Locating Lawyering

Power, Dialogue and Narrative

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1. *Introduction*

Feminist legal academics have made heroic efforts to facilitate the evolution, reform and revolution of the law and legal processes in manners that reflect women's experiences.[1] The importance of lawyering has been highlighted by these efforts, and in recent years feminists and others have focused attention on rethinking theories and practices of lawyering. This article contributes to these efforts in two manners. First, it focuses attention on reflecting the experiences of women clients in theories and practices of lawyering. Second, it considers the situated aspects of lawyering activity and the knowledge produced by this activity.

The blossoming of interest in critical theories and practices of lawyering in recent years has sometimes included talking to or interviewing clients about their experiences.[2] However, little of this work focuses on women survivors

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1 Elizabeth M Schneider, "Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse" (1992) 67 *NYU LR* 520 at 521; Elizabeth M Schneider, "The Dialectic of Rights and Politics: Perspectives From The Women's Movement" (1986) 61 *NYU LR* 589 at 601–2; bell hooks, "Theory as Liberatory Practice" (1991) 4 *Yale JL & Feminism* 1 at 8; Personal Narratives Group, "Origins" in Personal Narratives Group (eds), *Interpreting Women's Lives* (1989) 1 at 3; Kathryn Abrams, "Hearing the Call of Stories" (1991) 79 *Cal LR* 971 at 975–6; Mary Jane Mossman, "Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change" (1993) 15 *Syd LR* 30 at 50; Patricia A Cain, "Feminist Jurisprudence: Grounding the Theories" (1989) 4 *Berkeley Women's LJ* 191; Christine Littleton, "Feminist Jurisprudence: The Difference Method Makes" (1989) 41 *Stan LR* 751 at 763–71.

2 William L F Felstiner and Austin Sarat, "Enactments of Power: Negotiating Reality and Responsibility in Lawyer Client Interactions" (1992) 77 *Cornell LR* 1447 at n12: "we observed divorces over a period of thirty-three months ... We followed one side in forty cases, ideally from the first lawyer–client interview until the divorce was final ... interviewing both lawyers and clients ..."; Lucie E White, "To Learn and To Teach: Lessons From Driefontein on Lawyering and Power" [1988] *Wis LR* 699 at 702: "During the two months of my visit, I had several conversations with the lawyer and the organizer who worked with the

of domestic violence as clients. "I was shocked to learn how little had been written in law reviews about the relationship between battered women and their civil lawyers."[3] In addition, the category of "experience", and the assumption that all women share one unified experience, has been challenged in recent years, especially by women of colour and by "postmodernists".[4] For some, this challenge has resulted in rejecting the feminist project of reflecting women's experiences in knowledge.[5] Others have moved from a focus on experience to a focus on "narrative" or "stories", words which suggest the constructed aspects of experience. While harbouring no illusions about the authenticity of experience, and making no claims for the universality of the experiences reflected here, I continue to be convinced of the utility of the category of experience:

> Given the ubiquity of the term [experience], it seems to me more useful to work with it, to analyze its operations and to redefine its meaning. ... Experience is at once always already an interpretation and in need of interpretation. What counts as experience is neither self-evident nor straightforward; it is always contested, always therefore political.[6]

Attention to women's contested constructions and reconstructions of emotions and events, in all their diversity, whether consistent with or in opposition to the dominant constructions, is crucial to the feminist project of evolution, reform and revolution of the law and legal processes. One goal for the development of feminist theories and practices of lawyering is therefore the facilitation of this feminist project through the reflection of women's experiences, in all their complexity and contestation, in these theories and practices.

This article contributes to this goal by considering developments in feminist theories of lawyering in light of the experiences of the women clients involved in a New Zealand research project focusing on lawyering. The research project was conducted through a series of in-depth group interviews[7] with women survivors of domestic violence who had hired lawyers to obtain non-molestation and/or non-violence protection orders under the *Domestic Protection Act* 1982 (NZ). The interviews included women who were currently refuge[8] workers as well as women who were not. The non-Maori

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community, and with a volunteer lawyer who had gone to the village periodically to staff a legal clinic for the villagers. I also visited Driefontein with the organizer for two days, observing her work with villagers and the operation of the legal clinic. During that visit I interviewed several of the community leaders and some of the participants in the legal clinic. I was not able to interview other villagers at length, to explore their first-hand impressions of the events."

3 Kathleen Waits, "Battered Women and Family Lawyers: The Need for an Identification Protocol" (1995) 58 *Alb LR* 1027 at n8.

4 See Drucilla Cornell, *The Philosophy of the Limit* (1992) at 1–12; Somer Brodribb, *Nothing Mat(t)ers: A Feminist Critique of Postmodernism* (1992).

5 Diana Fuss, *Essentially Speaking: Feminism, Nature and Difference* (1989) at 113–9; but see bell hooks, *Teaching to Transgress: Education as the Practice of Freedom* (1994) at 77–92.

6 Joan W Scott, "Experience" in Judith Butler and Joan W Scott (eds), *Feminists Theorize the Political* (1992) at 22, 37.

7 Alfred E Goldman, *The Group Depth Interview: Principles and Practice* (1987).

8 "Refuge" is the New Zealand term for safe houses maintained by women for women escaping situations of domestic violence. Over 50 women's refuges are members of the National Collective of Independent Women's Refuges ("NCIWR"). See The National Collective of Independent Women's Refuges Inc., *Fresh Start: A Self Help Book For New Zealand Women in Abusive Relationships* (1993).

women[9] were interviewed in groups of three women over a two-day period. The first interview asked the women open-ended questions about their legal representation, guiding them chronologically through the legal process and asking them how they felt about their interactions with their lawyers. The second interview provided opportunities for the women to analyse their experiences and to brainstorm generally about legal representation.

The non-Maori women reported that lawyers share with the police, judges,[10] and society generally the tendency to minimise and trivialise domestic violence and to blame victims for the violence. The women also reported that many of their lawyers did not understand the dynamics of domestic violence. These attitudes shed light on the women's reports that the lawyers often did not believe them and that they sometimes felt the lawyers did not provide adequate advocacy.[11]

The second contribution of this article to feminist efforts to transform the law is its attention to the situated aspects of theories and practices of lawyering.[12] Grounding feminist theories in these women's experiences involves situating the theories. Situating theories and practices, or locating lawyering, presents challenges to the widely accepted traditional or "fiduciary" model of lawyering. The traditional model of lawyering requires the lawyer to act for the benefit of the client to further the interests of the client.[13] The lawyer is

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9 Consistent with the parallel Maori/non-Maori organisational structure of NCIWR, which was demanded by Maori women, interviews were conducted in a parallel Maori/non-Maori interview process. I conducted the non-Maori interviews and interpreted the experiences of the non-Maori women. A Maori woman conducted the Maori interviews and another Maori woman is interpreting the experiences of the Maori women. To some extent, separate interview methods were developed for the Maori women. In total, nine Maori and fifteen non-Maori women were interviewed. For a more complete discussion of the methodology see Nan Seuffert, "Lawyering and Domestic Violence: a Feminist Integration of Experiences, Theories and Practices" in Julie Stubbs (ed), *Women, Male Violence and the Law* (1994) at 79–90. For comment on the research methodology from a Maori perspective see Stephanie Milroy, "Maori Women and Domestic Violence: the Methodology of Research and Consequences for Critical Race Analysis" (forthcoming)(1996) 4 *Waikato LR.*

10 Ruth Busch, Neville Robertson and Hilary Lapsley, *Protection From Family Violence: A Study of Protection Orders Under the Domestic Protection Act*, Victims' Task Force, (1992) Wellington at 184–90.

11 Karen Czapanskiy, "Domestic Violence, the Family, and the Lawyering Process: Lessons From Studies on Gender Bias in the Courts" (1993) 27 *Fam L Q* 247 at 250: "Women litigants face the risk of bad outcomes because they may be subject not only to biased judging but also to biased lawyering process."

12 White, above n2 at 702. "The story I tell sets out just one version of 'what happened.' ... Even though I do not seek to impose and authoritative meaning on the events, I cannot tell any story about Driefontein without 'taking a stand,' in the dual sense of announcing my own perspective on the events and acknowledging its contingency."; Lucie E White, "Paradox, Piece-Work, and Patience" (1992) 43 *Hastings LJ* 853; Lucie E White, "Seeking '... The Faces of Otherness': A Response to Professors Sarat, Felstiner, and Cahn" (1992) 77 *Cornell LR* 1499 at 1502 referring to "a new body of situated micro-descriptions of lawyering practice".

13 Wayne Thompson, "Conflict of Interest" [1994] *NZLJ* 64; a similar model of lawyering has been described as the "lawyer-as-hired-hand" model: "The relationship between lawyer and client is built upon trust and respect: clients are to trust lawyers to act in the clients' best interests and, in return, lawyers will respect the clients' autonomy. It is not for lawyers to impinge upon that autonomy, but to act on behalf of the client to realize their

required to "fearlessly uphold the client's interests".[14] Upholding the interests of the client includes, at a minimum, discerning what outcome the client would like, presenting the legal options to the client, advising the client about the options and helping the client choose among the options. Once the client has chosen, the lawyer is responsible for making the strongest argument possible in support of the client's case.

This traditional model of lawyering assumes that the lawyer is neutral and objective with respect to the process of eliciting the client's story, determining the relevant legal responses to the client's problems, presenting the options to the client and presenting the client's story to the court.[15] The assumptions are that language is transparent and that dialogue between lawyer and client is not affected by any power disparity. It is assumed that the lawyer passively implements the client's desires once the client has chosen. The lawyer is also assumed to be neutral with respect to explaining the legal processes involved to the client.

The development of situated knowledges has resulted from the recognition that knowledge claims of objectivity and neutrality, such as those contained in the traditional model of lawyering, have been false claims. Knowledge is always situated in particular, partial experiences. Donna Haraway recognises the partiality of all experiences in her argument for the production of embodied knowledges that are *situated*.[16] Her argument is that we should value knowledge claims that are located and take responsibility for the partiality of the knowledge produced, rather than valuing those that make what can only be false claims of universality.[17]

> I am arguing for politics and epistemologies of location, positioning and situating, where partiality and not universality is the condition of being heard to make rational knowledge claims.[18]

The suggestion is that false claims of objectivity and universality are irrational and therefore lack value; locating knowledge and recognising its partiality is more rational and therefore more valuable.

The recognition that all knowledge is situated has implications for theories of lawyering. Lawyers are not neutral and objective decision-makers.

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interests and inspirations", Allan C Hutchinson, "Calgary and Everything After: A Postmodern Re-Vision of Lawyering" (1995) 33 *Alberta LR* 768 at 770–1.

14 New Zealand Law Society, *Rules of Professional Conduct* (2nd edn, 1992) R 1.02 commentary; R 8.01 and commentary; Robert Enright, "Legal Ethics and the Family Lawyer" (1994) 7 *AULR* 821 at 821–3: "[I]n New Zealand Family Court lawyers also owe a duty to the Family Court, which includes a duty not to mislead the court and which overrides the duty to the client where there is a conflict," at 823. This requirement of partisanship is common to professional ethics in Common Law countries. Thompson, above n13 at 65.

15 "The traditional image of lawyering is centred on the idea that lawyers are supertechnocrats; they possess a special set of talents and techniques which they deploy for the advantage of those people who hire them. They regard themselves as being neutral on the substance and form of the law; their task is very much to apply the law, a little to criticize it, but most certainly not to make it." Hutchinson, above n13 at 770–1.

16 Donna Haraway, *Simians, Cyborgs and Women: The Reinvention of Nature* (1991) at 183–201.

17 Id at 190.

18 Id at 195.

> [T]he insistence that lawyering is a neutral exercise that does not implicate lawyers in any political process or demand a commitment to any particular ideology is as weak as it is wilful. Such an image is a profoundly conservative and crude understanding of what it is to engage in the business of courts, legislatures and the like: it accepts and works within the bounds of the *status quo*.[19]

Knowledge is produced in all lawyer–client interactions in countless acts of interpretation: knowledge about the client, her stories and her desires, knowledge about the lawyer and her role and knowledge about the law and the client's and the lawyer's positions in relation to the law. This knowledge production is informed by the context in which it takes place, including the perspectives and experiences of the lawyer and client.[20] The representation that the lawyer provides to the client is not a simple act of transparently re-presenting the client to the court. It involves countless constructions and reconstructions of the client and the client's story for the court.

The recognition of the partiality of lawyering and of the situated aspects of knowledge produced in the lawyer–client relationship has at least three implications for theorising lawyering. First, it requires attention to the location(s), or situation(s) of lawyers and of clients in society. The traditional model of lawyering assumes that all lawyers and all clients are similarly located in society. Situating knowledge highlights power disparities in lawyer–client relationships, disparities that vary according to the particular locations of lawyer and client and the context(s) in which the lawyering takes place. The traditional model of lawyering assumes that lawyering activity is independent of social context. Situating knowledge suggests that social contexts are an integral aspect of knowledge produced in lawyer–client relationships, and theories of lawyering should therefore recognise and respond to these contexts. In Part 2 of this article I situate feminist theories of lawyering by discussing the location of lawyers in society and the location and experiences of 15 non-Maori women survivors of domestic violence. Situating lawyers and these clients highlights the power disparities between these two groups.[21] Part 2 therefore discusses and develops an analysis of power and critically analyses models of lawyering for the potential to redress power imbalances.

Second, situating knowledge suggests attention to the processes of lawyering that produce knowledge in the lawyer–client relationship. Knowledge is produced in the countless interactions and interpretations that make up the lawyering relationship. By recognising the co-construction of law and facts, situating lawyering suggests the importance of dialogue and translation in these processes. Dialogue between lawyer and client is crucial to these processes according to any model of lawyering. In the fiduciary model, dialogue is necessary to elicit the client's story, to present the client with options, and to determine the client's interests. The women's experiences suggest that a

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19 Hutchinson, above n13 at 773; William Simon, "Visions of Practice in Legal Thought" (1984) 36 *Stan LR* 469.

20 Clients' wishes cannot always be clearly discerned, and no matter how clear the client, lawyers will have a part in interpreting clients' wishes and should take responsibility for those interpretations. White, above n2 at 765.

21 Divorce clients are typically weaker parties in negotiation with lawyers. Felstiner, above n2 at 1497.

power disparity between lawyer and client and the gender bias[22] of the legal system and the actors within the system affect both the extent to which they are heard and believed, and the response to their experiences provided by the system and by their lawyers. Dialogue, or the exchange of ideas between lawyer and client in the lawyer–client relationship, is addressed in Part 3.

Attention to the processes of lawyering also highlights problems with the "fit" between women's experiences and the harms protected by the law: the law does not provide redress for many harms suffered by women.[23] The women raised issues concerning the translation of their stories to the court and their lawyers' explanations of the legal process. Their concerns suggest that situated feminist theories of lawyering should address issues of the translation of clients' stories into the categories of harms recognised by the law, and the possibilities for the expansion of those categories. Part 4 of this article therefore addresses issues of translation in lawyer–client relationships.

Finally, situating knowledge requires situating theories of lawyering in the context in which the lawyering takes place, recognising the experiences reflected in the theory and the limitations of those experiences. It suggests that it is misguided to assume that one "grand theory" of lawyering, such as the traditional model of lawyering, is sufficient; situating knowledge results in multiple theories of lawyering. The theories of lawyering produced here are situated reflections[24] on the experiences of 15 non-Maori women survivors of domestic violence in New Zealand with their lawyers and the legal system.

2. *Power Sharing and Lawyer–Client Interactions*

The recognition that all knowledge is situated suggests attention to the location of lawyers and clients in the lawyer–client relationship, and the social context in which the relationship operates. This focus reveals the power disparity between lawyers and women survivors of domestic violence. This section considers the implications of this power disparity, and possibilities for power-sharing in lawyer–client relationships.

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22 See eg The Australian Law Reform Commission Report No 69, Part I *Equality Before the Law: Justice for Women* and Part II *Equality Before the Law: Women's Equality* (1994) Australian Law Reform Commission; Kathy Ertel, C. Dot Kettle and Elisabeth McDonald, "Gender Issues For New Zealand District Court Judges: A Discussion Paper" WISER Associates (1993) Wellington. In 1995 the New Zealand Law Commission initiated the Women's Access to Justice: He Putanga Mo Nga Wahine Ki Te Tika project. The terms of reference for the project state that "[p]riority will be placed on examining the impact of laws, legal procedures and the delivery of legal services upon: family and domestic relationships; violence against women; and the economic position of women." New Zealand Law Commission, "Terms of Reference" (January 1996) *Women's Access to Justice Newsletter*, New Zealand Law Commission, Wellington, at 1; Dixie Nobel and MM Roberts (eds), *Proceedings of the National Conference on Gender Bias in the Courts* (1989); Wikler "Identifying and Correcting Judicial Gender Bias" in Kathleen Mahoney and Martin (eds), *Equality and Judicial Neutrality* (1987); Supreme Judicial Court, *Gender Bias Study of the Court System in Massachusetts* (1989) Supreme Judicial Court, Boston at 1.

23 Christopher P Gilkerson, "Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories" (1993) 43 *Hastings LJ* 861 at 873; see below text at nn106–23.

24 See above n12.

The discussion of power disparities between lawyers and women survivors of domestic violence requires consideration of the nature and function of power.[25] Traditionally, power has been analysed as a tool which is wielded by people in positions of domination. This analysis of power generally assumes that it is static, like an object, and moves from one person or position to another only at the behest of those few who wield the object. Under this analysis power is seen to serve mainly negative, or repressive functions. One repressive function is keeping what is assumed to be an otherwise chaotic society in order through threat of punishment. This analysis of power appears to leave little hope for positive social change because it seems unlikely that those who are in the positions of domination and who wield the power will give it up voluntarily.

The traditional analysis of power is challenged by a more fluid analysis that suggests that its "possession is neither necessarily obvious nor rigidly determined".[26] Rather than being wielded from fixed positions as though it were an object or a tool, power is constantly generated through complex never-ending micro-processes of negotiation and contestation. Negotiation and contestation of discourses generates power to different degrees in a wide variety of people and social positions. This analysis suggests that power is socially constructed, rather than assuming that certain individual people and positions are powerful regardless of the social context.[27] This analysis suggests the possibility of negotiating power in everyday interactions through, for example, one's ability to claim the "high ground" or to otherwise associate oneself with positive images.

Logically, this fluid analysis of power might suggest the possibility of redistributing power on an almost whimsical basis. However, power is sometimes "congealed" in institutions and channelled through institutions unequally to certain people or groups of people.[28] The social context in which power is constructed includes a long history of power congealed in certain groups in society. Shifting this historically entrenched power may require radical changes in the discourses that construct power and power relations.[29] However, even in those positions that are socially constructed as powerful, or where power is "congealed" in institutional positions, the amount of power associated with the position may be subject to fluctuations. Power may be accorded to certain positions in society through social construction, and fluctuate as the social construction of the position changes in everyday interactions:

> [I]t is not pre-existing individuals as such who have power: power is not simply something which an autonomous person can acquire in the same way that one acquires a car. People are powerful because of their place in a system: for instance because of their membership of a group (men, lawyers, white people,

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25 For an excellent and concise discussion of the debate about "static" and "fluid" aspects of power, which includes cautionary words about using an analysis that focuses only on fluid power, or the construction of power in everyday interactions, see White,"Seeking", above n12.

26 Id at 1501 quoting Felstiner, above n2 (quote in original draft on file with White).

27 Margaret Davies, *Asking the Law Question* (1994) at 253.

28 White, "Seeking", above n12 at 1505; Nancy Fraser, *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (1989) at 17–34.

29 Martha Minow, "Words and Doors to the Land of Change: Law, Language and Family Violence" (1990) 43 *Vand LR* 1665 at 1686: "Talking differently, by itself, will not make things different. But unless we talk differently, we may never make things different."

> heterosexuals, able-bodied people) which is invested with social value, or because they can use social meanings to their own advantage. It is therefore a person's position in the social network which constitutes him or her as an individual with power. Thus ... [it] is not that power can simply be reinterpreted, so that anyone can be seen to have it. The point is that we have to recognise the complexity of power. It is not just a question of there being a hierarchy of persons who are more or less powerful: there is a complicated network of meanings and values which constitute us as individuals.[30]

Some people are accorded power simply as a result of their membership in a group. Others access power through education, social status, or wealth. Education may develop the ability to use social meanings to one's advantage. Assessing or analysing power involves more than just according values to each of these factors and performing the resulting sums. The factors interact in complex webs, and all are to varying degrees context-specific. The male captain of the swimming team may not command the same authority at a meeting of chefs as he does poolside; women may be completely or largely excluded from both types of positions, either explicitly, or implicitly as the result of historical and current social constructions.

Lawyers as a group occupy a position in society, as the archetypal profession,[31] that is constructed as powerful and elite. In addition, the profession of lawyering has a long history of being peopled by privileged white men. Although the population of lawyers is slowly changing,[32] lawyers still tend to represent a very small segment of society:

> [T]he legal profession is still a bastion of privilege and elitism that is largely populated and dominated by white, middle-aged men of old European stock.[33]

Those lawyers who are not part of this segment of society may be required to assume the values and perspectives represented there in order to advance within the profession.[34] While there are currently a number of women lawyers practising who are serious about incorporating feminist perspectives into their work, the experiences that have historically informed, and still inform, much of lawyering activity are the experiences of privileged white men.[35] The recognition that all knowledge is partial and situated suggests that the knowledge produced by lawyers generally reflects these experiences, furthering the interests of this group.[36]

Women survivors of domestic violence have often been subjected to long campaigns on the part of their abusers that are intended to consolidate power and control in the abuser.[37] These campaigns often reduce the power of the

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30 Davies, above n27.

31 Maureen Cain, "The Symbol Traders" in Maureen Cain and Christine B Harrington (eds), *Lawyers in a Postmodern World: Translation and Transgression* (1993) at 20–5.

32 See Gill Gatfield, *Women Lawyers In New Zealand: A Survey of the Legal Profession* (1993) at 30–7.

33 Hutchinson, above n13 at 781.

34 Martha L A Fineman, "Feminist Legal Scholarship and Women's Gendered Lives" in Cain and Harrington, above n31 at 243.

35 Maureen Cain and Christine B Harrington, "Introduction" in above n31 at 1: "We are concerned with lawyers' power ... lawyers' work can now be seen to impact on the way that gender is constituted, as well on the meanings of race and ethnicity."

36 See Carol Smart, *Feminism and the Power of Law* (1989) ch1.

women in relation to the abusers and in society in general by reducing their self-esteem, stripping them of economic independence and cutting them off from support networks. For example, male abusers often use the historically constructed female role of the "housewife", combined with gender inequality in the workplace, which results in their ability to earn more than their female partners, to justify keeping the women financially dependent. One woman who was interviewed summed up these tactics:

> I think when you listen to abused women a lot of the stories are similar in content and that a lot of the men won't let you get a job. I was never allowed a job. I don't have a driver's licence. I was never encouraged to get my driver's licence. Friends were always abused and there was deliberate attempts to break up friendships. Lying about what they had said or what you said, the whole thing, and so a lot of these things we have in common.

Another tactic of abuse, isolation from family and friends, consolidates the woman's psychological and emotional dependence on the abuser. Physical and sexual abuse increase and reinforce the power disparity between the abuser and his victim.

As a result of often long histories of abuse, the perspective of women survivors of domestic violence is likely to be widely divergent from the perspective of the elite, powerful lawyers who represent them. There is also likely to be significant power disparities between lawyers and women survivors of domestic violence.[38] Where the perspectives of lawyer and client diverge, resulting in varying interpretations of events, the lawyers' interpretations, rather than the women's, are likely to prevail. This "interpretive monopoly" may have a significant impact on even the seemingly straightforward communications of the client's wishes with respect to the outcome of the legal action.

> [L]awyers [do not] have the option of passively implementing their clients' desires, thereby escaping the dilemmas of human judgment, responsibility, and commitment in their work ... client's desires are always ambiguous; they get spoken in an unequal dialogue in which the lawyer is inevitably partisan and in charge.[39]

The following group of quotes from the women interviewed reflect the power disparity between lawyers and clients who are women survivors of domestic violence.[40]

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37 For a discussion of tactics of power and control see eg Ellen Pence, "The Justice System's Responses to Domestic Assault Cases: A Guide for Policy Development" Minnesota Program Development, Inc., (1986) Duluth Minnesota; Ellen Pence and Michael Paymar, *Power and Control: Tactics of Men Who Batter*, Minnesota Program Development, Inc., (1986) Duluth, Minnesota, at 30; Martha Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation" (1991) 90 *Mich LR* 1. For discussions of a power and control approach to domestic violence in the New Zealand context see Graham Barnes, Sarah Fleming, June Johnston and Sandra Toone "Domestic Violence" (1993) New Zealand Law Society, Wellington, at 2–9; Busch, above n10 at 10–2; Ruth Busch and Neville Robertson "An Intervention Approach to Domestic Violence" (1993) 1 *Waikato LR* 109 at 116–7.

38 See above n19.

39 White, above n2 at 765 citing Simon, above n19.

40 Power imbalances were reflected in a number of experiences shared by the women interviewed, which included: experiencing gender bias on the part of lawyers, the legal system and the society in general, which constructed the women as less powerful than men in general and less powerful than male lawyers in particular; descriptions of lawyers' disbelief of the women; the

> I think it is an attitude thing actually, an attitude on the part of the lawyers that maybe, my situation was pretty bad, but I got the feeling that I was second class because I was in the situation and I was fighting like hell to get out but it was the inference oh well you are not really worth bothering about because you are second class because you are in this situation.
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> Yes, I had the brakes tampered with on my car, and about a half an hour or something like that out of where I lived, half an hour on the road all the brake fluid was totally out of my car and I just lost brakes and it was so obvious [that my ex-husband had done it], a car full of children as well. Saying it to the lawyer I got ... don't be a ridiculous so and so, people aren't like that ... Yes, that was the response that I got from the lawyer and the police and the judges and the counsellors and the psychologists for two and a half years ...
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> Yeah I would say first of all [that I would like the lawyer] not to make me feel inferior, make me feel comfortable, to represent me properly and to advise me ... To cut out or get away from that male across the desk attitude, you get ushered into a room, you sit down on the chair, it is more than likely a psychological seating where you are lower than the desk ...
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> Yes there is that taint and I think that you, that also hurts, very personal thing with abused women because they are made to feel worthless in their relationship and so when they sense that coming from their ... [lawyers] and it can have a very damaging effect on communication and yeah I think it is a very real thing, it is a very real attitude. It is a very terrible thing to feel when you are an abused woman.

The social construction of women survivors as "second class", as reflected in the first quote, and as a bit mad, paranoid, or "over the top", as reflected in the second quote, juxtaposed with the social construction of lawyers as powerful and elite, provides the context for the lawyer–client interactions. The lawyer has more credibility than the client, in the lawyer–client relationship, in the legal system and in society. As a result, the lawyer's interpretation of events, which is informed by the lawyer's position and experiences, will often be valued over the woman client's perspective.[41] In this manner the social construction of women survivors of domestic violence as "over the top", or ridiculous is perpetuated and reinscribed in the lawyer–client relationship, and the abuse is "invisibilised".[42] Even the woman may come to doubt her previously strong conviction about the source of the brake problem.

The woman in the second quote was able to remain firm in her conviction about the source of abuse, and therefore maintain some power, by connecting the attitudes of the lawyers and others and by attributing those attitudes to gender bias. In doing so, she also resisted the label "ridiculous". Her resistance may however be interpreted by others as further evidence of the label's suitability. It is also possible to interpret her resistance, despite two and a half years of negative reactions, as a reflection of her strength and courage. However, because the lawyer and others are constructed as more powerful than the

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failure of the lawyers to treat the women with respect; and the lawyers' lack of strong advocacy. For a more complete discussion of these experiences see Nan Seuffert, "Lawyering for Women Survivors of Domestic Violence" (forthcoming)(1996) 4 *Waikato LR.*

41 Czapanskiy, above n11.

42 Busch, above n10 at xi–xii.

woman, and this interpretation is not the one that arises from their experiences, it is not likely to emerge.

Even within the constraints of the existing congealed power disparities between lawyers and women who are survivors of domestic violence, an analysis of power that recognises that power is generated in everyday interactions can help us to see that the women do have some ability to influence the type of relationship that results.[43] The woman who resisted the "ridiculous" label refused the lawyer's interpretation. Some women interviewed were able to negotiate working relationships with their lawyers in which they received the information and advice that they wanted and needed, while other women were not able to do so. As one woman stated:

> If you are in that situation you are actually not strong enough, I mean it would work if you are sitting there going I want I want I want and that would work but in that situation you are not strong enough to do it ... it would be so good to be able to be strong enough to actually demand all the answers from the lawyer. [Another woman in the same interview] was fortunate that she was able to just sit there and say I want to know, I want to know, and I was sitting there last night thinking I wish I had been that strong.

This woman recognises that there was some room to negotiate power by making demands in her relationship with her lawyer, but she also notes that at the point of leaving an abusive relationship she was not strong enough to engage in that negotiation.

The client's power in the relationship may also be influenced in part by the extent to which she can access power within institutions where it is "congealed". For example, if she has a law degree or other tertiary education, or comes from a wealthy family of origin, she may have some negotiating power with the lawyer.[44] Occupying a position of authority in the community or having contacts within government, other institutions, or among the legal community may also provide her with some negotiating power. However, access to power in these positions may be tempered by the abuser's campaign to consolidate his own power and control. For example, isolation from friends, family and other community connections may result in isolation from powerful connections.

One result of power disparity between lawyer and client then, can be the ability of the lawyer to define the client and to impose that definition on the client through *unequal* dialogue. This group of quotes discusses the complete *failure* of dialogue between lawyer and client. One woman's aspiration for equal treatment reflected in information exchange is contained in the last of the following quotes.

> [My lawyer] was very obstructionist you know in a very nice charming kind of way. He just wouldn't give me access to information.
>
> My lawyer tried to spend as little time with me as possible because it was all costing me a hell of a lot ... So I was in there for 10, 15 minutes, longest

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43 Felstiner (1992), above n2; Gerald P Lopez, "Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration" (1989) 77 *Geo LJ* 1603.

44 Statistically women are less likely to have most of these types of "congealed" power than men. Jane C Murphy, "Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform" (1993) 21 *Hofstra LR* 1243 at 1251.

> was half an hour ... I felt like I was just going in there and walking out and getting billed. And there I was ... didn't have the time to actually sit down, talk it out, and make me understand more.
>
> She wasn't actually telling me what she wanted to know. She didn't say like this is what the story is, what I need is this this and this, can you give that to me. She wasn't treating me as an equal on that level. She was just saying well what happened then, which aggravated me because I have done some years of law and that aggravated me. That made me feel annoyed. I didn't need to be treated in that way ... Yes she kept me in the dark a bit as if there was a lot of stuff I didn't need to bother my head about. You didn't really need to know or whatever which I found annoying.
>
> [I would like my lawyer to be s]omeone that was prepared to treat me as an equal that would tell me, that would empower me by giving me the information about the situation, discuss possible scenarios and pull out information about such and such a case that's gone this way and another case has gone that, we can read about, in fact I wouldn't even mind doing half the research myself or doing it in tandem, because I feel very strong it is my life and I want to take charge of it and I want to be responsible for it, so therefore whatever things happen I'm responsible for the decisions that are being made about my life, be part of the decision making process.

In general, society constructs women as passive and accepting of guidance from men and authority figures. If the lawyer chooses to employ that stereotype in the lawyer–client interaction and assume that the woman client does not want or need information, again, the lawyer's interpretation of events is likely to prevail. The woman in this situation may have an uphill battle to convince the lawyer that she wants answers to her questions and information about her case. The power disparity between lawyers and women clients who are survivors of domestic violence facilitates lawyers in withholding information from clients, and in justifying a complete failure of dialogue. Both unequal dialogue and failure of dialogue may result from a power disparity between lawyer and client.

I have argued that the goals of feminist theories of lawyering should include reflecting the experiences of women in the lawyering process, thereby facilitating the reflection of women's experiences in the law and legal processes. The power disparity between lawyers and women survivors of domestic violence presents barriers to these goals. Therefore, in order to achieve these goals, feminist theories of lawyering need to address power disparities in the lawyer–client relationship, and the possibilities for power-sharing. I have also argued that power is generated through a complex web of social constructions and interactions. Addressing these power disparities therefore requires social change as well as change in lawyer–client relationships.

Lucie White's discussion of three models of lawyering[45] is helpful to the enterprise of re-thinking the lawyer–client relationship with a focus on issues of power and social change. I will call her three models the "traditional", "test case" and "social change" models.[46] Her traditional model is similar to the traditional or fiduciary model that I have described above. It provides little

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45 White, above n2.

46 While I draw heavily on Lucie White's excellent work in this section and am indebted to her, the discussion inevitably involves my interpretation of her work.

scope for redressing power disparities between lawyer and client. The test case model focuses on particular groups and interests that are excluded from the legal sphere. The test case model is relevant to feminist theories of lawyering because it provides a model, which, although limited, has the potential to expand the categories of the law to reflect women's experiences.[47] The social change model addresses more broadly both issues of power sharing between lawyers and clients and lawyering for social change.[48] It provides the greatest potential to address both the lawyer–client power disparity and the social change necessary to achieve the feminist goals of lawyering. I will therefore briefly discuss the test case model and then focus on the social change model.

The test case model of lawyering identified by White focuses on the barriers that keep certain interests and issues out of the political sphere and the legal system altogether.[49] One barrier is the formal exclusion of groups or issues from the system.[50] This approach to lawyering looks for factors that cause the suppression of conflict[51] and seeks to reveal the systemic working of the law to contain grievances.[52] Like the traditional model of lawyering, this approach assumes that the legal system can be used to challenge these mechanisms of exclusion. Even losing a test case "can reveal the law systematically working to contain grievances."[53] Test cases may be brought by private parties as civil actions, by government agencies as civil actions or by prosecutors as criminal actions. Test cases often coordinate lawsuits with direct political action and skilful use of media attention.

One example of a test case in New Zealand is in the area of sexual harassment. In *H* v *E*[54] an alleged sexual harasser, Mr E, refused to settle a complaint of sexual harassment at the Human Rights Commission.[55] Prior to this case the commission was considering claims of sexual harassment based on its own conclusion that sexual harassment amounted to sex discrimination under the *Human Rights Commission Act* 1977. Mr E argued that the commission did not have jurisdiction to consider the complaint of Mrs H that he had sexually harassed her because his conduct did not constitute discrimination on the grounds of sex.[56] Mrs H took the case to the Equal Opportunities Tribunal. The tribunal found that Mr E had sexually harassed Mrs H, that this behaviour had subjected Mrs H to detriment by reason of her sex, and that she had therefore been discriminated against on the basis of sex.[57] The *Human Rights Commission Act* 1977 therefore applied to sexual harassment claims.

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47 White, above n2 at 747–51. The assumptions underlying this approach are similar to the assumptions made by women who have been called "first phase feminists". Ngaire Naffine, *Law & the Sexes: Explorations in Feminist Jurisprudence* (1990) at 3–6.

48 White, above n2 at 747–69.

49 Id at 748.

50 Ibid.

51 Id at 751.

52 Id at 758.

53 Ibid.

54 (1985) 5 NZAR 333 (EOT).

55 See Frances Joychild, "A Critique of the Law of Sexual Harassment in Aotearoa/New Zealand" New Zealand Suffrage Centennial Women's Law Conference Papers, Women's Legal Group, (1993) Wellington at 43.

56 *Human Rights Commission Act* 1977 (NZ).

57 Above n54 at 339–49.

Sexual harassment provides an example of a grievance that was not addressed by the law until identified by the Human Rights Commission, and therefore represented conflict with no legal remedy. The commission's decision to hear the complaints was challenged by a claim that no legal grievance existed, or no harm redressable in law resulted from the alleged harasser's actions. The test case created a new category of harm recognised by the law; sexual harassment causing detriment in employment by reason of sex.

The interviews that I conducted indicate that there are harms that result from domestic violence that are not recognised by the legal system. For example, the women interviewed reported a high level of harassment and abuse before, during and after counselling, mediation and court hearings. Unless the harassment of the abuser rises to the level of assault, or the woman already has protection orders, this type of injury is not recognised by the legal system. Even where the abuser's actions may have been assault, none of the women were able to report any legal action in response. This is an area where the test case might be used effectively. Where the harassment and abuse does constitute assault or breach of existing protection orders, lawyers should advise clients to file criminal complaints. They might also informally ask prosecutors to argue for harsher sentences where harassment, abuse or breaches of existing protection orders take place in and around courthouses, counselling and mediation. Such an argument is supported by the complete lack of respect for the law and legal processes that these activities represent when carried out in and around the courthouse and other places where the law is administered. The fact that the women are required to be present for mediation and court hearings with the abusers, and therefore do not have the option of staying away from the abusers at these times, also supports arguments for increased protection for them. Attention to prosecution of these complaints might be accompanied by political action and attention to public education and awareness of the issue. Such attention might force legislators to consider the issue and legislate to create a new category of crime that addresses these injuries.[58]

The test case model of lawyering does not explicitly address power disparities between lawyers and clients, or issues of dialogue and translation necessary to the feminist project of changing lawyering and the substance and process of the law to reflect the experiences of women. Like the traditional model, it fails to recognise that communication between lawyers and clients is interpreted through the prism of the lawyers' experiences and backed by the powerful position of the lawyer. The test case model also requires that clients perceive their grievances or harms clearly and can articulate them to lawyers.[59] It cannot respond to people who "feel cheated but have no clear sense of who is responsible", or to people who distrust the legal system and do not want to use it.[60] Some of the women interviewed expressed these types of reactions to the legal system:

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58 The *Domestic Violence Act* 1995 (NZ) provides for increased penalties for multiple breaches of protection orders in s49. Incrementally higher penalties for assaults and breaches of orders that occur around court-houses could also be legislated.

59 White, above n2 at 760.

60 Ibid.

> I was just sort of lost, I thought well, heck, if that's what lawyers do, where do I go now?
>
> My feelings on it all now is that I would never go along with what a court demanded me to do, ever again, as far as that kind of stuff goes. I just wouldn't do it. I have no faith in the law at all.

Other women indicated that they felt that they were not heard by their lawyers and the legal system and that their experiences were manipulated to fit into the categories of the law.[61]

The social change model of lawyering is designed to work with people whose harms are not easily articulated, through a process of dialogue and translation, to develop an awareness and analysis of these incoherent harms and to plan action based on that analysis.[62] The goals of feminist lawyering and the discussion of the traditional and test-case models of lawyering suggest that at least two issues need to be addressed by this model of lawyering if it is to live up to its "social change" label. The first is attention to the process of producing coherence from incoherent harms. As discussed above, the power disparity between lawyers and clients can result in an interpretive monopoly on the part of the lawyer. The articulation of harms could be influenced in the same manner, with the result that harm is articulated from the lawyer's perspective rather than the client's. The second issue raised is the connection between this process and the goals of feminist theories of lawyering: does the process of articulating incoherent harms facilitate the reflection of women's experiences in the lawyer–client relationship and in the substance and process of the law?

The process of producing coherent harms from incoherent harms involves recognition of the possibility of incoherent harms. Harms are socially constructed in the interests of dominant groups to reflect their experiences.[63] Therefore the harms recognised by the legal system may not include many of those experienced by subordinated people. In addition, social conditioning in general may result in subordinated people viewing their own experiences through lenses shaped, polished and ground in perspectives that serve the interests of the dominant groups. Drawing on, critiquing and developing the Marxist/neo-Marxist "false consciousness", White identifies "double" consciousness.[64] Double consciousness is the awareness of both the dominant

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61 Australian Law Reform Commission Part I, above n22 at 28: "I never got to tell my story. It was as if what happened to me did not matter ... I felt like the player in a game that I had never played before, and was treated as if I was cheating in some way."

62 White, above n2 at 760–6.

63 For a discussion in the New Zealand context of the construction of rape laws from the perspective of men see Margaret A Wilson, JK McLay and Lannes Johnson "Sexual Violence: A Feminist Perspective" in Papers Presented at Seminar: *Sexual Violence: A Case for Rape Law Reform* in New Zealand, New Zealand Legal Research Foundation (1982) Auckland.

64 White, above n2 at 753 citing WEB DuBois, *The Souls of Black Folk: Essays and Sketches* (1965) at 3. This approach to lawyering is informed by the work of Paulo Freire. Eg Paulo Freire *The Pedagogy of the Oppressed* (1970); Paulo Freire *Education for Critical Consciousness* (1973); Peter McLaren and Peter Leonard (eds), *Paulo Freire: A Critical Encounter* (1993). Freire's processes of education and research assume, without justification, that subordinated groups acquiesce in the values and agendas of the dominant groups, to the extent that they do, because of oppression, and that leftist activists are therefore justified in intervening to raise consciousness. He does not attempt to justify the basis on which activists or educators intervene in the lives of subordinated groups to encourage political resistance.

perspective on society and of a disjointedness between that perspective and one's own; it is the awareness of interpretations of experiences that do not fit into the dominant perspective. This "gap" between interpretations may be a reason that subordinated people or groups are not always able to clearly voice their grievances.

With respect to the first issue, White suggests that lawyers have a part to play in working with people from subordinated groups to facilitate articulation of incoherent harms. However, it is a very different role than that played by lawyers in the first two models. In this model the lawyer's role is as a participant in a group process of articulating harms and designing action in response to those harms, which is not necessarily legal action.

With respect to the second issue, consciousness raising uses a "dialogic process of reflection and action"[65] to allow the articulation of previously unarticulated experiences and harms, and to promote social change in response. Consciousness-raising groups[66] are small groups in which people "reflect together about concrete injustices in their immediate world and act to challenge them".[67] The groups provide an "interactive and collaborative way of articulating one's experiences and making meaning of them with others who articulate their experiences".[68] The social change model of lawyering uses consciousness raising to focus subordinated groups on viewing the dominant groups and the dominant constructions of harms critically[69] and on articulating their experiences and harms. The groups[70] are not *led* by people outside the subordinated groups: to the extent that outsiders participate, they do so only on an equal basis with everyone else.[71]

The outsider lawyer participates in consciousness raising as a group member, allowing the process to take its own course, while also encouraging relentless reflection and critique. The lawyer should also strive to open the norms of her profession to critique by the group by questioning her own expertise and inviting group members to deepen the critique.[72] She might thereby encourage other participants to speak for themselves, "both as critics and as strategists", and to interpret their own and the group's experiences in manners that are consistent with their feelings of grievance or harm.[73]

White recognises this problem, but also does not resolve it. White, above n2 at 753–4. I would suggest that the recognition of situated knowledges can inform the manner in which we analyse intervention in the lives of subordinated people. See text at nn74–5.

65 White, above n2 at 761.

66 Consciousness-raising has also been identified as a feminist *legal* method. Phyllis Goldfarb, "Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory" (1992) 43 *Hastings LJ* 717 at 1626; Katharine T Bartlett, "Feminist Legal Methods" (1990) 103 *Harv LR* 829 at 863; Kathleen A Lahey, "... Until Women Themselves Have Told All That They Have To Tell ..." (1995) 23 *Osgoode Hall LJ* 525 at 532–3; Schneider (1986), above n1 at 602–4.

67 White, above n2 at 761.

68 Bartlett, above n66 at 863–4.

69 White, above n2 at 760–3.

70 Id at 761 n222.

71 Id at 762. White notes that the outsider may lead the first few groups, set the tone for collective learning and help to plan the first actions, but the outsider does not claim to have privileged knowledge about politics or reality.

72 Id at 763.

73 Id at 764.

The social change model of lawyering assumes that consciousness raising leads to activism, which is then also reflected upon within the group. The outsider lawyer is there to give the group access to the existing language and process of the law, especially the processes of shaping legal claims from their experiences. Whether these existing processes and claims are used or not, the outsider lawyer is there to provide this expertise on the process.[74] The approach emphasises dialogue within the groups and a dialogic process of reflection and action, where political action is brought back to the group for consideration and analysis.

The role of the lawyer in the process of producing coherent harms is as an equal participant in a group process. How does the lawyer transform herself from an authority figure from an elite group into an equal participant in a subordinated group? How does the lawyer shed her interpretive monopoly? Opening the profession, and therefore the authority and elite status of lawyers to critique is one manner in which to emphasise the equality of group participants. The lawyer might also explicitly and openly situate her own perspective, recognising her limitations and partiality and actively creating space for the expression of other perspectives. It is unlikely, however, that any lawyer, especially one who belongs to other privileged groups, would be able to completely shed her authority status and interpretive power. Lawyers therefore need to be wary of imposing their own views on the group.

The social change model of lawyering has the potential to facilitate the reflection of women's experiences within the lawyer–client relationship. It facilitates the articulation of experiences and harms and recognises the possibilities for a range of action with the potential to reflect these experiences and harms in the substance and processes of the law.

This model of lawyering places high demands of time and energy on all of the participants: the outsider lawyer and the subordinated groups. Other limitations of using this model are suggested by the experiences of the women interviewed. Women who are survivors of domestic violence are not an easily identified group. One of the tactics of abuse is isolation of the woman. Identification of these women to form consciousness-raising groups, while they are still in abusive relationships, would probably be very difficult. In addition, although community law centres are becoming more popular in New Zealand, lawyering for women who are survivors of domestic violence still occurs largely on an individual basis. The existing system is not conducive to working with women in groups. Finally, although working with women in groups might provide the opportunity for some savings on individual legal costs, it seems unlikely that this approach to lawyering would be funded by Legal Services District Subcommittees.[75] As survivors of domestic violence are often low on financial resources, lack of funding would be a serious impediment.

Some elements of the social change model might be incorporated in the widely used traditional model of lawyering. For example, women who are survivors of domestic violence do come together in groups in women's refuges, often when they are leaving an abusive relationship and engaging the services of lawyers. One of the positive aspects of refuge houses has always

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74 Id at 762–4.

75 See *Legal Services Act* 1991 (NZ).

been the cooperative atmosphere in which consciousness-raising discussions are facilitated. Some refuges have arrangements with local women lawyers where the lawyers visit the refuge on a regular basis to informally answer general questions about the legal system and legal process. These occasions may provide opportunities for lawyers to employ some aspects of the social change model of lawyering. Lawyers might initiate discussions in which they provide outlines of some of the feminist critiques of the law relating to domestic violence, or read comments from some of the cases concerning domestic violence in order to stimulate discussion. The women might then connect what is happening in their cases to the critiques, or to the outcomes in other cases. Research concerning outcomes and gender bias in these cases might also be presented for discussion.[76] This type of information might stimulate the women to re-think their own cases, their guilt, and any victim blaming attitudes or gender bias that they have encountered in the legal system or from their lawyers. Inevitably a range of experiences will be discussed and the women will work out for themselves where their experiences fit within this range and their own or the group's best course of action.

Consciousness raising might also be used successfully in a lawyer–client one-on-one relationship.[77] Through the process of sharing experiences, lawyer and client together might make meaning of experiences. The experiences shared might include those of the lawyer, or those of former clients shared in a general manner.[78] Recognition of the situated aspects of knowledge in this process suggests it is also important that the client have the opportunity to engage in discussion with the lawyer about the assumptions and values upon which the lawyer operates.[79] Again, the lawyer should be aware of her interpretive monopoly. Explicitly discussing the lawyer's values and position in society and its influence on her perspective opens space for the client to speak and to differ with the lawyer. Dialogue, which is discussed in the next section, is crucial to this process.

The social change model of lawyering represents a more radical restructuring of traditional approaches to lawyering than the test case model. Using this model opens up the potential to achieve the feminist goals of reflecting the experiences of women in the lawyering relationship and in the substance and process of the law. While its use may not always be practicable, its contrast with traditional lawyering provides insights into the possibilities for change of lawyering practices and inspiration for the directions of that change.

Although White does not focus in detail on the actual processes of dialogue and translation in lawyer–client relationships, they are integral to the

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76 Busch, above n10.

77 Kimberly E O'Leary, "Creating Partnership: Using Feminist Techniques to Enhance the Attorney–Client Relationship" (1992) 16 *F Leg Studs* 207 at 215–8.

78 Ibid.

79 It is important to create honest boundaries with the client to protect the privacy of both the client and lawyer. Id at 217; Joan S Meier, "Notes From the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice" (1993) 21 *Hofstra L Rev* 1295 at 1363. It has been argued that presumptions about clients' interests are inescapable and that therefore lawyers should make these presumptions explicit, thereby opening them to dialogue and also giving the client the choice to find a lawyer with a set of more acceptable presumptions. Simon, above n19 at 479–80.

social change model of lawyering. In this model the lawyer "can take on the dangerous project of listening carefully to the answers that at first might seem 'non-responsive.' She can work with those groups in a joint project of translating felt experience into understandings and actions that can increase their power."[80] Dialogue and translation are crucial elements of revealing unarticulated harms, and therefore of lawyering for groups in society who have been historically oppressed. These elements of lawyering are dealt with in the next two sections.

3. *Dialogue*

The recognition of the situated aspects of lawyering suggests attention to the processes of lawyering that produce knowledge in the lawyer–client relationship. Exchanges between lawyer and client in dialogue form an integral part of these processes. The social change model of lawyering, which recognises that grievances of subordinated groups may be suppressed, also highlights the importance of dialogue between lawyer and client to a successful lawyering strategy. The lawyer takes on the "dangerous project" of carefully listening to clients, even when their answers may seem "non-responsive".[81] Dialogue between lawyer and client is not only crucial to lawyering for social change, it is important in any model of lawyering.[82] The fiduciary model requires that lawyers discern the client's desires, present and discuss the legal options and assist the client's decision with advice.[83] Any input into the case or strategy by the client,[84] any direction of the lawyer by the client, any prospect of arriving at decisions mutually,[85] or any process of assisting the client to understand the legal procedures, requires dialogue. Failure to engage in dialogue that allows the women to make meaningful decisions about their legal representation may be a replication by the lawyer of the controlling behaviour of the abuser.[86]

Dialogue is also crucial to lawyering ethics: "a truly ethical relationship [is] one of symmetric reciprocity".[87] The suggestion is that an equal exchange is necessary to ethical lawyering; however, I have argued that the power disparity between lawyers and women survivors of domestic violence present barriers to equality. As discussed above, these barriers often result in *unequal* dialogue or in a complete failure of dialogue.[88] The experiences of the women interviewed

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80 White, above n2 at 760.

81 Ibid.

82 Drucilla Cornell, "Toward a Modern/Postmodern Reconstruction of Ethics" (1985) 133 *U Pa LR* 291 at 359–80.

83 Above n13.

84 O'Leary, above n77 at 218.

85 Ibid. "The best legal representation will occur only when the lawyer and the client have attained a mutual understanding and can make the decisions by consensus."

86 Susan Bryant and 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" (1992) 42 *J Urb Contemp L* 207 at 216.

87 Cornell, above n82 at 368.

88 Above text at notes 40–5; Waits, above n3 at 1051 notes that barriers of class, race, sex, language and culture can inhibit communication and trust between lawyers and abused clients. I would add sexual orientation and ablebodiness to this non-exhaustive list.

confirm widespread problems with dialogue. Some of the women interviewed felt that there were societal disincentives to talking to their lawyers about abuse.[89]

> So that's where the incentive is not to ... [use the legal system for protection]. Nobody wants somebody else knowing about all this stuff happening in their lives.

Many women reported defective or non-existent dialogue in their lawyer–client interactions.

> I actually don't even think that they are hearing your words, they are thinking of the procedure, so before you've even finished speaking, or before you've even started speaking they are thinking of the next step in the procedure.

These quotes reflect the frustration of the women interviewed with the dialogue in their relationships with their lawyers, and particularly with the lawyers' lack of understanding of the danger presented by the abusers.

> I just felt like nobody ever listened to me, nobody cared, so why bother.

> I felt like I was going to be murdered, any day and every day. That just went in one ear and out the other ear, with the lawyer.

> I didn't feel that this [male lawyer] understood the danger that I felt myself to be in. I was terrified I was going to be killed and so I went away to a girlfriend's place and she said you need a woman and I duly went and got a female lawyer that she recommended and I felt this woman was very much like 'I'm a woman lawyer, I'm very important' and she sat behind this huge desk and I was sitting there and I was just, this other woman drove me there I think, it was about six years ago and I didn't feel comfortable. Again nobody was listening to me about how scared I was.

Some women had the impression that their lawyers were too busy to talk to them, or trying to save them money by keeping their appointments short.

> She rushes a little bit through things too ... It is like she is on a tight schedule. Like 'leave it to me dear, don't worry about it I will phone you later'. See you later out the door sort of thing.

Women also felt totally unprepared for counselling sessions and court hearings.

> I had no understanding, that there were procedures and steps that you could go through. I just saw myself as being in a state of siege, absolutely terrified out of my mind ...

> I don't feel that he really prepared me at all. He told me that we were going to court and I was concerned about the set up of the room, where people would be sitting, what I was expected to do, and what my ex was expected to do or say or whatever and I didn't get a very clear picture from him at all.

All of these experiences implicate dialogue in the lawyer–client relationship.

Achieving the ideal of symmetric reciprocity in the lawyer–client relationship requires a number of preconditions:

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89 Above n3 at 1058–9: "[A] woman who makes a report of abuse, especially against an affluent batterer, is subjecting herself to microscopic scrutiny. It does not seem likely that many women will choose to be labeled an 'avenging bitch' without cause."

> [T]he fragile conditions that are required for genuine dialogue and conversation ... [are] mutual understanding, respect, a willingness to listen and risk one's opinions and prejudices, a mutual seeking out of the correctness of what is being said.[90]

The conditions required for dialogue are fragile. It is impossible to have a dialogue without listening to the other person. The women interviewed often reported a lack of the conditions necessary for dialogue to flourish, including the lawyer's failure to listen. This fact alone precludes dialogue. Some of the women recommended that lawyers develop listening skills.

> I also think that ... [lawyers] should have some sort of training of skills in listening, not necessarily counselling, but being able to kind of use some feedback or some sort of creative listening skills, so that you know that what you are saying is being understood and you know that they hear what you are saying.[91]

The mutual understanding required for dialogue may be provided by "shared experience, a place to begin, a way of knowing that our conversational partner is with us".[92] Empathising has been identified as a feminist method.[93] It is the ability to perceive, relate to, and understand the experiences of another person through a shared perspective on a similar experience. It suggests that women who are survivors of domestic violence may be best represented by other women who have experienced domestic violence from similar perspectives.

> [Y]ou have got to get a lawyer, male or female, that has some tiny idea of what it is like to be on the bread line, which is practically impossible. You can't get a lawyer that knows that. You have got to get a lawyer that understands what it's like to be abused and that's fairly rare too, I would imagine, I don't know. You have to get someone that knows what children are, understands what children are. Everything I would imagine would be to go for a woman.

Empathy based on shared experiences may be one way in which to provide some of the preconditions for dialogue in the lawyer–client relationship. However, identifying the similarities in the experience and each person's position in relation to the experience may in itself require a process of dialogue and should not be assumed. In addition, while this insight should support arguments for more practising women lawyers, and for serious consideration of the people who practise in this area of the law,[94] it is impractical to suggest that this type of matching might always be achieved. There will always be experiences that are not shared and perspectives on experiences that differ between lawyer and client.

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90 Cornell, above n82 at 365 quoting Richard J Bernstein, *Beyond Objectivism and Relativism* (1983) at 162.

91 Meier, above n79 at 1335.

92 Cornell, above n82 at 366.

93 Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (1990) at 219–24; Meier, above n79 at 1333–5.

94 Waits, above n3 at 1051 n123: "[M]ale lawyers may have a particularly hard time gaining the trust of battered women clients. Experience has lead nearly all battered women shelters to require that initial intake and hotline calls be taken by women."

A shared perspective on similar experiences is not the only manner in which to provide the preconditions for dialogue in a lawyer–client relationship. Lawyers might also explicitly acknowledge that they have a particular and partial perspective, identifying their perspective, their limitations and the existence of other valid perspectives. In this manner, they might signal to the women that there is space for their perspectives and their experiences.[95] Lawyers might explicitly acknowledge that the lawyer–client relationship requires dialogue and that dialogue always requires acknowledging the partiality of one's perspective and attempting to communicate across partial perspectives.[96] Explicitly acknowledging that there are areas in which the women must be considered to be the experts might also be helpful. One example of this might be with respect to predicting the actions of the abuser. The woman who has lived with the abuser, often for many years, is much more likely to be able to predict his actions than the lawyer who has never met him and who may not have any experiences of domestic violence.

The preconditions to dialogue of listening and exchanging opinions often involve a process of question and answer in which each person strives to give full consideration to the opinion of the other. Dialogue is not simply informational exchange.[97] In making decisions about a case, for example, a focus on dialogue suggests that the lawyer and client both have the opportunity to fully express their opinions. The client's expression of opinion may require an understanding of the legal processes. Understanding is best achieved through a dialogic process in which questions are not foreclosed, "[a] person who possesses the art of questioning is a person who is able to prevent the suppression of questions by dominant opinion".[98] Most lawyers interviewed indicated that they explained the process of obtaining protection orders to the clients and the women also indicated that their lawyers offered explanations.[99] Many of the women indicated, however, that they did not understand the explanations. For various reasons they did not feel comfortable asking questions to clarify their understanding or demanding explanations that they did understand. This woman had the problem of asking questions and not receiving adequate answers:

> I think things would have been made a lot easier if I had been given straight answers [from my lawyer]. I mean, I knew what I wanted. I used to walk in with a list of questions I would have written down in my head and I would

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95 Above n86 at 217. Client centred interviewing allows students to learn how to empower clients; see also Mary Jo Eyster, "Analysis of Sexism in Legal Practice: A Clinical Approach" (1988) 38 *J Leg Educ* 183.

96 For a discussion and critique of dialogue in the classroom see Elizabeth Ellsworth, "Why Doesn't This Feel Empowering?: Working Through the Repressive Myths of Critical Pedagogy" in Carmen Luke and Jennifer Gore (eds), *Feminism and Critical Pedagogy* (1992) at 100–10.

97 Cornell, above n82 at 366; William A Haskins, "The Art of Listening" (Summer 1984) *Litigation* 46: "[F]ew lawyers would disagree with the proposition that communication plays an important role within a legal situation ..."; Ann Campbell White, "What You Didn't Learn in Law School: Family Law and Domestic Violence" (Oct 1994) *Fla BJ* 38, lawyers focus on content at the expense of delivery.

98 Cornell, above n82 at 366 quoting Hans-Georg Gadamer, *Truth and Method*, G Bardena and J Cumming translation, (1975) at 291.

99 Relatively little theoretical work on the process of translating the law to clients exists. See O'Leary, above n77 at 218–9 for one discussion.

> ask for, I would want to know you know exactly what was going on and I would get fobbed off or get very general kind of answers.

A lawyer's simple refusal to answer questions, a more subtle side-tracking of questions, or an even more subtle failure to create an atmosphere in which questions are asked, all preclude dialogue.

> I think there is a huge difference when you see in Family Courts or any type of family law there is often a huge gap between counsel and client and understanding what is actually happening in communication of what is going on. Sometimes lawyers can communicate to their clients what they think is a very straightforward way, very clear language or whatever and the client may just simply not understand and may not be able to explain what they do and what they don't understand.

According to the fiduciary model of lawyering, the lawyer has the responsibility for creating the conditions in which dialogue can flourish. The lawyer therefore has the responsibility to first address power disparities, and then to ensure the fragile conditions under which dialogue can take place. Practical suggestions for lawyers' facilitation of dialogue include learning about the power and control dynamics of domestic violence, listening to and believing[100] the women[101] and showing respect for the courage and resourcefulness of the women.[102]

Dialogue is important to developing lawyer–client relationships in which meaningful decision making about crucial life choices takes place. Recent developments in feminist theories concerning dialogue, when tested in the light of the experiences of the women interviewed, suggest that even the preconditions for dialogue are often lacking in lawyer–client relationships. Focus on the preconditions of dialogue suggests that empathy, and recognition by lawyers of their own limited perspectives, are two important preconditions for dialogue. An atmosphere in which questions are encouraged is also crucial. Attention to dialogue, and to the preconditions of dialogue, in a manner that recognises the limitations of the perspectives of lawyers, is crucial to the feminist goals of reflecting women's experiences in lawyer–client relationships and in the substance and processes of the law.

4. *Narrative, Translation and Lawyering*

I have argued that the recognition of the situated aspects of knowledge suggests that any model of lawyering requires that lawyers develop an awareness of the importance and impact of power dynamics and the dynamics of dialogue with clients. I have discussed facilitating the articulation of incoherent harms using a social change model of lawyering. Redressing power imbalances and eliciting incoherent harms through dialogue and action may also result in the desire by clients to have these harms reflected in and redressed by the law. Lawyers are inevitably involved "in a joint project of translating felt

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100 Czapanskiy, above n11 at 257 noting that lawyers admit disbelief of their women clients' assertions about domestic violence.

101 Waits, above n3 at 1059 noting that a routine part of the adversarial system involves giving the client the strong benefit of the doubt, rather than reflecting back the societal myths about domestic violence and thereby challenging the woman's credibility.

102 For further development of these suggestions see Seuffert, above n40.

experience into understandings and actions that can increase [clients'] power".[103] Lawyers are central to the process of translation of the narratives that women tell of their experiences into the categories that the law recognises.[104] They also translate the language, categories, responses and remedies that the law offers for their clients.[105]

Recently, theories of lawyering have begun consideration of the process of translation of narratives,[106] or conveyed experiences, of clients into the categories of experiences that the law recognises and to which it responds.[107] The lawyer engages in a two-way translation process which is constantly in flux: conveying an interpretation of the contested law to the client as well as conveying an interpretation of the contested experiences of the client to the court.[108] The two processes are not distinct. Rather, each process builds upon and influences the other. Both these processes are also influenced by the lawyer's location, and by the lawyer's interpretive monopoly. In the first part of the translation project, the lawyer conveys an understanding of the law to the client through a dialogic process of question and answer. The dialogic process was considered in the discussion of dialogue. The substance of the law that the lawyer conveys is always an interpretation. The lawyer's understanding of "the law"[109] may change during the course of a case for various reasons both related and unrelated to a particular client. For example, the lawyer may conduct research related to a client's claim, and may come to new understandings about the capacity of the law to respond to the client's articulated experiences, or may learn something about processes or interpretations of the law from representing other clients. The law may change, or be reinterpreted, or the lawyer's other experiences may change the manner in which she views the law.

Interviews with divorce lawyers in other research suggest that lawyers use the process of translating the law to clients to control clients and to protect their own reputations.[110] The power disparity between lawyers and women

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103 White, above n2 at 760.

104 Maureen Cain, "The General Practice Lawyer and the Client" (1979) 7 *Int'l J Soc L* 331 at 333–4, 336, 343 lawyers' main function is translation, not control; "typically a bourgeois client brings an issue to a lawyer, which the latter translates into a meta-language in terms of which a binding solution can be found. The lawyer may have to extend the concepts and objects of that discourse in order to achieve such an effective translation".

105 White, above n2 at 762, 765.

106 Abrams, above n1; Richard Delgado, "Story Telling for Oppositionists and Others: A Plea for Narrative" (1989) 87 *Mich LR* 2411 Gilkerson, above n23; above n29 at 1687–9; Mahoney, above n37: "Feminist narrative scholarship" involves the use of narratives of women's experiences to illustrate the manner in which the so-called "universal" categories of the law fail to recognise and respond to these experiences. See also Personal Narratives Group, above n1.

107 Ellen Pence & Tineke Ritmeester, "A Cynical Twist of Fate: How Processes of Ruling in the Criminal Justice System and the Social Sciences Impede Justice for Battered Women" (1992) 2 *S Cal Rev L & Women's Studies* 1.

108 See Joan Brockman, "Social Authority, Legal Discourse and Women's Voices" (Wint 1992) 21 *Manitoba LJ* 213 at 216; above n11 at 260.

109 According to at least some views of law, it is largely indeterminate, and therefore there are many ways of conveying an understanding of the law. See Mark Tushnet "An Essay on Rights" (1984) 62 *Tex LR* 1363; Amy Bartholomew and Alan Hunt "What's Wrong With Rights?" (1990) 9 *Law & Ineq J* 1.

110 Lynn Mather, Richard J Maiman and Craig A McEwen, "'The Passenger Decides on the

survivors of domestic violence, and their history of subjection to the controlling tactics of an abuser may make the women particularly susceptible to control by lawyers. Further, representing these women adequately in the context of a society that denies the existence of domestic violence and suspects the credibility of its victim may present challenges to lawyers' reputations.[111] However, control of vulnerable clients through interpretations of the law, especially in the interests of the lawyer's reputation, is inappropriate. Lawyers should be aware of the manners in which their own value judgments are reflected in their interpretations and should correct their interpretations accordingly.

In the second part of the translation project, the lawyer translates the client's narrative of her experiences into the language that the law recognises by conveying the facts relevant to fit the experience into a category recognised by the law. The narrative that a client initially tells to the lawyer about her reasons for being there is a story that includes her situation and some of the many contexts in which her life is lived. She may convey the story in a manner that reflects her current understanding of the law's possible responses, editing out experiences that she thinks are not relevant. The client's initial articulation of her experiences and her understanding of her experiences may change as her understanding of the law changes.[112] The lawyer's understanding of the client's experiences may also change over time, as the client and lawyer reinterpret those experiences due to new understandings of the law or for other reasons.

The experiences conveyed by the women interviewed suggest that lawyers should not begin the process of translating the client's narrative of her experiences into legal categories immediately.[113] Lawyers should address issues of power sharing and establish the conditions for dialogue at the beginning of the lawyer–client relationship. Using a process of dialogue to elicit the client's experiences, and also the client's understanding of the law and the ways in the which that understanding has shaped her narrative, may be essential first steps to appropriate legal representation. In dialogue, the client develops an understanding of the law and the relationship of her experiences to the categories that the law recognises. The following quotes reflect a lack of understanding of this relationship.

> I felt like I was a pawn in the game. It seemed to be that [the lawyer] was having a — now how can I describe it — a point scoring thing between him and my husband's lawyer. It seemed like a game to them ... there was even one or two

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Destination and I Decide on the Route': Are Divorce Lawyers 'Expensive Cab Drivers'?" (1995) *Int'l J L & Fam* 286 at 301: lawyers control clients who they think are unreasonable by reference to the judge, court or law as authoritative outsider third parties; at 307: "By asserting an appropriate measure of control over their clients' decisions, divorce lawyers help to maintain the credibility with colleagues and judges that is crucial to their professional survival"; see Meier, above n79 at 1364.

111 Above n3 at 1040.

112 Simon, above n19 at 482: "Not only are the client's interests indeterminant at any given moment, but the client's understandings of her interests may change in the course of representation."

113 Above n86 at 218–22; clients should be encouraged to define their own problems and lawyers should not translate clients' problems into legal frameworks too quickly.

> occasions where the children's father, my husband then, I think we did sort of look at each other once or twice, as if to say we are not really in this game.
>
> [I]t is just like being blindfolded and pushed by people down certain directions and occasionally they would ask you something and you would indicate a response, although you try to indicate to start with and then you were just taken. That's the way it was for me.

The client should also have the opportunity to articulate experiences as harms, even though she hasn't previously done so. The lawyer explores with the client the manner in which the experiences might fit into existing legal categories, the possible broadening or creation of new legal categories to address the experiences and the possibilities of other social change for redress.

Once a discussion concerning the client's experiences and the existing law has taken place and the lawyer and client have formulated a strategy for the case, the lawyer begins the process of translating the client's experiences into claims. This process involves taking the situated and contextual narratives of the client and fitting them into the abstract categories of the law, using the strict relevancy rules of the law. The lawyer is trained to recognise the legally relevant facts of the client's story, which are determined by the category of the law into which the lawyer attempts to fit the experiences, and to include only those relevant facts in the story to be told to the court. Where the categories of the law respond to the client's experiences, this process may be relatively straightforward, although it will always be a crucial part of the case. There will therefore always be choices about presentation and development of clients' stories that should be discussed with clients in a dialogue.

In the process of fitting the client's experiences into the existing categories of the law, and thus conveying an understanding of the client to the court, the complexity of the client's narrative(s) of the experiences may be lost.

> [T]he concrete experiences of women who are beaten by men are expropriated through the creation of bureaucratic texts, whereby the lived experience becomes inevitably reified into a 'case.' With each interpretation her story will be re-written, altered and suppressed. Each time a document is added to 'the case,' the woman's narrative is being tinkered with.[114]

Some of the women interviewed discussed experiences consistent with this analysis.

> I felt that the attitude, the way the decision was made didn't really seem to have anything to do with me, so I felt that ... I wanted them to go through their particular procedures and whatever they wanted to do, but it was on the point, asked me to stand up and say what I thought, what I wanted, and all I had was questions which were yes and no. And you can't throw away a marriage and a home on yes or no questions. I just don't have to agree ... No, when that finished and I walked outside I just felt sort of, well, that's that, but I didn't feel, I don't know, I just felt that something was lacking ...
>
> I felt like [she did], there was absolutely no point in me being there, might as well not even be there. What was going to happen was going to happen.

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114 Above n107 at 1.

Where the categories of the law do not respond to the client's experiences, which may often be the case for clients who belong to subordinated or outsider groups, the harm may disappear in the attempt to fit the experiences into existing universalised narratives. "In order to win cases, poverty lawyers must fit their clients' stories into law's established terms by squeezing client identities, histories and problems into universalised narratives."[115] This process can leave the women feeling as though the concrete harms that they have experienced are not recognised, or do not count in the system; it can leave women in dangerous situations with no recourse, or lead to women being prosecuted for crimes.[116] This quote reflects a situation in which a woman's interpretation of her experiences was not reflected in the "book" or the categories of the law.

> Well it was almost as though whatever my details were, were fitted in with what the book said, as opposed to what my details were and how the book could help me, it was like round the other way. It wasn't in my interest from what I was being told or directed down it was what the book said could be done, there is a difference.

Her experiences were lost in translation.

Feminist narrative scholarship is used to disrupt the claims of universality of the existing categories of the law by focusing on particular experiences that do not fit into those categories. Feminists have suggested presenting more complete narratives of the experiences of women to the court.[117] For example in "Legal Images of Battered Women: Redefining the Issue of Separation"[118] Martha Mahoney argues for the creation of a new legal category of separation assault to reflect the experiences of women who leave abusive relationships.

Using narrative in legal arguments in specific cases is another aspect of feminist deployment of narrative technique. The process of presenting more complete narratives of women's experiences to the court, or of refusing to abstract and reify experiences into existing legal categories, allows lawyers to disrupt the claim to universality of the categories. Using narrative in court can support claims for reform of existing precedent by exposing the falsity of the universal narratives' claims to fairness. "[T]he feminist goal is to redevelop the law by infiltrating legal doctrines with alternative narratives."[119] The use of narrative allows presentation of a much broader spectrum of women's experiences to the court: when experiences that do not look like harms when abstracted or reified are presented in context it is often easier to see the harm.[120]

Elizabeth Schneider provides one example of the use of experiences that do not fit into any specific legal category in court when she discusses strategy

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115 Gilkerson, above n23 at 873: "Universalization occurs when legal narratives are applied to diverse individuals in the assumption (or imposition) of a unified world view, and when differences are acknowledged but then dismissed as naturally occurring and legally irrelevant."

116 Above n107 at 8–13.

117 Elizabeth M Schneider, "Lesbians, Gays and Feminists at the Bar: Translating Personal Experience into Effective Legal Argument—A Symposium" (1988) 10 *Women's Rts L Rep* 107 at 137–8.

118 Mahoney, above n37.

119 Gilkerson, above n23 at 874.

120 O'Leary, above n77 at 218: "Feminist practical reasoning is a reasoning that is more sensitive to context"; Gilkerson, above n23 at 874: "In feminist theory knowledge is contextual, based upon perspective and experience."

in *State* v *Kelly*.[121] Schneider spoke directly to the Chief Justice of the New Jersey Supreme Court in the process of oral argument, arguing that admission of expert testimony on battered women syndrome would help juries make sense of the narratives of women who kill their abusive partners in the same manner as the Justice had made sense of the actions of another defendant in an opinion, a man who killed his wife.[122] She drew on the experiences of the Justice and the defendant in the other case, whose own experiences did not fit into a legal category. This technique uses the basic principle of narrative advocacy, presenting contextualised pictures of experiences in arguments for changing categories of the law that do not respond to those experiences.[123]

Expert evidence on battered woman syndrome was intended to present courts and juries with a contextualised picture of the relationships which resulted in women killing their abusive partners, and the effects of these relationships on the women. Admission of this evidence broadened the category of self-defence to allow consideration of the history of events leading up to the act of self-defence. In Australia and New Zealand evidence of battered woman syndrome is also admissible as part of claims of self-defence and provocation when a woman who is a survivor of domestic violence kills her abuser.[124]

The development of battered woman syndrome was based on a cycle of violence analysis of domestic violence. Difficulties with the use of battered woman syndrome have resulted from this analysis of domestic violence and its development into a restrictive category. An example of these difficulties in the New Zealand context is presented in *R* v *Oakes*,[125] where it was argued that battered woman syndrome was relevant to provocation and self-defence. Expert evidence of battered woman syndrome was admitted and Crown counsel argued that initiatives such as locking the abuser out of the house, laying complaints with the police and obtaining protection orders against the abuser were inconsistent with the "learned helplessness" aspect of the cycle of violence.[126] These reasonable and practical steps taken by Gay Oakes in an attempt to ensure her survival, most of which are taken by many women in similar positions, were argued to be inconsistent with battered woman syndrome. The initial impulse to broaden the category of self-defence by introducing contextualised accounts of women's experiences through the use of battered woman's syndrome eventually was abstracted into a legal category which, although broader than the category that it replaced, was not broad enough to encompass the experiences of many women. These problems suggest that further development of this area of the law and the category of battered

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121 84 NJ 305, 419 A2d 406 (1980).

122 Schneider, above n117.

123 See generally Elisabeth McDonald, "Is Tania Witika Guilty? An Exploration of Battered Women's Syndrome and the Criminal Law" New Zealand Suffrage Centennial Women's Law Conference Papers Women's Legal Group (1993) Wellington at 215–32.

124 *R v Oakes* [1995] 2 NZLR 673; Elizabeth A Sheehy, Julie Stubbs and Julia Tolmie, "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 *Crim LJ* 369.

125 *Oakes*, ibid. Mrs. Oakes killed her husband after 11 years of physical, emotional and sexual abuse, as well as alleged sexual abuse of her daughter.

126 Id at 684.

woman syndrome are necessary to adequately reflect the experiences of many women. Use of narratives of women's experiences that reflect the complexity of the lives of women who are survivors of domestic violence could assist in this development.

The possibilities for broadening the categories of the law through the use of narrative are relevant to both the test case and social change models of lawyering. In the test case model narrative might be used to help to convince courts, the legislature and the public that the injuries excluded from the law, such as the harassment and abuse around the courthouse against women who are attempting to gain protection from domestic violence, are serious enough to warrant creation of a new crime or increased penalties for existing crimes. Harms identified using the third approach could also be effectively presented through the use of narratives that present the rich context of women's experiences and thereby highlight the inadequacies of existing legal categories.

The two-way process of translation in which lawyers engage in legal representation, and developments in the area of feminist narrative scholarship, suggest that lawyers should be aware of value decisions they make in the course of translation and client representation. Lawyers should develop with the clients understandings of the law and the clients' experiences. Lawyers should be aware of the potential need for broadening the existing categories of the law and for creating new categories, and should consider employing techniques of feminist narrative scholarship in this process.

5. *Conclusion*

Situating knowledge and locating lawyering involves attention to the contexts in which lawyering takes place and the processes involved in the lawyer–client relationship in producing knowledge. Attention to these contexts highlights the fact that privileged white males still largely populate lawyering, suggesting that lawyering activity reflects the experiences of these men rather than the experiences of women survivors of domestic violence. Achieving the feminist goal of reflecting the experiences of women in theories and practices of lawyering therefore requires re-situating lawyering in these historically excluded experiences.

Attention to the contexts in which lawyering takes place also highlights the power disparity between lawyers and women survivors of domestic violence. The disparity in power presents barriers to the reflection of women's experiences in lawyering, including barriers to the dialogue necessary to shape and convey experiences, and to the process of translating these experiences to the legal system. The dynamics of power, dialogue and translation in the lawyer–client relationship are therefore crucial to the feminist project of facilitating the recognition of women's experiences in the substance and processes of the law. The feminist project involves a radical reconstructing of these dynamics in the lawyer–client relationship, which both implicates and requires social change. The social change model of lawyering developed by Lucie White and re-interpreted here suggests equal participation by lawyers and members of subordinated groups in the process of co-constructing harms and designing action in response to those harms. It provides inspiration for the lawyering project engaged in by feminists and others representing people in subordinated groups.

The third implication of situating knowledges for lawyering theories and practices identified in the introduction to this article involves recognising the context in which the theories and practices are developed, and the limitation of the knowledge reflected in the theories and practices. Situating knowledge results in the recognition of the possibility, and perhaps the necessity, of multiple theories of lawyering. The traditional model of lawyering may work well in some lawyering contexts. The experiences of some non-Maori women survivors of domestic violence in New Zealand suggest that it does not work well for them. These women's experiences, and the New Zealand context, also suggest that certain aspects of the social change model of lawyering developed in the United States may not work here. The theories and practices of lawyering discussed in this article are situated reflections on theories and practices in New Zealand and elsewhere. These reflections are offered in the hope of stimulating reflections on lawyering by feminists and others representing people in subordinated groups.