FACT-FINDING IN CIVIL DOMESTIC VIOLENCE CASES: SECONDARY TRAUMATIC STRESS AND THE NEED FOR COMPASSIONATE WITNESSES

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INTRODUCTION

This symposium in response to Elizabeth Schneider's invaluable book, *Battered Women and Feminist Lawmaking*, is an excellent occasion for drawing attention to two striking features of domestic violence law and practice. The first is the troubling inadequacy of fact-finding resources[1] in civil domestic violence proceedings, particularly in cases

1. The phrase "inadequate fact-finding resources" refers to the combined effects of resource deficiencies and troubling practices. These include, for example, inadequate or no legal representation for clients with complex claims; overburdened, inexperienced, or poorly trained judges; and informal, rushed, often very brief legal hearings. *See infra* Part I; *infra* Part III. The term "civil proceedings"

involving children. This inadequacy means that even with progressive laws and promising remedies, justice and assistance for victims of domestic violence and their children are often out of reach.

The second striking feature is the high proportion of civil domestic violence cases that are murky and difficult, in part as a result of these cases' high degree of particularity. By the latter phrase, I mean that domestic violence family cases include a strikingly diverse variety of life circumstances, patterns of behavior, and needs for social support and legal intervention. This variety is coupled with unusual challenges in the gathering, presentation, and sifting of evidence. Finally, domestic violence cases, like many family matters, are primarily concerned with shaping and predicting the future on the basis of evidence about the past and the present. For this and other reasons, the correct outcome is more difficult to discern and may be more uncertain than in most other court cases. Even the concept of "outcome" is more ambiguous in these cases. While court judgments mark the end point of many legal disputes, both domestic violence and child maltreatment cases often require longer term judicial oversight and extended social services. As one litigator remarked, in effect, these cases begin rather than end with a judge's ruling.[2] The result is that many cases pose significant fact-finding challenges.

When cases are complex, the deficiencies of fact-finding resources have even more devastating consequences, because there is a sharp decrease in the odds of getting the accurate results that facilitate constructive support to adults and children who need it. Thus, the more difficult and confusing the cases, the more elusive the goal of providing appropriate civil remedies and other social assistance to victims and their children.

While addressing the fact-finding gap would not be a panacea, it would make an important difference to troubled families and

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is used for all proceedings in family court and for civil restraining (or protective) order hearings, although child abuse and neglect (dependency) proceedings are only occasionally discussed. Criminal proceedings brought to enforce civil restraining orders are also included.

2. Telephone Interview with Alan Lerner, Practice Professor of Law, University of Pennsylvania Law School (Feb. 14, 2003) [hereinafter Lerner Interview]. The need for monitoring and support on an ongoing basis is more widely reflected in system design in dependency courts than it is in either criminal or civil domestic violence matters, although domestic violence advocates and researchers have certainly demonstrated the need for such measures. For recent documentation of the importance in domestic violence practice of ongoing judicial oversight and intensive follow up with both victims and perpetrators of abuse, see EDWARD W. GONDOLF, BATTERER INTERVENTION SYSTEMS 174-75, 191, 214-18 (2002). *See also* LUNDY BANCROFT & JAY G. SILVERMAN, BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 185-87 (2002) (discussing protocol and the need for intensive follow up) and *infra* note 199.

children because the legal system has something worthwhile to offer. When the innovative legal remedies in civil domestic violence cases which have been developed over the last few decades are properly deployed, victims of violence and their children benefit.[3] From this perspective, the paucity of fact-finding resources in family courts to address the complex, urgent dilemmas presented and craft appropriate legal and social responses is tragic.[4]

The consequences for children of inadequate fact-finding resources in family matters, particularly in cases potentially involving domestic violence and child maltreatment, are especially severe. As compared to adults, children have far less capacity and dramatically fewer resources to handle dangerous, abusive or painful situations in their own families. Children usually cannot escape, cannot readily access external sources of support, and are not developmentally able to make sense of these experiences on their own. The negative impacts on children when domestic violence is inflicted on a parent are well documented, and there is a high correlation between such violence and direct physical and emotional abuse of children.[5]

The legal system in effect abandons children both when the protective efforts of one parent are not supported and when there are no direct supports for children in harmful family situations whose parents do not seek outside assistance for themselves or their children.[6] The failure to respond to the needs of children in the

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3. Intelligent application of existing legal remedies substantially reduces safety risks to victims of abuse and their children, especially when initial legal intervention is followed up effectively and combined with other forms of social support. *See* GONDOLF, *supra* note 2, at 202-03. For both civil restraining orders and arrest followed by criminal prosecution, the available evidence suggests that the deterrent effect of legal intervention may be as high as a one-third to one-half reduction in subsequent acts of violence. *See, e.g.*, CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 558-59, 637 (2001) (reporting social science research); GONDOLF, *supra* note 2, at 22-23, 201 (reporting results of a sophisticated four city evaluation of high-end batterer intervention programs). A recent study suggests that "in predicting long-term rates of domestic violence, the only public service variable that mattered is access to legal services." Lou Marano, *Access to Legal Aid Lowers Domestic Abuse*, UPI, Jan. 8, 2002 (reporting on a study conducted by two economists, Amy Famer and Jill Tiefenthaler), *available at* http://www.upi.com/view.cfm?StoryID=20030108-024530-2063r; *see also* Amy Farmer & Jill Tiefenthaler, *Access to Legal Aid Lowers Domestic Abuse*, 21 CONTEMP. ECON. POL'Y 158 (2003).

4. An implicit premise of this account is that issues of this importance and difficulty deserve the investment of time, attention and resources that would maximize the possibilities of accurate fact-finding in particular cases and in general.

5. For a review of both types of evidence, see DALTON & SCHNEIDER, *supra* note 3, at 240-66; *see also* BANCROFT & SILVERMAN, *supra* note 2, at 29-129 (examining various harmful effects on children having a battering parent); *id.* at 42-47 (reviewing evidence on correlation between domestic violence and child abuse). *See also infra* note 179.

6. In severe cases, the legal system requires and encourages other adults, e.g., teachers and health professionals who become aware of the children's difficulties, to

context of domestic violence has serious negative effects on children's lives during childhood and in adulthood.[7]

It is important to note that the well-being of children is directly related to the well-being of the adults who care for them. Unless protective resources for adults experiencing domestic violence are widely available, children suffer.[8] The lack of adequate fact-finding resources and practices means, among other things, that even when a family member seeks assistance from the courts, there is a high likelihood of one of three outcomes: no one will make adequate inquiry into the children's circumstances; the legal system will fail to respond effectively to harm and threats of harm; or children will suffer as a result of bungled intervention.[9] In fact, as Joan Meier explains, despite general improvements in domestic violence law and practice, the most egregious fact-finding gaps and failures in civil domestic violence matters tend to occur when parenting arrangements are at issue.[10]

While related weaknesses in domestic violence law[11] and practice[12]

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report the situation to the child welfare system. The suggestion here is that direct supports for children, not conditioned on contact with the child welfare system, are also urgently needed. *See infra* Part IV.B.3.

7. For reviews of the evidence of effects of childhood abuse during childhood and in the longer term, see B. B. Robbie Rossman, *Longer Term Effects of Children's Exposure to Domestic Violence, in* DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN 35 (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001); JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 110-14 (1992) [hereinafter HERMAN, RECOVERY] (reviewing the evidence of effects of childhood abuse on adults).

8. *See* DALTON & SCHNEIDER, *supra* note 3, at 250-66; BANCROFT & SILVERMAN, *supra* note 2 at 190. Of course, additional resources for children's and families' needs (education, health care, housing, child care, income support) are also necessary. *See, e.g.*, RUTH SIDEL, KEEPING WOMEN AND CHILDREN LAST, AMERICA'S WAR ON THE POOR 141-65 (2d ed. 1998); BETSY MCALISTER GROVES, CHILDREN WHO SEE TOO MUCH 133-35 (2002); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 268-70 (2002).

9. Practices and problems vary somewhat from one part of the legal system to another. For example, the child welfare system must investigate claims of child abuse and neglect, though the system may or may not treat intimate violence against a parent as a reason to investigate. (Of course, if the child welfare system is functioning poorly overall, adding domestic violence to the caseload without other reforms is not necessarily a good idea.) Civil domestic violence proceedings typically lead to inquiry into the risk to the children only if the adult victim of abuse raises the issue, and the resulting risk assessments are rarely done according to child welfare system standards. In any event, despite the valiant efforts of many people, the majority of jurisdictions are not yet doing an adequate job either on fact-finding or in their overall response to domestic violence and child maltreatment cases.

10. *See* Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 660, 667, 675-716 (2003).

11. *See infra* notes 57-58 for examples of recent reforms in applicable criminal and civil legal standards and related police and prosecutorial policies.

12. *See infra* notes 58, 183, 185, and 199 for discussion of recent efforts to

have been the focus of sustained inquiry and reform, I have been surprised to discover that the inadequacy of fact-finding resources and practices in the face of great and urgent need has largely remained in the background of scholarly and activist conversations.[13] As a result, I have become curious about two questions. The first is what caused the relative obscurity in domestic violence discourse of the fact-finding gap in these cases. The second inquiry concerns measures that might reduce the gap and improve outcomes for victims of domestic violence and children.

At one level, there is no mystery about why there is a fact-finding gap. Businesses, large corporations and the wealthy have more resources, both individually and collectively, which makes it easier for them to get attention paid to their fact finding needs. In contrast, high volume matters involving low or moderate-income people, particularly those involving women's and children's issues, are likely to get "mass processing" by "street level bureaucrats."[14] The fact-finding gap in civil domestic violence cases, and in family courts more generally, merely reflects this general pattern. Therefore, collective political action to promote economic, social and political equality will continue to be essential for feminist lawmaking on domestic violence, including addressing the fact-finding gap, as well as to make progress on other legal issues affecting families.[15]

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improve coordination between different systems of social response, including different parts of the legal system. However, although through what are known as Green Book initiatives, there have been heartening recent efforts to develop cooperative relationships between child welfare authorities and domestic violence advocates, see *infra* notes 183 and 185, child custody disputes between parents have not been included. *See* Meier, *supra* note 10, at 661.

13. While these deficiencies and possible reforms have received relatively less attention than other types of reforms, they have not been ignored in the social science and advocacy literature. *See, e.g.*, DALTON & SCHNEIDER, *supra* note 3, at 521-26 (discussing the importance and lack of adequate legal representation). In addition, the passage of VAWA II in 2000 provided around $20 million in new funding to legal service providers doing civil protection order work. *See* Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L., 499, 502-03 (2003). More attention is needed because of the enormous cumulative and pervasive impact of the fact-finding gap. Civil system reforms should integrate legal and non-legal strategies to support the efforts of battered women to stop the abuse. For a discussion of the disproportionate emphasis on legal intervention as opposed to other forms of assistance for victims of domestic violence, see *id.* at 509 and *infra* note 64.

14. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY 183-84 (1980).

15. *See, e.g.*, ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 229-32 (2000) [hereinafter SCHNEIDER, BATTERED WOMEN]. For a compelling account of the complex ways poverty, welfare policy, childhood victimization and domestic violence intersect to trap battered women and their children, see generally JODY RAPHAEL, SAVING BERNICE (2000). *See also* ROBERTS, *supra* note 8, at 25-46 (noting child maltreatment as "indirectly caused by parental poverty, detected because of parental poverty, or defined by parental poverty" *id.* at 27); *id.* at 268-71

This Article suggests another critical factor in understanding both the fact-finding gap and its relative obscurity in domestic violence discourse: the largely unacknowledged problem of secondary traumatic stress, and an associated lack of interdisciplinary collaboration to address this problem.[16] Secondary traumatic stress has the potential to affect everyone who has any contact with trauma, who are collectively described as "observers" or "bystanders."[17] Among the traumatic experiences whose vicarious impact on bystanders has been documented are rape, child abuse and domestic violence, as well as war, solitary confinement, torture, and natural and environmental disasters.[18] Prolonged, repeated interpersonal

(increasing social support for poor families as a way to drastically reduce cases of child abuse and neglect).

16. Among the other terms used for secondary traumatic stress ("STS") are vicarious trauma, indirect trauma, compassion fatigue or empathic strain. According to Charles Figley, STS can be defined "as the natural consequent behaviors and emotions resulting from knowing about a traumatizing event experienced by a significant other–the stress resulting from helping or wanting to help a traumatized or suffering person." Charles R. Figley, *Compassion Fatigue as Secondary Traumatic Stress Disorder: An Overview* [hereinafter Figley, *Overview*], *in* COMPASSION FATIGUE: COPING WITH SECONDARY TRAUMATIC STRESS DISORDER IN THOSE WHO TREAT THE TRAUMATIZED 1, 7 (Charles R. Figley ed., 1995) [hereinafter COMPASSION FATIGUE]. Figley has also suggested that the term Post-Traumatic Stress Disorder (and its now-familiar acronym PTSD) be redefined as Primary Traumatic Stress Disorder, to distinguish it from Secondary Traumatic Stress Disorder, which refers to the similar (though typically less severe) syndrome of symptoms that may arise in people exposed to secondary sensors, e.g., by working with victims of direct trauma. *Id.* at 8-9. STS should not be confused with burn-out, "which emerges gradually and is a result of emotional exhaustion, [whereas] STS (compassion stress) can emerge suddenly with little warning." *Id.* at 12. Of course, participants in the legal and social service systems may experience both STSD and burn-out. *See also* JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS § 9-2(g) (2001) (discussing vicarious traumatization in lawyers who work with child abuse victims); INT'L SOC'Y FOR TRAUMATIC STRESS STUDIES, INDIRECT TRAUMA (2003) (providing a brief explanation of indirect trauma), *available at* http://www.istss.org/terrorism/indirect_trauma.htm. Subsequent discussions of direct and secondary traumatic stress in this Article rely primarily on the work of Judith Lewis Herman and particularly her book, TRAUMA AND RECOVERY. *See generally* HERMAN, RECOVERY, *supra* note 7; *see also* PETERS, *supra* note 16, §§ 9-1-9-6.

17. *See* HERMAN, RECOVERY, *supra* note 7, at 7-8 (using the term bystander); *Id.* at 115 (using the term observer). The term "bystanders" may strike some readers as an odd way to talk about professionals involved in responding to domestic violence. The term seeks to highlight the impact of exposure to the traumatic experiences of others. When we come into contact with the trauma of others, we occupy individual societal roles (which can be more or less tangential to a traumatic situation, such as gardener, bank teller or more salient, such as social worker, judge, attorney, court clerk) and simultaneously the roles of bystanders to a scene that may be painful to encounter. *Id.*; *see also infra* notes 107-11 and accompanying text. The term bystander is also here differentiated from the word "witness" to mark the distinction between the fact of encounter and the moral choice to become a conscious witness. *See infra* Part IV.C. For discussion of the possible impact of secondary traumatic stress on professionals working with victims of domestic violence, see *infra*, Part IV.A.

18. *See infra* app. for bibliographic information on traumatic stress studies and links to other resources.

victimization, such as that which can occur in the context of domestic violence, child abuse, prisons, concentration camps and slave labor camps, is most likely to produce more serious forms of traumatic stress, both in survivors of trauma and in bystanders who have extensive contact with them.[19] This Article suggests that the practice of compassionate witnessing[20] can assist bystanders, particularly people on the front lines in the legal system, to respond more effectively to individuals experiencing or recovering from family-related trauma, particularly when prolonged and repeated victimization is involved. It also concludes that improving societal responses to both domestic violence and child maltreatment depends primarily on the formation of interdisciplinary communities of support, bringing together participants in the legal system and others with different training and perspectives who also work with people experiencing domestic violence and child maltreatment. Finally, this Article contends that compassionate witnessing, if widely practiced within the legal system, will provide new clarity about the link between the fact-finding role of family courts and the rights of both adults and children to be protected from intimate violence and patterns of domination and control. Part I provides an overview of the fact-finding gap and the murkiness of family law cases involving domestic violence issues. It argues that focusing attention on the lack of resources for fact-finding in civil domestic violence cases, as well as the high proportion of difficult cases, is an urgent and long overlooked task. This task is especially urgent in the context of divorce and child custody disputes. Reforming statutory standards

19. Researchers have suggested "expanding the concept of Post Traumatic Stress Disorder ("PTSD") to include a spectrum of disorders, ranging from the brief, self-limited stress reaction to a single acute trauma, through simple PTSD, to the complex disorder of extreme stress [Disorders of Extreme Stress Not Otherwise Specified] ("DESNOS") that follows upon prolonged exposure to repeated trauma." Judith Lewis Herman, *Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma*, 5 J. TRAUMATIC STRESS 377 (1992). For more information on the secondary impacts on bystanders of work with people suffering DESNOS, see HERMAN, RECOVERY, *supra* note 7, at 146-47, and works listed *infra* app. *See supra* note 16 for the suggestion that PTSD should be renamed Primary Traumatic Stress Disorder.

20. Compassionate witnessing is the term used here for certain capacities that are helpful to people whose work involves contact with traumatic situations. These capacities include being able to take care of one's own needs appropriately, serve as a conscious witness to the suffering of others, and make wise and compassionate choices about how best to respond to the underlying situation, consistent with one's role and resources. Essential resources for compassionate witnessing include curiosity, an effective support system, and the ability of the witness to acknowledge and manage the personal resonance of traumatic material. *See also infra* text accompanying notes 125 and 126 and text following note 135. Further explanation of the concept of compassionate witnessing (and its benefits to both participants in the legal system and victims and perpetrators of domestic violence and their children) is presented in Part IV.

and creating specialized domestic violence courts,[21] without acknowledging the fact-finding gap and its destructive effects, can obscure the magnitude and many significant nuances of the problem of domestic violence. Among these problems are the high rates of domestic violence during and after divorce proceedings, and the ability of abusers to use the judicial process to continue their abuse.[22]

Part II notes how the legal system's prevailing focus on criminal remedies and on dramatic, and often relatively clear cut, examples of domestic violence can distract attention from the crying need for resources to evaluate and respond to many other important domestic violence matters, particularly in cases where children are affected. This Part suggests that both preferences for more simplistic criminal justice remedies, and the failure to deploy adequate resources in civil domestic violence proceedings share the same cause: the painful emotions domestic violence often evokes in bystanders, particularly when children may be at risk. A more balanced distribution of resources and significant improvements in civil case processing can only occur if participants in the legal system have adequate support to function effectively in the highly charged context of domestic violence and child maltreatment issues.

Part III looks at the inadequacies of legal representation in family law cases and the anti-litigation bias of family courts, which are two additional structural and attitudinal obstacles to addressing the fact-finding gap in family court and civil protection order proceedings. It also describes the cumulative effect of fact-finding deficiencies on victims of abuse and their children. It concludes, in Part III(D), with a discussion of the complexity and magnitude of systemic changes needed to make meaningful improvements in the legal system's responses to domestic violence. If the cycle of incomplete and misguided family court reform is to be broken, transformative changes in people's attitudes toward themselves and each other are needed.

Part IV explores likely interconnections between the painful subject matter involved in civil domestic violence proceedings and the disheartening conditions in many family courts. Family court personnel experience first hand the reality that violent and

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21. For a description of such courts, see Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285 (2000).

22. *See infra* notes 53-54 (discussing post-separation violence, coercion and control); *infra* notes 42-43, 55, 100-02 and accompanying text (providing examples of batterers' abusive litigation tactics); BANCROFT & SILVERMAN, *supra* note 2, at 125 (illustrating batterers' use of litigation as a form of abuse).

controlling behavior in family and intimate relationships is prevalent, largely uncontrolled, poorly understood and often devastating in its consequences. Because of this exposure, system participants necessarily experience powerful emotional responses. Given the dispiriting circumstances in most family courts, the detrimental effects of secondary traumatic stress are especially likely.[23]

Unfortunately, most people are unaware of the nature and extent of secondary traumatic stress, lack access to supportive resources, and have little or no training about how to recognize reactivity[24] in themselves and others or how to respond to the resulting distress. As a result, people are likely to adopt coping mechanisms and engage in self-protective defensive maneuvers[25] to create distance and reduce to tolerable levels their own entirely understandable discomfort, anxiety, and, in some circumstances, pain.

A central claim of Part IV is that societal responses to domestic violence, and particularly tolerance of poor fact-finding conditions in family courts, are shaped by the unacknowledged reactivity of the people who make up the response systems (as well as of the people who create and maintain those systems, such as politicians and the citizens who elect them).[26] This Part also suggests that addressing the

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23. Ironically, system participants may actually deny the reality or significance of the events to which they are exposed or blame the victims, in an effort to cope with the secondary traumatic stress they are experiencing. *See infra* notes 24-26, 119-21 and accompanying text.

24. "Reactivity" is a lay and psychological term that may be unfamiliar to some readers. Psychologist Harriet Goldhor Lerner offers this explanation:

> The initial impact of anxiety . . . is always one of increased reactivity. Reactivity is an automatic, anxiety-driven response. When we are in reactive gear, we are driven by our feelings, without the ability to think about how we want to express them. In fact, we cannot think about the self or our relationships with much objectivity at all. . . .

HARRIET GOLDHOR LERNER, THE DANCE OF INTIMACY: A WOMAN'S GUIDE TO COURAGEOUS ACTS OF CHANGE IN KEY RELATIONSHIPS 36 (1989). Becoming aware of one's own reactivity and being able to identify that reactivity in others is a valuable skill for anyone who works with people, particularly lawyers and judges. This skill is essential for people who work with domestic violence and child maltreatment issues. For further discussion, including the related concepts of transference and counter-transference, see *infra* note 121 and accompanying text. *See also* HERMAN, RECOVERY, *supra* note 7, at 136-47.

25. Typical responses may include tuning out, denying or minimizing the situation presented, feeling numb, and becoming irritable or hostile to the person or persons in the present whose behavior has served as a stimulus. Helpful coping mechanisms may include converting a raw or primitive impulse into one that is more socially acceptable or constructive (sublimation), altruism and humor. *See* HERMAN, RECOVERY, *supra* note 7, at 151-53.

26. The commonly reported examples of inappropriate, dysfunctional and sometimes hostile behavior on the part of judges, attorneys, police officers, and court personnel may become more understandable when this phenomenon is acknowledged. *See infra* notes 95 and 167-75 and accompanying text.

fact-finding gap and other improvements in domestic violence practice, both at the level of individual participants in the legal system and in the system as a whole, entail finding ways to provide advocates and institutional actors with the support they need to handle being exposed to the traumatic experiences of others. Interdisciplinary collaboration is suggested as a critical resource in creating the supportive communities required.

Part IV first provides psychological background to understanding the concept of compassionate witnessing,[27] which is later described in greater detail. These sections explore how this practice, which is rooted in kindness and care for ourselves, has the potential to help people grapple more successfully with the vicarious traumatic stress associated with various levels of domestic violence work. Indeed, this practice seems vital for the sustained effort and openness of mind and heart required for finding new paths to change social response systems and engage in the kind of peacemaking that can address the deeper social patterns that fuel inhumanity and violence in intimate relationships. The transformative value of this practice in the legal system, and its relevance to the needs of children exposed to domestic violence or experiencing child maltreatment are described in subsequent sections. The last section of Part IV explores the prospects for using compassionate witnessing to address the fact-finding gap in civil domestic violence cases, as well as bringing about other systemic changes in responses to cases involving domestic violence and child maltreatment.

I. THE FACT-FINDING GAP AND THE COMPLEXITY OF FACT-FINDING NEEDS

A. Inadequate Fact-Finding Resources and Practices in Family Courts

The inadequate resources in family courts create a substantial fact-finding gap, which is intensified by the challenges of fact-finding in civil domestic violence cases. The gap is especially acute in domestic violence protective order proceedings, but is also evident in child custody and visitation disputes and contested divorce proceedings, again especially when domestic violence issues, gender dynamics and issues of power and control are of concern. One reason for the resource inadequacy is the huge volume of cases in many jurisdictions, both in family law generally, and in civil protective

27. *See supra* note 20 and accompanying text (introducing the concept of compassionate witnessing).

order proceedings in particular.[28] One rough estimate of the number of child custody cases filed nationally each year puts the number at about half a million.[29] The number of civil protective order cases is of a similar order of magnitude.[30] These case loads have expanded significantly in recent decades, but resources within the family court system have not increased sufficiently to meet the need.[31] In addition, many, if not most, litigants are unrepresented (especially in both protective order and child custody cases)[32] and the other needed decision-making resources—such as trial and appellate court time and attention; attorney and judicial training in other relevant disciplines and opportunities for interdisciplinary collaboration;

28. At various points in this Article, the focus shifts among different subsets of civil family law proceedings. These shifts reflect overlaps and interactions in the material under discussion. Families and individuals experiencing domestic violence often have to deal (either simultaneously or sequentially) with different types of family court proceedings, and the dilemmas that prompted this Article likewise appear in many different family law contexts. While most of the discussion in Parts I and III of this Article focuses on civil protective order proceedings and divorce and child custody cases in which domestic violence is (or should be) an issue, the problems of fact-finding in the child welfare system are also extreme. This Article's recommendations of interdisciplinary collaboration and the concept of compassionate witnessing should also be priorities in child welfare system reform efforts. *See infra* Part IV.B.3 (compassionate witnessing and the needs of children).

29. *See* Kristen Lombardi, *Custodians of Abuse*, BOSTON PHOENIX, Jan. 9, 2003, at 2, (extrapolating from Massachusetts statistics for 2001), *available at* http://www.bostonphoenix.com/boston/news_features/documents/02643516.htm. The volume of cases is understandable, since there are limited resources outside of the family law system to address high intensity disputes in family or intimate relationships, and once the aid of the system is invoked by one party, participation by the other is mandatory.

30. "A record high of 53,000 requests for civil restraining orders were filed in Massachusetts in 1992." JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM 72 (1999). In 2000, the New Jersey State Police reported 77,680 cases of domestic violence involving a police response. HON. ANGELO J. DICAMILLO ET AL., NEW JERSEY DOMESTIC VIOLENCE PRACTICE AND PROCEDURE 7 (2002). In Philadelphia in 2002, about 8000 victims obtained permanent protection orders, and police 911 dispatchers fielded 73,000 calls reporting domestic violence–200 a day. Craig R. McCoy, *Better Support for Domestic Abuse Victims*, PHILA. INQ. Apr. 23, 2003, at B1.

31. Increased caseloads are the result of many factors, among them the increased acceptance of divorce, the decline of the tender years presumption in custody decision-making, and new concern with the problems of domestic violence and child abuse and neglect. On the "astronomical increase" in domestic violence cases, both in civil and criminal courts, see SCHNEIDER, BATTERED WOMEN, *supra* note 15, at 49. On the increase in family cases, see Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 117 (2001).

32. For example, a recent interdisciplinary study of 406 women who sought intervention for domestic violence in Baltimore, Maryland, found extremely low levels of attorney representation in civil protective order cases. *See* Murphy, *supra* note 13, at 510-11; Berenson, *supra* note 31, at 110 (reporting studies conducted during the 1990s showing that one or both parties were unrepresented in from 40-77% of domestic relations cases); McCoy, *supra* note 30 (reporting public interest attorney Carol Tracy's estimate that in 2002, at best only one out of ten women seeking protection orders in family court in Philadelphia was accompanied by a lawyer).

resources for evidence gathering; the services of expert witnesses,[33] rapid response capability for high risk cases—are far outmatched by the demand for case resolution.[34] As a result, in family law cases, proceedings are often brief. Indeed, civil protective order statutes in most jurisdictions contemplate hearings that are conducted *pro se*. The laws and many judges also discourage or preclude discovery in civil protective order proceedings[35] and with regard to the non-financial aspects of divorce and custody cases.[36]

One experienced custody attorney recently commented,

> [M]ost family courts are 'overburdened' with cases and don't have time for . . . lengthy trials and investigations. . . . In many family courts . . . you often have only one sitting judge to hear hundreds of matters that have to do with many, many things, so the courts are compelled to move things along as quickly as possible.[37]

In other words, as a result of heavy caseloads, family matters are often subjected to routinized processing. The combination of volume, time pressure and oversimplified procedures virtually guarantees that judges will not be making well-informed, factual determinations. As another experienced litigator commented,

> Because there is often little or no pretrial discovery, or testimony

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33. At least in the context of child abuse and neglect proceedings, there is a general recognition of the need for social work and psychological expertise, and the court system supplies some funds for such services. In the context of divorce, child custody and domestic violence, the court often does not have such funds. Needed evaluations or services depend on the availability of free services or the parties' ability to pay. In Philadelphia, for example, domestic relations court-connected counseling services have only recently become available, and only on an extremely limited basis. Lerner Interview, *supra* note 2.

34. *See* SCHNEIDER, BATTERED WOMEN, *supra* note 15, at 95-96 (discussing the failure of domestic violence statutes to provide guaranteed access to counsel, despite the evident need for such representation in many cases); s*ee also infra* note 99 and accompanying text (discussing the cumulative impact of various factors on unrepresented plaintiffs' access to restraining orders).

35. Discovery in civil protective (or restraining) order cases are difficult in any event because of the short time between the entrance of a temporary restraining order and the final restraining order hearing. Many state rules permit discovery only upon a showing of "good cause" and requests are rarely made or granted. For a discussion of the New Jersey discovery rules, *see* DICAMILLO ET AL., *supra* note 30, at 32-33. Depositions are also not generally permitted. *See, e.g.*, Depos v. Depos, 704 A.2d 1049, 1051 (N.J. Super. Ct. Ch. Div. 1997) (holding that domestic violence actions are summary in nature and do not authorize depositions or any other discovery).

36. *See, e.g.*, Meier, *supra* note 10, at 664-65, 668 n.30 (describing the proceedings regarding child custody and visitation in a case where the judge refused to hold an evidentiary hearing on the matter, instead only permitting "colloquy" with counsel); *Id.*

37. Lombardi, *supra* note 29, at 2 (quoting Seth Goldstein, a Napa-California-based attorney and founder of the Child Abuse Forensic Institute, who represents men and women in custody disputes involving child sex-abuse charges).

> from qualified experts or others in the household or the community who may have valuable information to offer, a family court judge hearing a domestic violence case can rarely have confidence that she has seen all the evidence relevant to her determination. The situation is exacerbated when there are no attorneys to sharpen the facts and issues presented. When the judge has twenty minutes (or less) to hear and decide a case, try as she might, she cannot possibly give such a momentous decision the attention and reflection it deserves.[38]

B. Challenging Cases That are Difficult to Resolve

Family matters, particularly disputes involving children and domestic violence cases, are often contested and the cases that require court hearings are not necessarily clear-cut.[39] Indeed, a high proportion of both domestic violence proceedings and child custody cases are murky, ambiguous, and difficult—cases that any decisionmaker, no matter how wise or experienced, would find challenging to resolve.

Of course, some of these cases would no longer seem as difficult if there were more fact-finding resources or if the biases and reactivity of fact finders and other participants in the legal system were reduced,[40] but other cases would remain daunting even after full investigation and fact development. The family court docket of cases involving domestic violence issues typically includes a variety of circumstances, including:

- textbook examples of male dominance and control and well-documented serious violence;
- specific incidents of violent or threatening behavior by one or both parties, whose significance varies depending on a host of other circumstances about which little or no reliable evidence may be available;
- cases in which, in addition to evidence of domestic violence, the non-violent partner seems to be suffering from serious personal dysfunctions that may also be salient to custody decision-making;

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38. Lerner Interview, *supra* note 2.

39. *See* Tsai, *supra* note 21, at 1293 (noting that complex matters in domestic violence involve issues relating to family dynamics and emotional relationships that are not paralleled in other crimes).

40. *See* discussion *infra* note 46 and accompanying text and Part III.B; *see, e.g.*, Meier, *supra* note 10, at 676-81 (discussing, among other issues, the powerful norm of parental equality that courts rely on in adjudicating custody and visitation that, in reality, favors emphasis on the father's rights rather than the children's needs in the particular circumstances of each case).

- cases in which there seems to be no good answer for the children, because both parents' behavior seems quite problematic, the parents are at loggerheads, the children are bonded to both parents and the option of removing children from the household seems even more undesirable;
- cases in which the parties are engaged in intense conflict and both parties' behavior is arguably in violation of the civil protective order statute, but it is not clear whether either party is dangerous or to what extent one party is exercising power and control over the other; and
- cases in which the behavior that is the basis of the court's jurisdiction is borderline; some of these cases involve serious power and control issues and others do not.[41]

A batterer's tactics in custody and visitation disputes may further cloud the factual picture. Social scientists report that batterers often successfully employ a variety of maneuvers, including projecting a non-abusive image, using new partners as character references, using the mother's anger or mistrust to discredit her, making false or exaggerated defensive accusations against the other parent, presenting themselves as the parties who are willing to communicate or involving their own parents to obtain access to the children.[42] Since "it is common for [batterers] to be skillfully dishonest,"[43] fact finding in cases involving allegations of abuse is particularly challenging.

Fact finders are also in the difficult position of balancing competing social priorities. For example, promoting parent-child interaction and encouraging cooperation between parents in their children's care often conflicts with the need to protect children and adults from emotional injury, harassment, threats, manipulation and violence.[44] Judges are also making decisions about other people's futures without knowing what the future has in store. The task of

41. This listing of types of cases is intended to highlight the need for sophisticated evidentiary inquiry and particularized fact finding in each case. It does not imply that this case typology or others should be used in such fact finding. *See* BANCROFT & SILVERMAN, *supra* note 2, at 130-49 and Meier, *supra* note 10, at for powerful critiques of several widely-used typologies of divorce and domestic violence cases. *See also* Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION COURTS REV. 273, 275-281 (1999) [hereinafter Dalton, *Paradigms*] (discussing competing paradigms that prevent domestic violence from being recognized or properly weighed).

42. BANCROFT & SILVERMAN, *supra* note 2, at 122-26.

43. *Id.* at 124.

44. *But see* Meier, *supra* note 10, at Parts III.C.1 - D.2, for reasons to believe that in most cases, despite concerns to protect children's relationships with both parents, domestic violence should be given decisive weight in making custody decisions.

deciding which cases deserve legal intervention, either in the form of a protective order, or a departure from the child custody arrangements that would otherwise be ordered, is extremely difficult even with time for reflection, which is generally not available. In addition, to reach any conclusions about what is going on, judges must evaluate adult behavior or parent-child interactions through the distorting lens of adversary litigation. Observations made in a courtroom or when an evaluator is present may have little or no relationship to the lived reality of family life, and the work of expert witnesses is subject to other important limitations, even in the best of circumstances.[45]

Worse still, the unexamined and often unconscious preconceptions and beliefs of judges and other regular participants in family court (such as custody evaluators, mediators, and attorneys) can be decisive factors when these preconceptions are not subject to the checks that the structures of the adversary system are intended to provide. Gender bias, which is well documented, as well as homophobia, and race, and class bias, is often joined by other distorting factors, both traditional and sometimes quite idiosyncratic.[46] Moreover, as mentioned earlier, judges are often highly reactive to the subject

45. *See* BANCROFT & SILVERMAN, *supra* note 2, at 115-17, 119, 120-25 (identifying multiple reasons for differences between what judges and evaluators see and parental behavior outside of the artificial context of evaluation and litigation.); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 482-85 (1984) (discussing the danger that, even in the unusual case that adequate expert evaluative assistance is available, "the recommendation of the expert or the observations of the judge would be unduly colored by the stresses of the divorce process–by the parents' depression, anxiety, anger, and confusion and the child's reactions to it"); *see also* Meier, *supra* note 10, at Parts III.B.2-B.3 (explaining various sources of uncertainty and inaccuracy in courts' credibility determinations in custody cases involving domestic violence issues). While psychological evaluations can sometimes provide a useful source of data in child custody disputes, these can be beyond the means of the parties, and if available, are of varying or uncertain quality and relevance, and are often difficult for non-experts to weigh. *See* Chambers, *supra* note 45, at 482-85 nn.20–24; BANCROFT & SILVERMAN, *supra* note 2, at 118-19. In domestic violence cases, there are usually additional difficulties, including the fact that most custody evaluators do not have specific training in domestic violence issues and regularly dismiss allegations of abuse without investigation. *See* BANCROFT & SILVERMAN, *supra* note 2, at 117-22, 130-49. *See also* Dalton, *Paradigms*, *supra* note 41, *passim* for a sophisticated discussion of distortions in the identification and evaluation of domestic violence and child maltreatment claims in custody and visitation cases.

46. *See, e.g.*, Meier, *supra* note 10, at III.B.2 (examining the blatant gender bias in claims of "parental alienation," where the mother is accused of using domestic violence claims to alienate the child from his or her father); BARBARA A. BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, THEORY 1262-68 (1996) (discussing bias against working or student mothers, the discriminatory effect of relocation bans on custodial mothers, and sexism and heterosexism in using sexual conduct as a factor in child custody decision-making); ROBERTS, *supra* note 8, at 47-67, 92-98 (discussing the impact of racial bias, unconscious racism and poverty on decision-making in child-related family matters).

matter of the family court cases they hear. Under the conditions operative in most family courts, there is little chance for judges to acknowledge to themselves or find appropriate ways to handle the strong feelings that some family court cases inevitably generate.

In effect, the lack of adequate fact-finding resources further increases the reactivity of participants in the legal system. Paradoxically, the lack of supportive resources also gives system participants (including other court personnel and attorneys, as well as judges) additional incentives to truncate and routinize family court proceedings in order to defend themselves against the emotional stimulus overload they are experiencing. A system that routinely overloads participants is one that will inevitably suffer from declining functional capacity as time goes on.[47]

What is astonishing is the ease with which these challenges of fact-finding seem to become a reason for a retreat from fact-finding. Civil courts are established to determine the facts and resolve disputes according to governing norms. Dispute resolution in a case that is important enough to litigate is not simply a matter of reaching a result, but rather of coming as close as is feasible to an accurate result. The purpose of court hearings and evidentiary procedures is to make it possible for courts to sift through the claims of the parties and come to a fair conclusion based on the evidence. However, when family courts lack the resources needed to do a reasonable job of fact-finding, no one seems to pay much attention.

C. Overview of the Situation in Civil Proceedings Involving Domestic Violence

As a result of the conditions in family court, the difficulty of many of the cases and the largely unaddressed problems of judicial bias and reactivity, the promise of protection extended by both domestic violence laws and child custody laws is profoundly compromised. Serious cases of domestic violence are missed, relatively minor incidents are subject to overreaction, appropriate remedies are not ordered, custodial arrangements that are impractical and disruptive to children are adopted by way of compromise, and judges, parties

47. On the negative effects of unacknowledged reactivity on the performance of divorce lawyers in domestic violence cases, see Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 MICH. L. REV. 901, 921-27 (1997); Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 N. ENGL. L. REV. 319, 366-67, 369-70 (1997) [herinafter Dalton, *Domestic Torts*]. For materials addressing other contexts of legal practice, see *infra* app. *See also infra* note 162 and accompanying text for recent work describing new models of lawyering, teaching, and practice designed to encourage a greater integration of psychological understanding into domestic violence lawyering work.

and advocates are likely to become cynical or disheartened.

Proceedings in which domestic violence issues are at the forefront are especially likely to be mishandled. Many protective orders that should be granted are denied or are inadequately enforced when they are violated.[48] Domestic violence victims often settle out of court for less protection, aware that making the case before a judge may expose them to unacceptable safety risks or require more evidentiary and advocacy resources than they have available.[49] Victims of violence who are simultaneously engaged in divorce proceedings are routinely denied protection on the suspicion that their requests for protection are manipulative tactics.[50] Additionally, children's well-being is all too often sacrificed. Occasionally this is because a false claim succeeds. More frequently, it is because the abuse of one parent or the child by the other cannot be demonstrated to the satisfaction of overburdened and often skeptical courts with the limited fact-finding resources that are available, or because courts treat the abuse of the parent or the child as less important than other factors in determining custody.[51]

It bears emphasizing that civil remedies for domestic violence are a critical resource for victims of domestic violence, because domestic violence is widespread, harmful, varied, often escalating, and hard to escape. It is now generally agreed both that a significant proportion of intimate relationships are characterized by ongoing patterns of violent and illegally coercive behavior and that such patterns have enormous social costs, both for individuals, their children and third parties.[52] While sociological and psychological understanding of

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48. Sometimes, but not always, these problems are the result of a lack of attorney representation. *See, e.g.*, LeeAnn Iovanni & Susan L. Miller, *Criminal Justice System Responses to Domestic Violence: Law Enforcement and the Courts*, *in* SOURCEBOOK ON VIOLENCE AGAINST WOMEN 303, 314 (Claire M. Renzetti et al. eds., 2001) (reporting evidence that victims not represented by counsel are less likely to receive protective orders, or if they do, the orders are likely to lack needed provisions excluding the offender from the residence, or concerning child custody, visitation and child support, and discussing enforcement problems).

49. *See, e.g.*, Meier, *supra* note 10, at 664-65, 668 n.30 (describing a domestic violence child custody case she litigated in which a mother gave up custody of her child to the abuser rather than continue to litigate before a hostile judge).

50. *See* discussion *infra* note 97.

51. For a discussion of this problem, and the attitudes and beliefs that contribute to these failures, see, e.g., Meier, *supra* note 10, at PartII, III.A-E (explaining the court systems' mental "bifurcation" between custody and visitation issues, on one hand, and domestic violence issues, on the other).

52. For a review of statistics, see DALTON & SCHNEIDER, *supra* note 3, at 5-7, *See also* Jane Maslow Cohen, *Private Violence and Public Obligation: The Fulcrum of Reason*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE 349, 368-69 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994). For estimates of the annual costs of domestic violence to United States' companies, primarily as a result of health care expenditures, see *id.*

battering and batterers is in early stages of development, there is widespread agreement that the abusive behavior of a substantial proportion of batterers will escalate in seriousness and frequency over time, particularly in response to efforts by the victim to change or end an intimate relationship with the abuser.[53] It is also now recognized that many people who are targets of abuse in intimate relationships will need many attempts, often over a period of years, to get the abuse stopped, either by alteration of the power dynamics of the relationship or by leaving the batterer.[54] Finally, the dynamics of relationships characterized by battering and illegal coercion are quite diverse, and advocates for battered women and researchers in the field have increasingly emphasized the importance of confronting the dynamics of power and control as well as particular acts of violent abuse.[55] Meaningful criminal sanctions are only likely to be applied

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at 369.

53. On theories of battering behavior, types of batterers and predictions of escalation over time, see DALTON & SCHNEIDER, *supra* note 3, at 74-94 (discussing *inter alia* cyclical battering, shame and separation issues underlying the behavior, and the generational chain of family abuse); GONDOLF, *supra* note 2, at 165-92 (discussing research to identify the most dangerous batterers and develop appropriate responses specifically for them); BANCROFT & SILVERMAN, *supra* note 2, at 1-28, 130-49, 178-87. On domestic violence and exit from relationships, see Martha A. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICHIGAN L. REV. 1, 68-74 (1991) (coining the term "separation assault" and explaining how to identify it); *see also* BANCROFT & SILVERMAN, *supra* note 2 at 75-76, 110, 167-68 (illustrating battering parents' patterns of continued violence and coercion and control after separation). For empirical evidence on the substantial overlap between divorce, child custody and child support proceedings and domestic violence and the correlation of relationship dissolution and separation assault, see DEMIE KURZ, FOR RICHER, FOR POORER, MOTHERS CONFRONT DIVORCE 64-71, 134-43 (1995). For recent data on assaultive behavior designed to prevent relationship dissolution or in response to separation, see PTACEK, *supra* note 30, at 79-91.

54. *See* JILL DAVIES ET AL., SAFETY PLANNING WITH BATTERED WOMEN: COMPLEX LIVES/DIFFICULT CHOICES 74-80 (1998) (providing an overview of studies on point); *see also* Murphy, *supra* note 13, at 506-09, 515 app. A (discussing the top ten strategies women seeking intervention in domestic violence cases used to end the violence); Mahoney, *supra* note 53, at 73-80 (discussing a 1983 study of women who used a wide variety of strategies over a considerable period of time to end the violence in their intimate relationships without leaving their partners). For a vivid description of Bernice Hampton's creative efforts, over many years, to escape a relationship with a violent and controlling partner who was the father of her children, and then to recover from its effects, while simultaneously navigating off the welfare rolls, see RAPHAEL, *supra* note 15.

55. *See, e.g.*, PTACEK, *supra* note 30, at 74-91 (discussing the tactics and strategies of men who batter, based on a random sample of 100 domestic violence complaints); *see also* BANCROFT & SILVERMAN *supra* note 2, at 179-83 (identifying twelve steps necessary for behavioral change, including acknowledgment and commitment to change controlling behaviors and attitudes of entitlement); Evan Stark, *Representing Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 986 (1995) (arguing that the "profile of 'the battered woman' arises as much from the deprivation of liberty . . . by coercion and control as . . . from violence-induced trauma"); Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 146 SMU L. REV. 2117, 2118-20, 2124-41 (1993) (discussing the

to well-documented, long-standing patterns of violence or to particularly violent acts,[56] and only in cases that come to the attention of the authorities. Domestic violence laws intentionally include civil as well as criminal remedies to promote victim safety on an emergency and a long-term basis. The civil remedies function both as an alternative and an adjunct to the criminal justice system. Civil remedies are even more important when the parties have children in common. Thus, given the importance of civil remedies and the complexity of these cases, the gap between resources for fact-finding and the need for fact-finding in private family matters is a major problem.

Despite the theoretical and practical importance of effective civil remedies for domestic violence, which in turn depend on having adequate fact-finding resources available, advocates for battered women have not made addressing the gap in fact-finding resources in civil cases a major focus of political work, and little direct attention has been paid to these issues in the legal and popular literature on institutional responses to domestic violence. Instead, in recent decades, funding, effort and attention have mainly been directed to criminal law reforms,[57] and on the civil side, to promoting improved

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systematic pattern of control and domination in battering and urging attention to the internal culture of abusive relationships rather than specific abusive actions); R. EMERSON DOBASH ET AL., CHANGING VIOLENT MEN 31-37 (2000) (analyzing why batterers find the control from their violence functional and purposeful, even though it can be costly in the long term for the abuser); DALTON & SCHNEIDER, *supra* note 3, at 66-67 (noting the power and control and equality wheels developed by the Domestic Abuse Intervention Project, Duluth, Minn., and checklists used by a batterers counseling program to identify violent and controlling behaviors); Mahoney, *supra* note 53, at 81-87 (noting the impact on victim behavior of victims' fears of imminent danger or serious bodily harm as a result of repeated battering over time).

56. For example, one study demonstrates judges' reluctance to impose criminal sanctions when civil restraining orders are violated. Approximately 43% of the violations cases ended in dismissal or diversion, while only 18% resulted in jail time and an additional 25% resulted in probation. *See* Andrew R. Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 192, 208 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

57. In criminal law, reform efforts have addressed mandatory arrest and no-drop policies, coordinated community responses centered on the criminal justice system, and educating judges and law enforcement personnel. *See* SCHNEIDER, BATTERED WOMEN, *supra* note 15, at 184-88. No-drop policies require or permit prosecutors to proceed with domestic violence prosecutions over the objections of the victim, and if necessary, to impose sanctions to get the victim to testify. Another approach, known as evidence-based prosecution, which has been adopted in some jurisdictions, is to encourage law enforcement personnel to gather sufficient evidence to permit prosecutions in many cases even without the victim's participation. For relevant materials on changing criminal justice responses, see DALTON & SCHNEIDER, *supra* note 3, at 611-40.

legal standards in several contexts,[58] creating specialized domestic violence courts, providing better training for judges and promoting overdue collaborations between child welfare authorities and domestic violence advocates.[59] The problem is not with the reforms that have been adopted, which have been welcome, but with the relative neglect of the fact-finding gap in civil proceedings. The next section inquires into the causes and consequences of emphasizing some and not other types of reform.

II. THE IMPLICATIONS OF CONCENTRATING ON CRIMINAL LAW AND HIGH PROFILE CASES

An emphasis on criminal law remedies dominates much of our public discourse on domestic violence, as it does our preferred response to many other social problems.[60] Devoting the bulk of material resources to criminal law approaches and carrying out needed reform of federal and state statutory standards, without addressing the fact-finding gap in civil cases, is both a reflection of and a contributor to reductionist thinking about domestic violence.[61] The most troubling aspect of this uneven pattern of reform is the way it concentrates activist, government and media attention on a narrow range of cases and a narrow range of remedies, when success in the campaign against domestic violence and child maltreatment requires far more complex and broadly effective remedies. Family courts and civil courts, not criminal courts, are the logical sites from which to

58. Areas that have received much deserved attention include revising child custody statutes to take account of domestic violence, and addressing domestic violence issues in the context of immigration and welfare policy. Reform activity has also been devoted to improving the defense of victims of battering who kill their alleged abusers and addressing issues arising at the intersection of the domestic violence and child abuse and neglect systems. All of these topics are discussed in DALTON & SCHNEIDER, *supra* note 3 and several are also discussed in SCHNEIDER, BATTERED WOMEN, *supra* note 15.

59. For a discussion of specialized domestic violence courts, see generally Tsai, *supra* note 21. James Ptacek's study of judges' responses to battered women in protective order hearings in Massachusetts provides a useful historical overview of the reform process in that state. *See* PTACEK, *supra* note 30, at 40-68.

60. *See* Symposium, *Battered Women & Feminist Lawmaking: Author Meets Readers*, 10 J.L. & POL'Y 313, 330-31, 343-44 (2002) [hereinafter Symposium, *Author Meets Readers*] (discussing David Garland's book, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001), which analyzes a shift in criminal justice theory toward a more punitive approach to offenders, in part justified in terms of victims' rights).

61. As to the former, the flurry of statutory reform efforts without accompanying reform of civil court functioning can contribute to the unintended and misleading impression that domestic violence is being adequately addressed, and that victimization continues because women do not use the resources available, or because the problem is beyond solution, thus rationalizing a withdrawal of political attention and social resources.

organize the kind of multi-faceted approach to domestic violence that is needed.[62] What might explain this lopsided distribution of public attention and government resources among potential legal responses to domestic violence?

Criminal remedies have some distinctive qualities that make them particularly attractive to feminists and policymakers alike. In many instances, criminal law remedies are essential to protect the safety and well-being of battered women and their children, and to ensure that batterers are held accountable. Such remedies, when implemented effectively, simultaneously communicate a powerful social message about the equality of women and women's human rights. Resistance to gender equality and attachment to patriarchal forms remains strong, and backlash within families, communities, political life and the criminal justice system is a continuing problem. Even though criminal law responses will not always be sufficient, the availability of such responses in appropriate cases is one critical measure of women's equality before the law.

At the same time, the criminal justice system is best at dealing with relatively straightforward examples and easily categorized domestic violence, with recognizable story lines and sympathetic victims. As a result, actors in that system tend to emphasize such cases rather than acknowledge the wide variety of circumstances which the legal system must be able to address. The simple and sensationalist story lines encouraged by tragic cases of domestic violence and law and order frameworks also serve media and political interests. Dramatic cases and "tough on crime" policies are easily communicated in the mass media and have ready appeal to voters.[63] Concentrating primarily on criminal law issues is also easier than pursuing the more complex, expensive and less politically palatable goal of expanding social programs in other areas. For instance, victims across social class lines have a huge unmet need for legal services and for other supportive services, whether or not their abusers are ever arrested, prosecuted or

62. *See* Murphy, *supra* note 13, at 505-13, for a discussion of the complex strategies battered women use to end or escape violence; victims interviewed listed only one legal intervention ("CPOs") in their top twelve strategies for ending violence. FUTURE INTERVENTIONS WITH BATTERED WOMEN AND THEIR FAMILIES 53-86, 170-85 (Jeffrey L. Edleson & Zvi C. Eisikovits eds., 1996) (advocating involving the health care and child welfare systems in domestic violence prevention and response; improving informal responses to domestic violence; and developing innovative sanctions for batterers).

63. James Ptacek notes the paradox that the politicians and conservative lobbying groups who tried to increase criminal sanctions for certain types of domestic abuse "have historically been hostile to feminist views of social justice." PTACEK, *supra* note 30, at 14; *see also* Symposium, *Author Meets Readers*, *supra* note 60, at 332 (noting a convergence of conservative and feminist interests).

incarcerated.[64] Of course, the provision of better legal and social services might in some cases make it possible to avoid the need for criminal law involvement altogether.[65]

In specific instances, both the good and bad consequences of spotlighting tragic high profile cases are evident. For example, James Ptacek described the mixed results of a 1992 media campaign in Massachusetts which focused on a series of cases in which battered women who had sought help from the legal system were murdered by their abusers:

> This media spotlight contributed to public action against violence, and by informing women of their rights it encouraged abused women to seek restraining orders. Nonetheless, several dilemmas are posed by the collective definition of the problem as it developed in the *Globe* and in public campaigns. First, must issues of poverty and racism be ignored in order to mobilize public support against violence? Is this really a sufficient strategy, given the different needs of abused women in different circumstances? Will a rising tide really lift all boats? Second, is it possible to address femicides in a public campaign without losing sight of the ever-more common experiences of coercion and threats that drive women to the courts?[66]

As Ptacek points out with regard to the *Boston Globe* campaign, focusing narrowly on high profile cases (which are also those in which criminal law remedies might well have been appropriate) can mean ignoring the majority of cases in which criminal law sanctions are for various reasons inappropriate or unlikely even to be available.[67] These include cases in which victims are dealing with coercion and control that does not (yet) rise to the levels relevant to the criminal justice system. They may also involve victims who do not want to cede control to the criminal justice system, some of whom may have good reasons to distrust law enforcement personnel, or who

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64. *See* Symposium, *Author Meets Readers*, *supra* note 60, at 342-43, 347-50 (contrasting criminal law oriented domestic violence policies in the United States to more social service oriented policies in the United Kingdom and other European countries). *See also infra* notes 77-81 and accompanying text and Part IV.D.

65. *See infra* note 67 and accompanying text.

66. PTACEK, *supra* note 30, at 68.

67. Barbara Hart has been a long time critic of undue reliance on criminal law approaches to the exclusion of civil remedies. *See, e.g.*, Barbara Hart, *Battered Women and the Criminal Justice System*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 98, 100-01 (Eve S. Buzawa & Carl G. Buzana eds., 1996) (noting the tension between a battered woman's future safety and the criminal justice system's sole focus on winning convictions); *see also* SCHNEIDER, BATTERED WOMEN, *supra* note 15, at 187-88 (noting that the ideal model for state intervention is a "coordinated community response," but that "real world" criminal justice intervention rarely meets the ideal in providing the victim with real safety or autonomy).

have other goals, such as trying to continue the relationship but without the violence, or securing safety in the context of ongoing joint parenting relationships.[68] Some of these cases, in addition to being inappropriate to the criminal justice system, are also ambiguous, murky or difficult cases for other reasons.

Thus, an undue criminal law emphasis distracts attention from the many cases that do not fit the law and order mold, and implies that such cases are not as important, or may not even be "real" cases of domestic violence. The hard work of sorting out how to respond in the domestic violence cases in the civil courts and particularly in family court can come to seem a low priority or even a poor investment of legal and decisional resources. Yet, unless the resources necessary to improve the fact-finding capacity of civil courts are provided, many domestic violence matters that could have been handled civilly will instead escalate and be shunted into the criminal courts, with greater costs to society and far less satisfactory results to the individuals and families (and especially the children) who are involved.[69] Of course, many victims and their children will benefit significantly from having access to civil remedies, even if criminal remedies are later needed to address a continuation or escalation of abusive behavior.[70]

The reductionist thinking characteristic of law and order approaches may have a deeper appeal as well. The criminal justice system concentrates its resources on the most serious, urgent and unambiguous cases, then labels one or both parties as deviant, and

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68. For a review of the evidence suggesting the value of civil restraining orders, despite their limitations, see Iovanni & Miller, *supra* note 48, at 314-19; *see also* Murphy, *supra* note 13, at 509-12 (discussing the role of temporary and final restraining orders in the context of other strategies used by women to end domestic violence).

69. This is not to say, however, that criminal law remedies are only appropriate in life and death situations, or that family law cases and remedies are only appropriate for (or only sought in) lower risk or otherwise less serious cases. Indeed, in a comparison between civil restraining order cases and criminal prosecutions in one well-regarded specialized domestic violence court, offenders in the restraining order cases "had the most violent and abusive criminal histories and were among the greatest substance abusers, posing the highest risk to their victims for repeat violence." Iovanni & Miller, *supra* note 48, at 317. The interaction between civil protective orders, private criminal complaints, arrest-initiated criminal prosecutions, and family court responses to domestic violence is a complex matter. Since different types of remedies serve different functions, and individual cases involve a wide variety of circumstances, it is important to resist the temptation to think of the different settings and remedies in hierarchical terms, with family court as involving less serious cases, and felony prosecutions at the top of the pyramid.

70. *See* Iovanni & Miller, *supra* note 48, at 313-16 (discussing evidence of the benefits of civil protection orders to victims of domestic violence even in cases in which contact and abuse continue).

administers simple and easy to understand remedies, thereby providing a safe social distance between "normal" families and those afflicted with domestic violence.[71] By singling out abusers for punishment, the criminal justice system also encourages (and sometimes treats as a prerequisite) termination of the relationship between victim and abuser.[72] The idea that victims can only be safe if they separate from their abusers increases the social distance between a small group of "deviant" families (those rent asunder by violence and in need of criminal law intervention) and most families, who because they continue to live together, are presumptively free of domestic violence and other social problems.[73] These oversimplifications help protect advocates and government functionaries alike from attending to messy and threatening realities, including the existence of a continuum between the normal and the violent, and the prevalence of violent and illegally coercive behavior within families and in intimate relationships.[74] These are realities that we find difficult to tolerate for long without falling back into judgment, blame and categorical thinking.

In short, criminal approaches may be more attractive because they better enable people to manage the anxiety and distress brought on by contact with patterns of intimate violence and coercion and control in family settings. From this perspective, the overemphasis on criminal remedies and the inadequate fact-finding resources and

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71. One classic way to manage anxiety and maintain "safe" boundaries is by targeting people from marginalized groups for regulation and punishment. For an illuminating exploration of woman battering and the politics of criminal justice, including the damage inflicted on communities of color by the "war on drugs," and with particular attention to the implications of criminal justice approaches for women of color, see PTACEK, *supra* note 30, at 37-39. *See also* Symposium, *Author Meets Readers*, *supra* note 60, at 331-32 (discussing racial bias in the criminalization of battering behavior by men); SCHNEIDER, BATTERED WOMEN, *supra* note 15, at 62-64, 184-88, 196 (describing ways the "intersection of racism and sexism" can create added problems for battered women of color, especially in mandatory arrest situations); Espinoza, *supra* note 47, at 930-36 (discussing how "colorblind lawyering" is not always in the client's best interest); and ROBERTS, *supra* note 8, *passim* (racism in society's responses to Black families).

72. Since batterers frequently escalate their violence and other acts of coercion and control at the time of and subsequent to separation from their intimate partners, pressuring victims of violence to leave their batterers is a highly questionable practice. *See supra* note 54 (reviewing data from various sources on separation assault).

73. *See* SCHNEIDER, BATTERED WOMEN, *supra* note 15, at 78 (suggesting that is we are honest about our own relationships, our own experiences might lead to a sense of identification with rather than distance from the experiences of women who are battered).

74. *See id.* at 77-79 (noting that asking why battered women stay in relationships rather than what makes batterers abuse prevents us from having to examine the compromises and contradictions involved in all intimate relationships).

practices in family courts may both be aspects of the same underlying problem, our collective and individual difficulties in tolerating the painful feelings that exposure to intimate violence and child maltreatment evoke.[75]

Acknowledging the limitations as well as the value of criminal law remedies is thus not a reason to reject criminal law approaches in favor of civil remedies. Rather, what this discussion suggests is the need for more attention to the emotional demands placed on legal personnel as a result of involvement with domestic violence and child maltreatment issues. If politicians, government officials, judges, attorneys and members of the public were better prepared to handle those demands, there might be less need to oversimplify domestic violence cases by slotting them into a reductionist law and order framework, or subjecting them to routinized processing in family court. As a result, we may better be able to create the kind of flexible, sophisticated and coherent legal and social responses that are urgently needed.

III. ADDITIONAL STRUCTURAL AND ATTITUDINAL OBSTACLES TO ADDRESSING THE FACT-FINDING GAP

What other factors, besides the greater attractiveness of criminal law remedies and budget limitations, contribute to the neglect of civil court fact-finding needs?[76]

Three important and interdependent factors seem to be operating. The first is the prohibitive cost of legal services, which prevents most claimants from obtaining adequate representation, and thus, real due process. When lawyers are not present to focus the issues, family courts have an even more difficult time handling cases effectively. Furthermore, family court decisions are rarely appealed, and those which are typically centered on financial disputes between wealthy litigants, so evolution of case law on other issues is slow. Finally, family lawyers are a much smaller and less powerful group than many other segments of the bar, and thus cannot lobby as effectively for systemic change.

A second factor is the pressures for settlement and against judicial involvement in family decision-making (even in the context of divorce), which creates additional obstacles to the litigation of meritorious claims. The third factor is closely related to the first two. Most people doubt that judges and lawyers are likely to be much help

75. *See infra* Parts IV.A-C.

76. *See supra* Part II; *supra* notes 14-15 and accompanying text.

in resolving family and intimate relationship disputes. The fact-finding gap persists in significant part because we have not been able to imagine a way to overcome these obstacles.

A. The Prohibitive Cost of Legal Services

The cost of legal services is a primary factor in the continuing neglect of the fact-finding gap, because with inadequate or no representation, the adversary system cannot operate properly. Family matters, including but not limited to domestic violence cases, present a dilemma for the society and its legal system. Most cases demand significant attorney time if they are to be handled appropriately, but legal fees are not generally covered by insurance,[77] and except for those at the top of the income pyramid, do not involve sufficiently large sums of money to readily support private financing of the legal services needed (nor are contingency fees in this context considered ethical).[78] Draconian cuts in legal services funding have further reduced the availability of lawyers to handle family matters, especially those which are contested.[79] While many attorneys do excellent work under trying circumstances, either as public interest or legal services attorneys, on a pro bono basis or for moderate fees, their numbers are tiny in relation to the size of the need for representation of individual litigants of modest means in family law matters. Domestic relations cases differ in this regard, for example, from tort law, where money damages are at stake and contingency fees are permitted, and civil rights cases, where deep pockets and fee shifting provide some opportunities for redress of claims. In consequence, the vast majority

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77. With the exception of the small number of people who are covered by prepaid legal services plans, which are usually employment related. Not all of these cover contested family matters, and those that do often have significant limits on the extent of legal services available.

78. For studies showing that the high cost of litigation is a major cause of the increase in self-representation in family matters, see Berenson, *supra* note 31, at 116-18. One article reported that the average cost of litigating a child custody case in Orange County, Cal., was $10,000 in attorney's fees, and $4,000 in forensic fees. *Id.* at 117.

79. *See* Martha Minow, *Lawyering for Human Dignity*, 11 AM. U. J. GENDER SOC. POL'Y & L. 143, 144-49 (2002) (asserting that gaining access to legal services is becoming increasingly difficult as the ratio of unmet need to service provision continues to increase). For example, in 2001, the New York "Legal Aid Society's Civil Division turned away at least six eligible potential clients for every client it [could] assist." Michael Barbosa, *Lawyering at the Margins*, 11 AM. U. J. GENDER SOC. POL'Y & L. 135, 137 (2002); *see also* Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection and Voice*, 63 GEO. WASH. L. REV. 1071, 1071-72, 1077-78 (1995) (criticizing "a skewed triage system that neglects domestic violence issues," and the marginalizing of domestic violence because of the privileging of the public realm over the private, and because of the "false dichotomy between instrumental and affective lawyering styles").

of people in family court are unrepresented or are represented poorly, and the informality and brevity of hearings and failure to allow evidence to be properly developed or introduced often goes unchallenged both at the trial and appellate levels (especially since appeals are quite rare).[80] As a result of the way legal representation is financed, there is also no large, well-organized and well-remunerated group of attorneys available to advocate in the political process for systemic changes to advance the interests of family law litigants and potential litigants.[81]

B. The Pro-Settlement Bias of Family Courts

Another issue is the anti-litigation bias of family courts. For powerful practical and ideological reasons, the family court system has long encouraged negotiated or mediated private settlements rather than public judicial proceedings to resolve disputes between present or former intimates, especially disputes between parents.[82] The preference for settlement over litigation is of course not limited to family matters, but given the societal importance of the issues at stake—particularly in child custody and domestic violence cases—the particular reasons for this preference in the family law context are of

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80. *See* Berenson, *supra* note 31, at 105 (commenting that the increase of self-represented litigants in family law matters [due to the high cost of legal fees and lack of attorneys providing free or low cost services] burdens the courts and often results in unjust decisions for parties to family law disputes). In addition to the problem of cost and inadequate representation at the trial level, appeals are discouraged by the time sensitivity of most family matters, especially those involving children or patterns of coercion and control; by the discretion accorded trial judges under typically broad statutory standards; and by the fact that parties are not repeat players (which reduces the incentives for appeals). *See also supra* text following note 76.

81. In related areas of family law where the government does provide some funds for legal representation, like parent advocacy within the child welfare system, the lawyers are typically paid well below market rates applicable to other areas of law, and have had a difficult time in many places getting even minimally adequate resources. Advocacy gaps for children have to some extent been addressed through the efforts of public interest organizations and attorneys and advocates associated with law school clinics; inadequate representation of parents has received even less attention. *See* ROBERTS, *supra* note 8, at 125-26.

82. *See* Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law*, 88 YALE L.J. 950, 953-58 (1979), for a discussion of the long tradition of negotiated settlement in divorce cases and the policy reasons to defer to private agreement. *See also* CARL E. SCHNEIDER & MARGARET BRINIG, AN INVITATION TO FAMILY LAW 147 (2d ed. 2000), for a discussion of court-ordered and authorized mediation for family law disputes; Ray Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution* 5 (2002) (noting that the trend toward mediated settlements in family matters has had far less influence on family will contests, as a result of doctrinal rules that "involve a backward looking inquiry that focuses on testator intent and provides moral condemnation under a winner-take-all system"), *available at* http://papers.ssrn.com/paper.taf?abstract_id=309749.

interest.[83]

Private settlements of family disputes best conform to the ideals of family autonomy and privacy, which have had powerful appeal throughout United States history.[84] The traditional ban and subsequent restrictions on access to divorce were consistent with these notions.[85] Family conflicts were forced into an innocent party/guilty party mold, or treated as shameful signs of weak moral character on the part of both parties. Now that divorce is readily available and fault considerations de-emphasized, a vast number of people engaged in conflicts with former intimates turn to the legal system to facilitate the resolution of their disputes. However, given the societal anxiety and distress that such conflicts evoke, and the lack of a social consensus about what values should govern their resolution, it is not surprising that divorce law is increasingly privatized, particularly custody dispute resolution. As a result, both legal standards and legal procedures are increasingly designed to reduce litigation to the bare minimum.[86] Parties are expected to resolve disputes as best they can by themselves with minimal or no

83. *See* Madoff, *supra* note 82, at 1-3 (listing a wide range of areas for which mediation is touted); *see also* Andrew Kull, *The Simplification of Private Law*, 51 J. LEGAL EDUC. 284, 291-93 (2001) (suggesting that, due to a new perception that certain disputes are not important enough to justify the investment of legal resources in their resolutions, there is a related trend in private law to move away from equitable inquiries and instead to adopt no-fault legal rules for the resolution of disputes between private citizens).

84. *See, e.g.*, Elizabeth Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 976-80 (1991) (reviewing the history and critical feminist commentary on the descriptive and analytic strengths and weaknesses of commonly held dichotomous notions of sharply differentiated public and private spheres).

85. Lifetime marriage without divorce was originally part of a larger structure of moral regulation under what was characterized as the divinely ordained authority of husbands and fathers. The privacy and autonomy rationale, absent explicit patriarchal justifications, came to the fore in later years, along with fault divorce. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118-20 (1996) for a discussion of the evolution of rationales for denying wives protection from battering, and from hierarchical status norms to privacy and autonomy within the private sphere of the family, now reconceived in terms of companionate marriage.

86. *See* Madoff, *supra* note 82, at 12-17 (suggesting a connection between extensive doctrinal changes in divorce law between 1965 and 1985, and the increased reliance on negotiation and mediation to resolve divorce related disputes). The three most important changes in divorce laws are: "(1) the issues in divorce [and custody] law are governed by vague standards and there is broad judicial discretion; (2) the inquiry is primarily forward-looking in nature; and (3) the opportunity for moral vindication has been largely eliminated." *Id.* at 14. For discussion of the American Law Institute's Draft Principles for the Law of Family Dissolution, which continues the trend toward encouraging private rather than litigated dispute resolution, and which "regularly invite couples to substitute their agreements for the law's rules . . . and [attempt] to give couples a freer rein to negotiate . . . [while] reducing their incentives to bargain strategically," s*ee* SCHNEIDER & BRINIG, *supra* note 82, at 108-09.

judicial fact-finding or decision, either through negotiation or with the aid of brief sessions with court-connected mediators.[87] Anyone who chooses to litigate, even sometimes when there is a lot of money at stake, is likely to be stigmatized as foolish, unreasonable or emotionally unbalanced. As in many other situations, gender bias often plays a role in determining which party bears the brunt of such characterizations.[88]

The anti-litigation bias perhaps reaches its apogee in the context of child custody litigation. There are many factors involved in this development. Family lawyers, legal scholars and social scientists have described the difficulties child custody cases pose for judges and legislators as a result of the prospective nature of child custody decision-making, the diversity of our cultural norms and beliefs about human flourishing, and the poor fit between the personalities, preferences, training and experience of most judges and the subject matter at hand.[89] Now that the preference for sole custody and the gender-based standards, such as the tender years presumption, that made the outcome of litigation more predictable have been replaced with a preference for joint legal custody and if possible, shared physical custody, and in the face of the negative consequences of protracted custody litigation for the children involved, there is enormous and understandable pressure on the legal system to discourage custody litigation and privatize as many disputes as possible.[90]

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87. For discussion of the strength of the mediation movement for family matters, including those involving domestic violence, see Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1547-48 (1991); DALTON & SCHNEIDER, *supra* note 3, at 415; *see also* Meier, *supra* note 10, at 689 n.107 (describing a domestic violence child custody case she litigated in which the judge blamed both parties for bringing their dispute to court rather than working it out like "mature adults"). For a trenchant analysis of the inconsistency between feminist understandings of battering and the premises of mediation, see Fischer et al., *supra* note 55, at 2157-65.

88. On the double-binds battered women often experience in the context of mandatory mediation, as a result of both batterers' manipulative behavior and mediators' ignorance about domestic violence, see BANCROFT & SILVERMAN, *supra* note 2, at 124-25. On the pressure to mediate custody and divorce disputes and the adverse consequences for women, particularly those experiencing patterns of violence and coercion and control, see Dalton, *Domestic Torts*, *supra* note 47, at 365-66.

89. For the classic article discussing this topic, see Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 249-62 (1975); *see also* Chambers, *supra* note 45, at 480-86

90. On the shift from the tender years presumption to joint custody, see Meier, *supra* note 10, at Part III.A. On the negative consequences of custody litigation for children, see JANET JOHNSTON & LINDA E.G. CAMPBELL, IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT (1998); JUDITH WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER

The anti-litigation bias of the family court system is problematic for anyone with a meritorious legal claim whose adversary is able to exploit superior bargaining power in negotiations, and for significant numbers of parents whose personalities or circumstances make a negotiated solution impractical. However, the trend to privatize disputes is an even more serious obstacle for potential domestic violence claimants, whose circumstances are necessarily inconsistent with cherished beliefs about the family that make cooperative bargaining seem possible even when relationships break up. As Joan Meier documents in her path-breaking article in this symposium, in cases involving children, the tendency towards privatization is linked to false notions of neutrality and formalistic attachment to dividing parenting time and authority equally between mothers and fathers. These notions further impede domestic violence claimants' access to appropriate judicial relief.[91]

C. The Cumulative Impact of the Fact-Finding Gap and Other Circumstances on People Struggling with Domestic Violence

The cumulative impact of the factors noted here is truly remarkable, particularly in civil protective order hearings and in divorce and custody matters where there are credible domestic violence claims and genuine safety concerns. Going to court as a litigant is a stressful and unappealing prospect in the best of circumstances, particularly for people experiencing family conflict or dysfunction. Most people who come to family court have inadequate financial resources, and abusers often seek to maintain their power by restricting victims' access to financial resources.[92] Yet people who are being subjected by their partners to patterns of coercion and control who then seek the aid of the family courts must either represent themselves or somehow come up with the money to hire attorneys, who often require substantial retainers and may be reluctant to undertake cases involving domestic violence at all. Most family lawyers have little experience with domestic violence matters,

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DIVORCE (1989).

91. *See* Meier, *supra* note 10, at Parts III.A-B; *see also* DALTON & SCHNEIDER, *supra* note 3, at 357-64 (giving a brief overview of the evolution of legal standards promoting various forms of shared legal and physical custody).

92. *See* PTACEK, *supra* note 30, at 76 tbl. 4.3, for data from a 1992 study of a random sample of 100 restraining order files from Dorchester and Quincy, Massachusetts, in which a number of women reported economic or resource abuse. "Even in affidavits written hastily before their initial court appearances, many women felt it important to name threats, intimidation, economic abuse, and sexual violence as important to why they came to court." *Id.* at 78.

and many are dismissive or insensitive to such claims.[93] If the clients manage to get adequate representation, they must then assist in marshaling evidence, usually under great time pressure and often about humiliating events that they have previously tried to keep private, in a court system that either prohibits or discourages discovery and may severely limit the admissibility of evidence. In many circumstances, the domestic violence claimant will be subjected to intimidating cross-examination[94] and in the course of hearings, many will also experience bureaucratic or hostile reactions from judges.[95] Along the way such claimants may be dealing with threatened or intermittent violence, and must constantly weigh their concerns for their own and their children's safety and well-being against the unfortunately all too real fear that destructive and potentially dangerous custodial arrangements, including primary

93. *See* SCHNEIDER, BATTERED WOMEN, *supra* note 15, at 95 (noting that many battered women cannot afford legal representation, and even if they can, many lawyers are not "sensitive to their particular problems"). *See also* Dalton, *Paradigms*, *supra* note 41, at 284, citing *The Family Violence Project of the National Council of Juvenile and Family Court Judges, Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice,* 29 FAM. L. Q. 197, 214 (1995) (discussing family lawyers' poor performance in building adequate evidentiary records of domestic violence).

94. If there are parallel civil and criminal proceedings, the defendant's criminal counsel is likely to provide representation in the civil case as well. Given the linked nature of the cases and the norms of adversary behavior in criminal courts, defense attorneys tend to be quite aggressive in these circumstances. Even if the complainant is represented, s/he is unlikely to have been adequately prepared by counsel for testimony, because of the short time between the grant of the temporary restraining order and the final restraining order hearing.

95. *See, e.g.*, Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1671-73 (1990) (discussing court employees' negative behavior towards victims of domestic violence); PTACEK, *supra* note 30, at 46-48, 52-57 (discussing inappropriate and harmful police responses to victims of domestic violence in the 1970s and 1980s); DALTON & SCHNEIDER, *supra* note 3, at 526 (court officials in the late 1980s); *see also* Susan Bryant & Maria Arias, *Case Study, A Battered Women's Rights Clinic: Designing a Clinical Program which Encourages a Problem-Solving Vision of Lawyering that Empowers Clients and Community*, 42 WASH. U. J. URB. & CONTEMP. L. 207, 221 (1992). As a result of feminist concerns with judicial performance, the Violence Against Women Act includes funds for the training of both federal and state judges. *See* SCHNEIDER, BATTERED WOMEN, *supra* note 15, at 188, 240. It is unclear how much progress has been made. Iovanni and Miller report research from the mid and late 1990s illustrating anti-victim bias and open hostility toward battered women on the part of judges and court officials. Iovanni & Miller, *supra* note 48, at 316-18. Ptacek's 1999 study of eighteen judges in two specialized domestic violence courts in Massachusetts, showing improved judicial behavior toward domestic violence claimants, also reports some recent examples of negative judicial conduct. PTACEK, *supra* note 30, at 104-05 (illustrating harsh demeanor toward women complainants); *id.* at 109-10 (pointing out inappropriately disengaged or friendly behavior toward male defendants); *id.* at 127-33 (showing race and class-biased failures to provide economic remedies to domestic violence complainants). Since Ptacek's study involved a small number of judges in a "model" court, the behavior of judges hearing domestic violence cases overall probably continues to be mixed. *See also infra* notes 167-175 and accompanying text (discussing the dynamics of problematic judicial behavior and prospects for change).

residential custody to the abuser, will be ordered if they do not cooperate in developing a parenting plan and agree to joint custody.

All such claimants must also face a substantial risk that the domestic violence claim will be dismissed. In civil protective order proceedings, a surprisingly large proportion of claimants will be encouraged by their own attorneys to settle for less protection, rather than to risk outright dismissal of the claim by an overburdened, often poorly trained and possibly unsympathetic or even hostile judge.[96] Domestic violence claims are also particularly likely to be dismissed in the context of ongoing divorce or custody proceedings, because such claims will be seen either as the product of an overreaction to the conflict "normally" associated with divorce, or as a manipulative tactic designed to gain unfair advantage in the custody proceedings, or both.[97] Even if the domestic violence itself is acknowledged, judges and custody evaluators all too frequently discount the significance of violent and controlling behavior by fathers when determining custody arrangements and parenting plans.[98] If the domestic violence claimant is unrepresented, the odds of failure rise steeply, in part because without the evidence that an attorney could help gather and present, most such cases will come down to one partner's word against the other, and the burden of proof is of course on the claimant.[99]

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96. *See, e.g.*, Meier, *supra* note 10, at Part I (describing two cases where women settled for less protection due to judicial hostility and ignorance); *see also supra* note 46 (discussing the negative effects of unacknowledged reactivity to domestic violence issues on the performance of divorce lawyers in domestic violence cases) and Dalton, *Paradigms*, *supra* note 41, at 281-285 (discussing obstacles facing battered women and their lawyers that prevent abuse from being accurately identified, and hence preclude appropriate relief in family court).

97. A woman who raises domestic violence issues in the divorce or custody context "upsets the smooth functioning of the system, and is readily cast as a pariah. Such women are often suspected of manipulating the system for their own advantage, distorting the truth, or turning their children against their former partners out of vindictiveness." Dalton, *Domestic Torts*, *supra* note 47, at 366. *Cf.* PTACEK, *supra* note 30, at 90 (summarizing a study of a random sample of 100 restraining order complaints which strongly counters the notion that women are using restraining orders to gain advantage in divorce, home occupancy or child support, since most plaintiffs were not married to defendants, nor still living with defendants, nor were they asking for child support).

98. *See* Meier, *supra* note 10, at Part III.D-E; *see also supra* note 91 and accompanying text.

99. In a recent interdisciplinary study of women who sought intervention for domestic violence, only 32% of women who sought final restraining orders without an attorney got such orders, whereas of the small sample of women who were represented by attorneys when they returned to court for the final protective order hearing, most (83%) were successful in getting the protective order. *See* Murphy, *supra* note 13, at 511-12, 521 app. G. The study also showed the interaction of lack of representation with other significant obstacles to success in civil protective order proceedings. For example, more than half of the women who filed petitions for

The bottom line for victims can be devastating. For example, Kathleen Waits has published "Mary's Story," an account, written in the first person, of one battered mother's disastrous encounters (over several years of divorce proceedings) with four different lawyers and a number of expert witnesses and family court judges, that resulted in the expenditure of tens of thousands of dollars; the batterer's successful use of the court system to harass the mother with false accusations, thus putting the mother's claimed deficiencies on trial; ongoing abuse and intimidation of the mother by the father throughout the proceedings; and the mother's loss of the custody of the youngest of her three children to the batterer.[100] The ignorance, insensitivity, incompetence, and misconduct on the part of the professionals involved is shocking. The mother was ultimately successful in regaining custody of her youngest child when the batterer's new girlfriend reported that he was abusing the child. Four years later, the father's visitation rights were eliminated because the children were thrown out of the back of his pick up truck when he drove too fast on a bumpy road.[101] The mother commented:

> I cannot help but feel a little bitter that no one ever really cared about my safety and its affect (sic) on our children. In the court's eyes, Russ only became a bad father and a bad person when he injured the children personally and individually. . . . My word about his abuse of the children never counted.[102]

In a similar vein, *Battered Mothers Speak Out*, a recent research report based on interviews with domestic violence survivors in Massachusetts, summarized battered mothers' complaints:

> about a host of offenses: how court personnel labeled them hysterical and unreasonable; treated them with scorn, condescension, and disrespect, failed to give them a chance to be heard in court; and denied them access to sensitive investigations and documents pertinent to their custody disputes. Fifteen of the

protective orders never got one, which is attributable to both the fact that a substantial number of women (30%) never returned to court for the CPO hearing, and that in 50% of the cases, the court or law enforcement failed to serve the ex parte order. *Id. See also* DALTON & SCHNEIDER, *supra* note 3, at 522; Peter Finn & Sarah Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement*, *in* NATIONAL INSTITUTE OF JUSTICE, LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS 43, 44 (1998) (reporting that "even with a simplified petitioning procedure and energetic lay assistance, victims not represented by counsel are less likely to get protection orders. If an order is issued, it is less likely to contain all appropriate provisions . . ."); Marano, *supra* note 3.

100. *See* Kathleen Waits, *Battered Women and Their Children: Lessons Learned From One Woman's Story*, 35 HOUS. L. REV. 29, 34-67 (1998).

101. *Id.* at 59-62.

102. *See id.* at 61-62 (as excerpted in DALTON & SCHNEIDER, *supra* note 3, at 348); *see also supra* notes 88-91 and accompanying text; Meier, *supra* note 10, at Part III.D.

> 40 women interviewed said that their ex-partners retained sole or joint custody of the children–even though all 15 men reportedly abused both their ex-wives and their children. When it came to allegations of spousal or child abuse, 38 women said judges, family service officers, and [Guardians Ad Litem] had ignored or minimized their claims. . . . Carrie Cuthbert, one of the reports' co-authors and co-director of the Wellesley Centers Women's Rights Network, explains . . . 'Within the community of battered women and their advocates, the family courts have gained a reputation as a place where women don't find justice.'[103]

D. Prospects for Fundamental Change

The situation in family courts, and particularly in domestic violence and child abuse and neglect cases, cries out for remedy. While attorneys and clients are always frustrated when judges make legal or fact-finding errors, the pervasive and systemic nature of family court deficiencies is striking. Family courts, particularly those with domestic violence and child abuse and neglect dockets, are often dismal places, overcrowded, underfunded, and inhumane in their working conditions and their results. Justice and human rights are sacrificed in such circumstances, and society's promises of protection, security and care for its members are too often rendered meaningless.

The current situation is neither hopeless nor very hopeful. On the one hand, many people in positions of authority and responsibility—people in the state and federal government, the judiciary, the legal, medical, mental health and social work professions, social activists, and ordinary citizens—are already engaged in efforts to address the crisis in family courts. Many heartening efforts are underway, using media attention, traditional political activism, social science research, legal challenges and the mobilization of concerned citizens, spearheaded by the existing movements for justice and care for women, children and families.[104]

On the other hand, prospects for tackling the fact-finding gap in a meaningful way do not seem very promising, at least to most observers. A careful look at the severity of the problems, particularly in domestic violence and child abuse and neglect proceedings, as well as the history in the child welfare system of repeated cycles of scandal, promises of reform, and continued dysfunction, is sobering.[105] Both a

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103. Lombardi, *supra* note 29.

104. *See infra* Part IV.B.2. , notes 183 and 185 and accompanying text, and app.

105. In early 2003, the New Jersey child welfare system was rocked by scandal as a result of the death of a child whose case had erroneously been closed. Among the

lack of sustained attention to central difficulties and the profound structural changes that seem warranted suggest that there may be deeper patterns at work that deserve attention.

Making dramatic structural changes is a significant undertaking, and decision-makers and the public have to be persuaded that the results will be worth the effort. Under present conditions, structural reform of the family courts does not seem likely to pass the test. It is hard to imagine decision-makers or the public authorizing funding that would dramatically increase basic fact-finding resources enough. To do so would mean making lawyers available for everyone who would benefit from legal representation; substantially increasing the numbers of judges and mediators and the time and attention allotted to each case; and revamping legal education by expanding clinics and interdisciplinary collaborations so the new lawyers, judges and mediators would be better prepared for this work. One reason it is hard to imagine these changes coming to pass is that, even with these changes, it is not clear that people would be that much better off unless there were a number of other equally fundamental changes at the same time.

Many family matters involve domestic violence, patterns of coercion or control or other serious parental problems, such as alcoholism, drug abuse or mental illness. Many families are also suffering from moderate to severe economic and social disadvantage. As a result, there are many additional resources that would have to be available for families and individuals to derive real benefit from their encounters with the legal system. For instance, there would have to be risk assessment, case screening, and evaluations and consultations

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problems that re-surfaced were chronic underfunding, crushing workloads and high turnover among caseworkers, ancient and broken computer systems, and haphazard supervision of workers. *See* Leslie Kaufman & David Kocieniewski, *Newark Boy's Death Reveals Failed Promise to Fix System*, N.Y. TIMES, Feb. 7, 2003, at A1. The *New York Times* also noted that a similar crisis in 1998 had led to a flurry of reform initiatives, none of which were implemented. "Taken together, experts and lawmakers say, the failure to realize the needed reforms laid out nearly five years ago–a failure of political will and sustained public interest–amounts to a familiar tale in the world of child welfare. The formula of momentary crisis followed by calls for action followed by short-lived commitment has played out repeatedly across the country over the decades." *Id.* During the nineteenth and twentieth centuries, there were several cycles of concern about the impact on children of socially disapproved patterns of parental behavior. Responses to woman abuse have also varied over time. The results in both areas have been mixed. *See, e.g.*, ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 5-7, 12-13 (1987); LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 19-26, 289-99 (1988). Gordon argues that "family violence cannot be understood outside the context of the overall politics of the family." *Id.* at 3; *see also* PETERS, *supra* note 16, at 233 app. A and ROBERTS, *supra* note 8, at 174-200. How might we proceed differently in hopes of avoiding the errors of the past, whether of apathy and inertia, misdirected zeal or hostility to disfavored groups within society?

with experts; advocates for children; supervised visitation; coordination among the different branches of the legal system that deal with family matters; and a variety of social services and treatment programs for adults and children. Income supports, employment and educational opportunity, child day care, housing assistance, and health care are some of the other resources that would also need to be available.

Attention would also need to be paid to differential impacts of judicial failures on particular groups and in particular circumstances. The family court system (as well as the legal system as a whole) is not simply dysfunctional and arbitrary, it is also oppressive along race, class, disability, sexual orientation and gender lines, as has been amply documented by others, including the book that occasioned this symposium.[106] It is folly to imagine that expanding judicial and other resources for addressing family dysfunction either can be accomplished or would be desirable if ways are not found to reduce the frequently destructive effects (and side effects) of legal intervention, including, but not limited to, these types of bias.

Thus, examined more deeply, current patterns of societal investment have a certain logic. Even in a more egalitarian society, people would probably only invest scarce societal resources for the resolution of family disputes when: (1) the criminal behavior of one party is sufficiently serious to create a clear victim/perpetrator dichotomy, and also implicate a generalized concern with law and order; (2) there seems to be a reasonable chance that the legal system will treat litigants fairly and reach accurate conclusions; and (3) there are at least some of the resources necessary to deliver on the system's promises of protection and rehabilitation. From this vantage point, the historical cycles of incomplete or misguided reform are hardly surprising. People will not invest resources without being able to imagine the possibility of getting better results; yet it is hard to imagine getting good results from a system that is chronically starved for resources and in which people lack confidence.

The difficulty of making change is not for lack of a clear blueprint for change. With change of this complexity and magnitude, that kind of coherent plan is rarely if ever possible or necessary, especially

106. SCHNEIDER, BATTERED WOMEN, *supra* note 15, at 62-65 (illustrating oppression based on essentialism, racism, nationality, immigration); *id.* at 128-32 (demonstrating oppression based on gender); BANCROFT & SILVERMAN, *supra* note 2, at 120-22 (illustrating racial and gender bias in custody disputes); *id.* at 125-26 (showing a battering father's successful use of a mother's sexual orientation against her in a custody dispute); *see also* ROBERTS, *supra* note 8, for an eloquent examination of the powerful racial dimensions of the child welfare system's destructive impact on African-American families as well as the policy alternatives. *See also supra* note 46.

at the outset. Rather, the problem is one of basic attitudes and core beliefs. To mobilize creative energy to tackle the problem of fact-finding in domestic violence cases, and the larger problem of family and individual suffering with which it is connected, requires some sort of transformation in people's attitudes toward themselves and each other. The possibility explored in the next section is that compassionate witnessing can be a step toward that kind of transformation of attitudes, beliefs and hence, choices.

IV. COMPASSIONATE WITNESSING AS A RESOURCE FOR CHANGE

One aspect of the problem of domestic violence and child maltreatment that makes effective responses hard to create and sustain—particularly responses that depend on fact-finding—is the great difficulty most people experience in confronting the inhuman treatment that people inflict on each other. The paragraphs that begin and end the introduction to psychiatrist Judith Lewis Herman's brilliant and iconoclastic book, *Trauma and Recovery*, provide instructive commentary on this phenomenon:

> The ordinary response to atrocities is to banish them from consciousness. Certain violations of the social compact are too terrible to utter aloud: this is the meaning of the word unspeakable.
>
> Atrocities, however, refuse to be buried. Equally as powerful as the desire to deny atrocities is the conviction that denial does not work. Folk wisdom is filled with ghosts who refuse to rest in their graves until their stories are told. Murder will out. Remembering and telling the truth about terrible events are prerequisites both for the restoration of the social order and for the healing of the individual victims.[107]
>
> . . . .
>
> This book appears at a time when public discussion of the common atrocities of sexual and domestic life has been made possible by the women's movement, and when public discussion of the common atrocities of political life [referring to traumas suffered in warfare and under torture] has been made possible by the movement for human rights. . . . I have tried to communicate my ideas in a language that preserves connections, a language that is faithful both to the dispassionate, reasoned traditions of my profession and to the passionate claims of people who have been violated and outraged. I have tried to find a language that can withstand the imperatives of doublethink and allows all of us to come a little

107. HERMAN, RECOVERY, *supra* note 7, at 1, 4.

closer to facing the unspeakable.[108]

Herman expands on this central dilemma as follows:

> To study psychological trauma is to come face to face both with human vulnerability in the natural world and with the capacity for evil in human nature. To study psychological trauma means bearing witness to horrible events. . . . [W]hen the traumatic events are of human design, those who bear witness are caught in the conflict between victim and perpetrator. It is morally impossible to remain neutral in this conflict. The bystander is forced to take sides.
>
> It is very tempting to take the side of the perpetrator. All the perpetrator asks is that the bystander do nothing. He appeals to the universal desire to see, hear, and speak no evil. The victim, on the contrary, asks the bystander to share the burden of pain. The victim demands action, engagement and remembering.[109]

As Herman makes clear, the challenges she describes apply not only to therapists, but also to everyone who comes into contact with atrocities, including by simply following the news. The dilemma of how to respond intensifies with proximity. The dilemma is even more severe for people whose professional and social roles involve assisting in ascertaining the truth of what occurred, preventing further violation, holding perpetrators accountable and helping victims (and perpetrators) recover. The victim's demand on bystanders for "action, engagement and remembering" powerfully affects not only care-giving professionals, but also activists, reformers and scholars in the human rights movements concerned with domestic violence and child maltreatment, and legislators, attorneys, and judges.[110]

Herman's work both points the way forward, and illustrates a central conundrum of work with trauma, particularly within the legal system. The legal system necessarily operates in stark polarities. When facts are found and a judgment is rendered, the fluid and often messy realities of lived experience are temporarily fixed in the clear, formal terms of the legal ruling. In an adversary proceeding, one party's view is vindicated, and the other is rejected. People involved are likely to feel both shock and relief. People feel relief because the matter is resolved, and, if the judgment is fair, because the truth has prevailed. Even if the facts have been found with a

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108. *Id.* at 4.

109. *Id.* at 7-8.

110. *See also id.* at 7-32 (suggesting that historical cycles of attention and inattention to interpersonal traumas reflect the underlying distress provoked by the subject matter).

reasonable degree of accuracy, however, there is also a sense of shock, as the parties who have contended for the losing position confront their losses. Moreover, this sense of shock is not confined to the losing side. Until the judgment is reached, all the participants participate to some extent in a number of alternate realities, representing the many possible outcomes of the proceeding. Whatever the outcome, when these alternate possibilities are at least temporarily extinguished by the judgment, all the participants must come to terms with the sudden shift in position and perspective that the judgment has wrought. Furthermore, at the moment of the judgment, people are fixed in their positions, while in reality, none of us is simply a victim or a perpetrator (or even simply a bystander). We all participate to some degree in all of the positions. After all, the traumatic triad of perpetrator, victim, and bystander is familiar from our earliest memories of childhood. The slipperiness of these categories continues to plague us as adults. As victims, we take on some of the characteristics of perpetrators, for example, when we unfairly blame ourselves for what happened to us, and also when we want vengeance and not just accountability for the perpetrators.[111] As perpetrators, we participate in victimhood as well, in that our misdeeds and crimes cause negative consequences for us, and not only for our victims. Although many perpetrators never consciously recognize these dynamics, these consequences include self-hatred and despair, as well as increased alienation from other people. Moreover, we are all bystanders to our own experiences and those of others, especially since by the time we have an opportunity to tell anyone else about what has happened to us or what we have done, the event is already in the past, and we are now witnessing past experience, rather than living it at the moment. A holistic perspective allows us to recognize the complex web of relationships

111. Indeed, one of the notable consequences of interpersonal violence is the intense rage, as well as terror and grief, that victimization necessarily generates in both adults and children who are the targets of violence at the hands of others. Healing from trauma involves developing a sufficient sense of self to be able to feel and tolerate the intense feelings trauma causes, including an enhanced capacity to understand violent impulses, impulses that all human beings share, (though not everyone is conscious of such feelings). Without such healing, victims of trauma must somehow distance themselves from their feelings, which requires a great deal of energy and causes considerable suffering. Or victims may act these feelings out toward themselves or others. It is not surprising that self-destructive behavior is common among victims of abuse, or that many adults who commit certain types of crimes were themselves victimized as children, though most people who are victimized do not go on to commit such crimes. For a related and illuminating discussion of the psychological dynamics of oppression, the roles of oppressors and oppressed, and pathways to change, see generally PHILIP LICHTENBERG, COMMUNITY AND CONFLUENCE: UNDOING THE CLINCH OF OPPRESSION (2d ed. 1994), which is available from the Gesalt Institute of Cleveland Press.

and the underlying fluidity of the categories of victim, perpetrator and bystander, rather than slipping into polarized and distorted thinking.

When, as children, we first experienced the roles that make up the traumatic triad, we lacked a secure sense of ourselves as separate beings simultaneously deeply connected to others around us. In these circumstances, all of the positions are terrifying. It is worth noting that even with the most caring and effective parents, all children internalize these roles to some degree. This is because no matter how loving and capable their parents or caregivers, all children have powerful experiences of disappointment and loss, and protect themselves from otherwise overwhelming feelings by assuming blame and unwarranted responsibility. When children undergo severe trauma, of course, these effects are usually far stronger.

All of us carry the unresolved traces of those earlier experiences in our adult lives. Each time they come to the fore, we have an opportunity to resolve them in some way. Nonetheless, our childhood terror is powerful. When our current experiences make the victim/perpetrator/bystander dynamic present to us in some way, our first response is to recoil from the prospect of becoming unwitting participants in the drama, either as victims, perpetrators or bystanders. Since all seem terribly painful, our first reaction is usually to try as hard as we can to escape, using a variety of defensive maneuvers. Among the most common is to use whatever categories and strategies we have available in an effort to impose logic, establish control and somehow save ourselves from a reality that seems overwhelming and intolerable. At that point, we are no longer able to use legal categories to serve truth, justice and compassion, because our first priority is to keep our distance from the whole situation.

Learning to respond to trauma effectively involves developing the capacity to be aware of our deep connections to the situations and people with whom we work without becoming overwhelmed by our own defensive thinking and losing track of our roles and responsibilities. This challenge operates on us individually, and in all human systems. The ability to identify who has taken a particular action and respond appropriately with further action is a central feature of legal practice (and of human social intercourse in general). Yet we are constantly at risk of defending ourselves from our own emotional responses to the proceedings (and shock at the power of legal judgments) by reducing the human beings who appear in court to two-dimensional figures called “perpetrators” or “batterers;” “victims,” “battered women” or “children of batterers;” or

even "bystanders." When we treat these categories as accurate, comprehensive and mutually exclusive descriptions of actual people, we may experience some temporary relief from the discomfort of our own ambivalent feelings about the drama to which we are bystanders. Unfortunately, when we are treating our categories as if they fully captured reality and fail to recognize other dimensions that are operating simultaneously, we lose the open heartedness that is necessary to engage effectively with humans in distress. Moreover, we will lack the clarity and groundedness necessary to make and implement the required judgments, which the other participants (and we) understandably find so shocking.

The rest of this Article seeks to identify practices that can assist people doing domestic violence work in the legal system to recognize when their thinking is distorted by the emotional freight attached to work with trauma, so that the legal system can serve truth and embody both justice and compassion. It follows two separate lines of inquiry, which then come together in the final sections. The starting point for the first line of inquiry is the work of Herman and other pioneers,[112] who have taken the lead in investigating both the dynamics of trauma and recovery (particularly forms of trauma resulting from atrocities), and the practices which facilitate work with victims and perpetrators. Often guided by this pioneering work, many people, including care-giving professionals,[113] lawyers and legal advocates, as well as other social activists, scholars and reformers, continue to dedicate their lives to domestic violence and child advocacy work. Many who work with victims or perpetrators of violence find their work profoundly rewarding.[114] These are people who have responded to victims' needs to be heard and cared forand to the equally profound need for humane responses to people who have committed acts of domestic violence, as well as those who have taken up the work of prevention.[115] These first sections describe the understandings and practices, drawn from both the care-giving professions and activist and scholarly traditions, that have made sustained work of this kind possible.[116] The name used here for these

112. *See* Appendix *infra* for a bibliography and resources.

113. *See infra* note 116.

114. For discussions of the rewards of different types of work to stop, prevent and assist in recovery from interpersonal trauma, see, e.g., DALTON & SCHNEIDER, *supra* note 3, at 1121-22; PETERS, *supra* note 16, at 225-26; HERMAN, RECOVERY, *supra* note 7, at 153-54; LAURIE ANNE PEARLMAN & KAREN W. SAAKVITNE, TRAUMA AND THE THERAPIST 400-06 (1995).

115. For an overview of batterer intervention systems, see GONDOLF, *supra* note 2.

116. The women's movement and the movement for children's rights overlap at many points with other grass-roots social movements as well as with groups within the

understandings and practices is "compassionate witnessing."

The second line of inquiry focuses on the aspects of action, engagement and remembrance that make up the project of restorative justice and peacemaking work. Caregivers and advocates, lawyers and judges have parts to play in pursuing justice and making peace. This inquiry examines how the practice of compassionate witnessing, which therapists and others have developed, relates to the tasks of ascertaining truth, securing victim safety, practicing restorative justice and peacemaking. Both lines of inquiry then come together in asking what compassionate witnessing can contribute to efforts to address the fact-finding gap in civil domestic violence proceedings, as well as other deficiencies in existing systems of social response and prevention.

A. Compassionate Witnessing and the Problem of Bystander Reactivity

1. Psychological Perspectives on How People Cope with Distress

Compassionate witnessing is the capacity to remain open hearted and productively engaged with people in painful and difficult circumstances, particularly when outcomes are uncertain. People in movements to end intimate violence and those who are engaged in cutting edge human services work are at their best when they are able to relate in this way.[117] It is this capacity that enables people who work with trauma to respond compassionately to their own moments of grief, anger and despair; recognize and handle compassion fatigue; avoid burnout; create community; and establish new pathways to change when existing paths are blocked.[118]

The practice of compassionate witnessing is informed by psychological thinking about basic human needs for connection and relationship, and, conversely, how people respond to experiences of

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academy, and groups of care-giving professionals, including nurses, physicians, psychiatrists, psychologists, social workers and clergy. The thoughts advanced in Part IV of this Article are informed by the experiences and theoretical and practical work of people in many of these different contexts.

117. For working definitions of compassionate witnessing, see *supra* note 20, and *infra* notes 125 and 126 and accompanying text and the text following note 135. The ideas embodied in the practice of compassionate witnessing have an ancient history, and yet have needed to be re-discovered and re-invented in every generation. Traditions that have nourished this practice include Zen Buddhism, Kabbalah, mystical Christianity, Sufi poetry, and various schools of psychotherapeutic thought, including Humanistic Psychology. *See infra* app. for a terminological note and a brief list of general, psychological and legal resources.

118. For a pathbreaking collection of articles on the problems faced by professionals who work with traumatized people, as well as possible solutions, see COMPASSION FATIGUE, *supra* note 16.

disconnection and pain. As Jean Baker Miller and Irene Pierce Stiver explain,

> Violation of another represents the opposite of empathy. If one person is empathic to another, s/he will not engage in the kind of disconnection or mistreatment that hurts or violates that person–and violates the relationship. . . .
>
> With regard to non-mutual relationships, we believe there is a continuum that starts with a lack of awareness of the experience of others and the sense of a person's "right" to coerce them, and at its extreme leads to racial, class or other oppressions on the societal level, and on the more personal level to emotional, physical and sexual abuse. [119]

Domestic violence, child maltreatment and other inhumane treatment of one person by another are forms of violation, and each evokes pain both in its victims and in others who come in contact with them. Experiencing pain leads people to feel vulnerable, small, and helpless, whether or not they are conscious of these reactions. Similarly, people experiencing trauma directly or vicariously are likely to feel fear, anger, grief and despair. Since these feelings are often unwelcome, more acceptable responses may quickly be substituted, for example, boredom, impatience, frustration, irritation, a vague sense of discomfort, blame, judgment, or loss of energy. Reactivity—in the form of strong feelings or their common substitutes—is a signal that a person is in distress of some kind.[120] If the reactivity and distress are minor, the person may be able to wait until the feelings pass, or simply shift attention to something more appealing. If the feelings are stronger or recurring, people are likely to respond to their distress either by acting inappropriately or, recognizing that something is amiss, by engaging in a process of self-reflection. Personal growth occurs when someone is able to recognize that her or his feelings are not simply the product of present circumstances, but involve unresolved issues and distorted thinking in another area of the person's life, either contemporary or in the past. At that point, there is a possibility that the underlying issues (which may not previously have been recognized) can be identified and perhaps resolved.

This experience of becoming reactive is universal (though heightened in traumatic contexts), and everyone navigates her or his

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119. JEAN BAKER MILLER & IRENE PIERCE STIVER, THE HEALING CONNECTION: HOW WOMEN FORM RELATIONSHIPS IN THERAPY AND IN LIFE 58 (1997).

120. *See supra* note 24; *see also* MILLER & STIVER, *supra* note 119, at 77-78, 106-07.

own reactivity with more or less success.[121] The most satisfying ongoing relationships are those in which the people involved are able to recognize moments of reactivity, and use them as resources for growth. In such a relationship, people are more in touch with reality, and more able to explore differences and similarities between themselves and another.[122] The alternative is for reactivity to be acted out, and people to remain locked in the constricting patterns of behavior and belief that developed originally as a method of handling otherwise intolerable and overwhelming feelings of distress. Psychotherapists' work is to assist clients whose relationships are impaired by old patterns of defensiveness and disconnection to learn to make new choices for the present.[123] In order to help clients make

121. Psychotherapists often address patterns of reactivity in the context of therapist-patient or other professional-client relationships in terms of transference (on the part of the client) and counter-transference (on the part of the therapist or other professional). *See* Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 262-89 (1999) (discussing transference, counter-transference and the attorney/client relationship, and summarizing relevant psychoanalytic and legal literature); *see also* app. Miller and Stiver offer a useful reframing of traditional notions to emphasize the role of the therapist's personal reactions (or counter-transference) as a critical resource to establishing the connectedness that is necessary for psychological healing. MILLER & STIVER, *supra* note 119, at 143; *see also* CONSTANCE J. DALENBERG, COUNTERTRANSFERENCE AND THE TREATMENT OF TRAUMA 3-11 (2000) (giving an overview of definitional issues and distinguishing different schools of thought). Peters uses a narrower definition of counter-transference, as the lawyer's package of reactions specific to an individual client, as distinguished from secondary traumatic stress, which she defines as the cumulative effect of working with trauma. *See* PETERS, *supra* note 16, at § 9-2(f). For a discussion comparing and contrasting the concepts of counter-transference, secondary traumatic stress and burnout, see Figley, *Overview*, *supra* note 16, *in* COMPASSION FATIGUE, *supra* note 16, at 1, 9-16.

122. Psychologist Harriet Goldhor Lerner offers this definition of intimacy:

> [I]ntimacy means that we can be who we are in a relationship, and allow the other person to do the same. . . . [In other words], we can stay emotionally connected to that other party who thinks, feels, and believes differently, without needing to change, convince, or fix the other. . . . An intimate relationship is one in which neither party silences, sacrifices, or betrays the self and each party expresses strength and vulnerability, weakness and competence in a balanced way.

HARRIET GOLDHOR LERNER, THE DANCE OF INTIMACY: A WOMAN'S GUIDE TO COURAGEOUS ACTS OF CHANGE IN KEY RELATIONSHIPS 3 (1990). Miller and Stiver use the concepts of mutual empathy and mutual empowerment in relationships, which result in connection, in contrast to relationships characterized by distance, power-over, and non-mutuality, which result in experiences of disconnection, to capture similar ideas. MILLER & STIVER, *supra* note 119, at 42-59.

123. Psychologist and therapist Deborah Anna Luepnitz explains psychotherapeutic work this way:

> What talking therapy helps us do is separate the particular catastrophes of our family and social circumstances from the general catastrophe of having been born human, and thus, subject to aging, death, and the dilemmas of intimacy caricatured in Schopenhauer's fable. . . . Psychotherapy cannot make us whole, but it does allow us to transform suffering into speech and, ultimately, to learn to live with desire. . . . [I]t can help turn egregious neurotic misery into the porcupine

change, psychotherapists must know something about their own experiences of disconnection and connection, and the process of healing. Thus, methods of recognizing reactivity (in oneself as well as in others) and utilizing the resulting information productively are important parts of psychotherapeutic training.[124] However, a concern with reactivity and attention to methods of responding productively to one's own distress is by no means limited to psychotherapeutic contexts, as the following section explains.

2. An Introduction to the Concept of Compassionate Witnessing

Compassionate witnessing takes the constructs of psychotherapy and simplifies and extends them. Not simply a professional tool, compassionate witnessing is one name for a more conscious and practiced version of a capacity all human beings share, and all use in our relationships. In essence, compassionate witnessing allows bystanders to recognize our reactivity as a sign of the truth of our shared humanity: while we are individually quite different, we simultaneously all have the same basic needs and the same repertoire of emotional responses. Rather than acting out that reactivity, compassionate witnesses make the conscious choice to stay present to this truth of connectedness and similarity, while using various techniques that allow them to simultaneously acknowledge and own their own reactive feelings. Staying present has some important correlates. For example, from a perspective of our common humanity, we cannot cast someone else out without in some sense casting ourselves out too.[125] Similarly, the practice of staying present to our common humanity with others we encounter entails finding effective ways to respond to suffering. Our openheartedness allows us to recognize and understand the suffering of others, because it is similar to our own. Our own suffering, combined with our ability to

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dilemmas of everyday life.

DEBORAH ANNA LUEPNITZ, SCHOPENHAUER'S PORCUPINES, INTIMACY AND ITS DILEMMAS 18-19 (2002).

124. *See* Silver, *supra* note 121, at 271 (citing psychotherapeutic literature on counter-transference and several descriptions of psychoanalytic training); *see also infra* app. for selected works from traumatic stress studies and psychology.

125. Thus, the practice involves being able to recognize the constant pull we all experience to divide the world into good and bad, and consciously to choose to recognize that both always co-exist. As sages from many traditions teach, each of us is a complex mixture of feelings and desires. The mixture of good and bad and everything in between is an important part of what it means to be human. Dr. Theodore Isaac Rubin suggests an appreciation for "compassionate shades of gray," as an alternative to "a dream world of non-existent, simplistic black-and-white notions which simply do not apply to human life." THEODORE ISAAC RUBIN, COMPASSION AND SELF-HATE 143 (1975).

find comfort in the face of our suffering, leads us to see the importance of responding to the suffering of others. As a result, compassionate witnesses both experience and create a sense of commonality and shared purpose in addressing sources of trauma.

It is helpful to realize that compassionate witnessing involves a more conscious use of the skills people use to create intimacy and connection with each other in daily life. Intimacy between people depends on each person's willingness to be in touch with her or his own feelings and wants, which are expressions of that person's life force. Compassionate witnesses are able to acknowledge their own feelings and wants—a personal sense of self—while in relationship with another, who also has distinct feelings, wants and selfhood. None of us grow to adulthood with these capacities for intimacy fully intact. The work of adulthood (and not only of psychotherapy) is to restore that capacity, which is necessary to a full life and satisfying relationships. All of us spend some of our time mired in the defensive strategies developed in childhood (and perhaps intensified as a result of painful adult experiences), and, in consequence, disown parts of ourselves.[126] The more we attempt to separate ourselves from our distress, the more disoriented, vulnerable to upset, and disconnected we become, and the more maintaining our defenses seems a matter of life and death. A downward spiral of defense meeting defense keeps people feeling isolated, lonely and increasingly desperate for connection. Yet with connection comes the certainty that blocked material and aspects of ourselves we learned long ago to view as dangerous to our well-being will be brought to the fore.

All of us suffer from this dilemma, as it is part of the human condition,[127] and all of us move in and out of connection as we navigate through our lives. Some people are more sensitive to this dilemma, or have been exposed to more traumatic experiences, and

126. Jean Baker Miller and Irene Pierce Stiver offer the following comments:

> [A] relational context that includes serious or repeated disconnections will lead people to create restricted and distorted images of the possibilities of relationships between themselves and others, and to construct meanings that disparage and condemn themselves. These images and meanings then further limit their ability to act within connections to know their own experience and to build a sense of worthiness.

MILLER & STIVER, *supra* note 119, at 82-83. Miller and Stiver suggest that our fear of engaging with others because of our past disconnections and violations is so powerful that we develop strategies of disconnection. Through these strategies, we try to maintain some degree of connection while keeping our full responses, perceptions and feelings out of relationship. *Id.* at 104-17 (discussing *inter alia* the strategies of emotional disengagement, role-playing and replication).

127. Miller and Stiver use the term "central relational paradox." *See id.* at 81-82.

for them, this dilemma can become excruciating. People engaging in violence and efforts at coercion and control are acting out this dilemma in particularly dangerous and destructive ways.[128] Bystanders to domestic violence (and other scenes of trauma) who are successful in navigating the core challenges of relationship in their own personal lives are nonetheless likely to be deeply challenged by engagement with the suffering of victims and perpetrators of violence and coercion and control, because of the "human consequence of knowing, caring and facing the reality of trauma."[129] As discussed earlier and in section B of Part IV, the challenges of engagement are particularly great for witnesses who take part in responding to the demands of restorative justice and peacemaking.

3. Components of Compassionate Witnessing Practice

Compassionate witnessing can enable bystanders, including lawyers, judges, court personnel, advocates, and others, to remain present to the painful truths of the experiences of victims and perpetrators of violence in intimate relationships and family settings. What is more important, this practice is profoundly beneficial to everyone who undertakes it, whatever their chosen work, because, to use Byron Katie's phrase, it is a practice of "loving what is."[130] Nine components of compassionate witnessing practice, which can also be understood as requirements for adopting this stance, are discussed here. These include: (1) conscious choice; (2) adopting a moral stance as a witness; (3) acknowledgment of the particular challenges of work with trauma (that is, the problem of secondary or vicarious traumatic stress); (4) integrated use of reason and emotion; (5) maintenance of appropriate boundaries; and (6) a willingness to explore one's personal connections to the experiences and situations one encounters as a witness. The three final, and perhaps most

128. For a remarkable account, in the context of restorative justice, of dialogues between rape victims and the men who raped them, which eventually resulted in the men's acknowledgment that their rapes represented distorted attempts to get empathy for their own past experiences of abuse and violation by imposing similar agony on others, see D. Killian, *Beyond Good & Evil: Marshall Rosenberg on Creating a Non-Violent World*, SUN, Feb. 2003, at 6-7, *available at* http://www.thesunmagazine.org/326_Rosenberg.pdf.

129. PEARLMAN & SAAKVITNE, *supra* note 114, at 150-51, *quoted in* PETERS, *supra* note 16, at §9-2(g).

130. BYRON KATIE & STEVEN MITCHELL, LOVING WHAT IS (2002). There are many different methods that people have used to develop the capacity to be compassionate witnesses. The components chosen for discussion here are drawn from the practices already being used by many people who work with domestic violence and other forms of interpersonal trauma. Some resources for exploring other pathways are included in the Appendix and in notes 152 and 157 *infra*.

important, components are: (7) active self-care; (8) participation in creating an interdisciplinary community of support for one's work and for victims and perpetrators of violence; and (9) a commitment to being present and participating in remedial engagement moment to moment under conditions of uncertainty.[131]

The core of the practice of compassionate witnessing, a thread that runs through and links all nine elements, is a sense of integrity, based on an understanding of what it means to be human, that leads to actions guided by kindness and care for ourselves and others. The first seven elements are discussed here. The last two are discussed later in this section.

The first requirement for handling traumatic material productively is to have a sense of personal autonomy in relation to one's work as a witness.[132] Indeed, in order to serve as a compassionate witness, one must actively choose to engage with others in this way. Some people have made a conscious choice to create meaning in their own lives by working for justice and reconciliation among people, and this sense of larger meaning energizes them. This is not necessary, however. It is the choice to engage that is key.[133] From the exercise of conscious choice comes a host of other resources, including passion, curiosity, excitement, creativity, patience, persistence and a willingness to take

131. These requirements are interconnected. For example, as explained below, the last requirement, acting in the present under conditions of uncertainty, is closely linked to the second requirement, adopting a stance of moral witness. It is hoped that listing them separately will make the practice as a whole easier to understand. For a clear, sophisticated and detailed look at ways for lawyers and other helping professionals to recognize, recover from and act to prevent stress, burnout and secondary traumatization, see PETERS, *supra* note 16, at §§ 9.1-9.6. *See also* Yael Danieli, *Countertransference, Trauma and Training*, *in* COUNTERTRANSFERENCE IN THE TREATMENT OF PTSD 368, 384-85 (John P. Wilson & Jacob D. Lundy eds., 1994) (principles of self-healing for therapists working with traumatized clients).

132. For sociological documentation, see CARY CHERNISS, BEYOND BURNOUT (1995) (discussing two studies of stress and successful coping strategies among twenty-six human service professionals employed by public institutions (including six lawyers), conducted during the first year of their work and twelve years later, finding that autonomy, support, and moral commitment were among the most critical factors to their satisfaction and success).

133. The psychologists, teachers, spiritual leaders and other pioneers whose work informs this Article are in agreement that the need and capacity for connection is a basic defining characteristic of human beings, rather than a rare or learned inclination. Patterns of disconnection and distorted communication result not from a lack of need or capacity, but because of cultural, societal and familial patterns that lead people to behave counterproductively. One leading contemporary exponent of this view of universal human needs is Marshall Rosenberg, who formulated an approach known as "Nonviolent Communication," a basic form of interaction that is being used around the world to facilitate renewed connective capacity among people in a wide variety of settings, from daily life in workplaces, schools and families, to situations of previously violent enmity, including those requiring restorative justice. For more information see *supra* note 128 and MARSHALL B. ROSENBERG, NONVIOLENT COMMUNICATION: A LANGUAGE OF COMPASSION (1999).

risks and make change. These are some of the resources needed for remedial engagement with trauma.

A second requirement is adopting a moral stance as a witness. As Dalton and Schneider recognize in their textbook, *Battered Women and the Law*, there are important overlaps here between Herman's observations about the client-therapist relationship and the lawyer-client, or advocate-client, relationship.[134] In the excerpt which Dalton and Schneider present, Herman distinguishes as follows between the necessary professional neutrality of the therapist and the therapist's moral stance as a witness:

> In entering the treatment relationship, the therapist promises to respect the patient's autonomy by remaining disinterested and neutral. "Disinterested" means that the therapist abstains from using her power over the patient to gratify her personal needs. "Neutral" means that the therapist does not take sides in the patient's inner conflicts or try to direct the patient's life decisions. Constantly reminding herself that the patient is in charge of her own life, the therapist refrains from advancing a personal agenda. The disinterested and neutral stance is an ideal to be striven for, never perfectly attained.
>
> The technical neutrality of the therapist is not the same as moral neutrality. Working with victimized people requires a committed moral stance. The therapist is called upon to bear witness to a crime. She must affirm a position of solidarity with the victim. This does not mean a simplistic notion that the victim can do no wrong, rather, it involves an understanding of the fundamental injustice of the traumatic experience and the need for a resolution that restores some sense of justice. This affirmation expresses itself in the therapist's daily practice, in her language, and above all in her moral commitment to truth-telling without evasion or disguise. Yael Danieli, a psychologist who works with survivors of the Nazi Holocaust, assumes this moral stance even in the routine process of taking a family history. When survivors speak of their relatives who "died," she affirms that they were, rather, "murdered." . . . "The use of the word 'death' . . . appears to be a defense against acknowledging murder as possibly the most crucial reality of the Holocaust."[135]

All human beings share the capacity to serve as witnesses in this

134. DALTON & SCHNEIDER, *supra* note 3, at 1071.

135. DALTON & SCHNEIDER, *supra* note 3, at 1072-73, *quoting* HERMAN, RECOVERY, *supra* note 7, at 135. Upon reading this passage, some readers may wonder how the kind of moral witnessing Herman suggests as part of the therapist's role can be reconciled with judges' roles as neutral arbiters, partial to neither party. This question is discussed in Part IV.B of this Article.

sense, as well as the desire to turn away that Herman so eloquently described. Our concern here, however, is with people who are choosing to take this stance in the context of a professional role.

Despite the many significant differences among the roles of therapists, lawyers and judges, these roles share core commitments to truth, justice, and human rights, as well as to professional neutrality, discernment and engagement. Each has a part to play in responding to clients or litigants, and each is required to take appropriate action informed by these core commitments. A compassionate witness in any professional role is one who, consistent with her or his professional relationship to the person or people involved, is present to the human realities of the circumstances presented, including any traumatic material, stays in relationship to the situation and all of the people involved (including herself or himself), attends responsibly to both intellectual and emotional aspects of issues that are raised, and takes appropriate action in light of governing norms.

The difference between compassionate witnessing and traditional professional norms has to do with the ideas of presence and relationship embedded in this statement. Tradition suggests that therapists, judges and lawyers can operate in disconnected, distant and resolutely intellectual ways, and simultaneously be present to people and their often complex, ambiguous and painful experiences. Recent work in psychology and trauma studies challenges these notions, suggesting that human connections are essential to professional work of this kind. Thus, the idea of compassionate witnessing invites professionals to find a new middle ground of engagement, consciously maintaining a healthy sense of both self and other in relationship.[136] Compassionate witnesses are conscious of the twin temptations to withdraw and to become over-involved, and commit themselves simply to do the best they can under the circumstances, simultaneously acknowledging both the power that society and the people who seek their assistance have invested in

136. I leave to another occasion a more detailed analysis of the ways this account of lawyering and judging roles conflicts with or indeed may clarify or enhance traditional understandings of these roles. *See* PETERS, *supra* note 16, §§ 2.3-2.4, 9.5 for thoughtful exploration of competing professional norms and ethical rules in relation to representation of children in child protective proceedings; Susan Bandes, *Repression and Denial in Lawyering* (Oct. 18, 2001) (unpublished manuscript on file with author) and resources discussed therein for a related discussion of ethical questions, role constraints and the personal reactions of attorneys to difficult aspects of criminal defense work generally and death penalty cases in particular; *see also* Susan Swihart, Ethical Issues, in ABA COMMISSION ON DOMESTIC VIOLENCE, THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, 12-1-12-5 (Deborah Goelman et al. eds., 1996). For a discussion of the traditional split between reason and emotion in law and legal training, *see infra* note 138.

them and the limits of what they are able to do.

It is helpful to underscore once again key areas of similarity between compassionate witnessing and traditional notions of judicial and attorney roles. Both require a professional, while subject to role constraints (for example, impartiality for judges and mediators, or advocacy and loyalty for attorneys), to be guided throughout by a commitment to truth and justice, following the facts where they lead without compromise. Likewise, judges under either view are required to do justice, tempered, to the extent the law permits, by mercy. Compassionate witnessing does however add additional elements to traditional thinking about professional roles. As discussed above, taking this stance is a matter of choice, a choice which carries with it greater clarity about the moral dimensions of carrying out professional responsibilities in the context of atrocities. A compassionate witness is someone who understands and embraces the demands that shared humanity places on everyone to respond with fortitude and conviction to the painful circumstances of both victims and perpetrators of violence and coercive control.

The next several elements that compassionate witnessing practice adds to traditional thinking about judging and lawyering flow very directly from a commitment to be kind to ourselves and others, and thus maintain our integrity as witnesses. One is an explicit acknowledgment of the particular difficulties of carrying out professional responsibilities in settings involving allegations of violence, abuse, and illegal coercion, including, for example, the civil proceedings that are the subject of this Article. Like therapists who work with survivors of severe trauma, judges, attorneys, advocates, neutral evaluators and other system personnel must acknowledge the possible effects of secondary traumatic stress. A compassionate witness is conscious of this phenomenon and attentive to the possible impact of vicarious distress on her or his own functioning and that of others involved in responding to traumatic situations. Ignoring this issue or denying possible effects has painful consequences for people working with traumatic material, because it supports problematic coping mechanisms and creates isolation rather than community.[137]

137. Some recent research suggests that there are significant numbers of people who experience very limited effects after bereavement or other losses, and that some of these people are resilient because they deny or repress painful aspects of the experience. For a recent journalistic survey of this research, see Lauren Slater, *Repress Yourself*, N.Y. TIMES, Feb. 23, 2003, (Magazine) at 48. Popular accounts sometimes exaggerate the relevance of these studies to complex interpersonal traumas like domestic violence and child abuse, and also inaccurately equate healthy coping mechanisms (similar to those suggested here for compassionate witnesses) with denial or repression. In any event, even these researchers agree that many

The fourth requirement, which is closely related to the third, is a different perspective on how professionals (in common with other human beings) can best respond in situations where they are bystanders and witnesses to trauma. Professional training often teaches lawyers, judges, psychologists and other professionals to handle their emotions by using the tools of a well-developed intellect, putting their emotions in second place, or even ignoring them altogether.[138] However, in dealing with trauma, no one can successfully and consistently function effectively without using both reason and emotion, and without some tools to handle the personal identifications that trauma often evokes in bystanders.[139] By developing the capacity to use reason and emotion in an integrated way, professionals who choose to function as compassionate witnesses are able to use their own emotional responses as resources in carrying out their other professional responsibilities, including remaining present in the face of the disturbing and painful material to which they are exposed, and maintaining appropriate boundaries, neither over-involved nor disengaged from the human complexities of the situation.

The step of acknowledging our own personal connection to the circumstances we encounter in our work, including feelings transferred from other contexts in our lives, is not only of central importance, it is profoundly difficult, and requires strong motivation. This step also requires continued practice[140] because it involves

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people do have disruptive reactions to direct and secondary trauma. Thus, it is important for people who work with traumatic material and with trauma survivors to be knowledgeable about the possibility of such reactions and have tools available to respond appropriately to people in distress, including themselves. *See infra* app. for selected resources on point.

138. On the emphasis in legal training and law practice on splitting reason and emotion, see, e.g., Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997); Silver, *supra* note 121, at 279-80. *Cf.* Leti Volpp, *Lawyering at the Margins: On Reason and Emotion*, 11 AM. U. J. GENDER SOC. POL'Y & L. 129, 130 (2002) (discussing works which question on various grounds the possibility of separating reason and emotion as traditional legal thinking claims to require, including Susan Bandes, *What's Love Got to Do with It?*, 8 WM. & MARY J. WOMEN & L. 97, 97-100; Rachel Moran, *Law and Emotion, Love and Hate*, 11 J. CONTEMP. LEGAL ISSUES 747, 747-48 (2001); Martha Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN'S L. REV. 23, 23-25 (1996); and Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1154 (1995)). *See also infra* app.

139. There are similar conflicts in medicine and psychology. *See, e.g.*, JONATHAN SHAY, *No Escape from Philosophy in Trauma Treatment*, *in* SECONDARY TRAUMATIC STRESS: SELF-CARE ISSUES FOR CLINICIANS, RESEARCHERS AND EDUCATORS tbl. 1 (B. Hudnall Stamm ed., 1995), *available at* http://www.sidran.org/shay.html; *see also* MILLER & STIVER, *supra* note 119, at 125.

140. Many people also find difficulty in consistently carrying out most of the other requirements of compassionate witnessing practice. *See, e.g.*, *infra* notes 143, 194-96

acknowledging our own self-protective strategies for coping with distress, which, by the time we are adults, are familiar and deep-rooted. Indeed, most of us think these defenses are necessary if we are to be able to do our work (and at some level, even to survive). Learning that we can risk letting some of our strategies go at least some of the time is a gradual and demanding process.

One reason for our resistance to "getting personal" about this work is our own experiences of violation, our own relationship to violence and abuse, our own feelings of loss, grief, rage, and fear, our own destructive as well as constructive impulses.[141] Yet while, in the context of our professional work, it may or may not be appropriate to discuss aspects of our personal experience with others, we cannot be fully present as witnesses to traumatic experience without recognizing and acknowledging specific resonance in our own lives and beings. Indeed, our willingness to be real with ourselves about our own experiences challenges false dichotomies between us as professionals and the clients and litigants with whom we work . After all, in order to ask for intervention, people dealing with domestic violence have to begin by acknowledging to themselves at least some of the painful realities of the experiences that brought them to our offices or courtrooms.[142] Professionals who are able to acknowledge their own resistance to facing painful experiences will find it much easier to be understanding of the similar feelings and behavior of clients and litigants.[143]

In choosing whether to make these changes, it is helpful to remember that we have only two choices. The first is to become conscious of the impact of secondary traumatic stress on us, our reactions to our own experiences of victimhood and aggression, and the shared humanity that these commonalities reflect. The second is to deny that we are being affected, and be governed by our own unacknowledged reactivity. Each time we are willing to look at the distortions our own reactivity introduces, we become better able to accept the truth of this challenging proposition. Moreover, this is not an either/or choice. Rather, everyone oscillates between consciousness and unconsciousness. The practice of compassionate witnessing simply facilitates the process of recognizing when we have

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and accompanying text.

141. *See* Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225, 1258-60 (1996).

142. *See, e.g.*, Dalton, *Domestic Torts*, *supra* note 47, at 338.

143. *See* Mills, *supra* note 141, at 1228-31; PETERS, *supra* note 16, §§ 9.3(b)–9.4(d).

become unconscious, and moving back toward consciousness.[144] It is also helpful to recognize that we are the ones who reap the greatest benefits of developing our own capacities for conscious living. Compassionate witnessing is a practice people adopt out of self-love, not out of altruism.

Maintaining appropriate boundaries is essential to successful functioning in one's professional role, and also to serving as a compassionate witness. Boundaries promote the well-being of the client, who needs to be able to seek specific kinds of support from outside observers, free of the mutual responsibilities that friends or family members undertake with each other. Boundaries also protect the bystander who has become a witness from taking on personal responsibility for rescuing, changing or befriending a client or litigant.

Negotiating boundaries is also integrally connected to the practice of monitoring the personal emotional resonance of traumatic material. Experienced witnesses, like experienced professionals, use their awareness of their own feelings—whether of distance, connection, pleasure, discomfort, grief, irritation, rage, boredom, fear, curiosity—to assist them in their work with clients, in their own personal journeys of exploration and growth, and in maintaining flexible boundaries which support connection and balance in the relationship. While professional norms are of great importance, a compassionate witness will need the support of colleagues and people with experience and expertise in working with emotionally charged situations to develop the skills and perspectives necessary to make sound choices.

Ultimately, boundaries are a matter of respect for oneself and for the other person or people in the work setting. Work with boundaries is likely to be of particular interest to people in the legal world, since one way to view law is as a system for creating and negotiating workable boundaries.[145]

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144. *See* HERMAN, RECOVERY, *supra* note 7, at 135 ("The disinterested and neutral stance is an ideal to be striven for, never perfectly attained."); *see also infra* app. for material on processes lawyers use to track the ebb and flow of counter-transferential material in their work with clients.

145. There is a vigorous debate among feminist theorists and clinicians about working with counter-transference issues, what boundaries are appropriate and how they should be negotiated. *See infra* app. for references. For brief introductions to psychological thinking about counter-transference reactions ("CTRs") and boundaries in therapeutic work with trauma survivors, see HERMAN, RECOVERY, *supra* note 7, at 140-51; MILLER & STIVER, *supra* note 119, at 144-46; Judith V. Jordan & Linda M. Hartling, *New Developments in Relational-Cultural Theory*, *in* RETHINKING MENTAL HEALTH AND DISORDER 48, 52-53 (Mary Ballou & Laura S. Brown eds., 2002).

The six components of compassionate witnessing which have discussed thus far—conscious engagement, adopting a moral stance as a witness, reckoning with secondary traumatic stress, integrating reason and emotion, maintaining appropriate boundaries, and exploring one's personal connections to what one encounters as a witness—are all aspects of the integrity made possible by inquiry into our own thinking. As the philosopher Epictetus observed, "we are disturbed not by what happens to us, but by our thoughts about what happens."[146] When we are able to inquire into our own thoughts, we are able to recognize the distortions in our thinking that lead us to confuse the past with the present, our own experiences with those of others, our own present security with imagined vulnerabilities and dangers. When we recognize the ways in which we are scaring ourselves, we are no longer distracted from the situation that actually confronts us.

As may by now be apparent, compassionate witnessing involves self-care and community. Both self-care and community increase our ability to inquire into the sources of our own reactivity, and do the personal work necessary to achieve the calm and clarity that facilitate productive engagement with the world, but that may otherwise elude us. Active self-care is a clear expression of kindness toward ourselves, and increases exponentially the degree of compassion and efficiency we bring to our work.

Herman's work includes an insightful discussion of the kinds of support and conscious self-care therapists require in order to work with victims of trauma. Dalton and Schneider include a generous chunk of this discussion in their textbook for law students,[147] and highlight the importance of both support and self-care in a subsequent note:

> Judith Herman is adamant about the need for professionals working with those who have experienced trauma to engage in "self-care." . . . [S]he talks about setting appropriate limits with clients, about guarding against over-commitment, about finding room in one's life for relaxation and pleasure, and about working in an environment in which there is sufficient support, ideally among peers, but at a minimum from a clinical supervisor. These conditions may be harder for lawyers and legal advocates to secure

146. Epictetus, Encheiridion, V, *quoted in* KATIE & MITCHELL, *supra* note 130, at 257. "Two other relevant statements: 'Nothing can disturb us. We suffer only when we want things to be different from what they are.' (Encheiridion, V). 'No one has the power to hurt you. It is only your own thinking about someone's actions that can hurt you.' (Encheridion, XX)" *Id.* at 257.

147. DALTON & SCHNEIDER, *supra* note 3, 1080-82 (excerpting HERMAN, RECOVERY, *supra* note 7, at 133-54).

> than for those working in the mental health field, where concepts of self-care are better established, and clinical supervision traditionally includes attention to the clinician's own emotional state. . . .
>
> [A]nyone who has worked in this field has either experienced, or witnessed burnout, and Herman offers a compelling explanation both of why this happens, and of what to do to guard against it. She is also clear that self-care by professionals enhances rather than detracts from the service they provide to their clients. It is worth careful attention, therefore, on the part of students, advocates and lawyers . . . to the ways in which they can create and maintain a working environment sufficiently attentive to their own needs.[148]

These insights need to be extended and deepened. People work with trauma effectively when and to the extent that their own human and spiritual needs are being met. Of course, all human beings experience some trauma, and everyone needs access to these resources. There is every reason to start with ourselves.

It is critical to the success of this strategy to pay heed to the kinds of self-care Herman recommends. Her prescription has to do with core human needs for a balanced life, for connection with self and others, and for a relational life characterized by intimacy, authenticity and safety.[149] Social systems, including the legal system, function well only when participants' needs for basic self-care can be met. Radical change for the better is possible in any social system when these needs begin to be acknowledged and addressed. Conversely, if the needs of participants in the system for care are denied, everyone will continue to suffer in all too familiar ways. This suffering will necessarily lead people to distance themselves in various ways, in order to avoid succumbing to their distress. The more we are trying to operate in denial of our own needs, the less capacity we have to care for ourselves or meet the needs of others.

In other words, what makes integrity possible, both for individuals and for the legal system as a whole, is, as Herman insists, the following:

> It cannot be reiterated too often: no one can face trauma alone. If a therapist finds herself isolated in her professional practice, she should discontinue working with traumatized patients until she has secured an adequate support system. . . .
>
> . . . The role of a professional support system is not simply to focus

148. DALTON & SCHNEIDER, *supra* note 3, 1091-92 n. 1.

149. *See infra* notes 150-51 and accompanying text; *see also infra* app.C. (listing resources for lawyers regarding compassionate witnessing skills).

> on the tasks of treatment but also to remind the therapist of her own realistic limits and to insist that she take as good care of herself as she does of others.[150]

People who work in the field of domestic violence can both protect themselves from burnout and help bring about systemic change by committing themselves to active self-care, which includes recognizing and owning our own responses as we do this work, and taking responsibility for reaching out for the support each of us needs.[151] As each of us cares for ourselves, we become better able to make recognition of our common humanity an operating principle in our professional work. We will also enthusiastically join efforts to create the interdisciplinary communities of support necessary for systemic reform. To use a well-worn phrase, it is by changing our own behavior that we become part of the solution, not part of the problem.

The role of a compassionate witness also entails efforts to create community and a commitment to operating in the present, without ever knowing what will happen next. The next section takes up the second line of inquiry mentioned earlier, an exploration of how compassionate witnessing practice speaks to the core work of the legal system, pursuing truth and restorative justice. Section IV.C then brings the two lines of inquiry together in a discussion of the central importance of community and the practice of acting with kindness and integrity in the face of uncertainty.[152]

B. Compassionate Witnessing and the Legal System: The Role of Restorative Justice and Peacemaking in Responding to Atrocities

1. Teachings from Trauma Stress Studies

The second part of Judith Lewis Herman's book, *Trauma and*

150. HERMAN, RECOVERY, *supra* note 7, at 153 (emphasis in original).

151. Most lawyers, judges and domestic violence advocates who act as compassionate witnesses will want to seek some support on an individual basis (for example, through psychotherapy, personal growth workshops, meditation training, or religious, spiritual or artistic pursuits). At the same time, programs to encourage people in the legal system to practice compassionate witnessing depend on creating support systems that are not dependent on that level of individual initiative (although as a result of participation, people may be motivated to go further on their own). Training in many of the skills required for compassionate witnessing is already a part of some law school clinical programs and some programs for training judges. *See infra* app. for more information; *see also* PETERS, *supra* note 16, at § 9-4 (providing helpful strategies for lawyers to use in their practice); *infra* note 211 (discussing strategies to prevent secondary traumatic stress at the institutional level).

152. Psychotherapist David Crump teaches that it is often the case that, "[I]n order to see, I must act." Information on David Crump's work is available at http://www.ee.org.

Recovery, describes the stages of recovery from trauma, particularly severe forms of interpersonal trauma and complex interpersonal trauma, in terms that encompass both individual incidents and patterns of domestic violence and child abuse. Chapter Seven discusses the role of healing relationships in promoting recovery, followed by chapters about safety, remembrance and mourning, reconnection and commonality.[153] Healing relationships are those that place priority on the empowerment and recovery of the client or litigant. In addition, the relationship is premised on a conscious agreement between the witness and the client or litigant about the witness' use of the unequal power resulting from witness' professional role and the client or litigant's dependence on the witness for assistance. The witness takes on the responsibility to use the power that has been conferred upon her only to foster the purposes for which the power has been conferred, resisting all temptations to abuse that authority.

All of these aspects of recovery are salient to the work of the legal system. The first part of Part IV of this Article suggests some of the ways compassionate witnessing practice helps professionals and other bystanders better relate to victims and perpetrators of domestic violence and child abuse who are suffering from being directly involved in traumatic events. An important teaching of trauma theory is that when bystanders become compassionate witnesses in their relationships with victims and perpetrators, even if the witnesses involvement is narrowly time-limited or task-specific, the resulting relationships are nourishing both to the witnesses and to the people whose humanity and traumatic experiences are being acknowledged and brought into relationship.[154] Section B(2), which follows, provides some illustrations of this proposition drawn from the work of lawyer/teachers and judges who have adopted some elements of compassionate witnessing practice.

Advocates for victims of domestic violence and their children and judges who have chosen to serve as compassionate witnesses are also actively engaged in assisting both adult and child victims of domestic violence and perpetrators of such violence in facilitating all the other tasks of recovery. The battered women's movement and its allies have

153. *See* HERMAN, RECOVERY, *supra* note 7, at 133-236.

154. *See, e.g.*, MILLER & STIVER, *supra* note 119, at 121-22, 129-30, 178, 183-88 (suggesting that in therapeutic relationships, when patients see that they have impacted the therapist, they open up more and the resulting relationship is more beneficial to both parties, which helps the patients grow in other relationships as well). This teaching is not unique to trauma theory, but is also part of a number of other traditions and communities, which are discussed in app..

succeeded in designing and establishing important legal frameworks and networks of other resources that are designed to support victims in their efforts to achieve safety, do the work of remembrance and mourning, reconnect with others, and experience commonality. These frameworks are also essential in supporting perpetrators to accomplish the same tasks, although there has not been as much conscious awareness that these tasks are as essential for perpetrators as for victims.[155]

The argument to this point is that compassionate witnessing can help individuals and the legal system do better at remaining present to people experiencing and recovering from interpersonal trauma. The suggestion here is that the severely inadequate fact-finding resources and practices discussed in the earlier part of this Article are in large part a manifestation of our individual and collective difficulties trusting that safety, truth telling, justice and, hence, reconnection and commonality can exist in reality rather than remaining a utopian illusion. The rest of the Article discusses the ways compassionate witnessing practice, as embodied and expressed in the social and legal response systems for domestic violence and child maltreatment, generates concrete experiences of safety, truth telling, justice, reconnection and commonality for the witnesses themselves and for victims, perpetrators, and bystanders—that is, for everyone. In other words, compassionate witnessing, through the ongoing work of committed lawyers, judges, legal personnel, teachers, scholars, care-giving professionals, social activists, legislators and citizens, is itself the work of restorative justice, as well as evidence that justice and reconciliation are possible. More precisely, witnessing to and healing from trauma are in essence the same thing.[156]

The next sections explain some specific ways compassionate witnessing practice is already informing the practice of lawyers and

155. From the perspective of both traumatic stress theory and compassionate witnessing practice, adult perpetrators are morally responsible for their crimes. They are also, and equally, fellow sufferers. Perpetrators are people who, because of past experiences, distorted perceptions of reality and learned patterns of destructive behavior, do not currently have the ability to establish satisfying relationships with themselves or others. By committing atrocities, perpetrators demonstrate, in distorted ways, their own needs for safety, remembrance, mourning, reconnection and commonality. Unless they somehow learn on their own, or outsiders are able to intervene to stop their efforts to violate and control others and help them begin to establish healing relationships of some sort, perpetrators remain trapped in tragic patterns of behavior that are traumatic to them as well as to victims and bystanders. *See supra* note 128 and accompanying text.

156. This is a central premise of holistic (or nondualistic) healing traditions, including, for example, Jason Shulman's work, which is known as Integrated Kabbalistic Healing. *See* http://www.kabbalah.org for additional information.

judges, and suggests that these positive effects can be intensified by conscious commitment to and engagement in compassionate witnessing practice. It is helpful in thinking about the transformative potential of compassionate witnessing in the legal system to pay particular attention to the links between current fact-finding difficulties, the aspects of recovery from trauma described above—relationship, safety, truth telling, justice, reconnection and commonality[157]—and the nine elements of compassionate witnessing practice, particularly numbers one and two, choice and adopting a stance of moral witness.[158]

2. The Transformative Potential of Compassionate Witnessing in the Legal System

When individuals who make up the legal system practice compassionate witnessing, critical needs of litigants and their children begin to be met. Most people who live in abusive or severely troubled families, especially children, are "difficult" cases in the sense discussed earlier in this Article.[159] In troubled families, the available choices are limited and often seem bleak, outcomes of particular courses of action are uncertain, and there seem to be no easy answers or simple solutions. Children and adults who are in the process of sorting out for themselves how to handle the abusive or coercive aspects of their intimate relationships have a critical need to have concerned adults available to serve as compassionate witnesses.[160] People of any age who are at risk of harming another or being harmed or are already suffering significant physical and emotional injuries need to have as much authority and autonomy as possible consistent with keeping them safe from doing harm or being harmed. Unfortunately, for most adults who are abusive, and for adults and children suffering from abusive behavior by an intimate, the typical

157. These concepts from Herman's work are introduced at the beginning of Part IV.B.

158. *See supra* Part IV.C (defining and discussing the components of compassionate witnessing).

159. *See supra* Part I.B.

160. *See supra* note 155 and *infra* note 222 (explaining that the need for witnessing extends not only to those being injured but, to the extent possible (given the need to stop the abuse immediately and to hold those who cause harm accountable), also to those who are causing injury). There are of course practical reasons for this; prevention of future abuse depends on finding effective ways to help violent people change their behavior. *See, e.g.*, GONDOLF, *supra* note 2, at 4; Sandra L. Bloom, *Our Hearts and Our Hopes are Turned to Peace: Origins of the International Society for Traumatic Stress Studies* (last visited Mar. 4, 2003), *available at* http://www.istss.org/what/history4.htm. Prevention aside, however, the practice of compassionate witnessing entails work with everyone involved, and not just the "innocent." *See also infra* app..

responses of the legal system are themselves a major source of trauma, because the legal system subjects the parties to processes that are often harsh and indiscriminate, and are both unpredictable and controlled by others. At present, the absence of appropriate social response and legal intervention leaves many adults and children to suffer alone. Judith Lewis Herman observes:

> The core experiences of psychological trauma are disempowerment and disconnection from others. Recovery, therefore, is based upon the empowerment of the survivor and the creation of new connections. Recovery can take place within the context of relationships; it cannot occur in isolation. In her renewed connections with other people, the survivor re-creates the psychological faculties that were damaged or deformed by the traumatic experience. These faculties include the basic capacities for trust, autonomy, initiative, competence, identity and intimacy. Just as these capabilities are originally formed in relationships with other people, they must be reformed in such relationships.[161]

Adults experiencing domestic violence, either as perpetrators or as victims, can benefit significantly from receiving compassionate witnessing from professionals with whom they come in contact. Feminist legal theorists, clinical law teachers and activists have begun to use compassionate witnessing in their work with clients, and have written about the value of this approach (though using different terminology).[162] Ann Shalleck's work provides a useful synthesis of much of this work. As she explains, in recent years feminist theorists and activists have mounted systematic challenges to dominant paradigms of legal thinking about domestic violence, and particularly concepts of the "battered woman" and "battering" which "lead many women not to recognize themselves or their experiences in the standard narrative of domestic violence" and which, through expression of these concepts in choices made by advocates or counsel for women, or by prosecutors and judges, may "create additional dangers for women who have been abused rather than ensuring or even increasing their safety or the safety of their children."[163] To

161. HERMAN, RECOVERY, *supra* note 7, at 133.

162. Elements of compassionate witnessing are being introduced into the practice of lawyers and judges in other contexts as well, as a result of innovative scholarship and teaching. *See, e.g.*, Silver, *supra* note 121, at 296-313 (advocating lawyering with self-awareness and the cultivation of emotional intelligence among law students and lawyers). Silver also summarizes writing on lawyering and emotional intelligence from 1930 to the end of the twentieth century, but notes that it has not had a widespread impact on legal education and law practice. *Id.* at 283-89. For further discussion, *see infra* app.

163. Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019,

counter these dangers,

> these theorists and activists are engaged in a search for new legal strategies that provide abused women with legal accounts of abuse by an intimate partner that resonate with their own experiences, that create additional space for safely challenging that abuse, and that do not separate social policies regarding domestic violence from the complex and multiple realities of women who must find ways to cope with violence in their intimate relationships.[164]

As has been the case since the modern battered women's movement was initiated in the 1970s, feminist activism against domestic violence is premised on a commitment to empowering women, woman by woman. The models lawyers and lay advocates have developed in order to support their clients' empowerment (including their safety and recovery from trauma) incorporate many elements of compassionate witnessing.

For example, Shalleck reviewed the work of six theorists of domestic violence legal practice (all but one of whom are clinical law teachers), and grouped the characteristics of the lawyering they described under several headings.[165] These theorists all emphasize the need for conscious and emotionally sophisticated relationships between lawyers and clients as a foundation for the empowerment of victims that is at the core of feminist lawyering on behalf of victims of violence.[166] Shalleck's discussion of the first category, "Reflection on Experience," concretely illustrates both the overlap of these models of lawyering with compassionate witnessing, and also the benefits to both clients and lawyers of this innovative way of operating:

> [T]hese models of lawyering encourage lawyers representing women who have been abused to identify and reflect upon, both before and during their representation, their own experiences of and feelings about violence or powerlessness in intimate relationships. This reflection is needed for three interrelated reasons. First, understanding his or her own vulnerability and powerlessness within intimate relationships is part of a lawyer's ability to experience empathy with the client's situation. Although the lawyer may not have gone through the same type of experience as the client, the lawyer needs to find within his or her own experience a basis for beginning to understand the situation of a

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1025-26 (1997).

164. *Id.* at 1027.

165. The other headings are: "Recognition of the Fluidity of the Lawyer-Client Relationship," "Working Collaboratively with Clients," "Developing Responses that Enable Clients to Take Steps that Are Viable Within Their Particular Situations," and "Making Time." *Id.* at 1019.

166. *See id. passim.*

> client on an emotional level. For these theorists, the discovery of common experiential ground is necessary, not primarily for instrumental reasons of gaining the trust of or increased rapport with a client, but for the construction of a relationship built explicitly on the shared recognition of the similarities and differences in their situations. From a relationship characterized by this sort of understanding comes the lawyer's abilities to act effectively with and for the client.
>
> For these theorists, self-reflection is important for more than empathic understanding, however. Reflection by the lawyer on his or her experiences is part of the process of understanding the pervasive nature and complex dynamics of intimate violence. The lawyer needs to see intimate abuse . . . as a complex mixture of experiences involving not just physical violence, but also coercive behavior and the exercise of power and control. . . .[167]

Just as lawyers who incorporate compassionate witnessing into their work find that the change benefits both lawyers and clients, many judges now recognize the value of compassionate witnessing in their work with victims of violence, including domestic violence.

In fact, Herman's work is one of the resources James Ptacek used in his thoughtful study of domestic violence judges in Massachusetts.[168] These were judges who had chosen to work in specialized domestic violence courts, which had been established after many years of struggle to reform the legal system's response to domestic violence. Ptacek observed the ways eighteen judges in two of these courts interacted with women seeking restraining orders and men alleged to be batterers, arguing that judges' demeanor in the courtroom, an aspect of the "emotional labor" of judging, can empower or re-victimize women seeking to stop abuse in their intimate relationships.[169] Ptacek found that ten of the eighteen judges he observed usually used what he characterized as a "good-natured" demeanor in their interactions with battered women.[170] "The judges who exhibited this kind of demeanor used their authority to make women feel welcome in court, to express concern for their suffering, and to mobilize resources on their behalf."[171]

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167. *Id.* at 1029-38; *see also* Waits, *supra* note 100, at 67-78 (discussing the importance to clients of how they are treated by helping professionals); note 178 *infra* and PETERS, *supra* note 16, §§3-1-3-3 (describing a similar model of lawyering for children); *infra* app.

168. *See* PTACEK, *supra* note 30, at 137-38, 149, 153.

169. *Id.* at 97-111.

170. *Id.* at 98-101.

171. *Id.* at 99. Ptacek notes that two of the ten usually "good-natured" judges sometimes used a variant of this demeanor, which contained elements of

> If demeanor is an image of authority, the image [good-natured] judges wanted to communicate is one of empathy and support. They want to use their power to make women feel welcome in the court and to facilitate their requests for judicial remedies. There is an awareness by these judges that this demeanor is communicated by the design of court processes, by their patience, by open expressions of concern, through their listening to both parties, and by serious attention to the criminal nature of violence and abuse.[172]

This demeanor contrasted with several alternative forms of self-presentation, including bureaucratic (formal and distancing), firm, condescending or harsh. Advocates for battered women have long contended that the attitudes and behavior of law enforcement personnel, including police officers, prosecutors, court personnel and judges are a critical factor in the effectiveness of legal remedies for domestic violence.[173] Ptacek's work provides concrete evidence of both variations in judicial demeanor, and the significance to victims and perpetrators of particular choices by judges.

Ptacek's work also confirms the relevance of other elements of compassionate witnessing practice to judges' ability to engage supportively with litigants experiencing domestic violence.

> Emotional labor is a double-sided concept: it names both the means and the ends of a type of work. The ends of judging as a type of emotional labor involve making an emotional impact on plaintiffs and defendants. . . . [T]o have this impact, judges will be most effective if they act on their own feeling and emotional expression. If the goal is making a woman feel welcome in the court, the means may involve controlling or suppressing inappropriate feeling, such as frustration, or it may require evoking a desired feeling, such as empathy, that may not readily be there at the end of a very long and draining day. Truly engaging with a woman seeking an order requires more than merely pretending empathy. To really reach someone who has been assaulted and who may be intimidated and upset, a judge is more effective if he or she genuinely feels empathetic.[174]

Ptacek describes the cognitive and expressive work involved. Judges report their active engagement in learning about domestic violence,

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condescension toward the women appearing before them. *Id.* at 106 tbl. 5.1.

172. *Id.* at 122.

173. *See supra* note 95 and accompanying text.

174. PTACEK, *supra* note 30, at 117-18. For extended discussion of the political, sociological and personal factors that shape judicial behavior, and inquiry into the emotional demands that presiding over domestic violence cases places on judges, see *id.* at 95-97, 112-35.

and their conscious work on their self-presentation in court.[175] Ptacek notes that:

> . . . [T]here is also a personal cost to judges who present a "good-natured" demeanor. Empathetic engagement with women who are suffering from terrorizing violence can be exhausting. "Trauma is contagious," according to Judith Lewis Herman. . . . Herman states that in the role of witness to a violent crime, the therapist "experiences, to a lesser degree, the same terror, rage, and despair" as the survivor. This is called "vicarious traumatization." Judges who are willing to recognize women's experience of victimization will also feel this, as will advocates, shelter workers, and other feminist activists. With the volume of battering cases on court dockets, a district court judge in Massachusetts will meet several hundred women who have been abused and hear several hundred accounts of violence every year. One judge spoke of how she dealt with the personal strain of working with women who had been abused. She described the restraining order hearings as a "terrible emotional burden":
>
> "I think that two things help me with the stress. One, I talk about it. . . . I try not to make it identifiable, and I'm careful about confidences. But the things that are most traumatic, I do talk about. Both with friends and in terms of public speaking, as examples. And I do a lot of committee work. . . . I find that that gives me a sense of contributing in a way that dealing with the case by miniscule case–as much as I enjoy that, and I take each case very seriously, I think that if you feel like you are having some long effect, or short-term effect, anyway, on the system as a whole, it's easier to deal with the grind."
>
> By talking about traumatic events, and engaging in work on battering that is less isolating and individualized than sitting on criminal cases, this judge seeks to create a social environment that will strengthen her ability to stand as witness to such violence. Herman argues that "the perpetrator's arguments prove irresistible when the bystander faces them in isolation." Given the patriarchal structure of the state and the threat to the gender order that a campaign against sexual violence represents, it becomes tempting for judges to abandon the burden of vicarious trauma and turn against women who have been victimized. The current social environment for hearing and affirming women's testimony about violence was created by the feminist movement. Herman insists that the ability for our culture to sustain this recognition and support depends on the continued strength of this movement.[176]

175. *Id.* at 118-20.

176. *Id.* at 126-27.

The lived experiences of judges and lawyers with compassionate witnessing practice in domestic violence cases illustrate both the need for this sort of practice, and its value.[177] After the next section, which identifies some particular issues of concern as to the needs of children, Section IV.C takes up elements eight and nine, the formation of interdisciplinary communities to facilitate systemic change and presence and engagement in the face of uncertainty. This section also highlights the link between fact-finding deficiencies in civil domestic violence practice and the value of compassionate witnessing in legal and societal responses to domestic violence and child maltreatment.

3. Compassionate Witnessing, Children's Needs and the Legal System

Examining children's needs through the lens of compassionate witnessing is illuminating. The primary source of compassionate witnessing for children is usually their parents (or other guardians). Indeed, good parenting is a model for many of the tasks of a compassionate witness.[178] Children who experience trauma at the hands of a parent or guardian are at risk of growing up without this critical resource for healthy development, because even if the traumatic experience comes to an end, it is likely to be minimized, covered up or ignored by the parental perpetrator.[179] However, if one

177. The strain that Ptacek's "good natured" judges describe means that the full panoply of resources and attitudes which make compassionate witnessing possible are not in place. Experienced witnesses can help beginners learn to do this work in ways that are nourishing rather than depleting. *See infra* app. for additional information.

178. *See* MILLER & STIVER, *supra* note 119, at 42-47, 51, 66-68 (asserting that mutual empathy in parent-child relationships promotes growth and happiness and that this interaction can be found in other relationships as well); GROVES, *supra* note 8, at 84-85 ("Parents are the most important frontline supporters of their children. By their ability to listen, to help children understand, to interpret the world for children, and to provide an emotional buffer, they help children withstand the most traumatic events."); *see also* Lynda Marin, *Mother and Child: The Erotic Bond*, *in* MOTHER JOURNEYS: FEMINISTS WRITE ABOUT MOTHERING 19-22 (Maureen T. Reddy et al. eds., 1994), *reprinted in* JUDITH G. GREENBERG ET AL, MARY JO FRUG'S WOMEN AND THE LAW 513, 516-18 (2d ed. 1998) (describing the pleasure she and her young son take in each other, and the ways her son incorporates his experience of her mothering as a reinforcement of his own self-love); PETERS, *supra* note 16, at 1 (explaining children's needs for compassionate witnessing). She states:

> Children's unique viewpoints seem fated to get lost in the needs of an adult world. Because adults working with children are often people who prize children very much, children are cherished, but sometimes for what they represent to the adult, rather than for who they are on their own terms. It is extraordinarily easy to lose track of the child's point of view in the middle of an adult's day.

Id. Peters argues that traditional legal representation, which can be described as a "lawyer-as-context" model, should be replaced with a "child-as-context" approach. *Id.* at § 3-1.

179. For a clear and compelling explanation of the impact of child abuse on

of the parents or an outsider is able to help re-establish safety for the child, and respond to the child's situation as a compassionate witness, the child can begin the tasks of recovery.[180] Thus, the well-being of child survivors of intimate violence (either domestic violence perpetrated against a partner or physical and emotional abuse more directly inflicted on the child) can be enhanced by the development and implementation of two types of response. The first is legal and other interventions to support protective parents and other caregivers in re-establishing safety and serving as compassionate witnesses for their children, and the second is mechanisms to provide compassionate witnessing to children whose parents or other caregivers are unable to meet this need.[181] As to the latter, two prongs are needed: intervention based on engaging with the child and the child's perspective, and efforts to facilitate ongoing relationships

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children's development and their relationships with their parents and significant others, see HERMAN, RECOVERY, *supra* note 7, at 96-110. For a discussion focusing specifically on the destructive impact of secrecy and parental inaccessibility, see MILLER & STIVER, *supra* note 119, at 89-98, 111. For a discussion of the impacts on children of exposure to a battering parent, including but not limited to abuse directly targeted at the child, see BANCROFT & SILVERMAN, *supra* note 2, at 29-97. For batterers' tendencies to minimize or deny abuse of their partners and children, or to blame their victims, see *id.* at 18-19. For the effects on children's beliefs and values of exposure to a battering parent, see *id.* at 48-51.

180. See GROVES, *supra* note 8, at 80-85, 100-03; BANCROFT & SILVERMAN, *supra* note 2, at 103-05, 190.

> A strong bond to a caretaking parent has shown to be critical to recovery [from the] profound and chronic emotional distress of trauma. . . . Traumatized children need to be with a parent who is able to 'acknowledge, recognize, and bear witness to the child's pain.' Research indicates . . . that a strong mother-child relationship is an important contributor to resilience in children of battered women.

Id. at 104.

181. For the former's importance, see *supra* note 178. For the value of the latter, see GROVES, *supra* note 8, at 85-103 (noting therapists, teachers, police officers, and other adults as resources for children who have witnessed violence); *see also* BANCROFT & SILVERMAN, *supra* note 2, at 191-97 (indicating child therapists, family therapists and programs for children exposed to domestic violence as resources available), and PETERS, *supra* note 16, at §§3-1-3-3 (children's lawyers as resources for children). One study of eighteen children living in violent homes found that, "[A]ccording to the children, the best support for them was a strong caring adult within easy distance of home or school to whom the child could talk openly and safely about the violence at home. For some, it was a neighbor, for others a relative, a teacher, or an adult domestic violence worker." Peter G. Jaffe et al., *Domestic Violence and High-Conflict Divorce: Developing a New Generation of Research for Children*, *in* DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN 189, 224 (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001) (discussing a study conducted in Western Australia in 1992). Jaffe concludes: "Children exposed to family violence need not only the emotional support, advice, companionship, and instrumental aid that social support can offer them in response to specific incidents of violence but also the long-term support to recover developmentally from the effects of exposure." *Id.* at 230; *see also* Jordan & Hartling, *supra* note 145, at 64 (discussing a series of studies showing that a relationship with one supportive adult is associated with good outcomes when children are faced with various adverse conditions). *See also* note 183 *infra*.

between supportive adults and the child. Both supporting protective parents and successfully interacting directly with the child where parents are unable to meet the child's needs are hugely difficult for the legal system and other response systems, particularly as these systems are currently configured.

These observations contribute additional depth and urgency to the earlier discussion of the devastating effects of the civil fact-finding gap on victims of illegal patterns of violence and coercion and their children. Using felony prosecutions in relatively dramatic and clear cut cases to interrupt, sanction and perhaps halt partner and child abuse is necessary. Unfortunately, justice system responses to child endangerment suffer from enormous problems. The most glaring is the prosecution of mothers for "failure to protect" their children from harm at the hands of other adults, whether or not the mothers were themselves abused or could realistically have stopped the abuse of their children from occurring.[182] In contrast, when people in the criminal justice and child welfare systems—prosecutors, judges, social workers, other care-giving professionals and advocates for children and parents—are able to work in collaborative partnerships informed by compassionate witnessing perspectives, children's needs to have their relationships with their parents respected and preserved, and to experience connection rather than disconnection in their interactions with other adults, are given priority whenever possible.[183] As discussed in Parts I and III above, divorce, restraining order and child custody proceedings also often fall short in meeting children's needs for both accurate fact-finding and compassionate and effective

182. For materials on this issue, see DALTON & SCHNEIDER, *supra* note 3, at 285-334; SCHNEIDER, BATTERED WOMEN, *supra* note 15, at 157-68.

183. For example, since 1998, the Peace: A Learned Solution ("PALS") Project, a collaboration between Providence House, a battered women's shelter in Willingboro, New Jersey, and the New Jersey Department of Youth and Family Services, has served over 100 New Jersey children exposed to domestic violence. The child witnesses, three to ten years of age, receive individual and group therapy, day care and after-school programming and case management services for a period of six months. A therapist offers counseling to the children's mothers about parenting issues related to domestic violence. The innovative features of the program – tailoring treatment to the needs of each child, the sophistication of the services provided, and the coordination of services to children with services to their mothers – have been shown to be far more effective than previous interventions for child witnesses to violence. In comparison to a control group of child witnesses and their mothers who received psychoeducational classes but did not receive intensive individualized therapeutic attention, the children in the PALS program and their mothers showed dramatic improvements in their functioning, which for many of the children had previously been impaired at clinical levels. *NJ Spotlight: The Peace: A Learned Solution (PALS)Project*, NJ ADVISOR, 7 AM. PROF. SOC. ON THE ABUSE OF CHILDREN – N.J. NEWSLETTER 16-19 (Fall 2002). Psychologist Linda Jeffrey and sociologist Demond Miller, both of Rowan University, will soon be publishing additional research on the PALS model. *See also infra* note 185.

responses to children's own experiences in the face of the failures of parents and other adults.[184] To an equal or possibly even greater extent than in the dependency context, the lack of systematic attention to such cases leaves individual actors in the legal system to struggle alone with their reactivity and distress in the face of the terrible suffering experienced by thousands of adults and children.

Compassionate witnessing practice is already significant in both local and national efforts to address the needs of children affected by violence, abuse and neglect. Collaborative communities are facilitating cycles of witness, recovery and eventually prevention of domestic violence and child maltreatment and are growing in influence, although often only able, because of severe resource constraints, to address a small part of the need. Where such communities do not already exist, activists, non-profit organizations, foundations, government officials, scholars, and clinicians from a number of disciplines are actively engaged in research, organizing, writing and speaking out about the need and possibility for change.[185] With this support, even small groups of individuals working in systems of response already have less need to distance themselves and disengage. Even without anywhere near enough social support and

184. *See also* Meier, *supra* note 10, at Part II.B.

185. The National Council of Juvenile and Family Court Judges ("NCJFCJ," http://www.ncjfcj.org) is involved in a number of promising collaborations, one of which was initiated by the publication in 1999 of *Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice*, Recommendations from the National Council on Juvenile and Family Court Judges Family Violence Department, popularly known as the "Green Book." *See* Meier, *supra* note 10, at 659 for discussion of the many such collaborative communities scattered across the country that are using the Green Book as a starting point Coordinated community responses to domestic violence, see *infra* note 199, are another example. There are many law school clinics that facilitate the establishment of interdisciplinary collaborative communities of witness in family law, domestic violence and child advocacy. *See infra* app. for articles describing some of this work. Universities and non-profit organizations in many locations also take on this role, adding more substantial research (and often national outreach) capabilities. In Philadelphia, the Support Center for Child Advocates and the Center for Children's Policy, Practice and Reform at the University of Pennsylvania (http://www.ssw.upenn.edu/ccppr) are engaged in and supporting cutting edge interdisciplinary collaborative service work, research and policy change. Collaborations initiated by these organizations locally, (and in the case of the CCPPR, regionally and nationally) involve lawyers and social workers for children and adults (both from social and legal service organizations and volunteers), judges, child welfare and family court system personnel, and scholars and clinicians from the disciplines of social work, law, medicine, nursing, and psychology. Lawyers from the Support Center work in social work-lawyer teams. Students in Penn's Child Advocacy Clinic, which is co-taught by a legal clinician and a pediatrician, come from law, medicine, and the graduate program in social work. Teams from both programs have access to many other resources for collaboration and support. Lerner Interview, *supra* note 2. Other promising collaborations are discussed in GROVES, *supra* note 8, at 104-26, and *supra* note 183.

funding, these groups of individuals are beginning to respond more creatively and effectively to the human needs of adults and children they encounter.

Similarly, as Ptacek's work illustrates, individual actors dealing with adults in family court settings change their behavior when they are operating within a local framework which supports a compassionate witnessing perspective. Because the well-being of children and parents is intimately connected, these changes make a difference to children as well as to adult victims.[186] What would it take for more widespread change?

C. Compassionate Witnessing and Systemic Change

1. The Logic and Resilience of Legal System Patterns

The hypothesis presented earlier is that the legal system's penchant to respond to domestic violence cases either under a "get tough on crime" rubric, or by truncated mini-hearings in family court, reflects the dynamic of secondary traumatic stress at a systemic level. While existing procedures have many deficiencies, they have the advantage of buffering legal professionals' and other bystanders' exposure to the charged material involved in cases of domestic violence and child maltreatment. The structured operations of the criminal law are ritualized and somewhat abstract, and create a protective sense of distance between the public and legal professionals on one hand, and victims and abusers on the other. The relatively unstructured brief proceedings in civil court protect legal professionals and court personnel in another way, by reducing many cases to "he said/she said" family dramas in which underlying dynamics of power and control can be minimized or ignored. Instead, both parties can be blamed for airing their dirty laundry in public, or for what are characterized as joint failures to protect their children. In domestic violence cases in which the dynamics of power and control are more difficult to evade, judges are prone to adopt a bureaucratic demeanor, distancing themselves from the human dimensions of the matter at hand, and shifting responsibility for a humane response to other actors in the court system. As Ptacek observes,

> [I]nterviews with judges revealed aspects of the gendered division of labor and the gendered patterning of emotionality in the courts that cast light on [institutional resistance to supportive demeanor, and preferences for bureaucratic procedures in domestic violence cases.]

186. *See supra* notes 178, 180.

> There is a relationship between the "objectivity" of the judiciary and its support staff. Arlie Russell Hochschild uses the term coined by Ivan Illich, "shadow labor," to identify the kind of unacknowledged emotional labor that women perform to ensure that institutions run smoothly. In the courts, the clerical staff and advocates do this kind of emotional labor, offering a human face to plaintiffs and defendants. One judge admitted how his "objectivity" depended on the work of advocates:
>
> . . . I am very grateful when [plaintiffs] come in with domestic relations advocates, and I can sit back and play a more objective role. . .
>
> Note the metaphor of physical distance in the judge's statement–"sit back"–denoting greater emotional distance. . . . [Courts depend on domestic relations advocates, battered women's shelters and law students to provide this emotional labor] and simultaneously [there is] a denial of this dependence and a lack of acknowledgment of, or responsibility for providing this emotional service. It is left to the largely female clerical staff of the courts to facilitate this process. . . .[187]

The flip side of these institutional dynamics is that if the legal system did not have to be structured to distance professionals from suffering which they are not equipped to handle, fact-finding practices might improve, thereby providing a foundation for more sophisticated, flexible and effective responses to cases involving domestic violence, family dysfunction and child maltreatment.

Applying the standards of moral witnessing by therapists[188] to the legal system shows just how demanding it can be to follow the truth wherever it leads. The adversary system establishes processes to determine the truth of what occurred, and lead to corrective action based on that truth. Significantly, the structure of the system is also designed to protect system participants from the potentially crushing demands of carrying out these responsibilities alone. The core functions are divided among several different actors. Indeed, in criminal trials, a jury of citizens acting as a group is only responsible for the decision in a single case, and aside from death penalty cases, does not impose the sentence on the person they have voted to convict.[189] Even with the responsibilities divided up, professionals in

187. PTACEK, *supra* note 30, at 125-26 (internal citations and emphasis omitted)

188. *See supra* note 138 and accompanying text (quoting HERMAN, RECOVERY, *supra* note 7, at 135)..

189. For a review of the literature on juror trauma, an interesting study of this problem in traumatic and non-traumatic criminal trials, and a discussion of possible administrative responses, see Daniel W. Shuman et al., *The Health Effects of Jury Service*, *in* LAW IN A THERAPEUTIC KEY 949 (David B. Wexler & Bruce J. Winnick eds., 1996).

both criminal and civil contexts often find their responsibilities difficult to bear. Judges, prosecutors, defense attorneys and civil lawyers are each subject to distinctive role deformations, which if unchecked prevent the system from functioning properly.[190]

In the environment of family court, structures are looser than in other parts of the legal system,[191] which can paradoxically place more stress and incentives to disengage on participants. Despite the charged nature of much of the subject matter, there are fewer checks and balances when components of the system malfunction. As in some other civil settings, the judge bears responsibility for applying the law and finding the facts, but otherwise there are many distinctive challenges, especially in divorce and child custody cases.[192] As noted earlier, the parties are only sometimes represented by counsel, and children are rarely represented, further reducing the protective and process-supporting mechanisms available. The responsibilities imposed on the judge can become very burdensome.[193] In this light,

190. For example, in the pursuit of political rewards, prosecutors may sacrifice their commitments to truth and justice, or act out their own or community anxieties about particular groups of people or types of crime. Defense attorneys may fail to provide clients with a competent defense when the facts of the case are too ugly, or may use the cloak of their roles as defenders of the weak against the power of the state to justify abusive tactics toward witnesses or other morally questionable actions; see Bandes, *supra* note 136, at 3-4, 14, 20-22; *see also supra* note 95 (discussing displays of impatience, hostility and bureaucratic demeanor by judges and other legal personnel); *supra* Part IV.B.2 (discussing dynamics and consequences of such behavior, as well as promising alternatives).

191. The loosest structures of all seem to characterize restraining order hearings, in part because victims of domestic violence are supposed to be able to get such orders without attorney representation. *See, e.g.*, DIST. CT. STANDARDS OF JUDICIAL PRACTICE § 1:02 (referring to MASS. GEN. LAWS ch. 209A); *see also* PTACEK, *supra* note 30, at 98-99 (noting that unlike criminal proceedings in domestic violence cases, "restraining order hearings have no set formal structure in Massachusetts"). Varying degrees of informality are also characteristic of many proceedings in dependency court. *See* Amy Sinden, *Why Won't Mom Cooperate?: A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 350-58 (1999).

192. The divorce process creates particular challenges for judges, since the goals of this process are not very clear, either for the parties or from a societal viewpoint, and the applicable standards for resolving disputes between the parties are often ambiguous, containing diverse and conflicting components. The parties also often have a wide array of conscious and unconscious goals, some but not all of which parallel those in the governing statutes. Over twenty years ago, Mnookin and Kornhauser noted, "[E]xisting legal standards governing custody, alimony, child support, and marital property are all striking for their lack of precision. . . ." Mnookin & Kornhauser, *supra* note 82, at 969. Contemporary family law texts emphasize the incommensurability of factors listed in typical equitable distribution, spousal maintenance and child custody laws. *See, e.g.*, JUDITH AREEN, FAMILY LAW, CASES AND MATERIALS 762-65 (4th ed. 1999) (listing equitable distribution, alimony and maintenance standards); SCHNEIDER & BRINIG, *supra* note 82, at 745-46, 766-778 (indeterminacy, rules and discretion in child custody decisionmaking).

193. The inability of professionals to live up to their responsibilities contributes significantly to the fact-finding gap described earlier in this Article. From both a professional responsibility and a compassionate witnessing perspective, judges and

both the anti-litigation bias of family court, discussed earlier, and the larger problem of fact-finding gaps become even easier to understand.

2. Honoring and Challenging Strategies of Disconnection

As earlier sections of this Article have documented, in many divorce and child custody cases, and certainly when civil protective orders are sought, there is a pressing need for structured proceedings to ascertain the truth of what occurred and to impose the corrective actions required to keep victims and children safe, hold batterers accountable and facilitate changes in entrenched patterns of coercion and control. Simultaneously acknowledging the compelling internal logic of present arrangements and the urgent need for change is essential.

From a compassionate witnessing perspective, this stance is also potentially energizing. Miller and Stiver devote an entire chapter of *The Healing Connection*, their paradigm-shifting book arguing for a relational approach to psychotherapy, to the radical notion of "Honoring the Strategies of Disconnection."[194] They note:

> We want to emphasize our belief in the great importance of respecting [people's] strategies of disconnection . . .
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> . . . [O]ne's strategies for staying out of authentic connection . . . are in some sense adaptive. . . . [T]hey arise when the only relationships that are available are in some fundamental way disconnecting or even destructive: at some point in a person's history there was good reason to develop these strategies . . .
>
> Instead of labeling such behaviors in therapy as resistance [or as defenses], we think of them as lifesaving–or mind-saving–strategies that people have developed for a reason. . . .

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lawyers whose functioning is compromised are accountable for their poor performance, whether or not their failures derive from their exposure to traumatic material. Judges and lawyers who are not able to carry out their functions effectively should not continue to do this work. As discussed below, however, accountability does not entail scapegoating. Addressing professional responsibility issues includes considering whether judges, attorneys and other legal system personnel have been provided with the material, intellectual and spiritual resources required to do their jobs. The more we ask system participants to perform in inhumane circumstances with inadequate tools and support and under the pressure of misleading ideas about their roles and responsibilities, the more accountability for their failures should be shared by the government and society. *See also infra* note 199 and accompanying text; *infra* app.

194. *See* MILLER & STIVER, *supra* note 119, at 148. The term now used for this body of work is "relational-cultural theory." The change in terminology reflects in part an increasing emphasis over time on nuanced attention to the specific cultural contexts relevant to individual healing and social change. *See, e.g.*, Jordan & Hartling, *supra* note 145, at 53-55.

> Thinking about strategies of staying out of connection [empathetically] can make a big difference in our whole attitude and approach. We can feel a new kind of respect and honoring–even admiration–for some of the strategies patients have developed even as we believe these strategies are making problems for the patients themselves, and for the therapist. . . .
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> . . . [I]t is not just a question of an intellectual understanding. . . . That is important, but the therapist must really be able to "get with" the feeling of them. This combination of thought and feeling makes the difference: it allows the patient to "feel the therapist feeling with her" so that the therapy *moves*.[195]

As discussed earlier, this perspective is remarkably similar to the attitude toward clients that many domestic violence advocates, feminist lawyers in domestic violence cases, and progressive child advocates have adopted. The authors of an excellent book on safety planning with battered women describe their approach as follows:

> [T]he response to domestic violence must be built on the premise that women will have the opportunity to make decisions about that response–to guide the direction and define the advocacy. This means advocacy that starts from the woman's perspective, integrates the advocate's knowledge and resources into the woman's framework, and ultimately values her thoughts, feelings opinions, and dreams–that she is the decision maker, the one who knows best, the one with the power. This is woman-defined advocacy.[196]

Several of the recent important articles on new models of lawyering for domestic violence cases give compelling examples of the challenges of attending fully to the situated logic of clients' perspectives, the positive results of respectful partnerships, and the negative consequences of failures to engage sufficiently with the complex emotional, political, and cultural resonances of each client's decision-making process.[197] As Miller and Stiver argue in the therapy context, the need to attend to the nuances of client decision-making is often most compelling when the client's decision-making appears to be (and may in fact be) negatively affected by defensive strategies

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195. *See* MILLER & STIVER, *supra* note 119, at 149-50, 152 (emphasis in original).

196. *See* DAVIES ET AL., *supra* note 54, at 3-4. The remainder of the book describes specific steps advocates can take to integrate a consciousness of their own strengths and weaknesses, a thorough and sensitive exploration of the client's perspective, both as to batterer-generated risks and life-generated risks, and the need "to integrate the advocate's knowledge, resources and advocacy into the woman's risk analysis and plans." *Id.* at 6.

197. For a fascinating exploration of these complexities, *see, e.g.*, Espinoza, *supra* note 47.

the client has developed over time for dealing with various types of adversity.[198]

Advocates who have developed coordinated community responses to domestic violence have also pointed out the greater practical efficacy of looking at the handling of domestic violence matters in each community from a systems perspective rather than in terms of the functioning of particular individuals. Legal systems must be designed to promote and reward the desired behavior of system participants, so that appropriate responses to domestic violence do not depend on heroic actions by individual workers.[199] This is one of several ways compassionate witnessing and coordinated community response initiatives overlap conceptually and practically. An important feature of compassionate witnessing practice is that it operates at all levels simultaneously. This is one of the implications of the grounding of this practice in a sense of our shared humanity. As discussed earlier, being a compassionate witness entails bringing these principles to every encounter, including attitudes toward oneself, and toward people whose behavior is disconnected, frustrating and even actively destructive.[200] Thus, relational-cultural theory, feminist and progressive thinking about lawyer-client relations and systemic reform, and compassionate witness principles combine to suggest the importance of curiosity, respect, patience, and kindness in efforts to change the legal system. Indeed, what is needed is the capacity to combine a passion for delivering on the promise of safety for victims, accountability of batterers and opportunities for restorative justice, with an equal commitment to attend carefully to the history, culture and internal logic of current practices and structures, open to learning what sustains them, what can and must be preserved, and what patterns, though honorably established, are no longer constructive, and need to be changed.

3. The Eighth and Ninth Components of Compassionate Witnessing: Creating Community and Confronting the Unknown

In light of the resilience and logic of traditional patterns, how

198. For example, Espinoza discusses difficulties and ethical blind spots she and a clinic student, operating as a lawyering team, experienced in dealing with a client whose choices were informed by circumstances, world views and concerns that were unfamiliar and uncomfortable for the lawyers, and some of which therefore weren't even discussed until after the representation was concluded. *Id.* at 912, 919-22, 928-30.

199. *See* COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND 37-40 (Melanie F. Shepard & Ellen L. Pence eds., 1999).

200. *See supra* note 143 and accompanying text.

realistic is the suggestion of implementing compassionate witnessing within the legal system? This Article introduced the concept of compassionate witnessing only after an extensive survey of the negative consequences of legal system failures, and the many obstacles to making change through more conventional means. The implicit premise is that readers—and citizens—would need a clear grasp of how badly current systems are working to consider adopting a new and challenging practice.[201] People who are committed to creating better legal responses to violence, coercion and abuse might nonetheless prefer to make change using familiar tools, or at least to have a specific and concrete plan of action toward change. The practice of compassionate witnessing is a novel approach in part because the first step is not to try to change anything, but simply to be present with reality, including aspects of reality that seem very painful. Being a witness starts with witnessing (by not surrendering to) our own deep desires to turn away from that reality or to transform it into something that is easier to bear. The notion is that actions, when they come, will be different because they are not driven by our anxiety and distress. For most people, this is likely to be a big change in perspective. Taking action as quickly as possible, without time for reflection—whether by turning away or by intervening in the situation—is one of the most common strategies people employ to avoid recognizing their own anxiety and their experiences of secondary traumatic stress. At least initially, therefore, many people may have negative reactions to this model.

Even for people who feel some attraction to this new concept, the idea of using compassionate witnessing to shape policy and legal and judicial practice may sound radical and either foolishly idealistic or painfully out of reach.[202] Again, an extrapolation from Herman's suggestions for therapists may be illuminating. Here is her description of the perspective that allows therapists (and by extension, others) to engage successfully in facilitating recovery from trauma:

> Integrity is the capacity to affirm the value of life in the face of death, to be reconciled with the finite limits of one's own life and the tragic limitations of the human condition, and to accept these realities without despair. Integrity is the foundation upon which trust in relationships is originally formed, and upon which

201. Such a new practice would require roots in psychology, a discipline that is unfamiliar and not always well understood by (or attractive to) people who have chosen to be lawyers and judges. *See supra* note 138 and accompanying text, and note 162.

202. Which may actually come down to the same thing.

> shattered trust may be restored. The interlocking of integrity and trust in caretaking relationships completes the cycle of generations and regenerates the sense of human community which trauma destroys.[203]

The first sentence is powerful and challenging, because it links integrity to the acceptance of very painful realities both in each of our lives individually and that we share with all human beings. The premise of Herman's work and of this Article is that responding to trauma depends at its core on being committed to staying in reality, no matter how distressing or painful.[204] This is a challenge for both individuals and for the systems they create. When participants in the legal system (or any other bystanders to trauma) are caught up in the drama of trying to work with trauma without acknowledging their own pain, these individuals cannot operate, at least at that moment, with the integrity of which they are capable at other times. When many of the system's participants are caught up in this drama, the integrity of the system as a whole will be seriously compromised. At moments, or in circumstances, when integrity is compromised, both other legal personnel and clients or litigants who are turning to those individuals or systems for assistance will experience distress. When the legal personnel, clients or litigants have themselves been severely traumatized by past experiences of violation, these moments of distress are likely to trigger a wide variety of painful reactions, and ratchet up the anxiety and distress they are experiencing to perhaps intolerable levels. It is this sense in which trauma is said to be contagious.[205]

Great courage is required to move toward integrity. It is not a simple matter for anyone to begin to recognize how, under the stress of the painful material we encounter, and because we do not have adequate support systems, we become caught up in our own reactivity. When we are overwhelmed, we blame and judge victims, abusers, other participants in the legal system, legislators and society for their (and our) human limitations in the face of violence, strong emotions, pain, suffering and great need. We cannot tolerate either

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203. HERMAN, RECOVERY, *supra* note 7, at 154.

204. Or more accurately, to create the intention to be in reality, and stick with the effort as one experiences distress, contracts into denial and illusion, and eventually finds one's way into a more expansive understanding that can accommodate one's feelings of distress without panic.

205. *See* HERMAN, RECOVERY, *supra* note 7, at 140. For a compelling analysis of secondary traumatic stress at the institutional level, see Don R. Catherall, *Preventing Institutional Secondary Traumatic Stress Disorder*, *in* COMPASSION FATIGUE: COPING WITH SECONDARY TRAUMATIC STRESS DISORDER IN THOSE WHO TREAT THE TRAUMATIZED 232-40 (Charles R. Figley ed., 1995).

our own suffering and limitations or the suffering and limitations of others around us.

One of the dangers of work with trauma is that, if we become overwhelmed, we will forget to inquire into the distortions in our thinking that both direct and secondary traumatic stress creates. Our pain is real, but some of its causes may be in our thinking about reality, rather than in reality. For example, in Herman's definition of integrity,[206] the limitations of human existence are referred to as "tragic." The limitations to which she refers are real. Bodies become sick and die; our physical strength and mental capacities are limited even when we are in good health; there is much about life that is beyond our understanding. Moreover, human beings have great creative and destructive powers, and are capable of terrible atrocities. Recognizing the pain that destructive behavior can and does cause ourselves and others is a critical step in human development. When we lack this awareness, we are dangerous to ourselves and others. Compassionate witnessing reminds us that we are all dangerous in this way at least some of the time. Indeed, being caught up in our own reactivity, and therefore out of touch with reality, creates a danger of harm to ourselves and others. The word "tragic" aptly describes these destructive effects of human unconsciousness.

At the same time, labeling human limitations as "tragic" can also have pitfalls, if we confuse the map with the territory,[207] and do not continue our inquiry. Any limitation, or for that matter, any action, no matter how tragic, is never only tragic. Destruction and creation are always present. Inquiry leads us to recognize that what seems tragic from one perspective is always also simply part of what is—like the fact that, unaided, humans cannot fly or live underwater. Human beings have an innate capacity to treat limitations, whatever their origins, as a source of inspiration. The work of healing allows people to move from mourning a tragedy to reconnection, which is a process of finding the creative possibilities in what had previously seemed only tragic and a reason for despair. The polarized thinking to which we are all subject, and which interpersonal trauma brings to the fore for all of us, needs to be the subject of active inquiry, lest it obscure promising avenues for change. With inquiry, we are able to move from a dualistic and categorical perspective, in which destruction and creation are sharply delineated and separate from each other, to a

206. *See supra* note 203 and accompanying text.

207. This phrase from the work of Milton Erickson reminds us that the words, names and categories we use are not themselves reality, but rather only tools to communicate and interact with each other.

nondualistic perspective, which is more fluid and open-textured. Judith Herman's definition of integrity uses the word "tragic" in this nondualistic way, when she links the mature capacity to accept human limitations with the work of healing from trauma, and speaks of the possibility of affirming life in the face of death.

Thus, promoting a capacity for inquiry is a critical requirement for improving legal system responses to domestic violence. Supportive communities of compassionate witnesses, committed to self-care, can, through inquiry, restore a capacity for integrity both to individual lawyers, advocates and judges and to the legal system as a whole.[208] One of the first subjects of inquiry may be our belief that creating such communities will necessarily be difficult or even impossible.

As discussed earlier, building interdisciplinary communities of support has already begun in many localities, often aided by national organizations, private foundations, universities and the state and federal governments.[209] One critical need is for efforts to restore the social safety net, including in particular a funding base and organizational structure for supportive social service and mental health services and programs.[210] Domestic violence and child maltreatment cases place tremendous demands on professionals who work with families and children. Since the funding, training, and programs are not there, the professionals who remain are also stressed because they are underpaid and overworked, leading to high turnover and flight from these occupations. Screening and outreach for domestic violence and child maltreatment, provision of treatment services, and professionals' capacity to serve as compassionate witnesses for clients are among the resources that are needed and currently in extremely short supply. The strain on these supportive services also has obvious implications for the possibility of undertaking interdisciplinary collaborations to support compassionate witnessing in the legal system.

Strengthening our conscious awareness that the work in which

208. At the level of individual institutions, Catherall suggests steps needed to implement a secondary traumatic stress prevention program, including careful planning; opportunities for workers to normalize and better understand their reactions, and have a safe environment in which to share and work their reactions through; and steps to facilitate healthy mechanisms for coping with stress in general. Catherall, *supra* note 205, at 240-46.

209. *See supra* note 185 and accompanying text.

210. Making these resources available appears inconsistent with present trends toward concentrating increasingly limited mental health resources on pharmacological and biochemical interventions and very short-term therapies. GROVES, *supra* note 8, at 129-32. Similarly, the financing of health care may turn out to be a critical issue, as well as the associated shortage of nurses.

both care-giving professionals and the legal system are engaged is the work of responding to atrocities with inquiry, truth-telling, restorative justice and peacemaking may lead to the kinds of energized and widespread activism that will in turn make possible the fundamental changes in collective understanding and resource allocation that are called for. The paradox is that our attitudes and our practices can only be changed in concert with each other.

The Appendix lists resources that can serve as starting points in efforts to find support and create community both on an individual, local, or professional level and more broadly. In addition, there are increasing links between work in the United States and internationally on women's and children's rights to equality and justice, including freedom from violence, abuse and intimidation. As discussed in Liz Schneider's book, this work is carried out both in explicitly feminist terms and in the context of human rights, restorative justice and other peacemaking work, and has enormous transformative potential.[211] For example, the work of commissions on truth and reconciliation in South Africa and other countries is instructive and inspiring to anyone interested in using compassionate witnessing perspectives to inform systemic change efforts.[212]

There are at present deep political divisions both within the United States and internationally, which include major disagreements about the nature, source and solution of domestic and global problems. At the same time, all sides in contemporary political discourse—and most people in the world, whether or not they are politically active—tend to think our individual and collective happiness and well-being depend to a large extent on making significant changes in the world around us. When such changes seem unlikely, most of us respond with anger and despair, and many of us are inclined to put those feelings into action. The alternative is to change our thinking to be able to respond with kindness and integrity to people around us, whatever they are doing or thinking at the moment.[213] When we think the world around us must change in order for us to practice kindness, we adopt what might be called a politics of disconnection.[214]

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211. SCHNEIDER, BATTERED WOMEN, *supra* note 15, at 53-56.

212. A Black psychologist appointed to South Africa's Truth and Reconciliation Commission has written a compelling account of her work as a compassionate witness with Eugene de Kock, a former colonel in the South African police force, who led a counterterrorism unit that tortured and killed Black activists during the apartheid years. PUMLA GOBODO-MADIKIZELA, A HUMAN BEING DIED THAT NIGHT: A SOUTH AFRICAN STORY OF FORGIVENESS (2003). *See also* Rachel L. Swarns, *Looking for Hope in an Apartheid Monster's Eyes*, N.Y. TIMES, May 10, 2003, at A1.

213. *See infra* app. for works expressing this perspective.

214. Note, however, that the practice of compassionate witnessing includes being

Our wish to know the future before we commit ourselves to living in the present explains some of the difficulty we have in creating and maintaining systems capable of meeting basic human needs for significant parts of the population, or coming together to address pressing social problems either domestically or globally. Perhaps the most pressing of these problems are self-reinforcing patterns of violence and domination that seem to many people to be a necessary feature of human life on the planet. The challenge is for people who see the possibility of a different politics to subject our own thinking to inquiry, and to discover immediately that deep connection is always available, when before we believed that we were living in a society that was somehow irreversibly committed to disconnection and denial.

What do lawyers and judges bring to this challenge of self-inquiry? Many people choose the legal profession in order to develop the capacity for intellectual analysis, or to seek personal power, both of which may have as a subtext the hope of thereby thinking our way out of feelings of vulnerability we perceive as intolerable and tragic.[215] Lawyers, like many professionals, are trained simultaneously in the arts of connection and disconnection. While the dominant emphasis appears to be the pursuit of material gain, at a deeper level, people also become lawyers to help create a legal system governed by justice and mercy and to make possible the social connections human beings need to flourish. Both levels are resources in creating a system with integrity. Maturity for lawyers and judges, as for all adults, consists in being able to let go some of the sense of difference and specialness we rely on to shield ourselves against the need to inquire into how our own thinking is contributing to our suffering. Making change depends on being able to add to our intellectual and professional accomplishments the capacity to recognize the possibility of fully embracing ourselves and our circumstances, including our capacities to make change. It is when we can do this that we can create the kind of legal system in which we would like to be participants. Recognizing the necessary—indeed, foundational—connections between care and concern for ourselves and care and concern for others is what makes it possible for us to reconcile the apparent

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aware of and willing to experience our own anger and that of others, and indeed, maintaining relationships with ourselves and others that are sturdy enough to encompass everything that arises in those relationships. Anger is a valuable and potent resource for change. For useful discussions on point, see, e.g., LICHTENBERG, *supra* note 111, at 157-59, and ROSENBERG, *supra* note 133, at 135-53.

215. Of course, domestic violence work, and family law more generally, evokes the sense of personal vulnerability in particularly powerful ways, because family settings are those in which everyone first learns about love and hate, power, authority and vulnerability, and much else that is basic to our lives as human beings.

dichotomies between self-interest and the well-being of others, and find our calling, whatever it is.

Lawyers and judges who have chosen domestic violence and child protective work (both in the private litigation and child welfare contexts) have a particular opportunity to be compassionate toward themselves and hence to develop the capacity for compassion toward others, simply because lawyers and judges are themselves exposed to the deleterious effects of secondary traumatic stress. The need is for each person who is able to do so to explore the possible usefulness of this practice, and to encourage others. When numbers build, compassionate witnessing may take hold in one location at a time, as there is a critical mass necessary to create a supportive community, disseminate new norms of personal and professional conduct, and help community members create personal support systems to facilitate individual and collective work for change.[216]

One of the most difficult tasks for people who have chosen to serve as witnesses is staying present at the hinge of possible change when our own thinking is leading us to despair and a sense of being overwhelmed. The practice of compassionate witnessing opens the heart simultaneously to the power of each moment of our lives, and our inability to know the future. Whenever a person feels a sense of urgency about change needing to occur on a particular timetable (immediately, if not sooner) or in a particular way (the way I see it), that person is in the grip of reactivity, and in need of compassion and support themselves.

Compassionate change agents are those who are willing to subject their own thinking to inquiry, and to treat themselves kindly, including at moments when reactivity takes over, as it inevitably will. As a result of this acceptance, and a conscious commitment to doing the best one can in each moment, compassionate witnesses can stay engaged with everyone else, who is, of course, also working things out for themselves as best they can (although in times of reactivity, even the most compassionate observer may find this difficult to believe!).

Thus, the question posed at the beginning of this subsection of whether implementing compassionate witnessing in the legal system

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216. Efforts to promote constructive change can be hampered both if direct service is neglected in favor of novel programs promising dramatic breakthroughs, and if direct service is funded to the exclusion of interdisciplinary collaborations and needed support networks. As to the latter, Professor Joan Meier reports, for example, that funding for a conference designed to create a peer support network for interdisciplinary domestic violence collaborations in clinical and non-clinical settings was cut from a 1999 VAWA grant because of VAWA's emphasis on direct service funding. Telephone Interview with Joan S. Meier, Professor of Law, The George Washington University Law School (Feb. 2, 2003).

is realistic is itself a question loaded with understandable impatience, born of yearning to end or escape the uncertainty and perhaps distress associated with present circumstances.[217] The practice of compassionate witnessing calls us to be kind to ourselves when we find uncertainty difficult or impossible to tolerate, in the knowledge that if we are kind, we will better be able to stay fully present to reality and see where to direct our attention at the moment.[218] Choosing our steps in this way permits us to respond with integrity. From this perspective, compassionate witnessing is not an alternative to action, but rather a necessary component of action.

CONCLUSION

A chapter titled "Remembrance and Mourning," in the second half of Judith Lewis Herman's book, *Trauma and Recovery*, begins as follows, "In the second stage of recovery, the survivor tells the story of the trauma. She tells it completely, in depth and in detail. This work of reconstruction actually transforms the traumatic memory, so that it can be integrated into the survivor's life story."[219] This Article argues that the fact-finding gap in civil domestic violence proceedings deprives victims and also everyone else—their children, perpetrators, and bystanders—of an essential resource: a forum in which people can tell the stories of trauma and have those stories witnessed by others, so that the traumatic memories can be transformed and integrated into people's life stories, into the web of their intimate relationships, and into the life of the society. As one researcher put it, "Within the community of battered women and their advocates, the family courts have gained a reputation as a place where women don't find justice."[220]

It is important to make the link between ascertaining the facts that will permit the redress of individual wrongs, and the needs of the society as a whole. As Herman observes in discussing trauma survivors who choose to seek formal legal redress for crimes against them,

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217. Philip Lichtenberg suggests that change agents need to "anxiously act assertively," LICHTENBERG, *supra* note 111, at 181-90, and discusses the tendency to see change efforts as impractical in part because we are all anxious and ambivalent about making change, *id.* at 199-205.

218. If kindness to ourselves seems beyond our reach, perhaps we will be able to remember to reach out for support, which can restore our connection to ourselves and give us new resources for addressing whatever provoked our distress. Under conditions of overwhelm, reaching out for personal support is almost always the most constructive choice available.

219. HERMAN, RECOVERY, *supra* note 7, at 174.

220. *See supra* note 103 and accompanying text.

> [The survivor] . . . recognizes . . . that holding the perpetrator accountable for his crimes is important not only for her personal well-being but also for the health of the larger society. She rediscovers an abstract principle of social justice that connects the fate of others to her own. When a crime has been committed, in the words of Hannah Arendt, "The wrongdoer is brought to justice because his act has disturbed and gravely endangered the community as a whole. . . . It is the body politic itself that stands in need of being repaired, and it is the general public order that has been thrown out of gear and must be restored. . . . It is, in other words, the law, not the plaintiff, that must prevail."[221]

The concept of restorative justice brings critical depth and nuance to efforts to understand the challenges facing the legal system and the society in dealing with crimes, particularly those involving intimate violence. The reality of the human condition is that we all share experiences of being the perpetrator, the victim and the bystander, although in each of our lives, different strands are likely to be more visible. Therefore, our well-being individually and collectively depends on our ability to treat perpetrators, victims and bystanders with dignity and compassion. Each of us is helped when we can establish institutions and practices that attend humanely and effectively to the circumstances of each person. For both perpetrators and victims, this means holding people accountable for their wrongdoing, halting destructive behaviors[222] and providing the kinds of support that create genuine opportunities for change and reconciliation. Our legal system presently is unable to carry out the basic tasks of fact-finding that would permit the requisite truth telling in the presence of witnesses, moral reckoning and firm, compassionate, supportive and effective responses to intimate violence.

The reality we face is that unless our attitudes shift, we will continue to be overwhelmed by the magnitude of the changes needed for lawyers and courts to provide reliable help to perpetrators and adult and child victims of domestic violence. We will also continue to believe that the wider social changes needed to make restorative justice possible are entirely out of reach. This Article suggests that these challenges are simply systemic manifestations of

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221. HERMAN, RECOVERY, *supra* note 7, at 209-10.

222. This may include the protective use of force, including if necessary incarceration, which should not however be confused with the punitive use of force. Marshall Rosenberg explains the distinction as follows: "The intention behind the protective use of force is to prevent injury or injustice. The intention behind the punitive use of force is to cause individuals to suffer for their perceived misdeeds." ROSENBERG, *supra* note 133, at 155-56. *See id.* at 155-63 for further discussion.

vicarious traumatization. Jean Koh Peters observes, with regard to lawyers who represent children in child protective proceedings that, "[t]he lawyer who is most dedicated to trying . . . to do justice to the client's own experience of his or her world is also the one most likely to find the client's life challenges seeping into the lawyer's own daily functioning."[223] She continues,

> A pro-active strategy of preventing the negative effects of stress and vicarious traumatization from accumulating to a disabling level . . . are crucial assets to the lawyer who wants . . . to continue to perform this hard and important work. . . .
>
> [Understanding] vicarious traumatization also frees the embattled lawyer from time- and energy-consuming battles with shame and low self-esteem which are misplaced in this context. [224]

At a systemic level, the dismaying conditions in civil domestic violence proceedings and dependency courts both reflect and cause secondary traumatic stress and burnout. Our ability to change the conditions in our courts (and in society) likewise depends on our ability to free ourselves from battles with shame, blame and internal warfare, while each positive systemic change will help us step away from attack and defense and toward more loving and constructive relationships with ourselves and others.

The age-old practice of compassionate witnessing is gaining new impetus in the work of many people who have dedicated themselves to the work of peacemaking and restorative justice in the domestic lives of men, women, and children. People may now be ready to make the connections between individual practice and systemic integrity. Recognizing that change begins with ourselves and benefits everyone—victims, perpetrators and bystanders to domestic violence—can energize each of us to begin creating healing relationships, and the experiences of safety, remembrance, mourning, reconnection and commonality which such relationships facilitate.[225] The legal system has a distinctive role in the process of

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223. PETERS, *supra* note 16, at § 9-6.

224. *Id.*

225. Philip Lichtenberg makes a similar point when he notes that

> liberation psychology . . . does not call for sacrifice on the part of any activist engaged in the liberation struggle, and it does not privilege [people in any particular social position]. . . . To meet as equals in the contact of dialogue is the essence of liberation psychology. It is the movement away from sacrifice on the part of anyone . . . that animates the . . . commitment and actions that are aimed at transforming systems of exploitation into systems of cooperation among equals.
>
> Because each of us is oriented both to change and resistance to change, we are all available at one time or another for efforts to alter exploitative systems. . . . The focus of attention is upon actions that facilitate the

preventing and healing from trauma: creating a sustained capacity for finding facts accurately when there are allegations of violent and coercively controlling behavior, applying governing norms fairly, creating the conditions for due process and the respect for human rights in the legal process, and cooperating with other social institutions to respond effectively and humanely to the needs of people caught up in the drama of violence and coercion and control. Adopting the practice of compassionate witnessing ourselves has the advantage of bringing immediate comfort. Extending the practice to a wider audience in the legal system is one pathway between the difficulties of our present situation and a more hopeful future.

As the body of the Article illustrates, the intellectual underpinnings and societal implications of the practice of compassionate witnessing are complex, while the practice itself is both simple and profound. In each area of small or large deficiency that we encounter, the challenge is to mobilize human creativity to make change possible. The holistic nature of the practice of compassionate witnessing plays an essential role. The desire to turn away from suffering is powerful. Yet, as Herman points out, the force of secrecy and denial is matched by the yearning for openness and recovery. When people practice compassionate witnessing, there is a synergistic effect both on people around them, and on the resources available to support change. No one can or needs to become a compassionate witness in isolation, because small shifts in a new direction call forth similar impulses that everyone shares to some degree. Likewise, no one can or needs to take responsibility for discerning all the steps necessary to bring about the changes required. We engage most deeply with reality when we form the intention to be guided by kindness, integrity and compassion in our work, inquire into distortions in our thinking that cause unnecessary suffering to ourselves and others, find other like-minded people, and proceed with caution and curiosity into the unknown.

> dialogue of equals, whatever the source. . . . Change depends upon [the] support of all who support it in whatever degree that is embraced.

LICHTENBERG, *supra* note 111, at xi-xii.

APPENDIX

I. A Note on Terminology

The concept of compassionate witnessing which is explored in this Article has roots in many traditions. Although different terms may be used, the array of skills, beliefs, attitudes, understandings and patterns of behavior required for compassionate witnessing are being taught and practiced in a number of settings. Some of these settings, as well as some helpful written materials, are listed below. Readers interested in exploring this practice further are encouraged to attend to common threads and significant variations in work that is being done, and not to place undue emphasis on terminology as a method of identifying similarities and differences.

Note also that the concepts of compassion and witness are sometimes imbued with specific theological or sectarian associations. For a history of the Greek, Hebrew and Christian concepts of witness as these are reflected in the Old and New Testaments, including the relationship of these concepts to legal proceedings and to theological debates within the Christian tradition, see Allison A. Trites, *The New Testament Concept of Witness* (1977).

II. Selected Bibliography and Websites

A. Of General Interest

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- MARSHALL B. ROSENBERG, NONVIOLENT COMMUNICATION: A LANGUAGE OF COMPASSION (1999), and the CENTER FOR NONVIOLENT COMMUNICATION at http://www.cnvc.org.
- THEODORE ISAAC RUBIN, COMPASSION AND SELF-HATE (1975).

B. Traumatic Stress Studies and Psychology

- COMPASSION FATIGUE, COPING WITH SECONDARY

TRAUMATIC STRESS DISORDER IN THOSE WHO TREAT THE TRAUMATIZED (Charles R. Figley ed. 1995).

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- JEAN BAKER MILLER & IRENE PIERCE STIVER, THE HEALING CONNECTION: HOW WOMEN FORM RELATIONSHIPS IN THERAPY AND IN LIFE (1997).
- JEAN BAKER MILLER TRAINING INSTITUTE at the WELLESLEY CENTERS FOR WOMEN, at http://www.JBTMI.org or http://www.wcwonline.org.
- LAURIE A. PEARLMAN & KAREN W. SAAKVITNE, TRAUMA AND THE THERAPIST: COUNTERTRANSFERENCE AND VICARIOUS TRAUMATIZATION IN PSYCHOTHERAPY WITH INCEST SURVIVORS (1995).
- THE INTERNATIONAL SOCIETY FOR TRAUMATIC STRESS STUDIES at http://www.istss.org.

C. Legal Resources

1. A useful overview

Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259 (1999). Silver observes:

> [M]any writers have attempted to educate the bar and the academy about the importance of understanding the operation of the unconscious on the practice of law. Yet most of this literature appears to be largely unknown outside of a small community with a particular interest in or inclination towards psychology.

Id. at 289. Nonetheless, Silver concludes there is reason for optimism, both because of the "movement towards mainstreaming public discourse about mental and emotional illness . . . [and] a convergence of several threads of scholarship that focus on bringing humanism to bear on the lawyer/client relationship." *Id.* Among the threads Silver discusses are Therapeutic Jurisdprudence, affective lawyering, lawyering with an "ethic of care" and Creative Problem Solving. *Id.* at 293-95. More recently, the term "Comprehensive Law Movement" has been used as an umbrella term for the approaches Silver describes and several others, including the Collaborative Lawyering Movement. *See, e.g.*, the eponymous panel at the American Association of American Law Schools' Annual Meeting Workshop on Dispute Resolution: Raising the Bar and Enlarging the Canon, January 3, 2003.

2. Books

- ELIZABETH DVORKIN ET AL., BECOMING A LAWYER: A

HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM (1981).

- JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (1997) and the 1999 CUMULATIVE SUPPLEMENT.

3. Additional Law Review Articles

- Susan Bryant & Maria Arias, *Case Study: A Battered Women's Rights Clinic: Designing a Clinical Program Which Encourages a Problem-Solving Vision of Lawyering that Empowers Clients and Community*, 42 WASH. U. J. URB. & CONTEMP. L. 207 (1992).
- Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 MICH. L. REV. 901, 921-27 (1997).
- Rhoda Feinberg & James Tom Greene, *Transference and Countertransferences Issues in Professional Relationships*, 29 FAM. L.Q. 111, 114 (1995).
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- Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295 (1993).
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- Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225 (1996).
- Kimberly E. O'Leary, *Creating Partnerships: Using Feminist Techniques to Enhance the Attorney-Client Relationship*, 16 LEGAL STUD. F. 207 (1992).
- Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019, 1025-26 (1997).