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# Legal Reform and Social Construction: Violence, Gender, and the Law

Lisa Frohmann and Elizabeth Mertz\*

As scholars and activists have addressed the problem of violence against women in the past 25 years, their efforts have increasingly attuned us to the multiple dimensions of the issue. Early activists hoped to change the structure of power relations in our society, as well as the political ideology that tolerated violence against women, through legislation, education, direct action, and direct services.<sup>1</sup> This activism resulted in a plethora of changes to the legal codes and protocols relating to rape and battering. Today, social scientists and legal scholars are evaluating the effects of these reforms, questioning anew the ability of law by itself to redress societal inequalities. As they uncover the limitations of legal reforms enacted in the past two decades, scholars are turning—or returning—to ask about the social and cultural contexts within which laws are formulated, enforced, and interpreted.<sup>2</sup>

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1. See Nancy Matthews, *Confronting Rape: The Feminist Anti-Rape Movement and the State* (London: Routledge, 1994) ("Matthews, *Confronting Rape*"), and R. Emerson Dobash & Russell P. Dobash, *Women, Violence, and Social Change* (London: Routledge, 1992), for discussions of activism in the antirape and antibattering movements.

2. See, e.g., Cynthia Bowman, "The Arrest Experiments: A Feminist Critique," 83 *J. Crim. Law & Criminology* 201 (1992); Kathleen Ferraro, "Policing Women Battering," 36 (1) *Soc. Probs.* 61 (1989); Lisa Frohmann, "Discrediting Victims' Allegations of Sexual Assault:

This special issue of *Law and Social Inquiry* provides a sampling of the research being done in this area today. For a number of these authors, efforts at legal reform provide the backdrop for an examination of whether changes in legal statutes have done an adequate job of improving women's experience with violence and with the prosecution of violence cases. The findings presented in several of these articles challenge some assumptions regarding the effectiveness of existing legal reforms, joining in what has been called a "third wave" of feminist efforts to reconfigure the way law is conceived and applied.<sup>3</sup> These researchers find that changes in the law to date have not resolved a number of serious shortcomings of the legal system in relation to women's experiences. In a sense, these studies and the remaining articles can also be viewed as explorations of the complex reasons why this might be so. Through analysis of cross-cultural considerations, the paradoxes of law's attempt to be above culture, the constant stream of interpretation that infuses legal practice, and other aspects of the cultural and social contexts that surround legal approaches to violence, the authors demonstrate the problematic character of the presuppositions on which some legal reforms have been based. These pieces collectively suggest that further serious attention to the sociocultural construction and context of legal practice is a crucial step for future reform efforts.

## I. THE BACKDROP: LEGAL REFORM

In the 1970s, as part of the feminist movement, women began challenging the matter-of-factness of violence in their lives. Action began with breaking the silence that had kept this issue off the public agenda, leaving individuals to suffer privately. Along with various forms of direct action

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Prosecutorial Accounts of Case Rejection," 38 *Soc. Probs.* 213 (1991); *id.*, "Screening Sexual Assault Cases: Prosecutorial Decisions to File or Reject Rape Complaints" (Ph.D. thesis, UCLA, 1992) ("Frohmann, 'Screening'"); Cassia Spohn & Julia Horney, *Rape Law Reform: The Grassroots Revolution and its Impact* (New York: Plenum, 1992) ("Spohn & Horney, *Reform*"); Jane Larson, "Imagine Her Satisfaction: The Transformative Task of Feminist Tort Work," 33 *Washburn Law J.* 56 (1993); *id.*, "Introduction: Third Wave—Can Feminists Use the Law to Effect Social Change in the 1990s?" 87 *Nw. U.L. Rev.* 1252 (1993); Matthews, *Confronting Rape*; Elizabeth Stanko, "Missing the Mark? Police Battering," in J. Hamner, J. Radford, & E. Stanko, eds., *Women, Policing, and Male Violence* 46–49 (London: Routledge, 1989) ("Stanko, 'Missing'").

3. Larson (87 *Nw. U.L. Rev.* at 1252–53) outlines some of the concerns of this "third wave," which she views as centrally concerned with the question of whether law can be used to effect social change in the 1990s:

Feminists of the Second Wave, many of whom became politically active in the movement for racial justice, early on adopted a strategy for social change that emphasized legislation and litigation. In seeking to use the law to effect social change, reformers express confidence in the law's ability to transform deeply rooted social institutions and foundational values. Given the record of the feminist law reform movement, is this confidence justified? What explains not only the successes, but also the failures and unintended consequences of this movement?

supporting victimized women, a major focus of activist efforts was the legal system. Activists and scholars hoped that reform of laws, the criminal justice system, and practices of collateral institutions would facilitate the reporting of sexual assaults and battering, encourage prosecution of these crimes, and increase convictions. These reforms were intended to challenge the cultural and political ideology that either implicitly or explicitly tolerated and supported violence against women. Reformers particularly wanted to change institutional practices that held women responsible for their victimization, with the ultimate goals of restructuring power relations between the sexes and reducing men's violence against women.

### A. Rape

Reform efforts began with rape.<sup>4</sup> The typical reforms in statutory rape law included a number of changes. In many states rape was redefined from a single offense to a gradation of offenses with commensurate penalties. The requirement that a victim's testimony be corroborated by another witness was eliminated. The consent standard was changed to modify or eliminate the requirement that women physically resist their perpetrators. Rape shield laws were enacted restricting the introduction of evidence about a woman's past sexual history into trial testimony.<sup>5</sup> These legal reforms are united by their concern with making sexual assault more prosecutable and also with treating women more like other crime victims, primarily by removing the bases for discrediting or blaming women when they report rape. Thus legal reforms had dual concerns: one was with efficacy (for example, changing the law in order to deter rape and/or increase conviction rates), but the other involved attention to women's perceptions and experience of the process itself. Some have understandably linked a more sensitive process to increased efficacy, with the thought that a more sensitive process would encourage larger numbers of women to come forward and to stay in the system once they did report being attacked. However, the two goals do not always coincide. For example, a more sensitive process might give women more control over decision-making, more opportunities to decide about the benefits of proceeding with prosecution (more voice in the process)—and that might at times lead to decisions to exit the process even though a conviction could have been obtained. Herein lies an interesting problem for those who would measure the success of reform; some might not accept that one can judge prosecutions as "successful" merely because they end in convictions, but would rather insist on a more difficult standard that would ask

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4. See Leigh Bienen, "Rape III—National Developments in Rape Reform Legislation," 6 *Women's Rts. L. Rep.* 170 (1980).

5. Spohn & Horney, *Reform*.

about the overall effect of the legal process on the victim. Is a prosecution that results in a conviction but also devastation for the victim a success? Thus, in addition to assessing improved efficacy, studies reviewing reform efforts are examining somewhat distinct issues regarding the impact of legal processes on victims.

Interview studies have revealed a perception among legal practitioners that women's experiences in the system have improved with the passage of rape shield laws.<sup>6</sup> However, studies that have examined such efficacy issues as the rates of reporting, prosecution, and conviction before and after rape law reform suggest a mixed review for the effectiveness of reform. (And, of course, these studies do not address the issue of women's experience with the criminal justice system.) In Washington state, Loh found an increase in the conviction rate for rape but a decrease in other offenses.<sup>7</sup> He suggests that this is the result of a change in labeling, as men are now being convicted of rape instead of other offenses. Overall he found no change in charging decisions or in the overall conviction of rape cases. He also found that criminal justice officials were using the same criteria before and after the reform for making charging decisions (i.e., force, victim offender relationship, corroborative evidence, victim's credibility, and race). Marsh, Geist, and Caplan found that the major change in Michigan was an increase in the conviction rate and the number of arrests.<sup>8</sup> There was no change in the number of rapes reported to the police. Legal reform had very little effect on the factors prosecutors considered when making filing decisions, especially those surrounding a victim's sexual history. This information still finds its way into the courtroom.<sup>9</sup> Polk found that police clearance rates for rape have not changed.<sup>10</sup> There has been a slight increase in complaint filings, but the probability of conviction once a case reaches court is unchanged. The major difference in California, where the data were collected, was harsher sentences for those convicted of rape. However, this trend may be part of a general shift toward harsher penalties for all serious felonies. Horney and Spohn examined six U.S. cities (Chicago, Houston, Washington, D.C., Philadelphia, Atlanta, and Detroit).<sup>11</sup> Excluding Detroit, rape reform did not increase rape reporting, prosecutions, convictions, or incarcerations. In Detroit, reforms had some effect. There was an increase in the

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6. M. A. Largen, "Rape Reform Law: An Analysis," in A. W. Burgess, ed., *Sexual Assault II* (New York: Garland, 1988); Jeanne Marsh, Allison Geist, & Nathan Kaplan, *Rape and the Limits of Law Reform* (Boston: Auburn House, 1982) ("Marsh et al., Rape").

7. Wallace D. Loh, "Q: What Has Rape Reform Legislation Wrought? A: A Truth in Criminal Labelling," 37 *J. Soc. Issues* 28 (1981).

8. Marsh et al., *Rape*.

9. See Gregory Matoesian, *Reproducing Rape: Domination through Talk in the Courtroom* (Chicago: University of Chicago Press, 1993) ("Matoesian, *Reproducing Rape*").

10. Kenneth Polk, "Rape Reform and Criminal Justice Processing," 31 *Crime & Delinq.* 191 (1985).

11. Spohn & Horney, *Reform* (cited in note 2).

number of rape reports and in the maximum sentence for those incarcerated. On the other hand, there was no change in the rate of conviction or incarceration.

Explanations for limited instrumental effects of rape reform vary. Berger *et al.* suggest that the more radical elements of reform initially envisioned by feminists were diluted to enable them to work in coalitions with law enforcement officials to push for change.<sup>12</sup> This process continued as the reforms wound their way through the legislature. Horney and Spohn suggest that reform-oriented changes were already underway through case decisions before final reform was instituted.<sup>13</sup> These explanations focus on constraints in the law-making process, suggesting that if the laws were better, the results would be better.

Other researchers have focused on what practitioners do with the law, and have found that simply rewriting law is not enough. Horney and Spohn suggest that statutory reforms do not affect the courtroom work group and the informal norms of case processing.<sup>14</sup> Similarly, Frohmann found that organizational work concerns among prosecutors—such as their assessments regarding the convictability of cases and their expectations about jurors' beliefs—had a chilling effect on the prosecution of sexual assault cases despite rape law reform.<sup>15</sup> Her study demonstrates that the organizational structures and pragmatic work concerns that shape legal decision making can be seen in the everyday practices of legal agents.<sup>16</sup> Matoesian suggests that reforms do not address the deep structures and symbolic constructions through which people make sense of a rape.<sup>17</sup> He argues that power, domination, and patriarchy are constructed and maintained in and through courtroom talk, and that linguistic structures are essential to understanding the power relations between victims and assailants, men and women, and dominant and subordinate groups. The failure of legal reform to address these cultural constructs limits its ability to create change. Horney and Spohn, Matoesian, and Frohmann all suggest that there is a disjuncture between rules (i.e., legal statutes) and practice. Statutory change does not necessarily translate into change in the organizational structure or the logic of institutions, factors that shape both everyday decision-making and perceptions regarding responsibilities. Each of these researchers points to the need

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12. Ronald J. Berger, Patricia Searles, & W. Lawrence Newman, "The Dimensions of Rape Reform Legislation," 22 *Law & Soc'y Rev.* 329 (1988).

13. Julia Horney & Cassia Spohn, "Rape Laws and Instrumental Change in Six Urban Jurisdictions," 25 *Law & Soc'y Rev.* 117 (1991).

14. Spohn & Horney, *Reform*.

15. Frohmann, "Screening" (cited in note 2).

16. Frohmann, 38 *Soc. Probs.* (cited in note 2); *id.*, "'Hard Cases': Prosecutorial Accounts for Filing Problematic Sexual Assault Complaints," in H. Lopata & A. Figert, eds., 9 *Current Resources on Occupations* (Greenwich, Conn.: JAI Press, forthcoming).

17. Matoesian, *Reproducing Rape*, and *id.*, "Language, Law, and Society: Theoretical and Applied Implications of the Kennedy-Smith Rape Trial" (Dept. of Criminal Justice, University of Illinois at Chicago, n.d.).

to examine organizational subculture carefully in order to understand this disjuncture.

In their article in this issue, "Accounting for the Second Assault: Legal Organizations' Framing of Rape Victims," Martin and Powell take up this call through an examination of one of the process goals of rape reform: making the system more victim-sensitive (attentive to victims' needs and well-being). In a study of the work of legal and medical professionals, they found that in spite of good intentions, the professionals remained insensitive to victims' needs. Reinforcing the findings of Matoesian and Frohmann, Martin and Powell attribute this continuing problem to the organizational cultures of the legal and medical agencies, which orient staff more toward practical work concerns such as winning cases, or political concerns like public opinion, than toward victim's needs. They argue that organizational concerns shape agents' decision-making more than does statutory reform. They suggest that to effect deep change, a nationwide discourse on the "politics of rape victim's needs"<sup>18</sup> is necessary. Only in this way will we be able to address both the gender inequality underlying violence against women and the legal system's response to victims.

Beyond efficacy and process, then, those who study organizational culture open up a third area of concern for reform—the deeper issue of the cultural and epistemological construction of gender and violence. Razack's article, "From Consent to Responsibility, from Pity to Respect: Subtexts in Cases of Sexual Violence Involving Girls and Women with Developmental Disabilities," takes up this issue, using changes in rape law as a central problematic. Canadian feminists have proposed that disabled women receive distinctive legal treatment, and have suggested creating a separate category of women who are particularly vulnerable to sexual assault because of their difficulty in expressing nonconsent to sexual advances. Razack offers a provocative critique, arguing that this feminist position denies the agency of disabled women by reproducing a framework of vulnerability, which is problematic for several reasons. It does not examine why disabled women are more vulnerable to sexual violence, but merely accepts that they are, and posits that they therefore must receive "special" protection. This construction promotes pity rather than respect for disabled women, locating the "problem" more in the women themselves than in the sociocultural and legal systems they confront. Razack further suggests that rape shield laws that have been central to the feminist legal reform agenda might actually disempower some women because when a disabled woman's sexual history is omitted at trial, the resulting story centers on stereotyped presumptions regarding her vulnerability and supposed inability to consent. Razack's critique raises several important questions about how law currently handles

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18. See also Nancy Fraser, *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (Minneapolis: University of Minnesota Press, 1989).

“difference.” Like Minow,<sup>19</sup> she calls for a paradigm shift in how “difference” is constructed in a legal system that is based on conceptions of equality, arguing instead for a more relational and social context for understanding sexual assault. This shift would include transferring the focus in proving rape from whether and how disabled women consent to sexual intercourse to a standard of responsibility, where men are held responsible for their intimate interactions with women and any harm that may result from those interactions.

Thus interest in reforming rape law has included instrumentalist efforts to make the legal system more effective in prosecuting rapists, processual concerns about the treatment of rape victims, and analysis of deeply rooted institutional patterns and their accompanying sociocultural epistemologies. To effectuate social change through legal reform, recent work suggests, more formal attempts to alter statutes and policies must be supplemented by analysis of the social and cultural patterns that shape the implementation, interpretation, and effect of law.

## B. Woman Battering

In addition to changes in rape law, the past 20 years have seen changes in statutes that address wife battering. There have been three primary areas of reform related to battering. Statutes were changed to remove impediments to mandatory arrest by police for misdemeanor crimes (i.e., battering). Prosecutors have introduced innovative techniques for increasing the retention and successful prosecution of battering cases in the criminal courts.<sup>20</sup> Temporary restraining orders (TROs), a civil law procedure by which women who are battered can restrict a batterer’s contact with them, have become widely available.

How effective are mandatory arrest policies in deterring future violence? The findings are not conclusive. The research by Sherman and Berk that assisted in launching this policy found that arrest was a significantly more effective deterrent of future arrest than separation or mediation.<sup>21</sup> This study has been replicated in six U.S. cities, with mixed results. Studies from two cities—Milwaukee and Colorado Springs—showed that arrest had

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19. Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca, N.Y.: Cornell University Press, 1990). See also Michelle Oberman, “Turning Girls into Women: Re-evaluating Modern Statutory Rape Law,” 85 *J. Crim. Law & Criminology* 15 (1994).

20. For a review of legislation see Eve S. Buzawa & Carl G. Buzawa, “Legislative Trends in the Criminal Justice Response to Domestic Violence,” in A. Lincoln & M. Strauss, eds., *Crime in the Family* (New York: Charles C. Thomas, 1985).

21. Lawrence W. Sherman & Richard A. Berk, “The Specific Deterrent Effects of Arrest for Domestic Assault,” 49 *Am. Soc. Rev.* 262 (1984).

a deterrent effect for a group of "good risk" offenders,<sup>22</sup> while a study in Miami appears to have replicated the original Minneapolis finding of a deterrent effect for arrest.<sup>23</sup> Results from Charlotte (N.C.) and Omaha (Neb.) do not indicate long-term advantages to arrest as opposed to separation or mediation.<sup>24</sup> Indeed, in studies of Milwaukee, Omaha, Charlotte, and Colorado Springs, it was found that arrest may correlate with an increase in recidivism for unemployed and socially marginal offenders.<sup>25</sup> Researchers have differed as to the proper interpretation of these results, and the picture is complicated by the fact that no confirmation of an escalation in recidivism has been obtained from victim interview data.<sup>26</sup> Critics have questioned assumptions and methodologies underlying the original and follow-up studies, casting doubt, for example, on assumptions that rates of repeated violence can be accurately ascertained outside of victim interview reports or that reduced recidivism is the only worthy measure of success.<sup>27</sup> These criticisms move beyond efficacy concerns to raise the kind of process issues that were also a focus in rape reform efforts.

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22. Berk *et al.* interpret the evidence from Omaha as indicative of a deterrent effect for the subset of "good risk" offenders as well. See Richard Berk, Alec Campbell, Ruth Klap, & Bruce Western, "A Bayesian Analysis of the Colorado Springs Spouse Abuse Experiment," 83 *J. Crim. Law & Criminology* 170, 198 (1992).

23. *Id.*; Anthony M. Pate *et al.*, *Metro-Dade Spouse Abuse Replication Project Draft Final Report* (Washington, D.C.: National Institute of Justice, 1991); Lawrence Sherman, Janell Schmidt, Dennis Rogan, Douglas Smith, Patrick Gartin, Ellen Cohn, Dan Collins, & Anthony Bacich, "The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment," 83 *J. Crim. Law & Criminology* 137, 168 (1992) ("Employed, married, high school graduate and white suspects are all less likely to have any incident of repeat violence reported to the domestic violence hotline if they are arrested than if they are not").

24. Franklyn Dunford, D. Huizinga, & D. S. Elliott, "The Role of Arrest in Domestic Assault: The Omaha Police Experiment," 28 (2) *Criminology* 183 (1990); Franklyn Dunford, "The Measurement of Recidivism in Cases of Spouse Assault," 83 *J. Crim. Law & Criminology* 120 (1992); J. David Hirschel & Ira W. Hutchison, "Female Spousal Abuse and the Police Response: The Charlotte, North Carolina Experiment," 83 *J. Crim. Law & Criminology* 73 (1992).

25. Berk *et al.*, 83 *J. Crim. Law & Criminology* (cited in note 22); Dunford, 83 *J. Crim. Law & Criminology* (cited in note 24); Hirschel & Hutchison, 83 *J. Crim. Law & Criminology* (cited in note 24); Sherman *et al.*, 83 *J. Crim. Law & Criminology* (cited in note 23).

26. See Lawrence Sherman, "The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence," 83 *J. Crim. Law & Criminology* 1, 31 (1992).

27. For critiques of the restudies, see Joan Zorza, "The Criminal Law of Misdemeanor Violence," 83 *J. Crim. Law & Criminology* 46 (1992); Bowman, 83 *J. Crim. Law & Criminology* (cited in note 2); Lisa Frisch, "Research that Succeeds, Policies that Fail," 83 *J. Crim. Law & Criminology* 209 (1992); Lisa Lerman, "The Decontextualization of Domestic Violence," 83 *J. Crim. Law & Criminology* 217 (1992). See also Dan Polsby, "Suppressing Domestic Violence with Law Reforms," 83 *J. Crim. Law & Criminology* 250 (1992) (arrest may work as general deterrent even if not as specific deterrent; arrest may also serve justice values apart from issues of deterrence). For critiques of the original study, see A. Binder & J. Meeker, "Experiments as Reform," 14 *J. Crim. Just.* 329 (1988); D. Elliot, "Criminal Justice Procedures in Family Violence Crimes," and J. Fagan, "Cessation of Family Violence: Deterrence and Dissuasion," both in L. Ohlin & M. Torney, eds., *Crime and Justice: A Review of Research* (Chicago: University of Chicago Press, 1989).

Other researchers have also challenged the overwhelming deterrent effect reported by Sherman and Berk. Earlier studies by Ferraro<sup>28</sup> and Stanko<sup>29</sup> on the effectiveness of mandatory arrest policies suggested that top-down legal reform does not necessarily alter police discretion in street-level decision-making practices.<sup>30</sup> Police will circumvent or subvert rules or organizational goals and directives that differ from their underlying beliefs about the effectiveness of arrest in battering situations.<sup>31</sup> Ferraro and Stanko argue that mandating legal reform without addressing the organizational culture of policing, as well as the organizational structures and practical concerns that shape police work, will not change police practices on the street.

Researchers have also identified a number of unintended consequences of mandatory arrest policies that need to be recognized and attended to. To avoid having to decide who is responsible for the attack, police may arrest both the battered woman and her batterer.<sup>32</sup> Police also respond to battering calls differentially depending on the race, ethnicity, and class of the woman. They are less likely to respond to calls from black women and low-income minority women. Police are more likely to arrest men of color than white men. Mandatory arrest policies do not consider the life circumstances of women after men are arrested. For low-income women, arrest may mean a loss of income, forced change in housing, or homelessness.<sup>33</sup> Immigrant women, who fear that law enforcement officials will contact the Immigration and Naturalization Service, often do not call the police.<sup>34</sup> These are difficulties that could be addressed by combining greater attention to the implementation of mandatory arrest policies with social programs aimed at supplementing criminal justice system efforts. Critics and researchers appear to agree that attention to context and community are important in assessing the value of arrest and other policies.

An increase in the number of arrests by police in battering situations has pushed prosecutors to choose between dismissing higher percentages of

28. Kathleen Ferraro, "The Legal Response to Women Battering in the US," in J. Hamner, J. Radford & E. Stanko, eds., *Women, Policing, and Male Violence* (London: Routledge, 1989); *id.*, "Policing Women Battering," 36 (1) *Soc. Probs.* 61 (1989).

29. Stanko, "Missing" (cited in note 2).

30. See also B. Balos & I. Trotzky, "Enforcement of the Domestic Abuse Act in Minnesota: A Preliminary Study," 6 *Law & Inequality* 83 (1988).

31. See also Susan L. Miller, "Unintended Side Effects of Pro-Arrest Policies and Their Race and Class Implications for Battered Women: A Cautionary Note," 3 (3) *Crim. Just. Pol'y Rev.* 299 (1989), and Eve S. Buzawa & Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response* (Newbury Park, Cal.: Sage Publications, 1990) ("Buzawa & Buzawa, *Domestic Violence I*"), for an overview of ways police circumvent battering laws.

32. Ferraro, 36 (1) *Soc. Probs.*; Kathleen Ferraro, "Battered Women: Strategies of Survival," in A. Cardarelli, ed., *Violence among Intimate Partners: Patterns, Causes, and Effects* (New York: MacMillan, forthcoming 1995); Kevin L. Hamberger, "Effects of Mandatory Arrest Law on Domestic Violence Perpetuation Counseling" (invited testimony before the Wisconsin Equal Justice Task Force, 1990); Buzawa & Buzawa, *Domestic Violence I*.

33. Miller, 3 (3) *Crim. Just. Pol'y Rev.*, and Stanko, "Missing" (cited in note 2).

34. Ferraro, 36 (1) *Soc. Probs.*

cases (the traditional method) or developing innovative policies to process cases. Advocacy by feminist groups has led the majority of prosecutor's offices to choose the latter. In an attempt to process battering cases more effectively, prosecutors have instituted policies focused on different phases in the prosecutorial process. Cahn reviews these programs and their effectiveness.<sup>35</sup> She notes that examples of innovative programs include the institution of no-drop policies that locate the decision for case filing with the prosecutor and remove the victim's ability to drop the charges; development of victim support systems to encourage victim cooperation throughout the prosecution process; the development of guidelines for post-charge diversion programs to ensure their proper use; and incorporation of expert witness testimony in trials to clarify battered women's behavior for jurors. In addition, the range of sentencing options has increased to include counseling or other diversion programs, on the one hand, and harsher sentences, on the other. Cahn notes that studies on the effectiveness of these innovations are limited. Examination of existing studies reveals that these policies decrease the likelihood of repeat violence.<sup>36</sup> Cahn reports that the success of effective domestic violence case processing depends on a commitment by the prosecutor's office to changing the attitudes and actions of individual prosecutors. Success also depends on prosecutors' willingness to work with other agencies in the criminal justice system and social service administrations to ensure a comprehensive approach to battering cases.

Thus, while the effect of mandatory arrest policies by themselves may be equivocal, when these policies are combined with other kinds of innovative programs, existing studies suggest that intervention through the legal system may help in stemming the tide of domestic violence. As the studies in this Special Issue suggest, this is not surprising given that the innovative programs are geared specifically toward altering the social contexts within which the law is enforced and given meaning "on the ground." Bowman has similarly argued for a comprehensive approach that "would include a commitment to arrest, prosecution, and more severe sentencing practices, coupled with the provision of supportive services for domestic violence victims."<sup>37</sup> She notes that programs of this kind in London, Ontario, and in Duluth, Minnesota, appear to be increasing domestic violence filings and reducing violence rates.<sup>38</sup> Here is one example of the way in which increased efficacy and improved process could work together.

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35. Naomi R. Cahn, "Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview," in E. S. Buzawa & C. G. Buzawa, eds., *Domestic Violence: The Changing Criminal Justice Response* (Greenwich, Conn.: Auburn House, 1992) ("Buzawa & Buzawa, *Domestic Violence II*").

36. David A. Ford & Mary Jean Regoli, "The Preventive Impacts of Policies for Prosecuting Wife Batters," in Buzawa & Buzawa, *Domestic Violence II*.

37. Bowman, 83 *J. Crim. Law & Criminology*, at 207 (cited in note 2).

38. See Peter Jaffe *et al.*, "The Impact of Police Charges in Incidents of Wife Abuse," 1 *J. Family Violence* 37, 46-48 (1986); and Bowman, 83 *J. Crim. Law & Criminology*, at 207.

As for the effectiveness of temporary restraining orders, Chaudhuri and Daly found that they had some deterrent value.<sup>39</sup> Their analysis reveals that men were more likely to batter women again if they had prior convictions, were unemployed or partially employed, or abused drugs or alcohol. Police responsiveness increased when a woman obtained a TRO; they were more likely to answer the call and arrive promptly. TROs also empower women to end their abusive relationships if they are not economically and emotionally dependent on men. For many women the “process is (or can be) the empowerment.”<sup>40</sup>

As with the research on rape, many scholars in the area of battery suggest that although reforms have improved women’s lives, if front-line decision-making is to be fundamentally changed, the organizational culture of legal institutions must be addressed. Indeed, a further question arises if we recall that an early goal of both the rape and battery movements was to change the political structure of society: To what degree have legal reform and the women’s movement effected any deep-structural changes?

Miller and Barberet examine these issues in their study of efforts to reform legal responses to spousal battery in Madrid, Spain, and Washington, D.C. They use a cross-cultural analysis to compare the ways in which personnel in criminal justice and social service agencies define the problems, causes, and solutions pertaining to battering. Their work shows how understandings of the problem of battering and its solutions are shaped by local culture. In the United States, respondents cited individual pathologies and family dysfunction as the cause of violence. On the other hand, Spanish respondents were more likely to cite structural reasons as the causes, and individual pathologies and family dysfunction as the catalysts, for violence. When asked about solutions to battering, U.S. respondents focused more on the use of criminal sanctions as solution to the problem, whereas in Spain the focus was more on civil remedies such as separation or divorce, changing socialization practices, and prevention education for youth.

Miller and Barbaret also assess the efficacy of reform efforts. Their work provides an opportunity to see how gender inequality as shaped by local culture impacts people’s everyday lives, rationales for behavior, and approaches to problems. Some change has occurred; for example, the development and influence of the battered women’s movement has had an effect on practitioners’ understanding of the causes of battering and on the types of solutions offered in efforts to stop it. But despite these changes—and although battered women’s movements and legal changes developed differently in each country—the deep-seated structures of gender relations and

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39. Molly Chaudhuri & Kathleen Daly, “Do Restraining Orders Help? Battered Women’s Experience with Male Violence and the Legal Process,” in Buzawa & Buzawa, *Domestic Violence II*.

40. *Id.* at 264.

power continued to shape how legal and social service agents responded to violence against women in both cultures. The authors argue that unless we deal with these structural and cultural inequalities, recognizing male violence as political rather than only psychological, criminalizing battering will not significantly alter gender relations or eliminate male violence.

Scholarly examinations of historical continuities and changes in the courts' responses to domestic violence can also shed light on current concerns about the courts' handling of battering situations. In this issue, Merry draws on 19th-century court documents and current court observations in Hilo, Hawaii, to examine how the court treats battering allegations. Her research indicates that violence offers a conundrum to the law. On the one hand, the court has made an increasing attempt to focus only on the physical act of battering violence, treating battering violence as a decontexted, unambiguous, unmediated physical act. Although this provides the court with a clear space from which to speak, it also ignores the subjectivity of the victim's experience, deemphasizes the power relations that underlie the violence, and ignores the court's own role in constructing violence by its acceptance of men's justifications for their actions. On the other hand, the very work of interpreting what happened, assessing the severity of the violence, and considering the legitimacy of men's justifications for their actions grounds the physical act within a social context. Merry suggests that it is this paradox of violence—that it is both beyond representation and always represented—which places it at the boundary of the socially constructed world, and at the center of the problem for law. Herein lies a key challenge for legal agents handling battering cases.

Thus, as with our review of the scholarship on rape reform efforts, we have moved from examinations of efficacy and process to broader questions about the intersection of legal reform with organizational cultures and deep-seated social attitudes. With both rape and battery, we see that legal reforms have been able to improve efficacy and process to a certain degree, but that further attention to institutional and social contexts is required to bring about the thoroughgoing changes envisioned by the early reformers. To assess this level of change, analysis that examines these contexts is called for. As Bowman pointed out, arrest could have an effect on intangibles such as victims' self-esteem and children's moral values, "because arrest delivers an empowering message to the victim and communicates society's condemnation of the abusive behavior to children or other witnesses."<sup>41</sup> These subtle changes of attitude and self-concept might not bear fruit in measurable behavior for some time (or at all) but might nevertheless be important to the women and children who live with men who batter. This third, contextual level of analysis might require additional attention to the on-the-ground

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41. Bowman, 83 *J. Crim. Law & Criminology*, at 206; see also Martha Fineman & Roxanne Mykitiuk, eds., *The Public Nature of Private Violence* (New York: Routledge, 1995).

personnel who carry out legal change—and to the communities, programs, and social structures that can bring the seeds of legal intervention to fruition. And just as reform efforts will have to take context and culture into account, the social-scientific studies and methods needed to assess these reform efforts will also have to take account of social construction, affect, and context. As Merry suggests, it will be crucial to understand the epistemologies of both the legal system and the wider society within which law operates. We will return to this issue of social epistemology in section III.

### C. Other Areas of Legal Reform

In addition to rape and battery, there are a number of areas of reform not addressed directly by the articles in this Special Issue. We briefly summarize some of them here in order to paint a fuller picture of the range of issues involved and of the common threads that tie many of them together. Typically, these social problems have not been the focus of as much legal reform as have rape and battery, and so the process of legal change and subsequent reassessment is not as far along. In one sense, as we will see, social-scientific work in these areas has not yet reached our third level of contextual assessment. And yet, in another sense, because a cultural backlash has short-circuited reform efforts to date, we see the issue of broader cultural epistemologies everywhere in the battles just to open the courts to initial claims.

In looking over this terrain, it is especially interesting to note the important difference between critiques designed to further legal efficacy in addressing problems of women and violence, and reassessments that are part of an effort to close the courts to women's claims. Thus, the critical reassessments provided by the authors in this symposium are aimed at increasing legal access, efficacy, and processual sensitivity in responding to violence against women. However, in many cases there have been critiques of reform whose aim is to shut down the voices that had just begun to be heard.

One area in which this kind of regressive process is currently at work is that of child sexual abuse. Legal reform in this area is of relatively recent vintage, and the nascent changes that had begun to be effected are already under attack from a cultural backlash of major proportion.<sup>42</sup> Efforts at reform had produced changes in the processing of child sexual abuse claims that were aimed, for example, at minimizing the trauma to children of testifying against their abusers and at promoting a respectful hearing of chil-

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42. Cynthia Bowman & Elizabeth Mertz, "A Dangerous Direction: Legal Intervention in Abuse-Survivor Therapy" (Northwestern University School of Law) ("Bowman & Mertz, 'Dangerous Direction'"); David Hechler, *The Battle and the Backlash: The Child Sexual Abuse War* (Lexington, Mass.: D. C. Heath, 1988); John E. B. Myers, ed., *The Backlash: Child Protection under Fire* (Thousand Oaks, Cal.: Sage Publications, 1994) ("Myers, *Backlash*").

dren's stories.<sup>43</sup> There have also been innovative attempts to use domestic violence statutes to obtain protective orders against child abusers.<sup>44</sup> Just as with rape and domestic battery, advocates initially had to overcome a climate of incredulity in which claims were treated as prima facie untruthful, exaggerated, or hysterical.<sup>45</sup> This problem was even more acute for adults who belatedly came forward to accuse their abusers, sometimes after periods of memory loss, or after years during which they did not fully realize the impact the abuse had had on their functioning.<sup>46</sup> Early efforts to open the courts to these claims resulted in alterations to statutes of limitations so that adult survivors of abuse could take their abusers to court.<sup>47</sup>

As the courts were opened to these claims, it became clear that there would be some claims that were ill-founded, as indeed occurs in every other area of law.<sup>48</sup> However, as with rape law, opponents of reform often took the occasional ill-founded case as paradigmatic, and are now using those cases in an effort to close the courts once again to victims of child sexual abuse.<sup>49</sup> Clearly, in a less polemical atmosphere, the kind of critical revision of early reform efforts that feminists and others are carrying forward in various areas of law might be beneficial here as well. However, the atmosphere in a time of backlash creates an environment in which any critique becomes mere fodder for regressive efforts to shut down women's and male victims' voices entirely. Thus this area of law reform remains in an earlier phase, still in many ways clinging to "second wave" efforts to merely open the courts at all. Under these circumstances, it is difficult to obtain reliable social-scientific assessments of the efficacy of existing reforms or to generate critical

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43. See generally J. Bulkley, *Recommendations for Improving Legal Intervention in Intra-Family Child Sexual Abuse Cases* (Washington, D.C.: American Bar Association, 1982); Gail S. Goodman, ed., "The Child Witness," 42 (2) *J. Soc. Issues* (Special Issue) (1984).

44. See National Legal Resource Center for Child Advocacy and Protection, *Child Sexual Abuse: Legal Issues and Approaches 8-9* (Washington, D.C.: American Bar Association, 1981).

45. Jean La Fontaine, *Child Sexual Abuse* 4-13, 22-23 (Cambridge, Mass.: Polity Press, 1990); Jean Renvoize, *Innocence Destroyed: A Study of Child Sexual Abuse* xi-xii (London: Routledge, 1993); Ruth Kempe & Henry Kempe, *Child Abuse* 3-6 (Cambridge, Mass.: Harvard University Press, 1978); Ann Wolbert Burgess, A. Nicholas Groth, Lynda Lytle Holmstrom, & Suzanne M. Sgroi, *Sexual Assault of Children and Adolescents* xv-xxi (Lexington, Mass.: Lexington Books, 1978).

46. Christine Courteois, *Healing the Incest Wound: Adult Survivors in Therapy* xiii-xv (New York: W. W. Norton, 1988); Judith Herman, *Trauma and Recovery* 1-4, 110-14 (New York: Basic Books, 1992).

47. Brian D. Gallagher, "Damages, Duress, and the Discovery Rule: The Statutory Right of Recovery for Victims of Childhood Sexual Abuse," 17 *Seton Hall Legal J.* 505, 509 (1993); Jocelyn B. Lamm, "Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule," 100 *Yale L.J.* 2189, 2191 (1991).

48. See Gallagher, 17 *Seton Hall Legal J.* at 538-40.

49. Bowman & Mertz, "Dangerous Direction," and Myers, *Backlash* (both cited in note 42).

visions of additional approaches that might be necessary to deter further violence and make amends to those already victimized.<sup>50</sup>

Perhaps no area of law shows the imprint of feminist theorizing more dramatically than does that of sexual harassment, an arena in which feminist attorneys and legal scholars have joined forces to work effectively for change. Pioneering work by Lin Farley and Catharine MacKinnon in the 1970s opened many people's eyes regarding the verbal and physical harassment and violence to which women were often routinely subjected as part of their employment situations.<sup>51</sup> As a result of this and other work, there have been a number of initial changes in the law—most notably inclusion of sexual harassment as a violation of title VII of the amended 1964 Civil Rights Act—and proposals for further reform aimed at ending sexual harassment in the workplace and elsewhere.<sup>52</sup>

As with the area of child sexual abuse, the reforms regarding sexual harassment are still in their early phases, and we await further work and study in assessing progress to date and suggesting possible avenues for improvement.<sup>53</sup> Scheppele's article, "Manners of Imagining the Real," points out the ways in which efforts to prove sexual harassment through legal language meet with many of the same difficulties facing attempts to have rape and battery charges taken seriously—including having coherent stories ruptured because of practices such as "cross-examination, the search for physical evidence that has left marks in the world, [and] the obsessive focus on consistency and promptness as markers of truth" (p. 32). Through many

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50. There has been research assessing the effects of testifying on children, some calling for legal reforms aimed at making the experience less stressful (see, e.g., Gail Goodman, Elizabeth Taub, David Jones, Patricia England, Linda Port, Leslie Rudy, & Lydia Prado, *Testifying in Criminal Court*, Monographs of the Society for Research in Child Development No. 5 (1992); Desmond Runyan, Mark Everson, Gail Edelson, Wanda Hunter, & Martha Coulter, "Impact of Legal Intervention on Sexually Abused Children," 113 *J. Pediatrics* 647 (1988)), and some assessing the relative suggestibility of child witnesses (see, e.g., Stephen Ceci & Maggie Bruck, "The Suggestibility of the Child Witness: A Historical Review and Synthesis," 133 *Psychol. Bull.* 403 (1993); Gail Goodman & A. Clarke-Stewart, "Suggestibility in Children's Testimony: Implications for Child Sexual Abuse Investigations," in J. L. Doris, *The Suggestibility of Children's Recollections* 92–105 (Washington, D.C.: American Psychological Association, 1991)).

51. Lin Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (1978); Catharine A. MacKinnon, *Sexual Harassment of Working Women* (New Haven, Conn.: Yale University Press, 1979).

52. 42 U.S.C. §§ 2000e-3-17 (1988); for an argument for legal reform to prevent street harassment of women, see Cynthia Bowman, "Street Harassment and the Informal Ghettoization of Women," 106 *Harv. L. Rev.* 517 (1993).

53. There are, of course, still other areas of violence that have been addressed in legal forums—violent attempts to prevent women from obtaining abortions, for example (see Ruth Colker, *Abortion and Dialogue: Pro-Choice, Pro-Life, and American Law* (Bloomington: Indiana University Press, 1992); Rebecca Eisenberg, "Beyond Bray: Obtaining Federal Jurisdiction to Stop Anti-Abortion Violence, 6 *Yale J. L. & Feminism* 156 (1994)). And there are areas that involve violence not of individual men against women, but of male-dominated institutions—for example, the violence involved in criminalizing aspects of women's reproductive process or in enforced temporary or permanent sterilization through use of reproductive technologies. Again, we are limited here to a brief overview of a very complicated field.

areas in which legal reform has been attempted, we find some common problems in translating women's lived experience of violence in legal forums. These problems focus our attention on the critical role of culture, social construction, and context in legal translations of violence.

## II. CRITICAL PERSPECTIVES ON LAW, GENDER, AND VIOLENCE: THE ROLE OF SOCIOCULTURAL CONSTRUCTION AND CONTEXT

The symposium authors discussed above all examined either directly or indirectly the effectiveness of legal reforms. They concluded that until structural and cultural inequalities are addressed in society, legal reforms might improve aspects of women's lives but they will not eliminate violence against women. As we have noted, these conclusions did not envision a closing of legal forums to claims based in violence against women, but rather pointed to the need for more change in order to make legal and other remedies more effective. A related area of inquiry has been undertaken by critical theorists (including feminist scholars), who through their analysis of the structure of legal discourse and legal ideology are examining law as a system of knowledge and power. Features of this work include unmasking law's apparent neutrality and objectivity; making explicit how the structure of legal discourse and legal rules implicates power; making visible how legal ideology and discourse exclude the voices of women and men of color; and challenging the ability of legal reform to accept or integrate the voices of oppressed persons.<sup>54</sup>

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54. Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) ("Smart, *Feminism*"); Kim Lane Scheppele, "Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth," 37 *N.Y. L. School L. Rev.* 123 (1992); Martha Albertson Fineman, "Introduction," in M. A. Fineman & N. S. Thomadsen, eds., *At the Boundaries of Law: Feminism and Legal Theory* (New York: Routledge, 1991) ("Fineman & Thomadsen, *Boundaries*"); *id.*, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1992); Fineman & Thomadsen, *Boundaries*; bell hooks, *Feminist Theory: From Margin to Center* (Boston: South End Press, 1984); Michel Foucault, *The Archeology of Knowledge* (New York: Pantheon, 1972); Kimberlé W. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," 1989 *U. Chi. Legal F.* 139; Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (New York: Routledge, 1991); Lucie E. White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.," in Fineman & Thomadsen, *Boundaries*; Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York: Basic Books, 1987); Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, & Kimberlé Williams Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, Colo.: Westview Press, 1993) ("Matsuda et al., *Words That Wound*"); Patricia J. Williams, *The Alchemy of Race and Rights: The Diary of a Law Professor* (Cambridge, Mass.: Harvard University Press, 1991) ("Williams, *Alchemy*"); Gloria Anzaldúa, ed., *Making Face, Making Soul: Haciendo Caras* (San Francisco: Aunt Lute Foundation, 1991) ("Anzaldúa, *Making Face*"); Trinh T. Min-ha, *When the Moon Waxes Red: Representation, Gender, and Cultural Politics* (Boston: Northeastern University Press, 1991).

Working within this framework, Scheppele uses the Thomas-Hill hearings to examine how legal doctrine and procedures (for example, the rules of evidence) exclude or discredit subordinate voices in our society. Through an examination of the legal tactics legislators used during the hearings, she makes visible how prosecutors and jurists routinely employ legal rules to disqualify oppressed persons' knowledge and experience as "fact." By dismissing subordinate persons' accounts as nonrealities, legal representatives remove the possibility of addressing particular claims of injustice while simultaneously allowing the court to appear sympathetic to the notion that injustices generally are offensive and should be redressed. Scheppele suggests that it is the flexibility of legal rules that allows law to seemingly provide opportunity and voice for the powerless while in actuality maintaining the current social order. She argues that until we address the logic of legal structure and legal ideology, oppressed persons will not achieve voice or recognition.

Critical scholars such as Scheppele ask whether the voices of subordinated persons can be heard as legitimate within the current legal structure. This raises a related question: How accurate are the legal accounts that are constructed from a person's subjective experience? Can a subordinated person's experiences be accurately represented by dominant institutions? As women proceed through the criminal justice system, legal accounts of their experiences are constructed. These legal texts are representations of women's experience. They are shaped by the organizational structure in which they are written, and informed by both prosecutors' background knowledge of case processing and societal assumptions about gender and power relations.<sup>55</sup>

Hirsch joins scholars such as Bumiller and Young<sup>56</sup> in examining another venue in which women's experiences with violence are translated into text—the media. Through a comparison between U.S. and Kenyan media accounts of a rape incident in Kenya, Hirsch makes visible how cultural frameworks and assumptions about women as rape victims and men as rapists are infused in media representations of rape. In particular, she displays how U.S. journalists use their own cultural scripts concerning rape, gender, and race relations in describing the incident in St. Kizito rather than conveying local interpretations of the incident. She points to this phenomenon to criticize Western feminists' underlying assumption that there is an essential rape "experience" that crosses race, class, and culture. She is critical of Western feminists who universalize rape victims' experiences and perpetra-

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55. Frohmann, "Screening" (cited in note 2); Donileen R. Loseke, *The Battered Woman and Shelters: The Social Construction of Wife Abuse* (Albany: State University of New York Press, 1992).

56. Kristen Bumiller, "Fallen Angels: The Representation of Violence against Women in Legal Culture," 32 *Int'l J. Soc. L.* 125 (1990); Allison Young, *Femininity in Dissent* (New York: Routledge, 1990).

tor motives from an American standpoint. She argues that we must move toward more culturally specific representations of rape.

The issue of social construction and cultural specificity brings us to a final issue, a troublesome one for feminists and social scientists interested in the study of violence and gender. As Merry pointedly demonstrates, a profound epistemological problem emerges from the cultural analysis of legal constructions of violence. On the one hand, there is a focus on the "reality" of the physical injury, in some sense seen as beyond cultural construction. And yet, at the same time, this physical injury is so clearly understood within a context, a context of interpretation and culture. How are we to understand this complex relation of ontologically framed "reality" and cultural construction in and around the legal response to violence? From what vantage can we assess reform, generate critical insights regarding violence, and analyze gendered experiences while still remaining true to the varied and particularized contexts and moral visions attached to questions of gendered violence across societies and cultures?

### III. EPISTEMOLOGY AND JUSTICE: BEYOND SOCIAL CONSTRUCTION?

At the heart of the struggle for change lies a profound tension, one that is found more generally in cross-cultural studies of gender and of human rights. This problem is articulated by Scheppele in her questions about the search for physical evidence, by Hirsch in her dissection of the different accounts of the same violent events that emerged in Kenyan and U.S. media, by Razack's problematizing of the question of consent from the vantage of disabled women, by Merry's insightful unraveling of the two sides to social construction in domestic violence cases, and by Miller and Barbaret's contrast between U.S. and Spanish understandings of law and violence. The epistemological issue is a profound one, one that is currently troubling—from different angles—anthropologists, philosophers, social theorists, comparative legal scholars, feminist and critical race theorists, and human rights activists.

The question becomes: From what vantage can we assert any "reality," let alone any normative preference? If everything is "constructed" in culture and social thought, then why isn't one person's account just as good as another? From what ground can any woman resist the rapist's claim that this was "just sex," the child molester's claim that "nothing happened," the batterer's claim that he was merely "helping" his wife see the error of her ways? In many arenas, reform has begun with women's ability to make what is an essentially ontological claim (this event "really" happened) in the face of denial. There is a parallel with the discourses that have attempted to uncover the "true story" of genocide and political murder when states have

attempted to lie about the deaths—and often it is the unrelenting “reality” of the dead bodies, somehow beyond yet always within social construction, that begins the quest for justice. Of course, the categories and language of the assertions, quests, and assessments are cultural and social. But a tension emerges when analysis moves all events to the level of discourse, stories, and social categories, turning away completely from questions of truth and justice while concentrating on issues of construction, persuasion, and rhetoric.<sup>57</sup> The tension can be seen with great clarity if we compare feminist anthropology with legal feminism, for each forcefully articulates one part of the problem.<sup>58</sup>

On the one hand, feminist and other anthropologists have for years been at work deconstructing received wisdom regarding the fixity of gender categories. Thus, initial efforts to demonstrate and explain the universality of male dominance in gendered status hierarchies crumbled in the face of mounting evidence that women’s status was actually quite variable cross-culturally—and that more complex and accurate measures of status were required to do justice to varying assessments of value across cultures.<sup>59</sup> Similarly, attempts to discover cross-culturally similar kinds of social differences between men and women based on a division between public (male) and private (female) spheres, or on symbolic differentiation between nature (female) and culture (male), have turned out to be heavily ethnocentric, imposing Western cultural notions rather than mapping other societies with any precision.<sup>60</sup> Biologically based models of male/female difference have also come under attack from anthropologists, who have, for example, effectively refuted the more simplistic notions correlating female reproductive roles with fixed social consequences.<sup>61</sup> Indeed, as Moore has observed, the

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57. See Marianne Constable, “Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law,” 19 *Law & Soc. Inquiry* 551 (1994).

58. Hence anthropological feminist Marilyn Strathern’s observation that anthropology and feminism in a sense mock one another. Marilyn Strathern, “An Awkward Relationship: The Case of Feminism and Anthropology,” 12 *Signs* 276 (1987).

59. See, e.g., Eleanor Leacock, “Women’s Status in Egalitarian Society: Implications for Social Evolution,” 19 *Current Anthropology* 247 (1978); Rayna Rapp, “Review Essay: Anthropology,” 4 *Signs* 497 (1979); M. K. Whyte, *The Status of Women in Preindustrial Societies* (Princeton, N.J.: Princeton University Press, 1978).

60. See on public/private, Michelle Rosaldo, “Women, Culture, and Society: A Theoretical Overview,” and on nature/culture, Sherry Ortner, “Is Female to Male as Nature Is to Culture?” both in Michelle Rosaldo & Louise Lamphere, eds., *Women, Culture, and Society* 67–88 (Stanford, Cal.: Stanford University Press, 1974). For critiques, see Carol MacCormack & Marilyn Strathern, eds., *Nature, Culture, and Gender* (Cambridge: Cambridge University Press, 1980); Michelle Rosaldo, “The Use and Abuse of Anthropology: Reflections on Feminism and Cross-cultural Understanding,” 5 *Signs* 389 (1980); Marilyn Strathern, “Domesticity and the Denigration of Women,” in D. O’Brien & S. Tiffany, eds., *Rethinking Women’s Roles: Perspectives from the Pacific* 13–31 (Berkeley: University of California Press, 1984).

61. See, e.g., Judith Shapiro, “Anthropology and the Study of Gender,” in E. Langland & W. Gove, eds., *A Feminist Perspective from the Academy* (Chicago: University of Chicago Press, 1983); Sylvia Yanagisako & Jane Collier, “Toward a Unified Analysis of Gender and Kinship,” in Jane Collier & Sylvia Yanagisako, eds., *Gender and Kinship: Essays toward a Uni-*

most recent work in feminist anthropology stands poised to "provide a critique of feminism based on the deconstruction of the category 'woman.'"<sup>62</sup> Collier and Yanagisako similarly suggest that anthropological feminism's "next contribution to the study of gender and kinship should be to question the difference between women and men," "calling into question the universality of our cultural assumptions about the difference between males and females."<sup>63</sup> Here anthropological feminists are perhaps predictably aligned with critics who urge caution about essentialist approaches to gender, largely on the basis that when the theorists doing the writing are for the most part from similar socioeconomic and ethnic backgrounds, they may risk a version of ethnocentrism that universalizes particular women's experiences while ignoring those of other women (as Hirsch's study illustrates).

On the other hand, as feminist legal scholars effectively remind us, if we deconstruct the category "woman" too thoroughly, we may have no ground left from which to analyze any common ground of shared gendered oppression. Critiques grounded in "difference" theory have been highly successful in uncovering gendered dimensions to areas of legal doctrine and practice once thought to be neutral.<sup>64</sup> Even anthropologists grant that of all the cross-cultural universals to stand up under recent critique, perhaps the most persistent has been the cross-cultural asymmetry around violence; in a recent summary review essay, anthropologists Mukhopadhyay and Higgins note that newer anthropological work has yet to "satisfactorily account for the male monopoly over violence or for women's apparent nonviolence even in the face of aggression."<sup>65</sup> Without gendered categories from which

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*fied Analysis* 48-49 (Stanford, Cal.: Stanford University Press, 1987) ("Collier & Yanagisako, *Gender and Kinship*"); Barbara Diane Miller, ed., *Sex and Gender Hierarchies* (Cambridge: Cambridge University Press, 1995); K. Poewe, *Matrilineal Ideology: Male-Female Dynamics in Luapula, Zambia* (London: Academic Press, 1981); Marilyn Strathern, "Introduction," in M. Strathern, ed., *Dealing with Inequality: Analysing Gender Relations in Melanesia and Beyond* (Cambridge: Cambridge University Press, 1987).

62. Henrietta Moore, *Feminism and Anthropology* 11 (Minneapolis: University of Minnesota Press 1988).

63. Collier & Yanagisako, *Gender and Kinship* 48-49.

64. See, e.g., Mary Joe Frug, "Re-reading Contracts: A Feminist Analysis of a Contracts Casebook," 34 *Am. U.L. Rev.* 1065 (1985); Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989); Carole Pateman, *The Sexual Contract* (Stanford, Cal.: Stanford University Press, 1988); Lea VanderVelde, "The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity," 101 *Yale L.J.* 775 (1992); for critiques of legal neutrality from vantage of race, see also, e.g., Cheryl I. Harris, "Whiteness as Property," 106 *Harv. L. Rev.* 1707 (1993); Matsuda *et al.*, *Words That Wound* (cited in note 54).

65. Carol Mukhopadhyay & Patricia Higgins, "Anthropological Studies of Women's Status Revisited, 1977-1987," 17 *Ann. Rev. Anthropology* 461, 472 (1988). See also an interesting critique by feminist anthropologists who are suspicious of the postmodern trend in anthropology that deconstructs the subject just as women and non-Western peoples generally have begun to find their voices: "To the extent that [the] dominant group has in recent years experienced a decentering as world politics and economic realities shift global power relations, postmodern theorizing can be understood as socially constructed itself, as a metaphor for the sense of the dominant that the ground has begun to shift under their feet." Frances

to see this pattern, how can we begin to fashion remedies? In examining violence across cultures and history, would it be possible to give due respect to differences in values and perspectives and yet find a ground for critiques that insist upon the inviolability of certain fundamental human rights? The feminist and legal theoretical debates around international human rights are currently addressing this very question, and it is one that raises challenging issues at both the epistemological and moral levels.<sup>66</sup> Recent interesting suggestions for developing an ethic of human "flourishing" begin with serious attention to the language and perspectives of the women and men affected by violence and injustice, rather than starting from a priori universals asserted from Western perspectives.<sup>67</sup> The notion of an "on-the-ground" foundation for reforms aimed at ending violence could draw productively from these kinds of approaches. For example, Larson focuses on the benefits of the common law for the development of "situated, intuitive, and evolving norms of human flourishing" because it builds law from "social custom and experience."<sup>68</sup> Perry's insistence on an ongoing generative discourse within and between communities, building from internal cultural critiques of oppressive practices to a "shared productive moral discourse," also combines respect for indigenous context with a vision of a developing normative standard that could cross cultures.<sup>69</sup> Lugones's concept of "world-travelling" similarly provides a framework for understanding and inhabiting the distinctive contexts of different "worlds" while yet attaining a kind of conceptual continuity:

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Mascia-Lees, Patricia Sharpe, & Colleen Ballerino Cohen, "The Postmodern Turn in Anthropology: Cautions from a Feminist Perspective," 15 *Signs* 7, 15–16 (1989).

66. Clearly, the issues surrounding a perspectival, decentered, or language-sensitive foundation for knowing take us back to problems addressed from different vantages by Hume and Wittgenstein, just to begin a long list.

67. See Martha Nussbaum & Amartya Sen, eds., *The Quality of Human Life* (New York: Clarendon Press, 1993); Larson, 33 *Washburn L.J.* (cited in note 2); Michael Perry, "The Idea of Human Rights: Five Inquiries" (Northwestern University School of Law) ("Perry, 'Idea'"). For examples of arguments for advantages of nonrelativist human rights approaches from vantage of indigenous and oppressed women, see Asma al-Dareer, *Woman, Why Do You Weep: Circumcision and Its Consequences* (London: Zed Press, 1982); Celina Romany, "Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law," 6 *Harv. Hum. Rts. J.* 87 (1993); Williams, *Alchemy* (cited in note 54); articles in Martha Nussbaum & Jonathan Glover, eds., *Women, Culture, and Development* (Oxford: Clarendon Press, 1995).

68. Writes Larson, 33 *Washburn Law J.*, at 69–74 (cited in notes 2):

If truths about what constitutes the core of human personhood are partly contingent, disputes over them can be resolved only through struggles over social reality like those that go in highly localized legal disputes. The common law is a social dialogue that accommodates pressures for preservation as well as for change, creating cultural space for the emergence of shared values as well as for criticism and transformation of past commitments . . . by the accretion of regularities in human experience over time, it gains moral and political authority, and thus provides the society with a basis for judging right from wrong.

69. Perry, "Idea" (cited in note 67).

One can “travel” between these “worlds” and one can inhabit more than one of these “worlds” at the very same time. I think that most of us who are outside the mainstream U.S. construction or organization of life are “world-travellers” as a matter of necessity and of survival. . . . In describing a “world” I mean to be offering a description of experience, something that is true to experience even if it is ontologically problematic. Though I would think that any account of identity that could not be true to this experience of outsiders to the mainstream would be faulty even if ontologically unproblematic. Its ease would constrain, erase, or deem aberrant experience that has within it significant insights into non-imperialistic understanding between people.<sup>70</sup>

Fineman’s recent proposal for attention to the shape of “gendered lives” as they are experienced at a daily level involves a similar level of attention to the details of particular lives and contexts, while not evading analysis of the structures that cause injustice and inequalities of power.<sup>71</sup> Thus, from a number of vantages, there is a converging interest in a new kind of epistemological theory, one that accomodates multiplicity while not abandoning justice. We would suggest that in ethnography and qualitative work lies a similar powerful promise—of due respect for the voices and lives that emerge from particular and different contexts, yet of the possibility of analysis that uncovers and contests structures of violence.<sup>72</sup>

#### IV. CONCLUSION

All the authors in this symposium suggest that legal reform as currently instituted cannot by itself eliminate violence against women. The cultural, economic, and social roots of gender and race inequality are too deep.<sup>73</sup> Not only is change at the level of statute and official policy necessary, but in addition it will require substantial rethinking of institutional structures and ideologies to successfully combat violence against women. At times, this rethinking extends to the very framework of the institution or doctrine involved, asking challenging questions about the underlying epistemologies or

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70. María Lugones, “Playfulness, ‘World’-Travelling, and Loving Perception,” in Anzaldúa, *Making Face* 390–402 (cited in note 54).

71. Martha Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (London: Routledge, 1995).

72. See Elizabeth Mertz, “A New Social Constructionism for Sociolegal Studies,” *28 Law & Soc’y Rev.* 000 (1994); *id.*, “The Perfidy of Gaze and the Pain of Uncertainty: Anthropological Theory and the Search for Closure” (delivered at Meeting of the American Anthropological Association, Atlanta, 1994). See also the voluminous emergent scholarship on feminist methodology; for example, Sandra Harding, *Feminism and Methodology: Social Science Issues* (Bloomington: Indiana University Press, 1987); Dorothy Smith, *The Everyday World as Problematic* (Boston, Northeastern University Press, 1987).

73. Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989); *id.*, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987); Smart, *Feminism* (cited in note 54).

world-views that are embodied in legal practices. This is a domain that the field of interpretive sociolegal studies is particularly well suited to uncover. Essential to elucidating quantitative work that reveals wide-scale patterning of outcomes, qualitative and interpretive work can uncover the institutional and social processes that produce those outcomes. These processes are deeply cultural, imbued with the understandings that participants bring to the daily interpretation of law.<sup>74</sup> As quantitative and qualitative researchers in sociolegal studies bring their work to bear on issues of violence, women, and the law, they can shed light on the contexts that give life to statutory and policy reforms. In listening to the voices of the women who are subject to violence, and in charting the social forces at work in and around the law as it attempts to address the concerns of those women, we will confront some of the most difficult social, moral, legal, and epistemological issues of our time.

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74. See Austin Sarat & Thomas Kearns, *Law in Everyday Life* (Ann Arbor: University of Michigan Press, 1993).