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Mirrored Silence: Reflections on Judicial Complicity in Private Violence

Tracy and John had been married for seven years.[1] *They were so in love when they met at college. He brought her flowers and wanted to spend all of his free time with her. Everything was perfect. But it seemed to become increasingly tumultuous as soon as they got married, two years later. He didn't just want to spend all of his time with her; he had to know what she was doing every waking moment of the day. He had to approve of her activities and her friends. He called her at work every day. If she wasn't at her desk to answer the phone, she had to account for her whereabouts. He became very demanding of her when she was in his presence and yelled at her all the time. He hit her for the first time when she was pregnant with their son. She covered the bruises and told no one. She just couldn't believe the man that she loved and that was proud to have sired a son had actually beat her. That was four years ago. Now the way that he treats her is so regular, she no longer believes he is the same man she married. She finally got the courage to leave him. She filed for divorce and obtained a pro-*

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[1] John Person was the defendant in *People v. Person*, 658 N.Y.S.2d 372 (1997). His wife's name is never mentioned and is thus fictionalized in this account. In fact, John was only named in the caption of the case. It is only clear from reading between the lines that the parties are married. Not naming the parties is perhaps what enabled the judge to be detached from the factual situation.

tective order, requiring him to leave the marital home. She thought that if she could just get away from him for good everything would be okay. They had split up before, but he had always come back, bearing gifts and veiled threats toward her or to take her son away. She hoped this time would be different because she had that protective order. But she knew he would be angry; she was very afraid. Her fear was warranted. He broke into the house, barricaded the door, and began to slap her around. Over the years, he had learned how to hit in places where there would be few or no marks. She scratched him on the arm. He told her that she wasn't going anywhere and that she would never leave him. In his rage, he screamed that everything in the house was his and he'd take it away if he wanted to. He grabbed her handbag and dumped the contents, stomping on them as they fell to the ground. He grabbed the scissors off the kitchen table and randomly started shredding things: her favorite armchair, some of her dresses from her closet. The police arrived. A neighbor who knew about her protective order had called them. The police took him away, but not before he told her, "I'll be back . . . ."

This is an imagined re-creation of what happened in the appellate case of *People v. Person*.[2] It is an imagined recitation of the facts because the only written opinion in the case did not discuss the factual situation that gave rise to the case.[3] On the face of the opinion, one would not know it was a case of wife abuse; it appears to concern only the proper application of the law of criminal mischief involving the destruction of personal property. Only by reading between the lines, noticing indications that the defendant and the victim are married, references to "physical injury," "unlawful imprisonment" and the damage to personal property[4] would one have any idea that this was vio-

[2] *Id.* (holding that without proof that property stolen or damaged was owned by someone other than defendant, evidence is legally insufficient to sustain convictions for criminal mischief, petit larceny, or burglary in the second degree). This Article focuses on lower court opinions as these are the ones most directly affecting the lives of individuals in domestic abuse situations. *See* Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913, 1943 (1990) ("Instead of repeating some of the more cheery tales available by way of some Supreme Court opinions (in some eras), why not try some of what goes on (not all of it transcribed) in the lower courts, which are also places in which speakers of law display their power?").

[3] Silence, by its nature, is inherently difficult to document and discuss. *See infra* Part I. In fact, the necessity of writing about silence and discussing theories of silence are also forms of silence, not voicing the direct experiences of battered women.

[4] Batterers often terrorize their victims by threats, coercion and damage to their personal property. DANIEL JAY SONKIN ET AL., THE MALE BATTERER: A TREATMENT APPROACH 38 (1985); Catherine F. Klein & Leslye E. Orloff, *Providing Legal*

lence against a spouse. In *Person*, the court concluded that there can be no criminal mischief where the defendant holds an equitable interest in the property at issue and relied on marital status to establish such an interest. It did not even mention the physical abuse in the same set of facts for which the defendant was charged with criminal mischief, because it did not find it relevant. For this court, the salient consideration was whether the defendant could claim an interest in the property in question.

By the court's reasoning, because the defendant was married to the alleged property owner, he held an equitable interest in her property and could not be found guilty of criminal mischief. This means that, because of marital status, a husband could not be held responsible for the destruction of his wife's property, even when such destruction was a means of terrorizing her. Insisting that the husband has an equitable interest in his wife's property, which allows him to destroy it with impunity, effectively extinguishes the wife's rights in such property as against the husband, and thereby perpetuates the power imbalance of patriarchal family structure.[5] This reasoning affirms the husband's dominant role within the family[6] and continues the spirit

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Protection for Battered Women: An Analysis of State Statutes and Case Law, 21 HOFSTRA L. REV. 801, 872 (1993); Victoria L. Lutz & Cara M. Bonomolo, *My Husband Just Trashed Our Home; What Do You Mean That's Not a Crime?*, 48 S.C. L. REV. 641 (1997); Victoria L. Lutz & William R. Slye, *Where Criminal Mischief is Not a Crime*, 3 DOMESTIC VIOLENCE REP. 30 (Dec./Jan. 1998).

[5] The terms "patriarchy" and "patriarchal" are used throughout this Article. Patriarchy is not easily defined as it is a term precipitating much controversy and confusion. Literally, it means "rule by fathers." Colloquially, many find it to be pejorative in that it may be viewed as accusatory to men. The use of the term here is intended in its descriptive and academic use to explain current legal and social structures for the purpose of change. Academically, there is also much disagreement as to its origins and use. Carole Pateman gives an accurate historical account of the term's use and origins. She describes three forms of patriarchal thought: traditional, classical, and modern. The traditional form is based on the authority of the father as head of the family and provides the metaphor for power and authority relations. The classical, based on the position of Sir Robert Filmer, claims that the paternal and political power are not merely analogous, but identical. The modern form is a combination, confusion, and conflation of the traditional and classical forms. CAROLE PATEMAN, THE SEXUAL CONTRACT 19-38 (1988). Theories in this Article may fairly be characterized as a discussion of the modern form of patriarchy.

[6] Robin West, in her incisive critique of modern jurisprudence using a "separation thesis," that each human being is "physically separate from all other human beings," demonstrates how the law's approach to life is "irretrievably masculine" because it is based on the premise that human beings are separate and distinct. She also demonstrates that a "connection thesis," whereby human beings are essentially connected, manifest in women's lives literally through heterosexual intercourse, pregnancy, and breast feeding. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988)

of coverture long after its formal abandonment.[7] Where the court was quite creative in finding that marriage confers an equitable interest for purposes of the criminal mischief statute,[8] it just as easily could have considered how marriage can become an instrument of terror, aggravating rather than diminishing the severity of the alleged offense for which the defendant was charged.

The formalistic approach taken by the *Person* court does justice a disservice. This approach, treating the parties as abstractions and entirely omitting context, allows the court to distance itself from moral responsibility for the violence it ultimately condones or authorizes.[9] Adjudicating a controversy between living human beings requires personal investment in the decision and moral responsibility for the outcome. When judges distance themselves from the substance of the case, this inhibits the development of legal rules suited to human situations to which they apply. At best, the judges in *Person* acted out of lack of concern for the effect of their decision, or possibly on the premise that it was someone else's job to deal with the terrorism inherent in the crime charged in this case.

The *Person* opinion supports and perpetuates the power dynamic of the silencing force of patriarchy.[10] Indeed, as already

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(noting that by blindly enforcing patriarchal structures, the court protects male interests and male autonomy of action while obscuring the woman's interests in individuation and a woman's right to be free from terror).

[7] *See* Reva B. Siegel, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994) [hereinafter *Home as Work*] (examining the efforts of the nineteenth-century woman's rights movement to reform the doctrine of marital service); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994) [hereinafter *Marital Status Law*] (pointing out that the nineteenth-century married women's property acts and earnings statutes did not fully emancipate wives from the common law of marital status).

[8] The *Person* court relied on the definition of marital property in reaching this conclusion. Lutz & Slye demonstrate that the authorities cited in *Person* do not support its conclusions and furthermore are at odds with the State of New York's precedents. Lutz & Slye, *supra* note 4, at 17-18, 30 (citing Whiton v. Snyder, 88 N.Y. 299, 304 (1882); People v. Morton, 123 N.E.2d 790 (N.Y. 1954); Young v. Seckler, 426 N.Y.S.2d 311 (1980); Manheim v. Manheim, 302 N.Y.S.2d 473 (1969), *aff'd*, 310 N.Y.S.2d 1017 (1970); Kroul v. Kroul, 344 N.Y.S.2d 702 (1973); Goldberg v. Goldberg, 531 N.Y.S.2d 318 (1988)).

[9] Patricia M. Wald, *Violence Under the Law: A Judge's Perspective*, *in* LAW'S VIOLENCE 77, 81-83 (Austin Sarat & Thomas R. Kearns eds., 1992) (discussing how federal sentencing guidelines eliminate the judge's discretion and thus the personal involvement in moral decisions).

[10] Of course, the nature of patriarchy has changed over the years, in form more so than in substance. Reva Siegel calls a change in rules and rhetoric of a status regime

indicated, the court's holding is reminiscent of nothing so much as coverture. Coverture was the explicit legal erasure of the rights of married women.[11] We cannot consider the inequities of coverture to have been abandoned as long as the law continues to treat women as subservient to the whims of their husbands, as the *Person* decision does. Silence surrounding wife beating, especially silence perpetuated in judicial opinions, allows the perpetuation of the patriarchal structure embodied in the old doctrine of coverture.[12] Judges who do not address the full factual situation and narrate the stories behind the application of the law erase women by not adequately providing a voice and legal protection for them.

Formalism, in the sense of excessive adherence to abstract rules of law at the expense of substance and particularity, is a form of silence. The *Person* court discussed the law, reciting only the sparsest of facts necessary to support the chosen outcome. When only the facts required to support a given outcome are discussed, the avoidance of uncomfortable or ill-fitting facts makes it difficult to say that justice has, in fact, been done.[13] Such an

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"preservation through transformation." Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

Though not often discussed or acknowledged, patriarchy, as a system of power, has an intrinsic role in the nature of racism. *See* DOROTHY ROBERTS, KILLING THE BLACK BODY (1997) (discussing the rhetoric and politics used to degrade black women's reproductive choices); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1 (1998) (discussing the relationship between racism and sexism in forming stereotypes that condition violence); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 3 (1993) ("[Racism and patriarchy] are two interrelated, mutually supporting systems of domination and their relationship is essential to understanding the subordination of all women."). In addition, slavery had an influence on the nature of patriarchy and the modern American family, if for no other reason than the plantation was structured around an extended family model. In addition, the nature of patriarchy in the American black family originated from the influences of slavery. *See* HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM 1750-1925, at 31 (1976) ("How slaves learned and whom they learned from always affected what they believed and therefore how they behaved and the choices they made.").

[11] *See Home as Work*, *supra* note 7; *Marital Status Law*, *supra* note 7; Siegel, *supra* note 10; *see also* Lutz & Slye, *supra* note 4, at 31. This is also in direct contravention of the Married Women's Property Act of 1848 in New York, repudiating many of the vestiges of coverture. *See id.* at 17-18 (citing People v. Morton, 123 N.E.2d 790 (N.Y. 1954)).

[12] *See infra* Part I.A.

[13] For example, in the case of *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1990), the Court found that the Winnebago County Social Services Department did not violate the constitutional rights of Joshua DeShaney

approach proceeds backward: the law appropriate for the actual facts ought to be found, rather than limiting the narrated facts to those that neatly fit the most crabbed interpretation of existing law.

Even though the criminal law is largely a statutory scheme, this does not relieve courts from the duty to ensure justice. When a situation is novel or poorly fits the paradigm underlying an existing rule of law, the ill-fit ought to be elaborated so that appropriate new law can be developed.[14] The courts play a crucial role in demonstrating injustices in the law's application and its inadequacies, thereby making it possible for the law to approximate more closely true justice.[15] Omission of the full story, the full set

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when it failed to protect him from the violence of his father. In his dissent, Justice Blackmun accused the majority of retreating "into a sterile formalism" preventing it from recognizing either the facts of the case before it, or the legal norms that should apply to those facts. *See also* Wald, *supra* note 9, at 97-96; Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665 (1990). It is instructive to consider the continuum of silence between the "mere manipulations" of existing law to achieve a preferred outcome and outright omission of the facts preventing their consideration. Of course, both are a means of preventing the development of canon and new doctrine. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 201-25 (1975).

[14] There need not be a different law for every unique situation, but one narrow enough to apply in like situations in a similar area, such as domestic violence. The ill fit of violence against women in the home to the existing legal structures is, in part, produced by activists' reform efforts directed at a statutory criminal law system, rather than at effecting the formation of a separate doctrinal area within. *See* Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) (demonstrating the connection between political action, the formation of cognizable rights, and reform for women). An example of political action is the development of shelters in the mid 1970s, which helped force the issues affecting battered women into the public consciousness. *See* Jeffrey Fagan, *Cessation of Family Violence: Deterrence and Dissuasion*, *in* FAMILY VIOLENCE 377, 391 (Lloyd Ohlin & Michael Tonry eds., 1989) ("[W]omen's shelters effectively communicated societal rejection of battering; shelters create alternatives for women to remaining in violent homes and may neutralize male dominance and control that typifies violence toward wives." (citation omitted)); Susan Schechter, *Building Bridges Between Activists, Professionals, and Researchers*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 299 (Kersti Yllö & Michele Bograd eds., 1988) [hereinafter FEMINIST PERSPECTIVES]. Discussions with feminists, active in the early years of the Battered Women's movement, suggest that there were many reservations about using the criminal justice system as a component in eliminating the violence against women, for precisely the reason that it was institutionally patriarchal.

[15] *See* Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998) (arguing that one role of the judiciary is to point out inadequacies in the law). *But see* Abner J. Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825 (1998). *See also* 1 WAYNE R. LA FAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 2.1(a), at 89 (1986 & Supp.

of facts, evades justice rather than supports it and erases the voices of human beings, both victims and perpetrators, for whom our system of justice is established. It ignores the perspective of the concrete individuals who are the ultimate "consumers of justice."[16]

Person need not have been decided in the manner it was. *People v. Kheyfets*[17] is a similar case involving a situation of violence within a marriage where the husband not only physically assaulted his wife, but also destroyed her personal property in order to terrorize her. In an effort to indicate that he only reluctantly followed interpretation of the criminal mischief statute by the higher court in *Person*, trial Judge Leventhal set out the facts of *Kheyfets* at length in order to demonstrate the inequity of applying the precedent established by *Person* to those facts:

> The charges against the defendant arose out of two incidents. On January 14, 1997, the defendant, who had been drinking, allegedly started a fight with the complainant in their home between midnight and 1 o'clock. According to the complainant, the defendant called her names and attempted to get her to come to bed. When she refused, he hit and kicked her in the stomach and ripped off her blouse. The complainant yelled for help and the defendant turned up the volume of the television. The defendant then allegedly ripped the phone out of the socket, breaking it, because the complainant wanted to call the police. She continued to yell for help while the defendant kicked her arms and hit her breast, nose and lips, causing her nose to swell and her lips to bleed. Eventually the superintendent of the building and the police arrived. As a result of the incident, the complainant had black and blue marks, had difficulty eating and breathing, and took Tylenol for her pain. . . .
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> On April 18, 1997, the defendant, who had been drinking, allegedly began a fight with the complainant at their home. According to the complainant, the defendant wanted her to go to bed with him and when she refused he twisted her arm, ripped her watch off, breaking it, and began calling her names. The defendant pulled the phone out of the socket, breaking it,

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1999) ("[I]t is hard for the legislature in advance to conceive of all possible antisocial behavior that ought to be criminal.").

[16] Edmond Cahn, *The Consumers of Injustice*, *in* CONFRONTING INJUSTICE: THE EDMOND CAHN READER 5 (Lenore L. Cahn ed., 1962) (explaining that Cahn opposed the tendency of lawyers and legal philosophers to overemphasize concepts and abstractions, insisting that the purpose of law was to satisfy the needs of actual human beings in concrete processes).

[17] 665 N.Y.S.2d 802 (1997).

> because the complainant wanted to call the police or his father. The defendant then picked up a knife, telling the complainant he would not hurt her. He yelled at her and then hit her in the stomach with his fist. The defendant waved the knife around and cut the complainant's forehead, causing it to swell and bleed. As the complainant tended to her injury, the defendant "tried to be nice." The complainant then went shopping in order to get out of the house. The defendant later caught up with her in the lobby and started dragging her by the jacket while calling her names. The complainant screamed, causing neighbors to summon the police.[18]

After this recital of events, Justice Leventhal proceeded to demonstrate that the phrase "money of another" in the criminal mischief statute could have been interpreted differently, pointing out that the formalistic approach taken by the court in *Person* was not inevitable, but rather a choice substantially dictated by the omission of context.[19] Judge Leventhal pointed out that the Supreme Court of the United States had invalidated a state statute that gave a husband, as "head and master" of property jointly owned with his wife, the unilateral right to dispose of such property without the wife's consent.[20] He also pointed out that other jurisdictions do not hold that one spouse can destroy the property of the other with impunity just because he or she may have an ownership interest in it; these other jurisdictions recognize that "batterers often damage property to terrorize, threaten and exert control over victims of domestic violence."[21] With the full set of facts juxtaposed to the application of law, the inequities in domestic abuse become readily apparent. These exposed inequities provide powerful justification for the judiciary to fashion better remedies within the current law and provide incentive for the legislature to amend the laws to combat these social ills.[22] Thus,

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[18] *Id.* at 803.

[19] *Id.* at 804-05; *see also* N.Y. PENAL LAW § 145.00 (McKinney 1999). Judge Leventhal chose to consider New York's arson and larceny statutes to understand "property of another" under the criminal mischief statute rather than importing property concepts from Domestic Relations Law, which generally are not recognized under penal laws. *See* Lutz & Slye, *supra* note 4, at 18.

[20] *Kheyfets*, 665 N.Y.S.2d at 805. In *Kirchberg v. Feenstra*, 450 U.S. 455 (1981), the Court held a now superseded Louisiana marital property statute in violation of the Equal Protection Clause of the Fourteenth Amendment. A husband's ability to dispose of jointly held property is, in the least, analogous to a husband's right to destroy property in which he has merely an equitable interest.

[21] *Kheyfets*, 665 N.Y.S.2d at 804.

[22] It may be concluded from this Article that the judiciary make law, which is a legislative function. Though it is neither novel nor unprecedented, this is not the essence of the argument presented here. The judiciary must render its opinions in

despite the strictures of a statutory system a new doctrinal area might have the opportunity to develop.

Aiming to reform the legal system, as opposed to forming it anew, more readily permits biases in the system to remain. Of course, activists who seek to prevent actual ongoing violence against women will try to fit their claims into the system as it exists. This approach may yield successful results. This necessarily involves, however, resorting to a system that still incorporates patriarchal categories and processes,[23] and such categories and processes are themselves tools of oppression insofar as they define too narrowly what will and will not "count" as wrongs and how they are committed.

For example, it is not hard to envision the underlying picture upon which the law of battery is predicated. Say "battery," and we most likely imagine a street fight or a barroom brawl or perhaps even a duel.[24] A prolonged continuation of events and

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accordance with substantive considerations as dictated by the full set of facts. In addition, this Article does not suggest exception to the due process requirement of certainty in the law, *nullum crimen lege*, but does maintain that the judiciary is in the best position to point out gaps in the law through their opinions to the legislatures. For sources discussing the possibility of cooperation between the legislature and judiciary in forming law see Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992); Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995 (1987); Deanell Reece Tacha, *Judges and Legislators: Enhancing the Relationship*, 44 AM. U. L. REV. 1537 (1995). For sources discussing the judiciary's role in making law see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Christopher F. Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561; Katyal, *supra* note 15. *But see* Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1 (1998); Mikva, *supra* note 15; Patricia M. Wald, *The "New Administrative Law"—With the Same Old Judges In It?*, 1991 DUKE L.J. 647 (1991).

[23] *See* Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989) (discussing how the language of law is gendered male); *see also* Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623 (1980) (examining how sexual stereotypes of women and the male orientation are built into the law and legal system and how the assertions of self-defense by battered women are not requests for special treatment, but pleas for equal treatment).

[24] *See* Leslie Bender, *Teaching Torts as if Gender Matters: Intentional Torts*, 2 VA. J. SOC. POL'Y & L. 115, 127 (1994) (pointing out that the "classic bar room fight" or "fistfight serving as the classic example of battery" is a gendered notion itself). It should be no surprise that the law does not contemplate situations of women's victimization. Historically, women had no input in the formation of the law. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 215 (1993) ("Men who beat women, who harassed them, who raped them, were arrested by

strong relationship ties are not contemplated.[25] Thus, rules about when self-defense against a battery is permitted contemplates the need for immediate action in response to sudden threatened aggression by a stranger. Battered Woman Syndrome has been a reform effort to include other situations within the ambit of self-defense law.[26] There has been resistance to this expansion however.[27] Indeed, the development of Battered Woman Syndrome has been as much a struggle against the standard conception of battery as it is a demonstration of the need for new approaches in this specific area of law.

The objective of this Article is to advocate the following conclusions regarding the development of appropriate new canons for domestic abuse. More than written laws must be changed if victims of domestic abuse are to be better protected.[28] First, the stories of abuse must be told in an authoritative public forum: court opinions. Narrating the full facts is an indispensable prerequisite if change is to be effectuated and a new ethos evolved. Second, judicial interpretation of the law must include an elaboration of the inadequacies of existing rules. In this way, there is a greater potential for injustice to be better exposed and new rules designed to prevent such injustice. Third, remedies and/or punishments appropriate for abusive situations and designed to allow the victims an escape from the violence must be fashioned, rather than allowing the continuation of a situation which leaves the vic-

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men; tried by men, sentenced by men, and in many ways, the system looked at the whole process through men's eyes, using men's standards and men's consciousness.").

[25] *See* Donna Meredith Matthews, *Making the Crucial Connection: A Proposed Threat Hearsay Exception*, 27 GOLDEN GATE U. L. REV. 117, 159-64 (1997) (arguing for an exception to the hearsay rules in cases of domestic homicide to allow the court to hear about the victim's fears); Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1512-16 (1996) (arguing that rules of evidence which exclude prior acts of domestic abuse in homicide trials are gender-biased); Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789 (1996) (suggesting that background evidence of domestic violence should be given to jurors so they may determine its significance).

[26] *See infra* text accompanying notes 90-94.

[27] *See generally* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991).

[28] See *Home as Work*, *supra* note 7; *Marital Status Law*, *supra* note 7; Siegel, *supra* note 10, at 2121-41; *see also* JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES (1999) (examining the ways in which judges react to women who claim their rights to restraining orders and their enforcement).

tim exposed to violence, and possibly to an increased level of violence.

Part I of this Article describes the pervasive silence surrounding issues of domestic violence as well as the systemic nature of such silence. It specifically discusses the role of patriarchy in maintaining this silence and the judiciary's complicity in perpetuating the patriarchal structure and silence that surrounds it. Part II discusses the nature of violence and its role in creating and enforcing silence. It concludes with a discussion of the concepts of legitimacy and its relationship to political authority in the wielding and control of violence. Part III explores how the judiciary, through its authority, can assume a vital role in eliminating silence, and thereby better prevent violence by providing written accounts of the forms that violence takes. This part considers the relationship between law and literature and the useful lessons that may be learned from literature. Finally, Part IV discusses potential alternative remedies that might be employed by the courts in an effort to better protect the victims of domestic abuse.

I

SILENCE

In domestic abuse,[29] silence begins with the victim.[30] The vic-

[29] The context in which this Article explores these omissions, both in the text and in the discussion of the text, is violence against women in the home, or also referred to as woman battering or wife abuse. Woman battering is defined as violence by an adult male intimate against an adult female intimate, regardless of marital status of living arrangements. This Article focuses on male violence because men are the abusers and women the victims in the vast number of cases treated by public authorities, shelters, and counseling programs. *See* BUREAU OF JUSTICE STATISTICS FACTBOOK , U.S. DEP'T OF JUSTICE, VIOLENCE BY INTIMATES 4 (Mar. 1998) [hereinafter VIOLENCE BY INTIMATES] ("Although less likely than males to experience violent crime overall, females are 5 to 8 times more likely than males to be victimized by an intimate."); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT, SEX DIFFERENCES IN VIOLENT VICTIMIZATION, 1994, at 4 (Sept. 1997) ("For male victims a stranger committed a majority of victimizations (63%), while a nonstranger committed 37% . . . . For female victims the distribution was reversed. The offender was most often someone known to them (62%). A stranger committed 38% of the violence against females."); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1, 3 (Aug. 1995) (reporting that while men are about twice as likely as women to experience acts of violence by strangers, women are about six times more likely than men to experience violence committed by an intimate); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE: SELECTED FINDINGS, VIOLENT CRIME 2 (Apr. 1994) (reporting that "[a] third of all violent victimizations of women but a twentieth of all violent victimizations of men are committed by a relative or intimate").

In this discussion of "private" violence, the terms wife-beating, wife abuse, domestic violence or abuse, relationship violence, and intimate violence are more or less used interchangeably. The first three are most accurately situated in theories of patriarchal silence. The second and third also most accurately describe the preponderance of these experiences. Domestic violence and abuse are more inclusive of violence within all family relationships, such as child abuse, sibling abuse, and elder abuse. The last two terms are intended to be inclusive of the violence that occurs outside the formal bonds of marriage. These terms are used interchangeably in part to achieve some ambiguity and broad applicability outside normative expectations and to garner the wisdom of a broad range of literature.

The use of the term "battered woman" is avoided because, as Martha Mahoney points out, it "focuses on the woman in a violent relationship rather than the man or the battering process, it creates a tendency to see the woman as the problem." Martha R. Mahoney, *Legal Images of Battered Women: Redefining The Issue of Separation*, 90 MICH. L. REV. 1, 25 (1991) [hereinafter *Separation*]; *see also* Liz Kelly, *How Women Define Their Experiences of Violence*, *in* FEMINIST PERSPECTIVES, *supra* note 14, at 114; Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 530-31, 535 (1992) (preferring the phrase, "a woman who has (or had) a relationship with a battering man"). In the context of this discussion, even this subtle example of the woman as the problem contributes to the erasure of her voice from the solution. Similarly, victims of abuse often resist use of the term "batterer" to define their loved one, life partner, and perhaps, father to their children. *See* Martha R. Mahoney, *Victimization or Oppression: Women's Lives, Violence and Agency*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE 59, 75 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) [hereinafter *Women's Lives*]; *see also* Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. HEALTH SERVICES, 97 (1988) (viewing child abuse through the prism of woman battering and positing that the best way to prevent child abuse is through female empowerment).

The phrase "wife abuse" is used specifically to situate the discussion in the context of marriage. Marriage is integral to our conceptualizations of gender relations and intimate violence. I do not mean to exclude forms of intimate violence outside of institutional marriage. Understanding that most intimate abuse revolves around the conceptualization of marriage, regardless of marital status, I believe it more fruitful to closely explore the marriage model in developing theory. *See* Michele Bograd, *Feminist Perspectives on Wife Abuse: An Introduction*, *in* FEMINIST PERSPECTIVES, *supra* note 14, at 12 ("As feminists, we believe that the social institutions of marriage and family are special contexts that may promote, maintain, and even support men's use of physical force against women.").

Rape must be included in the definition of abuse. Therefore, literature concerning rape is also relied upon. *See, e.g.*, DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 37 (1985) ("[B]attered women are at high risk for marital rape. The kind of man who beats his wife is also more likely to rape her."); DIANA E. H. RUSSELL, RAPE IN MARRIAGE (1990) (discussing the relationship between rape and physical abuse and the nature of power and control within patriarchal relationships).

[30] *See* Sharon Wofford Mihalic & Delbert Elliot, *If Violence is Domestic, Does it Really Count?*, 12 J. FAMILY VIOLENCE 293, 306 (1997) (indicating that "from 67% and 83% of all marital violence assaults, both minor and serious, reported in the marital violence section are not reported in the crime section"); Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2152, 2156 (1995) (citing S. REP. NO. 102-197, at 38 (1991)); *see also* Linda G. Mills, *On the*

tim is silent to avoid the rebuke of family and friends who place blame for her troubles on the victim, is silent to avoid or lessen the retribution exacted from the abuser for revealing his actions, is silent to shield her children from the hurt that comes from the abuse of one parent by the other, and is silent to avoid her own sense of shame in not meeting the expected image of the perfect wife or mother. Some scholars estimate that perhaps fifty percent or more of all women will be victims of battering during their lifetimes,[31] and statistics suggest that twenty-nine percent of violence against women is committed by a lone offender, where the perpetrator was a husband, ex-husband, boyfriend or ex-boyfriend.[32] Yet, under-reporting by the victim is widely acknowledged.[33] Though the victim does not actively create the situation of abuse, she internalizes the blame. This dynamic is reinforced by the fact that one of the first questions asked of the victim is "why doesn't she leave?," placing responsibility for the situation on her.[34]

It is the abuser who forces the silence. Domestic abuse is a means of obtaining control. Control over another person's actions, activities, and whereabouts to the extent of controlling their identity is the ultimate in silencing. That such control is obtained by actual force and the threat of actual force adds to the debased nature of the erasure. Though the abuser should be ashamed of his actions, control of the relationship means that his shame is transferred to the victim. He removes himself from responsibility by externalizing his shame to the victim.[35] The con-

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Other Side of Silence: Affective Lawyering for Intimate Abuse, 81 CORNELL L. REV. 1225 (1996) (discussing ways for attorneys to better serve their clients who are otherwise silenced).

Even though we might say that silence begins with the victim, it is important to note that silence is a public construction of audible accounts as private, i.e., not worth listening to by public authorities.

[31] *See* SONKIN ET AL., *supra* note 4, at xi; LENORE E. WALKER, THE BATTERED WOMAN ix (1980); Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 27-28 n.19; *Separation*, *supra* note 29, at 10-11.

[32] R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 3 (1979).

[33] *Id.* at 164-67; Mihalic & Elliot, *supra* note 30, at 293 (discussing how under-reporting of domestic abuse is due in great measure to the respondents' unwillingness to characterize intimate violence as criminal).

[34] *See Separation*, *supra* note 29, at 61-65; *see also* Barbara Hart, *Battered Women and the Criminal Justice System*, 36 AM. BEHAVIORAL SCIENTIST 624, 626-27 (1993) (discussing blaming attitudes towards victims).

[35] It is not uncommon for the batterer to blame his victim for his own violence

trolling nature of this violence is exemplified by the fact that the point of separation, when the victim chooses to leave and reclaim a separate identity, is when there is the potential for the greatest harm.[36]

Social mores present the structure permitting the silence. Popular images in the media also create forms of silence.[37] The silences include ignoring the existence of abuse in the home, its issues and problems, and minimizing its occurrence and effects. Our preferred community image dictates that we treat domestic abuse as aberrant, not something into which society need put a lot of energy. In fact, lack of public resources for shelters, safe havens, counseling or other means of helping a victim end or move away from the violence limits the victim's ability to reclaim her identity and thus contributes to her silencing. Where resources or help might be found, the silence is institutionalized. The medical profession, for example, has been criticized for not properly diagnosing and treating victims of abuse.[38]

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and abuse. His rationale for his behavior is that she precipitated or deserved it and therefore he is not at fault. *See* WALKER, *supra* note 31, at 165-84.

[36] *See Separation*, *supra* note 29, at 6 ("Separation assault is the common though invisible thread that unites the equal protection suits on enforcement of temporary restraining orders, the cases with dead women that appear in many doctrinal categories, and the cases with dead men—the self-defense cases." (citation omitted)).

[37] *See* MARIAN MEYERS, NEWS COVERAGE OF VIOLENCE AGAINST WOMEN: ENGENDERING BLAME ix (1997) [hereinafter NEWS COVERAGE] ("The predominant problems with news about violent crime against women—such as blaming the victim and reinforcing harmful cultural stereotypes and myths—lie not with individual journalists but with the social structures and values that deny male violence against women in a serious, systemic problem rooted in misogyny and patriarchy."); Mia Consalvo, *"3 Shot Dead in Courthouse": Examining News Coverage of Domestic Violence and Mail-Order Brides*, 21 WOMEN'S STUD. IN COMM. 188, 207 (1998) (pointing out that dominant views about domestic violence in the news include: "[T]hat men who batter are deviant or sick; that only some victims are innocent; that the woman is often blamed for what happened to her—and the issue of domestic violence itself [is] often erased from the coverage."); Marian Meyers, *News of Battering*, 44 J. COMM. 47, 48 (1994) [hereinafter *News of Battering*] ("[T]he news works ideologically to support the dominant power structure by creating a consensus that appears grounded in everyday reality."). Shows such as "Cops", while striving for the quality of reality, omit the voice of the victim, and even the batterer, in portrayals of domestic abuse. *See id.* at 69.

[38] Moreover, . . . institutions like the medical and other helping professions (such as the police and the judiciary) are complicit, or at least congruent, with "the social construction of battering." For example, a study by Stark, Flitecraft, and Frazier (1979) of how the emergency room of a city hospital treated women for injuries or symptoms while completely ignoring the causes, if the injuries resulted from battering, shows how the institution of medicine "coerce[s] women who are appealing for help back into the situa-

Even though there have been a wide range of reforms over the last twenty-five years,[39] state and legal actors continue to become complicit in the silence early. Preferences by individual actors within the chain of justice, including judges, to treat domestic violence as a private matter or to ignore it whenever it does not meet their perceived threshold level of violence,[40] diminishes its import and marginalizes the needs of the victims. The police have

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tions and relationships that batter them. It shows a system taking women who were hit, and turning them into battered women."

Teresa de Laurentis, *The Violence of Rhetoric: Considerations on Representation and Gender*, *in* THE VIOLENCE OF REPRESENTATION 239, 241 (Nancy Armstrong & Leonard Tennenhouse eds., 1989) (alteration in original) (citation omitted); *see also* Frances L. Restuccia, *Literary Representations of Battered Women: Spectacular Domestic Punishment*, *in* BODIES OF WRITING, BODIES IN PERFORMANCE 42 (Thomas Foster et al. eds., 1996) (discussing a commentary on "the institutional complicity in battering of medical and other 'helping professions (such as the police and the judiciary'")); Minow, *supra* note 13, at 1668-72 (discussing how different actors contribute to the perpetuation of the violence).

[39] *See, e.g.*, Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853 (1994); Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133 (1994) (presenting a nuanced analysis of a complex problem); *see also* recent legislation to provide civil remedies in federal court for gender-based violence, 1994 Violence Against Women Act, 42 U.S.C. § 13981 (1994), and proposed legislation to provide greater funding and programs to stop domestic abuse, Violence Against Women Act II, H.R. REP. NO. 106-357 (1999) and S. REP. NO. 106-51 (1999), and proposed legislation to increase protections against hate crimes including those against women, Hate Crimes Prevention Act of 1999, H.R. REP. 106-1082 (1999) and S. REP. NO. 106-622 (1999). The reforms that have addressed some problems endemic to domestic abuse are to be applauded. In fact, the discussions which are the subject of this Article could not have existed without the work of women's movements and the acceptance of such reforms. Such reforms were a necessary response to the silences and attempt to facilitate the law's responses to them. Nonetheless, reforms themselves have a quality of silencing. When people believe something is being done, they often do not feel the need to do more or go further. The reforms to date can only be considered the beginning as they have not been transformative, perhaps because they were initiated from without. We need to go further in addressing the issues of domestic abuse. Attempting to fill the silences from within the system is the next place to start.

[40] In the 1970s and early 1980s, there was considerable academic disagreement as to what constituted "violence." *See, e.g.*, MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS 20-22 (1981) (discussing the differences between "normal violence" and "abusive violence"). Currently, there is more academic agreement that violence and abuse ranges from the emotional or psychological to the physical. *See* Gerald T. Hotaling et al., *Intrafamily Violence, and Crime and Violence Outside the Family*, *in* FAMILY VIOLENCE, *supra* note 14, at 315, 319-27 (discussing the expansion of the definition of family violence). Nevertheless, old perceptions continue and individuals may disagree as to what constitutes violence and abuse. These differences can be considered to be modes of resistance and additional means of silencing.

a long history of ignoring, and in some instances, facilitating domestic abuse.[41] Prosecutors have a history of selective prosecution and choices in plea bargaining favorable to the batterer[42] that may provide incentives for recidivism,[43] in some instances prosecuting the abuser only after a murder has occurred.[44] In addition to literal inattention, issues of domestic abuse are silenced when they are not identified as such, but categorically atomized and treated in several different doctrinal areas.[45] The diffuse treatment functions to dilute the magnitude and seriousness of

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[41] The "private" conceptualization of wife beating has traditionally influenced police responses. Male violence within the home was originally excluded from police action. Information about such crimes came from police reports (until recent advent of crime surveys/victimization surveys). Elizabeth A. Stanko, *Fear of Crime and the Myth of the Safe Home*, *in* FEMINIST PERSPECTIVES, *supra* note 14, at 75, 79. Reform efforts have changed police responses, but not necessarily police perceptions, and have led to the preference for mandatory arrest in abuse situations. *See* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996); Schulhofer, *supra* note 30, at 2162-70. *But see* LAWRENCE W. SHERMAN ET AL., POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS (1992) (expressing a preference for police discretion because of varying results in effectiveness in studies and because of the possibility of escalation effects).

[42] [P]rosecutors in a number of communities have taken the emergence of woman abuse seriously as a major crime problem and have developed procedures that allow them to prosecute batterers successfully. In other places, however, prosecutors still argue that most abuse cases are minor, undeserving of their attention, and/or that the women always drop the charges because they do not want their husbands to go to jail, so there is no point in prosecuting these cases.

Naomi R. Cahn & Lisa G. Lerman, *Prosecuting Woman Abuse*, *in* WOMAN BATTERING: POLICY RESPONSES 95, 96, 104-06 (Michael Steinman ed., 1991) (citation omitted) [hereinafter WOMAN BATTERING].

> Prosecutors believed that judges would dismiss all but the most egregious violations with a simple admonishment . . . . Judges were frustrated by what they considered to be a lack of acceptable sentencing options; not wanting to separate wage earners from their families, or believing that violence in a domestic setting was not truly "criminal" behavior . . . .

Donald G. Dutton & Barbara M.S. McGregor, *The Symbiosis of Arrest and Treatment for Wife Assault: The Case for Combined Intervention*, *in* WOMAN BATTERING, *supra*, at 131.

[43] *See* Fagan, *supra* note 14, at 394.

[44] *See infra* notes 83-87 and accompanying text.

[45] Contributing to the "silence" is the categorization of battering under other types of crime. *See* Dee Michael Steinman, *The Public Policy process and Woman Battering: Problems and Potentials*, *in* WOMAN BATTERING, *supra* note 42, at 1, 5; Hart, *supra* note 34, at 627:

> Many battered women who earnestly seek prosecution find substantial resistance to the appropriate charging of defendants. National data reveal that law enforcement routinely classifies domestic assault as misdemeanors even though the criminal conduct involved actually included bodily injury

the issues and is therefore a means of creating silence. Police reticence in arrest and prosecution choices limit the cases and issues available for judges to select in writing their opinions. While not all cases can, nor should, be prosecuted, this filtering system, through the police, the prosecutor, and then the judge's choice in which opinions to write, may in fact give a false sense of the seriousness of the cases coming forward, while marginalizing the import of those that do not.[46]

Legal participants and observers have a natural tendency to focus on the most egregious cases, the ones that absolutely have to be addressed.[47] Unfortunately, it is the smaller, seemingly less significant cases that are most important to the eradication of this kind of violence.[48] Murder in the home by an intimate is rarely random. It starts with a small indiscretion, abusive word or phrase, or minor physical contact, but then escalates. Analogously, in the law we tend to focus most heavily on the Supreme Court and other upper-level decisions, but it is the trial court or administrative decisions that have the most direct effect and greatest impact on individual lives.[49] Though the sound emanating from a single Supreme Court opinion may be quite loud, the accumulation of the tiny silences from each lower-level court is a cacophony.

A. The Dictates of the Patriarchal Order

The systemic nature of the silence[50] surrounding domestic

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as serious or more serious than 90% of all rapes, robberies, and aggravated assaults.

[46] *See infra* Part IV. In their 1979 ground-breaking work, DOBASH & DOBASH, *supra* note 32, at 207-22, describe the inattention of the police and judiciary. Improvements have been made in police responses, including mandatory arrest, prosecutorial training in handling these cases, and attempts to educate judges about the seriousness of domestic violence. While there is cause to celebrate the advance in this area, there is greater cause to push forward and insist on greater reform.

[47] *See Separation*, *supra* note 29, at 3 ("The self-defense cases in which women kill their batterers are small in number compared to the overall universe of domestic violence . . . .").

[48] *See infra* notes 264-68 and accompanying text.

[49] Heilbrun & Resnik, *supra* note 2, at 1937-44; *see also infra* note 210.

[50] Silence, as referred to in this Article, includes more than merely the literal. The breadth of silence entails the entire range of obfuscation and elimination. It includes both its existence, in its negative form, and the acts creating, contributing to, and perpetuating silence. There are even difficulties in attempts to discuss the silence. Such a discussion is necessarily a theoretical proposition. There is rarely direct confirmation, as we had in the *Person* case, of silence, but comes in the form of circumstance and shadow. Silence is not documented and its existence and effects

abuse presents a daunting challenge. The judicial system is integral to the operation of society and, in fact, tailors society's direction and has immeasurable impact on social customs.[51] Though judges appear to be last in the chain, they nonetheless may be the most important. In a cyclical way, judges influence the first steps in the process by sending signals as to appropriate responses by all other actors, including the batterer, police and prosecutors, and by defining the levels of violence and control of one person by another permissible in society. The courts thereby help define what is not culturally permissible within the enforcement community and the greater society. The judiciary must be responsible to the public in the messages it transmits.

Silence by the courts contributes to the conceptualization of separate public and private spheres,[52] perpetuating the violence in both substance and form. Substance is apparent as silence is permissive, implicitly condoning the existing violence and encouraging its perpetuation. Form is more complex in that it is the relevant governing structure determining what is silenced. These structures are both self-replicating and cyclical. The nature of the patriarchal family structure is to imitate the governing structure of the state.[53] However, because the state is comprised

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are rarely, if ever, studied. Though not the direct purpose of this Article, it might serve as a challenge to social scientists to make such studies. *See* Hotaling et al., *supra* note 40, at 352, 364-65 (pointing out that part of the problem is the lack of research exploring this connection); *see also* Lee Ann Hoff, *Collaborative Feminist Research and the Myth of Objectivity*, *in* FEMINIST PERSPECTIVES, *supra* note 14, at 269 (demonstrating inherent biases in research methodologies). On a related point, Peter Margulies points out that the social science used in criminal trials is troubling, precisely because it is silent on the subordinated groups who may be directly affected by such evidence. Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 RUTGERS L. REV. 45, 52 (1998). Indeed, this discussion is primarily about the silence, and not the events that are silenced. It too operates to silence.

[51] *See, e.g.*, George Kateb, *Brown and the Harm of Legal Segregation*, *in* RACE, LAW AND CULTURE (Austin Sarat ed., 1997) (using Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), *repudiated by* Brown v. Board of Education, 347 U.S. 483 (1954), to critique Chief Justice Warren's central argument about the harms caused by the intentional humiliation of legal segregation); Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1349 (1994) (arguing that women's and children's rights are grounded in the moral independence view that forbids state action for no other purpose than moral standard setting).

[52] *See* Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (coining the terminology of "separate spheres" in describing conceptualizations of male and female roles).

[53] This view of patriarchy corresponds with the classical form of thought pro-

of the individuals in those families, it is also true that the state replicates those structures of power and authority.[54]

Coverture is no longer official doctrine; we abrogated the immunities accorded to spouses, amended statutes concerning inheritance, property ownership, and right to contract. Women are now able to hold an action for physical and sexual assault in their own name. These changes have brought great strides in achieving the goal of equality. Nevertheless, silence and inattention to family violence[55] continue to perpetuate the patriarchal structure and the framework of violence that maintains it.[56] Silence reaffirms the patriarchal order by privileging some kinds of control, force, and violence by selective attention and enforcement and, thereby, permits a *de facto* form of spousal immunity.

The patriarchal order dictates the nature of the silence surrounding domestic abuse. Within this framework, there may be a variety of reasons for its perpetuation.[57] Most apparently, silence inheres for fear of change.[58] Those without courage generally prefer the status quo. Silence permits avoidance of the underlying problems and issues of concern.[59] Perhaps the silence is to avoid augmenting the shame of the victim or shame from

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pounded by Sir Robert Filmer, where the family structure is identical to that of the state. *See* PATEMAN, *supra* note 5, at 24-25.

[54] This view of patriarchy corresponds with the traditional form of thought, where the family serves as metaphor for other power relations. *See id.* at 23-24.

[55] *See* Siegel, *supra* note 10. Silence is both historical and systematic. *See* Schulhofer, *supra* note 30, at 2151 (discussing the relationship of the historical legal treatment of wife-beating and the current levels of toleration for abuse in the legal system). There is a history of the legal system's permissive attitude toward wife-beating and current levels of toleration for abuse. There is silence at every step in the chain of justice.

[56] *See infra* Part II.

[57] There is a relationship between personal experiences of disempowerment and oppression and broader political action and consequences. Monique Deveaux, *Feminism and Empowerment: A Critical Reading of Foucault*, *in* FEMINIST INTERPRETATIONS OF MICHEL FOUCAULT 211, 232 (Susan J. Hekman ed., 1996) [hereinafter INTERPRETATIONS OF FOUCAULT] (referring to instances of activism against social oppressions). It follows that there are also consequences of inaction.

[58] Robert M. Cover, *The Supreme Court 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 68 (1983).

[59] Avoidance is a form of silencing. "[O]mission, rejection, and ambivalence—share a common dynamic: each is a way of underexposing the intentional object in order to minimize its significance in the final picture." ELAINE SCARRY, RESISTING REPRESENTATION 95 (1994) (emphasis omitted); *see also* Cover, *supra* note 58, at 66 (discussing *Bob Jones University v. United States*, 461 U.S. 574 (1983), and its avoidance of the question whether Congress could constitutionally grant tax exemption to a school that discriminates on the basis of race).

the judge's inability (or refusal) to empower the victim. Another possibility is that the relative power position of the batterer is a replication of the power position of the judiciary[60] (imposing a specific order through violence, conceptual or actual).[61] Or, if the traditional conceptualization of family and home is a replication of the state governing structure, challenging the authority of the batterer might also challenge the authority of the state.[62] Families tend to be silent about their own dysfunction. In a perverse twist, the state may be replicating the family in its dysfunction.[63] Rather than dealing with these issues publicly, we hide from them, almost denying their existence. Maybe the courts prefer silence to avoid the sex and sexual implications inherent in the marital relationship, the writing about which, along with the violence and power imbalance, would have almost a pornographic or voyeuristic appeal.[64] Another reason for the silence might be to hold fast to a particular community image,[65] or image of self. Breaking the silence implicates the self in the violence.[66]

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[60] *See* PATEMAN, *supra* note 5 (discussing the traditional and modern forms of patriarchy).

[61] *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

[62] *See* PATEMAN, *supra* note 5 (discussing the classical form of patriarchy).

[63] Part of the dysfunction is denial and efforts to cover up or ignore the dysfunction. *See* Layne A. Prest & Howard Protinsky, *Family Systems Theory: A Unifying Framework for Codependence*, 21 AM. J. FAM. THERAPY 352 (1993) (noting the dysfunctional family and co-dependency within it are kept silent as indicated by the pervasiveness of the problem and the very insignificant recognition of the issue). In this area, it seems the state is also a means of covering social ills. *Cf.* Robert Weisberg, *Private Violence as Moral Action: The Law as Inspiration and Example*, *in* LAW'S VIOLENCE, *supra* note 9, at 175.

[64] As pornography is the ultimate expression of dominance by the use of violence, specifically in a sexual context, mere contemplation of the marital bed is enough to come within its purview. Feminists have referred to marriage as just another form of prostitution. *See generally* ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 19, 102 (1981):

> Wife beating and marital rape, pervasive here as elsewhere, are predicated on the conviction that a man's ownership of his wife licenses whatever he wishes to do to her: her body belongs to him to use for his own sexual release, to beat, to impregnate. The male power of owning, by virtue of its historical centrality, is barely constrained by the modest legal restrictions put on it.

[65] "In interpreting a text of resistance, any community must come to grips with violence. It must think through the implications of living as a victim or perpetrator of violence in the contexts in which violence is likely to arise." Cover, *supra* note 58, at 50. Cover is referring to revolution in the collective community sense. Resistance in the individual context no less implicates the community. Nor does it exclude the judge as the interpretive authority.

[66] *See* James Ptacek, *Why do Men Batter their Wives*, *in* FEMINIST PERSPECTIVES, *supra* note 14, at 133, 139 (discussing the tendency to refuse one's own potential for

Through self-identification, violence in the home is "too close to home." Acknowledging the systems of control within our families forces a personal involvement in the violence perpetuated by the patriarchal order, ubiquitous in our society.

To the extent patriarchy informs the normative community and self-image, it operates not only to silence actions not conceptualized within the norm,[67] but also marginalizes sub-cultures or counter-cultures within the greater society, deepening the silence within these communities.[68] The greater community image serves to silence by marginalizing; images of the sub-culture operate to silence further. As with the greater community, self-image within ethnic minority and gay and lesbian communities is the unifying force in the motive for silencing anyone outside of that image.[69]

B. Silencing Communities Within the Community

Community for "others" tends to be two-fold: immediate and greater, the immediate responding to the norms of the greater, with the individual responding to both.[70] The result is a doubled dynamic of a power structure within a power structure. For example, African American women and Latinas may prefer not to use state resources in eliminating violence within their homes for

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violence and how that can affect one's moral and political judgments); SONKIN ET AL., *supra* note 4, at 180-87 (discussing the violence within and the images of it around us).

[67] *See, e.g.*, Schneider, *supra* note 29, at 545-48 (discussing elder abuse).

[68] *See id.* at 542-45 (discussing violence between lesbians); *id.* at 531-35 (discussing race essentialism); *see also* Berta Esperanza Hernandez-Truyol, *Sex, Culture, and Rights: A Re/Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 625 (1997) ("Latinas as a group are so marginalized and invisible, that statistics are rarely available to allow commentators to bring them to visibility.").

[69] *See, e.g.*, Nancy Hammond, *Lesbian Victims and the Reluctance to Identify Abuse*, *in* NAMING THE VIOLENCE 190 (Kerry Label ed., 1986); Barbara Hart, *Preface*, *in* NAMING THE VIOLENCE, *supra*, at 9, 14.

[70] *See* Paula Gunn Allen, *Violence and the American Indian Woman*, *in* THE SPEAKING PROFITS US: VIOLENCE IN THE LIVES OF WOMEN OF COLOR 5 (Maryviolet C. Burns, M.Div. ed., 1986) [hereinafter THE SPEAKING PROFITS US] (pointing out that dealing with domestic abuse against a backdrop of a history of genocide is daunting and silencing); Christine E. Rasche, *Minority Women and Domestic Violence: The Unique Dilemmas of Battered Women of Color*, 4 J. CONTEMP. CRIM. JUST. 150, 152 (1986) (describing how minority women found themselves sharing common concerns as well as peculiar ethnic problems with those of non-minority women: "[F]or white women and women of color, the *experience* of battering is quite similar but at the point of seeking help or escape from the abuse, women of color face many problems that white battered women generally do not.").

fear of further stigmatization of their communities, supporting prevailing stereotypes, or precipitating greater violence.[71] Similarly, concepts of community are so important among Asian American communities, an import that may eclipse both self and family, that Asian American women may maintain silence to avoid bringing shame to their communities.[72] In addition, some women may have the additional burden of language barriers that may literally operate to silence them.[73]

To the extent that gay and lesbian relationships are viewed as deviant (that is, outside the expected patriarchal heterosexual relationship),[74] there is already a forced silence (in the closet). The silence is compounded when there is more silence concerning the violence encountered in those "deviant" relationships.[75] Gay and lesbian relationships *do not fit neatly* within our expectation of traditional relationships or our "cohesive national image."

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[71] *See, e.g.*, Rasche, *supra* note 70, at 157 (indicating that under-reporting in Asian American Communities may be more severe than the general population because of a perceived hostile white society); *see* Beth Richie, *Battered Black Women: A Challenge For the Black Community*, BLACK SCHOLAR, Mar./Apr. 1985, at 43 ("How can blacks in the domestic violence movement reconcile the reality of police brutality and blatant racism in the criminal justice system with the need for police and court intervention on behalf of battered women?"); Rasche, *supra* note 70, at 159-60 (discussing mistreatment of communities of color by the justice system); *see also* Evelyn C. White, *Life is a Song Worth Singing: Ending Violence in the Black Family*, *in* THE SPEAKING PROFITS Us, *supra* note 70, at 11. In addition, the history of the abandonment of marital chastisement supports this viewpoint. Examination of the doctrine transforming cases demonstrate class bias in enforcement and, where race was involved, a greater interest in controlling African American men than in protecting African American women. Siegel, *supra* note 10, at 2134-39.

[72] *See, e.g.*, Nilda Rimonte, *Domestic Violence Among Pacific Asians*, *in* MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN 327, 328 (Asian Women United of California ed., 1989) [hereinafter MAKING WAVES] (discussing how the Asian family's traditionally patriarchal system favors the family and community over the individual, demanding silence to protect community image); *see also* Tracy A. Lai, *Asian Women: Resisting The Violence*, *in* THE SPEAKING PROFITS Us, *supra* note 70, at 8.

[73] *See* Angela Ginorio & Jane Reno, *Violence in the Lives of Latino Women*, *in* THE SPEAKING PROFITS Us, *supra* note 70, at 13 ("This absence of information about Latina women reflects the triple burden of discrimination under which we function . . . : ignored by men because we are women, ignored by white women because we are women of color, and ignored by the English-speaking because . . . we can only speak in Spanish or Portuguese."). Rasche, *supra* note 70, at 157 (discussing how silence might be compounded by language barriers and both facetious and real threats of deportation).

[74] Thus, patriarchy is a complete system of control: silence on family matters; ostracism of those who do not fit within its expected norms.

[75] *See generally* NAMING THE VIOLENCE, *supra* note 69 (attempting to break some of the silence surrounding violence in lesbian relationships).

Often in situations of intra-lesbian violence, lesbian sexuality is punished instead of the violence, thereby accepting the violence as expected in such situations.[76] This is perversely consistent with conceptualizations of heterosexual relationships. When there is deviation from the expected patriarchal structure, violence is implicitly condoned and excused.

Thus, while enjoying privilege, it has come about that heterosexual white men may also be silenced. Because the patriarchal structure determines acceptable gender roles,[77] validating the use of force by men to control women, occurrences of men battered by women have historically been publicly ridiculed and labeled "weak."[78] Men often remain silent about the abuse while staying in the relationship to avoid ridicule for not conforming to their expected gender roles.[79]

Because conformity with the "unified community image" is the starting point in measuring degrees of silence, pointing out difference becomes unifying. Context, through each individual story not only broadens the "cohesive national image" that informs the normative, but also provides a better shot at justice for that individual.

C. It is Still Violence in Private

The rationalization of domestic crime as "private" and as such only due minimal, if any, state intervention, tends to be the primary justification for the silence surrounding it.[80] Relegation of these wrongs to the private is tantamount to forced silence; it is in the public arena where public debate and speech have meaningful impact. Ironically this is precisely the reason this crime is

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[76] *See* Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990) (discussing how in situations of intra-lesbian violence, lesbian sexuality is punished instead of the violence, thereby accepting the violence as expected in such situations).

[77] Gender roles are also determined by race. *See* Fenton, *supra* note 10; Roberts, *supra* note 10.

[78] *See* Suzanne K. Steinmetz, *The Battered Husband Syndrome*, 2 VICTIMOLOGY 499 (1978) (detailing a history of social ridicule for both husbands and wives who did not meet patriarchal gender role expectations).

[79] Husbands also stay. *See id.* at 506-07 (discussing social roles and pressures, resources, children, and other reasons men stay in battering relationships).

[80] *See* Dutton & McGregor, *supra* note 42, at 132 (discussing reasons judges infrequently punish offenders with fines or jail time); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991) (discussing how the conceptualization of woman battering as a private matter has contributed to the perpetuation of this form of societal violence).

the most serious and deserving of the most vociferous public condemnations. "In no other category of violent crime does one find the offender going home to live with the victim."[81] The interaction of patriarchy with the concepts of the "private" dictate the manner in which issues of domestic abuse are addressed. Unfortunately, judicial silence on these issues not only contributes to the "private" conceptualization, but also denies a primary avenue for public awareness, one with the weight of authority to change the status quo.

When the criminal courts are most willing to deal with domestic violence, the focus tends to be on the worst results rather than the incremental steps prior to and the ways to prevent them. The greatest number of cases reported on domestic abuse concern murder and its defenses. In fact, another facet of the silence is our preoccupation with the most egregious results of abusive situations, rather than with the reasons for the environment that permits abuse to exist at all.[82] Murder is itself a silencing force: "Many of the women killed by their husbands are killed after they have separated. Ironically, since those women are not alive to tell their stories, *their voices disappear* into the narrative voices of the courts, where the women are not usually identified as battered."[83] That so many written discussions of domestic vio-

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[81] Cahn & Lerman, *supra* note 42, at 97; *see also* DOBASH & DOBASH, *supra* note 32, at 7 ("There can be no doubt that being assaulted or raped by a stranger in some dark alleyway is frightening, humiliating, painful, and perhaps fatal, but are such things any less horrific if they happen within the home at the hands of a relative?"). Roommates may also have to live with their victimizers. Broadly defined, this might be considered a form of domestic abuse. Of course, prison inmates must also continue to live with their victimizers in many instances. The comparison between domestic abuse and inmate abuse obviates the qualitative differences, and perhaps, the similarities as well. *See* Angela Y. Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339 (1998) (discussing the centrality of physical abuse in the lives of women subject to state punishment and linking the punishment of women in the private space to that in the public).

[82] *See infra* notes 261-64 and accompanying text; *see also* STRAUS ET AL., *supra* note 40, at 15 (suggesting that "this is because it is a crime which leaves physical evidence which *cannot be ignored* in the same way that we can overlook other forms of intrafamily violence," and generally criticizing it for not examining power differentials in the kinds and degree of violence and abuse within the family) (emphasis added)).

[83] *Separation*, *supra* note 29, at 72 (emphasis added) (citations omitted); *see also* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1344 (1997) (pointing out that "[s]tudies suggest that between forty-five and fifty-six percent of all intimate homicides men commit involve some element of separation" (citations omitted)).

lence are stories of murder demonstrates the escalation necessary for attention to the matter.[84] The frequency of murder in the domestic setting, even with these discussions, is not perceived as a cost of silence and a logical result of patriarchy. Thus, there is a reaffirmation of the patriarchal order rather than an exposition of the nature of the relationships that have potential to reach such levels of violence.[85] The evidence of patriarchy is manifest when the treatment of victims is compared. Murder of a husband has traditionally been treated as far more egregious than that of a wife.[86] Comparisons of the overall success of the use of Battered

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[84] *See supra* Part I. Evan Stark suggests that "between 40 and 93 percent of the women in prison for murder or manslaughter killed partners who physically assaulted them, most in direct retaliation or to protect themselves and/or a child." Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973 (1995) [hereinafter *Re-presenting Woman Battering*] (citing ANGELA BROWNE, WHEN BATTERED WOMEN KILL 10 (1987)); *see also* PETER D. CHIMBOS, MARITAL VIOLENCE: A STUDY OF INTERSPOUSE HOMICIDE (1978); Manfred S. Guttmacher, *Criminal Responsibility in Certain Homicide Cases Involving Family Members*, *in* PSYCHIATRY AND THE LAW 73 (Paul H. Hoch & Joseph Zubin eds., 1955); Evan Stark, *Rethinking Homicide: Violence, Race and the Politics of Gender*, 20 INT'L J. HEALTH SERVICES 3, 16-20 (1990) [hereinafter *Rethinking Homicide*]; Franklin E. Zimring et al., *Intimate Violence: A Study of Intersexual Homicide in Chicago*, 50 U. CHI. L. REV. 910, 910-21 (1983).

[85] *See* Fagan, *supra* note 14, at 394.

[86] The history of Anglo-American law treated assault on women as acceptable practice and necessary to maintain authority. Conversely, husband killing was viewed as treasonous, analogous to crimes against the state. As Blackstone explained:

> Husband and wife, in the language of law, are styled baron and *feme*. The word baron, or lord, attributes to the husband not a very courteous superiority. But we might be inclined to think this merely and unmenacing technical phrase, if we did not recollect that if the baron kills his *feme* it is the same as if he had killed a stranger, or any other person; but if the *feme* kills her baron, it is regarded by the laws as a much more atrocious crime, as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime a species of treason, and condemns her to the same punishment as if she had killed the king.

Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 628-29 (1980) (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (R. Welsh & Co. ed. 1897)); *accord* 2 FREDERICK POLLOCK & FREDERICK MAITLAND, THE HISTORY OF ENGLISH LAW 500 (2d ed. 1898); *see also* ANN JONES, NEXT TIME SHE'LL BE DEAD: BATTERING & HOW TO STOP IT 5 (1994) (discussing how we tend to look to the woman, the object of abuse, for the explanation for its occurrence: "We are still inclined . . . to regard whatever 'right' the abused woman has . . . as merely formal, contingent, conditional, and in competition with many rights traditionally enjoyed by the man as *pater familias* and upheld by social institutions, religious leaders, public officials, and politicians under the rubric of family values."); Steinman, *supra* note 45, at 5 ("These hurdles are largely products of historical norms favoring patri-

Woman Syndrome and the use of extreme emotional distress as a defense is also instructive on this point.[87]

D. Existing Doctrine and the Inconsistencies

Explanations of Battered Woman Syndrome,[88] both in and out of court, have enabled juries and the general public to understand the necessity perceived by the victim of abuse to find a means of survival and to change the paradigm of self-defense as a response to the "criminal justice system's covert toleration of wife abuse."[89] Nonetheless, this situation being perceived as a "common story" has a long way to go.[90] Women who should be able to use such evidence in fashioning a proper state of mind defense are still limited by the traditional understanding of self-defense and by a very limited conceptualization of battered women and their responses.[91] Battered Woman Syndrome, as the state of mind element necessary to show reasonableness in self defense of murder, has been denied full acceptance in courts for many years.[92] Even now with its gained acceptance, it is limited by stereotypic expectations of battered women and of who may properly assert the defense.[93] Battered Woman Syndrome has

archal power . . . and limited government . . . . The former gives men power over women . . . . The latter helps protect this relationship by defining government's role narrowly and putting victims beyond government's protective reach." (citing DOBASH & DOBASH, *supra* note 32)); Maria L. Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CAL. L. REV. 1657, 1658-59 (1981).

87 Extreme emotional distress claims are the modern manifestation of the "heat of passion" excuse. *See generally* Nourse, *supra* note 83.

88 For a historical account of the acceptance of Battered Woman Syndrome in the courts, see Jones, *supra* note 86; *Re-Presenting Woman Battering*, *supra* note 84.

89 Michael A. Buda & Teresa L. Butler, *The Battered Wife Syndrome: A Back-door Assault on Domestic Violence*, 23 J. FAM. L. 359 (1984-1985) (citation omitted).

90 *See* Schneider, *supra* note 14 (examining how sexual stereotypes of women and the male orientation are built into the law and legal system and how the assertions of self-defense by battered women are not requests for special treatment, but pleas for equal treatment).

91 *See* Maguigan, *supra* note 27 (arguing that traditional self-defense doctrine is applicable to self-defense claims of battered women who kill); *see also Re-Presenting Woman Battering*, *supra* note 84, at 992-96 (discussing the constraints of gender stereotypes and structural inequality placed on battered women who come before the court as perpetrators of violence). *But see* George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553 (arguing that self-defense should not be "bent" to include the claims arising from Battered Woman Syndrome).

92 *See* Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477 (1996) (discussing gender bias in the criminal process, especially in perceptions of self-defense, the choice in defense, and expert testimony on battering).

93 In addition, representation must avoid stereotypes of the victim of "insanity,"

had a mixed history: its canons developed primarily through the work of, and stories told by, feminist activists have been limited by the implicit reliance on a specific "deviance" model of women to which the defendant must conform.[94]

The accession of Battered Woman Syndrome has been an effort, and even minor achievement, in the direction of establishing appropriate canons and effectuating reform. Unfortunately, there has also been the resistance to allowing the old canons to accommodate Battered Woman Syndrome as dictated by the overarching patriarchal paradigms. This point is further demonstrated by an examination of the evolution of the provocation defense in comparison.

This may be the starkest example of how the law embodies the male perspective:[95] under self-defense, the reasonableness of a woman's actions characterized by Battered Woman Syndrome are, at best, deemed questionable in light of the normative expectations of immediacy;[96] under provocation, reasonableness is determined by male understandings of self-actualization and male perceptions of normal relationships based on the "pursue and conquer" model.[97] The difference between the development of the two doctrines is apparent considering that the law's basis for objectivity is the male perspective[98] and that within that perspec-

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the "respectable woman" or the "violent brute" that have been used in the past and have been particularly problematic for the use of Battered Woman Syndrome. JONES, *supra* note 86, at 158-66 (describing the perversion of the defense as one of insanity); *Re-Presenting Woman Battering*, *supra* note 84, at 992-96; *see also* Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003; Fenton, *supra* note 10; Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994).

[94] *See* Schneider, *supra* note 92, at 499 (discussing how the issue of self-defense may never reach the jury if the abused woman is not considered a "real" battered woman); *see also* Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 376 (1992); Maguigan, *supra* note 27, at 381.

[95] *See* Finley, *supra* note 23 (discussing how the language of law is gendered male).

[96] *See* Fletcher, *supra* note 91.

[97] Separation assault is a manifestation of the classic pursue and conquer model of relationships where the male dates or courts the female so that he can have sex or get married (to have sex). *See* Nourse, *supra* note 83, at 1359. *See generally* Mary E. Becker, *The Abuse Excuse and Patriarchal Narratives*, 92 NW. U. L. REV. 1459, 1478 (1998) ("[N]atural, moral, sexuality is between a male sexual subject who pursues and a female sexual object who is pursued."); *Separation*, *supra* note 29.

[98] *Cf.* DWORKIN, *supra* note 64, at 108:

tive the concept of "family violence" is nearly non-existent.[99] The irony is that batterers have historically enjoyed privileged avoidance of the consequences for their actions merely by their status within the family; objections and resistence to including battered women within traditional doctrine or creating new doctrine are also based on status.[100]

Based on the extensive empirical research and findings of Victoria Nourse,[101] provocation defense cases have been told to the point that its canons have expanded to better protect batterers who kill.[102] Extreme emotional distress in defense of batterers has been used almost as "punishment" to the victim.[103] Reformist concepts of the "heat of passion" defense have been used to excuse the accused's outrage for even the mere desire of the victim to leave.[104] In what Nourse describes as an unusual murder

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> Note too that the male commits an objective act. Men are able to be objective, an exalted capacity, precisely because they are not objects. To be objective means that one knows the world, sees it as it is, acts on the objects in it appropriately .... Women, the logs at issue, cannot be objective or act objectively because objects do not see or know.

See also Nancy Hartsock, *Postmodernism and Political Change: Issues for Feminist Theory*, *in* INTERPRETATIONS OF FOUCAULT, *supra* note 57, at 39 (noting that domination, viewed from above, is more likely to appear as equality).

[99] *See* de Lauretis, *supra* note 38, at 246:

> To say that (a) the concept of "family violence" did not exist before the expression came into being, . . . is not the same as saying that (b) "family violence" did not exist before "family violence" became part of the discourse of social science. The enormously complex relation binding expression, content, and referent (or sign, meaning, and object) is what makes (a) and (b) not the same.

[100] *See* Marcus, *supra* note 86, at 1658 (pointing out that marriage created a status that for many years excused the actions of men and that comparatively Battered Woman Syndrome is resisted in its creation of status that excuses the actions of women).

[101] *See* Nourse, *supra* note 83, at 1332 ("Our most modern and enlightened legal ideal of 'passion' reflects, and thus perpetuates, ideas about men, women, and their relationships that society long ago abandoned.").

[102] *See id.* Nourse explains that the reformation of the "heat of passion" excuse for the more modern "emotional distress" have expanded a batterer's ability to receive a reduced conviction of manslaughter over the often more appropriate conviction for murder. *Id.*

[103] *Id.* at 1364 ("What seems less clear is how the law can avoid the implications of its choice—that it partially condones the use of private violence to punish dancing, traveling, and turning.").

[104] *Id.* at 1332. Of states following the MODEL PENAL CODE § 210.3 (1985), in whole or part, one-quarter of the cases reported between 1980 and 1995, involved a departure or separation prompting a passionate homicide. An amazing consequence knowing that one of the most dangerous times for a battered woman is during the period she chooses to leave. "Reform of the passion defense, however, has yielded

case, *State v. Traficonda*,[105] where the defendant shot his victim with a Winchester rifle in their home, the court noted that most of the evidence supporting the defense "'pointed to the defendant's mental and physical abuse of the victim,'" demonstrated a willingness for the defense based on the defendant's own violent acts.[106] *Traficonda* was only unusual in that it was explicit. The pattern of these stories soon becomes familiar. The court narrates a story of infidelity. Only by reading the cases carefully is it apparent that these are claims of departure.[107] The victim was divorced from the man now claiming her loyalty. She had left because she believed he was abusing their daughter, or she sought shelter in a home for battered women. It turns out in the pattern of cases that her separation from him is accepted as the basis for his state of mind, permitting him the justification. Considering that the batterer's self-justification for his actions depends on the rationale that "she deserved it" or she did something to precipitate or "provoke" him,[108] the provocation defense goes on to reaffirm removing the male from responsibility for his actions while continuing to blame the victim for the situation.[109]

It is understood that the most dangerous time for a victim of abuse is when she decides to leave.[110] Thus, the law is structured in a way that almost completely traps the victim of domestic abuse. On one hand, part of the stereotype and expectation of an abuse victim is that if the abuse is too bad, she will leave.[111] However, in cases where she does not leave, her status as a victim is brought into question, which may affect the effective use of Battered Woman Syndrome in her defense. On the other hand, in cases where she does find the wherewithal to leave, she is often putting herself in more danger and may be strengthening

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precisely the opposite result, binding women to the emotional claims of husbands and boyfriends long ago divorced or rejected." Nourse, *supra* note 83, at 1334.

[105] 612 A.2d 45 (Conn. 1992).

[106] Nourse, *supra* note 83, at 1354 (quoting Traficonda, 612 A.2d at 49). Nourse also points out, it is not only women killed, but also the man helping her to leave, the sheriff, the mover, or new lover, who dies, while the killer successfully claims the provocation defense. *Id.* at 1335.

[107] *Id.* at 1361 (citations omitted).

[108] *See* MILDRED DALEY PAGELOW, WOMAN-BATTERING: VICTIMS AND THEIR EXPERIENCES 54 (1981).

[109] *Cf. supra* note 98.

[110] *See Separation*, *supra* note 29.

[111] *Id.*

the abuser's defenses[112] and ability to get away with murder. The law's resistance to change, or even accommodation of multiple perspectives to find justice in every situation, becomes a means of complicity in domestic abuse.

E. Does Private Violence Fit Within the Current System?

Where the violence has not yet escalated to the point of no return, incidents of interpersonal violence are most often dealt with informally, in a quasi-criminal context, through the vast numbers of protective orders granted (but not as often enforced)[113] in civil courts, or obscured by the treatment of violence as expected in relationships in family and divorce proceedings. "More often the complaints of battered women are shunted into municipal or family courts to be heard by civil judges—which makes the offense complained of *by definition* a civil matter and not a crime."[114]

In fact, the judicial system has difficulty dealing with family issues in the criminal context at all.[115] This is not just because it is difficult to conceptualize violence in family relations, but also, for a variety of good reasons, victims may prefer civil remedies.[116] Such reasons may include not wanting to criminally punish one whom they continue to love, or the one whom is the father to their children, or the family, as a unit, cannot afford to do without the income brought in by that individual. Thus, not only does family violence not fit neatly within existing doctrine, it also does not fit psychologically or sociologically.[117]

Family divisions of civil courts may seem to be the logical place to deal with crimes between family members. However, family is the greatest ideological stronghold of patriarchy and, without vigilance, furthers the batterer's ability to control and exacerbates the violence. In addition, serious problems arise when dealing with family violence exclusively in the civil context. In the least, the civil system is not designed to effectively deal with

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[112] Nourse, *supra* note 83, at 1365 ("[T]he logic of reform, which focuses almost exclusively on the defendant's subjective state, operates to obscure competing factual narratives.").

[113] *See* Peter Finn, *Civil Protection Orders: A Flawed Opportunity for Intervention*, *in* WOMAN BATTERING, *supra* note 42, at 155.

[114] JONES, *supra* note 86, at 28.

[115] *See id.*; *supra* note 34.

[116] *Cf. supra* note 114 and accompanying text.

[117] Family violence research has traditionally been separated from criminological research. *See generally* FAMILY VIOLENCE, *supra* note 14.

violence. The basic premise underlying the civil system is that the parties have an equal power balance in settling their disputes.[118] The mere fact of divorce litigation pits the parties against each other in an adversarial model, intensifying the combativeness of the relationship. In fact, the current movement to return to "fault" in divorce proceedings, contributes to the silence by preferring to deal with the violence in a civil context, in a more private forum, rather than in the more public context of the criminal courts. In addition, the civil system is no less subject to patriarchal structures. Further, without the evidence necessary to prove the fault ground, the parties would be forced to stay together, with the violence, in private. In addition, scholars have demonstrated the lengths to which courts will go to protect paternal rights in child disputes, despite ample evidence of violence to the mother.[119]

As Stephen Schulhofer points out, the criminal justice system is preoccupied with male victims and male perpetrators primarily because that reflects the nature of the underlying phenomenon of crime in our society.[120] For those reasons, it would be imprudent to change the overall structure of the justice system. However, this should not preclude the criminal justice system from developing new canons within its boundaries to deal with a specific doctrinal area. Similarly, criminal law prefers to deal in single occurrences, rather than full context or series of events.[121] This may be because our normative understanding of crime is a single occurrence between individuals with limited contact or continuity of relationship.[122] This makes it difficult for courts to

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[118] There are exceptions to this basic premise, including the treatment of adhesion contracts and assumptions of corporate power. Power imbalances in these exceptions tend to be easily ascertainable. The power balance underlying human intimate relations are not so easily ascertained and are far more complex, suggesting that the courts cannot, or should not, try to handle the power imbalances of domestic abuse as an exception.

[119] JONES, *supra* note 86, at 33-35; Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991).

[120] *Schulhofer*, *supra* note 30, at 2157; *see also supra* note 29.

[121] *See, e.g.*, *Women's Lives*, *supra* note 29, at 75:

> When battering is seen only as discrete episodes of physical assault, this facilitates the position that leaving the relationship is the sole appropriate form of self-assertion. But battering reflects a quest for control that goes beyond separate incidents of physical violence and that does not stop when the woman attempts to leave.

[122] *See infra* note 126.

deal with situations that only have relevance in the full context of a relationship over a continuous period of time. It only makes sense that an entire area of cases that do not neatly fit within doctrine established for different normative understandings should be dealt within doctrine separately created.[123]

Finally, not only is the preference for civil solutions over criminal responsibility a means of silencing, but the preferred civil solutions may, in fact, increase and condition further violence. Once the violence has reached intolerable levels, the preferred civil solution is divorce, a form of separation. The preference for separation, however, creates two problems. First, there is an incentive for victims to avoid the use of the judicial system lest their family relationships be destroyed.[124] Second, separation does not eradicate the violence. In fact, it is often the case that when there is separation, there is an escalation of violence, at times to the point of death.[125]

Law is intended to stigmatize and exclude offenders through prosecution, trial and imprisonment; instead, silence serves to stigmatize and exclude the victims.[126] Violence and its potential use are the unspoken means of maintaining silence. The core of silence, regardless of the various layers of subordination,[127] in part, is understood through our conceptualizations of violence in law and society.

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[123] *See* Schulhofer, *supra* note 30, at 2153 ("The problems [confronting women in criminal justice] can be worked out only by paying close attention to particulars."). In other words, the stories demonstrating the issues and problems confronted by women, in this case victims of domestic abuse, need to be told through the courts in a manner that will allow the law to evolve to meet those needs. *See also* Schneider, *supra* note 29.

[124] The choice not to leave is most accurately understood as part of a comprehensive strategy of self-protection. *See Separation*, *supra* note 29, at 61-63. Martha Mahoney points out that the "shopworn question," "why didn't she leave?" reveals several assumptions about separation: that the right solution is separation, that it is the woman's responsibility to achieve separation, and that she could have separated. *Id.* at 61-71.

[125] *Women's Lives*, *supra* note 29, at 79 (discussing "separation assault" as the primary answer to the question, "why doesn't she leave?"); *see also* Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2138-39 (1993).

[126] "[F]eminist writings on empowerment suggest the need to place the subject's interpretation and mediation of her experiences at the center of our inquiries into the hows and whys of power." Deveaux, *supra* note 57, at 233 (discussing the writings of Audre Lorde, Patricia Hill Collins and bell hooks).

[127] *See supra* notes 67-79 and accompanying text.

II

VIOLENCE[128]

> Violence has become the domain of the other. Such acts are antithetical to the way in which we imagine ourselves behaving. We like to believe that we cannot understand what makes one person harm another. Yet one consequence of the puzzle over the violence criminals do becomes an uncertainty about ourselves and our neighbors. The violent act comes to define a character as different from us, as criminal. This person appears to be outside of human community, perhaps less than human. But this boundary, seemingly so secure, begins to erode when we become aware of a neighbor's violence . . . . We draw away from these offenders but remain uneasily aware that the violence we thought we had excluded from the community has found its way back into our midst. At such moments we turn away or deny the characterization of the act because otherwise our very identity seems in doubt.[129]

We[130] tend to treat violence as anomalous rather than as a natural part of our society, an integral part of the operation of law, and intrinsic to the operation of the family. The manner in which we portray violence allows us to think of it as exceptional and believe only the best of ourselves and our society. We tend to absent the force present in family relationships used to maintain the family structure when we conceptualize the typical family.[131] We also disassociate violence from the natural order of society and from the dynamic underlying the power of the law and corresponding government functions.[132] Robert Cover exposed the

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[128] The term violence as used in the discussion here refers to both the literal and the conceptual. *See* Cover, *supra* note 61; *see also* ROBERT PAUL WOLFF, *Violence and the Law*, *in* THE RULE OF LAW 54, 60 (Robert Paul Wolff ed., 1971) (pointing out that the common practice of restricting the term "violence" to uses of force, "usually serves the ideological purpose of ruling out, as immoral or politically illegitimate, the only instrument of power that is available to certain social classes.").

[129] Randall McGowen, *Punishing Violence, Sentencing Crime*, *in* THE VIOLENCE OF REPRESENTATION, *supra* note 38, at 140.

[130] I deliberately use the universalizing pronouns, "we," "us," and "our" as the referent in the text. Though norms often exclude the perspectives of many in society, we are all products of them, we all live with them, and we must all work toward changing them. The use of these terms is also intended to make the reader experience a level of discomfort. We ought to be uncomfortable with that which needs to be changed.

[131] From a Filmerian perception of the family as a sub-unit of government, this conceptualization is not surprising. *See* PATEMAN, *supra* note 5; *see also* Restuccia, *supra* note 38, at 67 ("For it appears that it is in the nature of violence to reproduce itself . . . .").

[132] *See* Cover, *supra* note 61.

manner in which this operates in his insightful discussion of the force of law.[133] Given the violence inherent in the force of law, we must consider the consequences of courts' unwillingness to wield their power to describe, address, and participate in the elimination of violence experienced in society, both public and private, whether directly occasioned by the state or not.

The absenting of violence from society happens in at least two ways, both dependent on our conceptualizations. First, where the violence is public, we make the act into a spectacle and the individual committing the act into a deviant. Second, where the violence is private, we ignore, hide and silence the violence as much as possible.[134] Thus, our treatment of public violence removes us from responsibility for the violence without, while our treatment of private violence shields us from the potential violence within. Contributing to this dynamic is the conceptualization of two separate spheres, public and private, dividing the conceptual types of violence.[135] Both operate as a means of silencing the existence of violence within society. Both operate as a means of creating personal and community image.

A. Public Violence

Our common understanding of public violence is that which is unjustified and occurs to and by other people who do not appear to be in an intimate relationship.[136] Not only is public violence

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[133] *Id.* (discussing interpretive practices in the law that ignore the violence it occasions and/or justifies); *see also* LAW'S VIOLENCE, *supra* note 9 (a collection of scholarly essays discussing the works of Robert Cover).

[134] *See* DOBASH & DOBASH, *supra* note 32, at 8 ("When forced to acknowledge [family violence's] existence, we attempt to deny that it is widespread or severe or that it happens between 'normal' people."); Stanko, *supra* note 41, at 83 ("As it stands, the conceptualization of violent crime remains firmly linked to acts randomly perpetuated by strangers against seemingly innocent, undeserving victims.").

[135] The myth of the safe home is deeply entrenched in the minds of most Americans. This myth is supported by academics and policy makers who fail to recognize the potential danger of the home as a locus of violence against women. Why, for instance, do images of serious crime, particularly interpersonal violence, continuously focus on street crime—crime supposedly committed by strangers—rather than on the interpersonal violence that exists at such high levels in American households?

Stanko, *supra* note 41, at 76.

[136] According to the U.S. Department of Justice, intimates, as defined by the victim, include spouses, ex-spouses, boyfriends, girlfriends, and former boyfriends and girlfriends. *See* VIOLENCE BY INTIMATES, *supra* note 29, at vi ("[T]hose who committed a violent crime against an intimate represent about 25% of convicted violent offenders in local jails and about 7% of violent offenders in State prisons.").

perpetrated by and to "others,"[137] it is only referred to as violence when it is perceived as illegitimate. This conceptualization allows us to view violence in our society as deviant, exceptional occurrences of which "normal" civilized individuals are incapable.

We accomplish this conceptualization through a variety of means. First, the media tends to emphasize certain acts and behaviors as violent and tends to give more attention to those acts committed by particular kinds of people.[138] In this way, certain categories become automatic mind associations for crime.[139]

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[137] "Others" refers to those marginalized in American society for reasons of identity, including race, gender, religion, sexual orientation, and disability. This list is not intended to be exclusive, but to point out those categories that have traditionally served to disprivilege. Acknowledging the possibility of simultaneous privilege and disprivilege, it is important to note that one's status as "other" is dependent on context. *Cf. supra* note 130.

[138] Authors point out that:

> [V]iolent crimes committed by blacks comprised a substantial portion of coverage of news stories centrally featuring blacks. Just as important, in video presentation black criminals were portrayed quite differently from white criminals. The former were more likely to remain unnamed, to be seen in handcuffs, in physical custody, and were less likely to speak for themselves. These findings strongly suggest that the media contribution is one of both linking blacks to the issue of crime and, moreover, rendering stereotypes of blacks more negative.

Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375, 376 (1997) (citing Robert Entman, *Blacks in the News: Television, Modern Racism, and Cultural Change*, 69 JOURNALISM Q. 341 (1992)). For example, the issue of Dukakis' "softness" on crime during his presidential campaign could have been pointed out without using a menacing looking picture of Willie Horton, an African American prisoner on furlough. *Id.* at 377 (citing KATHLEEN H. JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY (1992)). For another example, when two men beat and left a gay student for dead, his tormentor taunted, "It's gay awareness week." James Brooke, *Witnesses Trace Brutal Killing of Gay Student*, N.Y. TIMES, Nov. 21, 1998, at A9. When Susan Smith described a carjacker/kidnapper as a black man between 20 and 30-years-old, the fabrication was believed and reported, until the real fate of her children was discovered. Rick Bragg, *Police Say Woman Admits to Killings as Bodies of 2 Children Are Found Inside Her Car*, N.Y. TIMES, Nov. 4, 1994, at A1. Marian Meyers discusses the interconnection between sexist violence and racism, referencing the Stuart case of a white suburbanite claim that a black man killed his pregnant wife and the media's willingness to believe and perpetuate that myth. *See* NEWS COVERAGE, *supra* note 37, at 51. Though studies on news coverage on battering remain substantially undone, she suggests that "the news downplays the extent of the crime through underreporting and distorts what is reported through the omission of significant details." *Id.*

[139] *See* Richard Cohen, *Closing the Door on Crime*, WASH. POST, Sept. 7, 1986, (Magazine), at W13 (suggesting that jewelers and taxi drivers are rational in excluding certain customers on the basis of race). *But see* Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negro-*

Public violence is also often excused, if only subtly, by the characteristics of the victim.[140] Hate crimes,[141] both individually and institutionally, are recorded prominently throughout history, including holy wars, enslavement, lynch mobs, the Holocaust, McCarthyism, and apartheid.[142] The perpetrator self-justifies through the characteristics of the victim. The media, may openly condemn the act, yet reconfirm the deviant nature of the "other," whether perpetrator or victim.[143] Thus, the conceptualization of

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phobes 46 STAN. L. REV. 781 (1994). *See also* Randall A. Gordon et al., *Majority Group Perceptions of Criminal Behavior: The Accuracy of Race-Related Crime Stereotypes*, 26 J. APPLIED SOC. PSYCH. 148 (1996) (noting that a survey of respondents underestimate the number of theft, motor vehicle and aggravated assault offenses for whites, but overestimate these numbers for blacks); Hurwitz & Peffley, *supra* note 138 (analyzing their 1994 survey of race and crime, the authors highlight that racial stereotypes are significant in whites' perceptions of guilt).

[140] An example might be the differing response by the United States to the genocide in Rwanda versus that in Kosovo. The difference seems to indicate we place a different import on one kind of violence over the other. *See* Ann M. Simmons, *Nato's Role Reaffirms Doubts Among Africans*, L.A. TIMES, Apr. 14, 1999, at A16 (suggesting that the United States is deeply involved in conflicts in Kosovo because the victims are white while U.S. policy toward African nations is to allow genocide to continue); Zainab Jah, *Editorial, Serbia Forfeited Sovereignty Right*, N.Y. TIMES, Mar., 29, 1999, at A20.

[141] *See* Abraham Abramovsky, *Bias Crime: A Call for Alternative Responses*, 19 FORDHAM URB. L.J. 875 (1992) (discussing the aftermath of the Crown Heights riots); Dwight Greene, *Hate Crimes*, 48 U. MIAMI L. REV. 905 (1994) (discussing racially motivated violence); Frederick M. Lawrence, *The Punishment Of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320 (1994) (proposing a framework for assessing and dealing with hate crimes); Lester Olmstead-Rose, *Hate Violence: Symptom of Prejudice*, 17 WM. MITCHELL L. REV. 439 (1991) (discussing violence targeting gays and lesbians); Bruce Pitts, *Eliminating Hate: A Proposal For a Comprehensive Bias Crime Law*, 14 L. & PSYCHOL. REV. 139 (1990) (defining bias crimes and explaining the necessity of bias crime laws); Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47 (1997) (arguing for enhanced punishments for bias crime offenders).

[142] *See* GLENN T. ESKEW, BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE (1997); MCCARTHYISM: THE GREAT AMERICAN RED SCARE: A DOCUMENTARY HISTORY (Albert Fried ed., 1997) (violation of civil rights to eliminate communism); PETER PARTNER, GODS OF BATTLE, HOLY WARS OF CHRISTIANITY AND ISLAM (1997) (discussing holy wars); SURVIVORS, VICTIMS AND PERPETRATORS: ESSAYS ON THE NAZI HOLOCAUST (Joel E. Dimsdale ed., 1980) (racial extermination); IDA B. WELLS-BARNETT, SELECTED WORKS OF IDA B. WELLS (1991) (discussing lynching as a mode of racial control).

[143] *Cf.* ELAINE SCARRY, THE BODY IN PAIN 59 (1985) ("Power is cautious. It covers itself. It bases itself in another's pain and prevents all recognition that there is 'another' by looped circles that ensure its own solipsism."); Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457, 461 (1997) (arguing that "blackness has become a form of masochistic pleasure").

public violence contributes to the creation of the "other."[144]

We are resistant to discussing actions of the police as violent because we view the police as institutionally legitimate.[145] This is particularly the case when such acts are committed against those belonging to groups who are stereotyped as violent.[146] State violence in the form of capital punishment, though controversial, is generally considered a legitimate act and therefore not often characterized as murder and hardly ever identified as violence.[147]

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[144] "[N]egative attributes of the self or of one's in-group come to be perceived as characteristics of members of some out group." David L. Hamilton et al., *Social Cognition and the Study of Stereotyping*, *in* SOCIAL COGNITION: IMPACT ON SOCIAL PSYCHOLOGY 291, 293 (Patricia G. Devine et al. eds., 1994) (explaining that from a psychodynamic perspective, stereotypes serve the motivational needs of the perceiver, through the use of defense mechanisms, such as projection and displacement). Thus, we may project our own capacities for violence on to others.

Following the strictures of dichotomous thinking, would it be fair to say that race is public and gender (and sex) is private? Given the suggested conceptualizations of public and private violence, the means for the creation of the "other" and the protection of the "self," it seems this would be a fair statement. Absolutist dichotomous concepts problematize context. First consider the conjunction in the treatment of battering of minority women or of gays and lesbians. How does this explain our understanding of pornography or prostitution?

[145] *See* FRIEDMAN, *supra* note 24, at 172-92 (discussing police brutality, urban riots, vigilantism, lynchings, among other forms of lawless violence).

[146] "Minority offenders are sentenced to prison more often and receive longer terms than whites convicted of similar crimes and with similar records." Charles J. Ogletree, *Does Race Matter In Criminal Prosecutions?*, CHAMPION, July 1991, at 14 (citations omitted). As of February 9, 1997, "[o]nly four white defendants have been put to death for killing black victims in the United States, while 91 black defendants have been put to death for killing whites." Scott Richardson, *Deadly Debate; Legal Experts Differ on Capital Punishment Ban*, PANTAGRAPH (Bloomington, Ill.), Feb. 9, 1997, at A5; *see also* Randall L. Kennedy, McClerskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1391 (1988) (noting that based on empirical research on race and capital sentencing, the state places a higher value on the lives of whites than blacks.) This discussion of race and capital sentencing becomes particularly poignant when you also consider that prior to the 1977 case of *Coker v. Georgia*, 433 U.S. 584 (1977), capital punishment was permitted for rape and traditionally reserved for black men who were convicted of raping white women. *See* SUSAN ESTRICH, REAL RAPE 107 n.2 (1987).

[147] *See* Cover, *supra* note 61, at 1622-28 (discussing the "complex structure of relationships between word and deed" in capital sentencing). It is impossible to obscure the violence of a death sentence. Cover points out that in capital sentencing the judge is intensely aware that he prescribes the killing of another, yet never kills the defendants themselves. In comparison, judges often avoid the violence that continues when they do not act on the behalf of the victims of domestic violence. Social and institutional structures have allowed the potential violence of domestic situations to be obscured. Cover also points out that the formal structure of the courts may permit individuals to "delegate" their violent activities to others. *Id.* at 1615 ("Persons who act within social organizations that exercise authority act violently without experiencing the normal inhibitions or the normal degree of inhibition

We ignore the statistical imbalance of its use where race is concerned, as if it were natural and expected.[148] The most public of state violence, war and conflict between nations, is rationalized and minimized in its levels of violence.[149] We have discussed wars which have spanned over years as "police actions."[150] We have denied participation in international conflicts.[151] Also, as a means of creating the "other," we label nations and groups as terrorists depending upon our interests or ability to empathize.[152]

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which regulates the behavior of those who act autonomously." (citing A. Freud, *Comments on Aggression*, *in* PSYCHOANALYTIC PSYCHOLOGY NORMAL DEVELOPMENT 161 (1981))).

[148] *See* Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 434 (1995) (noting that "Although [African Americans] are the victims in half of the murders that occur each year in the United States, eighty-five percent of the condemned were sentenced to death for murder of white persons."); Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519 (1995); Hon. Julian A. Cook, Jr. & Mark S. Kende, *Color-Blindness in the Rehnquist Court: Comparing the Court's Treatment of Discrimination Claims by A Black Death Row Inmate and White Voting Rights Plaintiffs*, 13 T.M. COOLEY L. REV. 815 (1996). A disturbing case on this point is the atypical capital sentencing of John William King in the Jasper, Texas murder of James Byrd Jr. It took the brutal killing of Mr. Byrd by King and friends chaining him by his ankles to the back of their pick-up truck and dragging him three miles for such a sentence to be imposed. *See* Rick Lyman, *Texas Jury Picks Death Sentence In Fatal Dragging of a Black Man*, N.Y. TIMES, Feb. 26, 1999, at A1 (pointing out that this sentencing was only the second of a white for killing a black since 1850 in Texas).

[149] Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49 (1994) (pointing out that the rhetorical power of a "legal war," while adding to the image of a just and relatively humane war, the laws of war have facilitated rather than restrained wartime violence, legitimizing the violence); Roger Normand & Chris af Jochnick, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 HARV. INT'L L.J. 387 (1994) (arguing that the laws of war were drafted to subordinate humanitarian obligations to military necessities and therefore legitimized wartime violence during the Gulf War); *see also* James Schwoch, *Cold War, Hegemony, Postmodernism: American Television and the World-System, 1945-1992*, 14 Q. REV. FILM & VIDEO 9, 11 (1992) (pointing out that "[t]he current status of historical narration regarding American foreign relations still tends to invariably build upon a single-factor perception of the nation-state as protagonist, either hero or antihero.").

[150] *See, e.g.*, ROBERT J. BECK, THE GRENADA INVASION: POLITICS, LAW, AND FOREIGN POLICY DECISIONMAKING (1993) (evaluating the legality of operation "Urgent Fury" under international law); W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? (1981) (discussing the legacy of the Vietnam war).

[151] *See, e.g.*, LAWRENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP (1997).

[152] *See* Alpha M. Connelly, *Political Violence and International Law: The Case of Northern Ireland*, 16 DENV. J. INT'L L. & POL'Y 79 (1987) (discussing the claims of

"Containment" is a nice way of saying we are forcing others to live the way we want them to.[153] International violence against women, intertwined with racial and sexual identity are well silenced[154] and are very much part of the dynamic that creates the "other." In addition, surely we must question the legitimacy of international violence precipitated because governments and national leaders covet economic gain.[155] The rhetoric of international violence alone makes one wonder if our differences are an excuse for the outlet of innate violence.

B. Private Violence

The common understanding of private violence is that which you keep to yourself and do not talk about, something in which the public and the state have no business interfering.[156] Like

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legitimacy by both the British and the I.R.A. in their respective acts of violence); *see also* Necati Polat, *International Law, the Inherent Instability of the International System, and International Violence*, 19 OXFORD J. LEGAL STUD. 51 (1999) (postulating that violence is inherent in international law with intervention and terrorism natural facets of that system). Polat also describes terrorism as the sole means of recognition for counter groups and individuals within the system. *Id.* at 64-67; *cf.* Cover, *supra* note 58.

[153] *See* LOUIS J. HALLE, THE COLD WAR AS HISTORY 20-21 (1967) (arguing that Americans perceive the United States as ideal and everything else as "wicked").

[154] Penelope Andrews, *Violence Against Aboriginal Women in Australia: Possibilities for Redress Within the International Human Rights Framework*, 60 ALB. L. REV. 917 (1997); Hernandez-Truyol, *supra* note 68; James D. Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989 (1997); Adrien Katherine Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALB. L. REV. 943 (1997).

[155] *See* Alex Y. Seita, *The Role of Market Forces in Transnational Violence*, 60 ALB. L. REV. 635 (1997) (discussing the economics of international violence, including violent commodities and illegal goods).

[156] *See* Siegel, *supra* note 10, at 2150-74 (discussing the doctrine of family privacy).

However, the economics of private violence do affect the public and ought to be a public concern. The costs associated with domestic abuse are potentially phenomenal. Such costs include: (1) direct costs (including emergency room care, hospitalization, doctor visits, child protective services, foster care, shelters and subsidized housing, police and court resources, counseling, and property damage); (2) indirect costs (including job loss and unemployment, lost productivity, disruption of the work place by the batterer, lost home production, lost promotion and advancement, loss of control over one's environment, alienation from friends family and community, and mortality); and (3) transfer payments (though not considered a "cost" under economic analyses, welfare payments to victims of domestic abuse diminish the resources available for other public expenditures). *See generally* LOUISE LAURENCE & ROBERTA M. SPALTER-ROTH, INSTITUTE FOR WOMEN'S POLICY RESEARCH, MEASURING THE COSTS OF DOMESTIC VIOLENCE AGAINST WOMEN AND THE COST-

public violence, private violence is something that happens to other people. It is discussed publicly when it becomes a matter of celebrity, is so extreme as to be exceptional, or is committed by "others."[157] When the association with violence is too close to ourselves or our families, we minimize it, rename it, or ignore its occurrences.

Family is considered antithetical to violence, a "haven"[158] from the problems and violence in the outside world. Despite the very complex nature of family relations, this characterization tends to be our automatic assumption concerning the operation of the family.[159] Nonetheless, both "haven" and "hell" may be part of the internal reality for any one family, and any one individual within that family.

The stereotypical family structure, as maintained by the patriarchal structure, contributes to the dichotomy between haven and hell. That is, the male breadwinner who goes out into the cruel world to provide for his family is entitled to come home to a haven created by his wife, the homemaker. In other words, the conceptualization of the home as a haven is male-centric; it is a haven for him.[160] Contrary to statistics, the "hell" characterization is viewed as unusual and deviant; the violence viewed as exceptional.[161] Therefore, the way we deal with private violence

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EFFECTIVENESS OF INTERVENTIONS: AN INITIAL ASSESSMENT AND PROPOSALS FOR FURTHER RESEARCH (1996).

157 The trials of O.J. Simpson included many instances of exceptionalism, including celebrity, affluence and race. *See, e.g.*, David Margolick, *Evidence is Powerful, But He's Still O.J.*, N.Y. TIMES, July 8, 1995, at A1 (suggesting that the "mountain of evidence" may not be enough to counteract O.J.'s celebrity status); *see also* McGowen, *supra* note 129.

158 *See* FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW 1-2 (Martha Minow ed., 1993); *see also* DOBASH & DOBASH, *supra* note 32, at 7 ("In Western societies, the ideas of peace and security and harmony are still so strongly associated with the institution of the family that it has been exceedingly difficult to deal with the fact that many people are horribly abused within the home."); Siegel, *supra* note 10, at 2150-74 (discussing how doctrines emerging from the demise of marital chastisement were dependent upon "gender-neutral" notions of maritai privacy to justify the continuing toleration by the law of violence in the home).

159 "Haven" ought to be the *goal*, rather than the assumption. If the *potential* for violence within familial relationships is the initial assumption, then this goal can be more realistically reached.

160 *See supra* note 29.

161 Indeed, one-third to one-half of all female murder victims are killed by a male intimate. *See* RONET BACHMAN, PH.D. & LINDA E. SALTZMAN, PH.D., U.S. DEP'T OF JUSTICE, SPECIAL REPORT, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1 (Aug. 1995) (noting that estimates are conservative since "[m]any factors inhibit women from reporting these victimizations both to police

tends to be as an exception,[162] fit into a system not designed to deal specifically with the problems of violence in the home.[163]

> The fiction that violence is exceptional is fundamental to stereotypes that portray battered women as helpless, dependent, and pathological. If it were understood that violence is really everywhere, then it would not be difficult to accept that violence happens to ordinary women. Individual women could then begin to overcome their own denial of painful experience, a particularly dangerous component of broader social denial of the prevalence and seriousness of domestic violence.[164]

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and to interviewers, including the private nature of the event, the perceived stigma associated with one's victimization, and the belief that no purpose will be served in reporting it"); RONET BACHMAN, PH.D., U.S. DEP'T OF JUSTICE, SPECIAL REPORT, SEX DIFFERENCES IN VIOLENT VICTIMIZATION, 1994, at 1 (Sept. 1997).

In addition, domestic crime against adults accounts for approximately $67 billion per year, almost 15% of the total crime costs. TED R. MILLER ET AL., U.S. DEP'T OF JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 19 (1996). Of all persons treated for violence related injuries in U.S. hospital emergency departments, approximately 17% were attributable to a spouse or ex-spouse, or current or former boyfriend or girlfriend. *See* MICHAEL R. RAND & KEVIN STROM, U.S. DEP'T OF JUSTICE, VIOLENCE-RELATED INJURIES TREATED IN HOSPITAL EMERGENCY DEPARTMENTS 3 (1997) (noting that a higher percentage of women than men were injured by someone with whom they shared an intimate relationship). Of the violence perpetrated at the workplace, women are more likely to be attacked by someone known to them, and five percent of all women attacked in the workplace are victimized by a husband, ex-husband, boyfriend, or ex-boyfriend. RONET BACHMAN, PH.D., U.S. DEP'T OF JUSTICE, VIOLENCE AND THEFT IN THE WORKPLACE: A NATIONAL CRIME VICTIMIZATION SURVEY (1994); *see also supra* notes 29-34 and accompanying text.

[162] "[W]ifebeating is not, in the strictest sense of the words, a "deviant", "aberrant", or "pathological" act. Rather, it is a form of behavior which has existed for centuries as an acceptable, and, indeed, a desirable part of a patriarchal family system within a patriarchal society, and much of the ideology and many of the institutional arrangements which supported the patriarchy through the subordination, domination and control of women are still reflected in our culture and our social institutions.

R. Emerson Dobash & Russell P. Dobash, *Wives: The 'Appropriate' Victims of Marital Violence*, 2 VICTIMOLOGY 426, 427 (1978).

[163] *See infra* note 170 and accompanying text.

[164] *Women's Lives*, *supra* note 29, at 63; *cf.* Cover, *supra* note 61, at 1601 ("Neither legal interpretation nor the violence it occasions may be properly understood apart from one another. This much is obvious, though the growing literature that argues for the centrality of interpretive practices in law blithely ignores it.") (referencing law and literature scholarship). This theory is further examined by Margulies' analysis of the resonance and dissonance Cover's theory has for violence against women. Peter Margulies, *The Violence of Law and Violence Against Women*, 8 CARDOZO STUD. L. & LITERATURE 179 (1996) ("In his focus on the state as the source of violence, Cover neglects the more subtle, diffuse, but ubiquitous structures of oppression which subordinate out-groups such as women and [African Americans].").

It is apparent that the diametric conceptualization of "haven" and "hell" corresponds to the dichotomies of male/female, public/private.[165] Of course, the concept of "home as haven" and the corresponding dichotomies become more complex when considering the racial dynamics of "home." Ethnic minorities often view the home as a sanctuary from the racism without. Thus, the violence of racism without may serve as a container for the violence of patriarchy within.[166]

The way in which we treat private versus public violence makes it seem as though violence between intimates or against family members is somehow less serious or important as violence against strangers or non-family members.[167] This seems backward, as it would be more logical to believe the breach of trust and of any feelings of security that comes with the violence by an intimate or family member would make its commission all the more reprehensible. After all, domestic violence is a violent crime where the victim lives with the perpetrator and with whom the victim is supposed to have a relationship of trust.[168] In addition, family violence has tremendous potential for self-replication and perpetuation. It would therefore seem as important to address family violence as any other crime.[169]

In fact, it is more surprising that we do not more consistently examine the connection between family violence and street violence:

> Violent criminals are portrayed as inhabiting a different [socio-demographic] space than violent family members. While a profile of the street criminal begins to emerge through the discovery of risk factors, the violent family member remains invisible. He is depicted as being anyone. He could

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165 *See* Olsen, *supra* note 52.

166 For example, a common view that black battered women hold is that black men only batter because they need a place to release the anger and frustration that comes with dealing with a racist outside world. "[Domestic violence], like substance abuse, crime, and unwanted adolescent pregnancy, are symptoms of living systematically deprived in a society that is designed to dominate and control third world people." Richie, *supra* note 71, at 41.

167 Hotaling et al., *supra* note 40, at 326 ("[S]ome evidence suggests that violence against family members may be very similar in important respects to violence against nonfamily persons.").

168 *See supra* note 81 and accompanying text.

169 "The learning theory approach to family violence contends that the family serves as a training ground for violence. In terms of modeling, the family provides examples for imitation that can be adopted in later life as the individual draws from childhood experiences to structure appropriate parent or conjugal roles." Hotaling et al., *supra* note 40, at 327.

> possess some of the characteristics of the street criminal, but that is not seen in the research literature as setting him apart. His distinctiveness resides in his ability to avoid sociological labels. If those who assault other family members are depicted as otherwise law-abiding citizens, there is no compelling reason to apply notions of criminality to explain their behavior.[170]

There is some evidence that family assault victimization is linked to other antisocial behavior and violence towards non-family members.[171] The diametric conceptualization of violence as public and private reinforces the silence by dividing who may be labeled a criminal by his status and the nature of the crime. The silence about private violence allows us to ignore it as if it did not exist. Thus, it becomes a tool in that violence.

Also, given the use of the dichotomous conceptualization of violence to create and perpetuate the "other," and its use to maintain a silence concerning private violence, it should be no surprise that women of color and other "others" in abusive relationships would have many complex barriers to overcome in protecting themselves and in obtaining justice.[172] Stereotypes creating "others" are very public, imbedding such concepts in the public consciousness, in opposition to concepts of self.[173] In fact, public portrayals of private violence through media images are removed from normative conceptualizations and tend to indicate that domestic violence is primarily found in areas of uneducated urban poor.[174]

Acknowledging the potential for violence within family rela-

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[170] *Id.* at 323.

[171] *Id.* at 352, 364-65. Other sources suggest that intra-family violence is learned behavior. *See, e.g.*, STRAUS ET AL., *supra* note 40, at 121-22.

[172] Ammons, *supra* note 93 (discussing the experiences in the justice system of black women who have been battered); Kimberlé Williams Crenshaw, *Panel Presentation on Cultural Battery*, 25 U. TOL. L. REV. 891 (1995); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1993); Fenton, *supra* note 10; Richie, *supra* note 71; Rimonte, *supra* note 72; *see also* Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, 36 AM. BEHAVIORAL SCIENTIST 651, 675 (1993) ("Whereas racial bias generally leads to *greater* arrests of [b]lacks than [w]hites for equivalent crimes, particularly for [b]lack youths, the effects in domestic violence cases are more complicated, perhaps because service to [b]lack women as well as punishment of [b]lack men is involved.").

[173] *See supra* note 137.

[174] *See* Consalvo, *supra* note 37, at 205-09 (discussing the formation of popular images of domestic violence without directly implicating race or ethnic origin, but suggesting its relation to image formation).

tionships may be the first step in realistically approaching the problems of family violence.[175] "Like all other social units or systems, the family is a power system. All [power systems] rest to some degree on force or its threat, whatever else may be their foundations."[176] Force, within the power dynamic of the social relationship, plays a role, even when no deviant act is actually committed.[177] It is only when there is a deviant act (or a perceived one) when force is most literally realized.

If our starting point in understanding the nature of violence were of the natural existence of violence and an expectation of power differentials within relationships, our chosen solutions to family problems, and all social relationships in general, would be different.[178] We need to change the direction of the discourse. We ought to stop treating violence as exceptional and as something we need only deal in its extreme manifestations. We need to understand that the potential for violence is part of human reality and is a phenomenon we should deal with on a more com-

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[175] *See* RICHARD J. GELLES & MURRAY A. STRAUS, INTIMATE VIOLENCE 42 (1988) (discussing that violence within a family involves a system of human interactions, not just a single wrong-doer); *see also* STRAUS ET AL., *supra* note 40, at 4 ("[T]he American family and the American home are perhaps as or more violent than any other single American institution or setting . . . ."); *Separation*, *supra* note 29; Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 197, 220 (1986).

[176] William J. Goode, *Force and Violence in the Family*, 33 J. MARRIAGE & FAM. 624 (1971) (acknowledging that no system is based on force *alone*). "In our effort to gain compliance we may offer both a reward—love, respect, or money—and a threat of force, and we know that the latter will be one of the variables influencing the decision." *Id.* at 625; *see also* Murray A. Straus, *A General Systems Theory Approach to a Theory of Violence Between Family Members*, SOC. SCI. INFO., June 1973, at 105 (developing a theory, with the understanding that the empirical data leaves no doubt that violence between family members is so common as to be almost universal, which views continuing violence as a systemic product rather than a product of individual behavior pathology).

[177] Goode, *supra* note 176, at 625 (explaining role of force in the socialization of families). *See generally* SUZANNE K. STEINMETZ, DUTY BOUND: ELDER ABUSE AND FAMILY CARE (1988) (examining family relationship patterns and abuse as a means of control maintenance); Schneider, *supra* note 29, at 545-48 (discussing the nuanced treatment of elder abuse not always accorded other kinds of abuse). *Cf.* Cover, *supra* note 58, at 25 ("[I]n the domain of legal meaning, it is force and violence that are problematic.").

[178] Power and control is so natural to the structure of family relations that on a continuum violence and domestic abuse are expected. *See* Goode, *supra* note 176, at 625; *cf.* CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 126-54, 171-83 (1989) (implying that because of sex inequality all sex is rape or may be perceived as such); *see also* Hartsock, *supra* note 98, at 170-72 (suggesting a transformation of power relations).

prehensive basis. The judiciary, as a legitimizing force, must have a role in this change.

C. Legitimate Violence and the Legitimization of Violence

In discussing our conceptualizations of violence, our understanding of when violence is legitimate is essential.[179] In turn, our conceptualization of legitimacy rests on authority and who may properly wield it. As described by Robert Paul Wolff, authority may be contrasted with power in that it is a right, not an ability. Thus, to be possessed of authority is what differentiates legitimate and illegitimate uses of force.[180] The state may command compliance by right and may influence future outcomes by establishing binding precedent; parents may claim the right to be obeyed by their children and husbands may claim the right to be obeyed by their wives, but are not necessarily justified in these claims nor in the wielding of force to enforce such claims.[181] To the extent we believe there is no authority for anyone to administer physical abuse[182] within an intimate/family relationship, we may further redefine domestic abuse as an issue of power and control.[183] The mere exertion of might does not confer authority and therefore may not be legitimate. A batterer has the might, but not the right to abuse.

For authority to be legitimate, the appropriate individual must wield it. For example, a judge creates social meaning through the written opinion, backed by the authority of the state.[184] Owen Fiss gives two reasons for the uniquely authoritative position of the judge: 1) "it legitimates the use of force against those who refuse to accept or otherwise give effect to the meaning embodied in that interpretation" and 2) "an individual has a *moral duty*

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[179] "Legitimacy is thus the minimal answer to skeptical questions about the ways law's violence differs from the turmoil and disorder law is allegedly brought into being to conquer." LAW'S VIOLENCE, *supra* note 9, at 4 (citing WOLFF, *supra* note 128)).

[180] WOLFF, *supra* note 128, at 54, 56.

[181] *See id.* at 57.

[182] See *supra* note 40.

[183] The threat that battering poses to traditional notions of the family is even more profound when battering is redefined as an issue of power and control, rather than physical abuse. Individuals who have to confront their own feelings of family can distance themselves more easily when the issue is physical abuse, rather than personal domination.

Schneider, *supra* note 29, at 539.

[184] We all create or destroy meaning, but only state officials have the authority (and the violence) to back up their interpretation. *See* Cover, *supra* note 58, at 25.

to obey a judicial interpretation . . . because the judge is part of an authority structure that is good to preserve."[185] The complement to this authority is responsibility to wield it in the pursuit of justice so that such authority *is* good to preserve.

Human beings have a need to create and interpret texts.[186] Each of us attaches different significance to the same text or situation. For example, "all Americans share a national text in the first or thirteenth or fourteenth amendment, but we do not share an authoritative narrative regarding its significance."[187] Ascribed authority confers a privileged hermeneutic, in this case, on the judiciary.[188] It is necessary in the justice system for a privileged interpretation of the text to exist,[189] for the sake of continuity and predictability. For this reason, it is that much more important that the position of the law and its interpreters explore how the text is interpreted by the different actors in establishing the most equitable interpretation. So, for example, in a battering situation, the position and interpretation of the victim, the batterer, secondary victims such as child-witnesses, and actors in the chain of justice, including the police, the prosecutor, and even the judge ought to be considered.

When the courts use their authority, they have the power to alter the balance of power between individuals in a manner that might equalize, thereby conditioning the environment for an end to the violence.[190]

We usually think of law's violence as emanating from orders of

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[185] Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 755-56 (1982) (emphasis added).

[186] Cover, *supra* note 58, at 40.

[187] *Id.* at 17.

[188] [T]he statist position may be understood to assert implicitly, not a superior interpretive method, but a convention of legal discourse: the state and its designated hierarchy are entitled to the exclusive or supreme jurisgenerative capacity. Everyone else offers suggestions or opinions about what the single normative world should look like, but only the state creates it . . . . It encourages us to think that the interpretive act of the court is privileged in the measure of its political ascendance.

Id. at 42-43.

[189] In the area of domestic abuse, not only is the system working backward ideologically (punishing the victim while ameliorating the perpetrator), its function in doing so inflicts pain more intense than that generally inflicted by the system because of its inappropriateness. Cover points out that "[t]he violence of the act of sentencing is most obvious when observed from the defendant's perspective." Cover, *supra* note 61, at 1608. It then should follow that the violence perpetuated by a non-act would be most obvious when observed from the victim's perspective.

[190] *See* Hartsock, *supra* note 98.

> the court. But there may be equally violent consequences in the law's refusal to mediate certain disputes, leaving the parties to fend for themselves. By denying its offices, the law may affect the balance of power between individuals and, in certain circumstances, may actively encourage or legitimize violence by one toward the other.[191]

Judges make rulings that order society; their silence may be abdication of judicial responsibility that permits delegation to a non-legitimate actor.[192] In the case of *Person*, the normative world was created by the batterer, reaffirmed by the state, and resisted by the victim. Only the Judge had the authority and was in a position to counter the literal violence and create peace.[193] We might ask whether authority is maintainable when the corresponding responsibility is not upheld.[194] Authority cannot be legitimate when its holder refuses or does not use it for justice.[195]

III

WRITTEN REPRESENTATION AND BREAKING THE SILENCE: THE JUDICIAL ROLE

The creation of legal meaning cannot take place in silence.

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191 Wald, *supra* note 9, at 94 ("[B]ut it is surely possible to say that centuries of experience with the law's refusal to invoke its violence in the case of battered wives has only resulted in greater, not less, violence inflicted on these hapless women."); *see also* Bright, *supra* note 148, at 439-42 (discussing lynching as the precursor to the death penalty). Lynching is a public extra-legal form of control. Domestic violence can also be viewed as an extra-legal form of control, in private. Even if not discussed as acceptable, are these forms of control not expected? Does the judiciary take a convenient blind eye to these matters? *Cf.* COVER, *supra* note 13, at 8-30 (explaining how before 1850 judges could have fashioned legal arguments for the abolition of slavery, despite doctrinal opposition). Does this mode of operation constitute complicity?

192 *Cf.* Elaine Scarry, *The Declaration of War: Constitutional and Unconstitutional Violence*, *in* LAW'S VIOLENCE, *supra* note 9, at 23 (discussing executive orders of "police actions").

193 *See* Cover, *supra* note 58, at 53.

194 "For the law's violence to be legitimate, it must have roots in the law itself—not in the law's refusal to stop lawless violence inflicted in its name." Wald, *supra* note 9, at 86 (discussing *Wilson v. Seiter*, 501 U.S. 294 (1991), an Eighth Amendment case concerning prison conditions and abuse).

195 For an indictment of nations for inappropriate uses of authority, see AMNESTY INTERNATIONAL, 1999 ANNUAL REPORT, REGIONAL SUMMARY FOR THE AMERICAS (highlighting abuses such as "abuses by US police and prison officials, the arbitrary, unfair and racist use of the death penalty, the growing incarceration of asylum seekers and the USA's double standards regarding foreign policy and international human rights," and adding that "[d]espite its claim to international leadership in human rights the USA continued to fail to respect the fundamental promise of rights for all — both at home and abroad").

> But neither can it take place without the committed action that distinguishes law from literature.[196]

Activists attempt to fill the silence through narrative,[197] both in traditional forms of literature such as novels and short stories,[198] and in the use of narrative in law review articles, courses

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[196] Cover, *supra* note 58, at 49.

[197] Addressing the "silences" or the omission of women's voices and stories from historical and literary texts has been an important task of feminists. *See* JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW (1985) (discussing the silences in history concerning black women); ADRIENNE RICH, ON LIES, SECRETS, AND SILENCE 11 (1979):

> The entire history of women's struggle for self-determination has been muffled in silence over and over. One serious cultural obstacle encountered by any feminist writer is that each feminist work has tended to be received as if it emerged from nowhere; as if each of us had lived, thought, and worked without any historical past or contextual present.

See also Kimberlé Crenshaw, *Whose Story Is It, Anyway?: Feminist and Antiracist Appropriations of Anita Hill*, *in* RACE-ING JUSTICE, EN-GENDERING POWER 402 (Toni Morrison ed., 1992) (noting that women's voices are often omitted from race theories); GERDA LERNER, THE CREATION OF FEMINIST CONSCIOUSNESS: FROM THE MIDDLE AGES TO EIGHTEEN-SEVENTY (1993) (examining the ways in which patriarchy has created the silence of women and the ways in which women have found a voice, despite institutional restraints); GERDA LERNER, THE CREATION OF PATRIARCHY (1986) (discussing women's relationship to the making of history); Nellie Y. McKay, *The Souls of Black Women Folk in the Writings of W.E.B. Dubois*, *in* READING BLACK, READING FEMINIST: A CRITICAL ANTHOLOGY 227 (Henry Louis Gates, Jr. ed., 1990) (noting the silence in autobiographies on activities other than work: the personal, the affairs of women and children, the home, and family, discusses how these silences contribute to the dichotomy of personal vs. professional.); Deborah Gray White, *Private Lives, Public Personae: A Look at Early Twentieth-Century African American Clubwomen*, *in* TALKING GENDER (Nancy A. Hewitt et al. eds., 1996) (discussing how African American women tended to include only public information about themselves in autobiographies to avoid slander and stereotyping of their private lives); JOAN WALLACH SCOTT, GENDER AND THE POLITICS OF HISTORY 15-27 (1988) (addressing Virgina Wolf's call for a history of women and the approaches developed to rewrite history inclusive of women); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (noting that race is often omitted from feminist theories); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997) (pointing out the subordination of poor and people of color in gay and lesbian politics and legal theory); Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidisciplinary, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409 (1998) (discussing how the inclusion of sexual orientation has expanded the breadth of legal scholarship).

[198] *See, e.g.*, RAMSEY CAMPBELL, THE ONE SAFE PLACE (1997); GLORIA NAYLOR, LINDEN HILLS (1985); PAULA SHARP, CROWS OVER A WHEATFIELD (1996); MARY BURNETT SMITH, RING AROUND THE MOON (1998); MARK SPILKA, EIGHT LESSONS IN LOVE: A DOMESTIC VIOLENCE READER (1997); ALICE WALKER, THE THIRD LIFE OF GRANGE COPELAND (1970); *see also* ERIN PRIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR (1974); Emily Detmer, *Civilizing Subordina-*

and case books.[199] These media are extremely useful in expanding the legal imagination and in educating lawmakers to address real, existing problems.[200] Activism in domestic violence has increased public awareness, promoted changes in public responses, and led to the development of the Battered Woman Syndrome as a judicially recognized victim's response in abusive relationships. Narrative is important in the activists' mission. The ultimate goal of activists, no matter how radical their agendas may be perceived at inception, is to effectuate change in mainstream, normative understandings. Activists ultimately want their stories to be told in the legislatures, the judiciary, and to become central to the understandings underlying media representations. Activists' efforts are only one piece in the chain of justice. Their efforts are aimed at all actors in the chain, including the victim, the batterer, the community, the police, the prose-

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tion: Domestic Violence and the Taming of the Shrew, 48 SHAKESPEARE Q. 273, 274 (1997) (suggesting that "[t]o enjoy the comedy of the play, readers and viewers must work to see domestic violence from the point of view of an abuser" and that "the play signals a shift toward a 'modern' way of managing the subordination of wives by legitimizing domination as long as it is not physical"); Angela Mae Kupenda, *Law, Life, and Literature: A Critical Reflection of Life and Literature to Illuminate How Laws of Domestic Violence, Race, and Class Bind Black Women*, 42 HOW. L.J. 1 (1998).

[199] Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017 (1992) (suggesting uses of literature in clinical education to help students understand the perspective of their clients); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (demonstrating how counter stories by members of "outgroups" are useful in exploring the stories created by the dominant group); Jacqueline St. Joan, *Sex, Sense, and Sensibility: Trespassing Into the Culture of Domestic Abuse*, 20 HARV. WOMEN'S L.J. 263 (1997) (arguing for the use of literature and empirical research to educate judges about domestic abuse); *see also* Elizabeth Villiers Gemmette, *Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum*, 23 VAL. U. L. REV. 267 (1989); Minow, *supra* note 13, at 1689 (discussing a project of continuing legal education for judges in which family violence is discussed using works of fiction); Judy Scales-Trent, *Using Literature in Law School: The Importance of Reading and Telling Stories*, 7 BERKELEY WOMEN'S L.J. 90 (1992). *But see* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (questioning the extent of the usefulness of narratives in legal scholarship).

[200] *See* Carrie Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law*, 2 UCLA WOMEN'S L.J. 287, 304-05 (1992) (reviewing PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991)) (discussing how narrative can move us away from abstraction through the power of empathy); Carol Weisbrod, *Divorce Stories: Readings, Comments and Questions on Law and Narrative*, 1991 BYU L. REV. 143, 184 (arguing that the power of narrative is in its ability to affect those who will shape the law).

cutor, advocates and the judiciary.[201] Within the chain, activists are not the only ones who can tell stories to effectuate change.[202]

Judicial story telling can play a major role in effectuating change. "[W]riting is 'a form of violence in its own right'; reading and speaking too are implicated in power, in that they are exclusive, in that they necessarily reconstruct the world 'around the polarities of Self and Other.'"[203] What judges write changes the tenor of the dialogue and the actions of all other actors in society, bringing these issues to the "public."[204] The prosecutor, police, community, batterer and victim ultimately take their cues from the judiciary. Judicial opinions may be only one part in the realization of justice, but it is a very important part and the final step in legitimate norms.

Unfortunately, there are dangers in asking for stories to be told by the judiciary. It is always possible that these stories will be poorly told or manipulated for injustice.[205] Judges are a human element like any other. Their biases and personal experience will color the ways in which they tell the story. "Standpoint" or "social location"[206] affects the narrator and the telling of the story. Ironically, the same social factors that affect the judged also affect the judger. This point may be the greatest practical barrier to transforming the laws and norms affecting domestic violence. Nonetheless, full dialogue is not possible in silence.[207]

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[201] *See supra* notes 39-49 and accompanying text. In states which devote more resources to domestic abuse, there are lower rates of homicide committed by the women abused. Angela Browne & Kirk R. Williams, *Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides*, 23 L. & SOC'Y REV. 75 (1989).

[202] Victims must tell their stories. Batterers might help each other through stories. Members of the community may prevent further violence by retelling stories. Litigation is itself a story-telling medium in seeking the truth. *See supra* Part I.

[203] Restuccia, *supra* note 38, at 43 ("[W]henever we speak for someone else[,] we are inscribing her with our own (implicitly masculine) idea of order.").

[204] *Cf.* George Wattendorf, *Focus on Domestic Violence: Prosecuting Cases Without Victim Cooperation*, FBI L. ENFORCEMENT BULL., Apr. 1996, at 18, 20 ("Such proactive efforts on the part of the criminal justice system send a clear message to potential abusers. At the very least, the real threat of prosecution may deter some offenders. At best, courts can use the threat of jail time to divert abusers into treatment programs.").

[205] *See* Minow, *supra* note 13, at 1672-77 (discussing *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), and the possibility of injustice through words).

[206] Social location includes the categories of race ethnicity, class, age, sexual orientation, religion, and gender. Personal history and other factors may also be relevant to their social location.

[207] Much like mandatory arrest, full dialogue may not be appropriate in every

Regardless of any new problems that may occur with asking for more public statements and writings by the judiciary, discussion and debate are a better means of moving towards change than silence.

Appeals to the judiciary may be an imperfect solution because, as an institution, it is part of the patriarchal structure reinforcing male domination in the family.[208] The judiciary is also part of a system with a long history of racism and bias towards certain segments of the population.[209] With the understanding of the existence of institutional and individual biases, the potential that asking for a more active role by the judiciary could, at times, operate as a tool of oppression, needs to be addressed. The judicial system is no panacea for social problems, but it surely must be an integral part of the solutions. The judge may be singularly well positioned to effectuate such changes. Despite the possibility that a particular judge may not tell stories as would best comport with justice, in the least there would be a possibility for response and the dialogue necessary for change. The judiciary has been an active participant in creating the silence in our history; it is time it becomes part of the means of breaking that silence. In scholarship that examines the relationship of law and literature in discerning the meaning of the text,[210] questions of canon, who is given voice and who is marginalized and ignored, are most often

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situation, but is better than a do-nothing approach. *See* SHERMAN ET AL., *supra* note 41; Hanna, *supra* note 41 (arguing that mandated participation is a better policy choice than dismissing a case, while acknowledging the costs, such as the risk of infringing on a woman's sense of autonomy); Schulhofer, *supra* note 30, at 2162-70 (discussing the problems of a mandatory approach in dealing with all situations that could be alleviated through contextual responses and real enforcement).

[208] *Cf.* SHERMAN ET AL., *supra* note 41, at 32-34 (noting that in addition to institutional inertia, police departments often have batterers within their ranks, about which the instituion prefers to be silent).

[209] *Cf. id.* at 3, 148, 157 ("For most whites, arrests are seen as the rightful action of 'the law'; for many blacks, arrests may be perceived as part of a continuing pattern of racial discrimination and harassment.").

[210] Legal theorists, in focusing on interpretivism or its relationship to political reality, have discussed the Constitution as the primary text. In doing so, they have kept the dialogue at a high level of abstraction, obscuring the relationship between personal experiences of disempowerment and oppression, and broader political action and consequences. Abstraction gives the appearance of objectivity and tends to be the preferred "male" approach. *See supra* note 23. Context is the only way one can truly be objective. Case law and the development of the common law have the most direct effects on the lives of individuals. Heilbrun & Resnik, *supra* note 2, 1937-40. For these reasons, *Person* and *Kheyfets* are discussed as background in this Article.

neglected.[211] There can be no interpretation of the text if it has not been written. The choice in what not to write is as powerful as what is written.

The formalistic, normative formulation of the law is based on a "story," a situation anticipated by the legislature in promulgating a particular set of rules.[212] Litigation is itself a process of truth seeking, whereby each side presents its version of the facts, composing a story for the jury to accept or not accept.[213] The discretion in deciding which stories to write (and how to write them) is dependent upon the law's objectivity rather than actual context.[214] Therefore legal norms continue to be based on the stereotypical, rather than the specifics within a situation. As Sanford Levinson points out, the rhetoric of judicial opinions is tailored to demonstrate the authority over that which they speak. In some instances, this rhetoric permits the author of the judicial opinion to assert authority, while simultaneously relieving him of responsibility.[215] Judges must make a moral commitment,[216] not

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211 Heilbrun & Resnik, *supra* note 2, at 1936 ("[R]elatively little attention has been paid to the question of the canon—who is given voice, who cited, quoted, repeated, and who marginalized, ignored, submerged"); *see also* RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW (1996) (discussing identity as it crosses socially constructed categories); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990) (citations omitted) (describing the relationship between critical legal studies and feminism as problematic and suggests that the "'woman question' perpetuates a tradition of tokenism that has long characterized left political movements"); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (pointing out how critical legal studies tends to ignore the voices of blacks, other minorities and the poor in their critiques of rights analyses).

212 *See* Cover, *supra* note 58.

213 *See, e.g.*, Robert A. Ferguson, *Untold Stories in the Law*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 84 (Peter Brooks & Paul Gewirtz eds., 1996) [hereinafter LAW'S STORIES]; Robert Weisberg, *Proclaiming Trials as Narratives: Premises and Pretenses*, *in* LAW'S STORIES, *supra*, at 61.

214 *See generally* Heilbrun & Resnik, *supra* note 2.

215 *See* Sanford Levinson, *The Rhetoric of the Judicial Opinion*, *in* LAW'S STORIES, *supra* note 213, at 187; *see also* COVER, *supra* note 13, at 119 (pointing out that the rhetorical function of the judicial opinion, while intended to relate to the law, in fact operates as self-justification: "[O]ccasionally one finds the judicial opinion used to suggest the immorality of the law. Very often this suggestion is coupled with a statement that the judge is, nevertheless, bound to apply the law, immoral as it may be."); Caroline J. Howlett, *Writing on the Body? Representation and Resistance in British Suffragette Accounts of Forcible Feeding*, *in* BODIES OF WRITING, BODIES IN PERFORMANCE, *supra* note 38, at 3, 4 ("I suggest, then, that it is not that pain is resistant to representation, but that representation is resistant to pain.").

216 *See* Restuccia, *supra* note 38, at 69 (determining that we must take responsibility for the violence and pain).

just hide behind the formality of the law.

Representation, through the written word, has the ability to address the violence as a means of resistance and to be a mode of empowerment to end it. The choice of how and what to represent, might compound the violence and intensify the pain experienced.[217] Courts must not only take responsibility to write the stories, but must also endeavor to do so from the perspective of concrete individuals.[218] There should at least be an attempt to convey the real experiences of women, through the development of the facts, and not mere reliance on abstraction in the cold application of rules. "Lawyers for subordinated people have a special obligation not to replicate the silencing of subordination."[219] Courts also have an obligation to strive for a structure that does not contribute to that silencing.

Literature and narrative have attempted to fill the gap and tell the stories that are neglected by the law.[220] However, as many critics of "law as literature" point out, literature lacks the authority of law and therefore does not have the same ability to coerce actors in society.[221] There are many distinctions between great (and not so great) literary works and precedent establishing (or reaffirming) legal opinions. Literature uses facts as the foundation in creating a story, which although often a depiction of reality, is a work of fiction. Legal opinions use facts as the

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217 *See, e.g.*, Heilbrun & Resnik, *supra* note 2 (discussing the characterization of what was left out of the story in *Hoyt v. Florida*, 368 U.S. 57 (1961)).

218 If we consider that the criminal laws are written to protect society and address wrongs against it, they are generally written for the benefit of the wronged. Thus, it would follow that, while taking into account protection of the defendant's rights, the application of the law should consider the victim's perspective in enduring the wrong. *See* Cahn, *supra* note 16.

219 Margulies, *supra* note 164, at 185 (discussing why decision-making ought to remain with the client). Courts should also respect the voices of the parties affected.

220 Heilbrun & Resnik, *supra* note 2, at 1918-19, point out that "[a] first premise of feminist conversations is that we begin with the actual experiences of women. The realities of women's lives are central to feminist description, analysis and theory." With this as the premise, this Article asks for these stories to be told so that the conversation can be had. Activists for law reform often employ the technique of story telling to demonstrate the legal system's inadequate response to the human dimension of the problem. *See* Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243 (1993).

221 *See* RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988) (critiquing law and literature and discussing its shortcomings); Robin L. West, *Adjudication is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203 (1987); *see also* James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 434 (1982).

foundation in establishing law and in applying appropriate doctrine.[222] Literature is a reflection of society through the power of common experience and universal themes. Law molds society through the power of authority.[223] Law coerces; literature does not. Law has the power to shape norms; literature might also, but not with the same power.[224] Therefore, the judiciary must take the responsibility to tell these stories. "[T]he jurisgenerative impulse that compels the creation of law by forcing the court to grapple with substantive issues" is only possible if the court deals with the facts as they affect human beings.[225]

The courts have the power to transform the power dynamic within the relationship that conditions the violence.[226] Courts have a choice of aligning their power congruent with the dominant ideology, in this case, the patriarchal structure, or aligning their power with the object of violence to alter the power dynamic.[227] One might suggest that this choice is a political one, repugnant to the law. However, the false rupture between law and politics inures from a traditional construct of the law as isolated from politics as ideology. Once law is defined as apolitical, it becomes difficult to consider the politics involved in determining what is written as law in the form of an opinion.[228] Thus,

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[222] The definition of a fact in this discussion and comparison is an illusive one. One might suggest that facts in a legal proceeding differ from those used in literature in that they are more readily ascertainable and provable. However, because the system is itself a means of seeking the truth, generally with more than one version of facts, this is not necessarily so. Literature might be regarded as fanciful and pure fiction. However, the work of Sir Philip Sidney states that literature creates a "golden world," a better, truer, and nobler reality, whereas discourses that convey facts deal in baser realities. *See generally* SIR PHILIP SIDNEY, THE APOLOGY FOR POETRY (Mary R. Mahl ed., 1969).

[223] *See* White, *supra* note 221 (noting the fundamental differences between law and literature).

[224] This is not to deny the importance of narrative in expanding the legal imagination and the perspectives that comprise that "universal" standpoint of the law. *See supra* note 188.

[225] *See* Cover, *supra* note 58, at 56; *see also* Cahn, *supra* note 16.

[226] Hartsock, *supra* note 98, at 170-72 (suggesting a "transformation" of power relations . . .).

[227] A distinction must be made between literature complicit in battering and that which works on behalf of battered victims, literature that fights back. Restuccia, *supra* note 38, at 45 ("Not to make such a distinction is like equating batterers who destroy their victims with victims who defend themselves by destroying their batterers.").

[228] *Cf.* Stephanie Jed, *The Scene of Tyranny: Violence and the Humanistic Tradition*, *in* THE VIOLENCE OF REPRESENTATION, *supra* note 38, at 29, 35 (examining the superficial rupture between literature and politics).

without a completed choice, we have a reaffirmation of the politics of silence.

Robert Cover, in his brilliant work, *Nomos and Narrative*, describes how in our normative universe, a nomos, law and narrative are inseparable.[229] Cover reasons that it is insular communities, groups within society, which "establish their own meanings for constitutional principles through their constant struggle to define and maintain the independence and authority of their nomos."[230] In contrast, within the domain of legal meaning, "force and violence are problematic,"[231] making "[i]nterpretation always [take] place in the shadow of coercion."[232] Cover does not accept that any one nomos or hermeneutic methodology is superior to another, but points out that a convention of legal discourse is that only the state creates our single normative world.[233]

The initial choice in deciding which is the sustainable nomos, that is, our common story, determines the outcome moreso than any other interim choice.[234] When the story before the court does not fit within traditional norms, the court has two choices: (1) ignore the alternative *nomoi* to the extent they do not fit within the traditional; or (2) tell the story supporting the alternative nomoi to discover just solutions for that situation. Peter Margulies discusses the work of Robert Cover and these alternatives and suggests that "[f]rom a Coverian point of view, courts which balk at recognizing alternative *nomoi* are 'jurispathic;' i.e., they kill law."[235] By not recognizing alternative stories and alternative means of obtaining justice, courts reinforce systems contrary to truth and justice. Forcing law to fit a situation where it does not, does violence to the experience of both the victim and

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[229] Cover, *supra* note 58.

[230] *Id.* at 25.

[231] *Id.*

[232] *Id.* at 40.

[233] *Id.* at 42-43. In discussing the uniquely authoritative position of judicial interpretation, Cover cites the work of Owen Fiss. *Id.* at 43.

[234] We read what is most familiar to us and give it the most credence. *See* Jed, *supra* note 228, at 38 ("The intelligibility of the tyrant's message, for example, depends upon its reference to a code shared by tyrants."); Cover, *supra* note 61, at 1608 (discussing sentencing from the perspective of the defendant: "[T]he function of ideology is much more significant in justifying an order to those who principally benefit from it and who must defend it than it is in hiding the nature of the order from those who are its victims."); Heilbrum & Resnick, *supra* note 2, at 1941 ("[T]he texts of the powerful and the readers of the powerful.").

[235] Margulies, *supra* note 164, at 183 (emphasis added).

the perpetrator. Telling the stories that demonstrate the existence of alternative *nomoi* and alternative systems of justice, the law becomes jurisgenerative, creating justice.

In situations where courts do not recognize alternative *nomoi* and administer justice accordingly, it creates a void in which the courts are no longer the sole safeguards of justice.[236] In other words, where the courts are jurispathic, jurisgeneration might be taken on by someone within an alternative *nomoi*.[237] Feminist lawyers have wisely avoided the claim that their battered clients who kill are creating their own law. Nonetheless, this is the perception created when their nomos is not recognized and validated by the stories told by the courts. Thus, structurally there is a double bind for victims of domestic abuse. By not including victims' stories, the law diminishes their ability to find justice in the courts, and if these women seek an alternative means of justice they risk the imposition of law's violence upon themselves.[238]

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[236] "[T]he courts have been compelled to deal with the cases of homicidal self-help that have followed upon the granting of a class-based exemption for domestic assailants." Marcus, *supra* note 86, at 1658. The reference to "homicidal self-help" is from the case, *State v. Norman*, 378 S.E.2d 8, 15 (N.C. 1989). *See Separation*, *supra* note 29, at 92; Margulies, *supra* note 164, at 183.

Instances of civil disobedience are analogous here, especially if we extend the Filmerian trope to its furthest boundaries. *See* PATEMAN, *supra* note 5; *see, e.g.*, ROBERT F. WILLIAMS, NEGROES WITH GUNS (Marc Schleifer ed., 1962) (discussing how, in the context of widespread human rights abuse against African Americans, the black community's policy of self-defense developed and local activists concluded that they had to "meet violence with violence").

[237] Robert Cover describes the "ways insular communities establish their own meanings . . . through their constant struggle to define and maintain the independence and authority of their *nomos*." Cover, *supra* note 58, at 25. Though Cover's concept of insular communities is more broadly defined in a national context, the counter actions of victims in the context of family also fits this definition. *See id.* at 26-40.

In discussing *Nomos and Narrative*, Michael Ryan examines how alternative communities, like the Nazis, could become the state, with legal expression and ascendency over all others. Michael Ryan, *Meaning and Alternity*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 267 (Martha Minow et al. eds., 1992). Extending the Filmerian trope, this is certainly possible within the family, with the unfortunate consequence of affirmation by the state and society by the means of status. *See* PATEMAN, *supra* note 5.

[238] Where capital punishment is already a problematic proposition, it becomes more problematic when its imposition is contemplated on the women who "take the law into their own hands" out of necessity for lack of viable alternatives within the system.

In comparison to the number of men executed and on death row, women in a similar position are rare. *See* Kathleen Daly & Michael Tonry, *Gender, Race, and Sentencing*, 22 CRIME & JUST. 201, 202 (1997) (indicating that just over one percent of those on death row in 1993 were female). Thus, meaningful analysis of the reasons

In comparison, there is no need for jurisgeneration where the perspective is already embodied, as in the case of the provocation defense.[239]

If the law of self-defense is predicated on a single norm, as earlier suggested, alternative stories also validly indicating a need for self-defense by the reasonable person in such circumstances may be excluded. The act of self-defense is itself a literal telling of an alternative story through action contrary to that of the batterer. Perhaps by giving voice to those who need to defend themselves through the telling of their stories, there would be less need for those stories to be told through action.

It may be questionable whether writing the full story to affect justice is really within the purview of the judiciary. Why should the courts document facts that are not directly relevant or essential to the law presented in a case? Shouldn't this task be taken on by the legislature? There can be no absolute answers to these questions. The judiciary is perhaps in the best position to tell the stories on a case-by-case basis that would provide the predicate for new legislation.[240]

Many advocate an activist court to the extent of believing judges have the right, and even the responsibility, to write law. On the other extreme, some think the judiciary should have little or no role in the creation of law, leaving that function solely to the legislature. However, the judiciary has historically had a significant role in law-making. The common law was the means through which most of our legal principles and rules evolved. The criminal law, though now exclusively statutory for a variety of important reasons, began as an evolving common law system,

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for the death row status of women is speculative. Some authors suggest it is gender bias that operates both to exclude the majority of women from consideration for capital sentencing and the reason for their ascension to that status. Under the former theory, women are treated as weaker and less responsible for their own actions; in the latter, they have traversed their expected roles so severely as to deserve such punishment. *See* Joan W. Howarth, *Deciding To Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1346; Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501 (1990); Jenny E. Carroll, Note, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 TEXAS L. REV. 1413 (1997).

[239] *See supra* Part I.D.

[240] *See* Katyal, *supra* note 15 (suggesting that judges may recommend particular courses of action without mandate to engender a colloquy that enhances political accountability and encourages judicial candor while serving the goals of federalism).

changing to a statutory one only in the nineteenth century.[241] The problem for domestic violence is that, as an issue, it had minimal opportunity to fully develop through the common law as its own area of the law. In fact, marital chastisement as formal legal doctrine was also abandoned in the common law during the nineteenth century.[242] The abandonment of formal laws concerning the control of women did not precipitate revolutionary change in the treatment of intimate violence. The shift from common law to a statutory system may not have prevented substantive change, but it likely forestalled it.[243] Despite massive statutory material proscribing crimes, there are still gaps in the laws,[244] as earlier demonstrated. The modern question in the criminal law field is "whether judges can create (or discover) new crimes for which to punish . . . a new form of anti-social conduct not covered by the criminal code."[245] The doctrinal treatment of domestic crimes is one of those gaps.

IV

FINDING ALTERNATIVES

Not having an alternative model to examine, nor a concrete vision for a new system, it is not clear whether criminal courts, civil courts, or some special hybrid of the two should take on the task of developing new canons for domestic crimes.[246] Which-

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241 LA FAVE & SCOTT, *supra* note 15, § 2.1(c), at 92. Reform of common law systems to statutory ones by all fifty states was not complete in the ninteenth century. The approval of the American Law Institute's Model Penal Code was a significant influence in organizing state codes. *Id.* § 1.1(b), at 4-8.

242 *See* Siegel, *supra* note 10, at 2121-41; *see also* DOBASH & DOBASH, *supra* note 32, at 48-74.

243 Since each of the 50 states abandoned coverture and chastisement on different dates, as well as did each change to a statutory criminal law system at different times, broad reference to the nineteenth century is necessary. The closeness in time of these change is nonetheless significant as they both, independently and in tandem, may have had an impact on the development of law as it affects women, particularly in the area of domestic violence.

244 *See* LA FAVE & SCOTT, *supra* note 15, § 2.1(a), at 89-90.

245 *Id.* § 2.1(a), at 89.

246 *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinciton*, 42 HASTINGS L.J. 1325 (1991) (suggesting there need not be distinctions in civil and criminal penalties in the operation of our justice system, specifically citing civil protection orders as an example); *see also* Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U.L. REV. 1, 4 (1996) ("[M]y current view is that we should think about legal rules in terms of the incentives they create for individual conduct, be they for good or ill.").

ever courts deal with issues of family violence, they must take seriously the obligation to write the stories of domestic violence; to create the canons and precedents that are specifically tailored to this area. The judiciary needs to create meaning, favoring substance over form, context over abstraction and individuals over theory. They should strive to use norms appropriate to the situation and to find solutions. The judiciary should deal with the factors and indicia of violence before it reaches its extremes. The first step for the courts is acknowledging that relationship violence occurs in order to acquire and maintain a particular power balance within the relationship. The court is in a unique position to resituate the power hierarchies through their authority and through their ability to make what is "private," public.

The courts have a ready resource in understanding what to write and how to resituate power hierarchies, a resource that heretofore has been substantially ignored. If the state is to replicate the family,[247] why not explore the strategies successfully used by women who end the violence within their families?[248] These women's communities have created an alternative nomos of survival, a form of jurisgeneration.[249] Part of the silence perpetuated by the judiciary are the stories about the families that find a way to end the violence and stay together, with or without the assistance of the courts, using their own strategies to compel desistance. These success stories are ignored as we focus on the stories of escalated violence and murder.[250] While the courts have made real efforts to recognize reforms to address the issues of domestic violence, they have nonetheless continued to be jurispathic in that they use law and a system not designed to deal

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[247] *See* PATEMAN, *supra* note 5.

[248] "If the woman succeeds in continuing the relationship without further violence—if he does not hurt her again—no one will know it." *Women's Lives*, *supra* note 29, at 76. "Continuing the relationship may therefore be part of a pattern of resistance to violence on the part of the woman." *Id.* at 73; *see also* Elizabeth M. Schneider, *Feminism and The False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387 (1993). As Mahoney points out, we do not necessarily expect a relationship to end for an infidelity or other breaches of trust, or hurtful indiscretions. *Women's Lives*, *supra* note 29:

> [If] she tries to change his behavior—tells him to stop, seeks counseling, and extracts assurances from him—and later he is unfaithful again, friends and family will probably comfort her: Well, you tried to work it out. If he hits her, however, and violates his promise to stop, people will ask: Why didn't you leave?

[249] *See supra* note 237 and accompanying text.

[250] *See supra* notes 83-87 and accompanying text.

with family abuse, and do not fully recognize the strategies developed by these women's communities. If new canons were permitted to develop, solely for dealing with issues of domestic violence, courts could use and mimic the strategies used to successfully end violence without destroying relationships. This is important because in most instances these means for ending private violence are counterintuitive for the criminal justice system.

The strategies found to be successful for the victims of domestic violence include, but are not limited to, three specific strategies.[251] First, an effective strategy is social disclosure, the most literal form of public narrative, or what is referred to in this Article as making the private, public. This includes disclosure to employers, neighbors, relatives, friends and others important in the life of the batterer. In other words, finding actions to make the private violence a public matter. Courts have the ability to use this strategy, first by writing complete stories of the violence into the public record with some strong form of condemnation, and second through the use of appropriate punishment that makes the perpetrators' actions more public. This is consistent with recent emerging criminal law literature regarding alternative sanctions.[252] Though it may be considered inhumane to bring back

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[251] *See* Fagan, *supra* note 14, at 380-91. Another study identifies self-help strategies employed by victims to end the violence and may be considered a means of self-preservation. They include calling the police, seeking professional counseling, entering a shelter for battered women, some form of passive resistance to minimize her own injuries, leaving home for good and seeking a divorce, physically fighting back, and finding a way to have the man promise to end the violence. *See* LEE H. BOWKER, BEATING WIFE BEATING 9 (1983) (using a detailed and extensive survey of Milwaukee couples who experienced wife-beating and then found a way to end it).

[252] *See, e.g.*, *Development in Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1875 (1998) [hereinafter *Development*] (assessing the possibilities for experimentation with alternative sanctions); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 630-52 (discussing how shaming practices, which unambiguously convey moral condemnation, can fashion politically acceptable alternative sanctions as effective deterrents). *But see* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991) (arguing that because criminal offenders do not fear social disapproval, shaming techniques will not likely work); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1088 (1998) (arguing that shame sanctions are a deprivation of dignity and "involve a dangerous willingness, on the part of the government, to delegate part of its enforcement power to a fickle and uncontrolled general populace.").

A variety of constitutional challenges are possible with "shaming" sanctions, including free speech, freedom of religion, due process, right against self-incrimination, cruel and unusual punishment, and equal protection. These challenges have

the pillory in the public square,[253] it has been known to be effective in altering conduct. Something less severe and accessible to the courts as one component in ending private violence would be publication. For example, the names of those convicted of drunk driving are often published in the local newspapers as a form of public sanction. This has also been a form of sanction for long-term child-support delinquents. Names of people convicted of solicitation are also published in some jurisdictions.[254] Other possibilities for public shaming include sign posts, sandwich boards, or bumper stickers.[255] Public apology has specifically been employed as a form of public sanction against a wife beater.[256]

Many batterers continue their abusive behavior because of ratification by their peers, often in the form of silent assent. Public condemnation may be an effective component in ending violence by refusing to allow it to remain private. However, we must ensure that alternative public punishments not be arbitrary, but related to the offense, its prevention, and avoidance of recurrence. To that end, alternative public sanctions must not be considered panacea lest these sanctions turn into "slaps on the wrist" that exacerbate the situation. In addition, the "public" in this instance should not become yet another means of creating the "other." It is critical that public forms of punishment are not disproportionately levied against minorities.[257]

Alternatives to incarceration may serve additional benefits.

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had very limited success in cases of alternative sanctions thus far. *See Development*, *supra* at 1950-54.

[253] For a discussion of the more interesting punishments of colonialism, see ALICE MORSE EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS (1896). Colonial punishments tended to be public and focused on shaming. The American criminal justice system's focus on incarceration is a fairly recent phenomenon which might be considered unique both in comparison to other eras and to the criminal justice systems of other countries. *See Development*, *supra* note 252, at 1870.

[254] Even more extreme is "John TV" in Kansas City where photographs and personal information about those arrested for prostitution offenses is publicized on the local government channel. *See* Matt Campbell, *'John TV' Gets Started*, KANSAS CITY STAR, May 16, 1997, at A1; *see also* Kahan, *supra* note 252, at 632 (discussing examples of publication); Timothy Heider, *'John TV' Credited with Cutting Crimes*, KANSAS CITY STAR, July 18, 1997, at C12; Mark Morris, *'John TV' Shows Signs of Success: Arrests Dropped 49 Percent in the Month Following the Program*, KANSAS CITY STAR, July 18, 1997, at C8.

[255] *See Development*, *supra* note 252, at 1949.

[256] *See* Paul Sperry, *Judge Ted Poe: Throwing the Book—And Bible—At Texas' Criminals*, INVESTOR'S BUS. DAILY, Dec. 3, 1996, at A1 (noting that Judge Poe demanded that a batterer apologize to his wife on the steps of City Hall).

[257] *Cf. supra* notes 146-48 and accompanying text.

Incarceration of the primary bread-winner often levies harsh punishments on the entire family and exacerbates the tensions that may contribute to the violence.[258] Monetary fines, while likely leaving the family source of income continuous, still have the potential to add strain to the situation, exacerbating the violence. In addition, sanctions perceived to be less severe and unequivocal than incarceration may be more easily given by judges.[259] Nonetheless, incarceration should not be eliminated as sanction in appropriate situations. Especially with recidivist abusers and situations of high levels of violence, incarceration, in conjunction with appropriate victim protection strategies, may be the best option.[260]

The second effective strategy is self-defense efforts. These efforts might include hiding, taking shelter or physical self-defense. Hiding works if the victim has a social network where she is permitted to hide and is protected. Unfortunately, not everyone has this option, either for lack of family and friends, or because of complicitous conduct on the part of family and friends.[261] The availability of shelters has been and continues to be incredibly important for the survival of victims of abuse. Shelters are most effective in that they allow the victim to take control of her own fate. Nonetheless, there may be instances when it is paramount that the courts take a greater role in the protection of victims. The justice system has the ability to hide and protect victims, especially those pursued by the most violent. This option is seldom, if ever, used. This seems ironic considering we routinely hide, relocate, and even change the identity of known criminals to protect them from the violence of their mob "families."[262]

A third effective strategy is intervention. Intervention may be by a social agency, like a counseling center, religious institution,

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[258] For these reasons, many victims of abuse think twice before pressing charges against their abusers.

[259] Parceling out sanctions is no enviable task for judges, particularly where the punishment does not fully fit the offense. *But cf.* Kahan, *supra* note 252, at 592 (suggesting that alternative sanctions have not been accepted because they are not perceived to be severe enough).

[260] *See* Fagan, *supra* note 14, at 394.

[261] Isolation of victims of abuse is instituted by the batterer and perpetuated by ideologies of denial held within the community that tend to blame the victim for the abusive situation. *See Separation*, *supra* note 29, at 10-19.

[262] *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 501-04, 84 Stat. 922, 933-34, *repealed by* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 1207-10, 98 Stat. 1837, 2153-63. This Act is often referred to as the "Witness Protection Program."

or community service organization, or it may be by a criminal justice agency, including the police or the courts, as long as this intervention includes a real formal sanction or the threat of one.[263] It may be counterintuitive, but harsher sanctions earlier in the pattern of violence are more effective in ending violence than the usual criminal response after an escalation of violence. The hard question is what should these sanctions entail such that the justice system ends the violence without destroying the relationship and family. These questions are ones about which the courts should experiment and write to find answers.

To reach this end, courts should use a dual approach. Criminal justice interventions should be aggressive and early when the violence is at a stage of minimal severity, meaning those with little prior history of violence or prior injuries.[264] Because most batterers do not voluntarily seek help,[265] the courts can have a tremendous influence, first through public sanction, but also by directing batterers to such resources.[266] These are the cases where there is the greatest chance of eradicating the violence from the relationship. Interventions should, of course, be swift where the violence has escalated in the relationship. There is a theory that intervention by the judicial system is bad in situations of domestic abuse because such interventions have the potential to anger the batterer who will then retaliate against the victim with increased violence. However, studies have found this to be the case primarily in instances where the violence has already been prolonged and is already at a severe level of violence.[267] The primary focus in these cases must be the safety of the victim.

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[263] Sanctions must be meaningful to the defendant and constitute punishment that is more than illusory. *See* Fagan, *supra* note 14, at 386 (suggesting that probation supervision with minimal contact is an insufficient sanction).

[264] Fagan, *supra* note 14, at 383-86 (noting that criminal justice interventions resulted in less frequent and severe violence for the less severe cases and that "[a] weak sentence may actually neutralize the deterrent effects of legal sanctions for spousal violence, particularly for offenders with lengthy criminal histories.").

[265] Most of the husbands [in the Milwaukee study] did not voluntarily seek help. They were pressured into it by their wives, often with help from others. The fact that a husband enters treatment may reflect a change in the marital power balance as much as it does his willingness to receive treatment.

BOWKER, *supra* note 251, at 108.

[266] Fagan, *supra* note 14, at 407-10 (discussing personal costs to the batterer).

[267] *Id.* at 394; *see also* SONKIN ET AL., *supra* note 4 (assessing the various methods for treating male batterers).

In other words, separating the parties without ensuring protection against reprisals is unacceptable.

> Recent evidence from studies of legal and social sanctions for spouse abuse suggests that desistance in less chronic or serious (i.e., injurious) cases may occur in response to legal sanctions. However, legal sanctions for more serious cases were less effective and possibly led to escalations in violence. Evidence from theoretical samples of former victims who had ended spouse abuse in their relationships suggests that both legal and social sanctions were important factors in ending violence. Strategies varied, depending on the relationship history and on the assailants' backgrounds. Once again, desistance in severe cases with more injurious and protracted violence was more difficult, regardless of the nature or strength of the sanction. This suggests that habitual or systematic violence may be more amenable to different desistance strategies than less serious cases.[268]

Nuanced solutions and combined cooperative efforts will be most effective in eliminating the violence. That is, solutions particular to each situation must be employed to be most effective. Vigilance concerning the level of violence in the relationship is crucial. In addition, courts, while being an important and integral part of potential solutions, cannot be the only solution. Not only should courts be part of varied solutions, but they themselves should draw upon a variety of solutions according to the specific context.

A new approach is need which focuses on the protection of the victim, not merely deterrence and punishment. It needs to emulate and employ modes of desistance already found to be effective by victims. It might use public space to shame and counter the deviance model by ending silence. It needs to create a system (and canons) to deal with an area that is not easily dealt with in either criminal or civil courts.

CONCLUSION

> If our practice is rooted in feminist theory, then the realization that this model will not eradicate battering should neither surprise nor discourage us. Battering is rooted in a culture of domination, a culture that does not celebrate our differences in race, age, sexual preference, physical and mental abilities, and gender, but instead uses these differences to exploit and dehumanize. Surely we cannot expect that sending out the police to pluck batterers from their homes, using the courts to

[268] Fagan, *supra* note 14, at 394.

> make all sorts of nasty threats of doom, and rounding up counselors and teachers to convince men to stop beating their partners will end violence against women.[269]

Ideally, we would reformulate and introduce new paradigms to determine social functions and hierarchies. Unfortunately, a revolution of that sort is unrealistic. The more modest proposals in this Article are optimistic. The difficulty is mostly caused by a history of silence. In addition, the challenge to the judiciary to be the moving force in change, when it has an investment in the current structure, is daunting. Even those least invested in the current structures are still products of them.

This Article began with a silenced story, *Person*, that need not have been. Its foil, *Kheyfets*, provides an approach that may point us in a better direction. Most importantly, *Kheyfets* gives voice to the victim of the crime and others who have encountered similar situations. It does not allow the separation of the facts from the application of the law, thereby demonstrating the injustice and inadequacy of current law and making a *moral commitment* to substantively interpret the law for a just result. Had the discussion in *Kheyfets* been permitted the force of law, it would have affected the patriarchal power dynamic that allowed for the accession of violence. The full set of facts, demonstrating the fairness in the situation, sends a clear message to all actors in the chain of justice, from the victim and abuser, through the police and social workers, to the prosecutors and court personnel, and eventually to the legislature.

More effective ways of eliminating private violence can be found. This will be most effective if we fashion laws, remedies and other solutions specifically tailored to this area, rather than expecting solutions created for other situations to do the job. Narrative is a powerful means of changing and reforming the law within the legal system, as opposed to from without. The judiciary has the power and authority to use story as a means of recreating norms, to alter our concept of violence in society, and to affect the power structure that permits and conditions private violence.

Certainly the problems associated with eradicating violence in the home are immense. No one approach or organization can

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[269] Ellen Pence & Melanie Shepard, *Integrating Feminist Theory and Practice: The Challenge of the Battered Women's Movement*, *in* FEMINIST PERSPECTIVES, *supra* note 14, at 282.

complete the task alone. The judiciary can play a greater role, perhaps even one of leadership. In the least, the judiciary needs to ensure that it is not part of the problem.