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Contradictions, Open Secrets, and Feminist Faith in Enlightenment

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Contradictions, Open Secrets and Feminist Faith in Enlightenment

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I. INTRODUCTION

Judges often malign exception making as the erosion of legal rules, yet in the same breath sanction the territory that exceptions have eclipsed to date. Judges may embrace as precedent the course of exceptions that has shaped doctrine so far, but then cite the importance of enforcing common law rules to refuse exceptions that would redress violence against women. This paradoxical stance prompts many feminists to target ignorance of violence in women's lives as the source of judicial resistance to establishing exceptions to rules that prevent recovery for women's harms. These feminists call for education, for increased awareness, to combat this ignorance.¹ This article considers judicial resistance to making exceptions to rules in adjudication of certain tort claims by victims of domestic violence and proposes that the supposed blind spot surrounding this resistance will not be erased through enlightenment.

Feminist legal scholars and practitioners such as Robin West, Elizabeth Schneider, and Clare Dalton express the notion that if judges were to see more cases and the rules they produce through women's eyes, reform to eradicate gender biases in law would follow.² Drawing on the legal realist

1. Other postmodern feminists have observed that speaking out about women's issues subjects such speech to further regulation. That battered women have been treated as insane, ego-less victims (*see* Part III below), is one example of how efforts to speak out and interject women's stories into legal discourse subjects those stories, and speakers, to unfavorable regulation. *See, e.g.,* Wendy Brown, *In the 'folds of our own discourse:' The Pleasures and Freedom of Silence*, 3 U. CHI. L. SCH. ROUNDTABLE 185 (1996). This article builds on the critique of compulsory feminist discursivity to explore one pervasive mode of unfavorable regulation (namely, subjection to the discourse of legal argumentation) of speech about domestic violence.

2. *See, e.g.,* Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1 (1990); Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 333 (1997) [hereinafter Dalton, *Domestic Violence, Domestic Torts and Divorce*]; Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 17 FAM. & CONCILIATION CTS. REV. 273 (1999) [hereinafter Dalton, *When Paradigms Collide*]; ELIZABETH SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000); 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 (1986) [hereinafter Schneider, *Describing and Changing: Women's Self-Defense Work*]; Elizabeth M. Schneider, *Self-Defense and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill: Resistance to Equality*, 57 U. PITT. L. REV. 477, 505 (1996) [hereinafter Schneider, *Self-Defense and Relations of Domination*]; Robin West, *Fifteenth Anniversary Celebration: The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149 (2000) [hereinafter West, *The Difference in Women's Hedonic Lives*]; Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 1-3, 14-15, 58-60 (1988); Robin West, *Towards Humanistic Theories of Legal Justice*, 10 CARDOZO STUD. L. & LIT. 147 (1998). Much of this scholarship operates on the following premises: Premise 1: There are harms that are suffered disproportionately by women. Premise 2: The way in which the common law redresses these harms is inadequate for women. Premise 3: The common law can and should redress these harms to a greater extent than it does currently. Following from these three premises and incorporating many of the premises and conclusions of legal realism (*see infra* note 3), such feminists reason further that the common law would provide greater

conception that judges do (and should) make law in light of the factual consequences of their decisions,³ they reason that if more judges understood how violence makes the lives of many women differ from the life of the prototypical legal claimant,⁴ they would grant such women redress even if it required departure from precedent. For example, arguments to apply different voice theory in tort law hold this view,⁵ and though different voice theory has been criticized for its potential to reinforce gender-based stereotypes,⁶ a broad range of feminists frequently appeal to the redemptive power of knowledge as a catalyst to progress.⁷

redress if judges were more enlightened as to how women's situations differ from situations underscoring certain common law rules.

3. Legal realists reject the formalist idea that principles of law are neutral and independent of politics or of the political leanings of adjudicators. They are committed to the ideas that the particular facts of a case are more crucial to its outcome than abstract principles of law, that the justification for laws lies in their factual ramifications, and that laws should evolve in response to the changing practical needs of society. Legal realism developed in the 1920s and 1930s as a response to turn of the century formalism and remains influential today as the lineal predecessor of law and economics, much of feminist legal scholarship and practice, and critical legal theory. See Gerald B. Wetlauffer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1 (1999). See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF JUDICIAL PROCESS* (1921); Karl Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUM. L. REV. 431 (1930); KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1930); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

4. Legal rules contemplate specific legal subjects based on dominant conceptions of rational behavior. The "reasonable man" or "reasonable person" standard in tort law is one example of how the law presumes a prototypical claimant. Another such example is the assumption implicit in the statute of limitations on assault and battery that a reasonable person would sue within two years of the incident.

5. Different voice theory teaches that women have a greater sense of interconnectedness than men and place greater emphasis on relationships than on individual rights. See MARY FIELD BELENKY ET AL., *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF THE SELF, VOICE, AND MIND* (1986); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). Feminist legal scholars such as Leslie Bender, Robin West, and Carrie Menkel-Meadow have applied this theory to law by arguing that women favor an ethic of care for others over justice or rights models of morality and that the law should draw on this women's perspective to develop rules that value interconnectedness and interpersonal responsibility. See Bender, *supra* note 2 (arguing that tort law's abstract posture informed by liberalism's concerns for autonomy is essentially male, and that it prevents courts from considering social contexts informing many women's claims, so, courts should learn from feminist critiques and adopt an ethic of care in decision making); West, *Jurisprudence and Gender*, *supra* note 2, at 1-3, 14-15, 58-60; West, *The Difference in Women's Hedonic Lives*, *supra* note 2; West, *Towards Humanistic Theories of Legal Justice*, *supra* note 2; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculation on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

6. See, e.g., Mary Joe Frug, *Sexual Equality and Sexual Difference in American Law*, 26 NEW ENG. L. REV. 665, 678-79, 681 (1992); Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1176 (1992).

7. "Since 1980, nearly every state and more than half of the federal courts have commissioned studies about the pervasiveness and impact of gender bias in their systems. Nearly all found some degree of bias." Margaret Graham Tebo, *Equal Justice*, A.B.A. J., Sept. 2000, at 44 (2000). The studies that contained recommendations called for public education programs and better training of court personnel. *Id.* The National Organization

Irrespective of whether feminist legal scholars support different voice theory's premise that women (because they are women) have particular insights that law should learn from, it makes sense that the law would benefit from a more subtle understanding of women's experiences, however varied, and however such understanding might come to be.⁸

This article accepts that harms related to domestic violence women disproportionately suffer,⁹ and that the common law provides inadequate recourse for these harms.¹⁰ Despite both greater awareness of domestic

for Women (NOW) Legal Defense Fund runs a project called the National Judicial Education Program to Promote Equality for Women and Men in the Courts. *Id.* The director of that program reported to the ABA Journal that "more training of judges and more public education to counter stereotypes are key" to fight inequality in courts. *Id.* Like the current NOW Legal Defense Project, early grassroots efforts to address the issue of domestic violence in the 1970s quickly identified education and awareness as primary goals of the movement to fight domestic violence. The steering committee of The National Coalition Against Domestic Violence (NCADV) identified two out of its five central missions as: "4. To educate the public to a non-acceptance of violence and to strive towards the complete elimination of violence in our society. 5. To support and initiate change in traditional sex-role expectations for women and men." R. EMERSON DOBASH & RUSSELL P. DOBASH, WOMEN, VIOLENCE AND SOCIAL CHANGE 36-37 (1992). The members of NCADV link public education regarding violence directly to the elimination of violence in society. Further, they imply that cultural enlightenment regarding connections between traditional gender roles and violence against women will help change traditional sex role expectations and subsequently eliminate not only violence itself, but also the possibility of violence.

8. Feminist scholars such as Leslie Bender and Elizabeth Schneider imply that more complete understanding of the social context informing a case and its litigants would give judges a vantage-point from which to adjudicate between individualist and altruist impulses, legal rules and legal standards presented in any given case. See Bender, *supra* note 2; SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING, *supra* note 2; Schneider, *Describing and Changing: Women's Self-Defense Work*, *supra* note 2; Schneider, *Self-Defense and Relations of Domination*, *supra* note 2.

9. Though many victims of domestic violence are men abused by women or other men, and women abused by women, according to studies, ninety to ninety-five percent of the victims of domestic assaults are women abused by men. See DOBASH & DOBASH, *supra* note 7, at 265. "Studies have shown that more women are abused by their husbands or boyfriends than are injured in car accidents, muggings, or rape, and that 3 to 4 million households live with violence every day." BEVERLY BALOS & MARY LOUISE FELLOWS, LAW AND VIOLENCE AGAINST WOMEN 183 (1994) (quoting NATIONAL CENTER ON WOMEN AND FAMILY LAW, THE EFFECT OF WOMAN ABUSE ON CHILDREN: PSYCHOLOGICAL AND LEGAL AUTHORITY i (1991)).

10. Case law available for discussion involving claims by battered women is quite limited. One assumption regarding the low number of civil actions filed by battered women could be that the financial damages available in such suits are not large enough to provide adequate incentive. However, domestic violence occurs at all socioeconomic levels. Lenore Walker found that battered women come from diverse backgrounds – it is a myth that middle or upper-class women experience battering less often or less severely than poor women. See LENORE E. WALKER, THE BATTERED WOMAN 18-19 (1979). A study has shown that 51 percent of battered women had no access to credit card accounts, 34 percent did not have access to checking accounts, and 21 percent could not obtain cash in any way. See Melissa J. Pena, *The Role of Appellate Courts in Domestic Violence Cases and the Prospect of New Partner Abuse Cause of Action*, 20 REV. LITIG. 503, 506 (2001). A battered woman's financial dependence on her abuser can make her unable to leave the relationship. A judgment in tort is one way to secure financial resources. *Id.* For women whose abusers have a substantial income, pursuing a tort claim can be a very fruitful way to attain the financial independence with which to start a new life. See Edward S. Snyder,

violence and the continuing influence of legal realism in adjudication, strict applications of precedent to claims made by women whose lives (because of violence) significantly diverge from those of prototypical claimants endure.¹¹ To redress some of the harms caused by domestic violence, adjudicators would need to establish exceptions to current doctrine for women who experience incapacity resulting from abuse. For example, the common law has refused to yield an established exception to the statute of limitations on assault and battery for a woman who could not sue earlier because she suffered from "battered woman syndrome" (hereinafter BWS).¹² Consequently, the statute of limitations bars such claimants from recovering meaningful damages from their abusers.¹³

Remedies for Domestic Violence: A Continuing Challenge, 12 J. AM. ACAD. MATRIMONIAL L. 335 (1994). The fact that so few cases exist, given the magnitude of the domestic violence problem, evidences the dearth of opportunity to recover damages from an abusive partner at common law.

11. If there is either (1) some truth to the realist conception that judges make law with a view towards the factual consequences of their decisions, or (2) some truth to the idea that exceptions and exception making are necessary to the meaning and authority of legal rules, and some value in treating the common law as a source of justice, then it is worth asking how and why decisions that fail to grant victims of domestic violence sufficient damages persist. "Or" conjoins the preceding sentence because from within the theoretical framework developed in Parts II, III, and IV below, we need not appeal to the pragmatism of the realists to advocate for exception-making. The question at issue – why adjudicators have not established more exceptions (yielding new doctrine) for victims of domestic violence – can be approached from a procedural, as well as a substantive, political angle.

12. "Battered woman syndrome" is a psychological condition suffered by women who have repeatedly endured physical and/or emotional abuse by their partners. The syndrome is characterized by low self-esteem, passivity, and a condition of learned helplessness. See WALKER, *supra* note 10. However, given the diverse experiences of battered women, there is not necessarily one, accurate, all-inclusive definition of this syndrome. See A. Renee Callahan, *Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome*, 3 AM. U. J. GENDER & L. 117 (1994). Elizabeth Schneider argues that use of "battered woman syndrome" in court cases has been detrimental to women because it focuses on the woman's incapacity, rather than on why a battered woman's actions in course of an abusive relationship are reasonable from her perspective. See SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING, *supra* note 2. Also, she writes that "common and undifferentiated use of the term 'battered woman syndrome' has heightened general confusion about domestic violence." Schneider, *Self-Defense and Relations of Domination*, *supra* note 2, at 505.

13. The statute of limitations has been one of the greatest obstacles to recovery for battered spouses who sue their abusers. Dalton, *When Paradigms Collide*, *supra* note 2, at 259-64; David E. Poplar, Comment, *Tolling the Statute of Limitations for Battered Women After Giovine v. Giovine: Creating Equitable Exceptions for Victims of Domestic Abuse*, 101 DICK. L. REV. 161, 162 (1996). When battered women seek redress through tort law, years of violent assaults often go uncompensated because the statute of limitations bars recovery for any incident two years prior to the suit. The first time a batterer beats his partner she is not likely to sue. Even after the second or third battering she may still believe that the assaults are isolated incidents that will not recur or that she can change her abuser. By the time she concludes that the beatings will not stop and brings suit, the statute of limitations will likely have run out for all but the most recent abuse. See Rhonda L. Kohler, Note, *The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence*, 25 LOY. L.A. L. REV. 1025, 1052-53 (1992). For a more complete discussion, see *infra* notes 64-69 and accompanying text.

This article offers an explanation of why making judges more aware of the harms of domestic violence does not proliferate common law causes of action to redress these harms. Drawing on descriptive insights regarding intractable conflicts in consciousness raised by Eve Sedgwick¹⁴ in the field of literary criticism and Duncan Kennedy in the field of critical legal studies (hereinafter CLS),¹⁵ this article explores how knowledge of the

14. Eve Kosofsky Sedgwick uses literary criticism to explore how the ideas of the closet, coming out, homo- and hetero-sexuality permeate and define Western culture. See EVE KOSOFSKY SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* (1990). Scholars concerned with the legal status of sexual minorities frequently invoke Sedgwick's work to address the threshold question "who is homosexual" to explore how the complexity of defining sexual minorities affects prospects for such minorities' legal inclusion and protection. See, e.g., Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995); William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet*, 24 FLA. ST. U. L. REV. 703 (1997); Janet Halley, *Gay Rights and the Courts: The Amendment 2 Controversy: Romer v. Hardwick*, 68 U. COLO. L. REV. 429 (1997); Janet Halley, *Intersections: Sexuality, Cultural Tradition, and the Law*, 8 YALE J. L. & HUMAN. 93 (1996); Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141 (1997). This article extracts from Sedgwick's discussion of the epistemology of the closet that intractable contradictions – between universalizing and minoritizing, and integrative and separatist discourses – pervade our collective consciousness, and that there is no vantage point from which to reconcile these contradictions.

15. One unifying statement to describe all of CLS scholarship is difficult to formulate. However, a recurring theme in CLS work is that conceptual contradictions that cannot be consistently reconciled (between rules and standards, value objectivity and subjectivity, free choice and determinism) pervade much of liberal legal thought. CLS scholarship has drawn various conclusions regarding the political and doctrinal effects of such contradictions. One conclusion is that liberal legal thought suppresses recognition of conceptual contradictions themselves, and by de-emphasizing one of the two poles within a contradiction, leaves the opposite pole in a privileged, even hegemonic, position within legal discourse. This suppression of contradiction and privileging of one pole creates a latent ideological tilt (towards the right) embedded in liberal legal thought. Another conclusion is that contradictions lead to indeterminacy of result and indeterminacy of justification, such that a judge can issue a reasoned opinion in favor of either party in any given suit. The conservative tilt latent in liberal legal thought, in combination with the indeterminacy of legal reasoning, results in a masking or concealment of relations of domination in legal discourse. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE}* 236-63 (1997); Mark Hager, *Book Review: Against Liberal Ideology: A GUIDE TO CRITICAL LEGAL STUDIES*, by Mark Kelman, 37 AM. U. L. REV. 1051 (1988); E. Dana Neacsu, *CLS Stands for Critical Legal Studies, If Anyone Remembers*, 8 J.L. & POL'Y 415 (2000); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); John Stick, *Book Review, Charting the Development of Critical Legal Studies: A GUIDE TO CRITICAL LEGAL STUDIES*. By Mark Kelman, 88 COLUM. L. REV. 407 (1988).

CLS has been widely criticized on several levels. CLS has been charged with internal inconsistency in that many CLS scholars' substantive, leftist political aspirations imply a retreat to appeals to a "rule of law" to enforce legislative mandates to advance the positions of identifiable groups. Critics of CLS observe that CLS "waivers between charges that these contradictions lead to indeterminacy of result, indeterminacy of justification, invisible ideological tilt, and political pacification through constraint of the imagination," but then cannot whole-heartedly condemn liberal legal theory because of commitment to some sort of leftist political project. Stick, *supra*, at 412; see KENNEDY, *supra*, at 11, 294 (discussing the tension between leftist political aspirations and a modernist/postmodernist analytical approach).

CLS is also criticized for attacking the idea that principles of law can be neutral and

violence women suffer interacts with a privilege of ignorance harbored by courts such that we cannot expect enlightenment of adjudicators to yield common law causes of action to recover for domestic abuse.

Sedgwick argues in *The Epistemology of the Closet*¹⁶ that a crisis of modern sexual definition has produced an “internal incoherence and mutual contradiction of each of the forms of discursive and institutional ‘common sense’ on [sexual definition] inherited from the architects of our present culture.”¹⁷ One aspect of internal incoherence on which Sedgwick focuses involves the simultaneous designation of homosexuality as an act and as status. Irreconcilable acts-oriented universalizing and status-oriented minoritizing discourses surround the open secret of homosexuality in our culture, pervading crucial nodes of cultural organization.¹⁸ There is no intelligible standpoint from which to reconcile or adjudicate between these conflicting discourses.¹⁹ The dynamics of the act/status dilemma explicated by Sedgwick recur in claims by battered women as they find themselves caught between an integrative discourse of acts of assault, battery, and bringing suit, and a separatist discourse of status as being ill or as occupying a perspective from which their acts can be understood as reasonable. Feminist consciousness raising efforts aim to shift discursive and institutional common sense about women and domestic violence. This article considers the consequences of the internal incoherence embedded in such common sense for increasing awareness as a reform strategy.

In a development similar to Sedgwick’s in legal scholarship, Kennedy

for uncovering structures of domination embedded in legal discourse, without offering a theory of law or political prescription that could replace appeals to abstract rules. *See e.g., Book Note: Duncan Kennedy’s Stiff Knees*, 111 HARV. L. REV. 2117, 2121 (1998) [hereinafter *Duncan Kennedy’s Stiff Knees*]. Without a viable alternative to formalism (and liberalism), CLS admits the possibility of majoritarian rule too susceptible to totalitarianism without prescription for what might check such forces.

Because CLS has not adequately addressed these criticisms, the movement is largely considered in the past tense. I treat CLS here as an intellectual development with many descriptive insights useful for understanding how a strong adherence to abstract principles of law continues to prove indispensable despite the elusiveness of any external referent or source from which such principles could be derived. This article finds formal qualities of law (such as adherence to precedent out of fidelity to an abstract rule of law) to be simultaneously deconstructible and indispensable.

16. SEDGWICK, *supra* note 14, at 84-90.

17. *Id.* at 1.

18. Sedgwick draws on Michel Foucault’s work, which speaks of an intractable “double bind” constituted by simultaneous individualization and totalization of structures of power. *See, e.g., MICHEL FOUCAULT, DISCIPLINE AND PUNISH* 17- 31 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1979).

19. *See* SEDGWICK, *supra* note 14, at 86-90. Sedgwick’s writing about intractable cultural conflicts focuses on the ideas of sexual definition, the closet, and coming out. She both finds these ideas inextricable from their gay origins, and makes an “introductory case for a hypothesis about the centrality of this nominally marginal, conceptually intractable set of definitional issues to the important knowledges and understandings of twentieth-century Western culture as a whole.” *Id.* at 2. Sedgwick makes no representation as to applicability of her argument beyond discussions of sexual definition, but finds the idea of the closet and coming out to permeate many nodes of cultural organization.

(in *Form and Substance in Private Law Adjudication*²⁰ and *A Critique of Adjudication {fin de siècle}*²¹) finds the centrality of the experience of contradiction – between individualism and altruism, rules and standards – to be “one of the defining traits of modernism and its sequelae.”²² There is no epistemological grounding from which to adjudicate between the two sides of contradictory argument pairs through which principles are brought to bear on choice of legal rules.²³ From within the analogous analytical frameworks presented by Sedgwick and Kennedy, fundamental contradictions obviate any standpoint from which to reconcile their conflicting sides. If there is no metatheory with which to reconcile conflicting cultural or discursive impulses, then there is no way to police how adjudicators constantly slip between conflicting argumentative modes reflective of cultural incoherence. If there is no metatheory with which to reconcile internal incoherence, then there is no coherent understanding to cultivate, nor presentation to make of battered women (individually or collectively) that is consistently beneficial to advancing their possibilities for recovery at common law.

Sedgwick and Kennedy develop similar contradiction theories, but Sedgwick takes an important additional step regarding the relationship between power and ignorance – a privilege of unknowing. Given the parallelism regarding contradictions at the heart of Sedgwick's and Kennedy's work, this article extracts Sedgwick's further contribution with respect to ignorance,²⁴ to propose a relationship between a privilege of

20. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

21. KENNEDY, *supra* note 15.

22. *Id.* at 207; *see also*, Kennedy, *supra* note 20, at 1685. *Form and Substance* is one example of CLS's use of contradiction theory (as are parts of *Critique of Adjudication*). *See supra*, note 15. (See *infra* Part II.B, for a summary of contradiction theory in these works.) *Form and Substance* exemplifies a radical mode of CLS scholarship, which takes a deconstructionist approach to legal norms to argue that the law cannot be objective. (A more moderate mode of CLS scholarship, exemplified by some critical race theory and feminist theory, excavates latent systems of domination embedded in legal norms, but does not so thoroughly dismantle the possibility of objective legal norms.)

Some scholars have rejected Kennedy's argument that the adoption of rules as opposed to standards belies a commitment to individualist, not altruist, ideology. Altruist positions can be furthered by rules and individualist positions by standards in some contexts. Whether Kennedy can support his alignment of individualism with rules and altruism with standards does not affect the efficacy of drawing on his presentation of fundamental contradictions to critique appeals to enlightenment as a means to feminist reform in common law or to assess the common law's capacity for such reform. This article presents Kennedy's contradiction thesis parallel to Sedgwick's contradiction thesis in part to multiply levels of possible alignments of adjudicative positions with cultural implications with ideological predominance. The usefulness of Kennedy's argument lies in its presentation of a periphery of exceptions as presupposed by and included in a core of rules, and that the exercise of rule or exception-making is conducted against a background of altruist and individualist, integrative and separatist impulses, irrespective of the alignment of those impulses at any given moment.

23. *See* KENNEDY, *supra* note 15, at 209.

24. *See infra* text accompanying notes 120-23.

ignorance and the disappointing results of educating judicial actors in hopes of reform. Ignorance is not a thick cognitive darkness from which people emerge into the light of understanding. Rather, ignorance is pluralized and specified to correspond to various regimes of knowledge (which themselves can be seen as true or false).

This writing is not about judges who are decidedly unsympathetic to victims of domestic violence – judges whose views may be described as ignorant just because it is incomprehensible to many how they could know about domestic violence and not sympathize. In addition, this article is not about adjudicators who may understand domestic violence and sympathize with its victims, but resolutely consider it their duty to apply precedent strictly.²⁵ Nor does this article focus on resolutely pragmatist judges who always rule to produce justice given the facts and claimants before them. Rather, it considers the constellation of knowledges and ignorances informing adjudicators who operate between impulses to apply precedent strictly and to grant justice to disadvantaged claimants at the expense of adherence to an abstract rule of law. It explores what might be the knowledge (institutional or individual) to which ignorance operative in the adjudication of claims by victims of domestic violence corresponds.

Applying Sedgwick's and Kennedy's contradiction theories, this article finds battered women's claims seeking exception to a common law rule interchangeably within a core of formal common law rules or a periphery of standards and exceptions, and interchangeably universalizing or minoritizing for the litigants involved. Intractable contradictions preclude any epistemological grounding from which to adjudicate among the multiple levels of incoherence involved in cases brought by battered women. Feminist demands for a greater understanding of context – to create, for example, a reformed tort law system in which courts understand and take into account the complex situation of battered women plaintiffs – seek the epistemological grounding from which to adjudicate that contradictions posit non-existent. Fundamental contradictions refract the light that even thorough education regarding women's situations could aim to shed on any given case. As a matter of adjudicative process, contradictions enable courts to maintain an epistemological privilege of

25. In other words, this argument does not target decisions by adjudicators who consciously subscribe to the legal process school (begun by Felix Frankfurter and Henry Hart and currently furthered by Antonin Scalia) and adhere to a strong version of the rule of law for the explicit sake of fortifying the legitimacy of judicial decision-making. For example, some judges may have an intricate understanding of domestic violence and the particular problems of the litigants before them, but choose to follow precedent (despite "short-changing" such litigants) because they consider it their duty as judges to strictly apply precedent. Such judges may be steeped in knowledge of the fragility of democratic institutions and seek reinforcement of such institutions by maximizing the extent to which courts can rely on a strong version of the rule of law. Descendants of the realists can describe them as ignorant of the elusive nature of the rules to which they ascribe or the lack of justice their rulings produce.

ignorance.

Part II.A below explains Sedgwick's sense of intractable cultural conflict surrounding open secrets in sexual definition and the fundamental contradictions operative in such conflict. Part II.B presents Kennedy's view of irreconcilable contradictions in legal discourse as basically parallel to Sedgwick's intractable cultural conflicts. Part II.C compares Sedgwick's and Kennedy's writings and relates them to battered women's claims in court. Part III presents an example of how the theoretical frameworks presented in Part II operate in adjudication of claims for recovery beyond the statute of limitations by victims of domestic violence. Part IV explores how a privilege of ignorance informs adjudication of claims by battered women and the relationship between contradictions and this privilege of ignorance.

Several possible conclusions might be drawn from this argument, such as: "common law cannot yield meaningful reform regarding violence against women (but legislation might);"²⁶ or "efforts to heighten judges' awareness of domestic violence are ineffectual;"²⁷ or "focusing on how to profit in any given lawsuit from the incoherent discourses at play (rather than on how to find consistency between them) will maximize women's recourse."²⁸ This article does not aim to stand behind any one such conclusion. It provides an explanation for why feminists' efforts to raise awareness of the harms of domestic violence do not produce more common law recovery for these harms.²⁹

This article presents domestic violence as an open secret in our culture fated to interface at common law with the open secret in American

26. This article questions, but does not completely dismiss the possibility of reform favorable to victims of abuse through common law, and does not consider at all the possibility of reform through legislation.

27. The analysis in this article is not broad enough to support a conclusion that education of judges is completely ineffectual or has no bearing on the outcome of claims by victims of domestic violence. Rather, this piece shows how any knowledge about domestic violence imparted to judges must be subjugated, regulated and reformulated in the face of legal discourse and cultural discourse, such that the effects of education are unknown at best. In any event, the very limited scope of circumstances under which increased awareness might produce progress in the common law is radically incommensurate with the broad, common sense faith in the power of consciousness raising that underscores so much feminist legal analysis.

28. This conclusion would require consideration of how and why this type of approach avoids simply re-locating the ethical-political issue of what is the right way to act in response to domestic violence to a specific and local level. See *Duncan Kennedy's Stiff Knees*, *supra* note 15, at 2122 (citing RICHARD J. BERNSTEIN, *Foucault: Critique as a Philosophic Ethos*, in *THE NEW CONSTITELLATION: THE ETHICAL-POLITICAL HORIZONS OF MODERNITY/ POSTMODERNITY* 142, 161 (1991)).

29. By disrupting the notion that we can cause common law reform by opening more eyes to women's particular situations, I in no way intend to discourage the important work of filing and arguing cases on behalf of battered women with claims to be made. Rather, any long-term, strategic alignment of resources, women's needs and the law's power requires thoughtful exploration of the nature of courts' institutional authority, privileged ignorance, and common feminist premises regarding reform.

jurisprudence that the myth of an abstract rule of law (formulated almost entirely in reference to a rational, white, male legal subject) is at the same time readily deconstructed, yet crucial and indispensable. It relates ignorance, the open secret of domestic violence, and the necessity of perpetuating an abstract rule of law in adjudication, to suggest ultimately that ignorance of violence in women's lives can be viewed as central to the maintenance of courts' institutional authority.

II. PARALLEL SCHOLARLY DEVELOPMENTS FOCUSED ON CONTRADICTIONS IN CONSCIOUSNESS

This section presents some central theoretical components of each of Sedgwick's and Kennedy's writings. It draws out certain theories that are pivotal to their work and provides a reading of them to critique feminist theory and tort claims by battered women.

The incoherence and contradiction that Sedgwick describes surface through cultural pairings such as secrecy and disclosure, private and public, masculine and feminine, and many others. Cultural pairings result from the dependency of concepts on contrast or opposing concepts for meaning. For example, secrecy only has meaning in reference to disclosure. We only understand masculine because of an implicit understanding of feminine – an implied, presupposed opposite of masculine. Our understanding of common law rules presupposes exceptions. Rule administration in our common law system implies a necessity of exception making. Cultural pairings are series of such binarisms – concepts and their inextricable opposites – that surface repeatedly in discourse surrounding various nodes of cultural organization to produce meaning and social order. Nodes of cultural organization refer to the topics or subjects around which moral and social orders are produced and enforced, such as sexuality, gender, and profession.

Contradictory treatment surrounding some node of social organization, such as sexuality and the idea of the closet, or adjudication and exception-making, functions as an open secret. Domestic violence is an open secret. It derives its cultural meaning through contradictory discourses of, for example, secrecy, privacy, and femininity surrounding domesticity, yet at the same time disclosure, public indignation (either for revealing the problem or for suppressing it), and masculinity surrounding control of the household suggested by domesticity. Likewise, the elusiveness of a coherent core of legal rules is an open secret. We understand this core to embody an abstract rule of law, the elusiveness of which courts do not publicly acknowledge, adherence to which provides a basis for courts' institutional authority. Yet we make open appeals to the malleability of rules, to adjudicators' power to define a rule by stating what it is not.

By invoking contradiction theory, I do not intend to imply either that the contradictions themselves cause injustice to women, or that we could strive for some better order in which deep-seated contradictions are

resolved. Presenting the contradictions in legal discourse described by Kennedy alongside the cultural discursive contradictions described by Sedgwick suggests that intractable contradictions will permeate crucial aspects of virtually any social order that has been exposed to varying ideologies.

A. INTRACTABLE CULTURAL CONFLICT: SEDGWICK'S CRISIS OF SEXUAL DEFINITION AT THE CENTER OF WESTERN CONSCIOUSNESS

This section summarizes Sedgwick's analysis of the contradictions operative in discourses surrounding the closet. Parts II.C, III.B, and IV apply her analysis to explore how these same contradictions operate in adjudication of claims by battered women who sue their abusers. The idea of the closet and coming out imply a coherent darkness and a subject emerging from that darkness. Sedgwick's analysis of the cultural crisis of homo/ heterosexual definition complicates the schema of a dark closet and a coherent subject emerging from it.³⁰ This article applies Sedgwick's work to legal claims by battered women to show that there is neither a coherent dark (of ignorance of domestic violence) nor a coherent female subject to draw out of that dark in making battered women's claims in court.

Sedgwick argues that the idea of the closet does not just inform understanding of homosexuality or gay people. Rather, it has saturated many different aspects of our culture.³¹ However, that the idea of the closet permeates our culture does not give it meaning irrespective of its specifically gay origins.³² To the contrary, the many nodes of cultural organization affected by the idea of the closet are implicated in what Sedgwick calls a crisis of homo/ heterosexual definition³³ that is "organized around a radical and irreducible incoherence"³⁴ between two types of discourses: one integrative, the other separatist. A discourse is integrative if it is universalizing, if it erodes distinction between its subjects and society as a whole. A discourse is separatist if it is minoritizing, if it erects or fortifies distinction between its subjects and society as a whole.

In addition, this discursive incoherence operates on two levels. The first level involves conceptions of what gay and straight mean. Here, a separatist discourse of status, of persons who "really are" gay, irreconcilably coexists with a conflicting, integrative discourse of acts,

30. See SEDGWICK, *supra* note 14, at 78-82.

31. The Sixties have been described as the "decade when Black people came out of the closet." *Id.* at 72. A 1989 Republican National Committee memo called for Representative Tom Foley to "come out of the liberal closet" and acknowledge his left wing voting record. *Id.* at 72 n.6. Sedgwick herself writes about coming out of the closet as a fat woman. *Id.* at 72.

32. *Id.*

33. *Id.* at 72-73.

34. *Id.* at 85.

bisexual potential, and sodomy models.³⁵ The separatist discourse is minoritizing in its focus on homosexuals as a discrete, relatively small class. The integrative discourse, on the other hand, is universalizing in its focus on acts of sodomy towards which all people could have impulse.³⁶

The second level involves conceptions of homosexual gender (again, also organized around integrative and separatist tropes). Here, one discourse reads homosexual persons in terms of inversion or transitivity – the idea of “a woman trapped in a man’s body” or vice versa.³⁷ Sedgwick finds this discourse integrative in its “preservation of an essential heterosexuality within desire itself.”³⁸ But, at the same time, another discourse presents gender as a continuum. From the standpoint of this discourse of homosexual gender, Sedgwick writes: “far from its being the essence of desire to cross boundaries of gender, it is instead the most natural thing in the world that people of the same gender . . . should bond also on the axis of sexual desire.”³⁹ This discourse is separatist in its location of desire in two completely separate male and female spheres, homosexual desire marking the defining center of those spheres.

Sedgwick argues that these two sets of conflicting discourses – one integrative, the other separatist – represent a crisis:

[M]any of the major nodes of thought and knowledge in twentieth-century Western culture as a whole are structured – indeed, fractured – by a chronic, now endemic crisis of homo/ heterosexual definition . . . [such that] virtually any aspect of modern Western , culture must be, not merely incomplete, but damaged in its central substance to the degree that it does not incorporate a critical analysis of modern homo/ heterosexual definition . . .⁴⁰

That “the trope of the closet is so close to the heart of some modern preoccupations”⁴¹ attests to how deeply the irreducible incoherence Sedgwick describes surrounding sexuality saturates our culture. Sedgwick explains that the epistemologically charged pairings of secrecy and disclosure, and private and public, are condensed into the figures of “the closet” and “coming out,” and through these pairings, homo and heterosexual definition shapes other pairings crucial to cultural organization, such as health and illness, and knowledge and ignorance.⁴²

In addition, Sedgwick states that although numerous writers and thinkers have attempted to reconcile the conflicting integrative and

35. *Id.* at 85, 88.

36. SEDGWICK, *supra* note 14, at 85-88.

37. *Id.* at 87.

38. *Id.*

39. *Id.*

40. *Id.* at 1.

41. *Id.* at 72.

42. SEDGWICK, *supra* note 14, at 72.

separatist discourses, none have or will succeed.⁴³

A higher *valuation* on the transformative and labile play of desire, a higher *valuation* on gay identity and gay community: neither of these . . . seems to get any purchase on the stranglehold of the available and ruling paradigm-clash. . . . I have no optimism at all about the availability of a standpoint of thought from which either question could be intelligibly, never mind efficaciously, adjudicated⁴⁴

Advocates may argue for the preeminence of either the acts-oriented integrative, universalizing conception of sexuality, or the status-based, separatist, minoritizing conception. But adding to the weight of either discourse will not break the stalemate between them.⁴⁵ The "stranglehold" of acts versus status, of conflicting, integrative and separatist discourses generates intractable incoherence.

B. INTRACTABLE CONFLICT IN LEGAL DISCOURSE: KENNEDY'S ACKNOWLEDGEMENT OF CONTRADICTION AND THE IMPOSSIBILITY OF BALANCING RULES AND STANDARDS

Sedgwick's description of all-pervasive and irreducible integrative and separatist discourses parallels the sense of irreducible contradiction between legal standards and legal rules, altruism and individualism that Duncan Kennedy locates at the "center of modernist legal consciousness."⁴⁶ Kennedy writes in *Form and Substance* that opposed individualist and altruist conceptions of justice and separatist and integrative rhetorical modes pervade legal reasoning, reflecting a deep seated conceptual contradiction. There is no metasystem with which to resolve this contradiction.⁴⁷ The opposed rhetorical modes reveal a deeper level of conflict at which "we are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future."⁴⁸ This conflict is external in that it is manifested in law; it is internal in that very few participants in legal reasoning can avoid the sense of ascribing to both sides at the same time.⁴⁹

Kennedy presents two opposed rhetorical modes for discussing substantive issues: individualism and altruism. Kennedy describes individualism as the "making of a sharp distinction between one's interests

43. *Id.* at 86.

44. *Id.* at 86-90 (emphasis in original).

45. *See id.*

46. *See* KENNEDY, *supra* note 15, at 151-52, 207-09; Kennedy, *supra* note 20.

47. *See* Kennedy, *supra* note 20, at 1685.

48. *Id.*

49. *Id.* at 1776. Despite his/her firmly held convictions, there is a point at which the individualist stops short of advocating for the state of nature; conversely, there is a point at which the altruist stops short of advocating for complete collectivism. *Id.* at 1767, 1774.

and those of others,⁵⁰ valuing self-reliance. Individualists do not share in each other's gains or losses. However, individualism is not to be conflated with egoism – the notion that self-interest can be pursued without limit. Rather, individualism incorporates the idea that rules, or limits on self-interested behavior, are acceptable to the extent that they enable individualists to coexist.⁵¹

Individualism is an atomist social vision. It posits both the subjectivity of values, in the sense that it is impossible to verify other people's feelings or motivations, and the arbitrariness of values, in the sense that even if we could identify what values govern a particular situation, we could not explain why they are there and therefore cannot determine what values we ought to hold or strive for.⁵² The state in an individualist social order, then, is facilitative. It is an instrument the parties use to achieve their independently defined objectives.⁵³

Altruism, on the other hand, is about sharing and sacrifice.⁵⁴ Sharing and sacrifice represent the opposite of the individualist notion of exchange in that they leave open the possibility of non-reciprocity, whereas the essence of exchange is that each party takes away something.⁵⁵ Like individualism's affiliation with liberalism, altruism rests largely on organicist premises. Altruism demands that collective ends be determined, and that justice be established in reference to those shared ends.⁵⁶ Individualism and altruism correlate to differing conceptions of social justice.

Kennedy also presents two opposed ways of framing solutions to legal problems: one mode favoring highly administrable, formal rules, and the other favoring "equitable standards producing ad hoc decisions with relatively little precedential value."⁵⁷ These two modes of solving legal problems surface in legal arguments made by liberals and conservatives alike as they deploy sets of paired, opposing "argument bites" in pursuit of a certain outcome or rule choice that furthers their political agendas. No metatheory exists with which to police how judges facing a gap, conflict, or ambiguity in the law choose among a spectrum of available rule choices and corresponding sets of paired argument bites with which judges may justify their decisions.⁵⁸

50. *Id.* at 1713.

51. *Id.* at 1713-15. Liberalism is not necessary to individualism, but, as Kennedy observes: "liberal theory has been an important component of individualism in our political culture at least since Hobbes." *Id.* at 1767.

52. *Id.* at 1769.

53. Kennedy, *supra* note 20, at 1770.

54. *Id.* at 1717.

55. *Id.* at 1718. Kennedy notes that there is no way to "prove" the validity of these constructs. Rather, he relies on their intuitive familiarity and recognizability.

56. *Id.*

57. *Id.* at 1685.

58. See KENNEDY, *supra* note 15, at 147.

To align elements of Kennedy's and Sedgwick's frameworks, individualism can be cast as generally integrative, altruism for the most part as separatist. The imagery of core and periphery is a way of conceiving of integrative and separatist components in law. The core represents common law rules perceived as baseline, as traditional. Although legal institutions and decisions can be fit into either individualist or altruist molds, the dominant values animating the common law are perceived to be individualist.⁵⁹ So, to the extent that formal rules reflect individualist impulses towards self-reliance and exchange, they lie within the core. A legal rule that is part of the core is seen as integrated into the set of dominant background rules which define the values underpinning the legal system. Given the perceived alignment of individualism to the core, and of formal, rigid rules to the core, both individualism and rules can be described as integrative.

From the view of the core, counter-tendencies reflecting altruist values appear as exceptions, as at the periphery. Kennedy writes that basic legal institutions that do have an obvious altruistic basis, like the progressive income tax, social security, or minimum wage, are viewed as "after-the-fact adjustments to a pre-existing legal structure that has its own, individualist, logical coherence."⁶⁰ To say that a legal solution lies at the periphery of a core rule structure is to separate it from the dominant set of background norms. Given the perceived alignment of altruism to the periphery, and the alignment of equitable standards to the periphery, both equitable standards or exceptions to rigid rules and altruism can be described as separatist.

However, there is not one coherent core of rules flanked by attendant appendages that form a coherent periphery of exceptions. Likewise, there is not one coherent core of individualist thinking delineated by a periphery of altruism. Rather, rules and standards, individualism and altruism, are poles or vectors in constant tension. Each cell in the body of common law rules contains elements of the core and the periphery. Each rule represents a solution crafted while being tugged at from both individualist and altruist ends. To the extent that a core of legal rules is understood to be both explicative of a set of dominant background norms and opposed to a periphery of standards, the core and periphery are interdependent. The intelligibility of the core depends upon the simultaneous presence of the periphery.

In addition, the supposed centrality of the core and the supposed marginal position of the periphery are constantly unstable because the

59. Kennedy, *supra* note 20, at 1715-19. Kennedy states: "A very common view alike in the lay world and within the legal profession is that law is unequivocally the domain of individualism . . ." *Id.* at 1718. He observes that the "rhetoric of individualism so thoroughly dominates legal discourse . . . that it is difficult even to identify a counter-ethic." *Id.* at 1717.

60. *Id.* at 1719.

periphery is constituted at once internal and external to the core.⁶¹ In this way, the irreducible conflict between integrative and separatist elements, pervades the entire body of the common law just as Sedgwick's discursive incoherence pervades all nodes of cultural organization.

Further, in the same vein that Sedgwick presents her separatist and integrative discourses as irreconcilable, Kennedy presents the conflict between substantive and formal approaches to law as irresolvable. Whereas Sedgwick asserts that there is no standpoint from which to adjudicate between these discourses surrounding the notions of "the closet" and "coming out," Kennedy argues that there is no metasystem with which to adjudicate between altruism, equitable standards, individualism, or rigid rules approaches. The conflict between these approaches is not just disagreement about the best way to balance competing interests. Rather:

The acknowledgement of contradiction means that we cannot "balance" individualist and altruist values or rules against equitable standards, except in the tautological sense that we can, as a matter of fact, decide if we have to. The imagery of balancing presupposes exactly the kind of more abstract unit of measurement that the sense of contradiction excludes.⁶²

C. SEDGWICK, KENNEDY, AND BATTERED WOMEN'S CLAIMS IN COURT

Sedgwick's and Kennedy's frameworks can be described as parallel in that they both find incoherence and a lack of epistemological grounding from which to resolve incoherence to be the central, defining characteristic of the discourses with which they are most concerned. However, Sedgwick and Kennedy diverge in several important respects. Kennedy's argument aligns sets of contradictions, whereas Sedgwick's argument illustrates the difficulty of sustaining any such alignment. In examining the contradictions individualism and altruism, legal rules and standards, core and periphery, Kennedy posits a basic alignment of individualism, rules, core, and altruism, standards, periphery. Sedgwick, on the other hand, presents a matrix involving multiple possible alignments of various separatist and integrative discourses.⁶³ Kennedy focuses primarily on substantive distinctions between types of legal solutions such as rules and standards classified as individualist or altruist, as core or periphery. Sedgwick focuses on the implications for sexual definition of various

61. Cf. SEDGWICK, *supra* note 14, at 10.

62. Kennedy, *supra* note 20, at 1775; see also KENNEDY, *supra* note 15, 202-09. Though both Kennedy and Sedgwick present the conflicts they describe as irresolvable, they differ in that Kennedy does not endow his with the same sense of crisis that Sedgwick does. He states that presenting an irresolvable conflict among our own values may be "pessimistic, one might even say defeatist," but his project is to find order and meaning within the sense of contradiction. He seeks to show an orderliness to the myriad policy arguments that emerged after we stopped believing in law's neutrality. Kennedy, *supra* note 20, at 1724.

63. See SEDGWICK, *supra* note 14, at 87-88.

substantive distinctions by classifying two levels of discourses regarding sexuality as either separatist or integrative. Conflicting minoritizing and universalizing discourses surrounding sexual definition operate alongside conflicting continuum and inversion discourses surrounding gender.

The value of demonstrating the complexity and consequences of intractable incoherence for feminist reform and victims of domestic violence does not depend upon full integration of Kennedy's and Sedgwick's frameworks. A complete alignment or integration of Kennedy's and Sedgwick's contradiction frameworks may not be possible.

Victims of domestic violence embody the internal incoherence in discursive and institutional "common sense" regarding sexual definition. Incoherence in women's sexual definition is precisely what feminists such as Schneider and Dalton are concerned with in their critiques of using BWS in court. Sedgwick's work represents one of the most thorough and complex readings of intractable conflicts embedded in sexual definition. When victims of domestic violence sue their abusers, the internal incoherence of legal argumentation and adjudication informs their possibilities for success. Kennedy's work provides a thorough and complex reading of intractable conflicts entrenched in legal reasoning. Whether Sedgwick's and Kennedy's presentations of contradiction can be fully integrated is not important. What matters is considering how, when victims of domestic violence sue in court, they are steeped in both sets of contradictions.

This article finds that the intractability of the incoherences presented by Kennedy and Sedgwick is rooted in part in the consistent alignment of certain contradictions, yet simultaneous impossibility of logically sustaining or cementing such alignment. Like a shallow but wide, slow current, health, capacity, rationality, individualism and core flow together, as do illness, incapacity, insanity, altruism, periphery. The direction of this flow is consistent and never wholly reversed, but just a little stir or push upstream disrupts the alignments. Concern for this flow of associations drives criticism of designating victims of domestic violence as insane or incapacitated. Yet, representation with concerted effort to induce favorable cultural associations prompts a dizzying stir of possibilities and implications in the complex matrix of incoherences constituting sexuality and gender that surround battered women. The difficulty of challenging the dominant direction of alignments lies in its simultaneous cultural salience, yet fluidity.

For example, battered women who come out of an abusive relationship to sue are caught in a double bind between a universalizing discourse of acts (such as making a legal claim) and a minoritizing discourse of status (such as being incapacitated with BWS).⁶⁴ In attempting to guide battered women in court through this double bind, Schneider argues that instead of

64. See *infra* Part III.

pleading insanity or incapacity because of BWS, courts and litigators need to understand why a battered woman's actions are reasonable from her perspective.⁶⁵ This argument is steeped in the cultural incoherence Sedgwick describes between inversion and continuum. Schneider's logic inverts the battered woman on trial from being insane to its cultural opposite – being rational and reasonable given her experience. Yet her argument requires a continuum of reasonableness along a spectrum of perspectives. The reasonableness of a battered woman's acts can only be established in relation to her status as occupying an altered perspective.

III. CASE ANALYSIS AND THE THEORETICAL FRAMEWORK IN PART II

The incoherences described in Part II above pervade tort law claims of battered women against their abusers.⁶⁶ Adjudication of battered women's claims implicates various levels of incoherence both between integrative and separatist cultural conceptions of domestic violence victims and among divergent conceptions of social justice and modes of legal reasoning described by Kennedy.

The analysis below applies the contradiction framework to cases addressing the issue of whether the statute of limitations on assault and battery should be applied in cases where a woman sues her abuser after

65. See SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING, *supra* note 2; Schneider, *Self-Defense and Relations of Domination*, *supra* note 2.

66. There are several procedural obstacles that must be overcome before a woman abused by her spouse can even sue for assault and battery (and claim exemption from the statute of limitations). First, the state in which her suit is filed must have abolished interspousal tort immunity. See Dalton, *Domestic Violence, Domestic Torts and Divorce*, *supra* note 2, at 333 (arguing that although most states have formally abolished interspousal tort immunity, the doctrine's legacy still imposes many obstacles on spouses who sue their abusive partners). Second, if the plaintiff is simultaneously divorcing her abuser, it must be decided whether her tort claim should be joined with any divorce proceedings. If the plaintiff already divorced her abuser, it must be decided whether her assault and battery claim is barred by *res judicata*. See Pena, *supra* note 10, at 504-05; Kohler, *supra* note 13, at 1030. Despite the widespread elimination of the doctrine of interspousal tort immunity, the acceptance of testimony on BWS in criminal defense cases, and recent litigation arguing for a continuous tort of partner abuse, tort causes of action and recovery available to women who sue for personal injuries suffered during domestic violence is disappointingly limited. The legacy of interspousal immunity still imposes obstacles to recovery. Expert testimony on BWS has proven successful at improving chances of acquittal for a defendant charged with murdering an abusive partner. However, it has not fared well as evidence supporting a continuous tort of spouse abuse. See Daniel Atkins et al., *Striving for Justice with the Violence Against Women Act and Civil Tort Actions*, 14 WIS. WOMEN'S L.J. 69 (1999); Heather Tonsing, Note, *Battered Women Syndrome as Tort Cause of Action*, 12 J.L. & HEALTH 407, 433 (1997/1998). See generally SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING, *supra* note 2; Schneider, *Self-Defense and Relations of Domination*, *supra* note 2, at 487; Stephen Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2207 (1995); Lenore Walker, *A Response to Elizabeth M. Schneider's Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 223, 224 (1986).

many years of battering.⁶⁷ There are several possible legal responses to the defense of the statute of limitations that a battered woman litigant may make. For example, she could claim some form of incapacity that precluded her from suing earlier,⁶⁸ she could claim that domestic abuse is a continuing tort because all of the acts of abuse contributed to one sustained injury,⁶⁹ or she could try to sue under an alternative cause of action like intentional infliction of emotional distress.⁷⁰ Each of these causes of action involves hurdles to recovery arising from the mismatch between the contexts in which these doctrines were developed and the unique situation of domestic violence.

Women who claim to suffer from BWS have used testimony about the syndrome to argue both (i) that BWS is evidence of incapacity or insanity that precluded her from suing earlier and therefore excepts her action from the statute of limitations, and (ii) that BWS is evidence of the grounds for a continuing tort, inflicted over time, the cumulative effect of which is actionable.⁷¹ Cases decided to date dealing with battered women, BWS,

67. See *supra* note 13; see also Atkins, *supra* note 66; Dalton, *Domestic Violence, Domestic Torts and Divorce*, *supra* note 2; Dalton, *When Paradigms Collide*, *supra* note 2; Lisa Napoli, *Tolling the Statute of Limitations for Survivors of Domestic Violence Who Wish to Recover Civil Damages Against Their Abusers*, 5 CIRCLES: BUFF. WOMEN'S J.L. & SOC. POL'Y. 53 (1997); Tonsing, *supra* note 66.

68. This incapacity could be presented using claims of duress, insanity, or estoppel. Duress requires that the defendant used coercion to prevent the plaintiff from bringing suit. An estoppel theory maintains that the defendant is estopped from invoking the statute of limitations if his actions caused the plaintiff's delay in bringing suit. Insanity requires proof of a mental defect that prevented the plaintiff from bringing suit. Despite the range of possible approaches, cases brought to date have focused on insanity and on a possible continuing tort cause of action for domestic abuse. For discussion of the range of possible tolls, see generally Napoli, *supra* note 67.

69. Continuing torts involve a course of conduct which over a period of years caused damage. "Since usually no single incident in a continuous chain of tortious activity can 'fairly or realistically be identified as the cause of significant harm,' it seems proper to regard the cumulative effect of the conduct as actionable." *Page v. U.S.*, 729 F.2d 818, 821-22 (D.C. Cir. 1984) (citation omitted). Some examples of continuous torts are unremitting trespass, continuous negligent representation by an attorney, and intentional infliction of emotional distress.

70. Courts have been very reluctant to uphold claims of intentional infliction of emotional distress in a domestic context. Intentional infliction of emotional distress requires that the plaintiff establish the "outrageousness" of the defendant's conduct. Courts tend to hold acts between spouses to a higher standard of outrageousness than between strangers. See, e.g., *Hakkila v. Hakkila*, 812 P.2d 1320 (N.M. Ct. App. 1991) (holding that a suing spouse must meet a higher standard of the element of "outrageousness" in order to recover for intentional infliction of emotional distress). *Hakkila* cites RESTATEMENT (SECOND) OF TORTS section 895F cmt. h (1965), which states that the intimacies of family life involve intended physical contacts that would be actionable between strangers. *Hakkila*, 812 P.2d at 1323. However, the Supreme Court of Idaho upheld a claim of intentional infliction of emotional distress as a continuing tort between spouses. *Curtis v. Firth*, 850 P.2d 749, 753-54 (Idaho 1993).

71. See Dalton, *Domestic Violence, Domestic Torts and Divorce*, *supra* note 2, at 344-45 (explaining that because the statute of limitations bars recovery for so much domestic abuse, feminist scholars and litigators have argued both for allowing plaintiffs who have BWS to sue beyond the prescription period and for a new continuing tort of "partner abuse" to allow

and the statute of limitations create a somewhat confusing maze of legal claims and judicial responses. This section summarizes these cases and then uses the contradiction framework to analyze what they mean for feminist reform.

A. DOMESTIC VIOLENCE AND THE STATUTE OF LIMITATIONS ON ASSAULT AND BATTERY

Cases addressing whether to toll the statute of limitations for claimants who sue for assault and battery in a domestic context have focused on the toll for insanity and the toll for a continuing tort. Insanity means that the claimant could not sue within the prescription period because of some mental defect. "A 'continuing tort' is one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action."⁷² Insanity and continuing torts are both well established exceptions to the statute of limitations.

The most prominent and promising case exempting a plaintiff with BWS from the statute of limitations on assault and battery is the New Jersey case *Giovine v. Giovine*.⁷³ *Giovine* held that if a plaintiff establishes by expert testimony that she suffers from BWS, then she may seek recovery for all abusive acts that contributed to development of her syndrome regardless of the statute of limitations on assault and battery.⁷⁴ The grounds that *Giovine* offered for its holding included both that a claimant suffering from BWS can be likened to an insane plaintiff, and also that the acts causing BWS constitute a continuing tort.

In holding that BWS is an exception to the statute of limitations, the majority opinion in *Giovine* likened BWS to insanity. The court stated that "[o]ne common characteristic of battered woman's syndrome is 'psychological paralysis,' the inability of the victim 'to take any action at all to improve or alter the situation.'"⁷⁵ The court relied on a case in which the New Jersey Supreme Court tolled the statute of limitations because the defendant had caused the plaintiff to become insane. The *Giovine* court stated that the standard for whether the statute of limitations should be tolled for a plaintiff with BWS was the same as the standard for insane plaintiffs.⁷⁶

Giovine built upon *Cusseaux v. Pickett*,⁷⁷ which held: "Because the battered woman's syndrome is the result of a continuing pattern of abuse and violent behavior that causes continuing damage, it must be treated in

an entire history of violence and emotional cruelty to be presented under a single claim).

72. 54 C.J.S. LIMITATIONS OF ACTIONS § 177 (1987) (citations omitted).

73. 663 A.2d 109 (N.J. Super. Ct. App. Div. 1995), *overruled on other grounds by* Brennan v. Orban, 678 A.2d 667, 674 (N.J. 1996).

74. *Id.*

75. *Id.* at 118 (quoting State v. Kelly, 478 A.2d 364 (N.J. 1984)).

76. *Id.* at 115 (citing Kyle v. Green Acres at Verona, Inc. 207 A.2d 513 (N.J. 1965)).

77. 652 A.2d 789 (N.J. Super. 1994).

the same way as a continuing tort.”⁷⁸ The *Cusseaux* opinion substituted BWS itself for the tortious conduct that resulted in BWS. In distinguishing *Giovine* from *Cusseaux*, the *Giovine* court clarified that it was the underlying tortious conduct, not BWS itself, that constituted a continuing tort. The *Giovine* court stated: “We do not adopt the conclusion in *Cusseaux* that battered woman’s syndrome is itself a continuous tort. Battered woman’s syndrome is more correctly the medical condition resulting from continued acts of physical or psychological misconduct.”⁷⁹ The court continued: “To overcome the statute of limitations, it is imperative that the tortious conduct giving rise to the medical condition be considered a continuous tort.”⁸⁰

Though *Giovine* implied a new continuing tort, it did not adequately explain the evidentiary standards for establishing elements of that tort. The *Giovine* court held it is the plaintiff’s burden to show by expert medical, psychiatric or psychological testimony that she suffers from BWS which caused her inability to file suit earlier.⁸¹ However, *Giovine* was not clear on whether it is just the syndrome or the syndrome plus tortious acts inducing the syndrome that the plaintiff must prove. Judge Skillman’s dissent in *Giovine* was concerned with this problem. If a claimant can establish an exception to the statute of limitations by proving the fact of the syndrome, along with the inducing acts that are not independently tortious, then indirect liability has been created for a wide variety of the defendant’s prior acts that are not and should not be considered tortious.

Though *Giovine* and *Cusseaux* appear promising, they leave much confusion over the nature of the continuing tort claim that they established. Also, these cases are flanked by cases expressly rejecting claims to toll the statute of limitations on the grounds that domestic abuse can be considered a continuing tort and rejecting claims that BWS produces insanity warranting a toll of the statute of limitations. Many battered women suffering from BWS do not fit legal definitions of insanity because they often continue to function in society and exhibit rational behavior during the course of the abusive relationship. In New York, for example, the legal standard for insanity warranting a toll of the statute of limitations is inability “to protect . . . legal rights because of an over-all inability to function in society.”⁸²

78. *Id.* at 794.

79. 663 A.2d at 115.

80. *Id.* The *Giovine* court reaffirmed the *Cusseaux* four part test, establishing the continuing tort of domestic abuse: 1) involvement in a marital or marital-like intimate relationship; and 2) physical or psychological abuse perpetrated by the dominant partner to the relationship over an extended period of time; and 3) the aforesaid abuse has caused recurring physical or psychological injury over the course of the relationship; and 4) a past or present inability to take any action to improve or alter the situation unilaterally. *Id.* at 114.

81. *Id.* at 117.

82. See *McCarthy v. Volkswagen of America, Inc.*, 435 N.E. 2d 1072, 1075 (N.Y. 1980).

The Louisiana Court of Appeal, First Circuit, in *Laughlin v. Breaux*,⁸³ rejected the claim that BWS is evidence of incapacity sufficient to toll the prescription period. The plaintiff in *Laughlin* pled that prescription should not preclude her from damages for years of abuse using the doctrine of *contra non valentum*.⁸⁴ She contended that BWS made her unable to file suit.⁸⁵ The plaintiff's doctor testified that the plaintiff suffered from "learned helplessness" as a result of BWS and that this symptom prevented her from taking legal action.⁸⁶ The court found that the plaintiff in *Laughlin* did establish by expert testimony that she suffered from BWS. But because she exhibited rational, self-sufficient behavior while the abuse was going on – she ran her own business, talked about the abuse with friends, and once called the police – she could not establish that her situation warranted exception for insanity to the statute of limitations.⁸⁷

The *Laughlin* court also held that domestic abuse that causes BWS is not a continuing tort. The court summarily stated: "The principle of a continuing tort only applies when *continuous conduct* causes continuing damages. . . . In this action each incident of battery and assault is separate, and gives rise to a separate cause of action."⁸⁸ The court referenced testimony from witnesses describing multiple instances of abuse and the obvious physical injuries the plaintiff sustained from each incident.⁸⁹ Then, in explaining its holding, the court offered a statement of Louisiana doctrine regarding prescription and cited Louisiana precedent on point: "Prescription runs from the date damages are sustained; damages are sustained from the date the injury is inflicted if they are immediately apparent to the victim, even though the extent of the damages may not be known."⁹⁰

Similarly, the Supreme Court of Oregon in *Davis v. Bostick*⁹¹ overturned the lower court's decision rejecting a statute of limitations defense on the grounds that defendant's violent abuse of the plaintiff over several years constituted a continuing tort. The court acknowledged that "there can be no doubt that defendant's abusive behavior was all of a piece in intent and content without substantial letup for three years and with almost diabolical variety."⁹² However, the court refused to permit the plaintiff to recover for the acts suffered more than two years prior to suit because specific events of abuse (namely that defendant struck and broke the plaintiff's nose and that defendant made death threats to the plaintiff)

83. 515 So. 2d 480 (La. Ct. App. 1987).

84. *Id.* at 482.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* (emphasis in original).

89. *Laughlin v. Breaux*, 515 So. 2d 480, 483 (La. Ct. App. 1987).

90. *Id.* at 482.

91. 580 P.2d 544, 548 (Or. 1978).

92. *Id.* at 547.

were separately actionable.⁹³ Unlike the *Laughlin* court, the court in *Davis* found that there were no authoritative precedents "squarely raising the point here"⁹⁴ because of the context of abuse in which the separately actionable incidents occurred. Dicta in the *Davis* opinion condemned the defendant's reprehensible behavior, but ultimately the court feared that were the plaintiff permitted to "ride out the storm and lump sum her grievances"⁹⁵ the court could not "see where the relation back would end in this sort of case."⁹⁶

B. CONTRADICTIONS AND IMPLICATIONS OF THE *GIOVINE* OPINION FOR FEMINIST REFORM

This section uses the contradiction framework to analyze implications of the *Giovine* opinion for feminist reform. From a cultural standpoint, in coming out of an abusive relationship to sue her abuser, a battered woman is steeped in incoherence surrounding the crisis of sexual definition described by Sedgwick. From a legal standpoint, if she seeks recovery for abuse beyond the prescription period on assault and battery, her claim embodies the adjudicative quagmire described by Kennedy. Part IV below discusses the consequences of this complexity: that contradicting implications for women present in both legal and cultural discourses enable a privilege of ignorance that undermines the progressive potential of educating judges.

Feminist writers (including Schneider, Dalton, and Napoli) have expressed serious concern about negative, minoritizing implications for women claiming insanity and using BWS as evidence of incapacity.⁹⁷ In

93. *Id.* at 544-45, 548.

94. *Id.* at 547.

95. *Id.* at 548.

96. *Id.*

97. Battered women's advocate Elizabeth Schneider observes that cases involving testimony on BWS resound with the stereotypes of incapacity they were meant to overcome. See SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING, *supra* note 2; Schneider, *Describing and Changing: Women's Self-Defense Work*, *supra* note 2, at 197. (Although most of Schneider's work is about representing battered women who have killed their abusers, her critique is also relevant to representing battered women as plaintiffs in tort suits against their abusers.) Similarly, Lisa Napoli writes,

If it is argued that a person who has been battered is 'insane,' then she or he is placed in a position of weakness and of being in need of protection. While women may prevail using this argument, insanity may not be the best option since it feeds into the stereotype that women are helpless and cannot fend for themselves.

Napoli, *supra* note 67, at 60. See generally Abrams, *supra* note 14; Naomi Cahn & Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339 (1995); Dalton, *Domestic Violence, Domestic Torts and Divorce*, *supra* note 2, at 333; Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992).

addition, Schneider expresses sensitivity to potential stigma for women associated with novel causes of action or “special pleading.”⁹⁸ Use of testimony on battering can be socially integrative or universalizing for women when it contributes to an understanding of their actions as reasonable. But such testimony can be at the same time minoritizing or separatist for women in that it locates them within a specific minority suffering from negative psychological effects of battering, described as ill or as victims. Schneider responds to this dilemma by arguing that courts and litigators need to understand domestic violence better so that they can see how a battered woman’s seemingly irrational behavior is not insane, but in fact reasonable given her situation.⁹⁹ Her response pits an integrative strategy of describing battered women as reasonable against the separatist, peripheral move to establish a continuum of reasonableness along differing perspectives. The integrative power of categorizing battered women’s actions as reasonable is in conflict with the separatist fracturing of reasonableness. Schneider’s solution may well be the best possible way to represent battered women. This critique is meant to highlight its complexity and its potential consequences as it responds to the complexity and consequences of presenting battered women as incapacitated. Schneider’s approach marks one interface between the contradictions of health and illness, and core and periphery discussed below.

1. Contradiction: Health and Illness

Giovine and *Cusseaux* allow battered women to recover damages for years of abuse, but claiming BWS as grounds for a tort to toll the statute of limitations places battered women in the minoritizing discourse of the “syndrome” (a status that results from acts of a particular nature such as assault and battery over the course of a long relationship). Recognizing BWS as the basis for an affirmative tort separates women who have this syndrome from the general class of claimants for assault and battery who must file suit within the statute of limitations. Women plaintiffs in this situation are permitted to sue for acts beyond the prescription period not because the courts recognize abusers’ tortious conduct as a coherent, long-

98. See *infra* notes 99-100 and accompanying text.

99. Schneider’s work focuses on criminal defense of battered women who kill or attack their abusers (in self defense). She has worked to show why it is reasonable (given threats of violence and behavior of abusers) for a woman to stay in an abusive relationship or to act in self defense in a way that may not look reasonable to judges or litigators who are unfamiliar with domestic violence. See SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING, *supra* note 2, at 222. Her concerns about representing battered women as sick or incapacitated (as opposed to reasonable) are applicable in a civil case context as well. This article does not address the possible relationships between development of a criminal law doctrine in which battered women defendants who stay in abusive relationships or kill their abusers are seen as reasonable and a tort law doctrine allowing battered women to sue for damages beyond prescription periods. However, given the *Laughlin* and *Davis* decisions, casting battered women defendants as reasonable might undermine efforts to help such claimants avoid prescription in civil cases. See, e.g., text accompanying note 102.

standing infliction of abuse, but because courts find that such plaintiffs were not of able enough mind to sue earlier.

The *Giovine* court's focus on the incapacitating effects of BWS separates out claimants who use this diagnosis to avoid having their recovery limited to abuse which occurred the last two years from the standard, able claimant who would be subjected to the statute of limitations for the same acts of assault and battery. This approach subjects battered women to the minoritizing status of being sick or insane because of continuing abuse.

Conversely, holding a plaintiff suing for domestic violence to the statute of limitations on assault and battery places such plaintiff in a universalizing discourse of acts and rationality. It implies that the acts of assault and battery she suffered are just like any other, and that she is able-minded and therefore must bring suit within two years to recover for them. For example, Judge Skillman's dissenting opinion in *Giovine* stated:

Any person who is a victim of violence, or the threat of violence, may recover money damages for assault and/or battery. . . . Consequently, any woman who is the victim of an act of battering, or a threat of battering, can bring a tort action against her assailant for each of those acts.¹⁰⁰

Judge Skillman emphasized that domestic violence was actionable just like other acts of violence, and that the plaintiff did not claim insanity, nor was she incapacitated or prevented by her physical or mental trauma from pursuing her rights.¹⁰¹ He stated that the law has already determined under what circumstances accrual of a cause of action may be postponed, and since this plaintiff's situation was not one of the established circumstances, she must be treated like any other claimant.¹⁰² He found no reason why existing causes of action were not sufficient to compensate for the harm alleged, and saw no reason why a woman with BWS needed special accommodation respecting the statute of limitations.¹⁰³ Skillman's opinion implied the existence of a baseline, or standard, plaintiff who is reasonable and ready to pursue her rights within two years of assault and battery. His opinion was socially integrative for battered women to the extent that it incorporates them into this class of reasonable, able plaintiffs – those who have capacity to bring suit within the statute of limitations.

The court in *Laughlin* took an approach similar to Skillman's. In supporting its finding that the plaintiff was not sufficiently incapacitated to bring suit earlier and that domestic violence is not a continuous tort, the court noted that during the abusive relationship the plaintiff ran her own business, talked about the abuse with friends and with the defendant, had

100. *Giovine v. Giovine*, 663 A.2d at 125 (Skillman, J.A.D., dissenting)

101. *Id.* at 125, 129.

102. *Id.* at 127-28.

103. *Id.* at 125-27.

once called the police after an abusive incident, and saw a psychologist in order to deal with her abuse.¹⁰⁴ The opinion implied that there is nothing about the syndrome itself that makes battered women plaintiffs incapable of filing suit, that separates them out of the standard class of claimants.

Battered women plaintiffs are caught between an integrative discourse of health or capacity to bring suit and a separatist discourse of illness or incapacity. If they act in their defense during an abusive relationship by seeking divorce or counseling, they are not considered sufficiently sick to warrant exception to the statute of limitations. The law commands them not to take action that displays capacity to bring suit before actually bringing suit. To recover for abuse beyond the prescription period, they must prove themselves to be sufficiently insane.

2. Contradiction: Core and Periphery

The statute of limitations is a highly administrable, rigid rule. Barring recovery to battered women for any violent incident that occurred more than two years prior to the suit is individualist in its reification of the idea of the rational, independent claimant, capable of pursuing her rights promptly. A common law rule that tolls the statute of limitations for women who establish that they have battered woman syndrome can be understood as minoritizing not only because of its implication that battered women plaintiffs are sick and victims, but also because of its status as an equitable exception to the statute of limitations rule, as periphery.

Schneider asserts a relationship between claims which are viewed as exceptions to the core of common law rules and stigmatization. She laments the law's use of BWS as an exception to the traditional defense doctrine, as "special pleading,"¹⁰⁵ arguing that when battered women's claims are "perceived to be outside the traditional justification framework," then "gender bias is not only neither addressed nor remedied, but exacerbated."¹⁰⁶ Legal rules assume a prototypical legal subject capable of abiding by them. The statute of limitations assumes that a typical person can bring suit within two years of being assaulted. If someone is assaulted and does not sue within two years, then she either made a decision to forego legal action, or she not a prototypical legal claimant (because she lacks mental capacity or otherwise).

Quoting from *Davis* the dissenting opinion in *Giovine* stated: "Designating a series of discrete acts, even if connected in design or intent, a continuing tort ought not to be a rationale by which the statute of

104. *Laughlin v. Breaux*, 515 So. 2d 480, 482 (La. Ct. App. 1987); see also, Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 992, 994-95 (1995) (illustrating that a woman's aggressive behavior in court is inconsistent with that of the stereotypical passive victim).

105. Schneider, *Self-Defense and Relations of Domination*, *supra* note 2, at 492, 512.

106. *Id.* at 492.

limitations policy can be avoided.”¹⁰⁷ This statement suggested two levels of core and periphery designation. First, the statute of limitations is a core rule that must be protected from an encroaching periphery of exceptions – an ever growing list of continuing torts. At the same time, the continuing tort itself is a core or traditional exception to the statute of limitations which Skillman perceives as threatened by claimants who want to take a series of discrete acts, like batterings that occurred over the course of a marriage, and lump them together to establish a continuing tort.

The exception or periphery only has meaning in conjunction with the rule or the core. In fact, the exception can even be said to effectuate the rule. Søren Kierkegaard (as quoted by Carl Schmitt) writes: “If [exceptions] cannot be explained, then neither can the general be explained. Usually the difficulty is not noticed, since the general is thought about not with passion but only with comfortable superficiality. The exception, on the other hand, thinks the general with intense passion.”¹⁰⁸

Skillman defined the periphery by contrasting claims he deemed marginal to those he deemed established. The established exceptions to the statute of limitations become core as they appeared in contrast to more marginal claims in question. In arguing that there was no need for a new cause of action for BWS, the dissent cast established exceptions – insanity and the idea of the continuing tort – as belonging to a core of acceptable exceptions that should not be eroded. Skillman wrote: “A party who seeks to avoid the bar of a statute of limitations by invocation of the discovery rule or other comparable doctrine has the burden of proof.”¹⁰⁹ In other words, the discovery rule, which states that a cause of action for injury accrues when the harm is or could have been discovered, is an acceptable, core exception to the statute of limitations. Skillman’s assertion that battered women must establish either insanity or allege a continuous tort (which he says they do not) suggests that insanity and continuing torts count as “other comparable doctrines.”

IV. THE PRIVILEGE OF IGNORANCE, THE RULE OF LAW, AND EXPECTATIONS OF COMMON LAW REFORM THROUGH ENLIGHTENMENT

Adjudicators, such as Skillman in the sample case analysis above, lament the expansion of a periphery of exceptions, yet simultaneously endorse the ground that exceptions have laid so far.¹¹⁰ Courts have not generated established exceptions for women who cannot sue within the

107. *Giovine v. Giovine*, 663 A.2d at 109, 129 (Skillman, J.A.D., dissenting) (quoting *Davis v. Bostick*, 580 P.2d 544, 548 (Or. 1978)).

108. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 22 (1922), *quoted in* GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 16 (Daniel Heller-Roazen trans., 1998) (1995).

109. *Giovine*, 663 A.2d at 128 (Skillman, J.A.D., dissenting).

110. *See supra* note 25 (regarding the set of adjudicative acts targeted in this argument).

statute of limitations on assault and battery because of circumstances surrounding abuse. Yet, exceptions facilitate the meaning and administration of rules. This paradox has lead feminists such as Schneider, West, and Dalton to target ignorance as the source of judicial resistance to establishing such exceptions, and to call for education or enlightenment to effectuate reform.

The intellectual developments exemplified by Sedgwick's and Kennedy's work happened alongside proliferation of this predominant mode of feminist thinking that aligns and even equates enlightenment with progressive developments in common law. Feminists appeal to the power of knowledge, but from Sedgwick's and Kennedy's view, context and understanding are fractured along multiple incoherences – between minoritizing and universalizing cultural impulses, between individualist and altruist conceptions of justice, between separatist and integrative modes of legal reasoning – that cause disjuncture between enlightenment and progress.

This section critiques assumptions underpinning Schneider's, West's, and Dalton's belief in the progressive potential of educating legal actors to assist strategic thinking about what can be expected of current reform efforts. Causing adjudicators to produce developments favorable to battered women through increased awareness is more complex than pushing against a mountain of mainstream interest in a pacific, patriarchal yet egalitarian view of male-female relations. Intractable contradictions obviate any standpoint from which to police or assess how courts respond to demands for, on the one hand, institutional authority, fidelity to precedent, and potential to articulate any social justice, versus, on the other hand, exceptions, risk of personal and institutional authority, and more transformative visions of social justice.

A. SCHNEIDER'S, WEST'S, AND DALTON'S APPEALS TO ENLIGHTENMENT OF LEGAL ACTORS

Schneider, West, and Dalton may be well aware of their assumptions and of the severely limited conditions under which enlightening judges can produce progressive law. This article focuses on their writings precisely because they express sensitivity to the complexity of linking awareness of domestic violence, favorable or progressive views of battered women, and doctrines that can assist those women. Their writings share a respect for both the difficulty of effectively raising consciousness and the complex effects of various representations of battered women. Yet, after acknowledging difficulty and complexity, all three repeatedly strike the same chord sounding faith in the idea that if adjudicators could only see the situation through their eyes, progress in the common law would follow. When they strike this chord, it resonates loudly against the backdrop of broad, common sense, consciousness-raising strategies that have fueled other feminist projects. This article does not address the prospects of

education as a strategy for other types of social or cultural reform (or even legislative reform). It considers how intractable contradictions and courts' privileged ignorance create an impasse between consciousness raising and progressive common law developments.

Schneider targets courts' ignorance of battered women's experiences as the main reason for the persistence of legal obstacles to women's equality in court. Schneider asks: "How do we translate women's experiences honestly to courts without falling into extremes of victimization or fault that can be misheard?"¹¹¹ She calls for presentation of battered women as victims, actors and survivors, for a "fuller description of battered women's experiences" that "better explains to judges and juries why a battered woman doesn't leave the house and why she kills to save her own life."¹¹² Her recommendation implies that a more complete understanding of battered women's experiences on the part of the courts will advance women's equality through the legal system.

Similarly, West writes that "legal culture has committed a perceptual error . . . in failing to understanding the difference . . . of our subjective, hedonic lives,"¹¹³ and implies that more accurate understanding of women's subjective experiences would produce feminist legal reform.¹¹⁴ West describes a failure of legal professionals to pursue a humanistic conception of justice based on greater awareness of women's perspectives:

In an oft-quoted aside, Justice Holmes once remarked that when lawyers in his courtroom make appeal to *justice*, he stops listening: such appeals do nothing but signal that the lawyer has neither the facts nor the law on his side, or worse, that he is ignorant of whatever law might be relevant. Holmes's remark has not gone unheeded. Wary of seeming ignorant or without argument, legal scholars, legal educators, lawyers and judges have apparently chosen to forego the task of articulating concepts of justice that might enlighten or guide the work of adjudication.¹¹⁵

West's reaction to Holmes's comment presumes that the common law can and should animate a substantive vision of justice. West argues that if judges were sufficiently enlightened regarding women's particular hedonic lives and needs, the common law could develop a feminist vision of justice in which recovery is granted for harms suffered mainly by women.

111. Schneider, *Describing and Changing: Women's Self-Defense Work*, *supra* note 2, at 200.

112. *Id.* at 222.

113. See West, *The Difference in Women's Hedonic Lives*, *supra* note 2, at 153.

114. See *id.*; see also West, *Towards Humanistic Theories of Legal Justice*, *supra* note 2.

115. See West, *The Difference in Women's Hedonic Lives*, *supra* note 2, at 147. West acknowledges that conceptions of justice as wealth maximizing (exemplified by Richard Posner) and justice as law itself (exemplified by Ronald Dworkin) have been offered to both explain and guide adjudication, but states that they "have failed to persuade all but a few of us." *Id.* at 148. Therefore, more humanistic modes of justice should be pursued.

Yet, fear on the part of lawyers and judges of looking “ignorant or without legal argument” is the reason she offers for why legal professionals do not base their arguments on a humanistic vision of justice. Lawyers and judges who might otherwise base their arguments on a conception of justice that incorporates knowledge of women’s situations avoid doing so out of fear of seeming “ignorant.” What do they know about legal argumentation that creates fear of looking ignorant if they argue based on knowledge about women’s hedonic lives? West does not address the fundamental question of what facets of our common law system mandate that legal arguments command authority in terms of precedent rather than in terms of social justice. She side-steps the bind between transcendent justice and its inextricable opposite, law as compulsion of the text.¹¹⁶

Clare Dalton also espouses education regarding domestic violence as a means to reform, and yet struggles with the complexity of imparting knowledge to legal professionals to alter their practices.¹¹⁷ Dalton writes the following about training sessions designed to educate professionals involved with the family court system about partner violence:

[T]hese training sessions are too often ineffective in changing professional practice. In part, this follows from the . . . problem [that] as long as competing literatures and bodies of research advocate competing norms and practices, responsible professionals can still adhere to the set that was more thoroughly and deeply embedded in their earlier professional training and orientation to their work.¹¹⁸

Dalton writes specifically of training sessions designed for professionals involved with the family court system, but her observations are apt to describe the difficulty of reforming common law adjudicators’ behavior. The training she speaks of is training based on current developments in research on the subject about the nature and effects of partner abuse. After stating that professionals can adhere to competing views on domestic violence that more closely resonate with their prior training, Dalton writes that training sessions “often fail to take the critical step of helping or challenging professionals to look at their cases through new eyes and to use their new learning to discover and address abuse-related issues that previously escaped their attention.”¹¹⁹ Though competing literature and long-standing professional practices exist, if educational efforts regarding domestic violence simply were better or went further, she implies, education would induce professionals to create better outcomes in the family court system.

116. Cf. KENNEDY, *supra* note 15, at 208.

117. See Dalton, *When Paradigms Collide*, *supra* note 2.

118. *Id.* at 274.

119. *Id.*

B. THE PRIVILEGE OF IGNORANCE AND THE DIFFICULTY OF LINKING AWARENESS AND COMMON LAW REFORM

Sedgwick warns that "the angles from view from which it can look as though a political fight is a fight against ignorance are invigorating . . . but a dangerous place for dwelling."¹²⁰ Ignorance on the part of courts does not represent "pieces of the originary dark."¹²¹ Rather, ignorance corresponds to and is produced by various, particular knowledge. Sedgwick writes of an "epistemological privilege of ignorance" created by the facts that silence is as performative as speech, that ignorance colludes with knowledge in mobilizing goods and persons, and that the party with the less knowledgeable understanding of interpretive practice often defines the terms of exchange.¹²² For example, drawing on Catherine MacKinnon, Sedgwick points out that "the epistemological asymmetry of the laws that govern rape privilege at the same time men and ignorance, inasmuch as it matters not at all what the raped woman perceived or wants just so long as the man raping her can claim not to have noticed."¹²³ Courts' privilege of ignorance regarding battered women is epistemological both because it stems from the nature of judges' knowledge of courts' institutional demands, and because it relates to cultural understanding of domestic violence.

1. Intractable Incoherence and Schneider's, West's and Dalton's Appeals to Education

Doctrine declining to remedy domestic violence seems to simply co-exist with cultural awareness, feminist-consciousness raising efforts and statutes against such violence. In calling for awareness or understanding as a basis for common law reform, Schneider, West and Dalton seek the very vantage point from which to reconcile intractable conflicts that discursive contradictions obviate. From Sedgwick's and Kennedy's points of view, no grounding exists from which to resolve the incoherence between presenting battered women in terms of an integrative discourse of acts, health, or legal core, or in terms of a separatist discourse of status, illness or legal periphery.

Schneider observes this problem first hand with respect to courts' use of expert testimony on battered women defendants in criminal cases:

The court . . . accords a woman's experience a group based "public" dimension rather than merely an individual, "private" subjective one. At the same time, perhaps it is not surprising that the content of what is deemed "objective" is an image of a

120. SEDGWICK, *supra* note 14, at 7.

121. *Id.* at 8.

122. *Id.* at 8-9. See also, Eve Kosofsky Sedgwick, *Privilege of Unknowing, Genders*, No.1 (Spring 1988) 102-24.

123. SEDGWICK, *supra* note 14, at 8-9.

victimized, passive battered woman. Perhaps this is the reason the court sees it as objective and acceptable.¹²⁴

Schneider's argument harkens back to Sedgwick's critical point that "the phenomenon of the 'open-secret' does not, as one might think, bring about the collapse of those binarisms and their ideological effects, but rather attests to their fantasmatic recovery."¹²⁵ Coming out of an abusive relationship to sue one's abuser does not challenge the binarisms private and public, health and illness, or active and passive, that shape understanding of battered women. To the contrary, it re-asserts the salience of these pairings. Courts maintain an epistemological privilege of ignorance by demanding to be educated in terms intelligible to the legal system, such as expert testimony on a syndrome that forms the basis for analogies of battered women's claims to previously established claims. Any knowledge imparted to educate judges about the social realities that victims of domestic abuse face is complicated by this set of binarisms and fractured by the intractable conflicts in consciousness such binarisms reflect.

Intractable contradictions operate in lawsuits between impulses towards rules or standards, towards separatist or integrative social implications. If there is no metatheory with which to adjudicate between modes of reasoning in intractable conflict, then there is no way to police adjudicators' constant slippage between inconsistent modes of reasoning and between discourses surrounding battered women that have contradictory ideological effects. The impossibility of differentiating among positions maintained for sake of the common law's legitimacy and positions maintained to preserve a relation of domination between men and women, or courts and victims of domestic violence, preserves the position of ignorance. Because the intractability of contradictions makes efforts to preserve institutional authority indistinguishable from efforts to continue the disadvantage of women, fundamental contradictions enable a privileged ignorance that cannot be erased through enlightenment.

In the case of common law judges, the prior norms and practices embedded in the professional orientation Dalton speaks of include not only norms for responding to domestic violence, but also complex, deep-rooted norms for responding to legal claims in relation to precedent, for making certain presumptions about the objectives and capacity of claimants, and for protecting courts' institutional authority through adherence to these norms. In cases where a litigant claims exception (because of abuse) to an established common law rule (like the statute of limitations), the authority of precedent and of an individual judge's rulings relies on conformity with

124. Schneider, *Describing and Changing: Women's Self-Defense Work*, *supra* note 2, at 220.

125. SEDGWICK, *supra* note 14, at 67 (quoting D.A. MILLER, *THE NOVEL AND THE POLICE* 207 (1989)).

the norms and practices that do not offer an effective remedy for domestic violence. Linking enlightenment successfully to reform at common law would require alignment of interpretive fidelity and women's interests – proximity between law as compulsion of the text and social justice for victims of domestic violence. Even the most thorough education of judges on the nature and effects of domestic abuse funnels into this quagmire of pre-existing personal and institutional knowledge, of discursive demands that makes the results of Dalton's prescription of "helping or challenging [judges] to look at their cases through new eyes"¹²⁶ deeply uncertain.

West states that "legal culture has committed a perceptual error."¹²⁷ She personifies legal culture. She imagines it as a collective of legal actors who can be educated to erase the perceptual error and reform the law. But the perceptual error West observes is not simply made by legal actors who can be educated to avoid the error. Rather, a perceptual error constitutes legal culture. There is not a legal culture to be educated separate from legal discourse developed with and through the perceptual error. There is not sufficient distance between legal culture, legal discourse and long-standing perceptual error to insert corrective education. In their professional capacity, legal actors are individuals constituted by legal discourse that necessarily favors appeals to precedent in perpetuation of an abstract rule of law over appeals to substantive justice. Even (or especially) the visions of justice to which West aspires require abstract rules of law for effectuation and enforcement.

2. Objection and Response: Constraints on the Margin of Feminist Adjudicators

An objection could be raised that privileged ignorance of domestic violence is fueled simply by strong, mainstream interest in representing male-female relations as pacific, friendly, and patriarchal, with abuse as an exception that is pathological. Demand for an exception to the statute of limitations for battered women threatens the dominant view of male-female relations because such a doctrinal development would force recognition of unwanted knowledge, piercing denial. This interest explains choices adjudicators make within malleable, contradictory, two-sided legal rhetoric. Judges from the feminist margin who oppose this view of male-female relations and reject privileged ignorance of domestic violence could obviously choose to side with argumentative tropes favorable to battered women. Therefore, raising awareness of domestic violence to recruit more adjudicators to this feminist margin must be a fruitful strategy.

This section responds to this line of objection. The choice of judges from the feminist margin to rule based on the argumentative trope before them that favors a battered woman claimant is constrained in that the

126. Dalton, *When Paradigms Collide*, *supra* note 2, at 274.

127. West, *The Difference in Women's Hedonic Lives*, *supra* note 2, at 153.

interests that are threatened by demand for pro-feminist exceptions to current doctrine are more expansive than just interest in a certain view of male-female relations. Feminist judges are caught between the progressive potential of a single decision, and protecting individual and institutional capacity to generate and administer sustainable rules—a capacity essential to any reform effort, to feminist judges' ability to protect the disadvantaged and punish their abusers.

On the one hand, the most that a feminist adjudicator can do is rule based on one side of paired argumentative tropes applicable to any given issue where she finds that existing legal rules (or established exceptions) are not determinative. The argumentative tropes offered in a case are generated in response to precedents with sufficient proximity to applicable doctrine, and therefore, in many cases have only limited, questionable, and sometimes reactionary effects. The application of one solution must be better for battered women than application of the other solution. The discussion in Parts II and III above of contradictions pervading tort claims of battered women demonstrates the complexity of establishing this condition.

On the other hand, interest in the ability of legal discourse to denounce one of two, paired argumentative tropes by supporting its correlative with appeal to an abstract rule of law must be held by the feminist margin because no common law reform is possible without sustained belief in a rule of law to effectuate it. As Holmes's quotation and West's response above show, an argument supported by appeal to substantive justice and an argument supported by appeal to precedent do not have equal weight. A solution that can be supported with rhetoric of fidelity to a rule of law is necessarily more privileged than a solution supported with rhetoric of substantive justice because all visions of substantive justice require enforcement.

The myth of the rule of law sustains the possibility of substantive justice as an external referent to which legal actors can appeal. Courts must harbor their privileged ignorance of deeply pervasive social injustice towards women because courts' potential to have a relation to social justice depends on proximity between adherence to an abstract rule of law and the visions of justice courts can realize. Ignorance of social problems or of injustice helps to mask the elusiveness of abstract rules. Courts' privileged ignorance regarding pervasive violence against women can be viewed as vital to the maintenance of their institutional authority.

The open secret of domestic violence continues to co-exist with public condemnation of such violence by feminists, legislators, and others. The open secret that an objective rule of law is socially constructed¹²⁸ by tools

128. Kennedy writes of anxiety surrounding the idea of the lack of an objective rule of law evidenced by denial (by judges and by the public at large) of the possibility that it may not exist. "We call it denial when we have the idea that if the speaker recognized the truth about an external fact, or about his own desire, emotion, opinion, or intention, he would

that preserve a status quo involving domination of men over women co-exists with the requirement that law be both transcendent justice and fidelity to precedent. The abstract rule of law's simultaneous indispensability¹²⁹ and susceptibility to deconstruction fuels social and institutional need for the "secret" component surrounding not only the rule of law itself, but also injustices to women such abstraction fails to remedy.

experience painful anxiety." KENNEDY, *supra* note 15, at 193. Kennedy finds it common knowledge that the naïve view of an objective rule of law – administered independently from judges' subjective motives – is a myth. *Id.* at 192. Yet, the public and judges themselves maintain a hopeful fantasy that adjudicators can both articulate and dispense transcendent social justice and also assign the "correct" legal answer in disputes between particular parties. *See id.* at 207-09. Kennedy continues: "The speaker resolves the [anxiety-producing] conflict and dispels the anxiety by 'falsely' getting rid of one of the two conflicting elements." *Id.* at 194. To avoid realizing the nonexistence of an objective vantage point from which to choose between conflicting impulses, the public denies the possibility that an abstract rule of law is elusive. However, this anxiety and denial that Kennedy writes of are not, as Kennedy implies, psychological problems to be excavated. They are well-founded. This denial is not just of the elusive nature of the rule of law. It is of the bind, the paradoxical trap that the rule of law is at the same time elusive and crucial to effectuating the type of normative justice that leftist, feminist legal actors envision.

129. In addition to being necessary for the development and enforcement of feminist (as well as conservative) visions of justice, an abstract rule of law sustains the distinction between a maker of law and an interpreter or enforcer of law on which the theory of separation of powers is based. Pierre Schlag writes:

Once the law maker and the law interpreter are separated there must be something that links the two – something that ensures that the law made corresponds (at least roughly) with the law interpreted. . . . Get rid of that "something" – get rid of an "objective" law that binds, at least roughly, the law made with the law interpreted – and the rule of law collapses.

Pierre Schlag, *Authorizing Interpretation*, 30 CONN. L. REV. 1065, 1069-70 (1998).

America's system of government ostensibly intends to check adjudicators' power by limiting that power to interpretation of law created either by the legislature or through precedent. The success of this intention depends upon the existence of a "law" that can be passed from the creator to the interpreter. Schlag continues, "the distinction between the law maker and the interpreter is marked out by the thing called 'law' itself – the law cast as a stable, objective identity. This 'objective' law serves as the marker by which the law maker and the law interpreter are separated in their activities." *Id.* at 1070. Without an abstract, objective rule of law the architecture of separation of powers becomes nonsensical.