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Christine A. Littleton
Christine.Littleton@chicagounbound.edu

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Women’s Experience and the Problem of Transition: Perspectives on Male Battering of Women

Christine A. Littleton†

Try thinking without apology with what you know from being victimized.¹

INTRODUCTION

On October 14-15, 1988, The Legal Forum of the University of Chicago Law School brought together a significant number of speakers and commentators working in and struggling with the field of “feminist jurisprudence.” It was a heady experience, particularly for those of us who have long had the experience of having to fight for the legitimacy of this nascent discipline whose very existence was undreamed of only two decades ago. Today, it is hard to believe that the first time the Supreme Court used equal protection doctrine to vindicate women’s claims to equality was in 1971,² and that not until 1986 did the Court grant its imprimatur to the claim that equal employment opportunity guarantees include women’s right to be free of sexual harassment.³ Legal scholarship has been hampered by a similar failure to take women’s situations and women’s selves seriously. Prior to 1982, for example, the Harvard Law Review had no index heading for “feminist legal theory.”⁴

The symposium was also a sobering experience, however. Despite increasing recognition of feminist jurisprudence as a legitimate field of inquiry and scholarship,⁵ I was reminded yet again

† Professor of Law, UCLA School of Law. J.D. Harvard, 1982; B.S. Pennsylvania State University, 1974. This paper was prepared for The University of Chicago Legal Forum Symposium, “Feminism in the Law: Theory, Practice and Criticism,” October 14-15, 1988. Research assistance was provided by Pam Rodriguez and Kathy McDonald.

² Reed v Reed, 404 US 71 (1971).
⁴ I discovered this when I tried to index my student note, Toward a Redefinition of Sexual Equality, 95 Harv L Rev 487 (1981). Despite initial resistance to opening a new heading, the Review eventually agreed, and has since found other entries for the category.
⁵ For example, the 1987 Annual Meeting of the Association of American Law Schools
that we work in a discipline that is still in the process of developing its contours. The range and variety of implicit definitions of feminism, feminist method and feminist jurisprudence evident in the symposium and reflected in this volume indicate that any apparent orthodoxy of shared definitions is, at best, an illusion. While the participants may share a common enterprise, we also display a deep resistance to papering over differences.

This resistance is, I believe, a strength of feminist jurisprudence. Yet the differences themselves present a crisis, in the classical sense—both opportunity and danger. We have the opportunity to use our differences in creative and generative ways. We also face the temptation of trying to stamp them out in the name of false unity or, just as bad, letting them stand as unfathomable and irreconcilable. At the very least, this symposium provides a forum in which to break through the illusion of shared definitions, and into the reality of recognizing that we continue to work in a discipline that has no generally recognized core (and concomitantly, no periphery), no timeless givens, no irrefutable presumptions, no incontrovertible status, but, most exciting of all, no natural boundaries.

A. What Is Feminism?

What, then, is feminism? And particularly, what is “feminism in law?” My answer must necessarily reflect my own place in the discourse and yet it cannot remain there, for those very, very few of us with authority and license to speak on behalf of women have a responsibility to speak on behalf of all women, not merely those who seem most like us.

Feminism is (or at least aspires to be) a theory and practice forged directly from women’s experience as women. It thus directly implicates our biological status (as female), our sociological status (as those who are identified as, and treated as, women) and our

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offered a day-long “Mini-Workshop on Emerging Traditions in Legal Education and Legal Scholarship.” These “emerging traditions” were: law and economics, law and society, critical legal studies, clinical education and feminist jurisprudence.


Wendy Williams makes this grounding explicit in using “when and where I enter” as the theme of her essay. Wendy Williams, Notes from a First Generation, 1989 U Chi Legal F 99. The phrase is borrowed from Paula Giddings, When and Where I Enter: The Impact of Black Women on Race and Sex in America (William Morrow, 1984).

* Despite increasing numbers of white, upwardly mobile, apparently heterosexual and presently able-bodied women on law school faculties, large segments of the female population continue to be woefully underrepresented in legal academia.
political status (as those who identify with women). As Catharine MacKinnon notes, the "methodological secret" of feminism is that it is built on "believing women's accounts," on recognizing women's experience as central. When applied to (or in) law, feminism becomes feminist jurisprudence. Feminist jurisprudence refuses to take legal categories or doctrines as given, and thus refuses to limit itself to shaping women's experience to fit the current outlines of established law. Reversing the traditional process of introducing new ideas into law by trying to show that a new idea is very much like an old one, feminist jurisprudence takes women's experience as the starting point, whether or not our experience is "very much like" the experience of those who have previously made the rules and set the standards. Accordingly, legal categories or doctrines are "merely raw material—to be cut and pasted, stretched, arranged, and sewn together to fit [women's] experience."

By positing such an alternative framework for addressing legal issues, feminism poses a direct challenge to "business as usual" for law—just as it has for every other social institution feminists have challenged.

Because women's experience is the central building block of feminist jurisprudence, it is necessary to deal explicitly, carefully and deeply with the question of how to evaluate women's experience. In other words, we say lots of things about our experience as women. Some of these things apparently conflict, some apparently converge, some seem to pass each other like ships in the night. Feminist theorists have long struggled with potential approaches to this phenomenon, the paradox of diversity in commonality. Feminist legal theorists in particular struggle to reconcile recognition of diversity with a perceived need to articulate coherent positions around which legal doctrine can be "sewn together to fit."

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* MacKinnon, Feminism Unmodified at 5 (cited in note 1).
One approach is to define accounts that do not fit a theorist's particular experience as "false consciousness." Yet most feminist legal theorists have rejected this approach as either unhelpful or unpersuasive, or both. Unhelpful because it eliminates diversity among women, a diversity that could and should be enriching and generative. Unpersuasive because it comes from an intellectual tradition (Marxism and the "New Left") that accepts the idea that oppression and subordination can be accurately described and analyzed "objectively" (that is, from outside the condition of being subordinated).

Like traditional jurisprudence, which translates women's experience into male terms, the "false consciousness" explanation translates some women's experiences into other women's terms. Both processes falsify and distort women's experience—the first totally and the second partially. When feminism is criticized as "partial" because it rests on women's experience, then the criticism is unreal, because women occupy every stratum of economic and social class; inhabit every construction of race or ethnicity; practice every religion; live and love in or around every sexual and familial structure the culture has to offer. When, however, feminism is criticized as partial because it rests only on some women's experience, or only on some of our experience with the remainder defined away as "false consciousness," the criticism is real and demands a real response.

A second approach to the diversity of women's accounts views feminism as made up of a variety of "feminisms"—all of which are inherently partial. While initially more attractive than the "false consciousness" move, this approach also fails to provide a satisfying and useful basis for analysis and change. Indeed, uncritical pluralism undercuts our ability to criticize existing structures of male

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14 See Audre Lorde, *Sister Outsider* 122 (Crossing Press, 1984) ("Now we must recognize differences among women who are our equals, neither inferior nor superior, and devise ways to use each others' difference to enrich our visions and our joint struggles.")

15 While not denying the value of recognizing and resisting oppression from whatever perspective one happens to occupy, I think MacKinnon is right when she says that feminism is (or should be) "methodologically post-Marxist," that is, that feminism must develop an account of the oppression/subordination of women from our own perspective, not from an "outside" one. See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs 635, 639 (1983). See also Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or The "Fem-Crits" Go to Law School*, 38 J Legal Educ 61, 61-62 (1988).

16 See, for example, Sandra Harding, *The Science Question in Feminism* 194 (Cornell University Press, 1986).
domination. We do not live in a world in which each subset of women can pursue a separate agenda without implicating the lives and status of other women. So long as the dominant culture treats “women” as a class, we cannot afford to ignore the effect on “other” women of our particular analysis and programmatic suggestions. Moreover, as developed below, to set aside the struggle to define a feminism that works for all women in favor of the celebration of “feminisms” is to ignore a crucial issue—the problem of transition.17

Between the Scylla of false consciousness and the Charybdis of uncritical pluralism lies the possibility of a third option that always runs the risk of being heard as one of the first two (or indeed, actually falling into one or the other). This option requires a dialectic between our own descriptions of our varying experience and the conditions under which such descriptions are made. Rather than viewing any woman’s description as, on the one hand, potentially inaccurate, socially conditioned or merely the product of internalized oppression; or, on the other, individualized, attributable solely to determinants other than gender, or exceptional, I suggest that we should use as a working hypothesis the assumption that women’s descriptions of our experience are accurate, reasonable and potentially understandable given the conditions under which we live. Tensions and contradictions in women’s descriptions give us a way to examine and criticize the conditions under which we live, rather than a reason to deny status to some descriptions or to consider other descriptions as relevant to some women but not others. The task for the remainder of this essay is to use this “third option” to examine the experience of women in one context—battering—where distortion of that experience seems ubiquitous.18

B. The Context of Battering

By some estimates, almost half of all marriages are marked by

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17 For a discussion of the problem of transition, see pp 47-57.
18 Even the terminology of battering is problematic. Resisting what has been viewed as sexism in the terms “wife battering” or “battered women,” some have turned to neutral terminology such as “spousal abuse” or “domestic violence.” Both the traditional and the quasi-egalitarian labels seem to me to miss the point. First, wives are battered as members of the class of women; wife battering is therefore gender related in a way that is different from occasional violence against men. Second, as developed later in this essay, treating battering as “the problem” of the person who is battered (whether she is called woman, wife or spouse) obscures the responsibility of the batterer. Why isn’t battering considered “the problem” of violent husbands?
battering episodes,¹⁹ and many more women are battered by their boyfriends, fiances or lovers.²⁰ Yet battering per se occupies very little of the legal landscape, at least as measured by law review pages and published opinions. “Law”²¹ seems to come in only at the extremes, as, for instance, when long-term victims of battering escape through the unusual route of killing their tormenters.²² For most battered women, “the police always come late if they come at all.”²³

It is often said that rape victims are raped twice—once by the

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¹⁹ See, for example, Robin Morgan, ed, Sisterhood is Global 703 (Anchor Press/Doubleday, 1984) (50-70% of women experience battering during marriage). Exact figures are difficult to generate, both because battered women are often reluctant to acknowledge their situation and because serious study of the problem is a very recent phenomenon. “The problem of battered women has only come into the limelight in the past few years, its progression toward public awareness paralleling the growth of the women’s movement. Historically, there has never been any public outcry against this brutality.” Lenore E. Walker, The Battered Woman ix (Harper & Row, 1979). The 50% figure appears to me to be plausible, both because of the number of experts who subscribe to it (see, for example, id (“Some observers, including myself, estimate that as many as 50 percent of all women will be battering victims at some point in their lives.”)) and because of the number of my friends and acquaintances who have been psychologically and/or physically abused in intimate relationships. See, for example, Robin L. West, The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 Wis Women’s L J 81 (1987). West describes a “profoundly disturbing” sex difference in reaction to recent estimates: “When women see these newly reported high percentages, they are outraged at the violence, and when men see the same numbers they are outraged at what they perceive as ‘unethical’ and wild inflation of statistics.” Id at 86. She concludes that women are more likely to believe that violence occurred “because women live it and men don’t and women tell other women and not men.” Id.

²⁰ The existence of battering within lesbian relationships is an ill-concealed secret. See, for example, Kerry Lobel, ed, Naming the Violence (National Coalition Against Domestic Violence Lesbian Task Force, Seal Press, 1986). What such phenomena reveal, however, is not that battering is non-sexual, but rather that sexual roles are non-biological. “[O]ur concept of primary relationships was based on the heterosexual model of jealousy and possessiveness as proof of love, unquestioned expectations of monogamy, and the double standard of infidelity—forivable for the ‘butch,’ unforgivable for the ‘femme.’” Breeze (pseudonym), For Better or Worse, in id at 52. This article treats the batterer as a “he” and the battered as a “she” not only because that is the more frequent configuration, but because battering is a socially male activity, as are rape and warfare, even though occasionally practiced by biological females. See Christine A. Littleton, Reconstructing Sexual Equality, 75 Cal L Rev 1279 (1987) (elaborating analytical categories of “biologically female/male” and “socially female/male”).

²¹ I am always mindful of the difference between law as seen by “insiders” and law as seen by “outsiders.” As a tenured law professor, even with a specialty in feminist jurisprudence, I am an insider. Battered women are quintessential outsiders.

²² See, for example, Fennell v Goolsby, 630 F Supp 451 (E D Pa 1985); People v Emick, 481 NYS2d 552 (1984); Ibn-Tamas v US, 407 A2d 626 (DC App Ct 1979).

²³ Tracy Chapman, Behind the Wall, from the album Tracy Chapman (Elektra/Asylum Records, 1988). “Last night I heard the screaming/ Loud voices behind the wall/ Another sleepless night for me/ It won’t do no good to call/ The police/ Always come late/ If they come at all.”
THE PROBLEM OF TRANSITION

rapist and once by the legal system. If that is so, then battered women are battered three times—once by the batterer, a second time by society and finally by the legal system. Traditional society blames the victim of battering for “deserving” the punishment. If only she had been a better wife, a more submissive helpmate, a more compliant sexual partner, then her nose would not have been broken, her eye would still be uncut, the bruises would never have marked her thighs. The legal system is somewhat more generous. It does not blame all battered women for their plight, only those who do not immediately sever their relationships and leave their batterers.

Women who have been battered tell stories that include fear (the one story law might listen to), love (a story usually heard as masochism), desire for connection (a story hardly heard at all) and absence of options (often dismissed as “objectively” inaccurate). Must we be forced, by either the lack of a unitary account or the pressure of existing conditions, to choose among them only one story? Will recognizing their multiplicity undermine efforts on behalf of women who are battered? Can the multi-faceted nature of these descriptions be taken seriously and still provide the foundation of feminist critique?

The tension criminal law theorists identify in battered women’s self-defense claims is between a commonly held image of battered women as passive and the actual action of those relatively few battered women who kill their batterers. The tension certainly seems real, especially when we consider all battered women.

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24 See, for example, MacKinnon, Feminism Unmodified at 82 (cited in note 1). The analogy may be even closer than suggested in the text. Despite the success of feminist educational efforts, much of society continues to blame the victims of rape, just as most of society blames the victims of battering.

25 Last spring, a colleague invited me to comment “from a feminist perspective” on his work dealing with the “battered woman syndrome” as a proffered defense in homicide cases. Peter Arenella, “Battered-Woman Self Defense,” speech presented at the UCLA School of Law Faculty Colloquium, April 28, 1988. Deeply critical of the traditionalist stance that women incite men to violence, and potentially sympathetic to arguments that social forces constrain women’s responses to violence, this colleague was struggling with a question that apparently looms large in the theoretical criminal law literature: When can individuals fairly be blamed for character traits whose development is attributable to social forces over which they have control? In the context of “battered woman self-defense,” he tentatively proposed a distinction between “battered women” who were not given opportunities to overcome their “learned helplessness” and those who had been offered such “transformative opportunities.” My relative ignorance of criminal law made me reluctant to engage in this project, but I quickly became fascinated with the subject from a very different standpoint: Trying to treat the issue as a moral question within self-defense doctrine appeared to me to obscure the political question arising from female-male relationships.

26 Id.
If these women are so passive, dependent and helpless, where do they get the strength and courage to live, day after day, with the abuse, humiliation and violence? Where do they get the intestinal fortitude to protect their children, pay their bills, maintain their facade of wedded bliss? And, in those rare instances, where do they get the desperation to kill?

This lack of convergence between image and a full vision of action highlights two fundamental issues of feminist jurisprudence: the problem of evaluating women's experience and the problem of transition. As indicated above, and explored in Part I below, women's own descriptions of the experience of being battered cannot be reduced to a single story without substantial distortion and silencing. Part I attempts to add back into the legal discussion of battered women a sense of their tremendous strength, courage, guts and desperation—a sense strikingly absent from published legal views of battered women. This is a project of feminist jurisprudence as I understand it, albeit in its "critical-supplementary" mode.7 It presupposes a feminist standpoint; the perspective of women, rather than being seen as special, marginal or deviant, is treated as central. In asking, from this perspective, what traits are being exhibited and what values are being asserted and defended by women who stay in battering relationships, we begin to see what has been left out of the legal discussion and the massively distorting effects of that omission.

Part II of this essay attempts to place the discontinuity between legal views of battered women and women's own experience of being in battering relationships into the framework of feminist "reconstructive jurisprudence."8 Mapping the contours of mismatch between legal categories and women's experience is important, but it is not sufficient.9 It is still necessary to ask two further questions. First, what would this legal landscape look like if women had constructed it for ourselves?10 This question may be unan-

7 See Herma Hill Kay and Christine A. Littleton, Feminist Jurisprudence: What Is It? When Did It Start? Who Does It? (Text Note) in Kay, Sex-Based Discrimination 884-87 (West, 3rd ed, 1988); Littleton, In Search of a Feminist Jurisprudence, 10 Harv Women's L J 1, 2 (1987) ("First, feminist jurisprudence criticizes the law's omission of and bias against women's concerns, offering its insights as a supplement and corrective. Simple inclusion is not, however, the primary goal of feminist jurisprudence.") (footnote omitted).
9 See Heather Ruth Wishik, To Question Everything: The Inquiries of Feminist Jurisprudence, 1 Berkeley Women's L J 64 (1986).
10 This is my reinterpretation of Wishik's question "In an Ideal World, What Would This Woman's Life Situation Look Like, and What Relationship, if Any, Would the Law Have to This Future Life Situation?" Id at 75.
scherable, at least in a complete form. Nevertheless, the effort of thinking about a woman-centered ideal is both necessary and desirable. Revealing the distortion and silencing of women's experience raises an additional problem, however. If the law's occasional willingness to recognize women's use of self-defense and minimal recognition of women's claims to protection against male violence are based on such distortion, how can we move to a fuller and less distorted articulation without risking these partial gains? The second question is, therefore: What strategies might move us in the direction of the tentative ideal while minimizing the dangers of partial reform? In this endeavor lies the problem of transition.

The problem of transition is itself part of the structure of phallocentrism. In fact, being placed in the double bind of having to choose between being a woman and unequal, on the one hand, and being equal and not a woman on the other, is the hallmark of women as an oppressed class. The way out of this double bind is not, however, to choose between equality and identity, nor even to move back and forth depending on the instant context, but rather to focus on, criticize and change the conditions that create the double bind. This essay is dedicated to all women who have found themselves in the double bind of being human and female, and especially to those who have refused to choose between the two.

I. Women's Experience

In her paradigm-shifting article *Jurisprudence and Gender*, Robin West claims for the discipline of jurisprudence the ground of inquiry into human nature, but demonstrates that male theorists have consistently focused only on male nature, leading to

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31 See Littleton, 41 Stan L Rev at 782 (cited in note 10).
32 I use “phallocentrism” to mean an insidious and complex form of male domination: A history of almost exclusive male occupation of dominant cultural discourse has left us with more than incompleteness and bias. It has also created a self-referencing system by which those things culturally identified as “male” are more highly valued than those identified as “female,” even when they appear to have little or nothing to do with either biological sex . . . . By use of the term ‘phallocentrism’ I hope to capture [the culturally male] perspective—not the perspective of biological males, but the perspective to which the culture urges them to aspire, and by which the culture justifies their dominance.
“masculine jurisprudence.” Regardless of whether the human described by jurisprudence and inscribed in the legal system is a creature of nature or culture, the content of this conception of “human” bears little resemblance to women. Our lives are not described by it, our concerns are unaddressed or trivialized by it, and our attributes are ignored or undervalued by it. Indeed, when the legal system sets out to describe us specifically ("women," rather than "human beings") the discontinuity and distortion between our experience and their description becomes even more apparent.

As Clare Dalton has demonstrated in the context of contract cases, the law's description of us is both contradictory in theory and cruel in practice. She describes women trying to enforce promises in the most important economic relation in most women's lives—that is, a domestic relationship with a man. Either women are seen as "whores," attempting to exchange sexual services for money, in which case they lose, or they are painted as "angels" who cared for men out of love and affection rather than out of expectation of gain, in which case (surprise!) they lose.

Although the law's image of battered women at first appears neither as contradictory nor as cruel as the image Dalton describes, it is radically incomplete—and therefore false—and has its own set of adverse consequences. As Marnie Mahoney observes:

The picture of battered women which has appeared in the legal literature . . . is something with which no woman wishes to be identified. Denial and the sense of distance from these broken creatures make it harder for women to confront how widespread violence against us actually is. Most women, in living our lives, feeling our feelings, and struggling to make our way, are dismayed by the prospect of being grouped with the submissive, be-draggled, not-quite-human figures who people the cases.

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36 Id at 3. As much as I agree with West's analysis, I am extremely wary of categorizing female, male or human "nature." See Note, 95 Harv L Rev at 497-99 (cited in note 4). Rather than claiming that masculine jurisprudence has omitted something essentially feminine from its claims about the "human," I would prefer to focus on the fact that it fails to explain who women are and how we act. Whether we (or they) are the way we are because of nature, nature overlaid with culture, or pure cultural conditioning is irrelevant. Who we are is important, not because it is unconstructed, "genuine" or authentic, but because it is what we have to work with. See Littleton, 41 Stan L Rev at 782 (cited in note 10).


38 Id at 1110-13.
Where did this image come from, what purposes does it serve, and what does it leave out?

A. The Law’s Picture of Battered Women

It was late evening when 23-year-old Josephine Smith returned to her apartment in Atlanta. She was met outside by her live-in boyfriend David Jones. David lived at Jo’s place “most of the time,” leaving for days or weeks at a time to take care of business, hang out with his buddies or just get a little distance. Jo and David have had two children together, both of whom are spoken of as “her children,” and only one of whom carries David’s last name.

Jo finished the laundry while David hung around, then went upstairs to go to bed. Feeling amorous, David began to rub himself against Jo, who asked him to stop because she was tired. (By this time it was 1 or 2 a.m.) David grabbed Jo and shook her, saying, “You don’t tell me when to touch you.” Afraid, upset or just disgusted, Jo got out of bed, pulled on some street clothes and started to leave the bedroom. David held up a balled fist and told her she “wasn’t going anywhere.” Sighing, Jo sat down on the foot of the bed and started rolling her hair. David kicked her in the back. Jo placed her hair pick between her back and David’s foot, and, as a result, his second kick gave him a flash of pain. He responded by hitting Jo in the head with his fist, grabbing her by the throat and choking her. Then he threw her against the door.

Jo ran to the bureau, grabbed her gun and ran downstairs. She tried to call her mother, but David had already taken the upstairs phone off the hook, and now took the receiver out of Jo’s hand. Jo tried to run back to the bedroom, but David caught her. She tried to run out the door, but David slammed the door on her foot. Remembering the gun in her hand, Jo fired three times with her eyes

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31 This account paraphrases the Georgia Supreme Court report of Smith v State, 277 SE2d 678, 247 Ga 612 (1981). The opinion omits many of the facts I would like to know in order to tell the whole story, but I have resisted using artistic license to fill in consistent “facts.” (The only exception is noted in the following footnote.) Josephine Smith is not intended to be “Everywoman,” not even to be “every battered woman.” Indeed, as noted infra, her story is atypical in several respects, including the fact that she and “David” were not married, and the fact that she struck back. See p 34. Rather, her story is used to try to uncover the multiple meanings women may give to their relationships with violent men.
32 The opinion does not give a name, referring to him as “her live-in boyfriend,” “her boyfriend” or “the victim.”
closed, turned and ran. She begged a neighbor to let her in and used the telephone to call the police. When the police arrived, David was dead. Jo was arrested and charged with voluntary manslaughter.

Jo is not a typical battered woman. Most obviously, she had a gun and she used it. Over a million and a half women are beaten each year by the men they love, but only a few hundred kill. By contrast, several thousand women are killed each year by the men who supposedly love them. She may also be unusual in another respect—she was not married to the man who beat her. Apparently many wife-beaters do not engage in premarital battering. Those who do tend to increase the frequency and severity of such abuse after marriage. Nevertheless, Jo's case offers an opportunity to examine how the law distorts women's accounts, as well as to question why it does so.

At trial, Jo asserted that because she had acted in fear of her life, and thus in self-defense, she should be acquitted. In furtherance of this defense, she testified that:

[David] hit her in the eye with his fist about a month after they met, that he had beaten her periodically, particularly when she dated so she quit seeing other men, that she was scared to quit seeing the victim because he threatened her, that the beatings increased in frequency when she moved from her mother's house to the apartment, that after he beat her he would apologize and say he loved her, that she didn't call the police or tell her friends because she believed him when he said he wouldn't do it anymore, and that earlier on the day of the shooting the victim threatened her and she gave him ten dollars after asking him not to do that in the presence of her sister. She testified that on the night of the shooting the victim said he was going to do something to

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43 See Jeanne P. Deschner, *The Hitting Habit: Anger Control for Battering Couples* 6 (The Free Press, 1984) (3 million “battering couples”). Some estimates are much higher. See, for example, Morgan, *Sisterhood is Global* at 403 (cited in note 19) (“Approx. 2 million to 6 million women each year are beaten by the men they live with or are married to . . . .”)

44 In 1984, for example, approximately 477 husbands or boyfriends were killed by women. Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L Rev 1679, 1681 n 10 (1986).

45 See Morgan, *Sisterhood is Global* at 704 (cited in note 19) (“2000-4000 women are beaten to death by husbands each yr.”).

46 See, for example, R. Emerson Dobash and Russell Dobash, *Violence Against Wives: A Case Against the Patriarchy* 81-85 (The Free Press, 1979).
her and call her mother to come to get her, that she was scared he was going to hurt her more than before, and that she shot the victim in fear of her life.\\(^{46}\)

The jury found Jo guilty of voluntary manslaughter, and she was sentenced to 15 years. Jo appealed her conviction on the ground that the trial court had excluded expert psychological testimony during both the trial and the sentencing hearing. The court of appeals affirmed on the basis that such expert testimony would have invaded the province of the jury (that is, deciding whether Jo had acted out of fear for her life). The Georgia Supreme Court reversed, however, holding that “[e]xpert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion is beyond the ken of the average layman.”\\(^{47}\) The “average layman,” the court reasoned, might think that the “logical reaction” of a battered woman would be to call the police or leave her husband (boyfriend).\\(^{48}\) Only through use of expert testimony on the “battered woman syndrome” could a jury learn that “typically victims of battered woman syndrome believe that their husbands are capable of killing them, that there is no escape, and that if they leave they will be found and hurt even more.”\\(^{49}\) Without such expert testimony, a jury probably would not suspect that battered women believe “that they themselves are somehow responsible for their husbands’ violent behavior, and that they are low in self-esteem and feel powerless.”\\(^{50}\) Nor would they know that the primary emotion of a battered woman is fear.\\(^{51}\)

Jo’s conviction was reversed, and the opinion in her case opens the door to other women in Georgia (and potentially elsewhere) who seek to bolster their self-defense claims with expert testimony. Yet the sub-text of the opinion is deeply troubling.

First, battered women were viewed by the Smith court as alien, their reasoning and actions “beyond the ken of the average layman.” This view is indeed plausible: Not only battered women, but all women, may appear alien from a male perspective.\\(^{52}\) In this

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\(^{46}\) Smith v State, 277 SE2d at 679.

\(^{47}\) Id at 683.

\(^{48}\) Id, citing Ibn-Tamas v US, 407 A2d 626 (DC App Ct 1979).

\(^{49}\) Id.

\(^{50}\) Id.

\(^{51}\) Id at 689.

\(^{52}\) See West, 3 Wis Women’s L J at 96 (cited in note 19).
sense, the court's characterization may be even truer than the court itself imagined. Second, whether accurate or not, the truth of an expert's assertion that the battered woman's "primary emotion is fear" is largely irrelevant. Unless she can convince the jury that she was afraid in a way they understand, she will go to jail. That is a powerful truth. Third, battered women are said to believe that there is no escape. This statement seems consistent with women's accounts, but it is also incomplete in a particularly insidious way. That is, not only is the objective accuracy of the belief deemed irrelevant, but so is its very reasonableness. It is precisely because the belief appears so incredible that expert testimony is introduced.

Whether or not Jo's belief that she could not safely escape the relationship with David was accurate is, of course, not the point. Whether her belief was reasonable, however, was precisely the point of feminist theorists and litigators who worked so hard to gain acceptance of expert testimony on behalf of battered women claiming self-defense. There are, in fact, very strong empirical grounds for believing that escape is sometimes impossible, or at least as dangerous as staying. Every battered women's shelter has stories to tell of the men who follow "their" women, hammer at the door, and try to force their way through. Restraining orders do not prevent men from returning to threaten us again; moving only delays the day that they find us; even jail sentences do not assure safety. It is no coincidence that a book subtitled "Violence against Women and Children" has as its primary title "NO SAFE PLACE." The statistical incidence of "recapture"—men finding women and beating again—makes a mockery of the standard self-defense analysis regarding "duty to retreat." It also makes battered women's belief that there is no safe escape rational. That ra-

53 See pp 37-38. 
55 "Lisa Bianco, an advocate for battered women who had been beaten for years by her former husband, took little comfort in his imprisonment for brutally attacking her two years ago. Instead, she lived in daily fear that he would make good his threats to kill her. Her nightmare came true March 4, officials say, when Alan Matheney got an 8-hour pass from a state prison near Indianapolis. They say his mother drove him to this small town near the Michigan border, where he broke into his former wife's house" and killed her. Isabel Wilkerson, Indianan Uses Prison Furlough to Kill Ex-Wife, NY Times 14 (March 12, 1989). 
What difference does it make whether the belief that escape is impossible is rational, or an aspect of women's abnormal psychology? In either event, the belief will, when allowed into evidence, provide some way to educate a jury, some way to let women use the self-defense doctrine that has always been available to men.57

The characterization of the belief makes a difference in four interrelated ways. The first is that, paradoxically, the focus on the personal, interior, subjective nature of the belief without considering its class-wide, external, statistical rationality, denies the defense to those individual women who have not yet been beaten "enough." For example, in giving Jo Smith the benefit of expert testimony, the Georgia Supreme Court distinguished an Idaho case upholding the exclusion of psychiatric opinion "as to whether or not the defendant was in a state of fear at the time of shooting her husband."8 That case was seen as different because there "the defendant testified as to only one prior occasion of physical abuse."58

A second consequence of focusing on subjective belief rather than social reality is that it allows society, and encourages women, to deny the extent of male violence and the threat of such violence to our lives.60 Thus, women who are battered are viewed by many other women as deviant, unusual, perhaps even rare. Such denial and lack of identification undermine the unity of women necessary to bring about political and legal change, as well as cutting off battered women from potential sources of support and nurturance.

The third consequence is even more subtle. In bypassing the question of statistical frequency, the law's imagery and categorization allows, perhaps even encourages, a notion of the natural inevitability of violence against women. In Dothard v Rawlinson,61 for example, the United States Supreme Court decided that a female prison guard's "very womanhood" and the resultant likelihood of sexual assault would undermine her ability to maintain control over male prisoners.62 By failing to identify the problem as one of male violence or as one of conditions that make male violence a real possibility, the Court made it impossible to see that changing

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57 See Jordan and Schneider, 4 Women's Rights L Rptr 149 (cited in note 54).
59 Id (emphasis added).
60 See West, 3 Wis Women's L J at 93-96 (cited in note 19).
62 Id at 336.
the prison conditions was a viable alternative to excluding women from the job. In similar fashion, identifying the problem in battering by focusing on a woman’s psychological reaction rather than on the battering itself makes it harder for the legal system to craft solutions that will stop the violence, and easier to blame the woman for not fleeing.

Finally, this notion of natural inevitability causes the jury immediately to accept the dead husband or boyfriend as “the victim.” To gain acquittal, the battered woman’s only option is to make herself even more of a victim. If she is successful, she will gain the sympathy of a jury, but not necessarily its respect. Rather, a successful showing of victimization will lead the jury to characterize her as incompetent rather than as reasonable. Labeling those women who finally and desperately resist the imposition of male power as unreasonable, incompetent, suffering from psychological impairment or just plain crazy supports, rather than undermines, the assumption that male power over women is natural and unalterable.

Beyond characterizing the battered woman as unreasonable, however, the law in its present cast is also able to maintain an absolute focus on whether the battered woman “chose” correctly between the risk of leaving and the risk of staying, and away from whether men should be able to impose either set of risks on us. This fact, above all others, leads me to think that the problem is much more than various judges’ and juries’ tendency to hold onto sex stereotypes. Translating women’s victimization into a problem with women masks the pervasiveness and extent of men’s ability to oppress, harm and threaten us. It protects the legal system from having to confront the central problems of battering—male violence, male power and gender hierarchy.

B. Fear, Rationality and “Learned Helplessness”

In order to claim self-defense, a defendant must demonstrate that she acted “in fear of her life.” But fear can mean many things. It can be rational or irrational. It can be incapacitating and dehumanizing, but it can also be the necessary precondition of

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See Note, 95 Harv L Rev at 494-95 (cited in note 4).

See, for example, Smith v State, 277 SE2d at 679.

For this reason, Elizabeth M. Schneider, a pioneer in women’s self-defense work, decries such “sex-stereotypes of female incapacity.” 9 Women’s Rights L Rptr at 197 (cited in note 54).

Smith v State, 277 SE2d at 679.
bravery (to be brave is to act in spite of fear, not in its absence) and the trigger for effective action. The law's tendency to characterize women's fear as irrational is understandable if viewed as stemming from a desire (whether consciously experienced or not) to avoid seeing the extent of male violence against women. As feminists, we frequently underestimate this desire, and fail to protect ourselves against the consequences of "dropping our guard."

Consider the extent to which Lenore Walker's brave attempt to articulate women's experience with battering has been used and abused to blame the victim. In The Battered Woman, Walker stated her feminist assumptions: "I believe it will only be through listening to what battered women say that we will be able to understand what happens to a battered woman, how she is victimized, and how we can help a society change so that this horrible crime can no longer be perpetrated upon women." Yet she, like all of us, in underestimating the extent to which a phallocentric system could use even feminist impulses against women, failed to exercise the extreme care necessary to prevent such misuse.

The core of Walker's first book, or at least the core of what has been accepted legally, is the "psychological theory of learned helplessness." She first describes the origins of the theory in animal experiments:

Experimental psychologist Martin Seligman hypothesized that dogs subjected to noncontingent negative reinforcement could learn that their voluntary behavior had no effect on controlling what happened to them. If such an aversive stimulus was repeated, the dog's motivation to respond would be lessened.

Seligman and his researchers placed dogs in cages and administered electrical shocks at random and varied intervals. These dogs quickly learned that no matter what response they made, they could not control the shock. At first, the dogs attempted to escape through various voluntary movements. When nothing they did stopped the shocks, the dogs ceased further voluntary activity and became compliant, passive, and submissive. When the researchers attempted to change this procedure and teach the dogs that they could escape by crossing to the other side of the cage, the dogs still would not respond. In fact, even when the door was left open and

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97 Walker, The Battered Woman at xiii (cited in note 19).
The dogs were shown the way out, they remained passive, refused to leave, and did not avoid the shock. It took repeated dragging of the dogs to the exit to teach them how to respond voluntarily again. The earlier in life that the dogs received such treatment, the longer it took to overcome the effects of this so-called learned helplessness. However, once they did learn that they could make the voluntary response, their helplessness disappeared.68

The movement from animal to human behavior is quite sudden, occurring within a paragraph:

The learned helplessness theory has three basic components: information about what will happen; thinking or cognitive representation about what will happen (learning, expectation, belief, perception); and behavior toward what does happen. It is the second or cognitive representation component where the faulty expectation that response and outcome are independent occurs . . . . It is important to realize that the expectation may or may not be accurate. Thus, if the person does have control over response-outcome variables but believes she/he doesn’t, the person responds with the learned helplessness phenomenon.69

Application of the theory to battered women follows without hesitation:

Once we believe we cannot control what happens to us, it is difficult to believe we can ever influence it, even if later we experience a favorable outcome. This concept is important for understanding why battered women do not attempt to free themselves from a battering relationship. Once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive, "helpless."70

Walker concludes that the expectation that response and outcome are independent is indeed "faulty," and a problem with the women:

When one listens to descriptions of battering incidents

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68 Id at 45-46.
69 Id at 47 (emphasis added).
70 Id.
from battered women, it often seems as if these women were not actually as helpless as they perceived themselves to be. However, their behavior was determined by their negative cognitive set, or their perceptions of what they could or could not do, not by what actually existed. The battered women's behavior appears similar to Seligman's dogs, rats, and people.71

The picture of battered women offered here is more complex than it often appears in judicial opinions. While describing battered women's behavior as "similar to Seligman's dogs, rats, and people," and characterizing them as passive and submissive, Walker also places "helplessness" in quotes and juxtaposes it against the general perception that they "were not actually as helpless as they perceived themselves to be." However, even given this distinction between psychological state and behavior, the concept of learned helplessness, as used in law, is markedly inconsistent with Walker's own description of a "common behavior" among the battered women she studied. Walker reported that many of these "helpless" women attempted to control other people and events in the environment to keep the batterer from losing his temper. The woman believes that if she can control all the factors in his life, she can keep him from becoming angry. She makes herself responsible for creating a safe environment for everyone. One woman interviewed spent an enormous amount of time talking about her efforts to control her mother, his mother, and their children so that none of them would upset her husband. She found that if she kept all these people in check through some interesting manipulations, life was pleasant in their home. The moment someone got out of line, her man began his beatings.72

As the subtlety of the relationship between psychological state and behavior has been lost in translation, so has Walker's cautionary note in her second book The Battered Woman Syndrome that "[t]he issue of the woman's response to violent attacks by the man who loves her has been further clouded by the mythology that she behaves in a manner which is either extremely passive or mutually aggressive. Rather these data suggest that battered women develop

71 Id at 47-48.
72 Id at 34.
survival or coping skills that keep them alive with minimal injuries."

If we take women's own statements about their situation seriously, a picture emerges of women in positions of extreme danger and uncertainty performing literally amazing, and often successful, stunts to keep going, to stay alive. Along with "interesting manipulations" of other people who might affect the batterer's precarious balance come even more interesting manipulations of self-consciousness that allow battered women to continue taking care of pragmatic necessities:

Two days after he broke the glass in the door, it was the middle of a hot summer afternoon. My son was asleep in his crib in my room, my daughter was taking a nap in hers. I was lying in bed reading. Suddenly, I heard a popping noise, and glass started crashing to the floor. Someone was shooting through the windows. There were no bullets flying around—I remember wondering if it was an air rifle. The windows kept shattering, and I didn't know what would happen if anything hit the baby. I grabbed him out of the crib, got down toward the floor, and half-crawled out of the room. I took him downstairs. Of course, he was only three months old, when he woke up he had to nurse. Then I had to change his diaper. Then my daughter started crying—she had waked up from her nap. Then I had to change her diaper. Then she was hungry. Then I had to change his diaper again. By then he had to nurse again . . . . At 5:30 when I took them upstairs for their baths, I noticed the glass all over the floor. That was when I remembered what had happened.

This woman does not sound helpless to me.

In Walker's account of learned helplessness, the cause (random, uncontrollable violence inflicted by men) is at least part of the "syndrome." In the case law, the cause disappears while the "syndrome" remains. In neither case, however, is the focus explicitly and continuously placed where it belongs—on the intolerable conditions under which women live.

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74 Mahoney, What Self We Defend at 32 (cited in note 39).
C. Beyond Learned Helplessness

Is there some way to reconcile the conflicting images of women who report that they “cannot leave” and yet seem capable of heroic efforts on behalf of themselves, their children and other family members? There may be several plausible explanatory theories. In this section I will try to use the methodology of feminism to construct at least one. What I describe as “feminist method” is the process of constructing theories of explanation, critique and reconstruction from the perspective of the experience of women. In *Feminism Unmodified*, Catharine MacKinnon suggests that feminism’s “methodological secret, is that feminism is built on believing women’s accounts of sexual use and abuse by men.” While this formulation of feminist method is cryptic in the extreme, its first step is both clear and illuminating. Let us start by believing women’s own accounts, rather than by asking them to fit into pre-existing legal categories, and see what develops.

As described above, battered women engage in a variety of active strategies consciously directed either at reducing the frequency and severity of violence against themselves and their children or at taking care of themselves and their children despite the violence. Many of these women nevertheless describe themselves as unable to leave. Walker characterizes the latter account as “inaccurate,” reflecting the psychosocial phenomenon of “learned helplessness” rather than objective, or even unconditioned subjective, reality. What if it is not “inaccurate,” but only lacking in the articulation of a tacit predicate? In other words, these women may simply be saying “I cannot leave without giving up something important,” perhaps even “without giving up something I cannot give up”:

The witness testified further that the history she took from [Jo Smith] revealed a four year relationship with her boyfriend in which abuse began very early and escalated over the course of that relationship, that [Jo] continued the relationship for three basic reasons—she loved him, she believed him each time he said that he loved her and that he was never going to repeat the abuse, and

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76 MacKinnon, *Feminism Unmodified* at 5 (cited in note 1).
77 For an “unpacking” of MacKinnon’s methodological contribution to feminist legal theory, see Littleton, 41 Stan L Rev 751 (cited in note 10).
she was afraid that if she tried to leave she would be endangering her life.\footnote{Smith v State, 277 SE2d at 680.}

Jo gave three reasons for staying—love, faith and fear. The law only had a category—self-defense—for the last, and so it heard only fear. If the person reporting these emotions or attributes—love, faith and fear—had been male, would the law have heard only one of them?\footnote{There is at least some reason to think the answer to this question is “no.” In the Christian tradition, the man who forgives his enemy is seen as virtuous rather than foolish. “You have heard that it was said ‘You shall love your neighbor and hate your enemy.’ But I say to you, Love your enemies and pray for those who persecute you, so that you may be sons of your Father who is in heaven . . . . For if you love those who love you, what reward have you? Do not even the tax collectors do the same?” Matthew 5:43-46 (RSV). And faith, hope and love are treated as attributes to be acquired, cultivated, and encouraged. “Love bears all things, believes all things, hopes all things, endures all things . . . . So faith, hope, love abide, these three; but the greatest of these is love.” 1 Corinthians 13:7, 13 (RSV). The decision of Jesus to “turn the other cheek” has not been derided as “learned helplessness.”}

In 1979, Walker suggested that battered women were likely to have a “traditionalist orientation . . . evident in [their] view of the woman’s role in marriage.”\footnote{Walker, TheBattered Woman at 33 (cited in note 19).} In 1984, however, without cross-referencing the earlier statement, she stated that “[b]attered women held attitudes toward women’s roles that were more liberal than most of the population. They reported that batterers were very traditional in their attitudes toward women.”\footnote{Walker, The Battered Woman Syndrome at 148 (cited in note 73) (emphasis added).}

This change in characterization may stem from increasing attention to what battered women themselves say about their experience and the conditions under which they live. In other words, battered women may stay in relationships that are physically dangerous to them because they value connection, yet the connection they seek may have little or nothing to do with the traditional, patriarchal image of family. Walker’s later work categorizes these women as “more liberal” than most because they value their work outside the home, believe in shared responsibility in the home and try to engage in co-parenting. The fact that in 1979 Walker could only see these women as “traditionalists” even while she wondered over the fact that they often wielded great influence and demonstrated marked self-esteem in the workplace, says far more about the strength of traditional images of family than it says about battered women’s commitment to those images.

In her major article The Family and the Market,\footnote{Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Re-} Frances
Olsen described an oscillation between images of "the family" and "the market" that has kept legal reforms within a very narrow track. If the family is patriarchal, oppressive to women and shackling of the female spirit, the only alternative offered has been an individualistic model of the family. More closely resembling the hypothetical market, this family is one of juridically equal members freely choosing to associate with one another out of rational cost-benefit analysis. Lost in this image of family, of course, is the value of connection that goes deeper than mere association, of connection that is constitutive of self, rather than merely reflective of it. Too often, those who reject the patriarchal aspects of the traditional family are offered only the cold comfort of individualistic, alienated relationships of exchange. And those who seek sharing, meaning beyond personal gratification and power and a stake in the future of the species are offered only the traditional white picket fence. If battered women value the families they have been able to create despite the odds, does that mean they must also value the traditional sexual division of labor?

The phenomenon of some battered women choosing to remain in the relationship despite "objective" judgments that they would be safer if they left can be explained in several different ways—all of which have been, or could be, described as "feminist." One explanation accepts the accuracy of the outsider's judgment and ascribes the battered woman's behavior to some dysfunction in character, broadly described as "learned helplessness." A second view has stressed the unsafety of leaving, pointing out the lack of equal pay in female jobs, the practical problems of finding alternative housing and the difficulty of raising children alone. Few, if any, commentators have suggested that women are doing anything other than misperceiving the danger to themselves, or settling for the lesser of two evils. A third explanation, however, is that those women who stay in battering relationships accurately perceive the risks of remaining, accurately perceive the risks of leaving, and choose to stay either because the risks of leaving outweigh the risks


* Olsen goes on to describe a similar ambivalence about the market. Id at 1540-42. When it seems too cold and alienating, the remedy is to make the market closer to the family, offering a vision of decentralized "shared" decision-making, where the unit is more important than the individual members. Hidden in this image is the mailed fist of male power and "forced association" that lurks within the silken glove of "community."

* See pp 38-42.

* Deschner, The Hitting Habit at 23 (cited in note 42); Guberman and Wolfe, No Safe Place at 53-54 (cited in note 56).
of staying or because they are trying to rescue something beyond themselves.

Broad-based acceptance by the legal system of the first explanation has already been explored. Focusing on women's reactions to what men do to them is an all too common strategy of male jurisprudence. The failure of the second explanation to gain similar acceptance in law could concomitantly be related to the law's reluctance to acknowledge the extent of male violence against, and oppression of, women outside the home. It is also plausible that, despite the dangers of leaving, women are indeed marginally safer in leaving a demonstrably violent relationship. But if women value connection enough to keep trying despite marginally greater risks of harm, both problems of evaluating women's accounts and problems of transition arise.

For most men to whom I have spoken about this issue, it seems literally incomprehensible that a battered woman is not lying—at least to herself if not to others—when she says that one reason she has not left yet is that she loves this man and believes that he will stop beating her. Love and pain are mutually exclusive, they say, at least outside of masochism. It does not seem that men fail to value relationships per se, but rather that they

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66 The recent trial of New York attorney Joel Steinberg for the murder of the 6 year old child he and Hedda Nussbaum had raised offered an unusually public view of a relationship marked by almost constant violence directed against a woman and child. Consider the following exchange between Nussbaum and Steinberg's attorney:

"Are you familiar with the term masochist?" Mr. London asked.
"Someone who likes pain," she replied.
"Isn't it someone who accepts pain?" he tried to correct her.
"No," she said. "It's someone who likes pain."
"Did you like pain?, [sic]" he asked.
"No, I didn't," she replied.
"Then you must have been accepting of it," he said.

And later in the cross-examination:
"What was Joel's reaction when you told him you didn't like being beaten?" he asked.
"He said he hated himself for doing it," she said. "He said it wasn't him who was doing it. He felt it wasn't within his character."
"You had no anger or rage toward Joel?"
"No."
"Did he ever apologize for the beatings?"
"No," she replied.
"Did you ever ask him to?"
"No, I didn't."
"Why not?"
"Because I was very connected to him, not like someone who hurt me."

Ronald Sullivan, Defense Tries to Portray Nussbaum As a Masochist Who Liked Beatings, NY Times A18 (Dec 9, 1988) (emphasis added).
value them for the pleasure they can give. That's what relationships are for, they seem to say.

I often wish it were that easy; I wish I could explain Jo's statements ("She continued the relationship for three basic reasons—she loved him, she believed him each time he said that he loved her and that he was never going to repeat the abuse, and she was afraid that if she tried to leave she would be endangering her life") as only one reason (fear), mixed with a large dose of false consciousness. Jo's love and hope made her intensely vulnerable to David's violence, and to the fear such violence engenders. Jo's love and hope led to tragedy. To ask society—and especially to ask the law—to take that love and hope seriously is to run headlong into the problem of transition. How could we possibly take seriously women's accounts of love and hope without undermining the little protection from male violence women have been able to wrest from the legal system, without indeed increasing our already overwhelming vulnerability?

II. The Problem of Transition

In its most general sense, the problem of transition is created by an existing system of power that makes any non-conforming patterns of behavior appear deviant, which in turn makes it relatively easy to maintain and increase the differential in the social rewards between conformist patterns of behavior and non-conformist ones. Phallocentrism is just such a hegemonic system. It systematically rewards those who conform to culturally male styles of behavior and systematically disadvantages those who resist, regardless of the biological sex of the actor. The existence of such a power structure has two related consequences: By defining the "terms of the debate," or the range of acceptable discourse, it makes challenges that start from non-conformist premises appear

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* Smith v State, 277 SE2d at 680.
* One might also say to create the differential, although the temporal question raised by such a statement is quite problematic. It is not at all clear, as a matter of history and anthropology, whether the existing imbalance in social rewards between men and women was created during the male move to power, reflected prior imbalances in control over material resources that themselves facilitated phallocentrism or was due to other factors. Having already taken on law, philosophy, social theory and sociology, I think I will leave the rest to the historians and anthropologists, at least for now.
* See Littleton, 75 Cal L Rev at 1279-86, 1317-21 (cited in note 20).
* Id at 1308-11. Of course, women are caught in the double bind of being disadvantaged when we conform to culturally female standards (because even paradigmatic female behavior is devalued vis-a-vis male behavior) and being unable fully to conform to male standards (because the cultural norm is, rationally or irrationally, tied to physical signals).
not only deviant, but often literally incomprehensible,\(^9\) and by defining the reward system, it makes non-conformist action expensive in both tangible and intangible ways.

The first consequence of the asymmetry of power between women and men and between “deviance” and “normalcy” thus makes it difficult to talk about battered women valuing the homes they have made without “home” being understood as the patriarchal and nuclear family. This explains the difference between Lenore Walker’s first study, in which she evaluated the stories of the women she interviewed from outside their situation,\(^9\) and identified them as traditionalists, and her second study, in which she focused on the women’s own perceptions of themselves and their situation,\(^3\) and instead identified the women as “more liberal” than the traditionalist batterers.\(^4\) When feminists and non-feminists start from a different set of assumptions, as well as a different set of values, it is hard to describe feminist values without substantial distortion in the translation.

The second consequence of existing asymmetry is, however, even more troubling. When women’s current access (albeit unequal access) to necessary resources is based on a system of allocation that assumes current economic structures, movement toward new structures threatens to deprive us of access entirely. The best recent description of this problem of transition is found in the work of Margaret Radin, who wrestles with (among other issues) the question of whether specifically female forms of labor should be commodified, in order to fit within male norms of deserving payment, or non-commodified, in order to fit within feminist or humanist ideals of sharing and community.\(^5\) Even if everyone were to agree that human flourishing is best accomplished through non-commodification, abolition of markets and the acceptance of a model of human relationships based on caring and sharing, the social realities of a hegemonic exchange model of human nature would tend to subvert or destroy any partial attempts to prefigure the new social order.\(^6\) Partial non-commodification, especially if it

\(^{9}\) See p 23.
\(^{9}\) “When one listens to descriptions of battering incidents from battered women . . . .” Walker, The Battered Woman at 47-48 (cited in note 19).
\(^{9}\) See Walker, The Battered Woman Syndrome (cited in note 73).
\(^{9}\) Id at 148.
\(^{9}\) Margaret Jane Radin, Market-Inalienability, 100 Harv L Rev 1849 (1987).
\(^{9}\) Id at 1921-25. Richard Wasserstrom explored the problems of transition in his very influential work on affirmative action. Wasserstrom, Raci

is maintained along sex lines, would keep women’s labor out of the market while continuing to reward men’s labor through the market. So long as money is readily translatable into political power, then non-commodification of women’s labor will not alter the hegemony of the market, but only keep women poor and powerless in our separate sphere.\footnote{Littleton, 75 Cal L Rev at 1322 (cited in note 20).}

Similarly, the desire for connection expressed by women in battering relationships, even if understood and shared as an ideal, cannot simply be validated without taking account of the hegemony of male power. Leaving individual women to attempt to negotiate with their partners, even with a societal pat on the head for their good values and brave efforts, would be \textit{worse} than the current situation. Having connection with men imposed on us has made us intensely, intimately vulnerable to betrayal, abuse and murder. “Choosing” the same forms of connection under the same conditions of male dominance does nothing to decrease that vulnerability. We must have a safe place if we are to survive our desire, even if only to test whether it \textit{is} our desire rather than a habit of compliance. If law is to help, rather than hinder, this project, it must not only overcome its presumption in favor of separation, but also \textit{and simultaneously} stop men from battering us and foster alternative means of achieving connection. To fuse the desire for connection with the ability to resist or remove its abuses is the challenge of feminism \textit{in} the law.

A. Separation and Connection

Robin West’s exploration of the “separation thesis” of male jurisprudence and the “connection thesis” of feminism\footnote{West, 55 U Chi L Rev 1 (cited in note 28).} is instruc-
tive at both the level of theory and the level of practice. In simplified terms, the separation thesis describes men as separate individuals whose awareness of separation "defines consciousness." Thus men, being separate, fear frustration of their individual ends by other separate individuals. The counter-story told by critical legal studies is that men also desire community, so that their lives are tragic, caught between unlimited desire for and unlimited fear of others. In contrast, the connection thesis describes women as connected to others (materially in the phenomenon of pregnancy), and as fearing abandonment and isolation. The counter-story told by radical feminism is of the violence of forced community, or invasion.

Traditional jurisprudence tells the story of separation; critical legal studies tells the story of separation with a twist. These stories have been the ones to occupy the attention of "serious" legal scholars. These stories are about men, even when they claim to be about human beings.

The practice of the legal system is consistent with these jurisprudential underpinnings of separation. Law's most common response to conflict is to separate, to keep individuals from interfering with each other's ends by removing them from one another. Contractual relationships begin outside the legal system (although sometimes with the help of lawyer-midwives) and litigation marks their rupture, either as symptom or as cause. While the marriage ceremony is accomplished with very little judicial oversight, divorce occupies enormous judicial resources. Those convicted of anti-social acts are removed from the community, and even permanently stripped of the primary symbol of democratic community—the vote. Counter-trends—such as duties to bargain in good faith in labor relations or alternative dispute resolution mechanisms—are seen as exceptional.

Feminists facing the separationist impulse of the legal system have differed on how to react, just as they have differed on how to react to its other phallocentric tendencies. A great part of this

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99 Id at 2, citing Roberto Mangabeira Unger, Knowledge and Politics (The Free Press, 1975).
difference is a result of the complexity of sexual inequality, consisting as it does of three interrelated phenomena—sex discrimination (different treatment because of sex); gender oppression (pressure to conform to expected sex roles) and sexual subordination (devaluing of what is associated with women).

At the level of simple sex discrimination, women have usually been denied the benefits of the legal system’s impulse toward separation, even while feminists question the value of such an impulse. For the battered woman, even to get the police to respond, let alone arrest the batterer and separate him from the victim, takes incredible effort. A recent story in the Los Angeles Daily Journal began by citing a two-year sentence as “an unusually stiff jail sentence” for a man convicted of battering his wife. This arrest was his third probation violation since being convicted of beating his wife seven months earlier! Often it appears as if feminist questioning of the impulse toward separation should at least wait until women can count on the law allowing them to separate.

Challenging the impulse toward separation on the civil side seems similarly fraught with danger. While feminist theorists such as Carrie Menkel-Meadow posit a “feminization of law practice” leading to, or at least encouraging, increased use of mediation and negotiation instead of litigation as a dispute resolution technique, other feminists see in this trend the loss of what little power women derive from formal legal adjudication. Caught between the emptiness of formal equality and rights discourses and the private coercion and violence that informal justice ignores and thereby permits, some feminists by contrast even appear to call for the abandonment of law altogether. The debate is completely understandable as a debate about instrumentalities—that is, how do we get there from here? It may also be a debate about ideals;

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107 See, for example, Janet Rifkin, Mediation from a Feminist Perspective: Promise and Problems, 2 J Law & Ineq 21 (1984).
108 See generally Janet Rifkin, Toward a Theory of Law and Patriarchy, 3 Harv Women’s L J 83 (1980).
109 See Heather Ruth Wishik, To Question Everything: The Inquiries of Feminist Jurisprudence, 1 Berkeley Women’s L J 64, 75-76 (1986); Wasserstrom, 24 UCLA L Rev 581 (cited in note 96).
that is, whether sexual equality means assimilation, androgyny, empowerment or acceptance. But it seems to me this issue will not be clear until all potential ends have been made equally safe (or equally dangerous) for women.

B. Toward Safe Connection

If battered women seek to maintain connection in the face of enormous danger, perhaps the key to accessing the legal system on their behalf lies in taking seriously both the connection they seek and the danger they face in that quest. What would legal doctrine and practice look like if it took seriously a mandate to make women safer in relationships, instead of offering separation as the only remedy for violence against women? This is a complex question, and I offer only a tentative agenda for research and programmatic development. Nevertheless, one thing already seems clear: We cannot afford to accept the terms of debate set by male jurisprudence. Moral theories of self-defense and excuse distract us from political theories of change. We cannot afford to treat our goal as the limited, albeit important one of gaining acquittal for battered women who kill; our goal must be the far more difficult one of stopping the violence. “No woman is free until all women are free” is not merely a slogan. If a simple prescription is needed, here it is: fewer law review pages devoted to the ‘‘problem’’ of battered women” and more to “stopping male violence.”

The agenda, at least initially, seems to lead in several directions. First, change the batterer so that he fits within female models of community, rather than insisting that women fit within male norms of self-sufficiency and independence. This option takes seriously the equal status of female and male norms. Second, decrease the cost of rupture to women, so that both sexes face roughly similar disadvantages from the potential break-up. This option takes seriously the double-bind that women face in that even attempts to conform to male standards are currently very expensive for women. It also allows for the possibility that men also value connection, at least when it is threatened. Battered women themselves report that the single most effective strategy to stopping particular incidents of violence is a credible threat to leave the batterer.

Third, increase the perceived costs of battering behavior. This op-

111 Id at 1312-13.
tion places responsibility for battering where it belongs—on the batterer. Fourth, expand the options for community so that women might validate desires for connection without running the 50-50 risk battering male partners impose. This option takes most seriously the relational values expressed by women. None of these directions is exclusive of the others, and I would suggest that if we are serious about stopping battering we consider moving in all four.

1. Change the Batterer.

If women choose, or are compelled, to remain in heterosexual marriages or marriage-like relationships, why should they have to take the batterer as they find him? Evidence indicates that therapy can overcome even long-ingrained patterns of violent behavior—but only if the therapy is completed. Many of the programs that require therapy for the batterer make his agreement to enter therapy a reason for diversion from the criminal system, rather than making completion a condition of probation or parole. "Few would disagree that the concept of diversion, when it works, works well." When it works is when the batterer remains in therapy; when it does not work is when he walks into court agreeing to enter therapy and, on that basis, has the case against him dropped. He then never shows up to another therapy session, and a cycle of battering begins again.

Effective behavioral change on the part of those who make connection dangerous to women might be accomplished through other means as well. Social disapproval—especially from other men—could be effective in some cases. Such disapproval might be mobilized through educational programs designed to rebut the mythology that wives are "appropriate" targets of violence.

2. Decrease the Cost of Rupture to Women.

As noted earlier, Lenore Walker suggests that the battered woman's threat to leave is the most effective means to stop any particular incident of battering. If the law really cares about stopping the violence against women, then it should use every means possible to make that threat credible. Instead, over and over, it has constructed means to make the threat seem empty.

First of all, the law assumes that the woman must leave the battering relationship. Why should the woman leave? It's her

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113 See, for example, Hallye Jordan, Diversion Program for Wife-Beaters Called Ineffective, LA Daily Journal 1 (Sept 19, 1988).
114 Id.
home, too—in fact, often it’s her home, period.\textsuperscript{118} Evicting a batterer from the home, even if it is his home, is not unthinkable, and would reduce the costs of the rupture both to the battered woman and to the children who are usually additional victims of the violence.

Indeed, the need to care for the couple’s children often acts to keep women in violent relationships, at least until they too are threatened with violence. Women have good reason to fear that when they leave they may lose their children, as custody is awarded to fathers in approximately 60\% of cases in which custody is contested.\textsuperscript{116}

Not only do men typically have access to greater economic resources to provide for the children, but they often know how to manipulate women’s fear of losing them. Recently, a woman I had met once asked me for a referral. She had woken up one night to find the husband against whom she had obtained a restraining order standing in her bedroom busily slashing her clothes and shoes. When she ran out of the house to get away from him and the knife he was wielding, he walked down to the corner telephone booth, called juvenile services and told them that she had “abandoned” her children. She is still trying to get the kids back.

Battered women usually do work outside the home, but—like all women—they work for significantly less pay than men. Continued legal indifference to comparable worth claims has the indirect effect of keeping women in relationships they would like to leave, but can’t afford to. If women cannot afford to leave, they can’t make credible threats to stop male violence. Paradoxically, if women are going to be able to maintain community, it may only be through the ability to make that community optional and not mandatory for the women. So long as discontinuing the relation-

\textsuperscript{118} See, for example, \textit{Smith v State}, 277 SE2d 678 (Ga 1981). Even the popular film \textit{Tootsie} (Columbia Picture Industries, Inc., 1982) got this part right in the scene in which Dustin Hoffman (Tootsie) finally decides to write his (her?) own lines:

Battered woman: “I can’t move out, Miss Kimberly, I have no place to go. I don’t know what to do.”

Miss Kimberly (played by Tootsie, played by Dustin Hoffman): “. . . Why should you move out? It’s your home too!”

Ultimately, however, Miss Kimberly can only conceive of ending the violence by escalating it in a culturally male way: “You know what I’d do if somebody did this to me? Why, if they came around again I’d pick up the biggest thing around and I’d just take it like this and [crash of flower pot hitting wall] smash their brains right through the top of their skull before I’d let them beat me up again.”

\textsuperscript{116} Lenore J. Weitzman, \textit{The Divorce Revolution} 233 (The Free Press, 1985) (based on random samples of court records in Los Angeles County, California).
ship is costly to women but not to men, women lack the power to make credible threats to leave, and thus lack the power to use the single most effective (and non-violent) weapon in their arsenal.

3. Increase the Costs of Battering—to the Batterer.

Feminists have made some gains in getting the criminal law to take battering seriously. Police intervene more often; batterers are more likely to be arrested; meaningful sentences, although still characterized as “unusual,” are at least not unheard of. But these gains are still too little, and, besides, have been made by increasing separation at the expense of connection. Even recognizing a complete defense for those women who finally turn and kill, while no doubt increasing the perceived costs of battering, does so only via the most extreme form of separation.

Perhaps this trade-off is unavoidable. It does seem that the general failure to date of restraining orders in keeping battering men away from the women who obtain such orders bodes ill for any attempt to use restraining orders to keep men from battering women while sharing the same space. Yet greater legal and social sanctions may discourage some men from engaging in the rupturing activity of battering in the first place, thus eventually leading to increased safe connections.

4. Expand the Options for Community.

Currently no state sanctions lesbian marriage. Given the statistics on battering, the legal definition of marriage as a relationship between a man and a woman subjects most women to a 50-50 chance of violence within the only type of relationship sanctioned by law. As Gloria Steinem once opined, the reason why there are so few female compulsive gamblers is that women use up all their gambling impulses on the biggest gamble of all—marriage. While lesbian partnering does not guarantee the absence of battering, it does significantly reduce the odds. For women who are lesbian in orientation, the law’s absolute preference for heterosexual relationships imposes significant costs on statements of personhood and connection. For women who could find happiness with a female partner, that same absolute preference channels them away from safer relationships and into much riskier ones.

Similarly, committedly heterosexual women are not equally free to choose between singlehood and marriage. Jennifer Jaff has

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117 See note 105 (two-year jail sentence for beating wife termed “unusual”).
119 See Lobel, Naming the Violence (cited in note 20).
recently explored the myriad ways in which the legal system disad-

vantages unmarried people and the concomitant legal pressure
to marry. In addition to the social pressure to "couple," the law
piles on disadvantages in health care, social security benefits,
parenting rights and inheritance. Single women in partnership
with each other (whether in dyads or larger communities), or in
relation to their children, provide alternative models of community
that need not be so expensive compared to legal partnership with a
man. Women who work in shelters for homeless or battered women
often report that such women are reluctant to leave the shelter for
the single apartments currently presumed to be their ultimate goal.
Perhaps we should consider ways to expand the shelter movement
from the perspective of providing potential long-term community
rather than only short-term emergency housing.

The possibilities of alternative forms of connection are numer-
ous. Why should the law be permitted to pressure women into the
most dangerous form of social union? Making alternatives less
costly and more available will help at least some women achieve
connection without risking their lives and health.

The above suggestions are only the beginning of a search for
ways to allow women safe space in order to explore connection. A
full research agenda must include evaluation of what is actually
available now, as well as what might come to be available if we
were committed to a social, political and legal agenda that takes
seriously both women's values as women express them and
women's survival.

CONCLUSION

When I first suggested that women who stayed in relationships
with battering men might be displaying love and faith, as well as

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120 Id at 210-17.
121 For an extensive exploration of the possibilities for legal recognition of alternative family structures, see Barbara Cox, *Choosing One's Family: Can the Legal System Address the Breadth of Women's Choices of Intimate Relationships?*, forthcoming in SLU Pub L Rev (1989).
122 In *Harris v McRae*, 448 US 297 (1980), the Supreme Court announced that the gov-
ernment was free to prefer childbearing to pregnancy termination, and to reward the former
with insurance benefits while refusing to fund the latter. Perhaps it should come then as no
surprise that the government so far has been left free to prefer heterosexual marriage to any
other form of family-making and to reward the former even to the extent of condoning (by
ignoring) extreme violence against women inside its hallowed walls.
fear, I was told that that was crazy. Well, it is crazy when men do not value the relationship of women enough to change their own behavior; when they use our desire for connection with them to isolate us from everyone else and when they repay our faith with betrayal and more violence. But if it is crazy, then as many as half of all women's relationships with men are crazy. I think it is only crazy because we do not have the power to insist on mutuality; it is only crazy if Jake can always win over Amy just by not listening; it is only crazy within a system of male dominance.

If equality means anything, it should mean that the values women are displaying, which would be seen as praiseworthy in any other context, must be given an equal chance to survive (and that women displaying them must be given a chance to survive, too). If the context makes those values crazy, then it is the context that must change. If women's own interpretation of our experience is taken seriously, then a battering relationship should call forth the following responses: Change him; remove him; make him stop; or, indeed, make him irrelevant.

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124 See Carol Gilligan, *In a Different Voice* 28-29 (Harvard University Press, 1982).