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Gender, Violence, and the Rule of Law: Remembering Isabel Marcus

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INTRODUCTION

Isabel would have much to teach us about the recent rise of authoritarian politics fueled by fears of disorder in gender, sex, and family. Reading the news over the last year or so, I recall the many conversations in her living room, always accompanied by a pot of tea, that have been a highlight of my career and personal life. I wish I could drop in there now to get her insights, along with the familiar pot of tea, about Putin's war on Ukraine, the U.S. Christian nationalist movement, and the demise of *Roe v. Wade*,¹ for starters. All of these involved issues central to her work, and Isabel would have added plenty of stories from her own life to further illuminate the current situation.

Isabel was an intellectual leader who made sure to constructively question and change what that role meant. I

† Professor of Law Emerita, University at Buffalo, State University of New York, mcclusk@buffalo.edu. Thanks to Patricia Cain for organizing this symposium. Thanks also to my Buffalo feminist salon friends and colleagues whose conversations in Isabel's living room helped inform many of the ideas in this Essay.

1. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

will begin with some personal reflections on Isabel's activism and institutional leadership. I will then turn to her scholarship, exploring her theoretical analysis of women's rights and particularly violence against women, in relation to the rule of law. In the last Section, I will give an overview of her strategy for using legal education as a means for legal change, describing how she implemented that strategy through activist institution-building.

I. ISABEL'S ACTIVIST PRAXIS

The University at Buffalo School of Law faculty was an early leader in feminist legal theory and praxis, thanks to a faculty long committed to groundbreaking legal thought and teaching with close attention to social context. By the time I arrived in 1995, Buffalo stood out for having a number of faculty members with strong reputations for research and teaching on gender across a range of subject areas. As one of the first in that early group, Isabel was an ideal mentor, institution-builder, and general source of warmth, wisdom, and inspiration.

I was hired along with two other new scholars, Susan Vivian Mangold and Teresa A. Miller, who, like Isabel, combined scholarship with activism to engage with questions of gender and violence as important aspects of their legal work. Over the next two decades or so, our frequent gatherings in Isabel's office and living room were a home base for working on projects and challenges. The atmosphere she curated in each setting was at once domestic, global, whimsical, and steeped in reminders of the human problems implicated in our work as legal educators and professionals. Surrounded by posters, articles, and books on domestic and global violence, Isabel kept a basket of distinctive wind-up toys on the table in front of her comfortable office couch as a conversation starter and stress-reliever for students and colleagues.

Isabel brought to law a global perspective informed by decades of international human rights work. She was

committed to making law life-changing for those learning and practicing it as well as for those seeking relief from injustice. She challenged herself, her colleagues, and students to critically examine their own assumptions and expand their horizons. In an article about her empirical research on domestic violence in Central and Eastern Europe, Isabel explained that she designed her methodology to be mindful of her position as a foreigner, legal professional, and American among many other factors.² She addressed the limits of her perspective in part by building cooperative relationships with local women's rights activists and by engaging in extended conversations with local professionals and officials, especially those outside elite or cosmopolitan circles.³ In her extensive research travels, even in advanced age she made a point to avoid hotels catering to Western visitors and other elites and to instead stay with her activist contacts, often in rugged conditions, to better appreciate their everyday lives and to build professional and personal relationships as a key strategy for sociolegal change.

In another example of Isabel's leadership in changing theory and practice, as a junior faculty member she co-organized the 1984 program for the Law School's premier intellectual event, the annual James McCormick Mitchell Lecture. That year's lecture, published in a much-cited article in the *Buffalo Law Review*, became part of the canon of newly developing feminist legal theory.⁴ As Isabel explained in her introduction, she planned the event to

2. See Isabel Marcus, *Preliminary Comments on Dark Numbers: Research on Domestic Violence in Central and Eastern Europe*, 21 U. ARK. LITTLE ROCK L. REV. 119, 119–21 (1998).

3. *Id.* at 121.

4. See Ellen C. Dubois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon, & Carrie J. Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11 (1985).

showcase feminist methodology as well as feminist ideas.⁵ Instead of the traditional lecture format, she structured it as a conversation among five leading feminists with diverging views.

Isabel's pedagogy also focused on bridging diverse personal and professional perspectives. As a guest speaker on human rights in a gender and law class I taught, Isabel made time to hear from students about the experiences and hopes that brought them to law school and to the class. When Isabel created a human rights course bringing Buffalo law students to Bosnia after that region's civil war, she made sure to lead students outside of their personal and intellectual comfort zones to confront the struggles of traumatized and divided communities.

Isabel's life gave her plenty of personal experience in expanding horizons of gender, religion, class, and politics. In one of our more recent conversations, she reflected that she had faced discrimination and had lost some battles over the years. She explained these difficulties did not dampen her spirits or her commitment to justice, emphasizing that "I have enough" to live meaningfully. A model of courage and integrity, she continually pressed for institutional changes that would overcome barriers for others as well in her own career. Her institutional leadership at the University at Buffalo included working collaboratively to develop the interdisciplinary Gender Institute, the Global Gender Studies department, the Law School's domestic violence clinic and family law curriculum, as well as leading law school tenure cases and its international programs, among much else. In meetings with colleagues and behind the scenes, she could be counted on to be a strong voice and mobilizing force holding the Law School and the University to its high standards of equity, humanity, and professionalism.

5. *See id.* at 11–12.

II. ISABEL'S ACTIVIST THEORY

Now that Isabel is not here with us, her writing, research, and activism shed light on current legal and political turmoil. My comments here are my own interpretations and ideas provoked by reviewing some of her work, in hopes of carrying on the conversation and inviting others to join in.

A. *Gender and the Rule of Law*

Questions of gender shake the foundations of law. As Isabel's work shows, the idea that women's basic human rights will generally follow from reasonably functional liberal legal systems and democratic political processes misjudges the nature of law and the function of gender ideologies.⁶ Nor will gender equality generally follow from reasonably functional capitalist markets ruled by self-interest maximizing economic actors against a background of formally neutral rights.⁷ Further, a politics of cynical legal instrumentalism—whether based on right- or left-wing ideals of the rule of power—is also likely to reproduce gender injustices.

Conflicts about gender strike at the core of ideas about social order, weakening trust in law's legitimacy as a means for ordering conflicts and advancing societal well-being. In Western traditions of political theory and practice, intersecting status-based identity markers (such as gender, race, sexuality, nationality, religion, and economic class) have long defined legitimate authority. Liberal legal ideas of liberty and self-government draw on an ancient model of

6. See Isabel Marcus, *The "Woman Question" in Post-Socialist Legal Education*, 36 HUM. RTS. Q. 507, 508–09 (2014).

7. See *id.* at 531–33 (explaining that the neoliberal market perpetuates subordination in the guise of neutrality); Marcus, *supra* note 2, at 130 (noting "market economies do not repair the injuries of gender systems").

household masters acting as formal equals in a public sphere while exercising unequal power to rule others in his private domain (of wife, children, servants or enslaved labor, and property).⁸

Attention to women's rights challenges us to develop a critical approach that recognizes power is constituted through complex, changing interrelationships between culture, socioeconomic structures, politics, and law.⁹ Justice for women (and others systemically denied powers to rule) will require activism directed toward changing each of these interrelated systems at the level of everyday practice and thinking, not merely establishing principles and rules affirming and protecting particular rights. At the same time, gender justice requires rethinking foundational principles, purposes, and processes of legal institutions. Isabel's research, teaching, legal advocacy, and personal life were all committed to putting that theory into action—and to using that action to further theorize and correct law's injustices and shortcomings.

In a 2014 article on transforming law in post-socialist societies, Isabel writes that women's rights (like other identity-based rights) become “a lightning rod [testing] a state's commitment to constitutionalism, a rule of law, and its regional and international human rights obligations.”¹⁰ Liberalism makes these three commitments the basis for legitimating a regime's power and potential.¹¹ In practice,

8. See MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 5–6 (2005); see also AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 24–29 (1998) (explaining that, under the influence of this tradition, the right to freedom after the U.S. Civil War was used to support restrictions on women's rights within marriage).

9. Marcus, *supra* note 6, at 513.

10. *Id.* at 546.

11. See *id.*

however, she explains that the example of women's rights shows these commitments can also backfire as a means to change entrenched injustice.

Who rules the rule of law, implicitly as well as overtly, is a source of deep tension within liberal traditions and contemporary politics.¹² The power to interpret, apply, and enforce law matters as much as the specific legal provisions, as does the power to influence the ideologies and standards that make particular legal judgments credible.¹³ To carry out its promises, law necessarily depends on the authority of government institutions and personnel and their capacity to command some degree of private compliance. Law's legitimacy depends on trust in its capacity to hold diverging interests and institutions accountable to public principles and procedures, so that it is not perceived to be an instrument of insular, arbitrary, or destructive power.¹⁴

Ideas about masculinity, and its intersections with race, class, sexuality, and other identity characteristics, are deeply intertwined with judgments about who has authority

12. See generally ADAM COHEN, *SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA* (2020) (tracing the history and broad social and economic impact of conservative Supreme Court majorities appointed through conservative political maneuvers aimed at leveraging the court for long term legal change); STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2007) (showing that vastly unequal control of the legal system enabled white settlers to appropriate native peoples' land through egregious failures to enforce native peoples' rights in market exchanges under liberal law).

13. See Noah Feldman & Lidia Jean Kott, *Takeover: How a Conservative Student Club Captured the Supreme Court* (2021), <https://www.pushkin.fm/audiobooks/takeover-how-a-conservative-student-club-captured-the-supreme-court> (describing the Federalist Society's role in changing the ideology of the Supreme Court); AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015).

14. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2348–49 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

to interpret and apply law—and whose extra-legal or even unlawful authority over others deserves legal deference, indifference, or tolerance.¹⁵ Without changes in deeply held assumptions about who and what qualifies as unruly,¹⁶ liberal legal commitments to democracy and human rights will tend to appear fundamentally illegitimate or weak compared to authoritarian alternatives. In addition, without engaging these deeper assumptions, liberal law will provide ample ammunition for a politics of hate, fear, and division to advance a rule of well-fortified and enriched elites undermining human well-being across divisions of gender, sexuality, nationality, race, and religion.

B. *Gendered Rule by Violence under Law*

Isabel's theoretical analysis of these problems grows out of her deep engagement with the problem of gender violence. Despite formal legal protections, and vast differences in legal systems, intimate violence particularly targeting women persists and often remains beyond law's effective reach in both socialist and capitalist societies, in democracies as well as autocracies, regardless of "modernization," and despite liberal legal systems and human rights commitments.

Contrary to conventional wisdom, the "rule of law" does not mean that lawful governments hold a monopoly on force. Instead, governments inevitably legitimate and distribute the power to gain through force by the ways in which legal authorities define, interpret, punish, discount, and immunize private acts of violence.¹⁷ Within "free markets" or

15. See DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS 14–16 (2021) (explaining a pervasive societal and legal bias making masculine identity a marker of credible authority).

16. See Anita Bernstein, *What's Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655, 660, 665–67 (2013) (explaining the persisting social and legal power of race and gender based ideas about unruliness).

17. See Martha McCluskey, *Toward a Law and Political Economy of*

liberal capitalist societies purportedly constituted by voluntary, mutual exchange, many people must bargain with the reality or threat of violence in securing everyday needs and life opportunities.¹⁸

Both the Black Lives Matter movement and feminist movements have shed light on the unequal problem of pervasive, persistent, and even increasing violence under formally neutral laws and firmly established legal institutions that claim to restrict force to exceptional circumstances consistent with respect for life and liberty (like self-defense). As both of those movements highlight, systemic problems of unequal violence can be a familiar social phenomenon yet remain largely unacknowledged by many in power.¹⁹ At the same time, some kinds of accounts of violence are also unequally spotlighted and privileged, so that the problem is systemically displaced onto demonized others, based on race, gender, sexuality or other identity factors.²⁰

As one of her major research projects, Isabel studied domestic violence in Poland, Hungary, Russia, and Romania in a period of transition from socialist regimes under Soviet power from the 1990s well into the twenty-first century.²¹

Gender Violence, LPE PROJECT (Nov. 12, 2018), <https://lpeproject.org/blog/toward-a-law-and-political-economy-of-gender-violence>.

18. *See id.*

19. *See* Martha T. McCluskey, *Privileged Violence, Principled Fantasy, and Feminist Method: The Colby Fraternity Case*, 44 *ME. L. REV.* 261, 277–80 (1992) (critiquing a culture of denial of everyday instances of violence by white male fraternity members at an elite college).

20. *See, e.g.*, Blanche Bong Cook, *Biased and Broken Bodies of Proof: White Heteropatriarchy, The Grand Jury Process, and Performance on Unarmed Black Flesh*, 85 *UMKC L. REV.* 567, 568–70 (2017) (describing the legal influence and legitimation of ideologies of race, sex, and gender that serve to turn victims of violence into perpetrators).

21. *See* Marcus, *supra* note 2, at 119–20; Marcus, *supra* note 6, at 511–12.

She found that the officials and professionals she interviewed often used the term “dark numbers” to explain this violence that is widely known to exist, but generally kept hidden from public or official recognition and records.²²

She analyzed intimate violence in the distinct context of these countries’ transition from socialism not as an exceptional feature of societies construed as “other” but rather as one manifestation of a global problem that feminists had uncovered and challenged in the U.S.²³ Isabel investigated the rationales authorities used to explain the lack of data on gender violence in these societies with a history of bureaucratic number-crunching.²⁴ Their responses to her questions revealed the complex nature of the problem of law and violence and led her to focus on possibilities for reforming legal education as a global human rights strategy.²⁵

A common explanation of the persistence of the problem and its neglect by legal authorities is that violence against women is caused by cultural patterns outside of law. In her interviews with family law specialists and medical providers, Isabel found evidence that violence against women and children by husbands was a major factor in divorce.²⁶ Nonetheless, legal and medical providers tended to view this violence as a natural or traditional part of family relations or biological gender characteristics, not as a pattern of wrongful masculine behavior or governmental neglect appropriate for legal redress.²⁷ Indeed, professionals often placed responsibility for controlling or claiming domestic violence on women, interpreting the violence as a problem of female

22. Marcus, *supra* note 2, at 124–25.

23. *Id.* at 119–20.

24. *Id.* at 124–25.

25. *See infra* Section II.B.

26. *See* Marcus, *supra* note 2, at 129–30.

27. *See id.* at 129.

provocation or exaggeration.²⁸

The idea that governments cannot legislate social morality has a long and sordid history, exemplified in the Supreme Court's infamous opinion upholding U.S. racial apartheid in *Plessy v. Ferguson*.²⁹ That case was part of a series of Supreme Court decisions loosely interpreting the Reconstruction Amendments to impede the major sociolegal changes toward race and class equality taking shape after the Civil War. By limiting federal authority to protect civil rights and democracy from violent resistance in cases such as *United States v. Cruikshank*³⁰ and *United States v. Harris*,³¹ the Court naturalized and normalized a deeply contested culture of racial segregation and subordination enforced by white supremacist violence that continues to roil U.S. politics today.³²

As Isabel's research suggests, the cultural practices and social traditions that contribute to identity-based violence may not fade away over time even as social norms and structures undergo major change. Instead, these changes can provide new, and distinctly political, opportunities, rationales, and motivations for reinforcing the practices and ideas that enable systemic violence. For example, she notes that during socialist rule in Central and Eastern Europe, the

28. *See id.* at 129–30.

29. 163 U.S. 537, 551 (1896) (rejecting the view that “social prejudices may be overcome by legislation”).

30. 92 U.S. 542 (1876).

31. 106 U.S. 629 (1883).

32. *See* James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385 (2014) (explaining the vast impact of multiple constitutional doctrines established by this ruling refusing federal protection against anti-Black violence aimed at preserving white supremacist and elite electoral power); Martha T. McCluskey, *Facing the Ghost of Cruikshank in Constitutional Law*, 65 J. LEGAL EDUC. 278, 280–81 (2015) (connecting the case to a pattern of constitutional rulings legitimating anti-Black violence and discounting Black lives).

family was viewed as a haven from the state's inhumane surveillance and control, even though that meant families were often unsafe for women and children.³³ The idea that domestic violence was a personal and private matter not appropriate for socialist state action meshed with pre-socialist cultural and religious traditions grounding family well-being in patriarchal authority.³⁴ Socialist states sought to replace many of these religious and cultural traditions in the interests of modernization and unity, for example by adopting formal legal provisions for women's rights.³⁵ Despite women's increased access to wage labor and social supports, women continued to be the primary providers of unpaid family service at home and to be disproportionately channeled into lower wage jobs associated with feminine domestic work,³⁶ a pattern which likely served socialist states' interest in securing men's acceptance of women's increased economic power. In addition, by sustaining the family as a zone for freely exercising unaccountable authority, these socialist states may have alleviated male resistance to the indignities and injustices of authoritarian rule.

The dramatic changes involved in these socialist countries' transition to capitalist democracy produced new political logics serving state disregard of domestic violence. The collapse of factories, agricultural production, and state social supports contributed to widespread unemployment and immiseration.³⁷ Neoliberal policies of austerity and inequality could be made more palatable by continuing to cultivate an ideal of the family as a haven promising men unconditional support in a heartless world of market

33. See Marcus, *supra* note 2, at 123; Marcus, *supra* note 6, at 536–37.

34. See Marcus, *supra* note 2, at 129.

35. See *id.* at 123; Marcus, *supra* note 6, at 519–23, 528.

36. See Marcus, *supra* note 2, at 123; Marcus, *supra* note 6, at 523.

37. See Marcus *supra* note 2, at 128, 130.

competition.³⁸

In addition, post-socialist governments may seek legitimacy by claiming to restore authority for traditional religious and cultural norms suppressed by the former governments, including patriarchal ideas about gender and the family.³⁹ As post-socialist governments adopted formal commitments to antidiscrimination and human rights, necessary for European Union support, continued legal deference to masculine family authority could help to dampen opposition to socioeconomic liberalization from religious and conservative political movements.⁴⁰

Isabel's work in transitional societies contributes to feminist attention to other examples of law's role in reinforcing and amplifying treatment of gender violence as a cultural problem that can be shielded from effective legal redress. Over a century after *Plessy*, the Supreme Court overturned a portion of the 1994 Violence Against Women Act, concluding that Congress exceeded its constitutional authority to regulate commerce or to enforce equal protection by providing a civil damages remedy for victims of gender-motivated violence.⁴¹ The majority opinion reasoned that federal powers to protect the economy cannot extend to protection for gender-motivated violence, despite voluminous evidence of national economic impact, because that would intrude on family matters reserved to the states.⁴² The opinion further explained that evidence of pervasive bias in state criminal justice systems does not justify providing victims with the alternative of federal remedy against

38. *See id.* at 123 (comparing author Christopher Lasch's description of the ideology of the American home as a haven from a heartless market).

39. *See* Marcus, *supra* note 6, at 525, 528–29.

40. *See id.*

41. *See* United States v. Morrison, 529 U.S. 598 (2000).

42. *See id.* at 615–16.

private perpetrators of violence.⁴³ To support this reasoning, the Court majority reinforced late nineteenth century rulings denying federal powers to protect against anti-Black and anti-Union violence and political exclusion after the Civil War, including *Cruikshank* and *Harris*.⁴⁴

In another contemporary U.S. Supreme Court case, *Town of Castle Rock v. Gonzales*, Justice Scalia's majority opinion ruled that a federal civil rights law providing federal damage actions for state violations of due process did not allow a woman to sue for damages when the local police department failed to respond to her calls to enforce a court-issued domestic violence restraining order, with the result that her estranged husband murdered their three children.⁴⁵ Even though the state law governing her protective order appeared to mandate police enforcement in both the statutory text and intent,⁴⁶ Justice Scalia reasoned that the Constitution nonetheless carves out an implicitly protected zone of police discretion that overrides explicit state protections of family safety.⁴⁷

These U.S. legal rulings denying protection from systemic violence served both to limit law and to covertly make law. When state inaction becomes the accepted rule, some patterns of unequal violence appear not only cultural but also distinctly lawful, consistent with or even supportive of the rule of law.⁴⁸ Isabel's scholarship and activism

43. *See id.* at 621.

44. *See id.* at 621–23; *see also* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1024–30 (2002) (critically analyzing the Court's construction of gender violence as part of a private sphere of family relations undeserving of federal protection).

45. *See* 545 U.S. 748 (2005).

46. *See id.* at 759; *id.* at 775–77 (Stevens, J., dissenting).

47. *See id.* at 761–62.

48. *See* Marcus, *supra* note 2, at 122 (emphasizing that domestic violence exemplifies the problem that state inaction can maintain a

addressing violence against women embraced feminist legal theory's understanding that law wields de facto as well as de jure power.⁴⁹ The subjective judgments inevitably made in applying formal rules to specific facts become unwritten rules that create and distribute legal rights.

For example, legal scholar Deborah Tuerkheimer explains that men accused of sexual violence often benefit from a de facto presumption of credibility, or even inflated credibility, depending on their race, class, and access to other forms of status, while the credibility of accusing women gets unequally discounted.⁵⁰ The more this unequal presumption becomes part of legal authorities' normal practice, the more that covert unequal entitlement becomes ingrained in the culture as reasonable and lawful.⁵¹ The more prominent men successfully draw on stereotypical notions of white heteronormative masculinity as a successful means of fending off evidence of wrongdoing, the more that wrongdoing can become tolerated or accepted as normal and authoritative.⁵²

Philosopher Kate Manne explores misogynist violence as a problem of implicit sociolegal rights, challenging the common view that it is a problem of individual psychological animus toward all women or of isolated personal fragility

hierarchical family culture resulting in serious harm).

49. See Isabel Marcus, *Compensatory Women's Rights Legal Education in Eastern Europe: The Women's Human Rights Training Institute*, 39 HUM. RTS. Q. 539, 557 (2017).

50. See Tuerkheimer, *supra* note 15, at 14–15.

51. See *id.* at 52–56 (explaining confirmation bias produced as inflated credibility reinforces links between masculinity and authority).

52. See Deborah Tuerkheimer, *This Was Never About Amber Heard*, MS. MAG. (June 2, 2022), <https://msmagazine.com/2022/06/02/amber-heard-sexual-abuse-domestic-violence-believe-women/> (discussing Johnny Depp, as well as Brett Kavanaugh, as examples of powerful men who amplified their power and evaded evidence of wrongdoing by capitalizing on gendered and sexualized ideas of credibility and legitimacy).

and irrationality.⁵³ She analyzes gender violence as a law enforcement system aimed at preserving a masculine-coded entitlement to non-reciprocal feminized services, such as domestic labor, emotional support, deference, and sexual availability.⁵⁴ Even if most men do not assault or batter women inside or outside of the home, many men (especially those with race and class privilege) can nonetheless gain from a system that normalizes an unequal masculine entitlement to women's attention, bodies, and labor.⁵⁵

Discussing the persistent backlash against sexual harassment prohibitions, legal scholar Robin West traces part of the resistance to under-examined ideas about the de facto rights at stake in unwelcome sex.⁵⁶ West notes that this backlash involves some forms of sexual harassment where sexual conduct is unwelcome and has harmful effects on women, but where the behavior does not clearly violate consent, such as situations of coercion by economic pressures (such as sexual activity as an implicit condition of a job) or when sexual touching occurs without an opportunity to withhold or withdraw consent (such as groping by a stranger in a crowded subway).⁵⁷ West notes that much sexual harassment in theory fits well within traditional tort concepts of assault and battery, but that both public opinion and legal authorities commonly treat it as less wrongful or harmful than other kinds of invasive and uninvited touching.⁵⁸ West explains this unequal treatment as a

53. See KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* (2018).

54. See *id.* at 63.

55. McCluskey, *supra* note 17. See generally KATE MANNE, *ENTITLED: HOW MALE PRIVILEGE HURTS WOMEN* (2020) (discussing legal and extralegal practices conferring many forms of unequal masculine entitlement).

56. See Robin West, *Manufacturing Consent*, *BAFFLER* (May 2018), <https://thebaffler.com/salvos/manufacturing-consent-west>.

57. See *id.*

58. See *id.*

persisting assumption of an unequal masculine entitlement to access women's bodies for their own interests.⁵⁹

It matters that gender ideologies rationalizing unequal violence are implicitly affirmed and enforced as seemingly neutral rules of law. Analyzing U.S. constitutional doctrine denying protections for people in poverty, legal scholar Julie Nice concludes that the poor are included in constitutional law for the sake of being excluded from rights generally available to others.⁶⁰ This “inclusive exclusion” makes exceptional treatment of poverty an unstated legal norm, creating ambiguity that insulates the resulting subordination from legal and political challenge.⁶¹

Isabel's work in Central and Eastern Europe wrestles with the similar problem that women's human rights are included in the rule of law and democracy but in practice get neglected and undermined through “everyday state[s] of exception”⁶² that reinforce women's exclusion from meaningful legal protection. Governments gain legitimacy through rules that hold power to universal principles of justice, such as women's equality, yet also remain susceptible to political and cultural pressures to carve out areas of exceptional legal power to make and evade the rules, in the name of natural or benign hierarchies of gender, religion, nationality, or market success.⁶³

Across these differing ideologies of a hierarchical social

59. *See id.*

60. *See* Julie A. Nice, *Poverty as an Everyday State of Exception*, in *ACCUMULATING INSECURITY: VIOLENCE AND DISPOSSESSION IN THE MAKING OF EVERYDAY LIFE* 49, 56–60 (Shelley Feldman, Charles Geisler & Gayatri A. Menon eds., 2011) (drawing on Italian philosopher Giorgio Agamben's theory of perpetual abandonment).

61. *See id.* at 50.

62. *See id.*

63. *See* Marcus, *supra* note 6, at 527–33 (discussing the differing but overlapping backlash movements undermining women's human rights in post-socialist nations).

order, masculinity often figures as an implicit or explicit marker of superior authority and capacity to rule deserving special legal protection and deference. Describing the coalition of conservatives, populist nationalists, and religious leaders opposed to women's rights in post-socialist countries, Isabel observes a common rhetoric of "mass masculine gender trauma" caused by emasculation under socialism.⁶⁴ Along with these backlash interests, neoliberal "free market" advocates weaken women's rights in favor of protections for the private property rights of global corporations largely controlled by men.⁶⁵ In the U.S., neoliberal opponents of social welfare programs similarly draw on rhetoric of gender (along with race and class) to challenge the rule of the "Nanny State."⁶⁶ Neoliberal corporate leaders and policy makers often glorify a culture of masculine law-breaking as an indication of newly productive market innovation and entrepreneurship.⁶⁷

As this exceptional masculinized power to operate above and beyond the law becomes normalized and ingrained in law, claims to unequal authority without legal accountability can become especially legitimate and powerful. And if law's high-minded rules are widely experienced as hypocritical

64. *Id.* at 529.

65. *See id.* at 531–32.

66. *See* Martha T. McCluskey, *How Equality Became Elitist: The Cultural Politics of Economics from the Court to the "Nanny Wars,"* 35 SETON HALL L. REV. 1291, 1299–1300, 1306 (2005) (explaining that libertarian criticisms of the "nanny state" use gender, race, class, and sexual stereotypes to defend socioeconomic hierarchy).

67. *See* Martha T. McCluskey, *Are We Economic Engines Too? Precarity, Productivity and Gender,* 49 U. TOL. L. REV. 631, 650–51 (2018) (linking silicon valley's sexual harassment culture to masculinized ideas about productivity); June Carbone, Naomi Cahn & Nancy Levit, *Women, Rule-Breaking, and the Triple Bind,* 87 GEO. WASH. L. REV. 1105, 1123–28 (2019) (explaining that a turn toward a hyper-competitive, individualistic, winner-take-all model of business leadership and success creates a toxic "masculinity contest" culture rewarding corporate law-breaking).

and ineffective in practice, that will fuel cynicism toward both moral ideals and for law itself.⁶⁸ Deepening doubts about the power of both law and morality set the stage for both fledgling and established democracies to turn to authoritarian strongmen, especially those who claim to protect a natural and rightful order of sex, gender, and family.

C. *Making Women Equal Rulers Through Legal Education*

With characteristic intellectual and institution-building energy, Isabel developed a legal strategy for addressing these problems in collaboration with other feminist scholars and activists. Recognizing the limits of formal law and existing legal structures, along with the ongoing influence of culture and politics, she turned toward legal education as a means for fundamental change toward democracy and human rights.

As one problem with the post-socialist transition, Isabel explained that countries rushed to adopt new legal systems without thoughtfully considering “the nature of law” in relation to society and the methods for making, interpreting, studying, and improving law.⁶⁹ Legal systems were staffed with professionals trained in the authoritarian socialist era in a culture where law was an instrument of bureaucratic power rather than a means of public accountability and democracy.⁷⁰ Another problem was that the dramatic political and legal change to liberal democracy was carried out in a top-down process dominated by men, continuing the previous era’s treatment of politics as a masculine prerogative, without participation from the public or women

68. See Marcus, *supra* note 6, at 542 (noting that in many post-socialist states, public opinion continues to see law as a political convention disconnected from morality).

69. See *id.* at 538–39.

70. See *id.* at 539; Marcus, *supra* note 2, at 124.

who had been leaders in movements for democracy and human rights.⁷¹ Similarly, to be accepted into the European Union, states had to demonstrate formal compliance with gender equality provisions, but the compliance process prioritized property rights protections and did not include consultations with nongovernmental organizations informed about states' actual practices.⁷²

In addition, Isabel linked the shortcomings of post-socialist women's rights provisions to legal positivism, the legal approach prevailing in European civil law systems and in legal education.⁷³ That approach treats law as a logically coherent and autonomous system of neutral rules that determine results through objective application to particular facts.⁷⁴ Although this positivism can appear to preserve judicial independence from politics, in fact it ignores that applying law necessarily requires subjective judgments about contradictory and ambiguous principles, as well as about new circumstances and social contexts.⁷⁵ Positivism tends to lead courts to ignore the power relations involving gender, sexual orientation, ethnicity, class, and race that enable formally neutral rules to be applied as instruments of continuing subordination.⁷⁶ In legal education, this positivism tends to mean legal training relies on large lectures and memorization of rules with little opportunity for practical experience in how rules actually get applied.⁷⁷

Finally, legal education in the post-socialist countries has been underfunded, limiting both pedagogy and faculty time for scholarship, curriculum development, and

71. *See* Marcus, *supra* note 6, at 524–25.

72. *See id.* at 540–41.

73. *See id.* at 546, 554.

74. *See id.* at 546–48.

75. *See id.* at 548.

76. *See id.* at 548–49.

77. *See id.* at 555–56.

engagement in law reform.⁷⁸ Many faculty members were educated in Soviet-style legal systems,⁷⁹ and few women have achieved high-level positions in law schools in the region.⁸⁰ Texts and teaching materials in local languages provide limited information about women's rights.⁸¹ In the transition to market economies, law school curriculum reforms focused on including business and commercial law subjects with little attention to women's rights as an important part of liberal democracy.⁸² Attention to women's rights in new human rights courses tends to be cursory or nonexistent.⁸³

Isabel's vision for legal education addressed each of these problems and more. In the early 1990s, activist women in Eastern and Central Europe participated in the newly developing civil society by creating NGOs to advance women's status.⁸⁴ In 1995, as part of her work with a transnational feminist network, Isabel collaborated to develop a legal fellowship program that brought women's rights lawyers from the region to the U.S. for academic studies in feminist legal theory combined with internships in U.S. nongovernmental women's organizations.⁸⁵ The success of that project spurred its alumnae to push for an expanded program that could be more closely tailored to the particular context of that region.⁸⁶

In 2004, Isabel helped to develop and lead the Women's Human Rights Training Institute (WHRTI) in Sofia,

78. *See id.* at 554, 556.

79. *Id.* at 557.

80. *See id.* at 559.

81. *See id.*

82. *See id.* at 554–55.

83. *Id.* at 512.

84. *See* Marcus, *supra* note 49, at 545.

85. *See id.* at 548–51.

86. *See id.* at 551–52.

Bulgaria, providing what Isabel termed compensatory legal education for selected lawyers from human rights NGOs in the region.⁸⁷ The WHRTI implemented Isabel's three-pronged vision of transformative legal education, first, by providing intensive education in feminist legal theory. This aimed to develop a deeper understanding of law by engaging students in critical thinking about law as a "mechanism of power, a gendering practice, and a discourse embedded in political, social, cultural, and economic institutions."⁸⁸ That included exploring the de facto impact of formally neutral legal laws, for example due to stereotyping and devaluing of women's injuries and experiences, and challenging the public-private and sameness-difference binaries.⁸⁹ It also included naming and bringing attention to unspoken and controversial issues such as domestic violence and abortion, recognizing the diversity among women and the intersecting nature of identities (including but not limited to race, sexual orientation, and ethnicity).⁹⁰

Second, the WHRTI integrated theory with legal practice, bringing in professionals for in-depth exploration of particular subject areas, such as violence against women, in the changing context of domestic and international human rights law.⁹¹ Third, the WHRTI incorporated innovative and interactive feminist pedagogy, encouraging critical questioning by students.⁹² For example, rather than lectures, students worked through problems in small groups and participated in moot court exercises.⁹³ In addition, students were encouraged to connect their lived experiences

87. *See id.* at 552–54.

88. *Id.* at 556 (footnotes omitted).

89. *See id.* at 557–59.

90. *See id.* at 556, 558.

91. *See id.* at 562.

92. *See id.* at 563–64.

93. *Id.* at 564–65, 567.

to the theory and practice as part of a critical intellectual analysis, and many reported significant change in their own consciousness of the problems.⁹⁴ These methods were part of a successful WHRTI strategy to create a supportive community of activist lawyers who would maintain professional bonds over the long term to build a network of leaders and experts to advance law reforms.⁹⁵

In a final essay on legal education as a transformative strategy, Isabel made a case that international human rights agreements require governments to include women's rights as an integral part of legal education.⁹⁶ Without correcting the marginalization or neglect of women's rights, she concluded, legal systems will continue to reinforce sex/gender inequality. Isabel emphasized that gender does not operate as an addition or distortion of generally neutral legal, social, political, and economic systems, but instead permeates throughout with substantial impact on the legitimacy, justice, and sustainability of society as a whole. She would wish us to remember and honor her life's work by picking up the challenges she left us with. Now more than ever, we need to follow Isabel's example by working to transform the gender ideologies and practices that undercut law and democracy.

94. *See id.* at 565, 571.

95. *See id.* at 565–66, 569–71.

96. *See* Isabel Marcus, *The Case for the Full Integration of Women's Rights into the Law Faculty Curriculum and a Proposal for Embarking on that Integration* (2016) (unpublished manuscript) (on file with author).