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From the Selected Works of Katharine K. Baker

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Dialectics and Domestic Abuse (reviewing Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* (2000))

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Book Review

Dialectics and Domestic Abuse

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Battered Women and Feminist Lawmaking. By Elizabeth M. Schneider.*
New Haven: Yale University Press, 2000. Pp. 317. \$29.95.

In *Battered Women and Feminist Lawmaking*,¹ Elizabeth Schneider examines the legal treatment of battered women. It is a book rich in history, ideology, and challenge, which takes as its major goal the exploration of the relationship between the theory of feminist lawmaking and the practice of representing battered women. Schneider sees this relationship as a dialectic, with theory influencing practice and practice influencing theory, in order, she hopes, to arrive at a kind of synthesis that can better protect against the dangers of violence between intimates. In describing this dialectic, she explores feminist theories of rights, equality, and autonomy.

At the heart of Schneider's dialecticism is the now well-worn but still crucially important feminist understanding that the personal is political. As I read the book, the following hypothetical dialectical exchange kept repeating itself in my head. Says the very committed, well-motivated, earnest, feminist battered women's advocate to the woman who has been the victim of abuse: "We want you to understand that the reason that he beat you is because he has gender power. He wants control over you as a woman because he is a man. It feels personal to you, but it is really about gender politics." To which the equally earnest battered woman who, as is often the case, has suffered through years of horrific physical and emotional

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1. ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000).

abuse and fear, responds: "And I want you to understand that what you are talking about is my life. It is my family, my community, my relationship. Who am I without these things? How are your politics going to help my life?"

The fact that this exchange seems to keep repeating itself in a variety of different contexts involving battered women says something rather pessimistic about the process of Schneider's dialectic. At this point, one would hope that the feminist political vision had incorporated more of the voice of battered women and that battered women would be more able to view their lives as at once personal and political. Schneider critically explores the tension between the personal and the political. She is at her best when doing so. Instead of reaching for synthesis, however, she seems to call for retrenchment back into the purely political. At the end of her introduction, she announces her conclusion succinctly: "I conclude with the need to reaffirm the original vision of violence and gender equality that animated activist and legal work"²

After an explication, in Part I of this Review, of Schneider's comprehensive and sophisticated analysis of the issues surrounding battered women, I build on Schneider's analysis but draw a different conclusion. Part II argues that part of the reason that there has been too little synthesis of the political and personal visions is that legal feminism has resisted developing an appreciation for the role of personal relationships. Developing this appreciation requires reevaluating the roles that relationships, privacy, and men play in many women's lives. This means first coming to terms with some normative vision that includes an understanding of relationships. Feminism must recognize that many women still seem to want relationships more than they demand symmetrical distributions of economic and social power. Second, feminism must be more willing to evaluate the positive role that privacy can play in relationships. Privacy is something that most people appear to want in relationships. Accordingly, it may be unfair and counterproductive to expect battered women simply to relinquish their privacy in the name of politics. Third, coming to terms with the role of relationships in our lives means coming to terms with the likelihood that women cannot solve the problem of domestic violence on their own. If what women want is a world in which personal relationships can be meaningful and interdependent, then attacking the problem of domestic violence has to be about changing men as much as it is about empowering women. The psychological work being done with men in the area of domestic violence is political work even as it is personal work. Unless the masculine psychology that condones

2. *Id.* at 9.

aggression is changed, battered women will be forced to choose between safety and involvement in personal relationships.

Elizabeth Schneider has done feminism a great service by writing this book. With diligence and honesty, she details just how complex and difficult these issues are. Any meaningful proposal to help battered women must wrestle with the paradoxes that she carefully explains. Any thoughtful analysis of feminism must understand the tensions between theory and practice. This Review is an attempt to reconcile some of the dilemmas that Schneider presents. Although it suggests an alternative course to the one Schneider prescribes, it wholeheartedly adopts Schneider's belief in the dialectic. Taking that dialectic seriously means formulating new, not simply rejecting old, understandings of personal relationships, privacy, and gender.

I. SCHNEIDER'S DIALECTICS

For anyone who has wondered why domestic violence remains such a prevalent problem, Elizabeth Schneider's book is an excellent place to start. As one who from the beginning of her legal career has been at the forefront of both the theoretical discussion³ and practical lawyering⁴ surrounding battered women, Schneider is ideally suited to explore what she calls the "tensions and paradoxes"⁵ in this movement. She does so thoroughly.

The book is broken into four parts, all but the last containing three chapters each. The first part, "Domestic Violence as a Social and Legal Problem," starts with a brief introduction and then dives into history. Relying on the work of Linda Gordon⁶ and Reva Siegel,⁷ Schneider shows not only that domestic violence has always been a part of Western culture,⁸ but that attempts to redress the problem legally have always run into the same sort of obstacles American reformers face today. During the nineteenth century, the legal understanding of marriage changed from a

3. Schneider has written extensively on the subject. *E.g.*, Elizabeth M. Schneider, *Epilogue: Making Reconceptualization of Violence Against Women Real*, 58 ALB. L. REV. 1245 (1995); Elizabeth M. Schneider, *Introduction: The Promise of the Violence Against Women Act of 1994*, 4 J.L. & POL'Y 427 (1996); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991) [hereinafter Schneider, *The Violence of Privacy*].

4. Schneider has supervised battered women's advocacy clinics, trained judges and lawyers, participated on commissions, and prepared critical reports. SCHNEIDER, *supra* note 1, at 6.

5. *Id.* at 7.

6. LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* (1988).

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

8. According to early Roman law, a man could not only beat his wife with impunity, he could kill her if she dishonored him or put his property rights in jeopardy. SCHNEIDER, *supra* note 1, at 13 (citing R. EMERSON DOBASH & RUSSELL P. DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* 34-36 (1979)).

relationship of hierarchy, in which men had a legal right to control their wives physically, to a relationship of companionship. With that move from hierarchy to companionship came a veil of privacy that blocked the law's willingness to accept responsibility for domestic violence. Even when the law was willing to accept jurisdiction over domestic disputes, the most it was willing to do was punish the perpetrator. But then, as now, punishing the perpetrator without providing some sort of economic and social support for the victim left victims with an untenable choice. As Linda Gordon observed, "[g]iven a choice, [nineteenth-century domestic violence victims] might have preferred economic aid to prosecution of wife-beaters."⁹

The essentially feminist nature of domestic violence work becomes obvious in this historical account because domestic violence is visible as a problem only when feminists have a voice. Thus, it was visible as an issue in the late nineteenth and early twentieth centuries, but, with no vibrant feminist community to articulate its harms, it died out as an issue for most of the middle part of the twentieth century. It was not until the early 1970s, with the rise of the second wave of feminism, that activists and newspapers began to make the issue real again.

Schneider describes the 1970s activism around domestic violence with admiration.¹⁰ Many domestic violence activists got their start in consciousness-raising groups, and they viewed the problem of battering as an inherently political problem. Battered women's shelters and organizations were sites for political organizing, and battered women were seen as political allies, not clients.¹¹ Much of this has now changed. As more state money flowed into battered women's programs and as more sociologists and psychologists started studying the issue, battered women's shelters became places that provided services to clients, rather than places of activism. Battered women became psychologically damaged victims, not political recruits. The families in which the violence occurred became particular objects of study, not microcosms of a broader system of gender power. In short, what started as a political problem in the 1970s has become once again a personal one.

In the last chapter of Part I, "Dimensions of Feminist Lawmaking," Schneider dives into the theoretical dimensions of battering, particularly the relationship between rights and battered women's advocacy. It is in this chapter that she introduces the critical importance of *State v. Wanrow*,¹² a case that Schneider helped litigate.¹³ Although *Wanrow* did not involve violence between intimates, it was formative in establishing the need to

9. *Id.* at 18 (quoting GORDON, *supra* note 6, at 257).

10. *Id.* at 20-22.

11. *Id.* at 21-22.

12. 559 P.2d 548 (Wash. 1977).

13. SCHNEIDER, *supra* note 1, at 30.

integrate a distinct women's perspective into feminist lawmaking. Yvonne Wanrow was a Native American woman who killed a white man. She killed the man after he entered her babysitter's home, uninvited, while she and her children were there. Wanrow was on crutches at the time and had reason to believe that the intruder had already tried to molest one of her children. She shot him. In articulating Wanrow's claim of self-defense, her advocates needed to explain why it was necessary to think about the "self" and "defense" of a temporarily disabled woman of color as not necessarily the same as the "self" and "defense" associated with men. Feminist theory provided this explanation. A feminist understanding of Wanrow's "self" included incorporating her role as mother and caretaker, and a feminist understanding of her ability to defend herself included appreciating her physical inability to counter his strength with anything less than lethal force. She was at once more than one person as traditionally defined because her "self" included her children, and less able to defend herself as "defense" had been understood because of the physical advantage that her attacker had over her. In articulating Wanrow's perspective, Schneider and the other lawyers who worked on her case helped make the law appreciate that equal treatment did not necessarily mean identical treatment.

From *Wanrow*, Schneider moves on to a more abstract discussion of rights as they fit into the dialectical processes of lawmaking and politics. She notes the critical role that rights rhetoric can play in shaping public discourse and connecting individuals to a collective. By claiming a right that is held by many, an individual becomes part of that many. It is in this way that rights rhetoric is so important to the battered women's movement. As Schneider suggests, "[w]omen's rights discourse has linked the specific experience of women with the universal claim of rights—a potentially radical and transforming notion."¹⁴ Without the collective identity that rights foster, Schneider argues, it is unlikely that the law would have started looking inside the family to find the violence that connects all those women claiming a right to be free from it.

Nonetheless, claims of right have their limitations, as Schneider acknowledges. Drawing on the lessons of a small town in Hawaii that has developed a particularly feminist approach to domestic violence, Schneider notes that, notwithstanding the power that rights rhetoric engenders, rights rhetoric often fails to provide meaningful help. Rights help to connect women with something other than their private relationships, but when that connection is to nothing more than a legal system with its promise of liberal autonomy, women may well end up preferring the violence of their private relationships.¹⁵ There is an emptiness to the law's promise of rights. Rights

14. *Id.* at 40.

15. *Id.* at 52.

give women freedom from violence, but fail to give them anything to which they can belong. This means that "[t]he rights claim in law is inevitably limited in practice."¹⁶

Part II of Schneider's book is entitled "Theoretical Dimensions of Feminist Lawmaking." Each of the three chapters in this part introduces different theoretical dilemmas for the battered women's movement. The first is the fundamental problem of definition. What is it that people mean when they say a woman has been battered? By battery, does one mean only physical abuse, even though many of the women involved describe emotional abuse and fear as far more damaging and frightening than any physical contact?¹⁷ Are women who are able to extract themselves from violent situations not really battered? What about the problem of essentialization? The community of battered women is a heterogeneous one, spanning class, race, and geography.¹⁸ Not surprisingly, the strategies and reactions of women who are abused vary significantly. Asian and Latina women often do not report battery for fear of bringing shame on their families.¹⁹ African-American women often do not report battery because history has taught them that the police will neither take them seriously nor afford any reported batterers the rights that they are due.²⁰ Victims of lesbian battering are often ignored altogether.²¹ This cultural variation suggests a problem with trying to encapsulate the experience of battered women at all. Yet it is politically essential to try to capture the experience of battered women as a distinct harm because, if battered women's advocates fail to develop a working definition of the problem, they cannot demand the resources and mobilization that they need to combat the violence. Hence a paradox: Battered women's advocates realize that it is at once impossible and essential to define the problem of battery.

The second theoretical dilemma that Schneider addresses is a common one for feminists: agency.²² The debate over battered women's agency is

16. *Id.* Schneider makes this statement in reference to a quotation by Sally Merry, an anthropologist who has studied the same Hawaiian town. See Sally Engle Merry, *Resistance and the Cultural Power of Law*, 29 LAW & SOC'Y REV. 11, 21 (1995).

17. SCHNEIDER, *supra* note 1, at 65.

18. *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1547 (1993) [hereinafter *Developments in the Law*].

19. SCHNEIDER, *supra* note 1, at 64.

20. Lynora Williams, *Violence Against Women*, BLACK SCHOLAR, Jan.-Feb. 1981, at 18, 22 ("[B]lack men will be dealt with more severely . . .").

21. SCHNEIDER, *supra* note 1, at 68-70.

22. Kathryn Abrams has written about this issue most elegantly. See generally Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999) (exploring how women exercise some agency even within profoundly oppressive contexts, such as sexual harassment, forced pornography, and domestic violence); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (analyzing the debate within the feminist community over pornography regulation).

probably best exemplified in the debates about the question “Why didn’t she leave?” What does women’s continued presence in battering relationships say about their ability to act as their own agents? If they feel compelled to stay, does that make them incapable of protecting themselves? To help explain why many battered women do not leave, feminist lawmakers began to introduce evidence of Battered Women’s Syndrome,²³ a combination of psychological reactions to battery that make women feel powerless to leave an abusive relationship. Battered Women’s Syndrome helps to explain why some women stay in battering relationships, but it hardly answers questions about women’s agency. The legal criticisms of Battered Women’s Syndrome explain why. Relying on the syndrome re-essentializes women as helpless in a way that contributes to stereotypes,²⁴ often excludes women of color,²⁵ and can easily backfire when the facts demonstrate (as they often do) that women actually exercise some agency.²⁶ Schneider concludes, as have many feminists before her,²⁷ that a “portrayal of women *as solely* victims or agents is neither accurate nor adequate to explain the complex realities of women’s lives.”²⁸ Thus, a second paradox: Battered women are neither free agents as the law traditionally construed that term, nor victims incapable of acting on their own behalf. The reality lies somewhere in between.²⁹

The final theoretical dilemma that Schneider tackles is the problem of privacy. She declares that the “rhetoric of privacy . . . has been the most

23. Battered Women’s Syndrome is a phrase that evolved from one coined by feminist psychologist Lenore Walker. LENORE E. WALKER, *THE BATTERED WOMAN* 19 (1979) (using the phrase “the battered woman syndrome”); LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 35-38 (1989) (using the phrase “Battered Woman Syndrome”).

24. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 38-43 (1991).

25. See Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow To Support the Substance*, 38 HOW. L.J. 297, 302-03 (1995) (arguing that African-American women must overcome cultural stereotypes that they are domineering and masculine before they can even use the “learned helplessness” theory built into Battered Women’s Syndrome).

26. See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 397 (1991) (documenting cases in which battered women kill their abusers while the abusers are sleeping, through contract killings, or in other ways that suggest the battered women are exercising agency inconsistent with the idea of learned helplessness); see also David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 112 (1997) (arguing that “[b]ecause . . . ‘learned helplessness’ theory places so much emphasis upon the woman’s inability to rescue herself from the abusive situation, any proactive measures on the woman’s part may thrust her outside of the protective realm of syndrome theory”).

27. See generally Katharine K. Baker, *Gender, Genes and Choice: A Feminist Analysis of Evolutionary Biology and Law & Economics* (Feb. 8, 2001) (unpublished manuscript, on file with author); *supra* note 22 (discussing Kathryn Abrams’s work on agency).

28. SCHNEIDER, *supra* note 1, at 82.

29. The controversy surrounding Battered Women’s Syndrome also highlights Schneider’s first theoretical dilemma, the problem of definition. Battered Women’s Syndrome essentializes “battered” in such a way as to exclude many victims of abuse from the definition of “battered women.”

important ideological obstacle to legal change and reform.”³⁰ By defining domestic abuse as a private problem, the law has made it harder to conceptualize the problem as one for which all people have a social responsibility.³¹ By endorsing the notion that family interactions are somehow different from other interactions, and that therefore the law should be less willing to regulate them, the law has tacitly approved the violence that can permeate family life. Schneider cites *DeShaney v. Winnebago County Department of Social Services*³² as an important example of how this legal treatment of family privacy keeps the law from providing the help that women need. In *DeShaney*, the Supreme Court held that the state had no affirmative duty to protect a child, Joshua DeShaney, who had been repeatedly beaten by his father, even though the state had been investigating the case for several years.³³ Since *DeShaney*, women abused by their partners have been treated in much the same way as was Joshua DeShaney, denied the right to claim that the state has a duty to protect them from the physical harm inflicted by people within the home.³⁴

Schneider ends this chapter, however, with warnings about simply making public that which has been thought of as private.³⁵ She suggests that the politicization of and publicity surrounding battery has come with a cost, namely professionalization. With professionalization came increased accounting and regulation and a diminished ability to approach the issue as one of gender politics. Battered women’s advocates defined the problem of abuse with enough particularity to bring the issue into public focus, but the bureaucratization that followed the public focus ironically reprivatized the issue. The social workers that began providing services and the dispute resolution processes implemented to help handle domestic disputes once again defined the issue as one of family and privacy, not one of equal rights. Hence the third theoretical dilemma presents a third paradox: By making domestic violence an increasingly public concern, advocates once again made it a private matter.³⁶

The last two parts of Schneider’s book, “Implementing Feminist Lawmaking” and “Aspirations, Limits and Possibilities,” are less

30. SCHNEIDER, *supra* note 1, at 87.

31. *See id.* at 89.

32. 489 U.S. 189 (1989).

33. *Id.* at 192-93, 195.

34. *See* James T.R. Jones, *Battered Spouses' Section 1983 Damage Actions Against the Unresponsive Police After DeShaney*, 93 W. VA. L. REV. 251 (1991).

35. With a perfunctory cite to Anita Allen’s work, *see* SCHNEIDER, *supra* note 1, at 89-90, 257-58 n.11 (citing ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 70-72 (1988); Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 746 (1999)), Schneider acknowledges that protecting some notion of privacy may be important, but, given the tone of the chapter, it is hard to believe that her heart is in this acknowledgment. The importance of protecting some notion of privacy is discussed *infra* Section II.B.

36. This is, essentially, the political-becoming-personal problem that Schneider refers to earlier. *See supra* text accompanying notes 1-2.

theoretical than the first but no less important. It is in the last two parts that she provides concrete examples of what happens in jury boxes, judges' chambers, and law offices when battered women appear in court. The first chapter of "Implementing Feminist Lawmaking" gives an overview of how many of the problems that battered women encounter are problems common to other feminist legal struggles. Thus, although women have been given opportunities to voice their experiences in court, they are often not heard. Why they are not heard is an important question. Schneider suggests that people do not hear women because it is simply too threatening to do so.³⁷ Believing women, whether they are talking about sexual harassment, rape, or domestic violence, requires acknowledging the reality of violence. For women, this can feel too frightening; for men, it can feel too accusatory.

It is not only because women's stories are threatening, however, that judges and jurors disbelieve them. As Schneider explains, because the stories that battered women tell often do not conform to our cultural script for how truth emerges, they often seem false.³⁸ Battered women, like other victims of abuse, often tell their stories in bits and pieces, and the story changes as it comes out. This should not necessarily suggest that the women are lying. Various psychological devices readily account for why a woman's story would not emerge as one solid, permanent version of the truth.³⁹ Expert testimony can help educate the jury about how the truth is likely to emerge from victims of abuse, but expert testimony creates the same essentialization problem analyzed previously: An expert can tell the jury how a typical battered woman might respond in a manner different from that prescribed by the cultural script, but when the behavior in question fails to conform to either the cultural script or the alternative, expert-testimony script, the jury is still left disbelieving the woman.⁴⁰

In the next two chapters of "Implementing Feminist Lawmaking," Schneider tackles the two most prominent legal issues in the battered women's movement. The first is the problem of battered women who kill their abusers. The second is the problem of battered women struggling to retain custody of their children. Quoting Martha Mahoney, Schneider

37. SCHNEIDER, *supra* note 1, at 103 ("[I]ssues that women are raising . . . are extremely threatening and bring conflict into the open.").

38. *Id.* at 106-08. Schneider relies heavily on the work of Kim Lane Scheppelle for this analysis. See Kim Lane Scheppelle, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123 (1992); Kim Lane Scheppelle, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095 (1987).

39. The abuse itself creates patterns of denial and distancing that keeps the woman from being in touch with what really happened. See sources cited *supra* note 38.

40. Katharine K. Baker, *A Wigmorean Defense of Feminist Method*, 49 HASTINGS L.J. 861, 869 (1998) ("Syndrome evidence [often] backfires because it allows the jurors to substitute one stereotype for another. . . . [W]hen a victim fails to conform to the syndrome script, the jury dismisses her as readily as it would dismiss victims who did not conform to the cultural script.").

acknowledges that "the needs of battered women in custody cases seem almost directly inverse to self-defense cases."⁴¹ In the cases of women who kill, advocates must prove that the killing was the result of a kind of a dysfunctionality (something like "learned helplessness"⁴²) engendered by the abuse. In cases of women fighting to retain custody, advocates must prove functionality.

Schneider argues that the key to helping battered women who have killed their abusers is to see their actions as reasonable in light of their circumstances, not psychotic or the result of particularized weakness.⁴³ This position makes her particularly wary of Battered Women's Syndrome and the New Jersey Supreme Court's decision in *State v. Kelly*,⁴⁴ one of the first cases to admit expert Battered Women's Syndrome evidence.⁴⁵ She argues that the law should treat the battered woman who kills her abuser just as the law tends to see the man who, in the "heat of passion," kills his wife or her lover.⁴⁶ Just as judges tend to understand his circumstances sufficiently to view him sympathetically, even when they cannot condone his actions, so advocates too must work to make judges and juries understand a battered woman's circumstances sufficiently for them to view her sympathetically, without viewing her as a complete victim. Not only will this strategy better embody what Schneider calls "[t]he equal rights framework,"⁴⁷ it will also allow women to rid themselves of the victimization stigma and the essentializing problems that have accompanied the use of Battered Women's Syndrome.

Schneider seems somewhat less clear about how to help battered women fighting to retain custody of their children. She argues that a father's abuse of the mother must be relevant in determining whether the father is entitled to custody, though she does not say whether this principle should follow because batterers will make bad fathers,⁴⁸ because batterers do not deserve custody regardless of what kind of fathers they would

41. Mahoney, *supra* note 24, at 49, *quoted in* SCHNEIDER, *supra* note 1, at 171.

42. *See id.*

43. SCHNEIDER, *supra* note 1, at 130-42.

44. 478 A.2d 364 (N.J. 1984).

45. SCHNEIDER, *supra* note 1, at 127-32.

46. *Id.* at 116-17.

47. *Id.* at 118. At times throughout the book Schneider seems to view this "equal rights framework" as the essence of feminist theory. She never defines, however, what "equal rights" means.

48. One study found that seventy to eighty percent of men who beat their wives also beat their children, *Developments in the Law*, *supra* note 18, at 1608 (citing Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 158, 162 (Kersti Yllö & Michele Bograd eds., 1988)), but custody determinations are not usually made on this kind of statistical evidence. Consider the well-known custody case over O.J. Simpson's children in which the trial court ruled irrelevant any evidence of domestic abuse or murder. *See Simpson v. Brown*, 79 Cal. Rptr. 2d 389, 392 (Ct. App. 1998). Although the trial court's decision was overturned on appeal, the appellate court did not hold that evidence of domestic abuse necessarily defeats a claim for custody. *See id.*

make,⁴⁹ or because to allow them to retain custody presumably involves some continuing contact with the mother.⁵⁰ She notes with sympathy the well-publicized case of Hedda Nussbaum, who, some argued, should have been prosecuted along with Joel Steinberg for the murder of their daughter.⁵¹ Steinberg badly beat both Nussbaum and their daughter, but some feminists thought that Nussbaum should have been held responsible for failing to remove the child from the abusive environment. Battered women's advocates, with whom Schneider aligns herself, suggest that blaming Nussbaum was an archetypal example of blaming the victim.⁵²

Schneider sees a parallel problem in the case of Susan Smith, who killed her two- and four-year-old sons because her boyfriend did not want the burden of children. She suggests that the public failed to appreciate Smith's dilemma. From early childhood Smith had been taught that romantic love was the most important part of a woman's life. Caught between romantic love and motherly love, Smith chose romantic love. Without endorsing Smith's actions, Schneider suggests that a culture that celebrates romantic love to the extent that ours does shares responsibility for women who have difficulty protecting their children from the men whom those women are taught to love.⁵³

After recounting a litany of cases in which different state courts have addressed the problems of maternal custody for battered women, Schneider suggests that we cannot judge battered mothers' behavior fairly "[u]nless we place problems of motherhood and battering within a framework of gender socialization and subordination."⁵⁴ Schneider does not discuss the role of the child in such an analysis. In order to protect women's interests without abandoning the state's interest in children, feminists must frame the custody question as one in which the child's interests and the mother's—but not the father's—are aligned. It is not clear how such a strategy would fit into Schneider's "equal rights framework."⁵⁵

49. This argument is rarely made in the custody context, because it suggests that parental behavior (or parental desert), not an assessment of what is in the child's best interest, should govern a custody decision.

50. Schneider does not consider this argument at all, but it is a potentially powerful one. If the only way to honor the father's parental rights is to endanger the life of another human being and to perpetuate tension between the parents, there is a strong argument that his interest in maintaining contact with his children is outweighed by society's interest in protecting the mother and the children. The most important determinant of children's mental health after divorce is the anxiety level of the custodial parent; if contact with parents increases the stress level of the custodial parent, it may well have a detrimental impact on children. See FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES* 75, 106-07 (1991).

51. SCHNEIDER, *supra* note 1, at 153-54.

52. *Id.* at 157.

53. *Id.* at 154-56 (citing Barbara Ehrenreich, *Susan Smith: Corrupted by Love*, TIME, Aug. 7, 1995, at 78).

54. *Id.* at 178.

55. *Id.* at 118.

In the fourth and final part of her book, "Aspirations, Limits and Possibilities," Schneider is more concrete. In "Engaging with the State," she explains how many battered women's advocates have moved from being suspicious of state involvement to being supportive of it. This shift helped secure passage of the Violence Against Women Act (VAWA), which provides significant funding for battered women's shelters, educational programs, and legal services. The move toward engaging with the state also led to greater support for mandatory arrest and no-drop policies that help ensure state prosecutions even when the domestic violence victim is hesitant to go forward.⁵⁶ In "Lawmaking as Education," Schneider looks with some specificity at the facts and personalities involved in the O.J. Simpson case and elucidates how both Judge Ito's evidentiary rulings and Marcia Clark's personal resistance to domestic violence (born of her own experiences with an abusive husband) helped obscure the battering that so fundamentally explained the facts of the case. She also discusses how the failure to secure a conviction in the Simpson case led to new public awareness of the problem of domestic violence and significant law reform proposals in many states. In "Education as Lawmaking," Schneider details experiences with her students in a class on domestic violence. She suggests that the legal classroom is an ideal way of trying to synthesize the problems she has been articulating by asking students to incorporate legal doctrine, hands-on experience with battered women, and their own understandings of how violence affects their lives to create new goals for the battered women's movement. The optimism that fills this chapter leaves one with the sense that Schneider remains fully committed to overcoming the tensions and paradoxes that the book presents.

Nonetheless, in her conclusion, Schneider emphasizes assimilation more than synthesis. She wants to eliminate the tensions and paradoxes by reembracing the original feminist vision that gave birth to the battered women's movement.⁵⁷ Thus, she wants to subordinate the importance of relationship in women's lives,⁵⁸ further eradicate what she calls the "tenacity" of privacy,⁵⁹ and mobilize battered women into the core of

56. True to her dialectic process, though, Schneider also explains how both VAWA and mandatory arrest policies have costs. VAWA rhetoric tends to construe domestic violence as a crime problem, not a problem of gender power, and mandatory arrest policies tend to deny women their agency and increase the risk of retaliation.

57. SCHNEIDER, *supra* note 1, at 9 ("I conclude with the need to reaffirm the original vision of violence and gender equality that animated activist and legal work.").

58. In her conclusion, Schneider condemns the culture that "raises young girls to 'stand by their man'" and that emphasizes marriage as more important for women than men. She also suggests that it is cultural conditioning, not the desire of women themselves, that leads some women to stay in abusive relationships. *Id.* at 231-32.

59. *Id.* at 87.

feminist sisters that they can still become. In the next Part, I suggest an alternative course.

II. COOPTATION OR UNDERTHEORIZATION

Throughout the book, Schneider emphasizes the need to integrate an “equal rights framework” into the battered women’s movement. Despite her theoretical bent, she never really defines what she means by this. In particular, she does not elaborate on what aspects of feminism or “equal rights” are most important to the battered women’s movement. When she writes about *Wanrow*,⁶⁰ it is clear that she believes that incorporating an equal rights perspective means incorporating how women’s subjective experiences of fear, violence, and autonomy may be different from men’s. In other instances, however, while careful to acknowledge women’s subjective experiences, Schneider discounts the importance of these experiences, arguing instead that women’s subjectivity is too much shaped by the patriarchal culture around them.⁶¹ When she calls for a renewed faith in the original feminist political vision, she seems to be calling for a renewed activism to dismantle that patriarchal culture.

The dismantling of patriarchy is a goal with which no feminist can disagree, but feminists may well disagree about what dismantling patriarchy actually means and how best to accomplish it. Schneider seems to suggest that the problems the battered women’s movement has encountered are the result of feminism being coopted, not feminism being undertheorized. This is somewhat unsatisfying to anyone familiar with feminist theory, because the question of whether the problem is one of cooptation or undertheorization may depend, in large part, on what Schneider means by feminist lawmaking and equal rights.

In this Part, I explore three areas that I suggest have been undertheorized, or at least too easily dismissed, in much feminist legal analysis of domestic violence. First, I argue that feminists must recognize the positive role that relationships play in our lives. Dismissing the positive aspects of relationships because many women find themselves in oppressive or violent ones can make feminist analysis appear blind to the actual needs and desires of many women. Ignoring the inevitability of relationships also leads courts to find pathology in women who fail to conform to traditional (and traditionally male) liberal notions of autonomy and independence. Second, I discuss the problem with dismissing privacy as a patriarchal construct that ineluctably harms women. Certainly, women

60. See *supra* text accompanying notes 12-13.

61. See, for instance, Schneider’s discussion of Susan Smith, summarized *supra* text accompanying note 53.

have been harmed by the law's refusal to redress violence perpetrated in "private," but to condemn the idea of privacy because it can shelter harm is to ignore the important and positive role that privacy can play for women. A world in which the law had no respect for familial privacy would be a world in which women had no space to forge their own intimacies and no protection from state efforts to manipulate women's roles as mothers. Finally, I suggest that feminism must do more than simply reveal the link between domestic violence and gender, and it must do more than demand punishment for domestic violence. It must work to transform the constructions of gender that excuse male violence. Transforming these constructions of gender will require working with abusers so that they come to internalize a personal understanding of how unacceptable domestic violence is. Thus, transforming gender means making the political personal, even as feminists make the personal political.

A. *Relationship*

In her recent article on patriarchy and inequality, Mary Becker suggests that the two most well-known and accepted feminist theories of equal rights are (1) formal equality, or liberal feminism, and (2) sex inequality, or dominance feminism.⁶² The former is most widely associated with Supreme Court jurisprudence and early feminist legal scholarship.⁶³ The latter is most closely associated with Catharine MacKinnon.⁶⁴ If one had to place Schneider's feminism in either of these camps, it would probably be placed in dominance feminism.⁶⁵ The inability of liberal feminism, with its emphasis on similar treatment and choice, to address the problems of

62. Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 32.

63. See *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1007-08 (1984) (arguing against sex-based distinctions unless they are based on differences in reproductive biology); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 351-52 (1984-1985) ("I continue to believe that the course upon which feminist litigators set out at the beginning of the 1970's—the 'equal treatment' approach... is the one best able to... support a more egalitarian social structure.").

64. See generally CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 32-45 (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*] (describing the myriad ways in which the notion of difference masks male dominance); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 106-27 (1979) (using sex inequality to define the dominance approach); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter MACKINNON, *FEMINIST THEORY*] (advocating an approach that forces the law to look at whether a given standard or practice subordinates women).

65. Schneider's reluctance to discuss with specificity the feminist theory on which she is building is a source of some frustration to the reader. Nonetheless, her emphasis on *Wanrow*, see *supra* text accompanying notes 12-13, and her recognition of the problems with concepts of "sexual symmetry or gender neutrality," SCHNEIDER, *supra* note 1, at 67, suggest that she is suspicious of the liberal feminist emphasis on similar treatment.

private violence is fairly obvious. The problem is not that the law fails to treat battered women the same as it treats battered men, nor that the law prevents women from leaving violent situations. The problem is that women do not severely abuse men⁶⁶ and women do not want or do not feel able to leave. Forcing the law to treat women and men similarly and giving women the choice to leave will not enable the law better to understand or eliminate domestic violence.

Dominance feminism, with its emphasis on eradicating subordination, might do more to help the plight of battered women. At a minimum, dominance feminism highlights how domestic violence perpetuates sex discrimination because it brings into relief men's power over women. A dominance feminism analysis suggests that men use violence, just as they use other forms of power, to perpetuate difference and thereby assert control over women.⁶⁷ The horrific stories throughout Schneider's book and other analyses of domestic violence show how men use violence to demarcate difference: A man needs to make sure his spouse or partner stays in her place, does her job, and does not try to be like or equal to him. Moreover, the strong correlation between battery and rape⁶⁸ supports dominance feminism's core tenet that men sexualize hierarchy.⁶⁹

Thus, dominance feminism may tell us much about what domestic violence is and how it operates. The problem is that it tells us very little about what to do about it. MacKinnon's focus is on getting women more power, equal power.⁷⁰ It is not at all clear, however, that power is what women want in this situation. MacKinnon, and quite possibly Schneider, seem to assume that with more power, women will be able to choose what they want. As Katharine Bartlett points out, this assumption in and of itself suggests more of an allegiance to liberal ideology than MacKinnon likes to

66. Women do hit men, *see infra* note 152 and accompanying text, but only very rarely do they inflict the kind of pervasive and serious injury that men inflict on women.

67. Psychologists Goldner, Penn, Sheinberg, and Walker argue that men use violence to reinforce gender. Virginia Goldner et al., *Love and Violence: Gender Paradoxes in Volatile Attachments*, 29 FAM. PROCESS 343, 351 (1990). Catharine MacKinnon argues that creating gender, or difference, was the defining moment for patriarchy:

[O]n the first day that matters, dominance was achieved, probably by force. By the second day, division along the same lines had to be relatively firmly in place. On the third day, if not sooner, differences were demarcated, together with social systems to exaggerate them in perception and in fact, *because* the systematically differential delivery of benefits and deprivations required making no mistake about who was who.

MACKINNON, FEMINISM UNMODIFIED, *supra* note 64, at 40.

68. *See, e.g.*, Mahoney, *supra* note 24, at 86.

69. Catharine A. MacKinnon, *A Feminist/Political Approach: Pleasure Under Patriarchy*, in THEORIES OF HUMAN SEXUALITY 65 (James H. Geer & William T. O'Donohue eds., 1987) ("Male dominance is sexual. Meaning: men in particular, if not men alone, sexualize hierarchy . . .").

70. "I say, give women equal power in social life. Let what we say matter, then we will discourse on questions of morality. Take your foot off our necks, then we will hear in what tongue women speak." MACKINNON, FEMINISM UNMODIFIED, *supra* note 64, at 45.

admit.⁷¹ If women need power because power enables choice, then power is important as a means of achieving choice, the liberal ideal. Yet, as suggested above, the liberal ideal hardly seems like the answer to domestic violence. The intransigence of the abuse is deeply related to feelings of interdependence, bonding, and love;⁷² ideals of autonomy, choice, and freedom do not speak very effectively to such issues.

It might be that if women had more social power, men would be too afraid to beat them for fear of retaliation, a kind of mutual-assured-destruction theory of domestic violence. After listening to the women who have lived through years of battery, though, one finds it hard to believe that what they want is the power to do this back. What they want is for it to stop.⁷³ They do not want to scare men as much as men scare them. They do not necessarily want to be in a position where they can just leave.⁷⁴ They want to be in relationships in which they forgive.⁷⁵ They may even want to be in relationships that involve some relinquishment of self, autonomy, and power.⁷⁶ And what is more, they are not alone. Women who are not in

71. Katharine T. Bartlett, *MacKinnon's Feminism: Power on Whose Terms?*, 75 CAL. L. REV. 1559, 1567 (1987) (reviewing MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 64) ("MacKinnon rejects liberal ideology because its assumptions [about choice] do not apply to women in our society; yet her assumption that achieving parity of power with men will enable women to freely determine and choose what we want suggests that at some deeper level she retains allegiance to this ideology.").

72. Schneider quotes extensively from RODDY DOYLE, *THE WOMAN WHO WALKED INTO DOORS* (1996). The end of the excerpt reads:

I mopped up my own blood. I lost all my friends, and most of my teeth. . . . Because I scorched one of his shirts. Because his egg was too hard. Because the toilet seat was wet. Because because because. He demolished me. He destroyed me. And I never stopped loving him. I adored him when he stopped. I was grateful, so grateful, I'd have done anything for him. I loved him. And he loved me.

SCHNEIDER, *supra* note 1, at 11 (quoting DOYLE, *supra*, at 175).

73. See Williams, *supra* note 20, at 22 ("[B]lack women know they don't want [the abuser] in jail—all they want is for the abuse to stop.").

74. Martha Mahoney observes that the women in her support groups "resisted defining the entire experience of marriage by the episodes of violence that had marked the relationship's lowest points. Our understanding of marriage, love, and commitment in our own lives . . . shaped our discussion." Mahoney, *supra* note 24, at 16.

75. One woman explained:

[M]y husband is an alcoholic. Things have been really bad these past few years. But we've been married thirteen years. And I have three children. For nine of those years, he was the best husband and father anyone could have asked for . . . I may have to leave. But if I do, I'm giving up on a father for the children, and I'm giving up on him. And I can't just throw away those nine years . . . I may have to decide to go. But I'm not going to do it lightly.

Id. at 21.

76. Robin West suggests that controlled subordination, a relinquishment of autonomy and power that stems from trust, not fear, may be deeply satisfying to both women and men. Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 201 (2000) [hereinafter West, *Hedonic Lives*] ("[W]hile we crave liberal autonomy and radical equality . . . we also crave—because we also need—the capacity to trust one another, including those who are stronger than we are. The weak and the strong are in fact interdependent in this society The capacity to safely depend on another . . . is pursued as pleasure. When we test the limits of our capacity to trust . . . we give

battering relationships and men who do not batter want these kinds of relationships too.⁷⁷ To address the problem of domestic violence, feminism must address what relationships are and how they operate. It cannot simply adopt the liberal reification of autonomy and thereby discount the positive potential of and desire for relationships. Relationships of any kind—platonic, sexual, or familial—can be emotionally and physically dangerous, but they may also be inevitable or at least desirable.

Psychoanalytic research from the past several decades has revealed just how necessary relationships are to a healthy mental life.⁷⁸ Relationships are as primary as the self,⁷⁹ and the fusion of self and other is altogether healthy.⁸⁰ Individuals seek “*contact qua contact*, interaction in and for itself, not contact as a means of gratifying or channeling something else.”⁸¹ People seek relationships because it is relationship, not the individual, that is primary to existence. Hence, the problem may not be, as Schneider suggests, that women value relationships too much. The problem may be that many men and the law itself do not value relationships enough.

Robin West suggests that this need and desire for relationships may be particularly powerful in women.⁸² The potential for and process of pregnancy mean that most women must embrace the notion of relationship. Women who have been or ever want to be pregnant know or at least contemplate, in a way men may never, a fundamentally nonautonomous state of being. When pregnant and just after, women are depended upon by the embryo and infant. In meeting that dependency, women abdicate their

expression to our desire to be able to trust someone who is strong and trustworthy—which may be a fully human, and not just female, need.” (emphasis omitted)). West also suggests that sex itself can and quite possibly should involve a relinquishment of self—a giving of self that purposefully rejects a sense of autonomy. Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1451 (1993) (“Ideally—and it may be an ideal worth holding on to—the ‘self’ is given with the giving of sex; there is no clear differentiation between the sex given and the giving and receiving self.”).

77. For a survey of men who argue that relationships provide men, as well as women, critical fora for interdependency, selflessness, and nonautonomous states of being, see LAURENCE D. HOULGATE, *FAMILY AND STATE* 39 (1988), in which Houlgate states: “The mere need of others in my family for my benevolent attention suffices for my obligation to give it.” See also MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 113 (1993) (explaining how the self-interests of family members blend together); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 629 (1980) (“Some of the values of intimate association depend on this sense of shared collectivity, the shared sense that ‘we’ exist as something beyond ‘you’ and ‘me.’”).

78. See STEPHEN A. MITCHELL, *RELATIONAL CONCEPTS IN PSYCHOANALYSIS* 30 (1988) (“The hallmarks of [a] healthy mental life . . . are . . . attained at least in part through relationship.”).

79. “There is no ‘self,’ in a psychologically meaningful sense, in isolation, outside a matrix of relations with others.” *Id.* at 33.

80. These findings are supported by the work of those who find that an exchange-oriented view of marriage is negatively correlated with marital satisfaction for both men and women. See ROBERT H. FRANK, *PASSIONS WITHIN REASON* 200 (1988).

81. MITCHELL, *supra* note 78, at 24.

82. West, *Hedonic Lives*, *supra* note 76, at 210.

autonomy. Martha Mahoney writes that “[o]ne of the most pervasive fictions in the case law is that women with children are individual actors.”⁸³ Men who invest heavily in caretaking, particularly in the caretaking of a completely helpless infant, may come to experience something like this lack of autonomy. If they do, they, along with many women, render themselves nonautonomous. This is so not only because others come to depend completely on them, but because in meeting the needs of dependent others, caretakers become dependent. “[C]aretakers . . . are tied into intimate relationships with their dependents. The very process of assuming caretaking responsibilities creates dependency in the caretaker—she needs some social structure to provide the means to care for others.”⁸⁴ Leaving aside the question of whether women’s quest for relationship is biologically driven and different from men’s because of women’s biological difference, the fact is that many women and arguably all caretakers have very powerful needs for relationship.

Recognizing this need for relationship is a problem for both liberal and radical feminism, because both of these strands of feminism, at their cores, reify notions of female autonomy and choice. As West notes, “[t]he goals the liberal and radical seek—increased freedom and increased equality, respectively—are surely intended to benefit . . . the well-being of autonomous creatures. These goals will simply not serve women, if women are not ‘autonomous.’”⁸⁵ The response of liberal feminists has largely been to deny that women are different from men with regard to relationship and autonomy.⁸⁶ The response of the dominance feminists has been to suggest that even if women are not autonomous, they should seek to become so and they will inevitably become so if they gain equal power. As West points out, though, this dominance view is just as assimilationist as any formal equality view.⁸⁷ It assumes that autonomy is what women want, and it assumes that because autonomy has always been what men, who have power, have wanted.

83. Mahoney, *supra* note 24, at 19.

84. MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 163 (1995). Fineman suggests that the solution to this problem is public sponsorship of caretaking, which would allow caretakers (usually women) to free themselves from private dependencies (usually on men). *Id.* at 231-33. It is not clear, however, that the financial freedom that Fineman’s vision offers women would be sufficient to end women’s tendency to enter into relationships. Women, particularly mothers, and possibly all caretakers, may want relationships for the emotional, personal and (albeit often limited) parenting support they give, as well as for the financial support that they provide. Katharine K. Baker, *Taking Care of Our Daughters*, 18 *CARDOZO L. REV.* 1495, 1519 (1997).

85. West, *Hedonic Lives*, *supra* note 76, at 211.

86. Thus, equality feminists have argued, for instance, that equality principles do not require employers to provide pregnancy-related leave. MARY BECKER ET AL., *CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 64-67 (1994) (discussing the debate over *California Federal Savings & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987)).

87. West, *Hedonic Lives*, *supra* note 76, at 211.

Becker and West both argue that a feminism that valued relationship more and autonomy and choice less would better serve women's needs.⁸⁸ The experiences of the battered women's movement provide ample support for their position. The liberal and radical assumption that autonomy is a goal that all human beings share is arguably the main assumption that has led the courts and society as a whole to ask the wrong question of battered women. If the law valued relationship more, it would never ask, "Why didn't you leave?" For anyone who values relationship, it is perfectly obvious why the battered woman didn't leave. She was in a relationship that she cared about deeply, through which she understood who she was, with which she helped situate herself in a community, and in which she was (maybe) raising her children.⁸⁹ She did not leave because leaving is often as frightening as staying. Women may also not leave because they know that by leaving they will provoke an aggravated rage in their abusers. However dangerous it is for a woman to stay, it may be more dangerous for her to leave.⁹⁰ Many of the self-defense cases reveal that abusers tracked down their partners and proceeded to beat them more severely upon finding them.⁹¹ This is what Martha Mahoney documents in her discussion of separation assault.⁹² Not all of the self-defense cases involve past evidence of separation assault, however, and some involve women who voluntarily resume relationships with their abusers.⁹³ Women may do this because their alternatives seem so limited, but that is precisely the point that the law needs to appreciate. As the experience of the Hawaii town demonstrates,⁹⁴ battered women may value connection more than they value safety. A potentially violent relationship may feel better than a life alone. If the law sees this preference as pathological, it may be because the law fails to appreciate just how primary relationships are to our lives.

88. BECKER, *supra* note 86, at 47 ("[C]ommunity, relationships and traditionally feminine qualities should be valued more and traditionally male qualities [i.e., autonomy, choice and power] should be valued less."); see West, *Hedonic Lives*, *supra* note 76, at 210-12 ("More than do men, [women] live in an interdependent and hierarchical natural web with others of varying degrees of strength. . . . [F]eminists should insist on women's humanity—and thus on [women's] entitlements—and on the wrongness of the dominant [male] conception of what it is to be a 'human being.'").

89. Naomi Cahn points out that the question "Why didn't she leave?" is particularly damaging to women seeking custody of their children because the fact that a woman did not leave leads judges to conclude that any claims of abuse she makes are false. Thus, judges see such women as uncooperative, "bad" parents who should not get custody. Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1084-85 (1991).

90. See Mahoney, *supra* note 24, at 83-92.

91. *Id.* at 83. As Mahoney points out, requiring that these women be in fear of imminent attack before justifying their attempts at self-defense, see *infra* text accompanying notes 99-106, ignores what the women themselves may know about their ability to extricate themselves from a violent situation.

92. Mahoney, *supra* note 24, at 83.

93. *Id.* at 85-86.

94. See *supra* text accompanying notes 15-16.

Seeing relationships as primary to the construction of self would also lead the law to ask the question that it has never really asked: "Why does he do this?" If relationship were the ideal, or at a minimum, considered a valuable state of being, the abnormality would be the person who destroys the relationship with relentless, life-threatening violence, not the person who values the relationship enough to withstand remarkable pain and abuse.⁹⁵ Schneider acknowledges that the law should focus more on why men hit and less on why women do not leave,⁹⁶ but she does not link the desired shift to acceptance of and support for relationship. Instead, Schneider seems to accept traditional feminism's reification of autonomy. She suggests that women who feel so strongly about relationships have been coopted by a sexist culture that overemphasizes the importance of relationship for women.⁹⁷ She is certainly right in pointing out the disconnect between the emphasis that popular culture places on the importance of love and relationship and the way in which the law seems to ignore what relationship might actually mean.⁹⁸ There is also a disconnect, however, between what traditional feminist theories seem to assume about the desirability of autonomy and what women actually experience as desirable.

Taking relationship seriously could also have a concrete doctrinal impact for battered women. The self-defense claims of battered women who kill their abusers are often defeated on imminence grounds. Traditionally, in order to make a valid claim of self-defense, "the defendant [had to] reasonably believe his [sic] adversary's unlawful violence to be almost immediately forthcoming."⁹⁹ Although this imminence requirement is generally thought to be a sound idea for self-defense doctrine,¹⁰⁰ it presents a serious roadblock for battered women who retaliate with deadly force when their abuser is not immediately aggressing against them.¹⁰¹ Much of the debate about the self-defense doctrine in the context of

95. Men in counseling for battering often acknowledge that they are there because they want to maintain or reestablish the relationship. See James Ptacek, *Why Do Men Batter Their Wives?*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 48, at 133, 141. The batterers themselves seem to have more respect for relationship than the law does.

96. SCHNEIDER, *supra* note 1, at 78.

97. *Id.* at 231-32.

98. In asking courts to be as sympathetic to battered women who kill abusers as they are to men who kill adulterous spouses or paramours, Schneider does seem to call for an increased recognition of relationship. See *supra* text accompanying notes 43-47. It is because courts understand the power of relationship that they understand why a man would kill in the "heat of passion."

99. WAYNE R. LAFAYE, CRIMINAL LAW § 5.7(d), at 495 (3d ed. 2000).

100. *Id.*

101. Holly Maguigan suggests that many courts misinterpret the facts to presume that an attack is not ongoing. Maguigan reports that seventy-five percent of battered women who kill do so when the attack is ongoing or imminent. Maguigan, *supra* note 26, at 397. Nonetheless, there is still a sizable number who kill when it is clear that no attack is imminent.

battered women has focused on whether an objective or subjective standard should be applied to the woman's belief in the imminence of the attack. Critics of objectivity suggest that it is rigid and usually rooted in male norms.¹⁰² A purely subjective standard, on the other hand, fails to root the woman's defense in the context of gender power generally or battered women in particular; it focuses exclusively on the individual woman claiming the defense.¹⁰³ Schneider challenges the subjective/objective dichotomy and suggests that a proper standard should incorporate both an individualized and a group component.¹⁰⁴

An alternative course is to ask courts to confront the reality of relationship. If courts took relationships as a given, again, as a kind of ideal, then a requirement of any objective or subjective belief in imminence would be misplaced. Why should the law require immediacy in the context of an ongoing relationship? In nonrelationship situations, the law requires imminence because by doing so it ensures that someone who can avoid using deadly force by extracting himself or herself from the situation will do so. One cannot simply extract oneself from an ongoing relationship, however. A relationship in which one could do that would not be a relationship marked by mutual interdependence, a lack of autonomy, or love.¹⁰⁵ The relationship itself, not necessarily the victim's status as a woman or a battered woman, makes imminence an inappropriate requirement.¹⁰⁶

This approach also suggests that although *Wanrow* has some relevance for battered women, its value is limited. It may not be the landmark domestic violence case that Schneider's treatment of it suggests. The feminist arguments in *Wanrow* forced the court to appreciate that women may need to use deadly force when men do not because, for many women fighting against much larger men, anything less than deadly force will be no defense at all.¹⁰⁷ Their only choices are passivity or deadly force. Thus, *Wanrow* is helpful to battered women to the extent that courts reject self-defense claims when the abuser's attack was not significantly more violent than previous attacks through which the victim lived. But *Wanrow* does not

102. SCHNEIDER, *supra* note 1, at 139.

103. *See id.*

104. *Id.* at 139-40.

105. As Schneider's stories make clear, the sad fact is that a relationship marked by mutual interdependence, lack of autonomy, and love can also be marked by violence.

106. Eliminating imminence in this way is not the same as saying that because women value relationship more, they should be excused when they do not leave. Anne Coughlin tentatively suggests that such an argument could follow from Carol Gilligan's work. Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 88-89 (1994). Eliminating imminence suggests that the law should honor relationship more, regardless of whether women and men do so differently.

107. *State v. Wanrow*, 559 P.2d 548, 558 (Wash. 1977) ("In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons.").

speak to the imminence problem. Yvette Wanrow was not in a relationship with the man whom she killed. He had entered another's home uninvited and approached her. From that trespass and positioning, Wanrow may well have been able to infer that harm was imminent.¹⁰⁸ Most battered women should not even have to make such an inference. Regardless of whether her spouse's next attack is imminent, the law should not expect her to leave. There is too much relationship there.

B. *Privacy*

Incorporating the importance of relationship into feminist theory also means coming to terms with the role of privacy in our lives. There is a strong, if not obvious, link between relationship and privacy. Those who have written about the importance of familial relationships (both romantic and parental) have argued that because relationships provide an opportunity to reshape the self, and an opportunity to experience a kind of organic selflessness,¹⁰⁹ relationships need freedom from state interference.¹¹⁰ If the state defines what relationships are or how they are to be lived, those relationships cease to be fora for true self-expression and true altruism. If they are to thrive, relationships must, to a certain extent, be left alone.

There is, of course, a vigorous feminist critique of this line of argument.¹¹¹ Schneider has been at the forefront of this critique.¹¹² According to this critique, by keeping relationships private, the law shields from view the inequality and abuse so rampant in many relationships.

108. *Id.* at 551.

109. Regan and Karst write about creating a new and arguably superior moral identity when one is intertwined with a spouse or romantic partner. See REGAN, *supra* note 77, at 89; Karst, *supra* note 77, at 635-37. Others talk similarly about the role of self-expression and selflessness in parental relationships. E.g., Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1015 (1996) ("Speech and expression are the ordinary means whereby parents seek to impart values, habits, skills, and knowledge to their children."); Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 39-41 (describing the benefits of parental sacrifice).

110. See Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1533-34 (1998) ("If . . . intimacy and identity are integrally related and if in choosing our intimate relationships we create unique interdependencies that themselves constitute self-expression, then horizontal relationships must be viewed as souls with their own emotions, sensations, and beliefs. And they must be entities that have the right to be let alone by the government."); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 301 (1988) ("[A] tight, comprehensive set of [governmental] controls would remove from parents the discretion to act, upon which the capacity of moral decision making actually depends.").

111. See MACKINNON, *FEMINIST THEORY*, *supra* note 64, at 193-94; Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 856-57 (1985); Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 281, 295-97 (S.I. Benn & G.F. Gaus eds., 1983).

112. Schneider, *The Violence of Privacy*, *supra* note 3 (explaining how the privacy doctrine hides violence against women).

Schneider entitles the chapter of the book in which she continues this critique "The Violence of Privacy."¹¹³ It is a remarkably effective title because it focuses our attention on the dangers of privacy, but it is also, albeit on purpose, inaccurate. It is not privacy that is violent; it is relationship. Undoubtedly, this is what makes Schneider and others so wary of relationships, but, if feminists are to accept relationships as part of their lives, they must acknowledge that they can be violent. They also must acknowledge that most people, in most relationships, desire some privacy.

Ruth Gavison argues that "that which is intimate, that which may be related to an individual's self-identity or personhood, and that which is self-regarding, affecting only the individual (or his close and voluntary associates)" can and possibly should create "presumptive entitlements to inaccessibility and noninterference."¹¹⁴ Gavison is not addressing her argument specifically to the problem of domestic violence, and indeed concedes that violence within a relationship should be sufficient reason to overcome a presumption of privacy,¹¹⁵ but her broader point is critical for the battered women's movement. "[M]ost of us feel that there are aspects of our lives which are 'private' and 'personal,' and thus should not be accessible to others without our consent; they should not be matters dealt with by the public" ¹¹⁶ In other words, most of us affirmatively want some privacy. Most of us do not affirmatively want violence. That is why calling privacy violent is problematic. It is problematic in the same way that suggesting that most heterosexual intercourse is rape¹¹⁷ is problematic. Many women want heterosexual intercourse. No woman wants to be raped. Focusing on how privacy can be violent is important just as focusing on how heterosexual sex can be rape is important, but to dismiss all privacy as violent and all intercourse as rape is to deny the desires and experiences of many women.¹¹⁸ It is also to avoid the difficult yet essential task of defining

113. SCHNEIDER, *supra* note 1, at 87; see also Schneider, *The Violence of Privacy*, *supra* note 3.

114. Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 6-7, 10 (1992).

115. *Id.* at 34.

116. *Id.* at 21.

117. E.g., ANDREA DWORKIN, INTERCOURSE (1987); MACKINNON, FEMINIST THEORY, *supra* note 64, at 174 ("Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance."). For a critique of these views, see Lynne Henderson, *Getting To Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 56 (1993), which states, "[A]lthough we owe much to MacKinnon and Dworkin for their theoretical and practical contributions to the effort to end sexual use and abuse of women, their story of heterosexuality is a reductionist one of female innocence . . . and male guilt."

118. Henderson, *supra* note 117, at 60 ("Many women feel heterosexual desire. They want to, and do, act upon it and experience great pleasure. Heterosexual desire, touching, connection with another person who is male can feel good; it can be pleasurable; it can be happy and enjoyable for women.").

with more specificity exactly when and what it is that makes a desire for privacy inappropriate or an acceptance of heterosexual sex oppressive.

There is both rhetorical and real political power in articulating the extreme. To claim that all privacy is violent and all sex is rape is to demand a response with proof that some privacy is acceptable, as is some heterosexual sex. Articulating those responses is as important a feminist project as articulating the extreme, however. Some writers have tried to do this. As indicated, Anita Allen and Ruth Gavison have analyzed the importance of privacy in our lives.¹¹⁹ In doing so, they implicitly question Schneider's condemnation of privacy doctrine. Martha Chamallas, Lynne Henderson, and Lois Pineau have all tried to articulate what positive heterosexual encounters might look like.¹²⁰ Despite the difficulty in these tasks and the inevitable imperfections in any definitions that emerge, this work is essential. A movement that spouts the extreme while many people, including the elites within that movement, continue to enjoy heterosexual relationships that involve some degree of privacy, runs the risk of becoming hypocritical and soon obsolete.

Moreover, privacy may be most important to the least elite. Kimberlé Crenshaw writes that "[t]he home is not simply a man's castle in the patriarchal sense, but may also function as a safe haven from the indignities of life in a racist society."¹²¹ Families construed as distinct entities, the relationships within which often function differently than relationships between commercial actors or strangers, act as crucial sources of cultural identity.¹²² For communities of color, and particularly for women within those communities, families have been critical sources of support and growth.¹²³ They have served as key bases of resistance precisely because they are objectively and subjectively distinct from the public sphere. This could well explain why the original feminist call to tear down all walls of privacy rang hollow in many communities of color. It asked women in those communities to forfeit that which had given them such strength.

119. See *supra* notes 35, 114-116 and accompanying text.

120. Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 784 (1988); Henderson, *supra* note 117, at 60-63; Lois Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217, 234-37 (1989).

121. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991).

122. Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1371 (1994) (speaking of "family liberty" as a means to foster "full personhood").

123. See BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 37 (1984) (stating that family life allows black women "to experience dignity, self-worth, and a humanization that is not experienced in the outside world"); Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1470-71 (1991) (stating that family life for women of color is a "site of solace and resistance against racial oppression").

When activists concerned about battered women say to those women, "It feels private, but it really is political, you shouldn't think of it as private," they ask battered women to relinquish that which few others are willing to relinquish. Most people would rather think of their families and personal lives as private. Who relishes the idea of bringing a divorce dispute or a custody dispute or any intrafamily fight into the open? It may be necessary to do this at times if one needs the state to help resolve those disputes. It certainly will be necessary for battered women to do this if they are to get the state's help in stopping their batterers, but the battered women's movement must be sensitive to how difficult it is for abused women to let go of an identity and private space that those lucky enough not to be in abusive relationships can still cherish. This is what makes Schneider's obvious distrust of social workers and psychologists unfortunate. Schneider mourns the depoliticization of the battered women's movement and the accompanying infiltration by social workers and psychologists. Yet, if we take seriously what battered women have to give up when they leave the privacy of their relationships, if we recognize that they are leaving not only what is harmful but also what they have perceived as their identity, it seems entirely humane and necessary that they be afforded counseling and support that still feels, to them, private.¹²⁴

Privacy is important in women's lives for another reason, as well, a reason central to domestic violence litigation. It is through privacy doctrine that parents have secured freedom from state interference with child-rearing. When it comes to issues of battered women retaining custody of their children, privacy doctrine may well be battered women's best friend.

Most parents have the right to socialize their children "in the way [they] should go."¹²⁵ They have the right to discipline their children,¹²⁶ to educate their children,¹²⁷ to choose medical treatment¹²⁸ and religious traditions¹²⁹ for their children, and to choose where and how their children

124. I do not mean to suggest that all of the social science investigation and analysis of domestic violence has served women well. Much of it has focused far too much on the victims' rather than the batterers' pathology. Mahoney, *supra* note 24, at 27 & nn.101-02. Some of it continues to see reconciliation as a goal even when there are clear signs that reconciliation would be much too dangerous. *Id.* at 48 & n.222. Nonetheless, to suggest that political activism, not more private forms of counseling, can better meet battered women's needs is inappropriately to discount the desire for privacy that most people have.

125. *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944).

126. *State v. Fischer*, 60 N.W.2d 105 (Iowa 1953); *Bowers v. State*, 389 A.2d 341 (Md. 1978).

127. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (holding that a state cannot mandate public education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that a state cannot prevent the teaching of foreign languages).

128. *Parham v. J.R.*, 442 U.S. 584 (1979) (holding that a state can assume that parents are acting in their child's best interest when they seek psychiatric care for their child).

129. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that parents have the right to keep their children out of public school after age fourteen so as to ensure a proper Amish upbringing).

live.¹³⁰ These rights are essentially privacy rights, negative rights to be free from state interference.¹³¹ Although these negative rights are often not extended to one parent at the expense of another parent,¹³² they can be if a court places a premium on stability for the child. This means that one parent can be granted the presumption that he or she is acting in a child's best interest.¹³³ That is precisely what battered women fighting for custody need.¹³⁴ Schneider does not comment at all on the relationship between privacy doctrine and parental rights in custody disputes.

Male batterers can make credible claims to custody because the "best interests of the child" standard that now governs most custody proceedings¹³⁵ dispenses with privacy doctrine and opens the door to judicial evaluation of parenting practices.¹³⁶ A standard like the primary caretaker standard, which awards custody based on the parents' past (private) parenting practices, can protect battered women from this needless state interference by maintaining the presumption that a caretaking parent acts in the best interests of her child.¹³⁷ The fact that a father has abused a

130. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 884-85 (1984) (listing rights that parents have with regard to their children's upbringing).

131. Although these rights have not been explicitly labeled privacy rights by the state courts or the U.S. Supreme Court, the constitutional cases in which the Supreme Court articulated these parental rights have been invoked in virtually all of the cases that speak directly to privacy. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) ("[T]he Court has recognized . . . a right of personal privacy. . . . [This] right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." (citing *Meyer*, *Pierce*, and *Prince* (other citations omitted))); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("The foregoing cases [including *Meyer* and *Pierce*] suggest that specific guarantees in the Bill of Rights have penumbras Various guarantees create zones of privacy.").

132. In other words, for divorced or never-married couples, neither parent may enjoy negative parental rights. See *Baker*, *supra* note 110, at 1545-46.

133. Many states have a presumption that once a custody decision is made, there must be clear and convincing evidence that a change of custody is in the best interest of the child. See, e.g., 750 ILL. COMP. STAT. 5/610 (West 1999); *Burgess v. Burgess*, 913 P.2d 473, 479 (Cal. 1996) (stating that the presumption is that a change in custody is not in the child's interest, even if the custodial parent is moving away from the noncustodial parent). The primary caretaker standard, which awards custody based on who has performed most of the caretaking functions, see *infra* note 137, extends this principle to apply at the initial custody determination.

134. Martha Fineman suggests that all single women need this privacy. FINEMAN, *supra* note 84, at 233.

135. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 797-98 (2d ed. 1987) (noting that most states use the best interests of the child standard for custody determinations).

136. It is not only batterers who use custody challenges as leverage under a best interests of the child regime. Any man or provider who wants to extract more in negotiation from a woman or caretaker who is particularly averse to the idea of losing custody can make a very effective threat. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 979 (1979) ("We would predict that under the best interests standard the mother, because she is risk-averse, will accept less in order to avoid the gamble inherent in adjudication.").

137. The primary caretaker standard asks courts to determine who has been the primary caretaker of the child and awards custody to that person, thus eliminating the need for judicial determinations of good and bad parenting practices. For an excellent explanation of and

mother and that she therefore needs to extricate herself and her children from the relationship should not give the state an opportunity to evaluate all of the parenting practices that it would be prevented from evaluating if the couple remained married. The assumptions that motivate parental privacy doctrine—assumptions about parents knowing their children better than any judge or legislature can, assumptions about parents loving their children more than any state agency can, assumptions about how part of what the Constitution protects is the right to “intellectual and moral autonomy” which includes the right to “choose and propagate values”¹³⁸—are assumptions that inure to battered women’s benefit and assumptions that the primary caretaker standard protects. Given what experts know about how violence in the home adversely affects children,¹³⁹ there is a strong argument that fathers who batter have forfeited whatever rights they have to those assumptions.¹⁴⁰ Victims of battery have not forfeited those rights. Thus, privacy doctrine and state deference to established family relationships can protect battered women.

That is why *DeShaney* is a harder case than *Schneider*, and many others,¹⁴¹ suggest. The Court in *DeShaney* held that “a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.”¹⁴² *Schneider* writes that “[t]he majority opinion reflects a crabbed view of the world that reasserts a clear distinction between public and private: family violence is private and therefore immune from state scrutiny.”¹⁴³ It is not at all clear, however, that battered women who are mothers want the distinction between public and private to disappear. As Anita Allen writes, “[t]he solution to domestic violence and the *DeShaney* problem of public neglect of private violence is not to end families and seclusion, but to make better use of evidence of chronic violence.”¹⁴⁴ Women are the primary caretakers of most children. Single women, and especially poor single women, are likely to be the most subject to interference from court and legislative judgements. That Joshua

justification for the primary caretaker standard, see *Garska v. McCoy*, 278 S.E.2d 357, 360-62 (W. Va. 1981).

138. Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1371 (1994) (emphasis omitted).

139. See *supra* note 48.

140. Thus, even if the batterer is a primary caretaker, he or she should not be entitled to custody.

141. For further criticism of *DeShaney*, see, for example, Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 508-12 (1991); Aviam Soifer, *Moral Ambition, Formalism, and the “Free World” of DeShaney*, 57 GEO. WASH. L. REV. 1513 (1989); and Robin West, *Liberalism and Abortion*, 87 GEO. L.J. 2117, 2134-36 (1999).

142. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989).

143. SCHNEIDER, *supra* note 1, at 93.

144. Allen, *supra* note 35, at 746 (citation omitted).

DeShaney was in the care of his father is a rarity.¹⁴⁵ To suggest that the state should not be mindful of the line between public and private is to invite the state into the homes of thousands of women with children; it is to invite the state to bring with it classed and raced notions of proper parenting; and it is to invite the state to decide that a battered woman should not be able to retain custody of her children because she does not meet the state's standard of good parenting.

I do not mean to suggest that *DeShaney* was rightly decided. The preexisting involvement of the state may well have created a duty to Joshua that was violated by the state's subsequent laxity in checking on him. It is the preexisting involvement, though, and the manifest evidence of ongoing violence, that should trigger state responsibility and trump a presumption of privacy. If the state has every right to interfere without preexisting involvement or evidence of violence, it has every right to evaluate whether Hedda Nussbaum,¹⁴⁶ Sharon Bottoms,¹⁴⁷ and the thousands of poor women of color who struggle to feed and rear their children¹⁴⁸ are actually meeting the state's standard for proper parenting.

There is no doubt that traditional veils of privacy have prevented many women from getting the help that they deserve. There is comparably little doubt that few people relish a world in which the state monitors and regulates the most intimate details of their romantic and parenting relationships. Drawing the line between what is presumptively private and what is appropriately public is difficult political work. As Frank Michelman writes, "what ought to be . . . secured [as private], when, how, and in what circumstances, is the most deeply and constantly political of questions. What we must be seeking . . . is preservation of the language of the personal" ¹⁴⁹ In respecting the dialectical process that Schneider rightly argues governs this area, we must see how the political is personal just as we see how the personal is political—and we must work for a solution that values both the personal and the political.

145. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 66 (1996) (reporting that eighty-seven percent of all children who live with only one parent live with their mother).

146. See *supra* text accompanying notes 51-52.

147. In a case that received national attention, the Virginia Supreme Court denied Sharon Bottoms custody of her son, in part because "living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the 'social condemnation' attached to such an arrangement." *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995).

148. Minorities are "vastly overrepresented among those reported for child maltreatment . . . [but] not overrepresented among those recognized for child maltreatment." Richard J. Gelles, *Through a Sociological Lens: Social Structure and Family Violence*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 31, 33-34 (Richard J. Gelles & Donileen R. Loseke eds., 1993) (citations omitted).

149. Frank Michelman, *Private Personal But Not Split: Radin Versus Rorty*, 63 S. CAL. L. REV. 1783, 1794 (1990).

C. Gender

Schneider repeatedly criticizes our culture's denial of the link between domestic violence and gender,¹⁵⁰ but she also acknowledges that battering is "part of larger problems of power and control within intimate relationships."¹⁵¹ Thus, battering is about gender, but it is not only about gender, or at least it is not only about being gendered male. Issues of power and control may be central in any relationship. This could explain why women hit men and why women hit women.¹⁵² As one study noted, "the same characteristics we saw making the family violence-prone also serve to make the family a warm, supportive, and intimate environment."¹⁵³ The closeness that engenders support and intimacy can also engender frustration and anger.

Where, then, does gender fit into the analysis? Schneider is not very specific on this point. It seems clear, though, that one of the primary ways in which gender affects issues of domestic violence is in its ability to excuse the conduct. Defense attorneys often use gendered caricatures to portray a battered woman as somehow deserving of the violence she endured.¹⁵⁴ This strategy can be successful because "many people have biases about the nagging, provocative wife who deserves to be slapped around."¹⁵⁵ Interviews with abusive men demonstrate a comparable allegiance to gender roles. Explaining an abusive role-play they have just witnessed, men in a counseling session describe the reasons for the violence this way: "He's the boss." "His needs are more important." "She should take care of the cooking and the cleaning." "She shouldn't argue with him. She should do what he says."¹⁵⁶ In another study, seventy-eight percent of the abusive men justified their conduct in light of their wives' failure to fulfill the obligations of a "good wife."¹⁵⁷ In other words, women are held responsible for their own abuse if they fail to comply with gender roles.

150. SCHNEIDER, *supra* note 1, at 113, 119, 230.

151. *Id.* at 66 (noting that battering in lesbian and gay male communities and battering of the elderly expand the understanding of battering).

152. Women hit men as often as, though significantly less severely than, men hit women. See Murray A. Straus, *Physical Assaults by Wives: A Major Social Problem*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE, *supra* note 148, at 67, 70. For accounts of lesbian battering, see KERRY LOBEL, NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (1986).

153. Gelles, *supra* note 148, at 35.

154. Daniel Jay Sonkin & William Fazio, *Domestic Violence Expert Testimony in the Prosecution of Male Batterers*, in DOMESTIC VIOLENCE ON TRIAL 218, 224 (Daniel Jay Sonkin ed., 1987) ("Frequently the defense will portray the victim as being an evil, domineering and castrating woman.").

155. *Id.* at 221.

156. PAUL KIVEL, MEN'S WORK: HOW TO STOP THE VIOLENCE THAT TEARS OUR LIVES APART 200 (1992).

157. Ptacek, *supra* note 95, at 147.

There are, again, important parallels to rape here. The most comprehensive study of general attitudes toward rape found that sixty-six percent of one sample group believed that women's behavior and appearance provoke rape.¹⁵⁸ Another study found that "most respondents, including victims, saw women's behavior and/or appearance as the second most frequent cause of rape."¹⁵⁹ Published reactions to various kinds of rape suggest that people are often reluctant to blame men who rape. Jurors and bystanders excuse men, claiming that they "didn't want to ruin these boys' lives,"¹⁶⁰ that "[t]he guys are human,"¹⁶¹ and that what the men did was not really rape.¹⁶² Because "boys will be boys," their behavior is accepted. As is the case with domestic violence, so in the case of rape; women who transgress certain social gender roles deserve what they get, and the men who give it to them deserve to be excused.

Focusing on gender as an excuse for the conduct, rather than gender as the cause of the conduct,¹⁶³ helps avoid the debate about who beats whom more and why.¹⁶⁴ It also suggests that the intractability of domestic violence as a problem may have as much to do with gender norms as with notions of privacy. Whatever norm or law tells men that battery is wrong is counteracted by gender norms that reaffirm their right to control and their partners' duty to obey, just as whatever norm or law tells men that rape is wrong is counteracted by gender norms that encourage male sexual aggression and limit the range of permissible female behavior. In order to attack the problem, therefore, the law needs to do more than just label

158. HUBERT S. FEILD & LEIGH B. BIENEN, *JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW* 54 (1980).

159. JOYCE E. WILLIAMS & KAREN A. HOLMES, *THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES* 118 (1981). These respondents identified the rapist's mental illness as the primary cause of rape. *Id.*

160. Joseph P. Fried, *St. John's Juror Tells of Doubts in Assault Case*, N.Y. TIMES, Sept. 14, 1991, at B24.

161. Journalist Seymour Hersh reported the reluctance of men involved in the My Lai massacre to talk about the raping that went on. One squad leader told him, "You can nail just about everybody on that—at least once. The guys are human, man." SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 105 (1975).

162. One observer of a gang rape trial in Michigan commented, "I don't believe she was raped . . . I believe they ran a train on her." Chris S. O'Sullivan, *Acquaintance Gang Rape on Campus*, in *ACQUAINTANCE RAPE: THE HIDDEN CRIME* 140 (Andrea Parrot & Laurie Bechhofer eds., 1991). "Trains" involve multiple men taking turns sexually on one woman. For a man's description of a "train," see NATHAN MCCALL, *MAKES ME WANNA HOLLER: A YOUNG BLACK MAN IN AMERICA* 44-47 (1994).

163. Excuse and causation are almost certainly related. As Stevi Jackson has written in the rape context, "knowledge of acceptable justifications may control conduct." Stevi Jackson, *The Social Context of Rape: Sexual Scripts and Motivation*, in *RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT* 16, 18 (Patricia Searles & Ronald J. Berger eds., 1995). Thus, eliminating the excuse should help root out at least some of the cause.

164. Compare Straus, *supra* note 152 (highlighting the beating of husbands by wives), with Demie Kurz, *Physical Assaults by Husbands: A Major Social Problem*, in *CURRENT CONTROVERSIES ON FAMILY VIOLENCE*, *supra* note 148, at 88 (arguing for preserving the focus on women as victims of domestic violence).

domestic battery and rape wrong: It has to challenge the constructions of masculinity that excuse them.

Transforming deeply rooted gender constructions like this is not easy; it is significantly more complex than simply declaring the behavior wrongful or felonious. Gender norms are “sticky norms”—norms highly resistant to change.¹⁶⁵ Part of the reason they are sticky is that they are so well internalized. Simply declaring wrongful that which has not been seen as wrongful and that which, as gendered, may be deeply embedded in notions of self-identity is not likely to be a very effective means of combating the norm.¹⁶⁶ As Dan Kahan has recently argued, if the law punishes an action more severely than the average decisionmaker would, it is quite likely that there will be widespread underenforcement of the law.¹⁶⁷ No one wants to enforce a law that she does not view as just or fair. This problem is particularly significant in the domestic violence area because it is not only legal decisionmakers (police officers, judges, prosecutors) who may view the law as too harsh, it is often the victims themselves. As Eve Buzawa and Carl Buzawa have suggested, the chief deterrent effect of mandatory arrest policies may well be their tendency to deter calls to police, not to deter the conduct in question.¹⁶⁸ Schneider discusses some of the problems with mandatory arrest policies, but she focuses more on how they are paternalistic and disempowering to women,¹⁶⁹ not on how they may fail to change the gender norms that need changing.

Kahan suggests a “gentle nudge” approach to sticky norms. He argues that less severe laws are much more likely to be enforced and thus much more likely to have at least some influence. The small amount of influence they have grows over time as enforcement increases and thereby works to change the underlying norms. Some of the approaches he suggests in the domestic violence area include shaming sanctions, publicity campaigns aimed at attacking the “manliness” of battering behavior, and greater enforcement of civil and criminal contempt remedies for violation of

165. For an explanation of “sticky norms,” see Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

166. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 457 (1997) (“The real power to gain compliance with society’s rules of prescribed conduct lies not in the threat or reality of official criminal sanction, but in . . . [t]he networks of interpersonal relationships in which people find themselves, [and] the social norms and prohibitions shared among those relationships.”).

167. Kahan, *supra* note 165, at 608 (“If the law condemns the conduct substantially more than does the typical decisionmaker, the decisionmaker’s personal aversion to condemning too severely will dominate her inclination to enforce the law, and she will balk.”).

168. Eve S. Buzawa & Carl G. Buzawa, *The Scientific Evidence Is Not Conclusive: Arrest Is No Panacea*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE, *supra* note 148, at 337, 346. This may be a particular problem in communities of color both because of a strong community distrust of police and a strong desire not to see even more men from their communities go to jail. See Williams, *supra* note 20.

169. SCHNEIDER, *supra* note 1, at 186.

protective orders.¹⁷⁰ Other approaches might include providing services for both victims and offenders and funding more comprehensive rehabilitation programs.¹⁷¹ The point of these programs has to be about more than punishment; it has to be about transforming that which has been associated with the masculine into the unmasculine and the unacceptable, both to society at large and to the individuals involved.

Many feminists may resist such programs because they seem to minimize the punishment of abusers. It is far from clear that severe punishments can provide women with what they need, however. That is part of the problem with Schneider hanging her hopes on the original feminist visions. However horrendous male battering may be, however much misogynistic gender norms may explain its prevalence, however much it may be a political problem, it is also a personal problem. It is a problem involving relationships and privacy and deeply internalized notions of gender. Many women victims want their abusers to change more than they want the relationship to end. They want the abuse to stop, but they do not want their abuser in jail. They want to feel less economically dependent on their abusers, but they do not necessarily want to be independent. They want to change and they want their men to change, but they do not want to abandon completely their sense of who they are and what their relationship can be. If taking women seriously is central to feminist method, then feminist lawmaking must work to transform, not merely punish, male batterers.

III. CONCLUSION

Women like Elizabeth Schneider, who have devoted much of their legal careers to helping battered women, have taught us a great deal about the limitations of theoretical visions. *Battered Women and Feminist Lawmaking* explores those limitations. In doing so, it forces feminists to look anew at their theories and to listen more closely to the voices of the women they want to protect. As Schneider makes absolutely clear, there are no easy solutions. Every reform effort must be mindful of normative goals, practical realities and possible counterreactions. This Review has offered both theoretical revisions and practical suggestions in three different areas affecting battered women. The ideas offered urge new legal and social constructions of relationship, privacy, and gender roles. First, incorporating a normative commitment to relationships should allow the law to shift its inquiry from women who do not leave battering relationships to the men who riddle those relationships with abusive behavior. Legal respect for

170. Kahan, *supra* note 1675, at 630.

171. See Buzawa & Buzawa, *supra* note 168, at 353.

relationships should also lead to a modification, if not elimination, of the imminence requirement in cases of women who kill their abusers in self defense. Second, respecting the positive role that privacy can and does play in familial relationships should facilitate efforts to reach battered women who resist the call to make their personal traumas public. Without respect for privacy and an accompanying skepticism about state and other public interference, the battered women's movement runs the risk of alienating the women it most needs to help and undermining battered women's legitimate claims to custody. Finally, this Review endorses innovative, potentially lenient, probably controversial, but necessarily more widely enforced responses to battery. These responses must target not only the wrong of battering behavior but also the internalized gender norms that tend to excuse the behavior. Transforming such personal understandings of gender is likely to be slow and arduous work. It is not the kind of work that brings easily measured political victories. It may be the kind of work that is essential, however, if we are to work toward a world in which violence no longer undermines the relationships and privacy that so many women want.
