prosecuted cases in which the domestic violence victims signed the complaint. *Id.* In Brooklyn, however, ADAs prosecuted virtually all domestic violence cases pursuant to a no-drop policy. *Id.* In the Bronx, only 80 percent of domestic violence arrests resulted in prosecution, while in Brooklyn, 99 percent resulted in prosecution. *Id.* As a result of prosecuting only the cases that the domestic violence victims choose to cooperate, the conviction rate in the Bronx is 64 percent; in Brooklyn, it is only 18 percent. *Id.*

<sup>50</sup> See PETERSON, *supra* note 49 (indicating that Brooklyn's ADAs' no-drop prosecution policy produced a 99 percent prosecution rate, which was 19

the Prosecutors' Clinic—where we work primarily on domestic violence cases, we look at each case to see if it's triable without the victim, as well as with the victim. I'd say that as a theory and as a practice, there are many people who are in favor of it,<sup>51</sup> and many who aren't.<sup>52</sup> That would be the subject for an entire

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percent higher as compared to the Bronx ADA's office who primarily only prosecuted cases in which the domestic violence victims signed the complaint). *See also* Hanna, *supra* note 41, at 1860-64. "Many [prosecutor's] offices now have pro-prosecution or 'no-drop' policies. . . . Some states have adopted pro-prosecution legislation, and many others have officially endorsed its adoption." *Id.* "These policies actively encourage women to proceed through the criminal justice system." *Id.*

<sup>51</sup> At least four states have adopted legislation encouraging no-drop policies. *See* FLA. STAT. ch. 741.2901 (2002) (requiring the adoption of "pro-prosecution" policies and permitting the prosecuting attorney to disregard victim reluctance when deciding whether to pursue a case); MINN. STAT. § 611A.0311 (2002) (requiring all county and city attorneys to develop prosecution plans that address methods for gathering evidence other than the victim's in-court testimony); UTAH CODE ANN. § 77-36-3 (2003) (disallowing judicial dismissal of a domestic violence case at a victim's request unless there is "reasonable cause" to think that the victim would "benefit"); WIS. STAT. § 968.075 (2002) (directing all district attorneys offices to "develop, adopt and implement written policies" that are not based on the victim's consent to prosecute a domestic abuse case). Other states have encouraged more aggressive prosecution of domestic violence cases but do not specifically address the impact of victim participation on prosecutorial decisions. *See, e.g.,* CAL. PENAL CODE § 273.8 (2003) (allocating funds for use by district and city attorneys' offices under the Spousal Abuser Prosecution Program); N.J. STAT. ANN. § 2C:25-18 (2002) (encouraging broad application of remedies in criminal courts for domestic violence cases). *See also* Hanna, *supra* note 41, at 1860-64 (advocating aggressive prosecution of domestic violence but proposing that "rather than focus exclusively on whether the victim is willing to testify at trial, prosecutors should develop strategies aimed at gathering evidence that will overcome the presumption of innocence in criminal cases. A proper investigation can reduce the likelihood that the victim will ever have to take the stand.").

<sup>52</sup> For further analysis of varying viewpoints, *see* Renee L. Rold, *All States Should Adopt Spousal Privilege Exception Statutes*, 55 J. MO. B. 249, 249 (1999) (examining the concept of spousal privilege, discussing the various statutes in jurisdictions enacted to enforce compelled victim testimony in spousal domestic violence cases, and suggesting that compulsion statute wrongly takes the decision to testify out of the victim's hands); Renee



separate panel. But we do that, and that's changed things dramatically too. Because, if you can imagine, you were previously just dismissing all those cases, and now you're actually thinking about trying each of them with or without the victim. This doubles and triples the work, and tripled the work for every prosecutor.<sup>53</sup> But it's very interesting and it obviously gives you a huge amount of experience with evidence, criminal procedure, and trials. In fact—and this is not such a good story since it is an odd story—but a couple of years ago, one of the students from Brooklyn Law School was in the Prosecutors Clinic and he had a domestic violence case where the victim was uncooperative. We tried that case and the defendant was given probation. Oddly enough, and not because we even knew about it, two years later—and that was with one girlfriend—two years later he got re-arrested for beating up his new girlfriend. The case just happened to come to us and I recognized the name of the defendant. And now we are involved in trying to prosecute him for violating his sentence of probation.

I'm just going to quickly say that, from the defense perspective, bringing all of these cases creates much more work on the defense side. But there are a lot of very interesting areas to work on in the defense side of domestic violence. For one thing, mandatory arrest has done something unfortunate—it also causes a lot of cross-complaints where the woman gets arrested at the same time as the man.<sup>54</sup> This is because the cops get to the

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Romkens, *Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women*, 13 YALE J.L. & FEMINISM 265 (2001) (emphasizing the growing acknowledgment among feminist legal scholars that mandatory arrest and prosecution policies present nd problems that deserve critical attention when developing policies to help protect victims).

<sup>53</sup> Cf. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1188 (2002) (noting that greater arrest incentives, mandatory arrests and increased state record keeping requirements in domestic violence have resulted in a dramatic increase in arrests of both men and women, with increases running as high as 431 percent over one decade in one large California county).

<sup>54</sup> "Retaliatory arrests are very difficult because it does not obviously present itself to either the police officer or to the District Attorney's office at

scene and they're not sure who to arrest.<sup>55</sup> So there's a lot of defense work of women who are being arrested under mandatory arrest as well as under retaliatory complaints.<sup>56</sup>

I'm just going to quickly go through some of the problems I wish I had known as a practitioner before entering the practice. There are three things. You have to have a lot of patience and tenacity. You have to be really interested, and you have to

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that moment that there is a situation where we have got to sort out which one it was." Symposium, *Women, Children, and Domestic Violence: Current Tensions and Emerging Issues*, *supra* note 44, at 685. Furthermore, in domestic violence situations, "[w]hen cross-complaints are filed in court, the District Attorney's hands are tied because both parties want to end the matter in court, albeit for very different reasons. The District Attorneys cannot communicate with either party without their attorneys present and the cases are labeled "ACD" (adjourned in contemplation of dismissal) with limited orders or dismissed outright." *Id.*

<sup>55</sup> See *id.* Judge Morgenstern explained that "[w]hen the domestic violence officers would show up at that point, they would now have to make an assessment as to who was the primary initial aggressor in the situation." *Id.* See also Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 46, 57-60 (1992) (noting that the director of the country's first batterer's treatment program testified before the Gender Bias Study of the court system in Massachusetts that virtually every woman referred to the program was a victim wrongly accused by the batterer of being the aggressor).

<sup>56</sup> A lawyer from Sanctuary for Families, Center for Battered Women's Legal Services, noted:

[i]n the early 1990s, it used to be that my primary assistance to my clients was helping them convince the police to arrest the men who had abused them. I find myself now in the position of spending most of my time helping my clients not get arrested on retaliatory charges made by their abuser. I find that the mandatory arrest law is being used as a tool by abusers against women."

Symposium, *Women, Children, and Domestic Violence: Current Tensions and Emerging Issues*, *supra* note 44, at 686. However, Professor Lisa Smith, Director of Brooklyn Law School's Criminal Clinical Program, emphasized that the New York City Police Department has done special training in Brooklyn on the primary aggressor law, and there has actually "been a drop in cross-complaints in the courts, so much so that the judges actually independently mentioned to me one day that they had noticed that the cross-complaints were dropping dramatically." *Id.*

understand that you're opening a Pandora's box when you're working in the field because you have to be willing to think about yourself as a social worker, and as a psychologist.<sup>57</sup> You have to understand the cultural problems,<sup>58</sup> language barriers,<sup>59</sup> and other barriers because people come in with a lot of handicaps and disabilities.<sup>60</sup> You have to be willing to be the kind of lawyer who

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<sup>57</sup> See Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019, 1062 (1997) (noting that clinical practice can help prepare lawyers for legal representation of women who have been abused and pointing out that the practice involves a synthesis of elements beyond purely legal rights and remedies, including a client's vision of herself, her experiences and her needs).

<sup>58</sup> Violence against women is not limited by borders, culture, class, education, socio-economic level or immigration status. For women and their children who have immigrated to the United States, the dangers faced in abusive relationships are often more acute; immigrant women not only face pressures of cultural assimilation but also pressures of maintaining cultural traditions, language barriers, economic insecurity and discrimination due to gender, race or ethnicity. See Leslye E. Orloff & Janice v. Kaguyutan, *Offering A Helping Hand Legal Protections for Battered Immigrant Women a History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL'Y & L. 95 (2000).

<sup>59</sup> There is a lack of multilingual services provided to domestic violence victims. Battered women may be forced to locate their own interpreters and a victim may be forced to rely on community or family members who may be connected to her batterer. Even if service is obtained, language may interfere with the provision of adequate services; a limited-English speaker may find it difficult to discuss her experiences with a monolingual-English-speaking counselor or to live for a prolonged period in a shelter where only English is spoken. See Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community*, 3 ASIAN L.J. 151, 165 (1996). See also Berta E. Hernandez-Truyol, *Las Olvidadas—Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 J. GENDER RACE & JUST. 354, 384 (1998). Hernandez-Truyol notes that “[i]mmigrant Latinas who are victims of domestic violence doubly suffer from such lack of services.” She posits that “language difficulties or undocumented status can interfere with obtaining information about services or gaining access to services that is compounded by the additional obstacles of a possible inability to communicate with service providers or fear of deportation for themselves.” *Id.*

<sup>60</sup> See Conference, *Revolutions Within Communities: The Fifth Annual*

doesn't say, "I'm just doing criminal. I don't need to know about Medicare benefits, the school system, family court," etcetera.<sup>61</sup> Because you're going to need to know about every single thing that people are going to discuss here. Thank you.

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*Domestic Violence Conference: Mainstream Legal Responses To Domestic Violence vs. Real Needs of Diverse Communities*, 29 FORDHAM URB. L.J., 54-55 (2001). Holly Devine, director of a program at New York City's Barrier Free Living that specializes in working with disabled victims of domestic violence, noted:

[d]isabled women are dependent upon their abusers for everything, and their abusers in most cases are their caregivers . . . . Their abusers or caregivers may restrict their access to transportation. Caregivers may withhold wheelchairs and medications, refuse to assist with personal needs, leave their partners in bed all day and not get them up to go to the bathroom, resist access to friends, those sorts of neglectful type activities. So here is a disabled person who is dependent upon their abuser. If they report the abuse, they lose the person who gets them out of bed every day. They may lose their children as well, because if they go to a shelter, if there is one accessible for them, their children will have to go into foster care or some other place. For all these reasons, on top of their isolation, women with disabilities really do not have a lot of options and are often fearful of reporting the abuse, which is why they stay in dangerous situations significantly longer than non-disabled women. A disabled woman will stay in an abusive situation 8.3 years versus 4.1 years for a non-disabled woman.

*Id.* Additionally, seven years ago, SafePlace, a Texas-based organization recognized that disabled women were victims of domestic violence at a higher rate than the general population. See Chuck Lindell, *Grants Will Help Abuse Victims Who Are Disabled*, AUSTIN AMERICAN-STATESMAN, Mar. 5, 2003, at B1. "Women with disabilities are easier to victimize and harder to help afterward, a devastating combination that Austin-based SafePlace has struggled for seven years to correct . . . SafePlace last year won U.S. Justice Department approval to run a national program helping disabled victims of domestic violence." *Id.*

<sup>61</sup> To effectively provide for the needs of a battered client, a lawyer must consider, among other things, child support, child custody, the psychological impact on the client and the client's safety. See, e.g., Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225 (1996) (arguing that traditional legalistic approach to domestic violence is ineffective and insensitive to the complex circumstances that give rise to violence in intimate relationships).

*Professor Anthony Sebok*

Thank you. I'm very honored to be asked to speak on this issue. It is an issue which actually I see as continuous with a larger question, which has to do with the relationship between tort law, the education we receive in tort law and its application to larger questions of social policy.

I think that one of the lessons in looking at a typical casebook in tort law or looking at a syllabus is that concealed underneath what appears to be a rather technical and formal set of concepts are an incredible array of substantive decisions that are made by courts, both at the level of judges and juries. And these decisions get codified, and concretized in appellate decisions, which are then taught to you in your casebook.

The problem with thinking about domestic violence from the perspective of tort law is, I think, the following. Clearly, the concepts which you want to learn in order to be a skilled torts lawyer—or just a lawyer in general, so that you know what the practice of civil liability looks like—are broad. And in fact, the broadest and most important category really has to do with accident law. Accident law has a number of deep concepts which don't necessarily hook up directly with what you might think of as the primary area of interest for someone who is concerned about domestic violence issues. But even here there is a bit of a confusion. Because actually many of the concepts that need to be raised in thinking about negligence law hide serious questions about power and the distribution of power in society.

Currently, feminist scholars have written a great deal about critiques of the tort system, mostly from the perspective of looking at the negligence law system. However, within tort law there is also the whole issue of intentional torts. I remember when I began teaching torts, Regina Austin, a critical race scholar at the University of Pennsylvania School of Law, and a critical legal studies scholar, told me that she spends much of her time in her first-year torts class talking about intentional torts.

I was a little surprised by this. But she explained to me that many scholars who are progressive gravitate towards the

intentional torts section of the first-year course. And the reason for that is, of course, that with intentional torts there are an awful lot of opportunities to think about how violence is visited upon people who do not have real access to the criminal justice system, and also how in intentional torts there may be creative ways to at least recognize and perhaps even remedy the exercise of violence.

There is not as much scholarship on intentional torts from a feminist perspective as there ought to be, but there are a handful of wonderful articles. I would point out in particular Clare Dalton's wonderful piece from 1997,<sup>62</sup> and also a recent piece by Jennifer Wriggins in the *University of Southern California Law Review* called *Domestic Violence Torts*.<sup>63</sup> I've learned an awful lot about how to think about intentional torts by reading works like these.

Now, in talking about the things that you might want to learn from your torts course, an advanced torts class or thinking further about torts on your own, and then of course talking to torts practitioners like Betty Levinson, who is here today to speak with us, I want to just point out that there is an incredible array of ways in which the interactions between married and unmarried

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<sup>62</sup> Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319 (1997) (examining the obstacles to intentional torts suits brought by the abused spouses). The article begins with a proposal that the removal of interspousal immunity does not leave spouses free to sue one another in intentional tort claims. *Id.* at 321. Proceeding from the premise that there is a huge difference between simply removing the obvious discrimination against such plaintiffs embodied in the interspousal tort immunity and making the tort system genuinely hospitable to them, it directs possible solutions to practitioners, judges and legislatures, involving significant redesign of the tort system. *Id.* at 323.

<sup>63</sup> Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121 (2001) (offering an approach to civil liability for domestic violence torts through insurance reform because standard liability insurance policies, which generally do not cover domestic violence torts, are one of the reasons for the surprisingly small number of tort suits compared to the frequency with which people are injured by domestic violence). The article proposes procedural changes as a part of the solution for better access to the justice system. *Id.* at 176. It also addresses the relative lack of deterrence and compensation that the tort system and insurance policies provide domestic violence torts. *Id.* at 124.

individuals who have a domestic relationship manifest themselves as torts.

To list just the intentional torts—and I apologize if this is going to sound like a quick look at the table of contents of your bar review course book—there are battery, assault, intentional infliction of emotional distress and false imprisonment. There is also a whole way of categorizing many of these intentional acts as negligence, for reasons which I'll explain in a moment. That is just in the personal injuries areas. False imprisonment is technically personal injury.

Then in privacy and defamation, you can claim privacy violations within the domestic context just like one can claim privacy violations between strangers. You have to plead it right, but you could. Similarly there are, of course, opportunities for slander and libel, since disputes between individuals involving a great deal of vitriol do actually manifest themselves in false statements made about each other. Finally—and I wonder how much we will have a chance to talk about this today—there is a very interesting area in which some aspects of both divorce law and also relations between unmarried couples present questions about fraud and conversion, because property is involved. And so you have the whole panoply of common law tort brought in the interaction between individuals who have domestic relations with each other.

Now, the bad news is that one reason why many cases don't seem to present themselves in your torts casebook this way—for example, we could of course think about some cases that could have been, like the famous *Tarasoff* case, is an example of a boyfriend murdering an ex-girlfriend.<sup>64</sup> Or the whole question about subjective versus objective judgment in defense in battery could also be raised in that context.

But I'm not going to sugarcoat this. It doesn't happen too often. And why it doesn't happen too often is not just because of

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<sup>64</sup> *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (holding that when a psychotherapist determines or should determine that his patient presents a serious danger of violence to another person, the psychotherapist has a duty to use reasonable care to protect the intended victim against such danger).

the inherent sexism of the casebook authors, although that might be an explanation. It is also because—and here we'll have to speak with Ms. Levinson about this—there are certain very simple barriers as to why a large volume of cases do not make it up into the appellate courts, and maybe not even to filings and I'm going to briefly mention them. I think you may want to go into them in greater depth another time.

First of all, the lack of insurance of defendants makes it somewhat tricky for lawyers to take on cases. They may have insurance, but if it is an intentional tort their insurance won't cover them. New York State, for example, doesn't allow insurance contracts to be written that cover intentional torts, and this is true for a vast majority of states. So there you have simply a system of judgment-proof defendants. One famous defendant who may or may not be judgment-proof is O.J. Simpson. He was sued and actually lost a tort action against him for wrongful death. I suspect that the plaintiffs will eventually—if they have not already—locate personal assets to recover. But you can imagine that it is a very tricky proposition to structure tort law as a response to violence between domestic partners when insurance is a problem.

Secondly, and this is an interesting way in which one can frame the teaching of a torts class. It happened to me this morning. I realized, as I was teaching a statute of limitations case, that I could teach it from this perspective. But statute of limitations is in fact a tricky problem when you're talking about intentional torts. The short statute of limitations makes it hard for people to bring claims, especially when they are afraid of retaliation if they're intending to pursue divorce later on or if they're intending to try and extricate themselves, given that there may be children in common or property in common. So the short statute of limitations makes suing for intentional torts very, very difficult, which is why you don't see very many claims. There are also some very interesting cases on the question of continuing torts, as well as on the question of equitable tolling. But the law does not look very good.

Finally, the law of damages itself presents an interesting problem about how to measure and how to award damages.



Naturally, you'd think that this would be a wonderful area where punitive damages would be a great way for torts practitioners to use the skills that they have. But what we can talk about later is why juries are not necessarily sympathetic in the framing of punitive damages in cases including intentional torts against women as they might be in other contexts.

I think that's where I'm going to end it now, because what I'd like to hear more about is how these problems get played out in a variety of contexts, including the context of divorce, because I think that's really one of the biggest problems. Thank you.

### *Betty Levinson*

It is a pleasure to be with you. As I begin our discussion about tort and other civil remedies for victims of domestic violence, I want to first connect with Lisa's reference to criminal court allocutions.<sup>65</sup> As I listened to her comments, I thought back to 1973, my last semester here at Brooklyn. Parenthetically, Nancy Erickson, whose work has been acknowledged by Stacy Caplow,<sup>66</sup> and I were in the same section. I am glad that we are all here together today.

During that semester I was a member of the first class of students permitted to appear in criminal court under the aegis of the Legal Aid Society, as it implemented the new "student practice" rules.<sup>67</sup> We worked down the block on Schermerhorn Street, standing up for real clients in the arraignment part. Each time an assault case came in, the judge demanded to know the whereabouts of the complainant. If the assault was of the domestic variety, he would ask, "Where's the wife?" or "Where's the girlfriend?" and the case would invariably be

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<sup>65</sup> See presentation of Professor Lisa Smith, *supra* pp. 430-44.

<sup>66</sup> See presentation of Professor Stacy Caplow, *supra* pp. 418-30.

<sup>67</sup> N.Y. JUD. LAW § 478 (McKinney 2002) (allowing students to practice a limited amount of law and perform all of the essential lawyering functions in the jurisdictions including meeting with clients and witnesses to gather facts, analyzing legal problems and providing legal advice, negotiating matters on behalf of clients with opposing parties and representing clients before courts and administrative tribunals under faculty supervision).

dismissed as a mere “domestic dispute.”<sup>68</sup> If the case involved strangers, the question was, “Where’s the victim?” This was followed with inquiries regarding the severity of the injuries to determine if the offense was a misdemeanor or felony.

In the years since then, awareness about the nature and impact of domestic violence has grown.<sup>69</sup> We have ads in the subway and public service messages in magazines and newspapers. Daytime TV is filled with domestic violence on talk shows, not to mention the soaps. Many people have become more thoughtful about this problem and no longer automatically go into victim-blaming gear.<sup>70</sup> We better understand the shame and fear that make it so difficult for a domestic violence victim to be public about her painful private life.<sup>71</sup> We observe the

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<sup>68</sup> Other commentators have noted this phenomena. *See, e.g.*, ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 104–06 (2000) [hereinafter SCHNEIDER, *BATTERED WOMEN*] (suggesting that the domestic violence victim’s stories are often marginalized in the courtroom).

<sup>69</sup> For example, approximately 5 percent of employers have established policies pertaining to domestic violence. *See Cycles of Silence: More Employers Today Are Doing Their Part to Help Employees in Abusive Relationships*, CINCINNATI POST, June 4, 2002, at 1B (“For years, employers considered domestic violence a private matter, an issue best kept behind closed doors . . . . [Today] [a]bout 5 percent have policies that specifically address domestic violence”). In addition, some police departments have procedures for responding to domestic violence calls that allow officers to arrest the offender if someone has been beaten regardless of whether the victim decides to press charges. *See* presentation of Professor Lisa Smith, *supra* pp. 430–44 (discussing changes in processing and prosecuting domestic violence cases in New York City).

<sup>70</sup> In fact, Battered Women’s Syndrome (BWS) is generally admissible as part of a self-defense claim when a woman is charged with murder. *See, e.g.*, *People v. Seeley*, 720 N.Y.S.2d 315 (Sup. Ct. 2000) (stating that BWS is not a complete defense but is evidence of the defendant’s state of mind relevant to a legally accepted defense, such as justification, and holding that a woman on trial for the second degree murder of her boyfriend could submit expert testimony related to her condition as a battered woman); *People v. Garcia*, 1 P.3d 214 (Colo. Ct. App. 1999) (finding evidence of BWS admissible as to the general validity of a self defense claim; such evidence goes toward establishing whether, from the defendant’s viewpoint, she was justified in using deadly force).

<sup>71</sup> This difficulty has been noted elsewhere. For example in the process of

powerful draw of the abusive partner, as well as the nature of the emotional harms that inevitably accompany physical injuries. Despite this progress, we are still challenged by the need to truly bring this knowledge home—not just to the trenches where we lawyers work—but beyond, to the policy makers, and ultimately to our legislators, who create the standards for civil behavior and the remedies for their breach. We still have a lot of work to do.

Over the years, virtually every person I have worked with who has been a victim and then a survivor of domestic violence has been clear: the permanent injuries of most domestic violence are not physical, they are emotional.<sup>72</sup> They are the psychic, long-lasting pains of betrayal by somebody you had every reason and right to trust. Abuse by a trusted person—a domestic partner, a parent, a teacher, a psychotherapist, a clergy person—should not be treated as a garden variety tort, as the current crisis in the Catholic Church prompts us to remember. The power of the intimate abuser over his victim carries with it an imperative of silence. When the nature of the wrong makes such silence foreseeable, laws requiring prompt action remove any possibility of redress. Even sympathetic judges can do no more than point to the legislature for hope of reform, as has been demonstrated in the case law of childhood sexual abuse.<sup>73</sup>

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construction and location of a \$3 million women's shelter in Milwaukee Wisconsin, the center and its staff expressed hope that "shedding the secrecy of [the building's] location will increase awareness of domestic violence" and eliminate the privacy of the abuse. Ana Caban, *Public Appeal Begins For Shelter*, MILWAUKEE JOURNAL SENTINEL, Feb. 5, 2002, at 3B. "Privacy was once closely guarded as a way of preventing more violence against women and children. Becoming public, however, is a way of holding the perpetrator more accountable, . . . and a way of telling the community, '[I]et's all help to solve this problem' of domestic violence." *Id.*

<sup>72</sup> Cf. Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1216-19 (1993) (noting that the psychological impact of domestic violence and abuse reaches beyond depression, anxiety, or nightmares, and that "[p]sychological reactions to violence also include the ways in which battered women have come to think about the violence, themselves, and others as a result of their experiences.").

<sup>73</sup> For example, one opinion noted that "[i]t may be that special legislation is necessary to protect the civil rights of the defenseless victims."

Our procedural and substantive laws on the civil side do not provide a welcome mat to domestic violence victims.<sup>74</sup> Given the fact that the vast majority of domestic assaults are charged as misdemeanors or violations, tort claims pleading significant emotional injuries are legally hobbled when not accompanied by serious physical injuries. In addition, tort attorneys, paid on contingency fee agreements, are generally unwilling to litigate cases without the promise of a substantial recovery, which, at present, goes hand-in-hand only with such physical injuries.

In the absence of state law that would presumptively permit domestic violence victims to obtain meaningful financial compensation for their psychological as well as physical injuries, civil remedies, either in the tort sphere or within the matrimonial law context, however, turn a cold shoulder toward domestic violence victims. In New York, courts have been unfriendly to both married and single women seeking tort remedies for the psychological injuries sustained because of domestic violence.<sup>75</sup> The court of appeals ruled out any cause of action for damages for the intentional infliction of emotional distress between married people,<sup>76</sup> a rule of law that continues to disallow such claims until the present time.<sup>77</sup> The same result applies to

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Hoffman v. Hoffman, No. 30040/87 (N.Y. Sup. Ct. Dec. 8, 1988) *aff'd*, 162 A.D.2d 249 (N.Y. App. Div. 1990).

<sup>74</sup> Statutes of limitations present the most obvious example. *See, e.g.*, Wiggins, *supra* note 63, at 139-40 (noting the relatively short statutes of limitations for intentional torts compared to negligence and strict liability, and how the dynamics of domestic violence can make filing a tort claim near the time the injuries are sustained difficult if not impossible).

<sup>75</sup> *See, e.g.*, Weiker v. Weiker, 290 N.Y.S.2d 732, 734 (1986) (stating that recovery for intentional infliction of emotional distress should not apply to marital disputes); Murphy v. Murphy, 486 N.Y.S.2d 457, 459 (App. Div. 1985) (reducing an award for intentional infliction of emotional distress to an ex-girlfriend because there was no evidence that her injuries were permanent).

<sup>76</sup> *Weiker*, 290 N.Y.S.2d at 734 (finding that allowing recovery for intentional infliction of mental distress in disputes arising out of matrimonial differences would "result in the revival of evils which prompted the Legislature in 1935 to outlaw actions for alienation of affections and criminal conversation").

<sup>77</sup> *See, e.g.*, Reich v. Reich, 657 N.Y.S.2d 671, 672 (App. Div. 1997) (holding that a claim for the intentional infliction of emotional distress between

unmarried co-habitants.<sup>78</sup>

Furthermore, in the tort arena, the statute of limitations for assault and other intentional torts is typically very short.<sup>79</sup> In New York, it is just one year.<sup>80</sup> It often takes a battered woman numerous attempts to permanently break away from an abusive partner. A domestic violence survivor is likely to be emotionally bound to her abuser even after physical separation.<sup>81</sup> Thus, the expectation that she should be in a position to sue within one year is unrealistic. Here, I can't help but observe that the statute of limitations for breach of contract in New York is six years,<sup>82</sup> which speaks volumes about our legislature's priorities.

One recently achieved exception to New York's one-year statute of limitations arises if an adult domestic violence victim

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spouses is not actionable).

<sup>78</sup> See *Williams v. Lynch*, 666 N.Y.S.2d 749, 750 (App. Div. 1997) (holding that plaintiff could not maintain an action for intentional infliction of emotional distress where her "allegation was not atypical in a matrimonial dispute and did not rise to the level of atrocity or outrageousness to sustain such a claim."); *Artache v. Golden*, 133 A.D.2d 596 (N.Y. App. Div. 1987) (holding that there was no cause of action for intentional infliction of emotion distress in New York arising out of an oral partnership agreement by the parties who cohabit and hold themselves out to be husband and wife); *Baron v. Jeffer*, 469 N.Y.S.2d 815 (App. Div. 1983) (finding that it would be contrary to public policy to recognize recovery for intentional infliction of emotional distress in the context of a "dispute arising out of the differences" occurring between persons who, although not married, have been living together as husband and wife for an extended period of time).

<sup>79</sup> For example, California, Texas and New Jersey have a two year statute of limitations for intentional torts. CAL. CIV. PROC. § 335.1 (2003); TEX. CIV. PROC. & REM. § 16.003(a) (2003); N.J. STAT. ANN. § 2A: 14-2 (West 2003).

<sup>80</sup> N.Y. C.P.L.R. § 215(3) (McKinney 2003).

<sup>81</sup> See, e.g., *Barriers to Leaving a Violent Relationship*, National Coalition Against Domestic Violence, at <http://www.ncadv.org/problem/barriers.htm> (last visited Mar. 4, 2003) (detailing the reasons why women stay in violent relationships as well as why they may feel emotionally bound to their abusers). During non-violent phases, a victim can view her abuser as a "good man" who fulfills her dreams of romantic love. *Id.*

<sup>82</sup> N.Y. C.P.L.R. § 213(2) (McKinney 2003) (stating that an action upon a contractual obligation or liability, express or implied, must be commenced within six years).

can show that her injuries—physical, emotional, or economic—were so severe as to render her incapable of functioning in society.<sup>83</sup> The decision in the case, *Nussbaum v. Steinberg*,<sup>84</sup> on which I served as plaintiff’s attorney and Liz Schneider acted as counsel for *amicus curiae*, contains language that vividly describes the intensity of a battered victim’s connection to her abuser.<sup>85</sup> I am glad to say that the domestic violence survivor whose efforts to effectuate this precedent, Hedda Nussbaum, is with us today.

In the *Nussbaum* case, it was the physical element of the tort that provided the basis for damages, as opposed to the emotional injuries.<sup>86</sup> Again, emotional pain and suffering, to be compensable, requires a physical injury. Psychological injuries alone constitute second-class damages, as illustrated in *Roy v. Hartogs*, where an emotionally ill patient became the sexual prey of her psychiatrist.<sup>87</sup> Although a jury awarded significant

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<sup>83</sup> *Nussbaum v. Steinberg*, 703 N.Y.S.2d 32, 33 (App. Div. 2000).

<sup>84</sup> *Id.* at 33. See also *Court Decisions, First Judicial Department, New York Part* [hereinafter, *Court Decisions*], N.Y. L.J., Mar. 12, 1997, at 26, col. 3 (reproducing the opinion of special referee Liebman that allowed tolling of the statute of limitations for insanity in a domestic violence case where the victim was so overpowered by her abuser that she became unable to independently function in society and protect her legal rights).

<sup>85</sup> *Court Decisions*, *supra* note 84. Stating that in cases of domestic violence:

the abuser and the victim are generally found to be in a close or intimate relationship. The destructive impact of violence in such an intimate relationship may be so complete that the victim is rendered incapable of independent judgment even to save one’s own life. In various forms, the victim may very well turn to the tormentor for connection and support.

*Id.*

<sup>86</sup> *Id.* (stating that “[a] factual demonstration on the record of physical, emotional and even economic abuse can serve as an evidentiary basis for demonstrating that one is incapable of pursuing their legal rights” and entitled to an extension of the one-year statute of limitations in New York).

<sup>87</sup> 381 N.Y.S.2d 587, 588 (App. Div. 1976) (holding that a plaintiff who claimed that her psychiatrist had sexual intercourse with her for thirteen months as part of her therapy could sustain a cause of action for malpractice).

damages, the appellate division drastically reduced the award.<sup>88</sup>

Remedies for domestic violence occurring within the marriage relationship have been equally unavailing. When we think about the intersection of domestic violence and divorce, we remember our family law courses, and history in which women were the property of husbands and subject to his “chastisement,” provided a wife was beaten by a stick no thicker than his thumb.<sup>89</sup> For centuries, the notion of a wife suing her husband for exercising his rights was legally without merit.<sup>90</sup> Gradually, over time, legal impediments for women were lifted with the introduction of the Married Women’s Acts<sup>91</sup> and the repeal of interspousal immunity in many jurisdictions.

Faced with procedural and substantive impediments to obtaining damages, attorneys have sought alternative theories by which to obtain appropriate compensation for clients, such as negligence and fraud, which was the basis for recovery in *Maharam v. Maharam*.<sup>92</sup> The defendant husband in *Maharam* was liable for failing to inform his wife that he had contracted

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<sup>88</sup> *Id.* at 589. The appellate court modified the jury award of \$153,697.50 in compensatory and punitive damages, holding that compensatory damages greater than \$25,000 were excessive and that the plaintiff could not recover punitive damages. *Id.*

<sup>89</sup> For discussions of the historical treatment of abused wives in the law, see generally Ray Thomas, *History Has Been Brutal for Women*, 62 TEX. B.J. 903 (1999); Hazel D. Lord, *Husband and Wife: English Marriage Law From 1750: A Bibliographic Essay*, 11 S. CAL. REV. L. & WOMEN’S STUD. 1 (2001).

<sup>90</sup> See, e.g., Michael A. Buda & Teresa L. Butler, *The Battered Wife Syndrome: A Backdoor Assault on Domestic Violence*, 23 J. FAM. L. 359, 340-41 (1984) (stating that the “perception of the marital relationship gave husbands the legal right to beat their wives because married women were considered ‘nonpersons,’ they enjoyed virtually no rights—not even the right to be free from physical beatings.”).

<sup>91</sup> See, e.g., N.Y. GEN. OBLIG. LAW § 3-313 (West 2001) (providing a married woman with a right of action for an injury to her person, property or character, or for an injury arising out of the marital relation, as if unmarried).

<sup>92</sup> 575 N.Y.S.2d 846, 847 (App. Div. 1991). Wife sought monetary damages as a result of husband allegedly transmitting venereal disease to her. *Id.*

herpes.<sup>93</sup> However, it was by the plaintiff's reliance upon an imperative in the Public Health Law, rather than any law or attitude recognizing the nature of domestic violence, that permitted her to sue for money damages.<sup>94</sup>

Some attorneys have turned to the matrimonial sphere to pursue economic recognition of physical and emotional injuries sustained by domestic violence victims. In New York, the divorce cause of action under which a wife must sue is "cruel and inhuman treatment," which requires a showing that the defendant has engaged in conduct that "so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to co-habit with the defendant."<sup>95</sup> However, the level of cruel and inhuman treatment that may be actionable in a short marriage will not suffice in a marriage of long duration,<sup>96</sup> increasing the burden of proof for a domestic violence victim in a longer marriage. To compound this problem, there is a five-year statute of limitations for cruel and inhuman treatment.<sup>97</sup> A wife who remains with—or even separates from—an abusive husband and does not bring an action within five years cannot obtain a divorce on cruelty grounds.<sup>98</sup> Again, the current

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<sup>93</sup> *Maharam v. Maharam*, 510 N.Y.S.2d 104 (App. Div. 1986). The appellate court ruled that the husband had an affirmative legal duty to disclose that he had genital herpes to his wife based on a section of the Public Health Law which provided that "any person who, knowing himself or herself to be infected with an infectious venereal disease, has sexual intercourse with another shall be guilty of a misdemeanor." *Id.* at 107. *See also* N.Y. PUB. HEALTH LAW § 2307 (McKinney 2003).

<sup>94</sup> *Maharam*, 510 N.Y.S.2d at 107 (noting that the wife alleged that the husband was grossly negligent in failing to disclose the fact that he had genital herpes, which was the proximate cause of her injury). The court found that "[t]his states a legally cognizable claim inasmuch as the husband's alleged conduct violates section 2307, a statute enacted for public health and safety, and may therefore be negligent per se." *Id.*

<sup>95</sup> *See* N.Y. DOM. REL. LAW § 170(1) (Consol. 2003).

<sup>96</sup> *See, e.g., Hessen v. Hessen*, 353 N.Y.2d 421, 426-27 (1974) (holding that the level of cruel and inhuman treatment that must be established in a divorce proceeding increases with the duration of the marriage).

<sup>97</sup> N.Y. DOM. REL. LAW § 210 (Consol. 2003).

<sup>98</sup> *Id.*



statutes ignore the many reasons why an abused wife may not be able to bring an action within the requisite time, thus preventing her from obtaining a judgment of divorce, or, as likely, forcing her to accept undesirable settlement terms. Moreover, the standard settlement agreement contains a general release that waives any right to sue on any cause of action occurring prior to the execution of the agreement.

New York divorce law has never contemplated the explicit granting of financial compensation to an abused spouse. Before 1980, title controlled the distribution of property—most typically to the husband—and alimony was available to a dependent spouse. However, no matter how badly abused the wife was, if she was guilty of marital misconduct, her right to alimony was extinguished.<sup>99</sup>

In 1980, New York's Equitable Distribution Law became effective, creating a new genus of marital property. However, the statute is facially blind to fault and in the twenty or more years since its effective date, only a handful of cases have weighted the distribution of property in a fashion that recognizes the impact of egregious behavior by an abusive spouse.<sup>100</sup> I believe Kristin will talk about one such recent case, *Johnston v. Martin*,<sup>101</sup> handled by her office.

The result of our statutory framework is that if a stranger strikes me and does me significant physical and/or emotional injury, I can sue him for my medical expenses, my pain and suffering, as well as punitive damages. If my husband assaults me, however, my principal remedy is divorce, under the "cruel

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<sup>99</sup> See generally David Kaufman, Note, *The New York Equitable Distribution Statute: An Update*, 53 BROOK. L. REV. 845 (1987) (explaining that prior to the passage of section 236 of the New York Domestic Relations Law, New York courts were required to award property upon divorce to the spouse that held title to the property, often resulting in the husband being awarded the property).

<sup>100</sup> *Havell v. Islam*, 751 N.Y.S.2d 449, 452 (App. Div. 2002) (citing the trial court's finding that the husband's behavior was "so egregious as to 'shock the conscience' and relied on its equitable powers to render justice between the parties.").

<sup>101</sup> See presentation of Kristin Bebelaar, *infra* pp. 460-73.

and inhuman treatment” provisions of the Domestic Relations Law,<sup>102</sup> and I have no right to compensation above and beyond my “equitable share” of the marital estate, and perhaps a claim for spousal maintenance—particularly if I have been so badly injured I am unable to work.<sup>103</sup> If there is no marital estate at the time of the divorce judgment, and if my husband currently has no significant income, I’m out of luck.

While the result in *Johnston* is correct, it does not grapple with the underlying problem—that is, current remedies do not presumptively entitle an abused spouse to compensation for the physical and emotional injuries suffered during marriage either by way of a larger share of the marital estate or payment in the nature of damages.<sup>104</sup> In addition, the financial circumstances of the family at the time of judgment are those upon which the court

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<sup>102</sup> See N.Y. DOM. REL. LAW § 170(1) (Consol. 2003). Providing that “[t]he cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.” *Id.*

<sup>103</sup> A court may award maintenance “in such amount as justice requires.” N.Y. DOM. REL. § 236, Part B, (6)(a) (Consol. 2003). In determining the amount of maintenance to award, courts consider a variety of factors, including the parties’ health and earning capacities and the ability of the party seeking maintenance to become self-supporting. N.Y. DOM. REL. § 236, Part B, (6)(a)(2)-(4) (Consol. 2003). The statute also allows a maintenance award for “any other factor which the court shall expressly find to be just and proper. N.Y. DOM. REL. § 236, Part B, (6)(a)(11) (Consol. 2003).

<sup>104</sup> See generally Dalton, *supra* note 62, at 387. The author states:

If an abused spouse cannot commence a tort action subsequent to a divorce, the spouse will be forced to elect between three equally unacceptable alternatives: (1) Commence a tort action during the marriage and possibly endure additional abuse; (2) join a tort claim in a divorce action and waive the right to a jury trial on the tort claim; or (3) commence an action to terminate the marriage, forego the tort claim, and surrender the right to recover damages arising from spousal abuse. To enforce such an election would require an abused spouse to surrender both the constitutional right to a jury trial and valuable property rights to preserve his or her well-being. This the law will not do.

*Id.*

must make its determination, without reference to the abuser spouse's separate property. This excludes from judicial consideration the possibility that the abuser may have secreted assets and income or that he may vastly improve his financial standing after the entry of judgment. If an award were made without reference to the family's present economics, a judgment for such damages would function like any money judgment under New York state law, that is, it would be effective for a period of twenty years.<sup>105</sup>

Another area where domestic violence and tort law may intersect is on issues regarding the liability of a third party. For example, is a police department that is aware of an order of protection but fails to take action to enforce it liable for money damages? In Connecticut, the answer is yes.<sup>106</sup> In New York, unless the plaintiff victim can show a "special relationship" to obtain a finding of police negligence, she has no remedy.<sup>107</sup> In addition, even if there is an actionable claim, the police department will implead the abuser, thus, substantially reducing its share of damages.

As we make efforts to further modify our laws to provide remedies for victims of domestic violence, we should be mindful of what Candace mentioned about having our antennae sensitized to picking up issues of domestic violence.<sup>108</sup> In many spheres, not necessarily those that immediately announce themselves, domestic violence is just beneath the surface. For example, the client who comes for help regarding a real estate dispute with her former lover may not feel comfortable speaking about the

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<sup>105</sup> See N.Y. C.P.L.R. § 211(a) (McKinney 2003).

<sup>106</sup> See, e.g., *Thurman v. Torrington*, 595 F.Supp. 1521 (D. Conn. 1984) (finding a cognizable cause of action under the Equal Protection Clause where the police afforded more protection to those who were abused by non-relatives but did not devote the same level of attention and care when the abuser was the spouse or relative of the victim).

<sup>107</sup> See, e.g., *Sorichetti v. New York*, 65 N.Y.2d 461 (1985) (holding the police department liable for negligence only when a special relationship exists between the city and the infant because of an order of protection).

<sup>108</sup> See presentation of Candace Sady, *supra* pp. 414-15.

intimate details of their abusive relationship.<sup>109</sup> However, the outcome may turn on the fact that there have been allegations of domestic violence. By way of another example, the fact that a client is afraid of her life partner may influence the manner in which a will is drafted.<sup>110</sup>

As practitioners, we need to elicit all facts that will enable us to properly counsel our clients, even in cases where domestic violence may not seem to have any role in the problem the client has presented to us. Unless we can make our clients comfortable enough to trust us with such information, we may be missing a big piece of the picture.

In conclusion, we need to keep focused on all levels of concern. The legislature should be persuaded to bring current tort law into the modern era by making it accessible to victims of domestic violence who would otherwise be foreclosed by short statutes of limitation. Trial and appellate courts should be encouraged to recognize the depth of the psychological injuries suffered by victims of domestic abuse. Furthermore, attorneys should be attuned to the unspoken in order to permit injured clients to feel comfortable enough to describe what is, for most people, unspeakable.<sup>111</sup>

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<sup>109</sup> See Andrea D. Lyon, *Be Careful What You Wish for: An Examination of Arrest and Prosecution Patterns of Domestic Violence in Cases in Two Cities in Michigan*, 5 MICH. J. GENDER & L. 253 (1999) (discussing generally that victims of domestic violence are reluctant to report abuse and pursue criminal action for fear of inciting more abuse from their abuser).

<sup>110</sup> A victim's fear of her abuser may intersect with her anxiety about being able to obtain assistance from the judicial system. See Betty Levinson, *Handling the Domestic Violence Case 2000*, 82 PLI/NY 11, 20 (2000). Therefore, attorneys must be sensitive to their clients' doubts and fears and may have to adjust settlement or trial strategies in response. *Id.* at 21. Attorneys must maintain professional competence and the zealous representation of their clients, which requires awareness of all relevant aspects of law that could impact the handling of any particular issue in domestic violence cases. *Id.* at 23.

<sup>111</sup> The difficulties of open communication between abused clients and their legal counsel have also been noted elsewhere. See, e.g., Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot*, 4 PSYCHOL. PUB. POL'Y & L. 901, 907 (1998) (noting that when a client

*Kristin Bebelaar*

I have to say at the outset that I am honored and frankly, a little nervous to be on this panel. I've been practicing law for about six years and it's hard for me to believe that I'm on a panel with the people who taught me much of what I know. I took Professor Rosato's Family Law class. I took Professor Schneider's Women and the Law class and I was a research and teaching assistant in her course on Battered Women and the Law. I took Professor Sebok's Jurisprudence class. I worked on an *amicus* brief in a battered woman's tort case with Ms. Levinson when I was a law student. I have worked on a case opposite Patricia Fersch, who's going to talk about family law practice, and I have long respected her practice as an attorney. So I'm a little intimidated but I am very honored to be here. I'm glad that Professor Thomas spoke about the issues of mutual assent and duress,<sup>112</sup> because I think those issues are important aspects of contracts law in the context of battering, but I'm not going to have time to talk about them today.

Professor Schneider has written extensively on battering and the law.<sup>113</sup> As her work makes clear, battering is a major social

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is unwilling to engage in an open discussion, the attorney should observe the client for signs of agitation, anger, and distress and be sensitive to the client's anxiety level and proceed gently).

<sup>112</sup> The remarks of Professor Chantal Thomas are not reproduced here.

<sup>113</sup> Professor Schneider has authored or co-authored many articles and books on the subject of domestic violence and women's rights. *See, e.g.*, DALTON & SCHNEIDER, *supra* note 4; SCHNEIDER, BATTERED WOMEN, *supra* note 69; Cynthia G. Bowman & Elizabeth M. Schneider, *The Legal Profession: the Impact of Law and Legal Theory: Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 *FORDHAM L. REV.* 249 (1998); Elizabeth M. Schneider, *Resistance to Equality*, 57 *U. PITT. L. REV.* 477 (1996); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 *N.Y.U. L. REV.* 520, 522 (1992) [hereinafter Schneider, *Particularity and Generality*]; Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 *WOMEN'S RTS. L. REP.* 263 (1992); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 *HARV. C.R.-C.L. L. REV.*

problem, as well as a touchstone of feminist theory and activism. Therefore, battering is an excellent subject in which to teach students two things every practicing attorney comes to know. First, it is the rare case that fits precisely into only one area of law, which is why a good lawyer must be familiar with all areas of law.<sup>114</sup> Second, in every case, there is both a “specific picture,” the facts as your client initially presents them to you, and a “big picture,” the story the court will recognize as fitting into a particular area or areas of law.<sup>115</sup> Inevitably, your client’s story is more complex than the set of facts and legal concepts a court wants to hear about. However, as your client’s attorney, you must address both the issues that are significant to your client and the ones that will be significant to the court.<sup>116</sup>

Domestic violence is an excellent vehicle to teach these two concepts because domestic violence comes up in the facts, and thus, has legal effects on cases in virtually every legal category. Additionally, cases involving clients who have experienced violence in a relationship usually involve the kind of complexity that requires lawyers and law students to focus on both the “specific picture” and the “big picture.”

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623, 632 (1980).

<sup>114</sup> See, e.g., Meier, *supra* note 29, at 1296 (noting that practicing domestic violence law requires some degree of knowledge in other disciplines, including but not limited to psychology, sociology, public policy, and criminal law).

<sup>115</sup> See Schneider, *Particularity and Generality*, *supra* note 113, at 567 (acknowledging the difficulty with accurately describing the experiences of battered women and in conveying this understanding to the courts). “Although the battered women’s movement has had to demonstrate distinctive aspects of the problem of battering in order to establish battered women as a legal and social construct, the characterizations of distinctiveness have been incomplete, have not explained fully the complex experiences of battering, and have constrained feminist analysis.” *Id.*

<sup>116</sup> See, e.g., Dorchen A. Leidholdt, *Interviewing Battered Women*, in *LAWYER’S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM* 115, 127-29 (Ronald E. Cohen & James C. Neely ed., 2d ed. 1998) [hereinafter *LAWYER’S MANUAL*] (discussing the various issues victims of domestic violence face in addition to the legal proceeding their lawyer was retained to handle, such as the client’s personal safety concerns, and psychological needs).

I should preface my comments on the specific case I will discuss today by saying that it is perhaps misleading to say that I am a “contracts practitioner.” I am a general civil practitioner. I approach every case, whether it is presented to me as primarily a torts case or a family law case or a discrimination case or a contracts case, holistically, as I think most lawyers do—at least that’s what my professors at Brooklyn Law School taught me. I separate out different legal issues from one another and most cases fall primarily into one category or another, but I also need to understand how the different legal aspects of a particular case affect each other.<sup>117</sup>

The case I will focus on in my comments today is a “contracts” case in the sense that it involves drafting and executing a contract, but the contract has to do with the sale of real property. Therefore, in order to properly draft it, I had to utilize property law principles because it was a contract between people with a history of relationship violence. I also had to utilize what some would characterize as family law principles, as well as criminal law principles, in advising my client and in drafting the contract. Similarly, in this, as in every case, I had to understand how the facts a client brings me fit into various legal categories and rules. To do that, I have to start by really listening to my client.

Working with a client who has been abused involves some skills I think most people don’t learn in law school: the skill of listening.<sup>118</sup> Listening not just to the words your client is saying, but to her body language and the words left unsaid.<sup>119</sup> Some of

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<sup>117</sup> Similar client interviewing and counseling techniques have been explored elsewhere. *See, e.g.*, ROBERT F. COCHRAN, JR., ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 12-16 (1999) (stating that lawyers often control the direction of their client’s case by fitting the situation into areas of law with which they are more comfortable and that lawyers also serve as gatekeepers to the legal system by screening out issues that may not have legal bases).

<sup>118</sup> *See generally* SCHNEIDER, *BATTERED WOMEN*, *supra* note 69 (discussing the complexities of understanding and evaluating a battered woman’s needs).

<sup>119</sup> *Id.* *See also* Meier, *supra* note 29, at 1334-35 (noting that an attorney

this is perhaps something that can't be taught in three years of law school. I learned it largely by working with people in the process of freeing themselves from abuse. Coming to understand that process entailed understanding that while there are elements of the process that are common, each person's process is also different.

Professor Schneider refers to this as the "complexities of voice."<sup>120</sup> She points out that practitioners must understand that battered women have both a different voice as a group and different voices as individuals.<sup>121</sup> She writes about the importance of understanding the interplay between what she calls "particularity and generality."<sup>122</sup> In other words, there are experiences and themes that are common to every abused person's story, yet each person's particular life experience will inform her experience of abuse and how she communicates—or doesn't communicate—that experience.<sup>123</sup>

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should encourage communication by developing an understanding with his or her client which would entail knowing the client's feelings by being able to identify "nonverbal cues" such as body language).

<sup>120</sup> SCHNEIDER, *BATTERED WOMEN*, *supra* note 69, at 62-73 (discussing that the term battered woman does not capture the range of abuse, in terms of circumstances or type, that face women and there is a need to understand the variety of contexts in which abuse occurs in order to appropriately address the issues in a legal forum).

<sup>121</sup> *Id.* at 62 (asserting that effective counseling, as well as legal assistance for a "battered woman" must take into consideration not only the needs of the individual case but also consider pressures asserted on the victim by her community that may make her reluctant to report the abuse or pursue prosecution of the abuser).

<sup>122</sup> Schneider, *Particularity and Generality*, *supra* note 113, at 522. Professor Schneider argues that lawyers must take into account the particular experiences of abused women as well as the general violence against women in society. *Id.* She defines "particularity" as "describing the complexity of women's experiences non-simplistically, accurately, and in greater detail." *Id.* She divides the general problems of violence against women into two categories: "the way in which woman-abuse must be viewed as linked to larger societal violence" and the way it is "linked to women's subordination in general." *Id.* See also SCHNEIDER, *BATTERED WOMEN*, *supra* note 69, at 59, 71.

<sup>123</sup> See SCHNEIDER, *BATTERED WOMEN*, *supra* note 69, at 59, 71.



Second, as Professor Schneider writes, lawyers need to understand that battered women are often heard, yet not really heard—and for many women, this experience affects the way they tell their story.<sup>124</sup> In other words, within the relationship they are often repeatedly “gaslighted,” or convinced that their experience is not reality, that they are “crazy.”<sup>125</sup> When they try to tell others about the abuse, they are often not listened to or not believed or are asked what they did to deserve or cause the abuse, implying that it must be their fault. They learn to be hesitant about telling their story or not to tell it at all. They often feel a great deal of shame about the abuse, in part because their abusers often convince them it is their fault or that they deserved it.

I think battered women may be more hesitant to discuss the abuse today than they have ever been, because women are expected to be strong and autonomous in ways they weren’t ten or twenty years ago. Today, there are women whose strength and self-sufficiency in their work lives makes it much harder for them to admit to abuse at home. Certainly the average woman I deal with in my practice is in her thirties to fifties, well-educated, usually lives in Manhattan, has a successful career, and on the surface seems independent and self-confident, yet I encounter

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<sup>124</sup> Schneider, *Particularity and Generality*, *supra* note 113, at 558. Society typically views battered women as helpless, which puts them at a disadvantage in the legal system. *Id.* In an effort to minimize society’s impact on the judicial system, expert testimony on battering was developed to explain common experiences and their impact. *Id.* at 560. In addition “[t]he goal was to assist the jury and the court in fairly evaluating the reasonableness of the battered woman’s action. The notion of expert testimony was predicated on an assumption that battered women’s voices would not be understood or were not strong enough to be heard alone in the courtroom.” *Id.* By focusing on both the particular and general aspects of battery, social beliefs of female subordination are more easily recognized, and women are allowed to tell their individual stories within a general context. *Id.* at 567-68.

<sup>125</sup> See SCHNEIDER, BATTERED WOMEN, *supra* note 69, at 31 (recognizing that because of various societal stereotypes against women who kill, they often faced discrimination and inequality at trials); *see also* Meier, *supra* note 29, at 1344 (recognizing that society conveys messages to the victim that her experience of domestic violence is trivial, or that her accusations are false, or that she is personally responsible for the abuse).

clients on virtually a daily basis who have been battered or are now being battered.<sup>126</sup>

I have learned that abused clients will often only hint at the violence or threats of violence they are experiencing, telling only the surface of the underlying reality. They often have a depressed affect, not showing much emotion even when telling me about a traumatic event.<sup>127</sup> Some women, including the client whose case I will talk about in a moment, even laugh or tell jokes when talking about abusive behavior. Sometimes that is another way to downplay the seriousness of what they have experienced. Sometimes humor is also how they survive it.

I'm going to call my client Jane. I've been working with her for about a year. I conducted the initial consultation with a partner in my office, Ellen Gesmer. What Jane came to talk to us about was a scenario that Ms. Levinson just described when she was speaking.<sup>128</sup> Jane had purchased an apartment with her then boyfriend, whom I will call Bill, and their relationship was coming to an end. The apartment was a New York City condominium that they had purchased for approximately thirty-five thousand dollars. In the real estate market at the time Jane came to us, the apartment was worth approximately two million

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<sup>126</sup> For statistics on and profiles of domestic violence *see generally* *Domestic Violence Statistics*, at [http://www.actabuse.com/dvstats\\_3.html#3](http://www.actabuse.com/dvstats_3.html#3) (last visited Feb. 5, 2002). Midwestern State University conducted a study based on a survey of 6,000 women. More than 50 percent of women who said they had been abused reported family incomes above \$35,000. *Id.* Just over 70 percent of the women were Anglo, 10.4 percent were black, and 9.5 percent were Hispanic. *Id.* The women were also asked to provide information on education levels and income of the abusers. That profile showed that more than 18 percent had a bachelor's degree or higher. *Id.*

<sup>127</sup> This is also called "constriction." *See* Meier, *supra* note 29, at 1312-14 (1993). *See also* Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303, 318-19 (1997) (stating that a domestic violence victim suffering from Post-Traumatic Stress Disorder (PTSD) may recount stories of horrific violence inflicted upon her without emotion). Moreover, "[w]ithout the proper training to recognize such a trait, a benefits decision-maker may simply conclude that the battered (victim's) story is false" because they believe that true victims could never suffer such violence without evoking emotion. *Id.* at 319.

<sup>128</sup> *See* presentation of Betty Levinson, *supra* pp. 448-59.

dollars. She wanted to know what her rights were with regard to the property, and if it would be possible to sell the apartment and recoup her investment in it even if Bill could not afford to buy her out and did not want to sell.

When Jane initially came to us, she did not present her story as being about, or even involving, domestic violence. She told us that she and Bill owned the loft as joint tenants with rights of survivorship, that they'd been in the relationship for about fifteen years, and that they were never legally married. During their relationship, she had made a major financial investment in the apartment, paying for virtually all of the purchase and renovation costs, maintenance, mortgage, insurance, and real estate taxes, and had in addition loaned Bill money and paid half the rent on his separate work space over the years.

She talked about him having broken a piece of furniture during an argument, and then went on to tell the rest of the story. We had to stop her there, because she talked about it as if that were no big deal. In fact, I think she even laughed about it. We had to ask her a number of questions to get the whole picture.

What eventually emerged was what I've come to recognize as a fairly typical picture of an abusive relationship.<sup>129</sup> It started with a lot of isolation of her support systems—friends and family—which then progressed to threats, then the breaking of furniture or personal items or throwing and banging objects, then throwing things at her, and finally physical assaults on her such as grabbing her and shoving her against the walls. The threats became more frequent and more intense as time went on. Jane's partner also drank and it seemed that his drinking was getting worse. Jane knew that during a rageful episode, he was more violent drunk than sober. So, while she was hesitant to tell us this

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<sup>129</sup> Of course, no two clients or instances of domestic violence are identical. There are, however, elements that are considered common, typical traits. See Women's Issues and Social Empowerment, *Domestic Violence Information Manual: Forms of Domestic Violence*, at <http://www.wise.infoxchange.net.au/dvim/dvabuse.htm> (last visited Feb. 24, 2003) (describing the various types of domestic violence abuse such as psychological, emotional, physical, and sexual abuses all of which undermines the women's confidence and isolate her from her support systems).

at first, Jane was becoming concerned about her safety, and that was really what had brought her to our office. She wanted to know if she left the apartment, given the increasing danger to her, would she in effect be giving up some or all of her financial investment, or whether there were other options.

We next explored what her feelings were about the whole situation. One of the things that I think can be very difficult in working with people who have been abused and are still in the process of freeing themselves from that abuse is that they often don't know, themselves, what it is they feel or what it is they want, because they're so used to not being allowed to say what they feel or want.<sup>130</sup>

Other speakers today were talking about using patience. I think one of the things that I've had to learn to be patient about is that each person has his or her own process. As someone's attorney, I can't advise my client and can't take the next legal step, whether that's litigation, drafting a letter, or drafting a contract, if I don't know for sure that my client knows what he or she wants.<sup>131</sup> On the one hand, it is difficult to achieve a balance between empowering a client by listening to her and respecting her unique process versus confronting any denial she has and encouraging her to assess her safety realistically.<sup>132</sup>

When we listened to Jane, what emerged was that her

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<sup>130</sup> *Id.* (citing Mary Ann Dutton, *Post-Traumatic Stress Disorder Among Battered Women: Analysis of Legal Implications*, 12 BEHAV. SCI. & L. 215, 219 (1994) (stating that "victims of domestic violence suffer psychological effects, such as post-traumatic stress disorder or depression," as well as low self-esteem and nervousness as a result of being abused by a loved one)).

<sup>131</sup> Lawyers have a general duty to clarify a client's wishes before taking further steps during the course of representations. See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2002). A lawyer is required to "promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take." *Id.*

<sup>132</sup> See generally Meier, *supra* note 29, at 1345, 1347-49 (describing the difficulty for a lawyer to adequately assess the danger their client may face especially when some victims are unable to assess the danger for themselves as a result of the severe abusive treatment they endured causing them to become psychologically as well as physically dependent upon their abuser).

complex feelings about her experience had a strong effect on her ability to make a decision about what she should do.<sup>133</sup> She wanted to leave, but felt guilty because he had convinced her and/or she had convinced herself that she was responsible for his feelings. She also knew he would be unhappy about her leaving and afraid of what his reaction might be, to what extent she was safe, and what leaving might mean for her rights as to the apartment.<sup>134</sup>

As soon as we realized that there was a continuing physical and emotional danger for Jane in staying in her apartment with her abuser, we had to address her safety first before we even got to the legal issues regarding the apartment. That's not something that I think most of my professors taught me. It's certainly not something I learned in my contracts class, although I had a very wonderful contracts professor. Nor was it something I expected to deal with in what was essentially a real estate or contract case.

We had to talk with Jane about a safety plan.<sup>135</sup> For example,

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<sup>133</sup> The psychological response suffered from domestic violence victims exposed to prolonged abuse has been termed "learned helplessness." See generally Joan M. Schroeder, *Using Battered Women Evidence in the Prosecution of a Batterer*, 76 IOWA L. REV. 553, 558-59 (1991) (describing learned helplessness as the effect of repeated beatings causing a battered woman to become passive and remain in an abusive situation).

<sup>134</sup> An abused woman's safety is very often intertwined with her legal rights. See generally SCHNEIDER, *BATTERED WOMEN*, *supra* note 69, at 51-52, (citing Sally E. Merry, *Wife Battering and the Ambiguities of Rights*, in *IDENTITIES, POLITICS, AND RIGHTS* 301-02 (Austin Sarat & Thomas R. Kearns, ed., 1995) (stating that abusers are likely to become more violent towards women who leave them and this threat to their safety and the safety of their children are of great concern to victims)).

<sup>135</sup> A client's safety is, of course, of primary concern in situations of domestic violence. See Meier, *supra* note 114, at 1349 (suggesting that if danger is imminent, the lawyer should suggest to the client to seek shelter or protection). Safe Horizon provides a guide to help abused women make a safety plan. See Safe Horizon, *Essential Information for Battered Women: Making a Safety Plan*, at <http://www.dvshelertour.org/safety.html> (last visited Feb. 5, 2003). The main guidelines and topics are: planning ahead; deciding how you would get out; communicating with someone who can help and deciding where you should go; keeping important documents together in a safe place; memorizing or keeping a list of important telephone numbers; and

I suggested putting all of her important documents in one place so that if she had to leave suddenly she'd be able to get out quickly. I suggested she think of some people she could call on and stay with if she needed to leave suddenly. We talked about what the police response was likely to be if she called the police.<sup>136</sup> We spoke to her about other legal options, such as how to get an order of protection, which for her would be difficult because she was not married or related to her abuser nor did they have a child in common.<sup>137</sup> This meant that she would need to go to criminal court for the order, which, as discussed earlier, can be frightening to a lot of women.<sup>138</sup> It's a very different experience to get an order of protection in family or supreme court than to go to criminal court, where the abuser will have criminal charges against him or her.<sup>139</sup>

Next, we had to talk about Jane's options regarding the apartment. One option was to try to go to court and seek partition, which would mean asking the court to direct that the

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keeping your children safe. *Id.*

<sup>136</sup> See, e.g., *Domestic Violence: Guidelines on Police Response Procedures in Domestic Violence Cases*, at <http://www.state.nj.us/lps/dcj/agguide/3dvpolrs.pdf> (last visited Feb. 5, 2003) (stating that some common police procedures in domestic violence situations include escorting victims to the family part of the superior court, providing the victim with support hotlines, and other lifesaving guidance and assistance).

<sup>137</sup> In New York, if the victim is not or has never been legally married to the abuser, and does not have a child in common with her abuser, she must go to criminal court for an order of protection. See *Obtaining and Enforcing Valid Orders of Protection in New York State*, at [http://www.usdoj.gov/usao/nyw/victim\\_witness/pdf/OOPmanual.pdf](http://www.usdoj.gov/usao/nyw/victim_witness/pdf/OOPmanual.pdf) (last visited Feb. 5, 2003) (setting forth the procedures for obtaining and enforcing orders of protection).

<sup>138</sup> Once a domestic violence proceeding is within the jurisdiction of the New York State Criminal Court, the prosecutor has control over the case, not the victim, and the prosecutor may choose, but is not obligated, to take the victim's wishes into consideration. *Id.* at 18. Victims may hesitate to go to criminal court because there is a greater threshold of evidence required for the criminal court than in family court. *Id.*

<sup>139</sup> *Id.* See also N.Y. C.P.L.R. § 530.11(c) (McKinney 2003) ("The purpose of Criminal Court is to prosecute the perpetrator for violating a law in New York State and can result in a criminal conviction, incarceration, probation and/or a criminal fine.").

apartment literally be divided in half, so that she could do what she wants with her half and he could do what he wants with his. That, of course, would raise issues of whether it was physically possible to divide the apartment and what that would do to the value of the property. We decided that partition wasn't a good option for her. We also had to research whether, if she left, would it affect her right to seek partition. Our research indicated that she could leave and it would not affect her rights<sup>140</sup>—but there was still a concern about what he might do to the apartment if she left, and how that might affect its value. However, in researching partition, I came across one case, *Johnston v. Martin*, which I was surprised to find.<sup>141</sup> In that case, a couple owned real estate together.<sup>142</sup> The man had abused the woman for a long time resulting in her leaving the property.<sup>143</sup> A few weeks after she left, he changed the locks.<sup>144</sup> The court found that the combination of the abuse with the changed locks constituted ouster, which meant that she had the right to use and occupy the property and since her abuser had deprived her of this right, she could obtain the reasonable value from him for his exclusive use of the residence.<sup>145</sup> I don't know if the court would have found ouster if he hadn't changed the locks, but the opinion makes it clear that the man's violence toward her was a factor in the court's determination.<sup>146</sup>

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<sup>140</sup> See *Perkins v. Volpe*, 146 A.D.2d 617 (N.Y. App. Div. 1989) (holding that the defendant's exclusive occupancy of a residence did not constitute ouster because, as tenants in common, the defendant had the right to occupy the whole residence).

<sup>141</sup> 183 A.D.2d 1019 (N.Y. App. Div. 1992).

<sup>142</sup> *Id.* at 1019-20.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1021.

<sup>146</sup> *Id.* at 1019, 1021. The court stated:

[b]ased on the uncontroverted testimony that plaintiff moved out in response to her troubled relationship with defendant and his violence toward her and that defendant thereafter changed the locks on the doors of the big house and informed her of this fact, we are persuaded that defendant effectively denied plaintiff access to the property.

We discussed her offering to buy him out, but she could not afford to do so, so this was not a viable option. We discussed the possibility of his agreeing that he would buy her out. However, every time she had brought either of those options up with him in the past, he would become enraged. That was frightening to her. In addition, there was a concern that he might file for bankruptcy, in which case the apartment would be completely lost to her, as the homestead exemption is so low in New York.<sup>147</sup> So that was not a viable option.

Another option we discussed with Jane was to go to court and ask the court to force a sale. However, the legal standard to obtain this relief is “great prejudice.”<sup>148</sup> While I thought we might be able to argue that it was unsafe for her to remain there, and that he could not afford to buy her out, when I did the research I could find no cases where a court had found that abuse constituted great prejudice.

Finally, we discussed with Jane the option of negotiating with him to agree to sell the apartment to a third party, and then divide the profits in such a way that she could recoup her investment. Ultimately, we advised her and she agreed that she should move out of the apartment as soon as possible and then begin the process of negotiating an agreement to sell and divide the profits, or, if he wouldn’t agree, to take him to court to seek partition or a sale.

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*Id.* at 1019, 1021.

<sup>147</sup> N.Y. C.P.L.R. § 5206 (McKinney 2003) (exempting a principal homestead up to “ten thousand dollars in above liens and encumbrances . . . from application to the satisfaction of a money judgment”). New York’s homestead exemption will only protect ten thousand dollars of the value of the home above liens and encumbrances. *Id.* If there is any unencumbered value left in the property after the value of the liens, encumbrances, and the exemption are accounted for, the home will probably be sold to pay off the husband’s unsecured debts.

<sup>148</sup> N.Y. REAL PROP. LAW § 901(1) (2003). The statute provides:

[a] person holding and in possession of real property as joint tenant or tenant in common, in which he has an estate of inheritance, or for life, or for years, may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners.



Then over the next several months, a routine began where weeks would go by where I wouldn't hear from her and I was sort of flummoxed. I didn't know what to do. The partner who was supervising me encouraged me and validated for me that it's really my ethical duty to check in with her and make sure she's okay.<sup>149</sup> Not only is it a nice thing but it's really part of my duty as her attorney.

For several months I had to keep checking in with her to see if she was okay and to give her some encouragement. It took her a long time before she went through her process and was really ready to move out and to feel more empowered and more self-confident. Ultimately, Jane was able to get him to agree that they would sell the apartment.

I have been drafting an agreement setting forth when and how they will agree on a sale price, accept an offer, and how they will divide profits and expenses at closing. In doing that, even though my client is much more self-confident than she was when she first came to us, I have to be conscious of the power imbalance that is there and her tendency to either let her fears direct her decisions or to let herself believe that there is no abuse going on.<sup>150</sup>

In some cases where the parties to a contract have been in a relationship that was abusive, it may be impossible to form and execute a viable contract where the power imbalance is too great.<sup>151</sup> These situations raise interesting issues regarding

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<sup>149</sup> See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101 (2002). (“[a] lawyer shall not . . . neglect a legal matter entrusted to the lawyer.”). See also Jo Ann Merica, *The Lawyer's Basic Guide to Domestic Violence*, 62 TEX. B.J. 915, 916 (1999) (stating that “[l]awyers have an ethical and moral obligation to inquire about the existence of domestic violence in criminal, family, and tort cases, among others.”).

<sup>150</sup> This general tendency has been noted elsewhere See Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 69 (2000) (stating that “[m]any domestic violence clients will be in denial about their conduct or its wrongfulness, or will tend to rationalize or minimize it. Attorneys need to be aware of how to deal with these psychological defense mechanisms and how to engage in these highly sensitive conversations with the client.”).

<sup>151</sup> See also Marcia M. Maddox, *Undoing the Unconscionable: Breaking*

contract formation, such as whether a battered woman can ever be considered an “incompetent,” whether a true meeting of the minds has occurred, and whether there has been duress. Because of the extent to which Jane had extricated herself from the abuse, these were not issues in this case, although there were times earlier on in our working relationship when I considered them to be potential issues.

As in a divorce agreement, I wanted to take steps to involve as little need for direct communication as possible and resolve many of the foreseeable problems and to minimize the potential for confrontation and conflict. I made the contract self-executing to the extent possible. I made the definitions section of the agreement as complete and clear as I could. I also tried to build in real easily identifiable consequences for Bill in the event that he defaulted on his obligations under the contract. For example, if he failed to move out of the apartment at the agreed upon time and the closing was delayed as a result; he was solely responsible for any associated costs, including legal fees. To some degree, all of these are things I would want to do in any contract, but in this case the stakes were much higher.

### *Professor Jennifer Rosato*

I know we are running out of time, but I hope you’ll hang in. There’s still more to say. I try to do whatever I can, in whatever courses I have, to think about many of the social issues that are raised. Domestic violence is just one of them. And I’m not really looking in a course like family law to students like Kristin, who are very, very aware of these issues, who are knowledgeable already when they come to my class, but there are a lot of students in my family law class—I teach about 60 or 70 students each year—who either have experiences that are relevant, but they’re there mostly because it’s a bar course, not because they

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*Unlawful Separation “Agreements,”* 2 ATLA-CLE 2097 (2001) (addressing marital agreements arising from domestic violence situations and highlighting that evidence of domestic violence indicates that the parties to the contract do not have equal bargaining power and such agreements may be deemed unconscionable).

want to be enlightened. They want to hear, mostly, what are the equitable distribution rules, what are the rules for custody in New York. It seems almost a deviation for me to be doing domestic violence work in the class.<sup>152</sup>

That brings me to a couple of concerns that I always have to think about when I'm doing an issue like domestic violence in my classroom. The first is what has been called the feminazi problem.<sup>153</sup> That's a problem especially if you are a woman professor and you're raising these issues in your classroom. I think you have to be very careful that it's not considered part of your agenda that you're ramming down students' throats. Therefore, it has to be done very sensitively; it can't be done everyday. In some sense, you have to be more neutral than you might in other situations, because you can't let your thoughts about domestic violence seep into the conversation. Because in my mind, the reason why you raise domestic violence issues is not just for the enlightenment and learning, but also for the openness of the discussion that occurs. If you shut it down with your own agenda, that important discussion will not take place.

Therefore, before you start, you have to presume that in your class there are folks who have been victims, folks who have been perpetrators, folks that have worked for DA's (District Attorney) offices, folks that have worked in the defense context as well. With that in mind, I try to teach domestic violence issues using role-plays. That's very important to me, to get people out of

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<sup>152</sup> Cf. Naomi Cahn & Joan Meier, *New Approaches to Poverty Law, Teaching and Practice: Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339, 348 (1995) (noting that outside of the clinical context and feminist jurisprudence, few courses other than family law cover domestic violence and even within family law most casebooks devote relatively few pages to the subject).

<sup>153</sup> See Lani Guinier et al., *Becoming Gentlemen: Women's Experience at One Ivy League Law School*, 143 U. PA. L. REV. 1, 52, 82 (1994) (describing the law school experience of a woman who was called a man-hating "feminazi dyke" for her assertiveness); Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, 2001 UTAH L. REV. 1, 69 n.335 (2001) (attributing the growing use of the term "feminazi" as an inappropriate representation of anti-male feminism, to television and radio personalities).

personalizing their answer with “I think this,” “I feel this.”<sup>154</sup>

Specifically, what I do in family law is to create a fairly extensive role-play in which I give students roles as associates in a law firm who have a client coming to visit them during the next class. As for the role of the client, I do a little bit of casting myself, usually a former student that I know has a sensitivity to these issues, but also who is a very good actress.

One year I found that the portrayal was almost too real. The actress who I had in the role of “Linda,” the victim, actually broke down and cried. The class didn’t really know what to do. There was a collective sense of cognitive dissonance for a moment—“Was this real or was this pretend?” Afterwards, she said to me, “I don’t know what came over me. I just got so into the role that I forgot about what I was supposed to be doing.”

As a professor, you don’t want the role-play to be a bad Lifetime movie, right? On the one hand you want to role-play, you want to put people in a role, you want them to get interested and outside of themselves. On the other hand, you don’t want to make it so fake that it seems like we are just playing games. Until I teach them the black-letter law, that balance is sometimes

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<sup>154</sup> The merits of role-playing and other alternative teaching methods have been noted by other commentators, *cf.* Carrie Menkel-Meadow, *Case Studies in Legal Ethics: Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 FORDHAM L. REV. 787 (2000). (providing a review of various approaches to case studies, narratives and role-playing as educational tools in the legal classroom). *See also* Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319 (1999). Weinstein examines interdisciplinary education as a method to train lawyers to be “creative problem solvers” who can better serve the needs of their clients. *Id.* at 319 Her article reviews a model used at the San Diego Interdisciplinary Training Program in Child Abuse and Neglect and advocates exposing law students to professionals or students from other disciplines within a problem setting. *Id.* at 354-61. Weinstein posits:

[i]f we understand the developmental levels at which many of our students enter school, we should make efforts to expose them to law practice as early in their education as possible. An increase in role-playing and a requirement of pro bono work beginning in the first year of school would accelerate maturation from both sociocultural and psychological perspectives.

*Id.* at 362.

hard to achieve. Sometimes I try to do it by bringing in someone from the outside so it's not just me sitting in a chair with a wig. "Oh, that's so funny, Professor Rosato. You're playing the victim today." I have done that from time to time, when I've needed to. But having that stranger in the room changes the tone of the room significantly.

As the role-play begins, I ask the experts in the class—three designated students—to interview the client. Before class, I give the actress background facts to review. I ask her to be forthcoming with the facts, but not too forthcoming. I think it's interesting that even when I use the same scenario, every class elicits a different set of facts. Because in this particular scenario there is abuse going back five years. It's not very often that the class, in the limited amount of time they have, really sees that the pattern of abuse comes up often very early in the couple's relationship.

During the class, we not only get the facts during the interview, but also do some problem solving. We add in a little bit of skill development. The role-play is a realistic one, even though it is applied to a non-stereotypical situation: a young, white, middle-class couple. I developed the hypothetical with a clinical professor. By running the hypothetical past one of my clinical colleagues, I was able to really develop the ideas and make sure that they were going to work out in context. During the role-play, I have the students go back and forth with this actress, our victim/client. She talks about the issues that have come up in her relationship with her abusive husband. I have given the students the applicable laws beforehand so they can ask meaningful questions to reveal the material facts.

The interview usually takes place on one class day. For the next class, we come back and I ask, "What should we do about Ms. Fairless, our client?" What I find most interesting is, first of all, the discussion—like the interview—is different every time I use this hypothetical. It's amazing how that happens. Second, I find that there are some people who speak who have never spoken in class before and never will speak again. The subject engages them at some level. I try to have an open discussion, so it means that the students who are or have been police officers

tell me what it's like for a woman to get an order of protection and explain the role of law enforcement. DA interns talk about the prosecutor's role in the system. In the end, the discussion has a sensitizing effect if you do it right: the students become teachers by showing each other where they have been and there's a non-judgmental aspect to it. However, I think it's essential that if you are an opinionated professor and you don't think you can stay neutral, don't try this type of exercise in your class.<sup>155</sup> Because it is going to fail and it's going to fail very badly and perhaps negatively affect the entire semester.

Eventually, we do talk about the law. First, we discuss the meaning of stalking in context.<sup>156</sup> We have the statute in front of us,<sup>157</sup> and we have an interesting debate about whether a husband

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<sup>155</sup> See generally Menkel-Meadow, *Telling Stories in School*, *supra* note 154, at 814-16 (describing the practical mechanics of teaching with case studies and role-playing and noting that the professor's task is to place students in roles and facilitate dialogue); Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, *supra* note 154, at 361 (noting that professors "are in the position to model questioning behavior" and that, ideally, a professor's questions "would truly be information seeking").

<sup>156</sup> See also Susan E. Bernstein, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 CARDOZO L. REV. 525, 529-30 (1993) (analyzing case histories representing the typical stalking situation—the jealous lover, the violent husband or the vengeful ex-husband).

<sup>157</sup> A number of states have passed stalking legislation that could be used as teaching tools; although specifics invariably differ, Utah's legislation is illustrative. UTAH CODE ANN. §76-5-106.5 (2002). It provides that:

A person is guilty of stalking who:

- (a) intentionally or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person:
  - (i) to fear bodily injury to himself or a member of his immediate family; or
  - (ii) to suffer emotional distress to himself or a member of his immediate family;
- (b) has knowledge or should have knowledge that the specific person:
  - (i) will be placed in reasonable fear of bodily injury to himself or a member of his immediate family; or
  - (ii) will suffer emotional distress or a member of his immediate family will suffer emotional distress; and
- (c) whose conduct:

following his wife around in a grocery store everyday for a week constitutes stalking. We deal with the legal aspects but also what is the reality, and how the application of the law works in a particular context.<sup>158</sup> We also address more broadly whether the use of legal remedies is even appropriate, and whether the use of legal remedies can escalate violence.<sup>159</sup> I'm sure that, in the real world you say, "Okay, well, the best thing to do is to get that protective order."<sup>160</sup> But how is this really going to play out in this relationship? And we have a tendency as lawyers to get right to the legal remedy, but it may be an entirely inappropriate thing to do,<sup>161</sup> and we talk about that dilemma. We don't necessarily

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- (i) induces fear in the specific person of bodily injury to himself or a member of his immediate family; or
  - (ii) causes emotional distress in the specific person or a member of his immediate family.

*Id.*

<sup>158</sup> See, e.g., *H.E.S. v. J.C.S.*, 815 A.2d 405 (N.J. Super. 2003) (holding that husband's alleged video surveillance of wife's bedroom could constitute harassment and stalking as predicate offenses of domestic violence); *Milillo v. Milillo*, 748 N.Y.S.2d 850 (Fam. Ct. 2002) (mother's allegations of three physical break-ins by father to her home, in which she lived alone with her children, made out cognizable claim of stalking); *People v. Kieronski*, 542 N.W.2d 339 (Mich. Ct. App. 1995) (holding that there was sufficient evidence to bind defendant on charge of aggravated stalking of his ex-wife; ex-wife testified that defendant approached her at public places and stated "I'll get you, bitch!").

<sup>159</sup> See generally Catharine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993) (noting different studies that indicate the failure of restraining orders to adequately protect women from further abuse). The article also surveys civil protection order statutes and state appellate opinions and examines recent developments, trends and innovations. *Id.* at 813.

<sup>160</sup> The protective order is the primary method to deal with domestic violence in the United States. See Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 348 (1995) [hereinafter Barry, *Protective Order Enforcement*] (discussing the role of protective orders in responding to domestic violence issues).

<sup>161</sup> It has been noted that many attorneys do not understand domestic violence and its effect on the survivors. See Edward S. Snyder, *Remedies for Domestic Violence: A Continuing Challenge*, 12 J. AM. ACAD. MATRIM.

reach a solution, but we talk about it.

We also consider the lawyer's role as counselor, as Kristin just raised so beautifully so I don't really need to say more about it.<sup>162</sup> But what we raise, for example, is what kind of counseling a lawyer should do.<sup>163</sup> As a teacher, I take a fairly passive role in this discussion. I don't say "in my experience." Instead, I ask, "What is our role here?" since many students want to send our client to a mental health professional because they think she is being too weak. Some say: "What's wrong with her? Why can't she stand up to her husband?" Others are saying, "That's not our role. Our role is not to be counselors." Therefore, there's a back and forth about what the appropriate role of a lawyer is.<sup>164</sup>

Often, we also have a child in the picture. So it's also important for the class to think about the legal ramifications not

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LAW. 335, 338 (1994). (observing that rather than attempting to understand the psychological impact on survivors, attorneys generally seek legal remedies.) The survivor's lack of resolve in prosecuting the batterer with criminal charges of abuse leads most attorneys to seek civil protective orders. See Barry, *Protective Order Enforcement*, *supra* note 160, at 345. Although civil protective orders may be a popular remedy, they are not sufficiently enforced to make them as effective as possible. *Id.* at 348. Protective orders also do little in the way of reforming or punishing batterers because they only remove the batterer from his victim. *Id.* at 346.

<sup>162</sup> See presentation of Kristin Bebelaar, *supra* pp. 460-73. See also Robert L. Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 FAM. L.Q. 187, 191-3 (1995) (noting that, to be an effective counselor, attorneys representing battered clients should first acknowledge domestic violence as both a psychological and legal problem and rather than exclusively addressing the legal aspects of a situation).

<sup>163</sup> See generally *id.* at 194 (articulating the legal counseling a lawyer should provide and noting that "family lawyers handling domestic violence cases must ensure that their clients receive appropriate treatment for their emotional and psychological issues by psychotherapists or counselors properly trained to handle domestic violence cases.").

<sup>164</sup> The issue of a lawyer's role in domestic violence cases and counseling has been explored extensively elsewhere. See, e.g., Phyllis E. Bernard, *On Integrating Responses To Domestic Violence: Teaching Ethical, Holistic Client Representation in Family ADR*, 47 LOY. L. REV. 163 (2001) (commenting that a family law attorney addressing divorce or custody has the dual role of identifying whether domestic violence is a factor and an ethical obligation to protect the client from receiving or inflicting additional harm).



only for the partners involved, but also for third parties.<sup>165</sup> That also shapes what we do.

I also try to bring in some of the non-legal aspects of it. We talk about whether Linda should stay with her mother, who's a controlling person and tells Linda, "You stay with the man. He's a good man. He brings home the bacon. He takes care of the child." So her mom is telling Linda to stay, and that's not maybe what she wants to do. But what's the alternative? What's a battered women's shelter like?

Some students in the class with experience in domestic violence matters educate the others and I think it's very important to have that dialogue and look at the legal and non-legal aspects.<sup>166</sup> The students not only think about what's going to keep her safe, first and foremost, but also what is going to keep her the happiest in the long run and to pursue legal remedies if and when she needs them.

None of the things I posed as part of the hypothetical, and this also goes to what you were saying about real life dilemmas. What if the client says, "Thank you very much but I don't think

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<sup>165</sup> Addressing domestic violence in homes where children are present requires consideration of additional legal and parental matters. *See, e.g., In re Deandre T.*, 676 N.Y.S.2d 666 (App. Div. 1998) (holding that domestic violence by a child's father against the mother witnessed by the child was sufficient to constitute neglect because it placed the child in imminent danger of mental impairment); *In re Bryan L.*, 565 N.Y.S.2d 969 (Fam. Ct. 1991) (concerning an allegation that a man beat his wife in the presence of their child and that this behavior exposed the child to the risk of emotional and mental impairment); *E.R. v. G.S.R.*, 648 N.Y.S.2d 257 (Fam. Ct. 1996) (mandating the consideration of the impact of domestic violence on the child in a custody and visitation proceeding). *See also* Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757, 769 (1996) (noting that trial courts have terminated a father's parental rights for committing acts of domestic violence against the mother in the child's presence).

<sup>166</sup> Other commentators have explored this dichotomy. *See generally* Joyce Klemperer, *Programs for Battered Women—What Works?*, 58 ALB. L. REV. 1171, 1178-82 (1995) (stating that one non-legal aspect of domestic violence is what to do with victims who are seeking to get away from their abuser).

I'm going to need your services anymore." What do you do as a lawyer? In that scenario, is my duty as a lawyer to follow up or to simply hope that nothing happens to her?<sup>167</sup>

I think all of these legal, non-legal, and emotional issues are very important issues to raise in law school. I admit that sometimes I do it on the cheap, and I apologize if I do, but I think any well-intentioned attempts are worth it.<sup>168</sup> That's what I've always thought.

### *Patricia Fersch*

I might be able to help with some real life examples. I have a low-fee law office and I represent both men and women. I jotted down some names of some actual cases that I've worked on with varying results that I thought would be helpful. I will use their real first names because it just makes it easier for me to somewhat tell their stories.

I will say that my concerns as a practitioner are always, and I think I have them in the right order: safety first, hers and the children's safety; secondly, support. Again, in the right order—emotional and financial. Strangely, the last concern is the legal

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<sup>167</sup> As a general rule, the lawyer's duty to his or her client is a product of an established lawyer-client relationship and no duty extends to individuals who decline legal representation. See MODEL RULES OF PROF'L CONDUCT (Scope [3]) (2002) ("Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so."). *But see generally* Christine A. Picker, *The Intersection of Domestic Violence and Child Abuse: Ethical Considerations and Tort Issues for Attorneys Who Represent Battered Women with Abused Children*, 12 ST. LOUIS U. PUB. L. REV. 69 (1993) (exploring the potential expansion of a lawyer's duties in the context of domestic violence).

<sup>168</sup> See, e.g., Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259 (1999) (articulating reasons for and ways to cultivate law students' emotional intelligence in order to better represent clients in emotionally charged cases); Shalleck, *supra* note 57, at 1022 (asserting that law schools should take an active role in counteracting pervasive stereotyping of battered women to transform the legal community's understanding and representation of such clients).

issues.<sup>169</sup> But let me get to some of the stories.

First of all, to answer the last question that the professor posed, “What if the client stops your services?”<sup>170</sup> That is a real problem, but there’s really not a thing, frankly, that I can do about it. So I’ll start with the case of Lillian.

Lillian is very well educated and married to an attorney who at one time worked for the District Attorney’s office in the Domestic Violence Unit in one of the five boroughs. By the time Lillian came to my office she already had a criminal order of protection, evidence of very apparent physical abuse and a child that was about a month or two months old at the time. The issue for her initially was her apartment. She was in the apartment. He was out—he had been ordered out by the criminal court. But she was in his apartment and of course the child was his child. Lillian was unsure about what to do; whether she should go to Albany—her family was from the Albany area—whether she should stay in the county she was in and whether he would fight her in terms of issues of relocation because he was, of course, a lawyer. I won’t get into the relocation issues, but you can certainly address that with your family law professors.

As a result, Lillian was very unsteady. My role initially was to encourage her to make or take some steps, such as seek counseling. Finances weren’t a problem for her because she had a certain amount of cash that she had accumulated prior to the marriage. But it was going to be a problem because he was no longer in the District Attorney’s office. Her husband was now a private practitioner who took all his fees in cash and had not filed taxes for about ten years, which was a wedge to use against him if I got him into court. But the key was to get him into court.

Lillian, however, did not want to go into court.<sup>171</sup> I started the

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<sup>169</sup> This prioritization has been advocated elsewhere. See, e.g., V. Pualani Enos & Lois H. Kanter, *Who’s Listening? Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting*, 9 CLINICAL L. REV. 83, 93-94 (2002) (defining the client-oriented approach as one that seeks to give primacy to the overall well-being of the client while de-emphasizing the legal concerns).

<sup>170</sup> See presentation of Professor Jennifer Rosato, *supra* pp. 473-81.

<sup>171</sup> In fact, many domestic violence victims are hesitant to pursue legal

action and she dropped the ball. The case was before one of the most respected judges of the New York County Supreme Court, and I made the court aware of my problem with the client. I adjourned the case a couple of times, but unfortunately, Lillian dropped the action and never appeared.

She returned to my office a year later after sending me a Christmas card with the baby's picture. Lillian wanted to re-start the action. We started it again, and again she stopped it, saying that they were going to work things out. To my knowledge, in the last year, thankfully, she was not physically battered again. But that's one example.

Another case was that of Robin. She was a vice president for one of the banks, an absolutely beautiful, stunning, intelligent African-American woman, married to an African-American man. They had two boys, eight and ten years old. The husband was, I don't mean to be crude, but he was really a low-life.

Here there was no physical evidence of the abuse, whereas in the first case I had physical evidence, and that client had an order of protection.<sup>172</sup> In this case there was no physical evidence of abuse, no police record, and no order of protection. Robin had never called the police or sought an order of protection. The violence had escalated, but I had no evidence. However, I absolutely, unequivocally and without a doubt believed my client. There wasn't a question in my mind. The problem here was her safety and the safety of the two kids, with the abusive husband in the house and no record to get him out.

The judge in this case, while refusing to order the husband

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action against their abusers for various reasons. *See, e.g.,* Meier, *supra* note 29, at 1345 (listing various reasons why victims are hesitant to turn to the courts for help such as the fear of retaliation, fear of facing their abusers in the courtroom, or believing that the presence of danger is insufficient to warrant legal action).

<sup>172</sup> The trend in domestic violence physical assault cases is for the suppression of evidence of the abuse. *See* PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 51 (2000). According to definitive government statistics on violence against women, only 41.5 percent of female victims of physical assault by intimates showed physical injury. *Id.*

out, held a tight rein on the situation. The judge was concerned that getting him out would put Robin in worse harm. So the judge kept him appearing in court literally every single day until there was a resolution—and some of you may not like the solution. I can't say that I was really happy about it either but she was safe, the kids were safe and, ultimately, we got the husband out. This case is about three years old and I spoke to Robin recently. She thanked me and so I guess all's well that ends well. The bottom line was that the judge helped me realize that if we give this guy some money we'd get rid of him. This was exactly what we did—we gave him some money and he went away. He's been away for three years. He chooses not to see his kids. He doesn't bother her and she's happy as can be.

I admit that it was not the legal solution that I originally set out to get, which was, so I can be clear, a divorce, an order of protection ordering him out and for my client to get to keep all the money because he was a bum and made no contribution to the marriage or the kids. It was certainly a solution that has worked for Robin and those kids in terms of their safety. Furthermore, the amount of money in the scheme of things—which was about fifteen or twenty-five thousand dollars—was a rather minimal amount of money in this situation. However, relative to the other families I usually work with, offering such a sum would be impossible for most to bear. But in this case it was possible, and it worked.

It appears that I am out of time. So, I guess the one thing I wanted to say, and I'll end with this, is that the most difficult thing that I've found is many of the people who really are in trouble in terms of domestic violence don't say it.<sup>173</sup> Many victims remain silent. However, I often find people coming into

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<sup>173</sup> There are numerous reasons why battered women would remain silent about their abuse. See, e.g., Barbara J. Hart, *Victim Issues*, Minnesota Center Against Violence and Abuse, at <http://www.mincava.umn.edu/hart/victimi.htm>. (last visited Feb. 27, 2003). They may fear retaliation and heightened abuse from their abusers; fear that they will be blamed for the violence perpetrated against them; believe that reporting the abuse would be futile; be without resources to engage in a prolonged legal battle; or may believe that they can best protect themselves and their children by remaining silent. *Id.*

my office saying, “I’m a victim of domestic violence.” Those people are usually the ones whose marriage is unraveling.<sup>174</sup> It may not be pretty. What’s going on in their household may not be anything that anyone wants to live through. But it’s a marriage or a relationship unraveling, which is very, very different from domestic violence.<sup>175</sup>

The other question is that—I don’t know if anybody talked about it, and I’m obviously not going to get time to—when domestic violence is used as a weapon especially with regard to custody and visitation issues.<sup>176</sup> But I guess we’ll save that for another day. Thanks for your time.

### *Professor Elizabeth Schneider*

Thanks to all of our panelists for these great presentations. There are people in the audience who have done work in the area or are teaching about domestic violence in other law schools that I’d like to recognize.

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<sup>174</sup> See, e.g., William G. Austin, *Partner Violence and Risk Assessment in Child Custody Evaluations*, 39 FAM. CT. REV. 483, 491 (2001) (asserting that “clinical [studies] are likely to contain a higher level of psychological disturbance and more entrenched family conflict (e.g., couples involved in marital therapy), where biased reporting might be expected”); Andre Derdeyn & Elizabeth Scott, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 493 (1984) (stating that “spouses in a deteriorating relationship may become intensely competitive in an effort to protect themselves from distress caused by the partner and to blame the spouse for the failing relationship”).

<sup>175</sup> Cf. William G. Austin, *Assessing Credibility in Allegations of Marital Violence in the High-Conflict Child Custody Case*, 38 FAM. & CONCILIATION CTS. REV. 462, 466 (2000) (discussing “issues of reliability and validity in the measurement of [alleged marital violence] in the child custody evaluation,” and proposing a six-part test to evaluate the plausibility of domestic violence allegations).

<sup>176</sup> See *id.* at 491 (stating that “[a]lthough violence reporting may be more reliable than previously thought, this does not imply that there will not be self-interested distortions of violence reports for the complex child custody case involving domestic violence. When the case cannot be mediated or settled and a [child custody evaluation] is ordered, it is expected that there will be a highly contentious quality to the case, in which information manipulation will be common.”).

We have Vicki Lutz from the Pace Law School Battered Women's Justice Center, a law school program devoted to student representation of battered women, and Vanessa Merton also from Pace Law School, who teaches in the area of health law as well as other issues that touch on domestic violence. We have Kim Susser, Director of the Domestic Violence Initiative at the New York Legal Assistance Group (NYLAG), who co-teaches a course on domestic violence and the law at St. John's University Law School. Nancy Erickson, who was already mentioned, has done pioneering work and legal scholarship in this area, first as a law professor at Ohio State and now in private practice here in New York. Minna Kotkin established a Violence Against Women Act Project several years ago in the Federal Litigation Clinic that she directs here at Brooklyn Law School. This was a very innovative and important project—counseling, doing outreach, and educating women about their rights under the civil rights remedy of the Violence Against Women Act, until it was held unconstitutional by the United States Supreme Court in *United States v. Morrison*.<sup>177</sup> Finally a person is with us today who will be coming into the fold, Deborah Tuerkheimer, now with the Brooklyn DA's office. Deborah will be joining the faculty at the University of Maine Law School in Fall 2002 and teaching a course there on domestic violence. I would like to acknowledge one other person in the audience, Hedda Nussbaum. In addition to the criminal case here in New York that I'm sure many of you are aware of involving Hedda, she was the plaintiff in *Nussbaum v. Steinberg* that Betty litigated successfully in Manhattan Supreme Court and the Appellate Division, First Department.<sup>178</sup> Kristin and I wrote an *amicus curiae* brief in that

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<sup>177</sup> 529 U.S. 598 (2000). The Supreme Court found that the Commerce Clause did not grant Congressional authority to regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce" and that VAWA was also unconstitutional under Section 5 of the Fourteenth Amendment. *Id.* at 617.

<sup>178</sup> 618 N.Y.S.2d 168 (Sup. Ct. 1994), *aff'd*, 703 N.Y.S.2d 32 (App. Div. 2000). Hedda Nussbaum, battered companion of Joel Steinberg, who was convicted of killing their illegally adopted 6-year-old daughter, proved that years of his abuse rendered her so incapacitated that the statute of limitations

case and helped to organize law professors around the country on these issues. Now let's hear questions, comments and reactions from members of the audience.

**Nancy Erickson**

Are there any movements in the statute of limitations area? Anything happening there?

**Betty Levinson**

There are, but they're limited. Let me start with New York, which I know best. Both the toll for infancy and insanity are in the same section of the CPLR.<sup>179</sup> In either event, the toll of the statute of limitations extends for ten years past the date of the tort for which there would ordinarily be a one-year statute.<sup>180</sup>

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on her claims against him for assault and other intentional torts was tolled. Ms. Nussbaum argued that the statute of limitations on her claims should be stopped from expiring by section 208 of New York's Civil Practice Law and Rules, which extends the time to sue for persons under a disability due to infancy or insanity. A referee agreed that Ms. Nussbaum had proven "an overall inability to function in society," the standard applied by the New York Court of Appeals to the term insanity in the statute, and thus her civil suit against Mr. Steinberg could go to trial. The Appellate Division, First Department, affirmed the decision. *See also* Cerisse Anderson, *Tolling of Time-Bar Allows Nussbaum to Sue Steinberg*, N.Y. L.J., Mar. 11, 1997, at 1.

<sup>179</sup> *See* N.Y. C.P.L.R. § 201 (McKinney 2003). "An action, including one brought in the name or for the benefit of the state, must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action." *Id.* *See also* N.Y. C.P.L.R. § 203 (McKinney 2003). "The time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed." *Id.*

<sup>180</sup> *Nussbaum*, 703 N.Y.S.2d at 33. The appellate division held:

[t]he evidence adduced at the hearing and credited by the Special Referee amply demonstrated that, during the 10-year period preceding the commencement of this action, plaintiff was unable to protect her legal rights because of an overall inability to function in society, which tolled the one-year Statute of Limitations for



The toll for insanity does not require proof of insanity as understood in its colloquial use. As indicated in the leading case, *McCarthy v. Volkswagen*, you need to show that the person affected has been rendered incapable of functioning in society.<sup>181</sup> In Hedda Nussbaum's case,<sup>182</sup> the special referee who tried the summary judgment hearing on the toll explicitly held that an inability to function can arise for economic reasons. This suggests an expansion of the scope of "nonfunctioning" upon which the toll can be based. Thus, if an abuser impedes his victim's access to their income and assets, and she is financially dependent upon him, and has no funds with which to separate herself and live her own life, let alone the freedom and funds to retain counsel for the purpose of suing him, such can contribute to the "nonfunctioning" justifying a toll. Expanding this definition of "functioning" is definitely helpful.

Theories that have worked in other states either haven't been tried or haven't succeeded in New York. In New Jersey, there is good law based on continuing tort theory.<sup>183</sup> In Idaho, a

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intentional torts pursuant to CPLR § 208.

*Id.*

<sup>181</sup> *McCarthy v. Volkswagen*, 450 N.Y.S.2d 457 (App. Div. 1982) (interpreting the toll for insanity to apply to "those individuals who are unable to protect their legal rights because of an over-all inability to function in society").

<sup>182</sup> *Nussbaum*, 703 N.Y.S.2d at 33. The appellate division held that "[t]he evidence adduced at the hearing and credited by the Special Referee amply demonstrated that, during the 10-year period preceding the commencement of this action, plaintiff was unable to protect her legal rights because of an overall inability to function in society, which tolled the one-year Statute of Limitations for intentional torts pursuant to CPLR § 208." *Id.*

<sup>183</sup> See *Giovine v. Giovine*, 284 N.J. Super. 3, 18 (App. Div. 1995) (holding that a plaintiff "shall be entitled to present proof that she has the medically diagnosed condition of battered woman's syndrome" and is "entitled to sue her husband for damages attributable to his continuous tortuous conduct resulting in her present psychological condition, provided [that] medical, psychiatric, or psychological expert proof to establish[es] that she was caused to have an inability to take any action at all to improve or alter the situation"); *Cusseaux v. Pickett*, 279 N.J. Super. 335, 345 (App. Div. 1994) ("Because the battered-woman's syndrome is the result of a continuing pattern of abuse and violent behavior that causes continuing damage, it must be treated in the

defendant was estopped from asserting a defense of the statute of limitations when his conduct was shown to be the reason the plaintiff refrained from suing him.<sup>184</sup> Estoppel was rejected in New York in *Hoffman v. Hoffman*,<sup>185</sup> where a young plaintiff sued her father and grandfather for childhood sexual abuse. As Judge Ciparick, who now sits on the New York Court of Appeals, functionally said in the *Hoffman* case, “Legislature, do something.”

*Professor Elizabeth Schneider*

I would like to underscore something that Tony said.<sup>186</sup> There is some very good scholarship now, Nancy, on torts and domestic violence. First the Clare Dalton and Jenny Wiggins articles that Tony mentioned.<sup>187</sup> We have an entire chapter on

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same way as a continuing tort”). See also David E. Poplar, *Tolling the Statute of Limitations for Battered Women After Giovine v. Giovine: Creating Equitable Exceptions for Victims of Domestic Abuse*, 101 DICK. L. REV. 161, 186 (1996) (defining a continuous tort as “one inflicted over a period of time; it involves wrongful conduct that is repeated until desisted . . . . A continuing tort sufficient to toll the statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation,” and discussing this doctrine in the context of battered woman’s syndrome).

<sup>184</sup> *Figuroa v. Merrick*, 919 P.2d 1041, 1045 (Idaho Ct. App. 1996) (holding that the defendant was equitably estopped from asserting the statute of limitations defense because his “statements or conduct induced the plaintiff to refrain from prosecuting [the] action during the statutory limitation period.”).

<sup>185</sup> *Hoffman v. Hoffman*, 556 N.Y.S.2d 608, 609 (App. Div. 1990). The court held:

since the plaintiff reached her majority in 1961 and since she is now over 40 years of age, the alleged conduct of the defendants is not actionable unless the defendants are estopped from raising the Statute of Limitations as a defense. As a matter of law, plaintiff has failed to allege sufficient facts, as was her burden, to establish that the action was brought within a reasonable time after the facts giving rise to the estoppel had ceased to be operational.

*Id.*

<sup>186</sup> See presentation of Professor J. Anthony Sebok, *supra* pp. 444-48.

<sup>187</sup> Dalton, *supra* note 62, at 324 (exploring the ways in which abuse-related injuries fit or do not fit into traditional tort categories, discussing how

torts in our casebook, which is in itself pretty amazing.<sup>188</sup> You couldn't have had anything like that ten years ago.

So I think there's a lot written. There are obviously the real life problems that Tony and Betty were talking about, but there are many interesting developments particularly on statute of limitations efforts around the country.

### *Audience Member*

Speaking about legislative changes, I know there are multiple problems with women in non-traditional relationships. These changes would make terms in the law more gender neutral and broaden the definition of family relationships. I wonder if that has really translated into access to legal remedies for non-traditional victims of domestic violence—men, people in same-sex relationships, unmarried partners in family court arenas. I wonder if anybody could speak to that.

### *Kristin Bebelaar*

There's a lot of movement in Albany on a bill to expand the definition of family to include people who live together and are not married among the current definition. This would expand access to family court to those who are now unable to have that access.<sup>189</sup>

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issues of process make it difficult for victims of domestic violence to pursue traditional claims, suggesting some substantive and procedural "fixes" for these difficulties, and addressing the ways in which it is likely that a tort claim by a victim of domestic abuse will be both triggered by, and complicated by, a concurrent, or recently concluded, divorce proceeding); Wriggins, *supra* note 63, at 125 (asserting that as a consequence of the dearth of lawsuits in domestic violence cases, key aims of the tort system such as deterrence and loss-spreading are not achieved, and suggesting a more effective approach to civil liability for domestic violence torts through insurance reforms such as the Domestic Violence Torts Insurance Plan, which challenges the conventional wisdom that intentional torts cannot or should not be insurable).

<sup>188</sup> DALTON & SCHNEIDER, *supra* note 4, at 806-67.

<sup>189</sup> In the 2002-03 term, the State Assembly passed A2235, a bill that expanded the definition of family in the Family Court Act and Criminal

***Patricia Fersch***

The reality right now is that family court is not a vehicle for same-sex couples who experience domestic violence, unless they have another issue—unless they have a child in common.

***Betty Levinson***

There are ways around that, depending upon what remedy you're seeking, as long as you have a cause of action that could go to supreme court. You can always ask for preliminary injunctive relief, which can include an order of protection. In fact, there are cases which I have used and recommended stating that even if you can't go to family court you can attach a TRO to any claim.

***Audience Member***

Have any of you have seen any action around the gender animus legislation in New York City and Westchester that allows a tort action based on domestic violence over a six to seven year period?<sup>190</sup> Of course the problem is that you've got to show

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Procedure Law to include "members of the same family or household." This would include "unrelated persons who continually or at regular intervals reside in the same household or have done so in the past." See State Assemb. A2235, 2003-2004 Reg. Sess. (N.Y. 2003), available at <http://assembly.state.ny.us/leg/?bn=02235> (last visited Apr. 3, 2003).

<sup>190</sup> NEW YORK CITY, N.Y., ADMIN. CODE tit. 8, §§ 8-901-907 (2000), the "Victims of Gender Motivated Violence Protection Act." The statutory language closely follows that of the federal Violence Against Women Act and allows victims of gender-motivated violent acts to sue their attackers. See also Julie Goldscheid & Risa Kaufman, *Seeking Redress for Gender-Based Bias Crimes—Charting New Ground in Familiar Legal Territory*, 6 MICH. J. RACE & L. 265, 271 (2001) (examining state laws provide redress for gender-motivated violence). Recently, a plaintiff whose case against her former fiancé for alleged gender-motivated abuse, brought under the federal Violence Against Women Act, was dismissed because the applicable part of the Act was struck down by the Supreme Court while her case was pending but was allowed to be heard upon refiling in state court under New York City's local

gender animus, but has anybody seen such activity?

*Professor Elizabeth Schneider*

I don't know the answer to that. I've been wondering about that, myself. After *Morrison* held the civil rights remedy of the Violence Against Woman Act unconstitutional, New York City passed legislation to create a local remedy.<sup>191</sup>

Now, the problem is that many cases involving the gender animus requirement under the civil rights remedy of VAWA never got to the merits because of the constitutionality problem. My view always was that once they got past the constitutionality hurdle, there were going to be big problems with the gender animus requirement. My hunch was that rape looks like gender animus to people, but domestic violence does not. That raises questions that go to what Stacy Caplow discussed about unlinking the issues.

That is ironic to me because the whole thrust of my argument in *Battered Women and Feminist Lawmaking* is to put domestic violence back into a much more affirmative gender equality framework.<sup>192</sup> In one of the chapters in that book, written before

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law. *Local Law Applied Retroactively*, 8 CITY L. 64 (2002). The court applied the new law retroactively because the law's intent was to supply a private remedy to the victims of domestic violence and fill a void left by the Supreme Court's opinion. *Id.*

<sup>191</sup> NEW YORK CITY, N.Y., ADMIN. CODE tit. 8 §§8-901-907 (2000). The statute went into effect December 19, 2000, and was enacted because "in light of the void left by the Supreme Court's decision, the Council [found] that victims of gender-motivated violence should have a private right of action against their perpetrators under the Administrative Code." *Id.* In its Declaration of Legislative Findings and Intent, the City Council further described the gravity of the problems faced by victims of gender-motivated violence within the court system and sought "to resolve the difficulty that victims face in seeking court remedies by providing an officially sanctioned and legitimate cause of action for seeking redress for injuries resulting from gender-motivated violence." *Id.*

<sup>192</sup> SCHNEIDER, BATTERED WOMEN, *supra* note 69, at 5-7.

Feminist legal arguments about gender violence have developed from feminist insights about the way heterosexual intimate violence is part of a larger system of coercive control and subordination; this system

*Morrison* was decided, I discuss why I think courts are not going to be very responsive around the gender animus arguments.<sup>193</sup> Frankly, I think those points are still true, even under the New York City formulation of it, even though it's a different formulation.

The point is—that judges still have to interpret the meaning. If a batterer beats a woman and says, “I hate women as a class,” then judges more are likely to see gender animus. If he's just beating her, judges will ask, why does that show gender animus? That's a particular problem of consciousness and sensitivity—an enormous hurdle. That means that lawyers have to explain the systemic, individual and social dimensions of battering, which is very much the framework of our casebook. This is a tremendous educational challenge for judges, for lawyers, for law students, for law professors—for all of us—to put these pieces together and understand battering within this larger social context.

Thank you all for a very stimulating and informative program.

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is based on structural gender inequality and has political roots. The source of insight about the connection between lived personal experience and structural power relations was the notion that “the personal is political.”. . . In the process of lawmaking, feminist ideas about the relationship between violence and gender have been simultaneously transformed, depoliticized, subverted, and contained: the broader link between violence and gender inequality that animated them, has, to a large degree, been lost, or at least undermined.

*Id.*

<sup>193</sup> *Id.* at 188-96. (suggesting that the same social attitudes that have emerged and shaped the law in other domestic violence contexts—private, personal or family issues—are likely to prevent intimate violence from being understood or interpreted by judges as an issue of gender).

