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# Words and the Door to the Land of Change: Law, Language, and Family Violence

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Can words stem violence? More specifically, can anything anyone says halt the physical devastation inflicted daily behind the closed doors of family dwellings? Some people strike, beat, or burn their children. Some people assault their lovers, some their spouses; usually, men batter women.[1] Can words, uttered by anyone else, stop this violence?[2]

Words of journalists expose family violence to public view.[3] Words of legislatures and judges forbid and punish family abuse.[4] Words of historians, novelists, television scriptwriters, social workers, feminist theorists, and songwriters depict and decry domestic violence against a backdrop of societal silence about it.[5] But are there words to describe family violence that do not make it seem routine and familiar, that do

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1. *See generally Domestic Violence, 1978: Hearings Before the Subcomm. on Child and Human Development of the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. (1978); R. GELLES & M. STRAUS, INTIMATE VIOLENCE (1988); Schechter, *The Violent Family and the Ambivalent State: Developing a Coherent Policy for State Aid to Victims of Family Violence*, 20 J. FAM. L. 1 (1981-82); Recent Development, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 213 n.1 (1988) [hereinafter *Mandatory Arrest*] (noting crime statistics showing vast majority of cases involve men against women). Elderly people also are subject to abuse by their family caretakers. *See generally* THE BATTERED ELDER SYNDROME: AN EXPLORATORY STUDY (M. Block & J. Sinnott eds. 1979).

2. Policies are obviously important, too. *See Mandatory Arrest, supra* note 1, at 215 (offering evidence that police arrest policies can reduce substantially the numbers of domestic assaults and murders). In order to change policy and to enforce adapted policies, many words first must be marshalled to convince people of the degree of domestic violence and the need for change. Words play a significant role in changing the external and internal restraints people may feel against committing violence against family members. Richard Gelles and Murray Straus suggest that "people hit family members because they can"—there are rewards for violent behavior, and the costs do not exceed the rewards. R. GELLES & M. STRAUS, *supra* note 1, at 22. Public attitudes contribute to tolerance for family violence and for slow or absent policy intervention. *Id.* at 23-36.

3. *See infra* Part II.

4. *See infra* Part I.

5. *See infra* Parts III & IV.

not diminish violence by speaking about it? Are there words to render its ordinariness, its quotidian part of so many families' lives? Are there forms of expression that solicit humane responses and overcome restraints that hold people back from halting family violence? Finding languages to persuade judges, to empower victims, and to mobilize onlookers presents linked yet distinct difficulties.

This Article is an inquiry into current uses of words in response to family violence. Because the subject itself often makes speech difficult, the words are sometimes halting; the narrative is broken, and some of the edges are sharp. As I try to read texts that are themselves efforts by people to read the world, I wonder whether any of these readings and writings can change what happens. I wonder whether words by lawyers and judges differ from words by journalists, and whether the more intimate and yet more widely accessible languages of literature and popular music lyrics may change minds and prompt actions.

## I.

In February 1989 the Supreme Court of the United States rejected the claim by Joshua DeShaney and his mother that the Winnebago County Department of Social Services violated his constitutional rights when it failed to protect him from the violence of his father.[6] Joshua's father's violence put Joshua into a coma and left him paralyzed and without the functioning of half of his brain. The doctors found pools of rotted blood inside his brain as the result of months of bleeding from repeated assault. Joshua was just two weeks short of his fourth birthday. He is now in an institution for persons with profound mental retardation.[7]

The technical legal question raised in the case was whether the due process clause of the federal constitution should be interpreted to provide a basis for financial recovery after a government, its agencies, and employees failed to protect a child known to be at risk of severe physical abuse by his custodial parent.[8] Many difficult issues are implicated in this question.[9] Do precedents in the field of due process and other

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6. This section is a revision of my speech entitled, "Law and Violence," presented at the Harvard Medical School Continuing Education Fifth Annual Conference on Abuse and Victimization in Life-Span Perspective, Boston, Mass., Mar. 24, 1989. The case under discussion is DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989); *see also* S. EHRLICH, LISA, HEDDA & JOEL: THE STEINBERG MURDER CASE (1989); Reidinger, *Why Did No One Protect This Child?*, A.B.A. J., Dec. 1988, at 48.

7. *DeShaney*, 109 S. Ct. at 1002.

8. *See id.* at 998.

9. For thoughtful articles on the case, see Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 701 (1990); Beermann, *Administrative Failure and Local Democracy: The Politics of* DeShaney, 1990 DUKE L.J. ___ (forthcoming); Soifer, *Moral Ambition, Formalism, and the*

elements of legal analysis offer guidance? Would financial liability for failures to act lead to more effective or less effective social services programs to respond to family violence? Alternatively, instead of seeking to deter bad conduct through the threat of financial liability, should lawmakers articulate duties of social workers or seek changes in social services programs in order to produce greater responsiveness to situations like that of Joshua DeShaney? Are there standards of professional judgment that can be articulated to permit judicial evaluation of the role of the social services department in this case? Can those standards guard against both the risks of state over-intrusion into families and the risks of state failure to intervene? Or is the very use of law misguided, and do more promising alternatives lie in efforts to increase the funding and enhance the training of social services personnel? Can nonlegal resources such as cultural mediums and religious and communal activities help shape conditions that will provide better education for the next generation of parents and reduce social isolation and offer more sustenance and protection for children at risk of violence at the hands of their caretakers?

Beyond these important and difficult questions are the attitudes about family violence embedded in the language of the Supreme Court's opinions. The bottom line in the *DeShaney* case is judicial inaction—the Court's refusal to act in response to a claim for redressing child abuse. That is too simple a statement, however, of the judicial attitude toward family violence. Such a headline report does not communicate the nuance and complexity that the Justices themselves tried to convey to the watching community.

The case prompted three opinions from the Supreme Court. Chief Justice William Rehnquist wrote for the majority;[10] Justices William Brennan[11] and Harry Blackmun[12] wrote the dissents. The opinions offer varied rationales and approaches to the relationship between law and family violence. According to Chief Justice Rehnquist's opinion, for example, the major reason why Joshua and his mother lost their suit is that the state has no obligation under the Constitution to provide affirmative governmental aid.[13] The due process clause of the Constitution guarantees only against governmental acts that interfere with an

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*"Free World" of* DeShaney, 57 GEO. WASH. L. REV. 1513 (1989); Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53; M. Glendon, The Missing Language of Responsibility in Rights Talk: The Impoverishment of American Political Discourse (unpublished manuscript).

10. *DeShaney*, 109 S. Ct. at 1001.
11. *Id.* at 1007 (Brennan, J., dissenting).
12. *Id.* at 1012 (Blackmun, J., dissenting).
13. *Id.* at 1003-07.

individual's life, liberty, or property. There is no entitlement to governmental aid that may be needed by individuals to realize the advantages of freedom.[14] Judicial decisions mandating care for individuals who are institutionalized by the government in prisons and hospitals are exceptions because under those circumstances, the government has deprived the individuals of liberty.[15]

Chief Justice Rehnquist reasoned also that the state acquired no duty to provide adequate protection for Joshua even though the agency had multiple reports of the risk to Joshua. To Chief Justice Rehnquist's majority, it did not matter that the state had taken Joshua into temporary custody before deciding to return him to his father's custody.[16] The state court or state legislature might decide to impose such a duty, but the federal court, under the federal constitution, should not.[17]

Two significant assumptions are at work here. The first is that violence is private and that the distinction between public and private action makes violence, on occasions like this one, beyond public control. The second is that the government has to act in order to invade someone's rights; failing to act is not an invasion. For both assumptions, conceptual distinctions between categories, expressed through words remote from the facts of the case, do the work of judgment. The Justices in the majority point to words like "private" and mere "failure to act" as the basis for the judgment denying Joshua's recovery.[18] Such words work as talismans to ward off the facts of the case.

Justice Brennan's dissent probed beneath these talismans. To do so, he chose different words. He dealt powerfully with the second assumption. Justice Brennan explained that the case was one of governmental inaction only in the sense that the agency failed to take steps to

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14. *Id.* at 1003-04.

15. *Id.* at 1004-05.

16. *Id.* at 1006.

17. *Id.* at 1007. The equal protection clause provides another possible basis for challenging failures in the provision of social services. The majority in the *DeShaney* case indicated that relief might ensue if a complainant demonstrated that the failure stemmed from impermissible discrimination such as race or ethnicity. *Id.* at 1004 n.3. Justice Brennan called this "meager comfort," because only invidious discrimination on the basis of race or ethnicity has been sufficient to trigger this kind of protection. *Id.* at 1011 (Brennan, J., dissenting). Justice Brennan did not point out the more dismal fact that the Court often rejects even powerful evidence of racial discrimination because of the need to protect governmental discretion. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting challenge to claim that the death penalty is administered with much greater frequency to black defendants who kill white victims than to either black defendants who kill black victims or white defendants who kill black victims). Nonetheless, the equal protection argument may provide some avenues for relief, especially if courts are willing to give content to the idea of "protection of the laws," *see* Goldstein, Blyew*: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 555-63 (1989), and if the courts are willing to recognize gender or family status as an impermissible basis for discriminatory treatment.

18. *DeShaney*, 109 S. Ct. at 1004, 1007.

protect Joshua.[19] In another sense, the government actually did act. It acted when it established a system of public social services and directed all other actors—neighbors, school teachers, and medical personnel at hospital emergency rooms—to direct any suspicions of abuse to the public agency and to rely on the agency to proceed from there. Thus, when a police department or sheriff's office receives a report of suspected child abuse, it refers the report to the local social services department for action.[20] Justice Brennan observed that "[i]n this way, Wisconsin law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services such as [this one] to protect children from abuse."[21] In the case of Joshua DeShaney, the state's invitation was accepted when relatives, emergency room personnel, and neighbors all reported to the agency that they suspected Joshua was being abused.[22]

The government also acted when its employee social worker duly compiled her observations from nearly twenty home visits.[23] The Department did not do nothing: it obtained extensive information about Joshua through outside sources and through its own staff. It removed Joshua temporarily from his father's care, but then returned him to his father. The Department conveyed to others that it was monitoring the situation. All the information gathered on Joshua produced no efforts to protect him from his father, but this was not inaction. The Department acted when it decided not to take steps to protect the child. In his separate dissent, Justice Blackmun concluded that "the facts here involve not mere passivity, but active state intervention in the life of Joshua DeShaney—intervention that triggered a fundamental duty to aid the boy once the State learned of the severe danger to which he was exposed."[24]

Justice Brennan and Justice Blackmun also challenged the distinc-

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19. *Id.* at 1008 (Brennan, J., dissenting).

20. *Id.* at 1010 (Brennan, J., dissenting).

21. *Id.* (Brennan, J., dissenting). Similarly, Justice Brennan reasoned that the government had entered into a special relationship with Joshua by assuming a protective role over him. *See id.* at 1011-12 (Brennan, J., dissenting). This argument would place the kinds of duties on the government that would treat failures to act as culpable breaches. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307 (1982); Estate of Bailey v. County of York, 768 F.2d 503 (3d Cir. 1985); *see also* CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, THE STATE'S DUTY TO CHILD ABUSE VICTIMS: *DESHANEY V. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES* (1989) (authored by Lou Fields).

22. *See DeShaney*, 109 S. Ct. at 1011 (Brennan, J., dissenting).

23. *Id.* at 1010 (Brennan, J., dissenting). One report described a dozen visits. Reidinger, *supra* note 6, at 49.

24. *DeShaney*, 109 S. Ct. at 1012 (Blackmun, J., dissenting). Although not explored by the dissents, another dimension of state action here was the lower court's decision to award custody of Joshua to his father after his parents' divorce.

tion between action and inaction. Their opinions are dissenting views in this case and in law generally.[25] The distinction between acting and failing to act could be used by judges to stymie efforts to prod police departments to respond to the battery of women and children.[26] In the *DeShaney* case Justice Brennan wrote that "inaction can be every bit as abusive of power as action, [and] that oppression can result when a State undertakes a vital duty and then ignores it."[27] Thus he explains how action and inaction are intertwined, and that inaction by one who takes on a responsibility is different from inaction by one who does not.[28]

Justice Brennan himself paid deliberate attention to the way in which the Court's own conduct mirrored that of the Winnebago Department of Social Services: conduct that could be called simply inaction instead should be called action—affirmative choices not to act, not to respond. Justice Brennan concluded his opinion this way: "Because I cannot agree that our Constitution is indifferent to such indifference, I respectfully dissent."[29]

Justice Blackmun also evoked analogies between judicial behavior and the behavior of the social services department that could be de-

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25. Inaction by individuals in the face of another's distress traditionally triggered no legal sanction in the absence of a legally recognized special relationship of care. *See, e.g.*, Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928) (finding that defendant's failure to respond to cries for help from the man to whom he had rented a canoe created no liability); Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959) (holding that no liability was incurred by the defendant who had enticed the deceased to jump into the water and then failed to help him get out).

26. Before *DeShaney* several courts had ruled that government failures to respond to domestic violence violated the rights of victims. *See, e.g.*, Balistreri v. Pacifica Police Dep't, 855 F.2d 1421 (9th Cir. 1988); Thurman v. City of Torrington, 595 F.Supp. 1521 (D. Conn. 1984); *see also* Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) (finding that state trooper violated duty by abandoning plaintiff in high crime area), *cert. pending*, 59 U.S.L.W. 3029 (July 7, 1990). These rulings are cast in doubt if the distinction between acting and failing to act assumes the significance accorded by the *DeShaney* majority. *Cf.* Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988) (denying recovery after public dispatcher failed to send an ambulance); Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) (finding no duty owed by police to investigate whether a burning automobile was occupied by people at risk of death).

27. *DeShaney*, 109 S. Ct. at 1012 (Brennan, J., dissenting). Justice Brennan also viewed the majority opinion as construing the due process clause "to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent." *Id.* (Brennan, J., dissenting); *see also* Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2378 (1989) (stating that governmental tolerance of hateful expression should not be read as inaction); Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 889 (1987) (stating that act and omission concepts depend on an unstated baseline and that governmental failure to enforce contracts or trespass laws can be viewed as action depriving someone of their rights).

28. Brennan's opinion prefaces these points by criticizing Chief Justice Rehnquist's opinion for "its failure to see." *DeShaney*, 109 S. Ct. at 1012 (Brennan, J., dissenting). This could be a criticism of action or inaction, or a further rejection of the distinction between the two.

29. *Id.* (Brennan, J., dissenting).

scribed as inaction, but might be described better (though these are my words) as violations through complicity. Justice Blackmun drew an analogy to the conduct of judges before the Civil War who opposed slavery but who, nonetheless, felt bound by formalistic legal analysis.[30] They felt bound by something like the distinction between action and inaction and, therefore, concluded that they could not do otherwise but adhere to that distinction—even if that meant enforcing fugitive slave laws and returning runaway slaves to their masters. Justice Blackmun reasoned that "[l]ike the antebellum judges who denied relief to fugitive slaves, the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case is an open one" that leaves choices for the Justices.[31]

These dissenting Justices are on the brink of considering that violence itself is public as well as private—that law is part of the violence and that law itself can be violent.[32] But again, these are dissenting views. The usual legal rhetoric about violence often makes the law's violence and the law's part in violence harder to see.

What usually remains unseen? The violence encountered by people within their families has roots and consequences not confined to those families. When clerks in a local court harass a woman who applies for a restraining order against the violence in her home, they are part of the violence. Society is organized to permit violence in the home; it is organized through images in mass media and through broadly based social attitudes that condone violence. Increased unemployment correlates with increased family violence.[33] Society permits such violence to go unchallenged through the isolation of families and the failures of police to respond. Public, rather than private, patterns of conduct and morals are implicated. Some police officers refuse to respond to domestic violence; some officers themselves abuse their spouses.[34] It is a societal decision to permit such police practices. Some

30. *Id.* (Blackmun, J., dissenting). Above all, Justice Blackmun's comment highlights the complex interconnections between personal and institutional behaviors that maintain a phenomenon like family violence and that cannot be illuminated by simplistic notions like act and omission. *See id.* (Blackmun, J., dissenting).

31. *Id.* (Blackmun, J., dissenting) (citing R. COVER, JUSTICE ACCUSED 119-21 (1975)).

32. This insight should not imply that the rhetoric of privacy has no place in protecting important and valuable forms of human affection and autonomy. For a thoughtful exploration of the values and meanings behind privacy rhetoric, see A. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY (1988).

33. *See The Unemployment Crisis Facing Older Americans: Hearing Before the House Select Comm. on Aging*, 97th Cong., 2d Sess. 33-34 (1982) (statement of Paula Rayman, Professor of Sociology, Brandeis University) (stating that unemployment causes physical and mental health harms).

34. Eisenberg & Micklow, *The Assaulted Wife: "Catch-22" Revisited*, 3 WOMEN'S RTS. L.

clerks and judges think domestic violence matters do not belong in court. These failures to respond to domestic violence are public, not private, actions.

The language distinguishing public from private separates law from violence. Yet judicial inaction, as well as action, can be violent. Law is part of the violence when a court leaves in place a foster care system in which child abuse is rampant, or when a judge refuses a restraining order requested by a woman claiming she fears battery by her boyfriend. Law itself is violent in its forms and methods. Official power effectuates itself in physical force, threatened or carried out. Judges and top-level bureaucrats, however, are not forced to witness violence. Their jobs are structured so that violence happens well down the chain of command, and they often have no point of reference for acknowledging the violence they hear others describe.[35]

Judges and court personnel frequently blame the victim, trivialize the cases, or deny the victim's experiences.[36] These attitudes reflect the failures by public servants to understand and reveal problems deeper than their own lack of contact and more profound than their clumsy language. Redefining as unacceptable that which previously has been acceptable will remain difficult unless society can acquire a different language, a language that reflects the experiences of those abused by domestic violence.[37] Much work remains to be done on this score.

In one recent Massachusetts case, for example, the judge turned to a man accused of choking and beating his wife and said: "You want to gnaw on her and she on you, fine, but let's not do it at the taxpayers' expense."[38] In another case, a judge commented on the allegations that

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REP. 138, 157 (1977).

35. *See* Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

36. MARYLAND SPECIAL JOINT COMM., GENDER BIAS IN THE COURTS v (1989) (reporting that "[t]oo often judges and court employees deny the victim's experiences, accuse the victim of lying about her injuries, treat the cases as trivial and unimportant, blame the victim for getting beaten, and badger the victim for not leaving the batterer").

37. *See* L. KELLY, SURVIVING SEXUAL VIOLENCE (1988). Defining sexual violence includes the creation of a language that reflects a woman's perception of what happened to her. Women have introduced such terms as "battered woman," "domestic violence," and "sexual harassment" in order to make the invisible visible and to redefine the acceptable as unacceptable. *Id.* at 139.

38. McNamara, *Judge Criticized After Woman's Death*, Boston Globe, Sept. 21, 1986, at 1, col. 1 (quoting Judge Paul Heffernan). This statement was made in a notorious case in which the judge granted a restraining order, but scolded the woman who applied for it for wasting the court's time. The woman later was found dead and her husband was the chief suspect. *Id.* The incidents led to an investigation of the judge, who had been charged with misconduct in the past. McNamara, *Panel Heard Complaints Against Judge in 1983*, Boston Globe, Sept. 30, 1986, at 1, cols. 1, 2. Colleagues of the judge defended his sensitivity. McNamara, *Friends Say Charges Malign Judge: Abuse-Case Controversy Seethes Around "A Sensitive Person,"* Boston Globe, Oct. 5, 1986, at 1, cols. 3-5. A state report subsequently pushed for training programs in domestic abuse for police and court personnel. McNamara, *State Report Found Poor Enforcement of Abuse Pre-*

two children were physically abused: "Well, maybe they've been hit. I was hit when I was young, too."[39] The same judge in the same case responded to allegations that the father also had abused his wife: "He may have abused her, but that doesn't necessarily make him a bad father."[40] A judge may ask a complainant: "How often does he hit you," or "How did the child come to have a hematoma?" Compare these statements with the phrase, "a pool of blood rotted in the brain."[41] Judges more often use the former language—like that of a remote clinical examination. In the *DeShaney* case Chief Justice Rehnquist talked of "abuse,"[42] "multiple bruises and abrasions,"[43] "suspicious injuries,"[44] "injuries . . . believed to be caused by child abuse,"[45] and a "series of hemorrhages caused by traumatic injuries to the head."[46]

How can any of us talk about the pain and grotesqueries of violence that people inflict on one another, especially those whom they know? Elaine Scarry has written a remarkable book called *The Body in Pain*.[47] She suggests that pain does "not simply resist language but actively destroys it, bringing about an immediate reversion to a state anterior to language, to the sounds and cries a human being makes before language is learned."[48] Yet she also tells of the use of language by torturers that can become part of the pain and the ritual unleashing pain.[49] When the unspeakable becomes spoken, its significance may seem lessened, the horror brought down to the scale of other words in the sentence, staidly positioned between commas or parentheses. At the same time, further injury and helplessness arise when we lack words to give meaning to our experiences.[50]

Silence and words for those victimized by violence must differ from the silence and words of those who observe violence. Observers at least have a chance to assert some distance from pain and terror. But per-

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*vention Law*, Boston Globe, Oct. 30, 1986, at 1, col. 1.

39. English, *Battered by the System*, Boston Globe, Aug. 17, 1989, at 33, col. 1 (quoting Judge Vincent Leahy).

40. *Id.* The woman testified that while her children watched, she had been pushed, kicked, and locked in a room by her husband. She also testified that her husband raped her. The judge awarded joint custody of the children to both parents. *Id.*

41. *See supra* note 7 and accompanying text (discussing accounts of *DeShaney*); *see also infra* notes 91-93 and accompanying text (discussing journalist's account of the Lisa Steinberg case).

42. DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1001 (1989).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 1002.

47. E. SCARRY, THE BODY IN PAIN (1985).

48. *Id.* at 4.

49. *Id.* at 27-38.

50. *Id.* at 4-6.

haps a fear of proximity to the unutterable experience of victimization prompts silence or remoteness by observers such as judges. Perhaps judges believe they would be unable to do their jobs if they spoke truly of violence, if they acknowledged the emotions they may feel about what they hear and see. The Supreme Court Justices in *DeShaney* certainly knew the emotions and passions evoked by the facts of the case. Their responses to the emotion and passion are especially telling.

The *DeShaney* majority, represented by Chief Justice Rehnquist, explicitly declared that the Court has to restrain itself against emotion. The body of the opinion begins, "The facts of this case are undeniably tragic."[51] These Justices seem to be saying that even we cannot deny our response to the facts here, even we who are Justices sequestered in this splendid marble courtroom, even we who will reject the plea of Joshua and his mother. This statement, of course, simply could be a ritualistic nod to the emotional, the passionate, as well as an indication that the complaining parties will lose. After the opening statement, the opinion is strikingly devoid of emotional color and expression; it is as if the initial acknowledgement called for tucking in and hiding away the reactions that the Justices as individual persons may have had to the case—until, that is, the end of the majority opinion. There, as if to serve as the other bookend, or the doorway at the end of the corridor of passionlessness introduced by the majority opinion, Chief Justice Rehnquist closed by stating: "Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them."[52] Judges and lawyers, like other humans—but this sentence, too, is the opening to another stern demand for self-restraint, another "but."

Indeed, the next sentence begins, "But before yielding to that impulse . . . ."[53] Stop before yielding, cautions the phrase. Do not yield to that impulse—an impulse to act with sympathy, to act against reason. Impulse, of course, is the word long used by judges as a key factor in the test for the insanity defense: irresistible impulse. Impulse is thoughtless, irrational, crazy. Before yielding to impulse, the Chief Justice admonishes, "it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father."[54] The tragedy is a private one; the sin is not the state's. Emotion should not obscure these "facts," although as the previous discussion of act and

51. *DeShaney*, 109 S. Ct. at 1001.
52. *Id.* at 1007.
53. *Id.*
54. *Id.*

omission, of public and private, suggests, these are not facts, but rather choices about how to read the world. It is as if Chief Justice Rehnquist directs judges to use a wooden distinction between reason and emotion even if to do so restrains understanding and response. He acknowledges the possibility of responsiveness but urges against it; he recognizes the possibility of feelings but cautions against them.

What does it mean to hear someone say, "I'd better not feel?" The majority in the Supreme Court may be afraid of feeling, may be afraid of feeling overwhelmed by the pain the Justices hear about and by the sense of how much remains to be done. It is with this feeling that the Justices collectively don their hair shirts and summon self-restraint with statements of their own pain. This is not freedom from emotion and passion; this is a choice to submerge sympathy under fear, a choice to seek and then cling to totemic concepts—acts and omissions, public and private—to avoid confronting our mutual implication in one another's lives. Justice Felix Frankfurter also urged judges to adopt a stance of disinterest, yet his own passion in so urging disclosed something quite the contrary.[55]

The dissenters in *DeShaney* are more willing to describe the violence in vivid terms and more willing to draw from emotions and passions. Justice Brennan writes of reports of Joshua's father "beating or otherwise abusing Joshua,"[56] "the blows that destroyed Joshua's life,"[57] and his "last and most devastating injuries."[58] Justice Blackmun writes of "the severe danger to which [Joshua] was exposed"[59] and describes him as a "[v]ictim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father."[60]

Justice Blackmun explicitly embraces a " 'sympathetic' reading" of the relevant constitutional principles, one which "recognizes that compassion need not be exiled from the province of judging."[61] He begins his final paragraph with just this: "Poor Joshua!"[62] He uses an exclamation point—not the punctuation mark of choice in Supreme Court opin-

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55. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646-47 (1943) (Frankfurter, J., dissenting). Good reasons for judicial disinterest are not hard to find. Many who deplore the majority's lack of responsiveness to Joshua DeShaney might be alarmed by judicial responsiveness to lurid descriptions of murders offered by the prosecution in death penalty cases or to vivid descriptions of abortions submitted by pro-life advocates. Still, to fear judicial responsiveness in any of these circumstances does not assure better decisions. Indeed, wresting judgments from the pull of compassion simply may tether judgments to fear or to bureaucratic imperatives.

56. *DeShaney*, 109 S. Ct. at 1010 (Brennan, J., dissenting).

57. *Id.* at 1011 (Brennan, J., dissenting).

58. *Id.* at 1010 (Brennan, J., dissenting).

59. *Id.* at 1012 (Blackmun, J., dissenting).

60. *Id.* (Blackmun, J., dissenting).

61. *Id.* (Blackmun, J., dissenting).

62. *Id.* (Blackmun, J., dissenting).

ions. He uses the dissenting judicial opinion, which otherwise wields no power, to perform the act of expressing compassion and care even though the Court's majority denied Joshua a legal remedy. Justice Blackmun describes the Court's treatment of the case as "a sad commentary upon American life."[63] He also quotes with obvious approval and urgency this statement by Dr. Alan Stone, a psychiatrist who teaches at Harvard Law School:

> We will make mistakes if we go forward, but doing nothing can be the worst mistake. What is required of us is moral ambition. Until our composite sketch becomes a true portrait of humanity we must live with our uncertainty; we will grope, we will struggle, and our compassion may be our only guide and comfort.[64]

Justice Brennan argues that Wisconsin's system of child protection "invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services . . . to protect children from abuse."[65] He notes the "almost eerie" detail with which the social worker recorded her growing perceptions of Joshua's abuse,[66] "almost eerie in light of her failure to act upon it," and her comment upon hearing of his devastating injuries: " 'I just knew the phone would ring some day and Joshua would be dead.' "[67] This is an opinion written with drama and anger. The words are not typical for a law reporter:[68] "*[o]ppression can result* when a State undertakes a vital duty and then ignores it."[69]

These are dissenting views. Nonetheless, one week after the Court's decision in *DeShaney*, a majority of the Court reached a decision strikingly similar to the *DeShaney* dissent. In *City of Canton v. Harris*[70] the Court held that a city could be found liable under the Constitution for failing to train its employees to recognize and respond to health

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63. *Id.* at 1013 (Blackmun, J., dissenting).

64. *Id.* (Blackmun, J., dissenting) (quoting A. STONE, LAW, PSYCHIATRY, AND MORALITY 262 (1984)).

65. *Id.* at 1010 (Brennan, J., dissenting).

66. *Id.* (Brennan, J., dissenting).

67. *Id.* (Brennan, J., dissenting) (quoting DeSbaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298, 300 (7th Cir. 1987)). The social worker knew of several bead injuries suffered by the child and later testified that one mark on the child "to me appeared to look like a cigarette burn." Reidinger, *supra* note 6, at 49 (quoting Ann Kemmeter).

68. The majority of the Court can reach out with concern when it wants to. In refusing a claim by high school students that the censorship of school newspaper stories about teen pregnancy violated their first amendment rights, the Supreme Court majority reasoned that not only high school students, but also their younger siblings at home, might be exposed to the stories and be hurt by them. *See* Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988). This represents a kind of concern by the Court, although, again, it is expressed while denying a child's request for rights.

69. *DeShaney*, 109 S. Ct. at 1012 (Brennan, J., dissenting) (emphasis added).

70. 109 S. Ct. 1197 (1989).

problems of individuals arrested by its police.[71] In *Harris*, Geraldine Harris was arrested by the city police and slumped to the floor of the patrol wagon, seemingly unable to respond to questions. After being taken to the police station, she twice slid to the floor and still did not respond to questions. The police department sought no medical attention and released Harris after an hour in custody. Her family then had her transported to a hospital where she was diagnosed with severe emotional difficulties. Harris required one week of hospital care and a year of outpatient care.[72] In the subsequent lawsuit, Harris claimed a violation of her due process rights because the police department failed to provide necessary medical attention while she was in police custody. The Supreme Court agreed with her.[73]

By contrasting this case with *DeShaney*, I do not mean to suggest that Geraldine Harris was not entitled to recover money damages for the police department's failure to act. To the contrary, it is the Supreme Court's very willingness to impose liability when a public body failed to recognize someone in need—the grant of a grievance against the state for its failure to train police officers to seek medical care for someone held in custody for just one hour—that makes me wonder why the Court found it could do so little for Joshua DeShaney.

The Court treated Geraldine Harris as an adult. Perhaps this explains why the Court conceived of her time in state custody as sufficient to establish a duty of care, but viewed the state's temporary custody of Joshua DeShaney, a child, so differently.[74] Nonetheless, *Harris* shows that a different result in *DeShaney* would not have required innovative legal categories: the Court simply could have viewed the Department as having taken on a special relationship with Joshua when it monitored his care.[75] The choice to adopt this view was within the hands of the Justices.

Gloria Anzaldúa, a poet, wrote: "I can't reconcile the sight of a battered child with the belief that we choose what happens to us, that we

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71. In contrast, the Seventh Circuit, which produced the lower court opinion against Joshua DeShaney, also denied recovery to a woman who died when a public dispatcher failed to send an ambulance to help her. Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988). The Seventh Circuit has been emphatic in reviving the old formalistic distinctions between negative and positive rights and between acts and omissions.

72. *Harris*, 109 S. Ct. at 1200-01.

73. *Id.* at 1207.

74. The Court has maintained that state custody for children does not represent the same deprivation as does state custody for adults because children are assumed to be subject to the control of their parents, or the state if the parents fail. Schall v. Martin, 467 U.S. 253, 265 (1984). This view hardly justifies the Court's failure to recognize increased incursions on children's already limited liberty when such incursions occur.

75. *See supra* notes 19-24, 69 and accompanying text.

create our own world."[76] Neither can I. A close look at how law deals with violence, however, provides some clues. When those with power create and employ concepts to make themselves feel constrained from acting, they give a clue to the relationship between law and violence.

## II.

Focusing on one case, even a case like Joshua DeShaney's, may be problematic. Social workers tell me that they all know cases like his. It happens all the time. How can we talk about family violence in a way that pays attention to how often and routinely it happens, rather than concentrating on how extraordinary and monstrous it is? But how can we pay attention to the pervasiveness of violence without implying that it is anything but extraordinary and monstrous?[77]

The massive media attention to another single case—that of Lisa Steinberg—dramatizes this difficulty. The public drama drew public attention to private violence. The mass media's images and words depart from the judiciary's commitment to professional distance. Yet the media's construction of a public drama out of Lisa Steinberg's death tended to confine the problem. The case seemed to involve people who were horrifying and unrecognizable and whose behavior prompted the question: "Who could believe people act like that or live like that?" Perhaps the case of Lisa Steinberg became a cause célèbre because of yet another twist: the monsters did not fit familiar stereotypes. Joel Steinberg and Hedda Nussbaum were white, middle-class professionals; they were Jewish and lived in a brownstone.[78] Steinberg and Nussbaum could have been people we knew, even if we could never quite believe that people capable of such an atrocity could be us.[79]

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76. Anzaldúa, *La Prieta*, in THIS BRIDGE CALLED MY BACK, 198, 208 (C. Moraga & G. Anzaldúa eds. 1981).

77. This is somewhat analogous to problems of speaking about the Holocaust and about periods of genocide. *See generally* REWORKING THE PAST: HITLER, THE HOLOCAUST, AND THE HISTORIANS' DEBATE (P. Baldwin ed. 1990) (discussing the debate among historians over whether to historicize the Holocaust).

78. S. EHRLICH, *supra* note 6, at 1, 8-13, 18-21.

79. *See* R. GELLES & M. STRAUS, *supra* note 1, at 38. Gloria Steinem has suggested that "[w]e are fascinated by that which we recognize." *See* S. EHRLICH, *supra* note 6, at 7 (quoting Steinem). Thus, some element of familiarity and identification may be present in public fascination with a case like the Steinbergs'. Susan Brownmiller argues that it would be "simplistic and alarming" for feminists to identify with Hedda Nussbaum. Brownmiller, *Hedda Nussbaum, Hardly a Heroine. . .*, N.Y. Times, Feb. 2, 1989, at A25, col. 1. Brownmiller states:

> Systematic battering combined with misguided, though culturally inculcated, notions of love is not a sufficient excuse to exonerate Hedda Nussbaum from her share of culpability in Lisa Steinberg's death. . . . When decent, honorable women insist that a piece of Hedda Nussbaum resides in us all, they give the Joel Steinbergs of this world far too much credit and far too much power. More insidiously, they perpetuate the specious notion that women are doomed to be victims of the abnormal psychology of love at all cost.

The media seized upon the story as soon as the police found Lisa Steinberg near death in the care of her "parents," Joel Steinberg and Hedda Nussbaum. Upon inquiry, authorities determined that these were not Lisa's parents; that Joel Steinberg had used his position as a lawyer to obtain the baby Lisa by lying and stealing; that Joel repeatedly had physically abused Lisa; that Joel also had abused Hedda; that Hedda had stood by and allowed Joel to abuse Lisa; and that Lisa finally died through a combination of Joel's abuse and Hedda's neglect.[80]

The newspapers reporting these stories received countless offers to help pay for Lisa's burial.[81] Hundreds of mourners came to the funeral parlor.[82] The press followed the story of the criminal charges against Joel, the district attorney's decision not to prosecute Hedda in exchange for her testimony, and, finally, the trial itself. Because the judge allowed it to be televised, the trial became a daily soap opera as well as a constant source of headlines.[83] Some commentators worried that the continuing coverage glorified the violence.[84] Public fascination with the trial certainly mounted; people lined up to attend in person, even though it could be watched on television.[85]

As a result of the media coverage, a broad audience had a chance to hear the lawyers characterize the events in their summations before the jury. Millions of people heard or read about defense attorney Adrian DiLuzio's suggestion that Hedda's injuries occurred when she tried to put Lisa to bed, but Lisa resisted and Hedda fell. DiLuzio then suggested that Hedda delivered the injurious blows to Lisa.[86] A second defense attorney offered different language and a different scenario: "Lisa

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*Id.* An anonymous author wrote a contrasting editorial expressing why, from her own experience, she understood Hedda Nussbaum. *See . . . But You Can't Imagine,* N.Y. Times, Feb. 2, 1989, at A25, col. 1.

80. *See generally* S. EHRLICH, *supra* note 6.

81. *Id.* at 107.

82. *Id.* at 111.

83. One of Steinberg's lawyers later explained that the presence of the television camera led the judge to be more evenhanded and less restrictive toward the defense than he otherwise would have been. Ira London, Remarks at Harvard Law School (Feb. 20, 1990).

84. Dr. Richard Saphir, a professor of pediatrics at Mount Sinai, commented that television glorified the violence by making it interesting "in a voyeuristic way. Some weird nut out there will watch and say, 'Hey, I could be on TV if I battered my kid.' " S. EHRLICH, *supra* note 6, at 201.

85. *Id.* at 215.

86. Sam Erhlich relates the summation as follows:

> DiLuzio showed how Nussbaum might have reacted. It was a crude play-by-play, to say the least, more appropriate to a welterweight bout than the death of a six-year-old child.
>
> "Pow!" DiLuzio burst out while smacking his right fist into his left hand.
>
> "Whomp!" he shouted with a second feigned punch to a child's head.
>
> "Bam!" he yelled, giving his hand one more good blow, at which point [the judge] warned him to temper his enthusiasm.

*Id.* at 238.

. . . was thrown 'into a blunt object . . . thereby sustaining the brain damage that caused her death.' "[87] The prosecution, focusing on the theory that Joel Steinberg inflicted the damage on Lisa, delivered these words to the jury: " 'He clearly beat her and left her on the floor to die, and he didn't do anything to help her. Isn't this the equivalent of taking a gun and shooting her in the head?' "[88] The jury found Joel Steinberg not guilty of second degree murder, but guilty only of first degree manslaughter. The verdict reflected the jury's sharp division about Hedda Nussbaum's role and responsibility.[89]

Perhaps playing upon the sensational story, perhaps expressing the story's continuing power to enthrall and bewilder, and perhaps using the story to marshall attention to broader issues, several authors quickly published books about the Lisa Steinberg case and some entered into screenplay contracts relating to Lisa's story.[90] Sam Ehrlich published a mass market paperback tagged as "the first complete account of the heartbreaking case" and "the tragedy that outraged the nation."[91] The book begins in November 1987 with the police radio call "54-80"—a police code meaning a medical emergency involving a child.[92] A description of the scene at Joel Steinberg's apartment from the point of view of the police officers follows: the smell of urine and moldy food; broken furniture strewn about; blood stains on the wall; a toddler tied to a makeshift playpen with a nylon rope; Hedda Nussbaum with a soiled bandage on her head; and Joel Steinberg carrying six-year-old Lisa who is bruised, dirty, and motionless.[93]

Ehrlich comments that "[m]ore than a year later, we are still searching for an explanation."[94] In colorful and sometimes trite journalistic prose, Ehrlich suggests why the case riveted public attention. It pitted a villain—Joel Steinberg—against the innocent Lisa; and Hedda Nussbaum, Joel's common-law wife, seemed both a victim and an abuser, and crystallized public ambivalence about the whole situation.[95]

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87. *Id.* at 240-41 (quoting Ira London).

88. *Id.* at 244 (quoting Peter Casolaro).

89. *Id.* at 256-57. Was Hedda Nussbaum like the social worker who failed to prevent the abuse of Joshua DeShaney? Both received public criticism for failing to act to save an endangered child, but Nussbaum also became the recipient of public sympathy because she was so visibly a victim herself.

90. *See, e.g.*, J. JOHNSON, WHAT LISA KNEW (1990); T. Maury, The Dark Side of 10th Street (unpublished manuscript). CBS described plans for a miniseries based on Nussbaum's life story. Communication between CBS and Jennifer Hall (May 9, 1989).

91. The remark appears on the cover of the book. *See* S. EHRLICH, *supra* note 6.

92. *See* R. GELLES & M. STRAUS, *supra* note 1, at 37.

93. S. EHRLICH, *supra* note 6, at 1-4.

94. *Id.* at 5.

95. *Id.* at 6-7. Perhaps observers wanted to blame Nussbaum in order to explain why she suffered and to avoid having to acknowledge anyone's vulnerability to unjust suffering. *See* Lerner

In her novelistic version of the story, Susan Brownmiller used the devices of fiction to explore what still seemed unanswered, even after all the press coverage: What could a man and a woman have been thinking during the events leading up to the death of a child in their care?[96] The struggle for language about violence converged with a struggle for motives and meanings. The novel's very awkwardness hints at the author's difficulty in imagining believable expressions for the incidents.

Like much of the mass media coverage of the case, Brownmiller's novel reveals a preoccupation with culpability, especially that of a woman who herself may be a victim, but who also may have victimized a child. Was Hedda Nussbaum rendered so helpless and disturbed by her own battery at the hands of Joel Steinberg that she should be excused for failing to summon assistance for the child in their care or for otherwise contributing to the child's demise?[97] Or would this pattern of thinking so suspend moral judgment under the law that we would excuse any adult abuser on the basis of information about his or her prior victimization? So often lawyers push to blame mothers in order to excuse fathers. Was this ploy at work in the novelist's and journalist's coverage of the case? Or was the thirst for a simple answer driving them to compress and suppress complexity?

Amid these questions also lurks the real temptation to blame victims of violence.[98] Perhaps in the face of intimate brutality, observers

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& Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOLOGICAL BULL. 1030, 1031 (1978).

96. *See generally* S. BROWNMILLER, WAVERLY PLACE (1989). Perhaps like Brownmiller, I am drawn to both law and journalism but find them limited. As a result fiction, conversation, and popular cultural forms also seem to be valuable sources of insight. *See infra* Parts III & IV. Thus, this Article moves from legal texts to journalism, then to fiction, conversation, popular music, and therapeutic dialogue.

97. Similar questions have produced the battered woman's defense to assist women who commit violence against their abusers. *See generally* Schneider, *The Dialectic of Rights and Politics*, 61 N.Y.U. L. REV. 589 (1986). The concept of learned helplessness and an understanding of women's limited options have contributed to the development of this defense. *See* L. WALKER, THE BATTERED WOMAN SYNDROME (1984). For an early statement of the clinical relationship between depression and helplessness, see M. SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH (1975). Several recent books dispute the notion of learned helplessness for battered women and argue that battered women are not victims, but survivors who respond with heroism in the face of abuse. *See, e.g.*, E. GONDOLF & E. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS (1988); L. KELLY, *supra* note 37.

98. *See* R. GELLES & M. STRAUS, *supra* note 1, at 49-50, 60-61, 89, 139-40. The hint of blame even creeps into the choice of language. Christine Littleton has noted that people trying to resist sexism have replaced the terms "wife battering" and "battered women" with "spousal abuse" and "domestic violence." Littleton sets forth the following criticism of the teaching of the alternative formulations:

> Both the traditional and the quasi-egalitarian labels seem to me to miss the point. First, wives are battered as members of the class of women; wife battering is therefore gender related in a way that is different from occasional violence against men. Second . . . treating battering as "the problem" of the person who is battered (whether she is called woman, wife

feel a need to blame someone as well as a need to explain why it could not happen in their own home; perhaps these needs produce a tendency to blame victims. It seems easier—less frightening—to ask why battered women stay in relationships with their abusers than to ask why men batter. Yet another question needs to be asked about the woman who stays in a relationship with a man who batters not only her but also their children: Even if the children survive, what will the world hold for them, and what harms may they inflict on others when they grow up?[99]

The debate over whether to blame a battered woman for her neglect or abuse of a child has a long history.[100] Linda Gordon's book on the history of family violence shows that mothers commonly have received blame for their children's situations, even when poverty, racial and ethnic status, or the woman's own battery at the hands of a man had more to do with the situation than did actions or inactions by the mothers.[101] Similarly, social agencies have long blamed mothers for failing to prevent father-daughter incest, thus often freeing the father from responsibility.[102]The moral economy of family violence seems to require both expenditure of blame and focus exclusively on one wrongdoer.

Two important features are neglected in this familiar debate over assigning blame for family violence. The first is the real possibility that violence within a family involves a system of human interactions that should all be changed, rather than a single, sick, and malevolent wrongdoer.[103] The second is the family's embeddedness in larger social pat-

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or spouse) obscures the responsibility of the batterer. Why isn't battery considered "the problem" of violent husbands?

Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 27 n.18. For an insightful discussion of the battery process, see Mahoney, *Images of Battered Women: Redefining the Issue of Separation*, ___ STAN. L. REV. ___ (forthcoming).

99. *See* R. GELLES & M. STRAUS, *supra* note 1, at 121-23 (reviewing literature questioning whether children of abusers grow up to abuse children and concluding that, while most children of abusers do not grow up to abuse, prior victimization as a child is a valid predictor of future adult violence).

100. The debate is related to the historical attribution of blame to women who were battered by their husbands. *See* Prescott & Letko, *Battered Women: A Social Psychological Perspective*, in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 72, 74 (M. Roy ed. 1977) [hereinafter BATTERED WOMEN] (stating that early studies of marital violence blamed personal or individual forces and could be characterized as "blaming the victim").

101. L. GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 107, 262-63 (1988) (basing conclusion on a study of twentieth century child protection agency records); *see also id.* at 135 (stating that mothers are more likely than fathers to receive blame on grounds of parental immorality).

102. *See id.* at 201.

103. *See generally* R. GELLES & M. STRAUS, *supra* note 1. The authors argue that the picture of the abuser as mentally disturbed and the victim as innocent contributes to a sense that family violence is unusual and uncontrollable. *Id.* at 42. A more subtle analysis appears in Littleton, *supra* note 98, at 43. Littleton describes how "battered women engage in a variety of active strate-

terns—of neighbors who look the other way, police and social workers who do not respond to reports of violence, and public attitudes that tolerate or deny family violence.[104] By neglecting these two features, debates over assigning blame for violence within the family contribute to the sense that the problem is abnormal, private, and contained within that family.[105] At the same time, these features may help explain why some people who engage in family violence believe it to be normal, publicly accepted, and not confined to their own family.

In the face of either view, debates over which individual adult within the family is guilty partly mask the pervasiveness of the violence.[106] The debates contribute also to the dynamic of brief, public fascination with individual horror stories followed by extended public quiescence about the more widespread problem.[107] The denial of larger

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gies consciously directed either at reducing the frequency and severity of violence against themselves and their children or at taking care of themselves and their children despite the violence. Many of these women nevertheless describe themselves as unable to leave." *Id.* (footnote omitted).

Recognizing systems or dynamics that implicate people besides the abuser does not mean excusing the person who actually inflicts the abuse, but instead may help to identify more points for interventions that can help break the cycles of violence. For example, if a woman participates in a cycle of violence hy staying in an abusive relationship with a man, recognizing her participation should not excuse the man, but, instead, should highlight the additional question: What resources would help enable the woman to leave the relationship?

104. *See* R. GELLES & M. STRAUS, *supra* note 1, at 26-30. Murray Straus identifies cultural norms permitting wifebeating, general disparagement of women, and governmental and media violence as creating a climate in which violence seems an approved method for solving problems. In addition, the impact of economic dislocation deserves examination as a contrihuting cause of domestic violence. *See* L. GORDON, *supra* note 101, at 298-99; *see also* Straus, *A Sociological Perspective on the Prevention and Treatment of Wifebeating*, in BATTERED WOMEN, *supra* note 100, at 194.

105. Straus identifies options for a battered wife and for those desiring to help. Options for the wife include seeking help, preparing to leave, getting a job, or taking legal action. Help by others may take the form of hotlines, support groups, shelters, legal aid, and a change in police responsiveness. Straus, *supra* note 104, at 234. Littleton goes further and argues for changing the batterer, decreasing the cost of leaving for the woman, increasing the costs of battering to the batterer, and expanding options for support through communities of women and children. Littleton, *supra* note 98, at 53-56.

106. Richard Gelles and Murray Straus argue that to treat family violence as either rare or epidemic is a mistake. R. GELLES & M. STRAUS, *supra* note 1, at 40-41. Others suggest that over 50% of all women experience battery during marriage. *See, e.g.*, SISTERHOOD IS GLOBAL 703 (R. Morgan ed. 1984); L. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (1989); L. WALKER, THE BATTERED WOMAN ix (1979).

107. *See* R. GELLES & M. STRAUS, *supra* note 1, at 205. The authors note:

> It is easy, perhaps, to arouse the puhlic with examples of outrageous and cruel acts of violence towards defenseless and helpless victims. But even here, the half-life of public interest is amazingly short. Today's hot social problem is tomorrow's old news, less worthy of public attention, public support, and social resources—yet all the while just as common and just as harmful as it was when the public paid attention.

*Id.* For a striking exploration of the dynamics of public attention surrounding issues of child abuse, see B. NELSON, MAKING AN ISSUE OF CHILD ABUSE (1984); *see also* E. PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRE-

patterns of family violence seems to be linked to the dramatization of extraordinary cases.[108] In addition, lurid tales removed from the context of real lives become difficult to assimilate or connect to the real life of an observer.

Apart from what may be a psychological and cognitive dynamic of denial, society's failure to acknowledge widespread family violence suggests difficulties in marshalling language to describe larger patterns in ways that can persuade people to act differently.[109] We have trouble finding language that can connect the large social patterns and the local details, the macro and the micro. People tend to pay attention to and remember vivid stories rather than statistical patterns, even if they differ.[110] Even the telling of stories contains shortcomings; there are conventions that constrain what can be told and understood.[111] Stories that narrate individual tragedy seem incompatible with any larger explanations.[112]

On the other hand, explorations of the societal dimensions of a problem often take the form of statistical and other numerical descriptions that provide a handle on the problem, yet undermine a sense of

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SENT 201-03 (1987) (suggesting that periods of attention to domestic violence have been countered by arguments for preserving the family in its traditional form); Downs, *Up and Down with Ecology: The "Issue-Attention Cycle,"* 28 PUB. INTEREST 38 (1972) (discussing how public attention fades when an issue seems to require economic distribution).

108. The larger patterns encompass a number of similar violent incidents within families, including patterns of family stress associated with poverty, racism, and patriarchy. *See* B. NELSON, *supra* note 107, at 132, 136-37. Little appreciation appears to exist for the historical shifts in definitions of acceptable violence and acceptable expressions of emotions such as anger. *See* L. GORDON, *supra* note 101, at 285-93; E. PLECK, *supra* note 107, at 3-7; C. STEARNS & P. STEARNS, ANGER: THE STRUGGLE FOR EMOTIONAL CONTROL IN AMERICA'S HISTORY 4-10 (1986). Attention to the historical contingency in conceptions of acceptable harms within the family can liberate arguments for change from assumptions about the "natural" or "uncontrollable" qualities of violence.

109. Certain cultural assumptions about the relationships between factual assertions and moral obligations remain vulnerable to criticism. *See, e.g.*, J. KAGAN, UNSTABLE IDEAS: TEMPERAMENT, COGNITION, AND SELF 19-31 (1989).

110. *See, e.g.*, Tversky & Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974). People also make different judgments depending on the theoretical framework used to present problems. *See* Schelling, *Economic Reasoning and the Ethics of Policy*, 63 PUB. INTEREST 37 (1981).

111. *See* R. REICH, TALES OF A NEW AMERICA (1987); D. STONE, POLICY PARADOX AND POLITICAL REASON 109-16, 147-65 (1988).

112. Some theorists blame the individualized focus of dominant metaphors in social science for the confinement of understandings of the interactions between individuals, cultures, and social structures. *See* J. KAGAN, *supra* note 109, at 141-42; *see also* King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, in FEMINIST THEORY IN PRACTICE AND PROCESS 75, 91 (M. Malson, J. O'Barr, S. Westphal-Wihl & M. Wyer eds. 1989) (criticizing dominant feminist theories for individualistic world view and other conceptions antithetical to goals of black feminists). *See generally* CULTURE THEORY: ESSAYS ON MIND, SELF, AND EMOTION (R. Shweder & R. LeVine eds. 1984).

individual responsibility.[113] Numbers are cold. They may point to a problem, but create numbness rather than a sense of urgency. Numbers used to discuss trends and patterns may signal categories for analysis that we think should matter. When those categories generalize from individual and private circumstances, however, they can obscure points of responsibility and possibilities for change.

Consider this statement: "The FBI reported that thirty percent of all female murder victims in 1985 were killed by their husbands or boyfriends."[114] The statement implies that the categories of gender matter here and that women are at special risk of violent crime at the hands of the men with whom they are intimate. But who is responsible—the individual men or some unstated societal force?[115] If both are responsible, what changes could make a difference? The language used to describe individual stories may create a sense of drama and urgency, yet it hides the scope of the problem; the language of trends and populations may cover the scope, but it undermines the sense of personal connection and individual obligation to effectuate change.[116]

Similarly, increased rates of domestic violence accompany eco-

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113. D. STONE, *supra* note 111, at 131-32. Stone states:

> As norms, numbers are part of a story of helplessness and control. The administration is held responsible for the state of the economy, and much of the president's support is contingent on his seeming to be in control. So presidents weave a tortuous path between invoking numbers to prove their ability to reduce a problem willfully and to prove that some part of the problem is beyond human control.

*Id.*

114. Recent Development, *Judging Domestic Violence*, 10 HARV. WOMEN'S L.J. 275, 279 (1987) (citing U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS—1985 at 11 (1986)). Similar statements appear in advocacy documents. The National Coalition Against Domestic Violence analyzed a National Crime Survey for 1978-1982 which reported that 2.1 million women were victimized by their partners during a 12 month period and that 32% of these women were victimized more than once by their partners. The National Coalition concluded that "[b]ased on this study, a woman is being battered at least once every 15 seconds in the U.S." NCADV Statistics, May 1988.

115. Much contemporary research about domestic violence emphasizes its multiple causal sources and the dynamic interaction between psychological and wider social variables. *See* VIOLENCE IN THE FAMILY (S. Steinmetz & M. Straus eds. 1974); Prescott & Letko, *supra* note 100, at 74. More generally, there is an important distinction between a blameworthy causal agent and an agent who could make a difference, even if that person is not appropriately considered the cause of a problem. *See* Wortman, *Coping with Victimization: Conclusions and Implications for Future Research*, 39 J. SOC. ISSUES 195, 205 (1983) (stating that "it is important to draw a distinction between attribution of responsibility for a problem (i.e., who is to blame for a past event), and attribution of responsibility for a solution (i.e., who is in control of future events)").

116. Another example is provided by the sentence: "Nearly 1.6 million children were abused or neglected in 1986—up 150% since 1980." STAFF OF HOUSE SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, 100TH CONG., 2D SESS., CHILDREN AND FAMILIES: KEY TRENDS IN THE 1980S 45 (Comm. Print 1988). Based on these and other statistics, the Select Committee reported that many families are in crisis. These formulations help to portray the wide scope of family violence problems, but may diffuse responsibility for them, too.

nomic recessions and unemployment.[117] Although this trend should not excuse those who directly inflict violence against others, the pattern supports a critique of the unequal allocation of costs of business cycles and would justify efforts to reduce unemployment or to provide retraining and relocation programs.

Social patterns and our own involvement with them provide yet another twist on the troubled relationship between the general and the particular in the language of policy analysis. Because we do not like to think of ourselves as statistics, whether as perpetrators or as victims, we are reluctant to identify with general statements of social problems. This reluctance may extend to victims of abuse, their abusers, and to those who stand by. Workers in shelters for battered women report that many of the women do not identify themselves as "battered women," even though they report incidents that would place them in that category.[118]

The ways in which we talk about social problems disincline people to identify themselves as persons burdened by those problems.[119] The ways we talk also allow individuals to feel remote from other people's problems. Neither vivid, unique stories nor dry, statistical generalities disturb these patterns for long; instead, these forms of expression may contribute to cycles of brief attention followed by extended passivity.[120] Perhaps both kinds of talking, together, periodically can break through people's resistance to recognizing family violence. There still may be other ways of talking, however, that better convey experiences of violence, pain, and abuse, or that better prompt action to resist and prevent violence. Are there words that can illuminate the universal in the particular and the particular in the universal? Talking differently, by itself, will not make things different. But unless we talk differently, we may never make things different.[121]

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117. *See supra* note 33 and accompanying text.

118. Conversation with Elizabeth Schneider, Professor, Brooklyn Law School (Sept. 15, 1989). Similarly, legal services workers relate that women often report they have not been abused unless asked directly, "Have you ever been hit by your husband (or hoyfriend)?" and "how often?" Conversation with Gary Bellow, Professor, Harvard Law School (Feb. 15, 1989); *see also* Littleton, *supra* note 98, at 32-33 (reporting a fellow commentator's statement that no woman wants to be identified with the picture of battered women that appears in legal literature) (quoting M. Mahoney, What Self We Defend: A Phenomenological Critique of Legal Images of Battered Women (1988) (unpublished manuscript)).

119. *See generally* K. BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS (1988).

120. *Cf.* R. WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION 9 (1984) (examining works of fiction in which "wordy investigations" are at war with sensitivity to and action against injustice).

121. In her nonfiction book *Songs from the Alley*, Kathleen Hirsch provides an exemplary exploration of the lives of two homeless women that hrings the reader close to the women's hopes

## III.

Many contemporary legal scholars have joined other late-twentieth century intellectuals in a turn toward self-consciousness about language, expression, and persuasion.[122] Some legal scholars are influenced by philosophies of language that allocate ambiguity in meaning to the very structures of language that shape meaning, like the arbitrary assignment of some sounds to refer to some things.[123] Others turn to methods of interpretation that stem from biblical exegesis to provide a sense of direction in the struggles over the meanings of legal texts.[124] Still others look to literary classics for moral exemplars and for exemplifying and enacting moral relations between authors and readers.[125]

Legal scholars especially interested in issues of racial and sexual oppression have explored the possibilities of storytelling to devise narratives and accounts of the world that diverge from and reconstruct dominant understandings.[126] Derrick Bell, for example, has written cap-

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and disappointments. K. HIRSCH, SONGS FROM THE ALLEY (1989). Because the women and their past and present worlds are rendered in complex and rich detail, the book helps to bridge the distance many nonhomeless people feel toward "the homeless"—a newly coined category of people. The book does not tell the reader what to do and risks implying that unique and individual circumstances lead to homelessness. But the book does increase the chance that the reader will notice a homeless person as a person, and wonder how he or she came to be in that position. The power of the book perhaps is best evidenced by remarks like those of Raymond Flynn, mayor of Boston, who praised it, "as gripping as any novel." *Id.* (jacket copy).

122. *See, e.g.*, INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (S. Levinson & S. Mailloux eds. 1988).

123. *See, e.g.*, J. DERRIDA, WRITING AND DIFFERENCE (A. Bass trans. 1978); Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); *see also* Cole, *Thoughts from the Land of And*, 39 MERCER L. REV. 907 (1988); López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984). For a contrasting approach, see Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989) (looking at cognitive models grounded in prelinguistic experiences of the body).

124. This is known as the hermeneutic turn. *See* R. DWORKIN, LAW'S EMPIRE (1986); Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982). *See generally* Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 136 (1985). Judge Richard Posner has written criticisms of this turn to literature by lawyers; yet by offering his own interpretations of literary texts in relation to law, he has become a participant in the movement. *See* R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988).

125. *See, e.g.*, M. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY (1985); J. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW (1985); J. WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY (1984); Hirshman, *Brontë, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177 (1988); Soifer, *Assaying Communities: Notes from the Tempest*, 21 CONN. L. REV. 871 (1989); Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871 (1986); Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916 (1987); *see also* W. BOOTH, THE COMPANY WE KEEP: AN ETHICS OF FICTION (1988) (arguing for attention to the character of the reader who is being addressed and strengthened by reading literary texts). For a collection of articles exploring narrative and legal pedagogy, see *Pedagogy of Narrative: A Symposium*, 40 J. LEGAL EDUC. 1 (1990).

126. For arguments in favor of this strategy, see Delgado, *Storytelling for Oppositionists and*

tivating chronicles recasting past and present struggles over civil rights in terms of dialogues among hopeful reformers and more skeptical radicals.[127] Patricia Williams draws on her own experiences and the experiences of others to construct vivid images and angles for understanding discrimination, power, and identity.[128] Robin West uses literary sources to challenge the conceptions of human relations prevailing in particular legal authorities.[129] She also employs first-person accounts of sexuality and sexual oppression to alter usual patterns of silence about these themes.[130] One goal of all these works is to give voice to suppressed perspectives. Another is to help build a reservoir of alternative understandings through which existing practices can be criticized. Yet another goal is to enhance the chances of persuading people to act who currently are in a position to effect change. The hope is that narratives can create a bridge across gaps in experience and thereby elicit empathic understanding.[131]

The turn toward narrative by legal scholars may help illuminate the difficulties in speaking about domestic violence against children and against women. Literary accounts and narratives of experience can offer new language to challenge conventional legal understandings, or misun-

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*Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543 (1988); Gerald López, The Well-Defended Legal Academic Identity, Remarks at the 1990 American Association of Law Schools, Law and Humanities Section, San Francisco, California (Jan. 7, 1990).

127. *See, e.g.*, D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989). Following Bell, others have begun to try the narrative mode. *See* Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989); Singer, *Persuasion*, 87 MICH. L. REV. 2442 (1989); Delgado, *Derrick Bell and the Ideology of Race Reform Law: Will We Ever Be Saved?* (Book Review), 97 YALE L.J. 923 (1988).

128. *See, e.g.*, Williams, *On Being the Object of Property, 14 Signs* (1988), in FEMINIST THEORY IN PRACTICE AND PROCESS (M. Malson, J. O'Barr, S. Westphal-Wihl & M. Wyer eds. 1989); Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989); Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

129. *See, e.g.*, West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); *see also* Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979).

130. *See, e.g.*, West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59 (1989); West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

131. *See* Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989); Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); López, *supra* note 123; Singer, *supra* note 127. For more critical views of this strategy, see Bartlett, *Storytelling* (Book Review), 1987 DUKE L.J. 760; Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989). For an incisive criticism of stories that themselves wound, see Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987).

derstandings, of domestic violence. Narratives with evocative, rich details about subjective experiences can be used to persuade people—like judges—who have sufficient power to make a difference actually to do so for people—like children and women—who face persistent risks of violence at the hands of intimate fellow householders.

At least, this is the hope. But does the hope carry any promise for practices beyond the pages of law reviews? Does the turn to storytelling and literature offer any chance that words may halt the violence, or at least strengthen those in a position to punish and deter the violence? Toward this end, I have joined others in a project of continuing education for judges in which we create settings to discuss family violence by using works of fiction.[132] The project began as a response to a problem named in the trade as "judicial burnout." For one day, fifteen to twenty judges come to the campus of Brandeis University[133] to discuss several works of literature.

We begin each session by noting that we have two sets of texts before us—the assigned literature and our own lives—and both will engage us in interpretation for the whole day. I call the judges by their first names. Some of them know one another. Some of them talk with a kind of reserve that may come from not talking often with strangers who call them by their first names.

Sometimes there are moments of empathy engendered by the readings; a character seems quite appealing, or a difficult situation seems recognizable. Sometimes the judges express their irritation with litigants, the press, and society. Sometimes there are surprising insights into texts or intense arguments about the literature and about what judges should do.[134] In one session, several judges begin by criticizing women who come to court seeking temporary restraining orders to halt the physical abuse by their husbands or boyfriends. Two judges spoke:

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132. I have worked as a faculty member in the Doing Justice Program at Brandeis University. Saul Touster and Sanford Lottor created the program, which has conducted sessions with judges and other professionals in many states. Some of the sessions use fiction to explore general themes of professional accountability and tensions between public and private roles. Others have adopted specific themes, such as domestic violence, gender discrimination, and multicultural issues. Typically, three teachers share responsibility for the discussions of three works of literature during a single day, broken up by a lunch over which discussion continues. The following portion of this Article represents a composite summary of several sessions that I led.

133. The Doing Justice Program also has conducted sessions outside of the Boston area.

134. In one session, a judge explained how he resented the Catch-22 created when a social services department refused to return to their mother the children of a woman who had completed a residential alcohol treatment program because, in the interim, she had lost her subsidized housing. At the same time, the housing bureaucracy denied her eligibility until she had her children back. The judge said he ordered the state to pay for a motel to house the woman and her children until the state bureaucracies could work out something more permanent. Another judge interrupted, "You can't do that." "Well, I did it," said the first judge.

"These women come for the order, and then they never follow up with the hearing and final disposition," and questioned, "Are they serious or not?"

I suggest that we turn to Mary Gordon's short story, *Violation*.[135] The story begins with this statement by an unnamed narrator: "I suppose that in a forty-five-year life, I should feel grateful to have experienced only two instances of sexual violation."[136] I ask the judges, "What do you think is her tone of voice as she says or thinks this?" A judge responds, "I don't know, I found her baffling." Another says, "I think she is passionless. There is no emotion when she says it." We talk some more. How could she feel lucky? Is this an ironic statement, or is it a sober response to the world she has known?

We examine two incidents the narrator describes. In the first one, she recounts her postcollege trip to Europe, a conversation with a sailor in a bar, the walk she took with him, and the way he raped her.[137] "She should have known better," says one judge. "She wouldn't have talked with a sailor in a bar at home; it's only that she felt free and adventuresome during her travels," says another. A woman judge, one of the few present, recalls her own experiences traveling and says quietly, "Why should she have to watch what she does, why should she be to blame for what happened?" An intense discussion follows: the judges talk of their daughters, themselves, of the cities they know, of dangers outside.

We turn to the other incident described in the story. An uncle visiting the family comes to the narrator's bed; he is drunk and he makes a sexual overture. After experiencing an inner paralysis, she resists him with humor and then struggles with the knowledge that telling anyone would seem a betrayal of the whole family.[138] One judge comments, "She handled it perfectly." Another says, "I don't understand what is the big deal here." Another responds sharply, "So it's okay if it happens in the family?" After a series of exchanges, I return to the opening sentence of the story. What do we know, now, about this person; why would she describe herself as lucky? One judge says he feels sad for her because she seems repressed, she seems to have cut off feeling in response to the events in her life. Another disagrees, but says, "I still don't understand why she never told anyone."

We return to the first incident. After the rape, the narrator has missed her travel connection and checks into a hotel. She describes how she gladly paid extra for a private bath because she could not bear the

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135. M. GORDON, TEMPORARY SHELTER 184 (1987).
136. *Id.*
137. *Id.* at 185-89.
138. *Id.* at 193-94.

idea of sharing a bathtub. "It wasn't for myself I minded; I cared for the other people. I knew myself to be defiled, and I didn't want the other innocent, now sleeping guests, exposed to my contamination."[139] We talk about what she felt and why she could not tell anyone. After we converse, one judge volunteers, "I guess it's hard for anyone to come to court after something like this happens." I do not know exactly what prompts the thought, but I am glad for it.

We break for coffee. A judge who has said little or nothing all morning talks to me alone about a very difficult case, one in which the state removed a child from a family partly because the social workers thought the mother was mentally incompetent. They later found out that the mother only spoke a particular East Asian dialect. Meanwhile, the child has been with a foster family for eight months and has developed ties to them. Should the court correct the original injustice, or would this inflict a new injustice from the child's perspective?

After returning from the break, we discuss a story by William Faulkner. It is called *Barn Burning* and the story begins with a hearing before a justice of the peace in which a boy's father is accused of burning down a man's barn.[140] The complainant mentions that the boy knows what happened. The justice of the peace calls on the boy and Faulkner lets us hear the boy think about how his father wants him to lie and that he would have to do so. The justice asks the complainant, "Do you want me to question this boy?"[141] After a pause, the complainant explosively answers "no." Why does he not want the boy questioned? "Because he knows the boy will lie," says one judge. "Because he knows it will be excruciating for the boy to testify, whether he lies or tells the truth," responds another. "Because the father will beat the child, if he doesn't lie," says another judge.

A few pages later in the story, the father beats the child anyway. He "struck him with the flat of his hand on the side of the head, hard but without heat, exactly as he had struck the two mules at the store."[142] We talk about the father and about the boy: who are they, what do they think, what is their world like? The judges are deeply sympathetic with the boy. They despise the father. They give him psychiatric labels. We try to examine his social and economic position. As a "poor white," he is angered by his dependency as a sharecropper. He despises blacks, treats his family members like property, and moves constantly to elude the repercussions of his vengeful acts, like the barn

139. *Id.* at 190.
140. Faulkner, *Barn Burning*, in THE EXPERIENCE OF LITERATURE 733 (L. Trilling ed. 1967).
141. *Id.* at 734.
142. *Id.* at 736.

burning. It is hard to elicit any respect or understanding for him, although I try. We look at why he seems so humiliated by other people's expectations. We debate his motives and his capacity for self-reflection or self-control.

I then ask, "Does the boy ever strike anyone?" "No," says one judge. "Oh yes, he does," says another, pointing to the fist fight the boy started after another boy called his father "Barn burner!"[143] We trace the son's course through the story and our own course with him—how he comes to warn a landowner that his barn is about to be burned down by the father; how he comes to run away; whether this is strength or weakness of character; what we think about his abandonment of his mother and sisters; whether we should admire him; how much the boy knew at the time he ran away; and whether we have access to anything but what he thought years later about these events. What did Faulkner think about it all?

During these discussions, I sometimes sense a shift in the room. I sense a shift in loyalties. I hear imaginations exercised. Sometimes nothing like this happens. I often wonder whether we, the conveners, merely are providing a break from the routine of too many cases for these judges, or worse, a salve before sending the soldiers back to the war. My thoughts wander back and forth. Are they on our side? Am I on theirs? Who is "we," anyway?

After lunch, where I sit at a table with judges who complain about the lack of funding for court personnel and retell war stories about problems with the media, we read and discuss a story called *A Jury of Her Peers*.[144] In this story by Susan Glaspell, a feminist writing in 1917, a farmer has died and his wife is the chief suspect. The story depicts the inquiries made by the prosecutor and the sheriff, both men, who unsuccessfully look for clues to the motive behind the murder. The story presents the contrasting inquiry undertaken by the sheriff's wife and her woman friend when they visit the farm kitchen to gather items for the imprisoned widow. Seeing her world and imagining the details of her life, these women glimpse the widow's relentlessly desperate loneliness and the signs of abuse by her husband. The women find clues indicating an altercation between the husband and wife; they figure out that he had crushed her songbird. They conclude that she had felt her husband crushing the life out of her, and that she had responded by strangling him in his sleep. The women decide to share neither the

143. *See id.* at 735.

144. Glaspell, *A Jury of Her Peers*, in THE BEST SHORT STORIES OF 1917, at 256 (E. O'Brien ed. 1918).

clues nor their conclusions with the men.[145]

I ask the judges, "Did the women forgive the farmer's wife and protect her for that reason? Or did they feel they could not judge her because they themselves were partly to blame for her isolation? Did they believe that the formal legal system, with no women as judges, lawyers, or jurors, never could yield understanding and fair judgments about what happened here?"

No one responds at first. As in all the sessions, the judges are mostly men. There usually is tension in the room, often defensiveness, and sometimes suppressed anger. The judges seem distrustful even before we start. One responds that he is dismayed that a woman could excuse another woman despite concluding that she indeed did commit a murder. Another criticizes the story for suggesting that women see the world differently from men, observe clues that men miss, and judge those clues differently. Another judge objects to the men being portrayed as stick figures. (So were the women, notes a woman judge.) One judge trumpets a temporal difference: we are now enlightened; we now recognize a defense for battered women who attack their batterers. Another objects that this case does not fit our standard for the battered woman's syndrome defense. I intervene. Let's not talk about what the law says; let's talk about the story. A judge explains that the story made him think about his difficulties judging immigrant families who use extensive corporal punishment with their children. "They are in our country now, they must obey our laws," he says. He then wonders aloud about a man who killed his wife and then received a light sentence after explaining to the judge how his culture viewed her adultery.

I worry about these discussions. Am I simply sponsoring cultural relativism and undermining a commitment to disapprove of family violence? The judges reassure me, and themselves, that their commitment is to enforce the law, regardless of individual or cultural differences. But should we not learn to distinguish minimum norms—such as a right to be protected against physical harm—that warrant legal intervention no matter what competing demands we may endorse concerning tolerance for cultural differences? Then the business of understanding is not inconsistent with the business of judging, and cultivating empathy would not conflict with strengthening judgments about the unacceptability of some acts, especially violent acts. Understanding the complex reasons why people abuse others does not mean condoning that abuse. Perhaps understanding reasons for violence strengthens a commitment to draw violent actors into the human community and subject them to its judgments. I worry still about those who remain si-

145. *Id.* at 281-82.

lent, even in this room of judges—those whose point of view remains unspoken because it would not be popular. I wonder if anyone in the room has been a participant in family violence but does not speak about it.[146]

I enjoy these sessions, yet I worry about them, too. I relish the thirst the judges show for probing conversation. I delight when I see them scour the texts for meaning. When I hear them talk with intensity, and sometimes humility, I learn about their frustrations. I sometimes see the literature illuminated by their lives, and their lives by the literature. I fear disserving the texts, however, by my sometimes crude readings or by those offered by the students.[147] I fear my fear of this. Do I betray an elitist academic sensibility toward "right" or "sensitive" readings of texts and toward the meaning of doing "justice" to a text? I genuinely hope that engagement with literature can enlarge our understandings and our sympathies.[148] Reading literature can provide occasions for the moral act of taking the perspectives of others. I still worry, however, that in our pride in this enterprise we may neglect the possibility that we do not understand—that silenced discomfort over who is

146. In a special session with mental health professionals and others interested in family violence, we talk about William Shakespeare's *King Lear*. We look at the early scene in which Lear asks for public declarations of love from his daughters, and Cordelia, his most beloved offspring, refuses to respond. One psychologist comments that perhaps she was physically or emotionally abused by Lear. Her silence then was a form of resistance and strength. Cordelia later responds, but not as Lear wants; she gives the formally correct statement of her love that befits her role rather than the emotional or flowery outpouring offered by her sisters. Lear, however, does not want the sisters' offering, nor can he accept Cordelia's restraint. We discuss the micropolitics of families who make demands on one another for ways of speaking and being, and who wield power inappropriately, as Lear did, to enforce these desires.

One day a group of judges discusses a short story by Alice Munro entitled *Royal Beatings*. *See* Munro, *Royal Beatings*, in THE NORTON ANTHOLOGY OF SHORT FICTION 473 (R. Cassill 2d ed. 1981). The story reveals a repeated family dynamic. The stepdaughter triggers the anger of the stepmother and both of them know the cycle that will follow: the stepmother calls the father to discipline his daughter. After giving her a look filled "with hatred and pleasure," *id.* at 486, he lashes her with his belt and then his hands, and the beating continues long after she shrieks and cries. Yet the daughter knows she is playing victim. Later the stepmother comes, as always, to comfort her with a tray of food to eat in bed. *Id.* at 487-89. As we discuss this repeated pattern and acknowledge that all three participants apparently knew each time what had happened and what would happen, one judge comments: "You know, when a family like this comes to court, I never know whether the court is breaking the pattern or simply becoming another participant in it."

147. Sometimes a kind of humor is bought at the expense of understanding the texts. One discussion with social workers of Albert Camus's short story, *The Stranger*, was going nowhere. A participant finally said, "I just can't discuss this without knowing more about his mother." In a different setting, with business executives, I once discussed Camus's essay, *The Myth of Sisyphus*. One of the executives paused after a lengthy discussion to say, "Oh, I get it, life just keeps rolling along." Perhaps these reactions only mean that we should stay away from the works of Camus.

148. *See* Weisberg, *Family Feud: A Response to Robert Weisberg on Law and Literature*, 1 YALE J.L. & HUMANITIES 69 (1988) (authored by Richard Weisberg); *see also* Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMANITIES 1 (1988) (authored by Robert Weisberg).

"we" is itself a serious stumbling block to understanding. I see a difference between readings that lead to sage nodding because "we" claim to share an understanding of the text, and readings that lead to struggle and disagreement because I did not see it the way you did, or because you catch a glimpse of a character you know and I do not, or because she reads against the text for what it does not say, or because he believes we are kidding ourselves about what we really would do under similar circumstances.

Perhaps in these struggles, we make a way to talk about violence. Perhaps. If so, we may come closest in those moments of silence in which we—individually and together—realize some of that which we do not know how to say.

## IV.

My name is Luka/
I live on the second floor/
I live upstairs from you/
Yes I think you've seen me before/
If you hear something late at night/
Some kind of trouble, some kind of fight/
Just don't ask me what it was/
Just don't ask me what it was/
Just don't ask me what it was.[149]

Because music depends on the spaces between silences, songs may be a more immediate and more haunting way than speech to speak of the rhythms of domestic violence. Songs about child abuse and battered women written before 1980 are difficult to find.[150] Since 1980, however, a number of popular songs about the abuse of children and the battery of women have appeared, and some even have become memorable hits.[151]

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149. Suzanne Vega, "Luka," *Solitude Standing* (1987).

150. There are some earlier examples. *E.g.*, Billie Holiday, "Mean to Me," *The Quintessential Billie Holiday Volume IV* (1988) (originally recorded for Brunswick Records in 1937); Kurt Weill & Bertold Brecht, "Ballad of Immoral Earnings," *Three Penny Opera* (1928).

151. Although many blues ballads talk about women's difficulties with men who drink and men who leave, few make direct references to men who hit or men who murder their women lovers. Since 1980, however, the following pop songs, which deal directly with violence against women or children, have emerged: Pat Benatar, "Hell is for Children," *Life from Earth* (1984); Tracy Chapman, "Behind the Wall," *Tracy Chapman* (1988); Shawn Colvin, "The Story," *Steady On* (1989); Madonna, "Oh Father," *Like a Prayer* (1989); George Michael, "Look at Your Hands," *Faith* (1987); Tears for Fears, "Woman in Chains," *The Seeds of Love* (1989); 10,000 Maniacs, "What's the Matter Here?," *In My Tribe* (1987); Vega, *supra* note 149; Welcome to the Beautiful South, "Woman in the Wall," *Welcome to the Beautiful South* (1990). Many other songs are suggestive of but less explicitly about domestic violence. *See, e.g.*, Roseanne Cash, "Rosie Strike Back," *Kings Record Shop* (1987); Prince, "When Doves Cry," *Purple Rain* (1984). The Author would like to thank Jennifer Jordan Hall, Harvard Law School, 1991, for her remarkable research into songs about domestic violence.

In "Luka" Suzanne Vega creates a haunting melody and a direct, first-person lyric that acknowledges some trouble going on, but repeatedly admonishes the listener not to ask about it. The lyrics then turn to self-blame[152] and a repeated statement resembling a litany that one would repeat over and over to oneself: "You just don't argue anymore/ you just don't argue anymore/ you just don't argue anymore."[153] The song ends by returning to mix acknowledgment of the violence going on with a plea that the listener refrain from intervening or even asking "how I am":

> "Yes I think I'm okay/
> I walked into the door again/
> Well, if you ask, that's what I'll say/
> And it's not your business anyway/
> I guess I'd like to be alone/
> With nothing broken, nothing thrown/
> Just don't ask me how I am/
> Just don't ask me how I am/
> Just don't ask me how I am."[154]

These words capture and convey the difficulties of speaking about the violence, especially for someone who remains a victim and who fears that reaching for help will trigger new violence.[155] The lyrics similarly express the victim's belief that he is in some way responsible for the violence, for concealing it, and even for concealing any reaction to it. The use of repetition expresses the intensity and the desperation felt by the victim, but paradoxically, the repetition consists of requests also to be left alone, to give in, and not to "argue anymore."[156]

As sung and produced for a recording, the song offers the high-pitched voice of either a woman or a child. The singing voice suspends the words in time and entwines them within the melody and rhythm. Spaces of silence built into the music make listeners wait, but also give them a chance to recall what already has been heard.

In "Luka," as in other recordings, gendered voices and the possibility of more than one voice singing together or responsively create for the listener the presence of real, embodied people. When contrasted

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152. "I think it's because I'm clumsy/ I try not to talk too loud/ Maybe it's because I'm crazy/ I try not to act too proud/ They only hit until you cry/ And after that you don't ask why." Vega, *supra* note 149.

153. *Id.*

154. *Id.* Does the repeated protest actually represent a request to be attended to? Or does the protest represent a fear of losing control or of losing the familiar violence he knows?

155. Interestingly, 10,000 Maniacs, in "What's the Matter Here," presents the point of view of the listener who knows the young boy's face, lives near him, and hears the mother threaten him and scream at him. It is the listener who says, "I want to say 'What's the matter here' But I don't dare say." 10,000 Maniacs, *supra* note 151.

156. Vega, *supra* note 149.

with the instrumental lines, the voices are startlingly human. Moving through a temporal line of rhythm, the songs are in real time. They join the singer and the listener together in the present. Yet lyrics also evoke memories and future thoughts. The use of dynamics—crescendos and decrescendos, sudden loudness next to a sudden hush—intensifies the sense of time while directly eliciting emotions. To capture this in words alone is impossible, but I offer some examples that may prompt a focus on the dynamics when you next hear the songs.

In "Woman in the Wall," by Welcome to the Beautiful South,[157] a repeated chorus drops its dynamic in a sudden hush; after the boldly sung lines: "Cry freedom for the woman in the wall/ Cry freedom for she has no voice at all," the dynamics immediately become very soft: "I hear her cry all day, all night/ I hear her voice from deep within the wall."[158] Coming as it does after descriptions of a man who "was just a social drinker" and who enjoyed the thought of killing a woman who was "just a silent thinker," the hush is startling and riveting for the listener.

The Tears for Fears song, "Woman in Chains,"[159] similarly juxtaposes loud and soft, but this song begins quite dreamily with expansive sound and spare words: "You better love loving and you better behave." Only later does it build to an emphatic forte: "Well I feel deep in your heart there are wounds Time can't heal/ And I feel somebody somewhere is trying to breathe/ Well you know what I mean/ It's a world gone crazy/ Keeps Woman in Chains."[160]

The songs that evoke abuse differ from one another. Some depend upon rock beats and instruments;[161] others weave folk ballads through the strings of acoustic guitar.[162] More different in sound than all of the recent songs about violence, however, is Tracy Chapman's bare a cappella voice in "Behind the Wall."[163] Again, the use of first person and the suspension of words against rhythms require the listener to wait and to think:

> Last night I heard the screaming/
> Loud voices behind the wall/
> Another sleepless night for me/
> It won't do no good to call/
> The police/
> Always come late/
> If they come at all.[164]

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157. *See* Welcome to the Beautiful South, *supra* note 151.

158. *Id.*

159. *See* Tears for Fears, *supra* note 151.

160. *Id.*

161. *See, e.g.*, Benatar, *supra* note 151; Michael, *supra* note 151.

162. *See, e.g.*, Vega, *supra* note 149; Colvin, *supra* note 151.

163. *See* Chapman, *supra* note 151.

164. *Id.* The song continues with an explicit statement of police unresponsiveness and invokes the distinction between public and private to justify the nonintervention: "And when they

The absence of direct statements about any violence occurring echoes the absence of accompanying music. We hear screaming, yes, but it is the absence of direct statements about what prompts the screaming that causes the trauma to sink in. Boundaries of silence and convention assure a distance between what happens "behind the wall" and anything that anyone could do to stop it. The first line is repeated later, but is then followed by the singer's introspective statement. The first time we heard about the screaming, a commentary followed on the events and the failure of the police to respond. Reminded of the now remote screaming for a second time, we hear the observer's inward response to the domestic violence: "Last night I heard the screaming/ Then a silence that chilled my soul."[165] The song ends with a policeman calling for the crowd to disperse with the statement: "I think we all could use some sleep."[166] This statement shows an ironic appearance of concern for onlookers by the police officer because it comes right after the singer's description of police statements justifying the refusal of the police to help the victim of battery.[167]

Attention to the onlookers in this and many other songs, however, presents a tricky problem. The onlooker, the witness to violence who watches but does nothing, appears in the songs at the very moment the singer appears as an onlooker. Is the audience, too, composed of onlookers who do nothing?[168]

Because of the immediacy of music, it seems oddly harsh and distant to use words to describe its force. Yet there is something to say about how songs speak. Songs speak immediately. Songs set silences around violence and create spaces to think about it. They create rituals for remembering and for mourning, and they generate noise and rhythms to disrupt ordinary accommodations to pain.[169] Songs express

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arrive/ They say they can't interfere/ With domestic affairs/ Between a man and his wife." Chapman, *supra* note 151; *see also supra* note 18 and accompanying text (discussing the Supreme Court's assumption of the private-public distinction in DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989)).

165. Chapman, *supra* note 151.

166. *Id.* The song ends with a return to the opening stanza, which describes police who come too late if they come at all. Filled with delayed action and an expression of concern for the people not in danger, the song laments failures to act and public and private boundaries. *Id.*; *see also supra* text accompanying notes 20-29 (discussing similar concerns of the dissenting Justices in *DeShaney*).

167. *See supra* note 164.

168. *See, e.g.*, 10,000 Maniacs, *supra* note 151; Vega, *supra* note 149; Welcome to the Beautiful South, *supra* note 151.

169. A chorus is particularly effective. *See, e.g.*, Benatar, *supra* note 151. The song repeats:

violence, but they also help constitute and transform understandings of violence. Once we come to know the songs, we hear them even when they are not being played. When played as background music or hummed by people who do not know the lyrics, the songs do not generate comprehension. They even may risk making talk of violence trivial or routine. Still, the songs offer layers of insight to those who do listen. A song may disturb complacency enough to elicit another hearing, but not enough to prompt action. Songs that do not even try to disturb the listener, however, hardly can be better at promoting action.

One song says, "I want to say 'What's the matter here?' But I don't dare say."[170] Paradoxically, by the act of singing, the singer does say enough to break the silence. Perhaps music and lyrics now help give voice to what is hard to say because each note depends on the contrast between sound and silence and the contrast between then and now, between sound a second ago and sound this instant. But when will there be words not only to convey the paradoxes and pains of action and inaction, but words to stop the violence?

## V.

Cornelia Spelman, a psychotherapist, recently wrote:

> The stuffed clown flies across my office and hits me in the head. "Use *words*," I say to my six-year-old patient, a little girl. "Use words to tell me if you're mad; don't throw the clown."[171]

Spelman explains that a psychotherapist tries to help patients learn the power of words:

> Using words to teach and comfort, listening, I am witness and midwife to the slow, painful rebirth of people whom language failed. For them, words had been used by others only to wound and destroy.
> A week later the six-year-old was carefully cutting paper. "This," she announced, pointing to a hole she had made in a piece of paper, "is a Door to the Land of Change."[172]

For survivors of family violence, words may be doors to the land of change. Words may provide these survivors with something to hold on to and thus something to aid recovery, something to grasp for a modicum of control and recollection of self. What words can open doors for those not yet victimized and for those who have been standing by?

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"Because Hell, Hell is for children/ And you know that their little/ Lives can become such a mess/ Hell, Hell is for children/ And you shouldn't have to pay for your/ Love with your bones and your flesh." *Id.*

170. 10,000 Maniacs, *supra* note 151.

171. Spelman, *Introduction*, 75 TRIQUARTERLY 5 (1989).

172. *Id.*