

ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (NEW HAVEN: YALE UNIVERSITY PRESS, 2000)

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Domestic violence is a problem of epidemic proportions plaguing our society. Nearly 1.9 million women are battered each year in the United States¹ and approximately sixty percent of all women murdered are killed by a present or former intimate partner.² While there have been important advances in legal remedies for battered women over the past twenty years, including federal legislation such as the Violence Against Women Act and state laws specifically addressing domestic violence, there remain many obstacles—legal and social—which battered women, their advocates and attorneys, and legal scholars must confront. Given the prevalence of these problems, the issue of domestic violence should no longer be marginalized nor omitted from law school curricula.

In *Battered Women and Feminist Lawmaking*,³ Brooklyn Law School Professor Elizabeth Schneider provides an outstanding critical overview of the history of the battered women's movement and the complex legal and social issues facing battered women. This book is unique in the way it challenges the legal approaches historically used to address the issue of battering and provides both a theoretical and practical roadmap for legal and social reform. Schneider adopts a feminist theoretical approach, which links theory with practice, to analyze the legal and social responses to domestic violence over the last two decades. At the core of this book is the call to recognize that domestic violence is not an isolated problem, but, rather, is embedded in gender inequality that permeates our society.

Schneider shows that the remedies for addressing domestic violence are far from simple. While she insists that feminist advocacy, which

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¹ Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, *Prevalence, Incidence, and Consequence of Violence Against Women: Findings from the National Violence Against Women Survey* (1998); Jan M. Chaiken, U.S. Dep't of Justice, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends and Girlfriends* 12 (1998).

² Violence Pol'y Center, *When Men Murder Women: 1998 Homicide Data* (2000).

³ Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* (2000).

promotes the equal rights of women in the legal and political arenas, is essential to eradicating domestic violence, she acknowledges that rights-based legal arguments made within the courtroom and legislature are not enough to protect battered women. For example, in Schneider's examination of issues such as battered women's self-defense, the criminalization of domestic violence, and battered women's battle for custody of their children, she urges that solutions for such problems cannot be found alone in the law, but must encompass changes in equal treatment of women in society as a whole. She concludes that "equality requires profound social reconstruction of gender roles within the workplace, the family, and the larger society."⁴

Schneider is particularly well suited to write this seminal book on domestic violence and feminist lawmaking. She is one of the premier experts in the fields of violence against women, gender inequality, and feminist legal scholarship, and is one of the pioneers in advancing the legal rights of battered women. Beginning her legal career at the Center for Constitutional Rights, she litigated on appeal such groundbreaking cases as State v. Wanrow,⁵ successfully arguing that the law of self defense was biased against women, and winning a reversal of the trial court's conviction on the grounds that the jury was not instructed to consider the reasonableness of Wanrow's act from her perspective. Schneider was one of the first to teach a course on battered women and the law, teaching the course at Harvard Law School for the first time in the spring of 1991. She has taught courses on women and the law and gender discrimination at Brooklyn Law School and Harvard Law School for many years.

Schneider's analysis of the historical progression of the battered women's movement is insightful. She explains that advocates who

⁴ Schneider, *supra* note 3, at 41.

⁵ 559 P.2d 548 (Wash. 1977). Schneider states:

In Wanrow, a jury had convicted Yvonne Wanrow, a Native American woman, of second degree murder for shooting and killing William Wesler, a white man whom she believed had tried to molest one of her children. Wesler had entered her babysitter's home uninvited when Wanrow and her children were there. Wanrow, who at the time had a cast on her leg and was using crutches, claimed that, based on her perceptions of the danger created by Wesler, she had acted in self-defense. She maintained that she had information leading her to believe that Wesler had a history of child molestation and had previously tried to molest one of her children The judge's instructions (to the jury) had prevented the jury from considering Yvonne Wanrow's state of mind, as shaped by her experiences and perspective as a Native American woman, when she confronted Wesler.

Schneider, *supra* note 3, at 30.

pioneered the movement understood violence against women as part of a larger system-wide subordination of women. As feminists, advocates believed the personal was political. Over the years, great strides have been made to publicize the problem of domestic violence and to unmask battering as purely a private matter. With the discourse of domestic violence becoming mainstream, however, the movement has somehow shifted away from its feminist political roots and now focuses on domestic violence within a narrower context. Legal and social services address domestic violence on the individual rather than global level. Consequently, Schneider argues, the “issue of domestic violence has been decontextualized from the larger issue of gender subordination that animated the movement.”⁶

Schneider raises important concerns that the focus on battering as a psychological symptom of individual and family dysfunction minimizes the role of gender inequality as being inextricably linked to the problem of battering. Schneider asserts that even though there has been important progress in legislating protection for battered women and in shaping the public perception of domestic violence as unacceptable, if the link between gender subordination and violence against individual women is ignored, the problems facing battered women in society will continue.

Lawmaking, Schneider explains, is a significant part of the battered women’s movement. She contends that legal reforms for battered women are most effectively advanced by using the process of feminist lawmaking, which is “built on the experiences of battered women and has sought to transform law in light of this experience This process of lawmaking . . . has reflected core assumptions concerning the link between gender and violence.”⁷ She suggests that in order to understand the experience of battered women, we must first listen to each woman’s story and must also examine the social aspects of violence against women ingrained within our society. A woman’s particular experience should be understood, Schneider argues, within the context of subordination of women in our culture. Too often, the voice of the victims of domestic violence and the link with the communal experience of gender inequality is lost within the legal system. She illustrates this concept in her analysis of several important issues, including the legal defense of battered women who kill, the treatment of battered women as mothers, and the criminalization of domestic violence.

Schneider devotes an entire chapter in Battered Women and Feminist Lawmaking to discussing the legal challenges facing battered women who kill their batterers. She describes this as “one of the most

⁶ Schneider, *supra* note 3, at 27.

⁷ *Id.* at 34.

significant areas of feminist lawmaking on domestic violence.”⁸ At the heart of the problem of defending battered women who kill, Schneider contends, has been gender bias in the application of self-defense laws. Unfortunately, defense attorneys and judges have relegated battered women who kill their batterers to the categories of “mentally ill” or “temporarily insane,” rather than considering their actions as fitting into the reasonableness standard required by self-defense laws. By not listening to the woman’s particular experience as a battered woman or understanding the generalized experience of many battered women, defense attorneys do not provide (or judges do not allow) necessary evidence regarding the reasonableness of the battered woman’s perception of the danger she faced from her abuser. Because of this failure, battered women are not provided with an equal opportunity to defend themselves in a court.

Schneider insists that legislation which creates a separate defense for battered women is not only unnecessary, but ill-conceived. While she urges the use of experts to explain why a battered woman’s perception of danger to her life is reasonable, she opposes use of expert psychologists testifying to “battered woman’s syndrome.” This type of testimony places the focus on the actor rather than on the circumstances around which she acted. It pathologizes battered women and often works to the detriment of many defendants. For example, women who do not fit into the stereotype of someone suffering from “battered women’s syndrome”—the passive abused victim who suffers from “learned helplessness” put forth by the well-known psychologist Lenore Walker—are demonized for their action of killing their abusers. Judges too often do not allow jury instructions on self-defense for women who do not fit this stereotype of a “battered woman.”

Schneider contends that by attempting to reform the legal system to provide gender equality for women, feminist lawmakers are increasing the defense options for women at trial. Feminist advocates argue that it is the disparate application of self-defense law at trial that harms battered women, rather than the law itself. Instead of a special defense for battered women, jurors and judges must be educated about the experience of the particular victim as well as the experience of battered women as a whole in order to understand the reasonableness of the battered woman’s actions on both the subjective and objective level required by self-defense law.

In her chapter on motherhood and battering, Schneider addresses one of the most difficult legal issues facing battered women today, that of custody disputes. Again, she bases her analysis upon the real experiences of battered women, providing a review of custody cases nationwide. She shows that the use of the “battered women’s syndrome” has become a sword against mothers seeking custody when they are categorized as

⁸ *Id.* at 112.

dysfunctional and too weak to protect themselves, and, therefore, adjudicated unfit as parents. Schneider also explains that the gender stereotyping of the “good mother”—engrained within our society—puts battered women in an untenable position because it not only requires that a woman keep her family together and provide a father for her children, but also that she never expose her children to domestic violence.

A significant number of battered women stay with their abusers because these men threaten to take custody of their children should the women leave. Since courts often reward a father for just asking for custody, according to Schneider, these women’s fears are well-founded. Schneider highlights the problem, often unreported, of battered women accepting mutual restraining orders in divorce proceedings because their batterers threaten to sue for custody should the women seek unilateral protective orders. Mutual restraining orders, however, tend to be ineffective in protecting victims because they are difficult for police and courts to enforce.

While society often asks the question “why did she stay?” when a battered woman flees her home, leaving the children behind, courts sometimes will adjudicate that she has abandoned them and award custody to the abuser. Likewise, a battered woman who refuses to get an order of protection or leave the abusive relationship because the batterer threatens to kill the entire family if she does leave, is sometimes punished by losing custody to the state social services department. To put this in context, studies have shown that violence against women escalates when she leaves or tries to leave the abuser.⁹

Schneider insists that in order to successfully reform the legal and social systems for victims of domestic violence, we must gain insight into the tremendous difficulties battered mothers confront. She shows how “[t]he circumstances of battered mothers dramatize the challenge of feminist lawmaking: the need for legal advocates to describe and make visible all dimensions of battered women’s experience as mothers within a broader gender framework. They also highlight the enormous obstacles to both accurate description and significant change.”¹⁰

Schneider also examines the movement to criminalize domestic violence. For many years, battered women’s advocates throughout the country have urged states and the federal government to treat domestic violence as a crime, rather than simply a private matter. Prosecutors and

⁹ Caroline Harlow, U.S. Dep’t of Justice, *Female Victims of Violent Crime*, (1991); Angela Browne, *When Battered Women Kill* (1987); Franklin E. Zimring, Satyanshu K. Mukherjee, & Barrik Van Winkle, *Intimate Violence: A Study of Intersexual Homicide in Chicago*, 50 U. Chi. L. Rev. 910 (1983).

¹⁰ Schneider, *supra* note 3, at 178.

police officers have been trained not only to address violence between intimate partners in the same way they do assaults between strangers but to further understand that domestic violence assaults can ultimately lead to fatalities. As a result, states have responded by instituting laws and policies such as mandatory arrest and no-drop prosecution, placing the decision to prosecute the batterer within the states' purview.

These policies, however, are controversial. According to Schneider, proponents of mandatory arrest and no-drop prosecution maintain that these approaches protect battered women because batterers know that they cannot manipulate women to drop their cases; the state is in charge of the decision to proceed with prosecution. Critics, on the other hand, challenge these policies as being paternalistic and detrimental to battered women. They argue that not allowing women the choice of whether or not to have the batterer arrested and prosecuted takes away a woman's autonomy and increases the risk of retaliation by a batterer who is now furious that he was arrested and prosecuted.

Importantly, Schneider does challenge the criminal justice system to look beyond mandatory arrest and no-drop prosecution to address the problems of battering. She suggests that "the problems posed by mandatory prosecution and no-drop policies highlight the degree to which formal legal remedies and particular legal strategies may not take account of the complexity of the relationship and social and economic realities for battered women's lives."¹¹ She concludes that we should neither reject states' criminalization of domestic violence nor rely solely upon the state to solve the problems of domestic violence. In addition to legislation that makes domestic violence a crime, Schneider asserts that we must address deeply ingrained attitudes and practices which subordinate women in our society, such as economic disparities in women's pay, in order to solve the problem of domestic violence. She proposes: "[A]n explicit framework of gender equality, which makes the link between battering and power and control, battering and attitudes of disrespect, battering and verbal abuse, battering and economic coercion, battering and childcare, is necessary to the possibility of meaningful reform."¹²

Another significant aspect of Battered Women and Feminist Lawmaking is the emphasis on lawmaking affecting public education on domestic violence, and education on these issues leading to legal reform. To explain the importance of lawmaking's impact on public education, Schneider analyzes the O.J. Simpson criminal and civil trials and the media coverage surrounding these cases. The media attention of the O.J. Simpson cases, Schneider suggests, "provided a major opportunity for national

¹¹ *Id.* at 188.

¹² *Id.* at 198.

education on the issue of domestic violence over the past thirty years.”¹³ In the beginning of the trial, the media did expose the problem of domestic violence and put a face to the problem by calling Nicole Brown Simpson a battered woman. The fact that there were no serious sanctions against O.J. Simpson by the judicial system or his employers when police reports were made gave the public insight into the problems battered women face with the minimization of abuse by society. Most importantly, a public education campaign was launched after the O.J. Simpson case—spreading information on television, radio, billboards and signs on buses throughout the country—bringing awareness to the widespread problem of domestic violence.

Conversely, the fact that O.J. Simpson was acquitted in the criminal case, Schneider comments, had some negative effects on the education of the public. The fact that the prosecutors did not provide substantial evidence linking Nicole’s homicide to the history of domestic violence sent a dangerous message to the jurors, and possibly the public as a whole, that domestic violence is not connected to homicide. Schneider notes that one juror stated after the trial that “evidence on domestic violence ‘had been a waste of time. This was a murder trial, not domestic violence.’”¹⁴ Another negative result of O.J.’s acquittal, reported by battered women themselves, was that some batterers threatened their victims by stating that they, too, could get away with killing their girlfriends or wives.

What we learned from the O.J. Simpson case, Schneider asserts, led to some positive legal reforms. For example, Domestic Violence Fatality Review Commissions, which examine homicides caused by domestic violence, have been established in many states.¹⁵ California instituted a law requiring a guilty plea or jury trial for prosecution of first-time offenders, to ensure that there will be a criminal record if there is a conviction. Several cities have made cell phones for calling 911 available to victims of domestic violence.

Schneider points out that public education and legal reform arising from such highly sensationalized trials as the O.J. Simpson case have their limitations. She insists that in order to address these important legal struggles, it is critical to educate future lawyers about the problems of violence against women and gender inequality. In fact, the widespread problem of inadequate legal representation of battered women documented by Schneider in a report to the Ford Foundation in 1990 concretely supports her assertions.

¹³ *Id.* at 199.

¹⁴ *Id.* at 206.

¹⁵ *Id.* at 208.

Furthermore, Schneider's discussion of her own experience in teaching one of the first classes on "Battered Women and the Law" at Harvard Law School, which involved class discussions, research, and a clinical component, is an excellent example of the effectiveness of such courses on legal education. The "course demonstrated the power of combining scholarship and activism and the possibility of transforming legal education from a frequently passive and intimidating experience into an active, motivating experience."¹⁶ By teaching this class and courses on gender discrimination, Professor Schneider has had a tremendous impact on many of her students who have gone on to pursue careers in legal services for battered women, contribute significantly to research on violence against women, and teach such courses themselves at a number of different law schools. Schneider asserts that the successful reform of policies and practices affecting battered women depends upon integrating the issues of violence against women and gender discrimination into a wide variety of legal scholarship and law school courses, including, torts, civil procedure, criminal law, and family law.

Battered Women and Feminist Legal Theory is a must-read for attorneys, battered women's advocates, judges, legislatures, and legal educators. Schneider succeeds in linking theoretical discussions of gender inequality with life-and-death practical experiences, such as is the case with battered women who kill their abusers, mothers who risk losing custody, and women who are forced to testify against the batterer. The book is powerful in its message that in order to reform our legal system to assist victims of domestic violence, we must understand violence against women within the context of gender subordination and address gender inequality in our society. By writing Battered Women and Feminist Lawmaking, Schneider has laid the groundwork for critical advancements in legal representation and legal scholarship around the issues of violence against women.

¹⁶ *Id.* at 217.