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Creating an Intimate Partner Violence Against Women Legal Theory

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Acknowledgements

My appreciation to the generous research assistance of Associate Law Library Professor Raquel Gabriel and my student research assistant Christine Zielinski. My thanks also to the New York City Law Review for hosting the Symposium and inviting me to participate on this panel. I am also most grateful to Professor Ruthann Robson for her tireless work in furtherance of a more just society. I am, however, especially thankful to her for being a generous colleague who has placed the professional interests of her fellow teachers and of our students at the top of her list of priorities!

CREATING AN INTIMATE PARTNER VIOLENCE AGAINST WOMEN LEGAL THEORY*

*Jenny Rivera***

Thank you.¹ It is a pleasure to speak on this panel and to participate in this symposium. Professor Robson's work has had tremendous impact in many areas of critical legal analysis, and has challenged us to think in nontraditional ways about the law and legal jurisprudence.² It is thus appropriate that we honor her work today by actively engaging in discourse on her scholarship and the areas that she has explored through her work in a manner that is grounded equally in pragmatism and legal abstractions.

The focus of this first panel is the very broad topic of equality. What better place is there to challenge our legal constructs with praxis, rather than a discussion of the legal and social aspects of equality. As an initial matter, we must ask what is intended by the word "equal" and the legal concept of "equality." Certainly, it implies more than the same treatment—or mistreatment.³ Similarly,

* This is an edited expanded version of remarks delivered at the Symposium to Honor the Work of Professor Ruthann Robson on November 6, 2004.

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¹ My appreciation to the generous research assistance of Associate Law Library Professor Raquel Gabriel and my student research assistant Christine Zielinski. My thanks also to the New York City Law Review for hosting the Symposium and inviting me to participate on this panel. I am also most grateful to Professor Ruthann Robson for her tireless work in furtherance of a more just society. I am, however, especially thankful to her for being a generous colleague who has placed the professional interests of her fellow teachers and of our students at the top of her list of priorities!

² For an overview of Professor Robson's work and its significance as it relates to a variety of jurisprudence sectors, see generally Ruthann Robson Symposium (Nov. 5, 2004) [hereinafter Symposium]. See also Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990) [hereinafter Robson, *Lavender Bruises*]; Ruthann Robson, *Incendiary Categories: Lesbians/Violence/Law*, 2 TEX. J. WOMEN & L. 1 (1993) [hereinafter Robson, *Incendiary*]; Ruthann Robson, *Sexual Minorities & the State: Some Struggles and U.S. Perspectives*, 2 FLINDERS J.L. REFORM 67 (1997) [hereinafter Robson, *Minorities*]; RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* (1992) [hereinafter ROBSON, (OUT)LAW]; Ruthann Robson, *Posner's Lesbians: Neither Sexy Nor Reasonable*, 25 CONN. L. REV. 491 (1993); RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL: FRAGMENTS IN LESBIAN LEGAL THEORY* (1998); Ruthann Robson, *Embodiment(s): The Possibilities of Lesbian Legal Theory in Bodies Problematized by Postmodernisms and Feminisms*, 2 L. & SEXUALITY 37 (1992).

³ See Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 296-300

equality as a legal construct cannot be simply about sameness without a consideration of how individuals and distinct community circumstances are not, and may never be, the same. My conclusion that individual and community circumstances may never be the same is based on a recognition of our political, social, and cultural realities, as well as my hope that differences among people can be a point of celebration rather than a foundation for unjust results. Equality is instead a principle that must be derived from, and by, experience.⁴ The topic for this panel should be what, and whose, experiences have been the focus of our equality principles and how that served our goal of shaping a just society.

My comments are limited to the application of certain equality principles to intimate partner violence against women—a topic in which Professor Robson did groundbreaking scholarly work on intra-lesbian violence.⁵ My comments also focus specifically on Latinas and draw from my work on intimate partner violence within the Latino community.⁶ This work suggests that the efforts to address intimate partner violence against Latinas share common elements with Robsonian legal theory and critique on the limits of

(1991) [hereinafter Williams, *Dissolving the Sameness/Difference Debate*]; Iris M. Young, *Difference and Policy: Some Reflections in the Context of New Social Movements*, 56 U. CIN. L. REV. 535 (1987) [hereinafter Young, *Difference and Policy*]; KATHARINE T. BARTLETT ET AL., GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 117 (3d ed. 2002).

Formal equality is a principle of equal treatment: individuals who are alike should be treated alike, according to their actual characteristics rather than assumptions made about them based on stereotypes. . . . What makes an issue one of *formal* equality is that the claim is limited to treatment *in relation to* another, similarly situated individual or group and does not extend to a demand for some particular, *substantive* treatment.

Id.

⁴ See Williams, *Dissolving the Sameness/Difference Debate*, *supra* note 3, at 296-300; Young, *Difference and Policy*, *supra* note 3.

⁵ See Robson, *Lavender Bruises*, *supra* note 2.

⁶ See Jenny Rivera, *Intimate Partner Violence Strategies: Models for Community Participation*, 50 ME. L. REV. 283 (1998); Jenny Rivera, *Preliminary Report: Availability of Domestic Violence Services for Latina Survivors in New York State*, 16 IN PUB. INTEREST 1 (1997-1998) [hereinafter Rivera, *Preliminary Report*]; Jenny Rivera, *The Availability of Domestic Violence Services for Latinas in New York State: Phase II Investigation*, 21 BUFF. PUB. INT. L.J. 37 (2002-2003) [hereinafter Rivera, *Phase II*]; Jenny Rivera, *The Politics of Invisibility*, 3 GEO. J. FIGHTING POVERTY 61 (1995) [hereinafter Rivera, *Politics*]; Jenny Rivera, *Puerto Rico's Domestic Violence Prevention and Intervention Law and the United States Violence Against Women Act of 1994: The Limitations of Legislative Responses*, 5 COLUM. J. GENDER & L. 78 (1995) [hereinafter Rivera, *Limitations*]; Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994) [hereinafter Rivera, *Domestic Violence Against Latinas*].

legal approaches and remedies.⁷

I define Robsonian legal theory as a theoretical methodology that reflects Professor Robson's thoughtful and thought-provoking approach to law and legal studies and which engages the reader in an analysis grounded in the reality of the subject matter and the practical implications of various legal approaches. Professor Robson's lesbian legal theory is thus grounded in the real experiences of lesbians and the political and legal consequences of adopting laws and remedial frameworks, both defined by and intended to apply to heterosexual communities. Thus, she challenges the reader to consider an analysis that is fundamentally based on the validity and vitality of lesbians *qua* lesbians, nothing less. Robsonian legal theory recognizes that comparisons are veiled attempts to accommodate lesbians and lesbian life to appease heterosexuals and non-lesbians. Such accommodation is ultimately disastrous for lesbians and legal theory.

A recurring theme in Robsonian legal theory is the irrelevancy or inapplicability of hetero-relational and/or feminist concepts in considering intra-lesbian violence.⁸ Similarly, Latinas and other women of color have challenged feminists and various actors within the legal system to reevaluate, restructure, tear down, and structure anew intimate partner violence legal theories, responses and remedies.⁹

I agree with Professor Robson that the current legal system and its foundational legal abstractions are ineffective and improperly suited to address the needs of the particular women of whom we respectively speak.¹⁰ I share Professor Robson's concerns about how the law and legal theory is designed and applied. Thus, a reconsideration and an appropriate defining and structuring of the experience of intimate partner violence in the lesbian community, the Latino community, and within the Latina lesbian community is needed and must come from the work of members of these respective communities.¹¹

In a truly Robsonian way, Latinas have questioned the applica-

⁷ See Robson, *Lavender Bruises*, *supra* note 2.

⁸ See Robson, *Incendiary*, *supra* note 2; Robson, *Minorities*, *supra* note 2; Symposium, *supra* note 2.

⁹ See, e.g., Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7 (2004); see also *supra* note 6.

¹⁰ See, e.g., ROBSON, (OUT)LAW, *supra* note 2; Rivera, *Domestic Violence Against Latinas*, *supra* note 6.

¹¹ See *supra* note 6; see also Robson, *Lavender Bruises*, *supra* note 2.

bility of legal and feminist jurisprudence that has focused on criminalization of battering, with its attendant enhanced penalties and mandatory arrests policies, short-term shelter systems and networks which are fashioned in crisis-mode response, rather than long-term empowerment models, and the compartmentalization of services which fracture and balkanize families.¹² These challenges have been based on the experiences, lives, and deaths of Latinas and the experiences of their family members and the Latino community.¹³ For example, their emphasis has been to reject an approach that unquestioningly accepts the benefits of criminalization, without also considering its dangers and potential for creating or causing violence.¹⁴ At the same time, however, Latinas accept the need for a certain level of law enforcement and civil legal intervention.¹⁵ Nevertheless, Latinas question what type of intervention and law enforcement is appropriate, and the terms of such intervention. Just as Professor Robson has critiqued law enforcement and certain legal approaches, and identified harm that has resulted to lesbians from the application of these legal efforts,¹⁶ Latinas have questioned the wisdom of over-reliance on state law enforcement policies for a community long exposed and subjected to police brutality and officially sponsored neglect.¹⁷

¹² See Rivera, *Preliminary Report*, *supra* note 6; Lisa M. Martinson, *An Analysis of Racism and Resources for African-American Female Victims of Domestic Violence in Wisconsin*, 16 WIS. WOMEN'S L.J. 259, 279 (2000); Rivera, *Domestic Violence Against Latinas*, *supra* note 6.

¹³ In addition, commentators have also raised the issue of essentialism as it is applied to women of color. See Candice Hoyes, *Here Come the Brides' March: Cultural Appropriation and Latina Activism*, 13 COLUM. J. GENDER & L. 328, 328-29 (2004) (describing briefly the story of Gladys Ricart, a Dominican-American woman who was assassinated by her ex-lover on her wedding day and the ensuing experience-based activism prompted by her death); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1990-1991) [hereinafter Crenshaw, *Mapping*].

¹⁴ Rivera, *Domestic Violence Against Latinas*, *supra* note 6, at 246 (noting Latinas call the police despite language barriers and negative police treatment of their community).

¹⁵ Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL'Y 463 (1996).

¹⁶ See Robson, *Lavender Bruises*, *supra* note 2.

¹⁷ See Rivera, *Politics*, *supra* note 6, at 63; Katherine M. Culliton, *Legal Remedies for Domestic Violence in Chile and the United States: Cultural Relativism, Myths, and Realities*, 26 CASE W. RES. J. INT'L L. 183, 187-89 (1994) (explaining that Latinas often face difficulties accessing protection and services in the U.S. because police blame the Latino culture for domestic violence) [hereinafter Culliton, *Legal Remedies*]. A great deal of scholarly work has similarly critiqued law enforcement as it affects Black and African-American women. See, e.g., BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* (1996); Miriam H. Ruttenberg, *A Feminist Cri-*

Latinas also have a history of state sanctioned cruelty and oppression. Latinas have faced the scorn and have been ostracized from within the Latino community for exposing the community to what some perceive as hostile scrutiny from outsiders.¹⁸ Latinas have also challenged the shelter system and service provision networks as alienating and at times inaccessible.¹⁹ Latinas have observed and experienced shelters that deny access based on language, ethnicity and/or immigrant status; it is a system that continues to lack sufficient bilingual/bicultural staff, and often demands of survivors that they sever ties with their communities.²⁰ Latinas fear that a shelter system that fails to represent the aspirations, hopes, desires, and realities of Latinas as they live in the United States will do harm to Latinas.²¹ This model is one that Latina advocates have struggled to navigate and mediate, while demanding equal access to shelters and battered women's service programs.

A doctrinal legal framework contextualized by experiential discourse provides an opportunity to analyze the constituent elements of equality and equalness. In contrast to an approach that defines equal as "same treatment," a more discursive approach constructs equality from within a community's reality, and on the basis of

tique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy, 2 AM. U. J. GENDER SOC. POL'Y & L. 171 (1994); Rivera, *Limitations*, *supra* note 6; Rivera, *Domestic Violence Against Latinas*, *supra* note 6.

¹⁸ See Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN'S L.J. 138, 167-68 (2004) (relaying an account of a Latina whose mother kicked her out of their home when the mother learned that her daughter divorced her abusive husband); Culliton, *Legal Remedies*, *supra* note 17.

¹⁹ See Rivera, *Domestic Violence Against Latinas*, *supra* note 6; Rivera, *Politics*, *supra* note 6; see generally Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1992-1993).

²⁰ See Rivera, *Phase II*, *supra* note 6; Crenshaw, *Mapping*, *supra* note 13; Sharon Cammack and Patrice Pujol, *Domestic Violence: A National Epidemic*, THE HOUSTON LAWYER, Sept./Oct., 2004, available at http://www.thehoustonlawyer.com/aa_sep04/aa_feature/page10/page10.htm (reporting on same-sex couples involved in domestic violence but are denied access to shelters); Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Covertures Diminishment, But Not Its Demise*, 24 N. ILL. U. L. REV. 153, 201 (2004).

²¹ See Rivera, *Preliminary Report*, *supra* note 6; see also Yolanda R. Davila & Margaret H. Brackley, Mexican and Mexican American Women in a Battered Women's Shelter: Barriers to Condom Negotiation for HIV/AIDS Prevention, 20 ISSUES IN MENTAL HEALTH NURSING 333 (1999); Satya P. Krishnan et al., *Documenting Domestic Violence among Ethnically Diverse Populations: Results from a Preliminary Study*, 20 FAMILY AND COMMUNITY HEALTH, Oct. 1997, at 32; Albert Valencia & Judith Van Hoorn, J., *La Isla Pacifica: A Haven for Battered Mexican American Women*, 54 AM. PSYCHOLOGIST 62 (1999); Rivera, *Phase II*, *supra* note 6.

shared and individual experience.²² The latter approach is based on a community's history and socio-political interactions within society as well as an individual's life. This equality does not occur in a vacuum because on some level it is a reaction to externalities. However, this construction of equality challenges us to formulate the idea of "equality" as more than solely a response to inequality, but rather as a concept and an experience that has its own foundation and meaning. The challenge then, is to reject essentialism and relativism not for its own sake, but because equality's doctrinal and analytic roots are of a different genus.

Professor Robson has asserted that a lesbian legal theory of intra-lesbian violence is not about separation from a patriarchal legal system, or a rejection of the relevance of lesbianism within such a legal system.²³ She posits that a lesbian legal theory of intra-lesbian violence should and must recognize lesbianism as lesbianism, both by the legal system and by those actors responsible for the movements that shape the legal system and legal doctrine.²⁴

In full Robsonian form, Latinas have also rejected essentialist model approaches to intimate partner violence. Latinas have questioned and eschewed approaches that suggest all women experience intimate partner violence the same or in significantly similar ways, except Latinas experience it in Spanish.²⁵ Latinas have been constructing a battered Latinas' movement, not a Latina battered women's movement.

A battered Latinas' movement demands the recontextualization of existing civil and criminal remedies and legal reforms in order to investigate the propriety of remedies not dependent on state intervention. Such a movement responds to concerns of Latina survivors based on their experiences as those experiences are articulated by Latinas. From this movement's vantage point we may consider shelters as potentially isolating and alienating places for many Latinas because they lack bilingual/bicultural staff.²⁶ Similarly, we may find a rational basis in a Latina's decision to continue

²² See Williams, *Dissolving the Sameness/Difference Debate*, *supra* note 3; Young, *Difference and Policy*, *supra* note 3.

²³ Robson, *Lavender Bruises*, *supra* note 2.

²⁴ *Id.*

²⁵ See generally José E. Alvarez, Book Review, 95 AM. J. INT'L L. 459, 462 (2001) (reviewing HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000)) (stating that rape and the definitions by which it is criminalized may be experienced differently in different cultures); Rivera, *Domestic Violence Against Latinas*, *supra* note 6.

²⁶ See Julissa Reynoso, *Perspectives on Intersections of Race, Ethnicity, Gender, and Other Groups: Latinas at the Margins*, 7 HARV. LATINO L. REV. 63 (2004); see also *supra* note 6.

her relationship with the batterer, while simultaneously focusing on ways to end the battering but not the relationship.²⁷ We may also find logical reasoning in a Latina's choice to remain with the batterer rather than face potential violence from law enforcement and judicial and/or immigration officers. Thus, we would seek to develop legal responses and legal analyses that are based on these choices and realities as described, and lived, by Latinas, not through some other person's or group's analysis of these experiences and choices.

As we consider this approach to or definition of an "equality project," we would recognize that the "domestic violence" movement is English language-centered and uncultural. It is a movement that has centralized criminalization while it has observed continued victimization of survivors. It has observed aspects of our current judicial system that works best when survivors acquiesce through assimilation and acculturation.²⁸ It is a movement that demands that Latinas adopt criminalization and law enforcement tactics and the primacy of separation from a batterer and a community.²⁹

For any individual Latina any or all of these approaches may be optimal, but current approaches cannot work as a remedial framework for a community without consideration of the reality of the experiences and desires of Latina survivors. Cultural sensitivity does not grasp the concept of developing response systems that are able to acknowledge the needs of a community under attack from external efforts, as well as the sense of isolation that a Latina survivor feels in her own home when the attacker is from her community. Stereotypes and caricatures are inappropriate and guided by racist and xenophobic misconstructions of Latino lives.

Where does this leave us? Let me close by noting some responses that Latina advocates have promoted or are considering. I provide this brief description so that we can fully engage in a Robsonian critique of the potential value and costs of these responses.

The first, of course, is the sufficient staffing of all intimate partner programs with bilingual/bicultural staff. Full and ade-

²⁷ See generally *supra* note 6; NATIONAL LATINO ALLIANCE FOR THE ELIMINATION OF DOMESTIC VIOLENCE, NATIONAL SYMPOSIUM ON LA VIOLENCIA DOMÉSTICA: AN EMERGING DIALOGUE AMONG LATINOS (Nov. 1997), http://www.dvalianza.org/pdfs/r_symposium.pdf; NATIONAL LATINO ALLIANCE FOR THE ELIMINATION OF DOMESTIC VIOLENCE, FIRST NATIONAL LATINA POLICY SUMMIT ON DOMESTIC VIOLENCE (June 2001), http://www.dvalianza.org/pdfs/fs_voices.pdf.

²⁸ Crenshaw, *Mapping supra* note 13.

²⁹ See generally *supra* note 6.

quate staffing is part of redesigning shelters—philosophically and administratively. It requires a willingness to recognize that certain currently applied models and strategies are not working for everyone because they are not best suited for everyone. It requires recognition that the United States has always been a non-monolingual society and that if we wish to provide women with services in a setting conducive to securing them with a safe environment that facilitates empowerment, we must respond to linguistic as well as other needs.

A second area of focus is on the Latina's family and the usefulness of batterer programs. This requires an understanding that children are central figures in many women's lives. Nevertheless, it may be seen as decentralizing our focus from women to children and men. This may appear as centering the male experience and, thus, counter to feminist doctrine. However, to the extent the emphasis on children and the batterer comes from women, then perhaps we need to explore the possibility that it is no less feminist to consider these other important matters and persons if it addresses women's requests regarding their needs and choices. It may very well facilitate a discussion about male and female roles within the family and the impact of violence upon the family unit.

Part of the discourse yet to be fully explored is how we address these concerns with limited resources, when we must ensure the availability of services to protect women first, and avoid the deprioritization of women and their safety while attempting to "rehabilitate" men.

Third, there must be a community response, and not an individual response, to intimate partner violence. Community in this sense does not mean solely the extant larger "community," but rather the local community of women who may share and understand particular mores and norms associated with their own insular community.

Fourth, there must be ongoing education of the community, advocates, and lawyers on immigration laws and their application to women and their batterers. The role of immigration law and policy is without question of great importance to immigrant battered women, and is even more critical post September 11, 2001 and November 4, 2004, because current immigration policy and reform is developed in a crucible of fear and undisguised resentment for those who are immigrants of color or from countries designated "unfriendly" or "terrorist havens."

Despite the importance of immigration laws and policies to

the lives of Latinas, it is also important to recognize that many Latinas are not undocumented immigrants, but are indeed citizens under the law. Nevertheless, many of these women are treated by law enforcement officials as women without rights afforded other citizens simply because they are associated with a community that is labeled solely as immigrant or non-citizen and, for some, less valuable. It is important to acknowledge this disparate treatment based on community association and disassociation as we construct an understanding of battered Latinas and the complexities of the issues involved in representing these women.

Fifth, we must work from the non-negotiable position that this struggle for equality is part of a larger justice project and should not be decoupled from other struggles for equality and social justice. While each discreet struggle has a value and capital worth recognizing and building upon, we must accept the multivariate aspects of our struggle to end interpersonal violence. This anti-violence struggle is not only a feminist project because, as so many authors and other advocates have described, it is a struggle that replicates the racialized society it represents. It is also not solely an anti-discrimination project because it is clearly grounded in responses to gendered societal as well as individual violence. It is also a struggle about how the law recognizes the impact on interpersonal violence, gender and sexuality, and society's perceptions about "domestic violence" and women. It is no surprise that Latina domestic violence advocates and other feminists working on interpersonal violence are labeled "anti-men" and/or "lesbian" in an attempt to categorize advocates as somehow "outside the mainstream" and vulnerable to marginalization. Such labeling is, of course, another form of violence—one geared to undermine and divide us. It is accomplished through threats, intimidation, and derailment from our central focus on violence done on women by intimate partners. To avoid the current tensions amongst communities we must reject efforts that seek to separate us into those who are "accepted" and those who are outsiders.

In closing, I give public thanks to Professor Robson for all of her work. Latinas, and other women—lesbians and non-lesbians alike—have benefited from her work. The urgent call behind Robsonian legal theory inspires us to be "Presente," which is for us to say that we are here and we are here to stay.

Thank you.