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# ON THE OTHER SIDE OF SILENCE: AFFECTIVE LAWYERING FOR INTIMATE ABUSE

Linda G. Mills†

*If we had a keen vision and feeling of all ordinary human life, it would be like hearing the grass grow and the squirrel's heart beat, and we should die of that roar which lies on the other side of silence.<sup>1</sup>*

## I

### ON THE OTHER SIDE OF SILENCE

Shades of violence and dimensions of abuse penetrate every shared space. An uninvited interruption, a slammed door, a disregarding glance—a spit, a slap, a sock. One afternoon's folly can be next week's destruction. To be pushed may be play, a wrestling match, or abuse. When is rape, rape? Is it the night of the incident, or two years later when the denial lifts and you recall that he forced himself on you despite your pleas to stop?

Violence depends—depends on a mood, an interpretation, a history. It depends on an awareness, a consciousness if you will, that one's experience is *violent*. Denial, often a mediating force in the face of abuse, can be so fierce that it deafens the silence that is screaming. Meanwhile to the observer, to you, there is no silence. You hear only a roaring injustice: systematically, she is robbed of her dignity, deprived of her character, mutilated from heart to bone. You become enraged, possibly even violent yourself. Paradoxically, your denial mirrors hers—a denial so fierce that it deafens the silence that is

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Those who listened and heard the silence in this essay include Linda Durston, Colleen Friend, Julia Heron, Peter Margulies, Laurie Mattenson, Emily Maxwell, Anton Schütz, Louise Trubek, Rose Weber, Mieko Yoshihama, my law and social work students at UCLA, and participants of the Political Lawyering Conference at Harvard Law School held in Gary Bellow's honor in November, 1995. Jane Connors, Frances Olsen, and Marie Victoire Louis were also invaluable to the project, as was a small Ford Foundation grant which facilitated these collaborations. Margret Caruso, Andrew Siff, and Andrew Wisch of the Cornell Law Review were particularly wonderful in sorting out the details and in seeing the big picture. James Rubin deserves my thanks for making available whatever I needed transcontinentally. As for its magic, there is only Passage Sainte Avoye to thank, and the mystery of the silence in my love for Peter Goodrich.

<sup>1</sup> GEORGE ELIOT, MIDDLEMARCH 177-78 (1985).

screaming. She too hears a voice, so loud and so clear, that it silences all the others: This is all I have! This is what I deserve!

Describing her own and other women's histories of domestic violence, Martha Mahoney found that "[w]e resisted defining the entire experience of marriage by the episodes of violence that had marked the relationship's lowest points."<sup>2</sup> Indeed, "the daily reality of the marriages . . . defined most of our memories and retrospective sense of the relationship: these were 'bad' marriages, not ordeals of physical torture."<sup>3</sup> One woman describing her experience of violence explained: "I just thought that . . . in order to be a battered woman you had to be really battered. I mean OK, I had a couple of bad incidents, but mostly it was pretty minor . . . 'violence.' I didn't see myself in that category, as a battered woman at all."<sup>4</sup>

Recent feminist theory has begun to question the utility of relying on currently formulated legal methods to regulate domestic abuse.<sup>5</sup> I am concerned that existing strategies which unilaterally criminalize intimate abuse and which disentangle, and in many cases divorce, the survivor from the battering situation may so exacerbate her denial, and alienate her from her personal history and emotional experience, that she may never obtain the help she needs to free herself from violence.<sup>6</sup> R.J. Gelles and M.A. Straus estimate that *only 14 percent of*

<sup>2</sup> Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 16 (1991).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 16-17. For an astute reading of how the continuum of abuse operates, particularly as it relates to larger problems of power and control within intimate relationships, see Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 537-39 (1992). See generally Martha Minow, *Beyond Universality*, U. CHI. LEGAL F. 115, 130-31 (1989) (arguing that "[t]aking all women seriously should mean respecting women's own conceptions of themselves and their interests").

<sup>5</sup> See, e.g., Christine Littleton, *Women's Experience and the Problem of Transition*, in FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW 261 (Martha Minow ed., 1993); Mahoney, *supra* note 2, at 4-7, 64-71; Schneider, *supra* note 4, at 526-29. Feminists to date have been more engaged in this problem theoretically, than they have in contemplating a practical solution. Indeed, my search of the literature did not reveal any comprehensive proposals for legal reform which respond to the emotional, social, cultural, and political contingencies of battered women who rely on the legal system to interrupt the violence in their lives.

<sup>6</sup> By criminalization strategies, I refer to the efforts by battered women's advocates and policymakers, both nationally and internationally, to implement such legal procedures as preferred arrest. See J. David Hirschel & Ira W. Hutchison, III, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 73, 82, 86 (1992). For a description of preferred arrest policies and prosecution laws, see Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1865-66 (1996); Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853 (1994). For a comprehensive overview of these approaches, see UNITED NATIONS, STRATEGIES FOR CONFRONTING DOMESTIC VIOLENCE: A RESOURCE MANUAL 12-47 (1993) [hereinaf-

battered women<sup>7</sup> who experience "severe" violence ever contact the police.<sup>8</sup> In Sweden, where wife-beating was made a public offense in 1982, only 31 percent of battered women surveyed in 1989 reported that they wanted their batterer arrested.<sup>9</sup> Not only are women not using the strategies made available to them through the legal system, but men too often become more violent, not less, following arrest.<sup>10</sup> Given the critical commonality of battered women's denial, the deeply personal nature of intimate violence, and, most significantly, the paradoxes and exigencies of domestic abuse, I argue in this essay for comprehensive legal reform which forces us to re-formulate our institutional responses to domestic violence, and to imagine new ways of relating to battered women who access those systems. In sum, I propose intervention strategies for battered women that respect interactional structures of relating and provide, above all, opportunities for survivors to develop remedies that respond to their particular needs.<sup>11</sup>

To achieve a restructuring of legal interventions for battered women, the interpretive framework of domestic violence practice must

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ter STRATEGIES FOR CONFRONTING DOMESTIC VIOLENCE]. Other criminalization efforts are described herein. See *infra* part II.B.

7 I am aware that the use of the term "survivor," or other terms not yet imagined, is preferred to the dominant terminology "battered woman," since the latter implies an essentialist or totalizing quality. For further explanation, see Schneider, *supra* note 4, at 529-31. Given that women who experience violence often reject the term battered woman to describe themselves, it is important that we become cognizant of the ways our language constructs an ideology of judgment and exclusion. "Victim" of domestic violence is also inadequate insofar as it fails to capture the strength and sheer determination of battered women who have endured intimate abuse. Even "survivor" is far from perfect, as many women who have experienced domestic violence do not see themselves as having "survived." Given these conflicting realities, I use the terms "battered woman," "survivor," and, to a much lesser extent, "victim," interchangeably, in the hope that I have considered, and included as many women's experiences as possible. I remain on the search for a more competent term to describe the myriad of violent contingencies women endure.

8 RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE: THE CAUSES AND CONSEQUENCES OF ABUSE IN THE AMERICAN FAMILY* 149 (1988). Gelles and Straus in the Second National Family Violence Survey used a national representative sample of women who were married to or cohabiting with their male partners. They examined whether battered women had called the police. Less than three percent of the women who experienced "minor" violence immediately called the police; only fourteen percent of those who experienced beating, choking, and other forms of "severe" violence did so. *Id.*

9 R. Amy Elman & Maud L. Edwards, *Unprotected by the Swedish Welfare State: A Survey of Battered Women and the Assistance They Received*, 14 *WOMEN'S STUD. INT'L F.* 413, 445 (1991).

10 See, e.g., Richard A. Berk et al., *The Deterrent Effect of Arrest in Incidents of Domestic Violence: A Bayesian Analysis of Four Field Experiments*, 57 *AM. SOC. REV.* 698, 698 (1992); Lawrence W. Sherman et al., *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 *AM. SOC. REV.* 680 (1992) [hereinafter Sherman et al., *Crime, Punishment, and Stake in Conformity*]; Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 *J. CRIM. L. & CRIMINOLOGY* 137, 139 (1992) [hereinafter Sherman et al., *The Variable Effects of Arrest*].

11 For an analysis of particularity in feminist legal discourse and systems, see Schneider, *supra* note 4, *passim*.

be radically transformed. This article argues that three theoretical limitations of contemporary domestic violence legal practice prevent battered American women from seeking the services they need to imagine and achieve safety. The first problem is that the legal system isolates, individuates, and intimidates the survivor by conceiving of the rights of and interventions for battered women as abstract, predetermined, and immutable. Second, the law attempts to eradicate violence rather than to understand it in all its complexity, particularly the cultural interpretations of violence which contraindicate essentializing legal interventions and the emotional contingencies of intimate abuse which make it difficult, if not impossible, to legislate fixed methods of response. Third and correlatively, the law fails to approach domestic violence as involving two subjectivities, as existing in a mutual "space in between" intimates.

From this vantage point, I build upon my own experience of teaching students and training practitioners in the techniques of what I have come to term "Affective Lawyering."<sup>12</sup> Affective lawyering involves meeting clients on their own ground in spaces co-created by advocate and client, and formulated on a mutual recognition of distinctly similar, yet uniquely different, emotions. It is a method which assumes that differences between clients and advocates can be transgressed when lawyers recognize and shed their assumptions, fears, and canned solutions. More importantly though, it is a method which demands from advocates working with people who enter the legal system emotionally frightened and politically disempowered, that these "meetings" occur at the "interpersonal" level. Toward this end, affective lawyers understand that progressive advocacy depends on their ability to feel their own impotence in the subtext of their own relational worlds, and on their capacity to acknowledge their powerlessness in the face of lovers, supervisors, opposing counsel, or judges more powerful or seemingly more persuasive than themselves. Affective lawyering, then, demands that lawyers understand their own political and social transformation, not intellectually or ideologically, but rather, through their personal experiences of strength and weakness, passion and melancholy, distance and deprivation in all facets of their lives. Only when advocates begin to do this insightful work, will they

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<sup>12</sup> The only reference I have seen to "affective lawyering" is in Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071 *passim* (1995). Margulies uses the term "affective lawyering" interchangeably with such concepts as access, connection, and voice, contrasting it with other forms of lawyering, such as an instrumental approach. Margulies argues that an affective approach demands that advocates spend "time" with their clients, that they be willing to self-disclose, and that they be attentive to the needs of these interpersonal relationships. Ultimately Margulies argues for what he calls a "contextual approach." *Id.* at 1092-1103. See also *infra* part II.C, for a further explication of Margulies's approach.

have the tools necessary to "crawl inside" their clients and feel, from the inside out, the oppression neither the lawyer nor the client may have the language to vocalize.<sup>13</sup> From this personal work and shared strength, comes the broader based political commitment to act not only on behalf of, or with, the so-called client, but also to build larger coalitions with women or other marginalized groups, which both the advocate and client are now poised to understand together.

In its more limited application to intimate abuse, affective lawyering refers specifically to the need to understand the emotional contours and the subjective and relational structure of violence so as to be able to address it in a sensitive or affective, and hence, concrete and diverse practice. Affective lawyers in the domestic violence context are therefore both cognizant of the differences between themselves and their clients, their own abuse, and the abuse of the battered women before them, and simultaneously capable of finding the shared ground, or space in between, that is, the similarities of the violence they have both endured, which serves to bridge the differences between them.

I argue that an affective method, more than any other political lawyering theory or technique,<sup>14</sup> is critical for responding to the survi-

<sup>13</sup> Only from this perspective can the lawyer realize the strength that is endemic in an argument or strategy that starts with the connection between lawyer and client.

<sup>14</sup> By political lawyering I refer to a genre of several literature, including GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* *passim* (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *YALE L.J.* 2107, 2118-30 (1991); Anthony V. Alfieri, *Speaking out of Turn: The Story of Josephine V.*, 4 *GEO. J. LEGAL ETHICS* 619, 620-28 (1991); Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 *N.Y.U. REV. L. & SOC. CHANGE* 659 (1987-1988); Linda Durston & Linda G. Mills, *Toward a New Dynamic in Poverty Client Empowerment: The Rhetoric, Politics, and Therapeutics of Opening Statements in Social Security Disability Hearings*, 8 *YALE J.L. & FEMINISM* 119 (1996); Louise G. Trubek, *The Worst of Times . . . and the Best of Times: Lawyering for Poor Clients Today*, 22 *FORDHAM URB. L.J.* 1123, 1132-40 (1995); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 *N.Y.U. REV. L. & SOC. CHANGE* 535, 538-40 (1987-1988); Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 *GEO. L.J.* 1961, 1990-2002 (1993); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1, 52-57 (1990); Lucie White, *Theoretics of Practice: The Integration of Progressive Thought and Action: Paradox, Piece-Work, and Patience*, 43 *HASTINGS L.J.* 853 *passim* (1992); Anthony V. Alfieri, *Practicing Community*, 107 *HARV. L. REV.* 1747 (1994) (reviewing GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992)). This movement was kick-started by the pioneering work of Gary Bellow and Bea Moulton, *The Lawyering Process: Materials for Clinical Instruction in Advocacy* (1978). Both feminist and critical race scholars have also proposed political lawyering theories and methods. See, e.g., Marie Ashe, "Bad Mothers," "Good Lawyers," and "Legal Ethics," 81 *GEO. L.J.* 2533, 2536-46 (1993); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 *MINN. L. REV.* 1599, 1646-67 (1991); Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 *HASTINGS L.J.* 749, 749-59 (1992); Angelo N. Ancheta, *Community Lawyering*, 81 *CAL. L. REV.* 1363, *passim* (1993) (reviewing GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992)).

vor's need for flexibility and for helping her work through her personal ways of knowing, being, and relating as she learns to distinguish in her own mind and soul between violence and healthy expressions of intimacy. Affective clinical practices address the survivor in her own emotional space and respond to the specific relationship and subjectivities within which she is to be found. Rather than adopting a normative approach, this postmodern<sup>15</sup> clinical approach respects the survivor's relational structure, and also provides the space, the time, and the fluidity necessary for self-guided resolution. Such a process also recognizes that true empowerment for battered women will be achieved not through obedience to the expectations of lawyers or social workers, but rather through a system which acknowledges that she herself must reconsider and reevaluate the meaning of the violence in a time frame and an environment that supports the fluctuating complexity of her particular circumstance. This Article proceeds in four parts. Part I presents a critique of current legal practices, theories, and methods. Part II maps the existing, and some of the most innovative, legal systems which have emerged transnationally over the past twenty years—institutions that have been designed by feminists and survivors alike to respond to the needs of battered women. Also in Part II, the interactive framework of domestic violence legal practice is explored, particularly as it has been described in the law school clinical literature. Such reflection is important not only because the lawyer-law student/client relationship almost always marks the battered woman's initiation into the legal system, but it also has important implications for the larger politics of domestic violence. Part III draws on theories of institutional violence, and the law and emotion literature, to posit a model of relational, or affective justice, which takes account of the particularities of each battered woman's experience, and begins to imagine a system and a method of relating which can respond more flexibly to the unique complexities that financial, cultural, and emotional contingencies place on the battered woman. Part IV concludes with a proposal for overhauling domestic violence legal practice, combining systemic reform with methods for representing battered women using affective lawyering techniques and drawing from the best institutional and interactional practices being employed today. This comprehensive reform is designed to ensure that all battered women who find the courage to seek assistance from the legal system will be given the opportunity at their own pace, and from their

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<sup>15</sup> By postmodern, I refer to the notion that clinical certainty is neither desirable nor achievable. "The operable assumption here is that legal and social work advocates must abandon clinical postures which claim to 'know' how a battered woman feels and instead adopt a position at least of measured clinical uncertainty." Linda G. Mills, *Empowering Battered Women Transnationally: The Case for Postmodern Interventions*, 41 *SOC. WORK* 261, 262 (1996).

own peculiar cultural and political position, to explore the screaming silence. And for advocates to do the same.

## II

### EXISTING AND INNOVATIVE INTERVENTIONS AND INTERACTIVE FRAMEWORKS FOR TREATING THE PROBLEM OF WOMAN ABUSE

Each year, in the United States alone, at least two million women of all races and classes are physically abused by a spouse or intimate partner.<sup>16</sup> Thus, exceeding childbirth, automobile accidents, muggings, and all other medical emergencies, battery by a spouse or lover is the single most common reason women enter hospital emergency rooms; in fact, one out of three women who use emergency medical services has been battered.<sup>17</sup> Furthermore, in 1993, twenty-seven percent of all violence against women was committed by their lovers or ex-lovers.<sup>18</sup> These statistics suggest that spousal abuse is widespread and that it does not occur exclusively in the home of the "other."<sup>19</sup>

American women are certainly not alone in this regard. A cross-cultural study of family violence found that wife beating occurs in more than eighty-four percent of the ninety societies examined.<sup>20</sup> In Canada and Guatemala, twenty-five to forty percent of women studied had been abused by an intimate partner.<sup>21</sup> In Chile, Colombia, and

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<sup>16</sup> Murray A. Straus & Richard J. Gelles, *Societal Change and Change in Family Violence from 1975 to 1985 As Revealed by Two National Surveys*, 48 J. MARRIAGE & FAM. 465, 470 (1986).

<sup>17</sup> A.H. Flitcraft et al., *Diagnostic and Treatment Guidelines on Domestic Violence*, AM. MED. ASSN. 8 (1992).

<sup>18</sup> DEPARTMENT OF JUSTICE, *Domestic Violence: Violence Between Intimates*, in BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS 1-2 (1994).

<sup>19</sup> For an insightful discussion of the "othering" prevalent in domestic violence discourse, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1258-62 (1991) (describing the efforts of one U.S. senator to sell the Violence Against Women Act of 1991 to elite whites by describing intimate abuse as *not only* a problem in inner cities, but also a problem for urban and rural women). Crenshaw astutely observes:

Rather than focusing on and illuminating how violence is disregarded when the home is "othered," the strategy implicit in Senator Boren's remarks functions instead to politicize the problem only in the dominant community. . . . The point here is not that the Violence Against Women Act is particularistic on its own terms, but that unless the Senators and other policymakers ask why violence remained insignificant as long as it was understood as a minority problem, it is unlikely that women of color will share equally in the distribution of resources and concern.

*Id.* at 1260.

<sup>20</sup> David Levinson, *Family Violence in Cross-Cultural Perspective*, in HANDBOOK OF FAMILY VIOLENCE 435, 443 (Hasselt et al. eds., 1988).

<sup>21</sup> Lori L. Heise et al., *Violence Against Women: The Hidden Health Burden*, 255 WORLD BANK DISCUSSION PAPERS 6-7 (1994) (citing Lori Haskell & Melanie Randall, *The Women's Safety Project: Summary of Key Statistical Findings*, CAN. PANEL ON VIOLENCE AGAINST WOMEN (Ottawa 1993)).



Belgium, the figure ranges from forty-one to sixty percent.<sup>22</sup> In Europe (not including the countries of the former Soviet Union), between twelve and twenty-four million women and girls are subjected to violence each year.<sup>23</sup> Estimates for Sweden, often considered a model country for gender equality, indicate that a woman is battered by a current or former intimate partner every twenty minutes.<sup>24</sup>

Over the past twenty years, feminists and domestic violence advocates alike have fashioned interventions, some more deliberate than others, to address the devastating effects of intimate abuse—effects which had previously been all but ignored.<sup>25</sup> The legal treatment of domestic violence, then, mirrors an evolving consciousness, a realization that men who beat their wives should be given the same legal treatment as men who beat their neighbors. Moreover, it reflects a belief that the criminal justice system should act unequivocally to protect a battered woman from her abuser and that the threat of incarceration will deter future perpetrators from violence.

Transnationally, arrest and prosecution laws, and in this country, civil protection orders, have become the cornerstone of this unyielding response. Recently, the United States and other jurisdictions have augmented these interventions with new strategies designed to increase the effectiveness of restraining orders and prosecution of batterers. Most notable are mandatory or preferred arrest policies when the victim is visibly injured or when there is probable cause to believe a crime has been committed.<sup>26</sup> Some jurisdictions also employ mandatory prosecution or a no-drop policy.<sup>27</sup> Court proceedings and

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<sup>22</sup> *Id.* at 6-7 (citing Soledad Larrain, *Estudio de Frecuencia de la Violencia Intrafamiliar y la Condicion de la Mujer en Chile*, PAN-AM. HEALTH ORG. (Santiago, Chile 1993)); PROFAMILIA, *Enchestrada de Prevalencia, Demografia y Salud*, DEMOGRAPHIC & HEALTH SURV. (Bagata, Chile 1990). See R. Bruynooghe et al., *Study of Physical & Sexual Violence Against Belgian Women*, DEP'T OF SCIENCES HUMAINES & SOCIALES, LIMBURGS UNIV. CENTRUM (Belg. 1989).

<sup>23</sup> UNITED NATIONS WORLD CONFERENCE ON HUMAN RIGHTS, TESTIMONIES OF THE GLOBAL TRIBUNAL OF VIOLATIONS OF WOMEN'S HUMAN RIGHTS AT THE UNITED NATIONS WORLD CONFERENCE ON HUMAN RIGHTS 12 (Vienna, 1993).

<sup>24</sup> Elman & Edwards, *supra* note 9, at 413.

<sup>25</sup> For an overview of these interventions, see LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION (N. Zoe Hilton ed., 1993); Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, JUV. & FAM. CT. J., n.d., 1992, at 3, 48-62. See generally *Symposium on Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY (1992) (reporting views of several authors).

<sup>26</sup> For information regarding the effectiveness of these interventions, see Greg Anderson, Note, *Sorichetti v. City of New York Tells the Police That Liability Looms for the Failure to Respond to Domestic Violence Situations*, 40 U. MIAMI L. REV. 333 (1985); Daniel Goleman, *Do Arrests Increase the Rates of Repeated Domestic Violence?*, N.Y. TIMES, Nov. 27, 1991, at 4.

<sup>27</sup> Mandatory prosecution, often called "No-Drop," is a policy under which a domestic violence prosecution will not be dropped due to victim non-participation in the prosecution's case. This policy can exist in the form of a statement, practice, or protocol. No-Drop policies emphasize that the State, and not the victim, is a party to the action. States that have no-drop policies follow one of two versions of this policy—hard or soft. A hard No-Drop policy does not, in any way, take into consideration the victim's preference to

coordinated responses that provide more sensitive interventions for battered women have also been implemented.<sup>28</sup> The existing and innovative strategies described in this section, and the methods of relating to battered women explored in the next section, have all emerged in response to a growing awareness that we are witnessing gender warfare and that we must take drastic steps to arrest it. They reflect an assumption that violence against women, particularly in intimate relationships, is so rampant, life-threatening, and out of the woman's control that only a system-imposed legal response can adequately address the naked proportions of the problem. Although I do not dispute the exigencies of intimate abuse, I question, in these sections, and in Part III of this essay, the effectiveness of this unidimensional criminal response—all of which provides a launching pad from which to explore my proposal to overhaul the institutional and interactive frameworks of domestic violence policy described in Part IV.

#### A. Criminal Intervention Strategies

Despite the good intentions of some early advocates of criminal response to domestic violence, arrest and prosecution have not proven effective in reducing violence against women in the family. In the short term, mandatory arrest appears to reduce future battering by minor offenders, but to escalate violence by offenders<sup>29</sup> who have previously spent significant time in jail, depending in part on such

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drop the case. In contrast, soft No-Drop policies permit the victims to drop charges under certain circumstances such as after receiving counseling and appearing in front of a judge to explain why they want to drop the charges. As of 1994, four states (Utah, Wisconsin, Florida, and Minnesota) had adopted legislation enacting no-drop policies. See Naomi R. Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 161, 168-69 (Eve S. Buzawa & Carl G. Buzawa eds., 1992); Corsilles, *supra* note 6, at 858-63.

<sup>28</sup> The most famous of the more comprehensive approaches is the Duluth Model. See, e.g., Teri Randall, *Duluth Takes Firm Stance Against Domestic Violence; Mandates Abuser Arrest, Education*, 266 J. AM. MED. ASS'N 1180 *passim* (1991) (describing the model). Other similar projects are described by Demie Kurz, *Battering and the Criminal Justice System: A Feminist View*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 21, 33-35 (Eve S. Buzawa & Carl G. Buzawa eds., 1992). Other efforts have complemented these critical legal strategies. Shelter and other services are available, but still wholly inadequate. See, e.g., Crenshaw, *supra* note 19, at 1262-65 (discussing the inaccessibility of domestic violence support services to many non-English speaking women). Educational campaigns which inform the public about the dangers of domestic violence have been somewhat ineffective. See, e.g., Harold G. Grasmick et al., *Changes in Perceived Threats of Shame, Embarrassment, and Legal Sanctions for Interpersonal Violence, 1982-1992*, 8 VIOLENCE & VICTIMS 44, 313-23 (1993). For a more positive assessment of educational campaigns, see STRATEGIES FOR CONFRONTING DOMESTIC VIOLENCE, *supra* note 6, at 85-96.

<sup>29</sup> Hirschel & Hutchison, *supra* note 6, at 117.

factors as the employment and marital status of the batterer.<sup>30</sup> After six months, even minor offenders tend to abuse again.<sup>31</sup>

Civil protection orders, which enjoin a batterer from further violence or threats, are often cited as helpful tools for American women.<sup>32</sup> Because in most American states they can be used either in conjunction with criminal proceedings or on their own in civil court,<sup>33</sup> protection orders potentially give women the means to fashion their own remedies according to their needs. However, a recent study of women who obtained temporary protection orders found that sixty percent of them experienced physical or psychological abuse in the year following the issuance of the order.<sup>34</sup>

The problem with civil protection orders, prosecution, and arrest policies is that they effectively require women to terminate their abusive relationships. Although on the surface this outcome seems desirable, studies show that battered women who attempt to leave their abusers may be most at risk for more serious attacks by their batterers, and even femicide.<sup>35</sup> Ironically then, criminal strategies which seek to terminate the abuse and hence the relationship through legal interventions may prove more, rather than less, dangerous. Further, recent feminist theory, discussed in Part III, indicates that for women, whether they are battered or not, to terminate relationships involves far more complex action than early advocates of criminal interventions ever thought.

## B. More Innovative Legal/Social Work Strategies

Recently we have witnessed the implementation of several innovations adopted in the United States and other countries that do not rely exclusively on criminal legal strategies, but seek to incorporate alternative legal and also social work methods to respond to the problem of domestic violence. Although, as the following descriptions reveal, these leading innovations may provide a more woman-centered approach, they still fail to incorporate contingent realities that demand a legal response which meets the varying emotional, cultural, and financial needs of battered women. In addition, these innova-

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<sup>30</sup> Berk, *supra*, note 10, at 702-03; Sherman, *Crime, Punishment, and State in Conformity*, *supra* note 10, at 160-61; Sherman, *The Variable Effects of Arrest*, *supra* note 10, at 685.

<sup>31</sup> Sherman, *The Variable Effects of Arrest*, *supra* note 10, at 154, 167.

<sup>32</sup> See, e.g., Susan L. Keilitz, *Civil Protection Orders: A Viable Justice System Tool for Deterring Domestic Violence*, 9 VIOLENCE & VICTIMS 79, 80 (1994).

<sup>33</sup> *Id.* at 80.

<sup>34</sup> *Id.* at 82.

<sup>35</sup> Barbara Hart, *Beyond the "Duty to Warn": A Therapist's "Duty to Protect" Battered Women and Children*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 234, 240-41 (Kersti Yllo & Michele Bograd eds., 1988); Karen Stout, "Intimate Femicide": *Effect of Legislation and Social Services*, 4 AFFILIA 21, 22 (1989).

tions fail to rectify the more subtle problem that any criminal-oriented intervention, innovative or not, unwittingly encourages battered women's advocates and counselors to disempower survivors by robbing them of a critical opportunity to design their own responses to the violence in their lives.<sup>36</sup>

Hawaii, for example, has attempted to address family matters in a more sensitive fashion by adjudicating woman and child abuse, divorce, and juvenile delinquency matters in a unified criminal and civil court. This unified court may administer a more "therapeutic justice" than do traditional courts, but it nevertheless remains limited in its ability to respond to the particular needs of battered women. Among others, Barbara Hart, Legal Director of Pennsylvania Coalition Against Domestic Violence, has argued that revealing spousal abuse in one proceeding, however, may affect a woman's credibility in another family matter (such as child custody) adjudicated by the same court.<sup>37</sup>

In a more tailored but still comprehensive program, Dade County, Florida launched a dedicated Domestic Violence Court in November, 1992. The Dade County court considers criminal aspects of woman and child abuse exclusively. In doing so, it incorporates some social work methodologies and is woman-centered in that it recognizes domestic violence as a problem of "male power" in our society. The court strives to stop the violence, protect the victim and her children, make the offender accountable, and make treatment available as needed.<sup>38</sup> This court also represents institutional progress, although I would argue that this dedicated court would be even more effective were it to provide administrative and civil as well as criminal remedies.

Like Dade County's dedicated Domestic Violence Court, the Winnipeg Family Violence Court in Winnipeg, Canada hears only cases of child, spouse, and elder abuse.<sup>39</sup> A study of the court's effectiveness during its first two years concentrated on the program's stated goals, namely processing cases within three months, reducing case attrition before sentencing, and imposing more appropriate sentences on abusers.<sup>40</sup> The study found that the average processing time was close to the three-month goal (2.8 months in the first year and 3.5 months in the second year).<sup>41</sup> It also found, however, that woman abuse cases were slightly less rigorously prosecuted, perhaps because newly insti-

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<sup>36</sup> For a more thorough discussion of this problem, see *infra* part III.

<sup>37</sup> See generally Unified Courts: A Preliminary Discussion (minutes of June 1, 1993 conference at Palmer House, Chicago).

<sup>38</sup> U.M. Alums, *Help Stop the Violence*, 48 BARRISTER: U. MIAMI SCH. L. ALUMNI MAG. 8-10 (1993).

<sup>39</sup> E. Jane Ursel, *The Winnipeg Family Violence Court*, 14 STAT. CAN. 1 (1994).

<sup>40</sup> *Id.* at 2.

<sup>41</sup> *Id.* at 8.

tuted mandatory arrest and prosecution policies often result in weak evidence and in complainants reluctant to proceed.<sup>42</sup> Changes in sentencing practices in the Winnipeg Family Violence Court have also resulted in higher rates of incarceration and in higher percentages of offenders being sent to batterer or alcohol treatment programs.<sup>43</sup>

Sao Paulo, Brazil offers yet another approach to draw women into the legal system. This model is similarly important to consider in developing a truly comprehensive solution to the problem of domestic violence. As background, it is important to note that Brazil is the first country in the world to target domestic violence in its national constitution; in 1988 Brazil required its state governments to "suppress violence within the family."<sup>44</sup> Sao Paulo has translated this strong ideological stance into forty-one women-staffed police stations, including female investigators and jailkeepers, dedicated solely to crimes against women.<sup>45</sup> Officers investigate women's reports of assault, battery, and sex crimes, and social workers help with non-legal needs.<sup>46</sup> Since the institution of these programs, complaints of woman abuse have skyrocketed,<sup>47</sup> signifying that many women think these police stations are helpful.<sup>48</sup>

Two other programs, one in Hamilton, New Zealand, and the other in Duluth, Minnesota, also employ groundbreaking and more comprehensive approaches to combatting domestic violence. Both provide integrated legal and social services for the victim and the batterer. The program in Hamilton, New Zealand, uses a coordinated multi-agency approach, monitoring the consistency of police, corrections, court, and shelter responses.<sup>49</sup> In addition, it provides educational programs for abusers and support services for battered

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<sup>42</sup> *Id.* at 11-12.

<sup>43</sup> *Id.* at 12.

<sup>44</sup> CONSTITUICAO FEDERAL [Constitution] tit. VIII, ch. VII, art. 226, para. 8 (Braz.).

<sup>45</sup> Luiza Nagib Eluf, *A New Approach to Law Enforcement: The Special Women's Police Stations in Brazil*, in FREEDOM FROM VIOLENCE: WOMEN'S STRATEGIES FROM AROUND THE WORLD 199, 204-05 (Margaret Schuler ed., 1992).

<sup>46</sup> *Id.* at 205-08.

<sup>47</sup> *Id.* at 205.

<sup>48</sup> The institution of women's police stations may be a way of making the criminal justice system more accessible to some women and seems an advisable policy decision. Similar proposals have been made for the Navajo Nation. See, e.g., James W. Zion & Elsie B. Zion, *Hozho' Sokee'—Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407, 425-26 (1993) (arguing that to address domestic violence, Navajos should identify and rethink their traditional values and develop responses accordingly). Zion and Zion suggest, for example, relying on clan relatives' homes as "natural" safe-houses for battered women and recommend using family members as probation officers. A program in Wisconsin using lay advocates who assist in petitioning the court for protection, accompany victims to court, and attend divorce hearings with battered women, is another innovation. See Trubek, *supra* note 14, at 1125.

<sup>49</sup> Memo from Hamilton Abuse Intervention Project ("HAIP") (Jan. 18, 1995) (on file with the *Cornell Law Review*).

women.<sup>50</sup> Special efforts to reach native Maori women and children make this program a useful model for replication in working to address domestic violence in cross-cultural contexts.

The comprehensive program in Duluth, Minnesota, uses a combined criminal and therapeutic model and operates in three stages: police are instructed to arrest batterers rather than tell them to "take a walk and cool off"; representatives from battered women's shelters and batterers' treatment programs are dispatched to talk with the parties immediately after the arrest; and batterers are often ordered by courts to undergo treatment as an alternative to serving time in prison.<sup>51</sup> Researchers evaluating Duluth's program found that since its introduction in 1981, conviction rates in domestic assault cases have significantly increased, the number of women filing for protection orders has tripled, and the number of batterers brought back into court for failure to comply with civil or criminal court orders has risen tenfold.<sup>52</sup>

Taking all the evidence together, it appears that harsher or even more comprehensive criminal-oriented policies are not the panacea feminists hoped they would be. Sweden, as mentioned previously, made wife beating a public offense in 1982, but in 1989 only thirty-one percent of the women in a study conducted at shelters wanted their batterers arrested.<sup>53</sup> In England, too, "[t]he criminal law is punitive, rather than rehabilitative. It looks to past conduct and is rarely concerned with future behavior."<sup>54</sup> If recent homicide statistics are an indication of whether or not prevalent or innovative approaches to domestic violence are working, it appears that current interventions serve to protect men against violence at the hands of women, but do not effectively protect battered women against the violence of men. That is, while the number of women who have killed their male partners has declined, men are killing their female partners at the same rate as before.<sup>55</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> Randall, *supra* note 28, at 1180, 1183.

<sup>52</sup> *Id.* at 1180.

<sup>53</sup> Elman & Edwards, *supra* note 9, at 415.

<sup>54</sup> Jane Connors, United Nations Fourth World Conference on Women Background Paper on Violence Against Women 79 (1994) (unpublished manuscript, on file with the author).

<sup>55</sup> See Angela Browne & Kirk R. Williams, *Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides*, 23 LAW & SOC'Y REV. 75, 91 (1989) (comparing homicides in 1980-84 with those in 1967-79). That any battered woman is still driven to kill her batterer, however, raises questions regarding the efficacy of current interventions allegedly designed to protect her from violence. See Evan Stark & Anne Flitcraft, WOMEN AT RISK: DOMESTIC VIOLENCE AND WOMEN'S HEALTH 130-131 (1996) for a brief explanation of victim precipitated homicide.

Aspects of the Hawaii Unified Court, the Dade County Domestic Violence Court, and the Winnipeg Family Violence Court do provide promise for re-thinking domestic violence policy which has heretofore focused exclusively on traditional criminal interventions. More specifically, these courts have the potential to reduce the stigma faced by battered women who choose to stay in their relationships, in that these courts provide not only criminal but civil and other, including therapeutic, remedies for addressing intimate abuse. In addition, programs like the women's police stations in Sao Paulo and the multi-agency efforts in Duluth, Minnesota, and Hamilton, New Zealand have all proven useful for helping women to better cope with the violence in their lives. And yet, research reveals that a comprehensive response to domestic violence, one that combines criminal legal strategies with more affective or empowerment oriented interventions, could go significantly further to reduce the occurrence of woman abuse.<sup>56</sup> Before proceeding to the theoretical and practical underpinnings of this new system, I will first explore how current and innovative interactive frameworks have come to influence domestic violence practice.

### C. Current and Innovative Interactive Frameworks for Working with Battered Women in Domestic Violence Practice

A recent survey of shelter counselors reveals that those who believed that male abusers were 100% responsible for the violence between intimates advocated that a battered woman who decided to remain married should be encouraged to change her decision and leave her abusive partner;<sup>57</sup> these self-identified feminist advocates believed that because a batterer is incapable of breaking the cycle of battering, the survivor's only hope of safety was to leave.<sup>58</sup> In sharp contrast, another study, which interviewed battered women on the status, over time, of their abusive relationships, revealed that theories of learned helplessness which characterize the survivor as undecided,

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<sup>56</sup> See Larry L. Tiff, BATTERING OF WOMEN: THE FAILURE OF INTERVENTION AND THE CASE FOR PREVENTION 133-35 (1993); see also David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION, *supra* note 25, at 127. Ford and Regoli essentially argue that one of the most effective means of preventing future violence in an intimate relationship is to allow the battered woman to make choices in the prosecution process (i.e., whether to drop charges). *Id.* at 159-60; see also Littleton, *supra* note 5, *passim* (providing an interesting explication of the role of empowerment in mandatory prosecution policies).

<sup>57</sup> A. Jay McKeel & Michael J. Sporakowski, *How Shelter Counselors' Views About Responsibility for Wife Abuse Relate to Services They Provide to Battered Women*, 8 J. FAM. VIOLENCE 101, 107 (1993).

<sup>58</sup> *Id.*; Crenshaw, *supra* note 19, at 1262-65 (describing shelter counselors in particular, and the battered women's movement in general, as rigid and inflexible, particularly in their approach to women of color).

weak, confused, and defenseless are inaccurate.<sup>59</sup> This study suggests that the majority of battered women do indeed take actions to end the violence in their lives and that helping professionals "need not be frustrated if it does not happen instantaneously."<sup>60</sup> These researchers observe: "In spite of serious physical and emotional problems resulting from abuse and the grief of a significant relationship in serious jeopardy, most women are able to either leave the abuser or find ways to make the current relationship nonviolent."<sup>61</sup>

In legal discourse, Christine Littleton recently challenged advocates to reject prevailing views of battered women as helpless, and instead suggested that we construct a new feminist interpretation of a survivor's experience by "believing women's own accounts, rather than by asking them to fit into pre-existing legal categories."<sup>62</sup> Viewing battered women as the powerful survivors they are, Littleton suggests that the legal system be reformed to take account of the contradictory feelings inherent in battering: battered women's emotional connection with and attachment to their abusive partners should be respected in legal doctrine and practice when designing interventions which protect them from the dangers posed by battering.<sup>63</sup>

Given the reality that so few battered women seek assistance, and that those who do may be easily deterred from using those strategies again should they fail,<sup>64</sup> it seems critical that when and if battered women do seek assistance, legal practitioners, shelter counselors, and social workers be prepared for the conflicting emotional contingencies they are likely to encounter. What do law professors and practitioners currently advocate in the way of domestic violence theory and practice? In this section I draw on the work of Joan Meier, Ann Shalleck, Peter Margulies, and Susan Bryant and Maria Arias to explore and critique how the interactional structure of domestic violence practice has been conceptualized thus far.

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<sup>59</sup> Jacquelyn Campbell et al., *Relationship Status of Battered Women Over Time*, 9 J. FAM. VIOLENCE 99 (1994).

<sup>60</sup> *Id.* at 110.

<sup>61</sup> *Id.* at 109-10.

<sup>62</sup> Littleton, *supra* note 5, at 267. I have made a similar argument in *Empowering Battered Women Transnationally: The Case for Postmodern Interventions*, *supra* note 15. Schneider, *supra* note 4, at 548-49, makes a similar argument suggesting that none of the images of battered women as victims or provocateurs are accurate depictions of women who are involved with abusive men. Moreover, such images ignore the reality that intimate abuse is a form of oppression.

<sup>63</sup> Littleton, *supra* note 5, at 269-72.

<sup>64</sup> See, e.g., Cynthia G. Bowman, *The Arrest Experiments: A Feminist Critique*, 83 J. CRIM. L. & CRIMINOLOGY 201, 204 (1992) (arguing that battered women may be deterred from making reports if their interaction with the system was unsuccessful).



Ann Shalleck in *Clinical Contexts: Theory and Practice in Law and Supervision*<sup>65</sup> describes supervising students in a domestic violence case that arose in the course of a law school clinic.<sup>66</sup> While much of the focus of her article is on the challenges posed by clinical supervision, it nevertheless provides insight into how one law school (American University), and possibly others,<sup>67</sup> supervise law students who provide services to battered women.

I have to admit that Shalleck's account of her students' representation of their client, Jessica Green, made me shudder.<sup>68</sup> The students were, in some instances, wholly unprepared to represent a battered woman. For example, they were legally and emotionally ill-equipped to deal with the restraining order hearing they attended on Mrs. Green's behalf.<sup>69</sup> They seemed taken aback by the extent of the judge's wrath and his impatience, which to an experienced lawyer representing battered women would not be at all surprising.<sup>70</sup> I too have both law and social work students working with battered women and,

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<sup>65</sup> Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109 (1994).

<sup>66</sup> Although it is not absolutely clear whether this case was a case Professor Shalleck actually supervised, one can surmise that it is because Shalleck wrote that the article drew upon "the traditions of, and [her] own experiences within, the clinical community in order to describe one vision of clinical supervision." *Id.* at 111.

<sup>67</sup> *Id.* at 109, 111-12. The author acknowledges the numerous people who conspired on her project and conferences she attended from which she drew her conclusions.

<sup>68</sup> In part, the description Shalleck provides inspired me to write this Article. Shalleck describes how the students make numerous errors in representing Ms. Green in court, errors which might have been remedied by a more experienced lawyer, given the nature of the judge hearing the proceeding. Should not a battered woman, though, whose very life may depend on her lawyer's persuasiveness, skill, and understanding of institutional practices be represented by no one less than the best? Cunningham's article *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989), raises a similar problem. Cunningham's case which he calls "the Silenced Lawyer," involves a federal prisoner and his student representatives. *Id.* at 2465-69. In that case, the client "fires" the students on the grounds that they failed to heed his claim that his case was a broad constitutional challenge to the validity of the entire prison system—not the narrow due process notice claim they had constructed. *Id.* at 2466-68. The worry is that the dissatisfied battered woman, unlike the federal prisoner, is unlikely to express her dissatisfaction with the representation she is receiving, given the already overwhelming circumstance in which she is ensnared. Indeed, the articles of Susan Bryant & Maria Arias, *Case Study: A Battered Women's Rights Clinic: Designing a Clinical Program Which Encourages a Problem-Solving Vision of Lawyering that Empowers Clients and Community*, 42 WASH. U. J. URB. & CONTEMP. L. 207, 219-20 (1992) and Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1343-47 (1993), document the passivity battered women express when they decide not to follow students' advice and do not take legal action: they either do not call or do not show up.

<sup>69</sup> See Shalleck, *supra* note 65, at 123-36.

<sup>70</sup> It is interesting to note that the student's ignorance during the court proceeding appeared to help them "get away with" lapses and pauses for which more experienced attorneys would have been admonished. *Id.*

in some instances, representing them.<sup>71</sup> For this reason, Shalleck's retrospective account of the mistakes students made and the process of learning and doing lead me to reflect on who should be allowed to work with battered women, and with what training.

Shalleck's clinic seemed to provide little in the way of specialized training for students working with battered women. Although it appears from her account that the clinic amply provided legal training, it provided little or no information on the unique situation of battered women or the diversity of their reactions to violence.<sup>72</sup> Given this limited training, it is not surprising that Shalleck's students seemed overly focused on legal remedies,<sup>73</sup> rather than on developing a relationship with their client, which would provide the seeds for discussing what legal or non-legal recourse she might need.

My informal study of survivors, which involves supervision of students who assist battered women in obtaining legal remedies such as restraining orders through a Restraining Order Clinic and my ten years experience representing Social Security disability claimants who often had abuse histories, reveals that most battered women do not know what legal relief they desire, nor do they understand their "legal" or "non-legal" options. Indeed, Shalleck's clinic students were so overly focused on proffering legal remedies, they never contemplated how Jessica Green felt when confronted with a judge who was unsympathetic both to her need for support and her need to remain housed with her children in the family residence.<sup>74</sup> Nowhere in Shalleck's article does she describe how the student representatives explored with Mrs. Green the abuse she had endured at the hands of this judge, a man who minimized and marginalized the violence her husband had inflicted.<sup>75</sup> Instead, the clinical supervision focused only on how to get the legal relief Mrs. Green had originally sought, and on how to help the students recover from their courtroom trauma—the loss *they* felt when the judge denied their request for Mrs. Green's support.<sup>76</sup>

A related problem, and one which should be avoided in other clinics doing domestic violence work, occurred when the students in Shalleck's clinic were not given a prior supervisory meeting before in-

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<sup>71</sup> I teach a Social Advocacy course in domestic violence which is offered to both Law and Social Work students. Students assist clients in getting restraining orders at a Restraining Order Clinic in Santa Monica, California. Several of us at UCLA Law School are also in the process of developing a domestic violence clinic, which will include my course and the legal and clinical tenets I espouse.

<sup>72</sup> See Shalleck, *supra* note 65, at 113-36.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 126-36.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 113-36.

terviewing their client.<sup>77</sup> Having asked countless law students, recent graduates,<sup>78</sup> and law professors about their views on domestic violence, particularly on such questions as "How many believe a battered woman should leave her abuser?" and "How many believe a battered woman is wrong if she stays in an abusive relationship?", it is abundantly clear that students, lawyers, and law teachers all come to this work with far too many unfounded and uninformed assumptions—about victims (such as believing the victim is "wrong" if she stays), perpetrators, and the violence in their own lives—to be able to interview battered women without extensive classroom and individual training sessions. In many cases victims have no idea whether it is legal action they want to take. Many of those who arrive at clinics or seek legal assistance through legal services offices are making preliminary inquiries to determine if it is "a safe place" to talk.<sup>79</sup> In this regard, these initial interactions may very well be the one and only chance the advocate has to entice a battered woman to seek any kind of help, even if that help comes in the form of dialogue.

Joan Meier overcomes the limitations of Shalleck's clinical attitude, and our collective naivete on the complexities of domestic violence, by using a team teaching approach to supervising students in domestic violence cases.<sup>80</sup> Meier, a law teacher, works with a psychologist to train students on psychological counseling techniques to be used in client interviews. These techniques help students to dig beneath the surface of the battered woman's narrative, to understand the subtext, and to decode the emotional and cultural micro and meta messages. The students then use what they decipher to propose alternative strategies with which the battered woman might be comfortable. Meier, enthusiastic about the team teaching approach, specifically describes the need for such an approach to enable students to respond more appropriately to clients, and to aid, for example, in overcoming student's dialogic paralysis in cases where the horrors of one woman's story would render the psychologically untrained student speechless.<sup>81</sup>

In my view, Meier's enthusiasm for a dual legal/psychological approach is tempered by her limited view of the lawyer's institutional

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<sup>77</sup> *Id.* at 113, 137.

<sup>78</sup> I have presented these questions to numerous students in both social work and law classes at UCLA and at Cardozo Law School classes. In addition, I have had extensive discussions with groups of graduates from Harvard Law School, Boalt Hall School of Law, Harvard School of Public Health, and law and social work professors in a training course on domestic violence and child abuse.

<sup>79</sup> I have found this to be the case based on my experience supervising students working with battered women and representing battered women on Social Security disability claims myself.

<sup>80</sup> See Meier, *supra* note 68, at 1322-66.

<sup>81</sup> *Id.* at 1337.

capacity. She specifically argues that "law students need a meaningful conception of the lawyer's role in order to productively incorporate the insights of psychology into that role."<sup>82</sup> And she assumes "[a]t root, the lawyer's role is to act as an advocate for the client vis a vis other people and institutions in the world."<sup>83</sup> In sharp contrast, Meier argues, "[t]he therapist's role is characterized primarily by his or her limitation to private, confidential communication only with the patient, as a supportive listener in an isolated one-on-one interaction, without communication or advocacy in the larger world on the patient's behalf."<sup>84</sup> The lawyer, Meier concludes, cannot be both.<sup>85</sup> I disagree. I am arguing that advocates for battered women have a responsibility to draw from psychoanalytic theory and practice to relate to clients affectively, and to create interactional structures which dismantle patriarchal forms of dialogue that the traditional and even progressive lawyer-client relationship has habitually mirrored.

Peter Margulies diverges from Meier's more limited conception of the lawyer-client relationship by proposing a domestic violence practice which recognizes a contextual approach.<sup>86</sup> The core elements of his "affective" model of the lawyer-client relationship in domestic violence cases are access, connection, and voice.<sup>87</sup> He is particularly concerned that these practices be adopted in legal services programs and that domestic violence becomes integral to the poverty law tradition. To ensure battered women have access to legal clinics, Margulies recommends that survivors be given different income and asset standards from other clients. He argues that they should be represented if they have either income or assets no greater than twice the poverty level.<sup>88</sup> He also encourages advocates for battered women's causes to join the boards of legal services programs, and to lobby government and foundation funders to ensure that adequate allocations are made for representing battered women.<sup>89</sup> In addition, he recommends that legal services offices develop branch offices at sites where battered women are likely to present themselves.<sup>90</sup>

Connection, in contrast to access, involves concepts such as "mutuality," "care," and "empathy"<sup>91</sup> between the lawyer and client, mak-

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<sup>82</sup> *Id.* at 1360.

<sup>83</sup> *Id.* at 1361.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1359-66.

<sup>86</sup> Margulies, *supra* note 12, at 1092-1103.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1093.

<sup>89</sup> *Id.* at 1093-94.

<sup>90</sup> *Id.* at 1094.

<sup>91</sup> Empathy has been a topic of much concern to the progressive lawyering community, generating debate on its merit in practice. Few, if any, legal academics believe in it

ing the lawyer's work more rewarding and making the client feel more willing to offer information helpful to her case.<sup>92</sup> According to Margulies connection also means crossing professional boundaries, such as transporting clients as social workers do, or taking clients through emotional crises in a manner expected of a therapist.<sup>93</sup>

Third, and finally, Margulies argues for a space for client voice, which translates into ideas such as "solidarity" and "participation."<sup>94</sup> This commitment to voice requires lawyers to help clear the way for the possibility of consciousness raising, especially among poor women, or women of color, who are battered and who may need similarly situated women to help them make important decisions regarding the violence in their lives.<sup>95</sup> Margulies recommends pursuing this consciousness raising through peer support groups and through one's connection with an affectively oriented lawyer.<sup>96</sup> Voice for Margulies also places a responsibility on lawyers to provide clients with enough information about their legal options so that their participation in legal and nonlegal decisionmaking is meaningful.<sup>97</sup>

However progressive Margulies seems to be in conceptualizing a broader emotional role for lawyers in domestic violence, he nevertheless stops short of encouraging battered women's advocates, that is, law students or lawyers, from reflecting more personally on how they themselves have experienced the violence they will witness in their clients' lives and how those experiences affect the connection between affectivity and countertransference.<sup>98</sup> In this regard, Margulies

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unconditionally. Those that tend to be more receptive include: LOPEZ, *supra* note 14, at 101-02; Lucie E. White, *Seeking ". . . The Faces of Otherness . . .": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499 (1992). Those who find it a useless or even harmful practice include: Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989).

<sup>92</sup> Margulies, *supra* note 12, at 1094.

<sup>93</sup> *Id.* at 1094-95.

<sup>94</sup> *Id.* at 1098.

<sup>95</sup> *Id.* 1099-1100.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1100.

<sup>98</sup> Countertransference, of Freudian origin, is well-recognized in contemporary psychoanalytic theory and practice, and refers to an awareness that "[y]ou can exert no influence if you are not susceptible to influence . . . . The patient influences [the analyst] unconsciously . . . . One of the best-known symptoms of this kind is the countertransference evoked by the transference." ANDREW SAMUELS, *THE PLURAL PSYCHE: PERSONALITY, MORALITY AND THE FATHER* 147 (1989) (quoting CARL G. JUNG, *THE PRACTICE OF PSYCHOTHERAPY: ESSAYS ON THE PSYCHOLOGY OF THE TRANSFERENCE AND OTHER SUBJECTS* para. 163 (Herbert Read et al. eds. & R.F.C. Hull trans., 2d ed. 1966)).

Carl Jung describes the process more elaborately as follows:

Between doctor and patient, therefore, there are imponderable factors which bring about a mutual transformation. In the process, the stronger and more stable personality will decide the final issue. I have seen many

seeks results without process, effects without means. He does not call for a radical restructuring of the interactive framework of the advocate-survivor relationship, which would reflect a balancing of power, a relinquishing of the "I know more" structure which characterizes even the most progressive attorney-client relationships.<sup>99</sup>

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cases where the patient assimilated the doctor in defiance of all theory and of the latter's professional intentions—generally, though not always, to the disadvantage of the doctor.

The stage of transformation is grounded on these facts, but it took more than twenty-five years of wide practical experience for them to be clearly recognized. Freud himself has admitted their importance and has therefore seconded my demand for the analysis of the analyst.

What does this demand mean? Nothing less than that the doctor is as much "in the analysis" as the patient. He is equally a part of the psychic process of treatment and therefore equally exposed to the transforming influences. Indeed, to the extent that the doctor shows himself impervious to this influence, he forfeits influence over the patient; and if he is influenced only unconsciously, there is a gap in his field of consciousness which makes it impossible for him to see the patient in true perspective. In either case the result of the treatment is compromised.

The doctor is therefore faced with the same task which he wants his patient to face—that is, he must become socially adapted or, in the reverse case, appropriately non-adapted. This therapeutic demand can of course be clothed in a thousand different formulae, according to the doctor's beliefs. One doctor believes in overcoming infantilism—therefore he must first overcome his own infantilism. Another believes in abreacting all affects—therefore he must first abreact all his own affects. A third believes in complete consciousness—therefore he must first reach consciousness of himself. The doctor must consistently strive to meet his own therapeutic demand if he wishes to ensure the right sort of influence over his patients. All these gniding principles of therapy make so many ethical demands, which can be summed up in the single truth: be the man through whom you wish to influence others. Mere talk has always been counted hollow, and there is no trick, however artful, by which this simple truth can be evaded in the long run. The fact of being convinced and not the thing we are convinced of—that is what has always, and at all times, worked.

Thus the fourth stage of analytical psychology requires the counter-application to the doctor himself of whatever system is believed in—and moreover with the same relentlessness, consistency, and perseverance with which the doctor applies it to the patient.

CARL G. JUNG, *THE PRACTICE OF PSYCHOLOGY: ESSAYS ON THE PSYCHOLOGY OF THE TRANSFERENCE AND OTHER SUBJECTS* paras. 164-167 (Herbert Read et. al. eds. & R.F.C. Hull trans., 2d. ed. 1966).

<sup>99</sup> Margulies comes closest to recognizing a shared history between lawyer and client in *Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate and Other Dichotomies of Poverty Law*, 3 U. MICH. J. GENDER & L. 1996 (manuscript at 13-24, on file with the author). However, I believe he still falls short of recognizing the need for reflection on personal experience as a means of transgressing emotional boundaries, a process beneficial to both lawyer and client. That lawyers should, in appropriate circumstances, actually disclose their history of abuse to the clients and reveal their potential enmeshment in the clients' care, and that together they emerge with the clients' truth, goes beyond Margulies' proposal of "getting personal" in that, what I suggest is that the lawyers themselves, not only the clients, "get personal."

Susan Bryant and Maria Arias describe starting a Battered Women's Rights Clinic at CUNY Law School,<sup>100</sup> a public interest institution uniquely committed to producing public interest attorneys. Three themes form the cornerstone of the relationship between the law student and the battered woman that Bryant and Arias aim to achieve: close attention to the diversity of client groups, the importance of practicing to "empower" battered women, and "the value of education, as well as advocacy, in the lawyer's role."<sup>101</sup> The first theme forces students to recognize the race, class, and cultural diversity of any given client and to understand how that diversity influences both the client herself and the advisability of more systemic solutions.<sup>102</sup> Whether the client has financial resources, for instance, must be considered when contemplating the client's options and decisions. Whether the client has a supportive family will also influence what action a battered woman should take. And recognizing diversity enables students to ask African-American clients, for example, how popular images of African-American men as violent hinder their institutional or formal options.

The second theme focuses the advocate's attention on what the battered woman wants from the lawyer or the legal system.<sup>103</sup> To empower clients, according to Bryant and Arias, is to allow them to make their own decisions, to take whatever action they feel comfortable taking. The idea is to develop "a vision of the lawyer as a problem-solver who works with people rather than makes choices for people."<sup>104</sup>

Finally, Bryant and Arias emphasize the need to ensure that students understand that serving battered women extends well beyond litigation and demands their simultaneous involvement in nonlitigation strategies.<sup>105</sup> Legislative advocacy and other group-oriented work is their recommended focus.<sup>106</sup> Although I find Bryant and Arias's attention to diversity and empowerment a critical component of any domestic violence practice, I believe it fails to go far enough. Using their approach, lawyers and law students are relatively free to structure their relationship with a battered woman without reflecting on how their own experiences in violent relationships may influence the choices they subtly encourage their clients to make.

Of all the advocates and academics writing on this topic, only Joan Meier and Martha Mahoney are cognizant of the importance of a self-reflective response when representing battered women. Drawing

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<sup>100</sup> Bryant & Arias, *supra* note 68.

<sup>101</sup> *Id.* at 215.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 216.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

from psychoanalysis's concept of "countertransference,"<sup>107</sup> Meier underscores the importance of recognizing how professionals' own personal histories may affect their response to their clients, and of realizing the importance of encouraging advocates to understand "the personal dimensions of their own responses to their client and those of other players in the case."<sup>108</sup> Unfortunately, as noted earlier, Meier's conception of countertransference is as limited as her conception of the role of psychology in law.<sup>109</sup> For Meier, countertransference was not a topic of general interest and application addressed in class, but rather an issue law students grappled with in individual supervision.<sup>110</sup> Indeed, Meier does not encourage law students or lawyers in any categorical, or general, sense to use the usual methods of peer support or professional supervision to cope with and understand countertransference. Instead, she recommends a less proactive, self-reflective, personal, non-public approach.<sup>111</sup>

Martha Mahoney's work, however, encourages a different conception of self-reflection, one which is particularly useful in exploring the emotional and cultural interpersonalities of domestic violence. Mahoney encourages practitioners to reflect on the legal images of battered women and to tear away the "othering" assumptions which separate advocates from clients, lawyers from survivors, and law students from battered women.<sup>112</sup> In this regard, her work is specifically designed to dispel myths that battered women are different from ourselves, that they are dysfunctional, helpless, and dependent—images which prevent all women from identifying "ourselves and our experience as part of a continuum of power and domination affecting most women's lives."<sup>113</sup> Mahoney argues persuasively that the work must center on transforming

legal and social images of women [which] will in turn affect women's experience and understanding of our lives, allowing women to recognize our experience as part of a larger system of subordina-

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<sup>107</sup> See *supra* note 98 (providing further explanation of this concept).

<sup>108</sup> Meier, *supra* note 68, at 1349.

<sup>109</sup> See *supra* text accompanying notes 82-85.

<sup>110</sup> Meier, *supra* note 68, at 1355. The reason countertransference is a cornerstone of psychoanalytic practice, and should be to legal practice, particularly in domestic violence cases, is that it affects everyone. The idea is that any interaction between client and lawyer, lawyer and judge, and even friend and friend can evoke a personal memory or reaction, which in turn colors, clouds, or infringes upon the story of the other.

<sup>111</sup> *Id.* at 1354-56. This, in my view, only reinforces the status quo which represses personal experience and feeling in legal discourse and interaction. I am suggesting that we must free not only those willing to express their abuse histories, or those whose stories reveal themselves, but also those who repress their memories. This can only be accomplished by recognizing the power and pervasiveness of countertransference in a systematic and public way.

<sup>112</sup> Mahoney, *supra* note 2, at 10-19.

<sup>113</sup> *Id.* at 93.



tion so that we can structure our understanding of our needs in relation to those of other women facing oppression.<sup>114</sup>

There is much to learn and to explore from the work of Professors Shalleck, Meier, Margulies, Arias, Bryant, and Mahoney. Access, voice, connection, diversity, empowerment, and self-reflexivity are the key underpinnings of an affective model for working with battered women. In the next section, these themes form the basis of my exploration and critique of the dominant interpretive and interactive framework of domestic violence. Also in that section, I explore how a new, more dynamic juridical approach can emerge from this history and experience.

### III

#### DOMESTIC VIOLENCE DISCOURSE AND POLICY: AN ARGUMENT FOR RELATIONAL NOTIONS OF JUSTICE

In this part I will argue that criminal interventions—even the most innovative ones—which potentially subject the batterer to incarceration are effectively unthinkable and, therefore, unusable for many battered women.<sup>115</sup> This is especially true for the women who do not perceive their experience as violent.<sup>116</sup> In fact, in being so remote from such perceptions of their experience, laws that mandate subjecting women or abusers to the criminal process, especially as the only remedy available, may well discourage women from coming to see the violence in their lives as something they might eliminate or control.<sup>117</sup> Correlatively, I will also explore in this section how these patriarchal approaches have unwittingly forced battered women's advocates to collude in disempowering survivors.

In arguing for more accessible interventions, I explore three specific issues that relate to the theoretical limitations, and hence limited effect, of contemporary domestic violence practice. First, it is necessary to address the presuppositions that underlie contemporary legal

<sup>114</sup> *Id.* at 94.

<sup>115</sup> See Littleton, *supra* note 5, at 268 (proposing that due to "the lack of equal pay in female jobs, the practical problems of finding alternative housing and the difficulty of raising children alone," it is possible that "those women who stay in battering relationships accurately perceive the risks of remaining, accurately perceive the risks of leaving, and choose to stay either because the risks of leaving outweigh the risks of staying or because they are trying to rescue something beyond themselves").

<sup>116</sup> Mahoney, *supra* note 2, at 15-19.

<sup>117</sup> Indeed, this is one of Cynthia Bowman's most important points: "After an automatic arrest, a battered woman may therefore be less likely to report subsequent abuse." Bowman, *supra* note 64, at 204. See also Kathleen J. Ferraro & Lucille Pope, *Irreconcilable Differences: Battered Women, Police, and the Law*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION, *supra* note 25, at 96 (analyzing the tensions between the culture of power and the contractions between the United States legal structure and women's needs).

practices, even when those institutional methods are invoked by feminist lawyers. In its current form, recourse to the legal system is threatening to battered women because its conception of rights and interventions is structured in such a way as to further isolate, individuate, and intimidate the survivor. Second, recourse to the legal system has failed to take account of the ethnocentricity of the law's reaction to intimate abuse. Law attempts to eradicate violence rather than understand it, and consequently fails to appreciate the complex cultural relativity and emotional contingencies of everyday violence in relationships. Finally, I will suggest that only by understanding that domestic violence involves two subjectivities, that it exists in a mutual "space in between" the intimates, can we begin to comprehend the postmodern diversity of responses necessary for, and appropriate to, violent situations and the specific relationships in which they are embedded.

A. Recourse to the Legal System: (Mis)conceptions of the Survivor's Rights and Remedies

In light of the statistical realities of women's reluctance to use the legal system,<sup>118</sup> it is not surprising that political theorist and psychotherapist Jane Flax, in analyzing the theories of equality and difference in relation to justice, concludes that "[W]hile the necessity of the feminist project of ending gender-based relations of domination remains, the appropriate means to do so seem ever more elusive and uncertain."<sup>119</sup> What is significant is that Flax argues that feminist political theories of equality are embedded unwittingly in the language of abstract legal right and its objectifying practices.<sup>120</sup> Whether claimed by feminists or by masculine rights bearers, the structure of legal doctrine is such as inevitably to impose a distance between the subject asserting rights and the state-organized system of implementing and protecting those rights. Feminist political theories of equality, which rely upon the assertion of legally defined rights are, Flax suggests, inevitably "linked to a disembodied, abstract, impersonal rationality."<sup>121</sup> The argument can be taken further. As Robert Cover and, more recently, Martha Minow have argued, juridical rationality and, specifically, the abstract and alienated quality of rights manifests itself

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<sup>118</sup> See *supra* note 8 and accompanying text.

<sup>119</sup> Jane Flax, *Beyond Equality: Gender, Justice and Difference*, in *BEYOND EQUALITY AND DIFFERENCE* 193, 195 (Gisela Bock & Susan James eds., 1992).

<sup>120</sup> See *id.* at 193-95.

<sup>121</sup> *Id.* at 196. Toni Massaro, to use another recent example, thus contends that law's dependence on reason allows it to transcend personal interests and guarantees the legitimacy and, hence, universal applicability of its claims and procedures. See Massaro, *supra* note 91 at 2100.

in more than impersonality.<sup>122</sup> It manifests itself also in its own unwitting acts of violence: "[T]he relationship between legal interpretation and the infliction of pain remains operative even in the most routine of legal acts."<sup>123</sup>

This form of legal thought, I would suggest, replicates unconsciously the structure of violence that it is seeking to eradicate in intimate relationships. Not only does the state intervene as the omnipotent savior and omniscient father, it does so without engaging the battered woman as an equal partner and without relying on her insight and experience to better understand exactly what legal measures should be taken to diminish the violence and when they should be taken.<sup>124</sup> Assuming that violence in intimate relationships is inflicted when the male partner believes that he is stronger and smarter than the female partner, and gender-empowered to do whatever, whenever he wants, the structures of the relationships between the state and the battered woman and the abusive partner and the survivor look frighteningly similar.<sup>125</sup> The fact that both the batterer and the state are incapable of relating to women in a more intimate or particular way,<sup>126</sup> that they are incapable of finding a "space in between," a third space co-created in a spirit of cooperation by both parties, reveals why criminalization remedies as they are currently employed, even in their most innovative form, hopelessly replicate the violence they seek to eradicate.

Although it is disappointing, it is not surprising given predictable patterns of repetition, that domestic violence advocates, even those previously battered who may be unwilling to admit that violence is in different forms omnipresent in *every* relationship,<sup>127</sup> would unwittingly adopt responses to violence such as mandatory criminalization that mimic the patriarchy they seek so much to escape. To end violence as

<sup>122</sup> See Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 210 (Martha Minow et al. eds., 1992).

<sup>123</sup> Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1607 (1986); see also Durston & Mills, *supra* note 14, at 121-23.

<sup>124</sup> Here I am describing the situation where the state, or the prosecutor's office, proceeds regardless of the battered woman's iterated and reiterated desires—not the case of the battered woman who wishes to proceed and does so as a full partner in the state's action.

<sup>125</sup> When I made this point in a recent editorial, the Los Angeles District Attorney's office denied such a connection. See Linda G. Mills, *Battered Women Need Better*, *L.A. TIMES*, Jan. 28, 1996, at M5; Gil Garcetti & Scott Gordon, *D.A. on Domestic Violence Cases*, *L.A. TIMES*, Feb. 9, 1996, at B8.

<sup>126</sup> By particularized justice, I refer to the idea that legal intervention can and should be tailored to the subjects who invoke the law. This is a form of the particularity and generality that Elizabeth Schneider describes in her article, *supra* note 4, *passim*, but in its most practical application.

<sup>127</sup> For a thoughtful discussion of the "we" of violence, see SUSANNE KAPPELER, *THE WILL TO VIOLENCE: THE POLITICS OF PERSONAL BEHAVIOUR* 20-23 (1995).

we know it, the law must begin to model a more loving relationship with women, one which respects their experience and insight and draws on them to fashion interventions in their own lives. For it is only through these new alternative ways of relating that battered women will realize, and actually experience, possibly for the first time, non-abusive ways of relating. To empower the battered woman herself to understand her tolerance for various forms of violence and to help her to recognize these familiar interactive structures is the only way we can begin, on a grand scale, to eradicate these repetitious and destructive patterns from women's lives.<sup>128</sup>

On a more abstract and systemic level, the difficulty lies in the contradiction between a juridical process which is allegedly committed to responding feministically to domestic violence, and hence, individualistically to the demands of victims, and one that is pressured to appear unbiased and impartial in its treatment of cases.<sup>129</sup> The effects of this contradiction, particularly on the battered women themselves, are exacerbated by the additional burden on survivors bringing legal actions—they become the political tool, a pawn if you will, for battered women's advocates who believe that each survivor's court victory sends a loud and clear message to the patriarchal community that abuse will not be tolerated.<sup>130</sup> The result is that the individual narrative, the needs and the subjectivity of the survivor, the particular voice, becomes lost in the universality and abstraction of the dominant legal discourse and its habitually dichotomous actions that cannot, by their very nature, take account of the particularity of any given woman's experience.<sup>131</sup>

I am arguing that the state and the criminal law cannot act as everything to everyone. Given that so few women use the legal system, and given that those who do may find it unresponsive to their individual needs, the law cannot be simultaneously personal and political,

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<sup>128</sup> To eliminate these patterns from women's lives is to take the first step towards eliminating them from men's lives. Even social science reveals the link between empowering the battered woman and reducing future violence. See Ford & Regoli, *supra* note 56, at 159-60.

<sup>129</sup> Never has this tension been more apparent than in the case of the Honorable Cindy S. Lederman, the family court judge in Miami, Florida who started the dedicated domestic violence court there. Once the dedicated court had been established, the public defender's office in that district sued Judge Lederman, claiming that she was biased towards victims and against defendants. The Florida Supreme Court refused to hear the case. *A.G. v. Lederman*, 643 So. 2d 1091 (Fla. 1994).

<sup>130</sup> Ironically, these educational efforts have not been particularly effective in changing attitudes. See Grasmick et al., *supra* note 28, at 323 (finding in their national study that "[d]espite all the publicity concerning intimate violence during the past decade, respondents in 1992 experience no greater pain of shame or remorse for physically hurting someone on purpose than did respondents in 1982").

<sup>131</sup> By this I refer to the judgments of courts, that is, when judges must decide who does and does not get custody, who stays in the primary residence and who does not, etc.

attentive and abstract, biased and unbiased. Indeed, when it tries to do so, it inflicts its own violence. It imposes a monolithic criminal solution upon a spectrum of attitudes and subjective perceptions of survivors, and hence, inhibits the majority of battered women from seeking assistance. Finally, being ill-equipped to address the complex and sometimes conflicting needs of battered women, it fails to provide opportunities to avert abuse.<sup>132</sup>

In sum, I find that laws against domestic violence which disrupt or destroy the battered woman's intimate life, without her input at every stage in the institutional intervention, rob her of the opportunity to act on her own behalf. In this regard, the law is inappropriately preoccupied with eradicating violence, with a misguided agenda that interprets every legal success or failure as a political victory or setback. But violence is much more complex than an analysis of patriarchy implies—both battering in gay relationships and elder abuse<sup>133</sup> prove that violence crosses gender boundaries and is much more dynamic than the dominant ideology of woman abuse implies.

Moreover, legal practices which seem preoccupied with "the political" unwittingly inflict, albeit in state-legitimized form, a violence that mimics the very patriarchy the battered woman may seek to escape. In this regard, exclusive or primary reliance on criminal or state intervention to protect battered women may very well be counterfeminist, or even counterpolitical, insofar as it disables the majority of these survivors from recognizing, confronting, and taking the steps they themselves need to take in order to address the violence in their lives and ultimately the violence in the lives of all women. This is nowhere more manifest than in the law's failure to address the differing cultural contexts and languages of violence in domestic relations described in more detail below.

## B. Ethnocentricity of the Law's Reaction to Domestic Violence

White, western feminists who have dictated a unidimensional approach to domestic violence have often been criticized for making assumptions about women that do not hold universally, and in particular, are not appropriate to women of color.<sup>134</sup> Cultural and familial norms variously influence women to silently endure abusive

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<sup>132</sup> Although I do not believe that women cause the violence to which they are subjected, I do believe that they have some small degree of control over averting it. For example, battered women can avoid their abusers by going to a shelter or taking other extraordinary measures to stay safe. I am not suggesting that these measures are in any way foolproof or that the abuser is not fully responsible and accountable for his violent actions.

<sup>133</sup> For a description of the similarities and differences in lesbian and elder abuse, see Schneider, *supra* note 4, at 542-48.

<sup>134</sup> See Crenshaw, *supra* note 19, at 1242-43 ("Contemporary feminists and antiracist discourses have failed to consider intersectional identities such as women of color.");

relationships.<sup>135</sup> Women living in cultures that value community over individuality, for instance, as well as those that hold women fundamentally responsible for the preservation of community over individuality (which may be to say most of the world's cultures), face enormous barriers when confronting domestic violence.

As Nilda Rimonte explains, a woman abused by her husband in some Pacific-Asian cultures will "hesitate[ ] a very long time before attempting to do anything about the violence at all." Rimonte continues, "[t]o some, her inaction (and silence) suggests collusion. In fact, it is an indication of the desperation induced by the limited vocabulary of self-definition permitted by her culture, and the terrible price she must pay to preserve her identity within her culture."<sup>136</sup> Indeed, immigrant women from similar cultures may be doubly victimized. Not only will cultural practices influence them to endure violence, but legal constraints on their immigration status will prevent them from reporting their batterer.<sup>137</sup>

Kimberle Crenshaw<sup>138</sup> conceptualizes the problem of African-American domestic violence in a similar way. She observes that in the African-American community, a Black woman who seeks criminal action against her violent partner may be perceived as a traitor, and that it is impossible to deny that racism contributes to the cycle of vio-

Many feminist critics have written powerfully about the way in which the notion of womanhood has been described as a single uniform experience, and the way in which that has excluded a multiplicity of experiences based on race, class, ethnicity, age, sexual orientation, and other dimensions. . . . It is crucial that our theoretical framework be expanded, and traps of essentialist thinking avoided, for in practice battered women are not all similarly situated.

Schneider, *supra* note 4, at 531-32 (citations omitted). See generally Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1322 (1991) (arguing that intervention with a domestic violence victim that provides a "message of choices and rights may not be appropriate for Pacific-Asians").

<sup>135</sup> The social science-type literature on the multicultural complexities of addressing domestic violence is extensive and thought-provoking. A sampling includes: Jacqueline R. Agtuca, *A COMMUNITY SECRET: FOR THE FILIPINA IN AN ABUSIVE RELATIONSHIP* (rev. ed. 1994); Paula Gunn Allen, *Violence and the American Indian Woman*, in *THE SPEAKING PROFITS US: VIOLENCE IN THE LIVES OF WOMEN OF COLOR* 5, 5-7 (Maryviolet C. Burns ed., 1986); Evelyn C. White, *Life is a Song Worth Singing: Ending Violence in the Black Family*, in *THE SPEAKING PROFITS US: VIOLENCE IN THE LIVES OF WOMEN OF COLOR* 11, 12-13 (Maryviolet C. Burns ed., 1986); Beverly Horsburgh, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 HARV. WOMEN'S L.J. 171 *passim* (1995); Deana L. Jang, *Caught in a Web: Immigrant Women and Domestic Violence*, 28 CLEARINGHOUSE REV. 397, 402 (1994); Mieko Yoshihama, *Violence Against Asian Pacific Women Perpetrated by Male Intimates* (Aug. 16, 1994) (paper presented at the Symposium on Asian Pacific and Asian Pacific American Women in Relationships, on file with author).

<sup>136</sup> Rimonte, *supra* note 134, at 1319.

<sup>137</sup> For the experiences of immigrant battered women in the legal system, see *id. passim*; Crenshaw, *supra* note 19, at 1246-50; Margulies, *supra* note 12, at 1095-96.

<sup>138</sup> See Crenshaw, *supra* note 19, at 1256-57.

lence.<sup>139</sup> Beth Richie argues that popular images of Black men as violent dissuade African-American women from reporting their abusers out of fear of contributing to racial stereotypes.<sup>140</sup> However, both Crenshaw and Richie argue that racial allegiances and community influence often prevail over gender oppression.<sup>141</sup> Indeed Richie describes disclosure or reporting of domestic violence in the African-American community as all too often interpreted as a form of "treason."<sup>142</sup>

Institutional shortcomings in domestic violence systems are exacerbated when battered women of color contemplate seeking assistance. These women are doubly and triply marginalized and excluded when cultural pressures equate help-seeking from mainstream institutions with racial treason. Making the situation worse is the reality that many battered women and battered women of color reject legal intervention because it will effectively terminate their relationship with the batterer—a man they may need culturally, emotionally, or financially. Hence, the third conceptual problem with criminal intervention, described in more detail below, is that these strategies ignore the relational needs of battered women, and disregard the reality that violence can only be eradicated when battered women themselves decide that they are prepared to understand how violence forms a part of their lives.

### C. Domestic Violence Involves Two Subjectivities

To address the emotional and doctrinal complexities and demands of particularized justice, some feminist theorists have proposed an agenda which adopts so-called relational notions of justice, that is, systems which recognize social interaction and intimate relations as their cornerstone.<sup>143</sup> Indeed, it is primarily through intimate others that many women come to know themselves and learn to mediate the emotional, cultural, and even financial features of their personal well-being.

As painful (and, perhaps, embarrassing) as it is for feminists to acknowledge, women's comparative dependence on the intimate presence and active, involved expression of the other<sup>144</sup> suggests that emo-

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<sup>139</sup> *Id.*

<sup>140</sup> Beth E. Richie, *Battered Black Women: A Challenge for the Black Community*, 16 BLACK SCHOLAR 24, 24-25 (1985).

<sup>141</sup> Crenshaw, *supra* note 19, at 1257; Richie, *supra* note 140, at 41.

<sup>142</sup> Richie, *supra* note 140, at 41.

<sup>143</sup> See Flax, *supra* note 119, at 197; Deborah L. Rhode, *The Politics of Paradigms: Gender Difference and Gender Disadvantage*, in BEYOND EQUALITY AND DIFFERENCE, *supra* note 119, at 149, 156-58.

<sup>144</sup> See Jane Flax, *Contemporary American Families: Decline or Transformation?*, in FAMILIES, POLITICS, AND PUBLIC POLICY 21, 28-36 (Irene Diamond ed., 1983).

tional and physical violence may not be altogether incompatible with women's ways of knowing and patterns of relating. Without judging how such patterns are formed and why they manifest in more extreme forms in some intimacies than in others, it is apparent that the battered woman may be reluctant to sever completely her interactional ties with her batterer. Nevertheless, when violence erupts and the batterer is removed from the intimate setting, the woman survivor is emotionally displaced and deprived of an important linkage to herself.

Jane Flax, drawing on D. W. Winnicott's theory of symbolization and culture,<sup>145</sup> describes social interaction for women, the events themselves and the experienced feelings, as a "transitional" space, a world that "has its own processes, tasks and ways of making sense out of experience."<sup>146</sup> She continues:

[T]his space is transitional only in the sense that it bridges the gaps between self and other and inner and outer reality. It is a permanent facet of our mental life; it is not part of a stage of development that is necessarily incorporated into some subsequent or higher state. It does, however, continually grow in complexity and richness.<sup>147</sup>

Along these same lines, law professor Peter Goodrich describes interactional space between friends and lovers when illuminating how 12th-century judgments in Courts of Love and contemporary feminist thought converge to raise legal questions concerning what justice should be accorded human relationships.<sup>148</sup> Goodrich argues that casuistry and an explicit feminization of law demand that we delineate *regulae amoris*, or publicly formulated rules that bring "ethics to love, [and] justice to relationship."<sup>149</sup>

In reifying what Goodrich calls "the space in between" lovers, we acknowledge the importance of contextualizing a woman's perspective, a process which may entail accounting for her attachment to the relationship before we can begin to formulate intervention policies which go beyond the unidimensional criminal approach and more appropriately address a woman's complex and specialized needs. Such efforts may also involve devising paths to neutral and cooperative interactive spaces—and methods for travelling there—where together the battered woman and the state, the survivor and her advocate, and even the victim and her abuser, can find the shared ground needed to imagine, and create, a world free of violence.

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<sup>145</sup> See D.W. WINNICOTT, *PLAYING AND REALITY* (1971).

<sup>146</sup> Flax, *supra* note 119, at 204.

<sup>147</sup> *Id.*

<sup>148</sup> Peter Goodrich, *Law in the Courts of Love: Andreas Capellanus and the Judgments of Love*, 48 STAN. L. REV. 633, 667 (1996).

<sup>149</sup> *Id.*



#### D. Imagining New Interventions for Battered Women

In sum, a multi-faceted and multi-deliberative legal system which responds to the survivor's need for flexibility is necessary to help her work through her personal ways of knowing, being, and relating, and to learn specifically to distinguish in her mind and soul between violence and healthy expressions of intimacy. In this vein, interventions for battered women, both legal and otherwise, must take account of the dynamic and contingent nature of violence as it manifests in the space in between intimates. That the law is distant and itself violent, abstract, and abusive, especially to women and particularly to women of color, requires that we envision a more reflexive system, one which requires judges to reflect on how they intentionally or unintentionally inflict state-legitimized violence on marginalized groups, particularly those groups bearing characteristics distinctly different from their own.<sup>150</sup> In addition, attorneys must be cognizant of these institutional practices, and their implied complicity when participating in them. It is clear, for example, that affective advocates should avoid the formal legal system if the threat of state-legitimized violence seems plausible.<sup>151</sup>

Advocates too should focus their attention on how they hold themselves, either personally or institutionally, above violence, contributing to erroneous assumptions that they can eradicate violence in women's lives. Violence can only be eradicated when we make an effort to understand its undercurrents, uncover its unconscious, and undercut its underbelly in each of us. An important aspect of this personal and collective psychoanalytic expression is to recognize that feminism and the feminist juridical project must reject the rationalistic male models which preceded our institutional presence, and imagine systems that accept the complex and individualistic emotional and cultural structure of women's lives.

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<sup>150</sup> For an account of the biases of Social Security Administrative Law Judges, and for a sketch of a proposal to reform judicial practices to ensure more reflexivity in decisionmaking, see LINDA G. MILLS, A PENCHANT FOR PREJUDICE: UNRAVELING BIAS IN JUDICIAL DECISION-MAKING (forthcoming 1997); Linda G. Mills, *A Calculus for Bias: How Malingering Females and Dependent Housewives Fare in the Social Security Disability System*, 16 HARV. WOMEN'S L.J. 211 (1993).

<sup>151</sup> By way of example, there is one judge in Los Angeles County who often refuses to grant restraining orders to women (based on the reports of students the author supervises and on informal conversations with advocates working in the Los Angeles courts). Knowing that this judge may be unsympathetic, advocates may want to develop alternative methods for documenting domestic violence to ensure that the survivor is not further traumatized by the court process. The Court Watch program in Los Angeles is one method advocates should use to "monitor" the attitudes of judges to ensure that battered women are not re-traumatized by judges.

## IV

## REFORMING DOMESTIC VIOLENCE PRACTICE: TOWARD AN AFFECTIVE CLIENT DYNAMIC AND A COMPREHENSIVE INSTITUTIONAL APPROACH

To achieve the programmatic restructuring of legal interventions described below, the interactive framework of domestic violence practice must be radically transformed. In this section I draw from the best current practices used by advocates to relate to battered women, described in Part II, and build upon my own experience of teaching students and training practitioners in the techniques of affective lawyering. The lawyer, I will argue, as much as the social worker or doctor, can only respond to their clients' needs if they understand and appreciate their clients *affectively*.

## A. Toward An Affective Client Dynamic

Domestic violence clinics in the United States (sometimes referred to elsewhere as restraining order clinics or Battered Women's Rights Clinics), legal services centers, hospital emergency rooms, prosecutors' offices, and police stations worldwide have the potential to be important institutional settings within which women who experience violence can come to face the abuse in their lives. My work with these agencies, together with the evidence I have mounted, overwhelmingly affirms that rather than helping the majority of battered women to address the violence in their lives, these institutions unwittingly force a majority of survivors to suppress it. Front-line workers in these agencies must be trained to ensure that no battered woman feels prejudged or forced underground because of her desire or unwillingness to pursue a given course of action. One way to reduce that likelihood is to ensure that advocates trained in basic postmodern clinical techniques, or in affective lawyering methods, are available for survivors of domestic violence who are not or may not yet be ready or prepared to take legal or other formal action.

Affective clinical practices address the survivor in her own emotional space and respond to the specific relationship and subjectivities within which she is to be found. Rather than adopting a normative approach, such postmodern clinical interventions respect the survivor's relational structure and also provide the space, the time, and the fluidity necessary for self-guided resolution. Such a system recognizes, too, that true empowerment for the battered woman will be achieved not through obedience to the expectations of legal or social work advocates, but rather through a system which acknowledges that she herself must reconsider and reevaluate the meaning of the violence in a time frame and an environment that supports the fluctuating complexity of her particular circumstance. It would go a significant way toward establishing a postmodern client dynamic—a dynamic that in-

corporates multi-deliberative legal and social work systems in order to recognize and respond to survivors' particular and evolving needs—if law students and practitioners who work with battered women were trained in three basic, interrelated clinical principles.

First, working on the principle that clinicians are ineffective when unaware of their emotional experiences, it is the lawyer's responsibility to reflect on the violence, in all its various forms, that they have experienced or tolerated in their own lives—both personally and professionally, both intimately and institutionally. To be truly effective, in other words, practitioners must make an ongoing, concerted effort to understand their own history and experience of violence in relationships before working with battered women. Only in this way do they have a chance of leaving their own histories, prejudices, and presuppositions in relation to intimate violence, at the clinic door. This in itself is no simple task; the potential of practitioners to internalize the other two basic principles depends on their success with this first.

Second, domestic violence workers must treat their clients as they themselves would want to be treated. Again, practitioners can accept the survivor for who she is and where she is in her emotional development only if they recognize from their own personal experience the multifaceted, insidious, paradoxical, complex, and confusing character of intimate violence.

Finally, and most importantly, front-line legal and social workers must empower battered women to take the incremental steps they feel they are prepared to take. To be effective, then, practitioners must take the clinical journey with the client. They must venture with their clients just far enough to encourage the client's safety and to help them learn more about their conundrum. However, practitioners must not venture so far as to alienate their clients from the professional resources available when and if they are ready to take the next step. I address each of these issues more specifically below.

### 1. *Reflect on the Violence in One's Own Life*

"We can't judge a battered woman's decision to stay in an abusive relationship until we explore the violence we deny or accept in our own lives," I warned the law students in my advocacy class. "How many people tolerate abuse from parents, lovers or friends?" I continued. A few raised their hands. "Consider the following possibilities: Did your brother ever hit you? Did you hit him back? When was the last time your mother, your father, your lover, humiliated you? Interrupted you? What did you do about it? When was the last time you humiliated others dear to you? How did they respond?" Suggesting to my students that we all tolerate and perhaps even inflict or at least participate in intimate violence, I encouraged them to explore the

abuse in their own lives before rendering judgment or offering advice to the battered women they would counsel. In journals kept specifically for this purpose, almost all students who worked with "battered" women realized that their own histories of violence were not entirely unlike those of their clients. Moreover, given that similar or different forms of violence had gone so completely unnoticed in their own lives, the students had no legitimate grounds on which to judge their clients for their decisions to leave or stay.<sup>152</sup>

Several theorists and practitioners have argued that instead of asking "Why doesn't she leave?" the appropriate question is "Why does he batter?"<sup>153</sup> Of course, the problem is that it is nearly impossible to train people out of the question "Why doesn't she leave?" when so many of us are so busy denying or ignoring the violence in our own lives, hence seeing the battered woman's conundrum as more obvious than it is in actuality. I suggest that the means for transgressing the "Why doesn't she leave" question and getting to the "Why does he batter?" question is to explore (in therapeutic settings, including individual treatment and group support, and in case supervision at clinic law schools both in and out of the classroom) the ways in which we ourselves (particularly those of us who feel among the so-called non-abused) tolerate violence in our own lives. My students who did this work found that representing battered women is as much about helping clients take incremental steps toward self-discovery and insight, as it is about taking concrete steps toward eliminating violence from their own lives. To do so, we all concluded, is to undertake a radical program of long-lasting change which is achievable only through personal decisionmaking arrived at through a means and in a time frame with which we as individuals and as members of our particular cultures and communities are comfortable.

## 2. *Accept the Battered Woman as She Is*

Once practitioners begin self-discovery, and recognize and start to grapple with the violence they tolerate, they are prepared, regardless of their professional training, to work with a battered woman, a woman who is probably no less equipped than the practitioner to address the violence in her own life—just less confident and in more danger. Toward this end, the practitioner must be painstakingly sensitive to achieving a most delicate balance. On the one hand, the bat-

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<sup>152</sup> See Meier, *supra* note 68, at 1349-50 (discussing countertransference and domestic violence practice).

<sup>153</sup> By way of example, see *id.* at 1317-20; Mahoney, *supra* note 2, at 5-7; Littleton, *supra* note 5, at 268-70; Schneider, *supra* note 4, at 557-59, all of whom argue that the ease with which people observe, judge, and distinguish themselves from the projected image of battered women is ludicrous. In Schneider's words, "[r]equiring a battered woman to leave is a projection of a higher standard of conduct." *Id.* at 559.

tered woman seeks the practitioner's insight, guidance, and expertise. On the other hand, the exigency of the battered woman's situation can only contribute to her overriding fear that the system will judge whatever action (or inaction) she has taken to date and diminish the little power she may have to act in the future.<sup>154</sup> If she feels prejudged, implicitly or explicitly forced to act, or pressured to take steps she is not prepared to take, then she may become alienated from the worker and reject whatever help is offered (or pretend to accept it but later fail to follow through on appointments, etc.). This aspect of "meeting" the client is in some respects the most important, because it involves drawing the client in and sustaining her involvement long enough for her to identify with a vision of a better, freer life for herself and to develop a plan for achieving it which keeps her safe in the meantime. To lose her to prejudgment may not only further increase the woman's probably already well-developed sense of hopelessness and despair, but it could have life-threatening consequences as well.<sup>155</sup>

### 3. *Baby Steps Only*

Gently, ever so gently, the task of the practitioner advocate is to offer enough information, enough insight, and enough options to empower the client to think, to imagine, and, possibly, to act. The practitioner should hope for everything but expect nothing and then be thrilled if, and when, in the gentle (i.e., non-judgmental, interactional) space, the battered woman decides to act. Recognition that movement comes incrementally, that denial is fierce, and that immediate action is rare, are the only assumptions that practitioners should make. Most importantly, the practitioner should realize that the point is not to eradicate violence as we know it by ending their relationship now, but rather to enable a battered woman to come to realize that it is she alone who can understand the violence in her life and how she wants to respond to it.<sup>156</sup>

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<sup>154</sup> For a sensitive interpretation of these issues, see Margulies, *supra* note 12, at 1097.

<sup>155</sup> See Meier, *supra* note 68, at 1343-47 for a related discussion describing the client who wants affirmation of her decision to leave by the attorney representing her. See also Margulies, *supra* note 99, at 1078-84 (describing the importance of expressions of worry and affirmation).

<sup>156</sup> I realize this is a controversial point. Advocates of a law and order approach argue that it is the state's responsibility to keep society civil and non-violent. The studies described in detail herein, however, especially the arrest studies, do not reveal that state intervention necessarily prevents future violence. Indeed, as I have argued, it may not only in some cases exacerbate it, but in others, send victims further underground.

## B. A Comprehensive Institutional Approach

Armed with this clinical approach that recognizes the crucial factor that women's relationships may be important to them for cultural, emotional, social, or even political reasons, even when they involve violence, and that battered women may find criminal interventions disempowering and unapproachable, legal and related systems must be reformed to welcome all battered women needing services irrespective of the nature or status of their relationships. Toward this end, existing criminal systems should be enhanced to ensure that the medical, legal, and social work personnel most likely to encounter survivors are trained in affective clinical techniques and are prepared to address and to understand the shifting uncertainty of a survivor's experience as she grapples with a multitude of conflicting loyalties. A reflexive legal/social work-oriented system that is designed to reach battered women whose relational and associated financial, emotional, or cultural needs are currently unmet, should be implemented by all existing programs serving battered women, including but not limited to hospital emergency rooms, police programs, prosecutors' and legal services offices, hotlines, shelters, and restraining order clinics.

Under such a system, women would be invited to file domestic violence complaints in informal but confidential and private settings, such as hospital emergency rooms staffed with social workers, women-run police stations, legal services offices, or telephone hotlines. These reports could be stored as documentation for verification of future incidents. For women who desire them, restraining orders and other legal remedies would also be available at these same locations. Other safety measures, including shelter stays for either the victim or perpetrator, house surveillance, and monitoring devices would be available on request through these front-line service centers. Criminal or civil actions would be available but pursued only when and if the client is ready to file and physically and emotionally prepared to proceed.<sup>157</sup>

But, again, legal alternatives are not sufficient means to help most battered women see beyond the violence that defines for her an unhappy and unhealthy life. Front-line workers at each service center should be equipped to educate battered women on the financial resources available to them through welfare, credit (on her or her husband's or partner's accounts), medical and housing benefits, child care allocations, and alimony. They should also be aware of employment opportunities and resources. When women worldwide are not provided with concrete tools to modify their social or economic cir-

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<sup>157</sup> In previous work, I recommended that the United States develop a commission system to handle incidents of intimate abuse—a special judicial body that would be prepared to investigate and remedy instances of abuse, based on the survivor's needs and desires. See, e.g., Mills, *supra* note 15, at 266.

cumstances, the likelihood of the recurrence of maltreatment increases.<sup>158</sup>

This comprehensive institutional approach would advance domestic violence policy not only because it would offer alternatives to criminal intervention but also because it would empower the battered woman to design the course of action she feels would eradicate violence from her life. This model provides a flexible remedy menu (emotional, practical, financial, or legal support) in existing battered women's programs and a time line that respects the uncertainty generated by conflicting loyalties. Such choice and the opportunity for her to control her future may be just what the battered woman needs in order finally to face, incrementally and at her own pace, what she may have otherwise tolerated for fear of the essentialist legal system, and its blunt criminal instruments, and her history of violence.

#### CONCLUSION

The problem with current strategies, I am arguing, is that we have neglected the importance of the survivor's relationship to the violence she tolerates. Such an approach ignores the significance, theoretically and practically speaking, of treating a woman in the fluid context of her relationships and of recognizing that her uncertainty, and emotional and cultural loyalties, demand a safe and non-judgmental space in which to explore her issues. By taking the lead to incorporate civil, criminal, and administrative legal interventions with postmodern clinical practices that provide an openness to options and embody an ethos for empowerment through self-paced, and self-initiated change, domestic violence advocates can reinvigorate domestic violence policies and programs with a value on the particularity of any given battered woman's experience that appears necessary to ensure her full participation in the effort to understand and address violence in her life.

In sum, a new language for intimate abuse demands that we rethink two crucial points that have influenced the structure and form of domestic violence theory and practice of the past two decades. First, a rights based criminal response to domestic violence which disengages and alienates survivors through its unitary impersonality and state-legitimized normative coercion, may intensify the very violence it seeks to eradicate by repressing it. To understand violence, then, and to circumscribe its effects, we need to devise systems and strategies that provide the survivor the emotional space within which to understand her history and relationship to violence in order to act in her

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<sup>158</sup> See, e.g., Cristina Zurutuza, *Domestic Violence: Strategies Used by the Latin American Women's Movement*, in *WOMEN WATCHED AND PUNISHED* 59 (Latin American Committee for the Defense of Women's Rights ed., 1993).

own best interest. Such measures entail an element of professional self-criticism and client-self reflection, the postmodern conjunction of what I have termed affective lawyering which enables client empowerment. A second, and related, point is that the survivor's subjective experience of the violence, whether a tickle is a bruise, a glance is a violation, or a stroke is a slap, is as relevant when designing or enforcing interventions as is the legal, normative, or culturally essentialist definition of violence. Only if and when the survivor's subjectivity is heard and unjudged, repeated and introjected, or most significantly, melded into current approaches, will she begin to feel the liberty to describe, in any real detail, the experience she seeks to unburden. To think that current institutional philosophies unwittingly disregard and hence exclude the very women these systems seek to embrace is the tragedy, and irony, of the feminist policies employed and so effectively implemented thus far.