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*"Violence against women: Good practices in
combating and eliminating violence against women"*

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COMBATING VIOLENCE AGAINST WOMEN IN THE LEGAL DOMAIN

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I. Introduction

Law has the potential to play a leading role in efforts to combat violence against women. The law's symbolic function in setting standards of right and wrong, as well as its power to incarcerate, impose other remedies, and allocate resources, make the legal arena a crucial site for initiatives to improve a country's response to violence against women. However, the legal system has traditionally not lived up to its potential as a force for the protection and empowerment of women.

In recent decades, advocates and policy-makers have worked to establish a variety of legal reforms that are designed to improve the prevention and redress of domestic violence, rape and sexual assault, sexual harassment, and other forms of violence against women.¹ These reforms have not all been equally successful. The purpose of this paper is to analyze good practices in the response of the legal sector to violence against women, focusing on federal and state law in the United States of America. The paper will discuss criteria to identify good practices in the legal domain, examples of good practices, strategies for implementation and enforcement, and considerations affecting possible future efforts to replicate these good practices elsewhere.²

II. Criteria for identifying good practices in the legal domain

An examination of good practices must begin by identifying a set of factors that will be used to assist in determining whether a particular practice has been successful. An ideal response by the legal system to violence against women should possess the following characteristics:

A. Legal practices should promote women's safety. As one indicator that this goal has been met, legal measures should contribute to specific deterrence (that is, a reduction in the occurrence of offenses among individuals who are targeted by a particular legal intervention) as well as general deterrence (that is, a reduction in the occurrence of offenses among the population as a whole). However, determining rates of recidivism among targeted offenders is not a simple process. Individual offenders may become impossible to locate as time passes; they may

¹ See, e.g., ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000) (describing the movement to reform domestic violence laws).

² Because of the scope of the topic, this paper does not purport to be comprehensive.

commit additional offenses that are not reported to police or other data collectors; and they may stop engaging in one type of behavior (such as physical abuse of a spouse) but substitute another behavior that is more difficult to monitor (such as emotional abuse).³ Tracking rates of violence against women in the general population, and determining the extent to which changes in those rates are the result of changes in legal practices, are also difficult tasks.⁴ An increase in the number of reported cases may indicate that more women are willing and able to report, not that the rate of violence has actually increased.

B. Legal practices should increase public awareness that violence against women is unacceptable and should contribute to a sense of public responsibility for solving the problem. For example, there is often a tendency to view domestic violence as exclusively a private, family matter.⁵ This attitude undercuts attempts to address the issue effectively and imposes shame and stigma on victims. The law should do all it can to designate violence against women as a serious public concern that requires a commitment of public attention and resources.⁶

C. The legal system should identify violence against women as a form of sex discrimination that is linked to other forms of oppression of women.⁷ Systemic gender inequality is a root cause of violence against women, and violence in turn perpetuates women's unequal status.⁸ The law should recognize that individual acts

³ See Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence 1970-1990*, 83 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 46, 65-72 (1992) (questioning the methodology and conclusions of studies designed to test the specific deterrent effect of mandatory arrest policies).

⁴ See Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline In Domestic Violence*, 21 CONTEMPORARY ECONOMIC POLICY 158, 158 n.1 (noting that there is controversy about the accuracy of statistics on the incidence of domestic violence in the national population).

⁵ Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO STATE LAW JOURNAL 1 (2000).

⁶ *Id.*

⁷ The recognition that violence against women is a form of discrimination based on sex is consistent with the Convention on the Elimination of All Forms of Discrimination Against Women and other international human rights instruments. See generally Brief of Amicus Curiae International Law Scholars et al., *Town of Castle Rock v. Gonzales*, 366 F.3d 1093 (10th Cir. 2004) (en banc), cert. granted, 125 S. Ct. 417 (2004) (No. 04-278); Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down But Not Ruled Out*, 39 FAMILY LAW QUARTERLY (forthcoming 2005) (manuscript at note 114 and accompanying text).

⁸ See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 245 (1989); SCHNEIDER, *supra* note 1, at 5-6, 22-23.

of violence are particularly damaging because of their place within a larger framework of discrimination.⁹

D. Legal rules and the manner in which they are applied should empower individual women who are victims of violence. Domestic violence, rape and sexual assault, sexual harassment, and other forms of violence often deprive women of their sense of control, autonomy, self-respect, and personal privacy.¹⁰ The legal system should seek to restore and reinforce those qualities, while avoiding measures that “revictimize” the victim.¹¹

E. The legal response to violence against women should strengthen women’s place in society by enhancing women’s overall equality. As one illustration of this approach, Professor Donna Coker has suggested that “every domestic violence intervention strategy should be subjected to a material resources test” and “priority should be given to those laws and policies which improve women’s access to material resources.”¹²

F. The legal system should avoid measures that impose a disparate negative impact on disadvantaged groups. Legal practices should be scrutinized for differential impacts based on class, race, ethnicity, religion, disability, cultural differences, indigenous status, immigration status, sexual orientation, etc.¹³

⁹ Sally F. Goldfarb, *Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice*, 11 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & THE LAW 251 (2003).

¹⁰ See, e.g., Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICHIGAN LAW REVIEW 1 (1991) (describing domestic violence as an assault on women’s control and autonomy); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALBANY LAW REVIEW 973 (1995) (emphasizing that domestic violence is a pattern of coercive control).

¹¹ Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARVARD LAW REVIEW 550 (1999).

¹² Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS LAW REVIEW 1009, 1009 (2000).

¹³ On the differential impact of legal policies concerning violence against women on different groups, see, for example, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD LAW REVIEW 1241 (1991); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 BOSTON COLLEGE THIRD WORLD LAW JOURNAL 231 (1994).

III. Examples of good practices in the legal domain¹⁴

A. Civil orders of protection

Civil orders of protection, also known as protection orders or restraining orders, are a major innovation in the states' legal response to domestic violence. An order of protection is a court order that prohibits an offender from further abusing the victim and may set other limits on his behavior, such as evicting him from the family home, forbidding him to contact the victim, and prohibiting him from possessing firearms. A number of features make these orders particularly useful. An order of protection can be obtained in a self-contained legal proceeding, without initiating any other legal action such as a divorce or criminal prosecution. A temporary order can be granted on an emergency basis, without notification to or the presence of the accused; in some jurisdictions, proceedings to obtain a temporary order are available seven days a week, twenty-four hours per day. A final order can then be obtained at a later hearing. The procedure is usually designed to be simple enough that a victim can manage without an attorney, although legal representation is helpful in obtaining the desired outcome.¹⁵ A violation of a temporary or final order is a crime.¹⁶

Orders of protection have been successful in many cases. According to a study by the National Center for State Courts, which surveyed women six months after they had obtained civil protection orders, over 85 percent of the women felt their lives had improved since getting the order, over 80 percent felt safer, and 65 percent of the orders had not been violated.¹⁷ Many women feel empowered by the

¹⁴ For state and local legal practices described in Part III, details may vary among different states and localities.

¹⁵ See *infra* Part IVB.

¹⁶ For information on orders of protection, see, for example, PETER FINN & SARAH COLSON, NATIONAL INSTITUTE OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT (1990); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA LAW REVIEW 801, 811-1142 (1993); Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WISCONSIN LAW REVIEW 1657, 1667.

¹⁷ SUSAN L. KEILITZ ET AL., NATIONAL CENTER FOR STATE COURTS, CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE ix (1997). See also Victoria L. Holt et al., *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?*, 24 AMERICAN JOURNAL OF PREVENTIVE MEDICINE 21 (2003) (reporting results of a study showing significantly decreased risk of violence among abused women who obtained civil protection orders and concluding that civil protection orders appear to be one of the few

court's issuance of an order of protection because of the message it communicates to the batterer that his behavior is unacceptable and society takes domestic violence seriously.¹⁸

Orders of protection are not a panacea, however. Their effectiveness depends on proper enforcement.¹⁹ In a tragic case currently awaiting decision by the United States Supreme Court, Jessica Gonzales of Castle Rock, Colorado, complained repeatedly to her local police department that her estranged husband had violated a restraining order by abducting their three daughters, but the police took no action; the man later killed all three girls.²⁰ As discussed below, training of police, prosecutors, and judges on proper enforcement methods is essential to ensuring the effectiveness of orders of protection.²¹

There are additional problems with orders of protection. Some women find the process of obtaining an order difficult or intimidating.²² Others are deterred from seeking an order of protection because they do not want to sever ties with the abuser.²³

Finally, state laws on orders of protection differ in their scope, including who is eligible to seek an order, what evidence must be offered for an order to be

available interventions for domestic violence that has demonstrated effectiveness); Jane C. Murphy, *Engaging With the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & THE LAW 499, 509-16 (2003) (describing results of a study in Baltimore in which sixty-eight percent of battered women who had filed for a protection order indicated that doing so was helpful, quite helpful, or extremely helpful). *But see, e.g.*, Andrew R. Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 192 (Eve S. Buzawa and Carl G. Buzawa eds., 1996) (reporting results of a study in Quincy, Massachusetts finding that at least forty-nine percent of offenders re-abused their victims within two years of issuance of a restraining order, and concluding that one reason for the high rate of re-abuse was the failure to punish most violations of restraining orders).

¹⁸ Karla Fisher & Mary Rose, *When "Enough Is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQUENCY 414 (1995).

¹⁹ FINN & COLSON, *supra* note 16, at 2, 49.

²⁰ *Town of Castle Rock v. Gonzales*, 366 F.3d 1093 (10th Cir. 2004) (en banc), *cert. granted*, 125 S. Ct. 417 (2004) (No. 04-278).

²¹ *See infra* Part IVC.

²² Fisher & Rose, *supra* note 18; Murphy, *supra* note 17 at 510-12.

²³ Fisher & Rose, *supra* note 18; Murphy, *supra* note 17, at 512.

granted, what types of relief may be included in the order (including child custody, visitation, and financial support), and the duration of a temporary or final order.²⁴

B. Civil rights laws that treat violence against women as a form of discrimination

Federal law has recently taken some steps toward recognizing that violence against women is a form of sex discrimination.

In 1986, in the case *Meritor Savings Bank v. Vinson*, the United States Supreme Court ruled that sexual harassment in the workplace can violate the major federal employment discrimination statute, Title VII of the Civil Rights Act of 1964.²⁵ Subsequent Supreme Court decisions have strengthened the incentives for employers to establish programs to prevent and remedy sexually harassing behavior.²⁶ Amid a growing number of sexual harassment complaints and lawsuits, some of which have resulted in large monetary awards, many employers throughout the country have adopted policies prohibiting sexual harassment.²⁷ Training programs to educate workers on how to avoid sexual harassment, which were unheard of twenty years ago, are now common.²⁸

In 1994, Congress enacted the Violence Against Women Act (VAWA), which included a provision stating that gender-motivated violent crime is a violation of the victim's federal civil rights.²⁹ The provision allowed a victim of a

²⁴ For a comparative analysis of state laws regarding orders of protection, including recommendations of good practices, see FINN & COLSON, *supra* note 16; Klein & Orloff, *supra* note 16, at 811-1142.

²⁵ 477 U.S. 57 (1986). The *Vinson* decision came in the aftermath of feminist advocacy for recognition of sexual harassment as a form of sex discrimination. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979); Reva B. Siegel, *Introduction*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 1, 8-11 (Catharine A. MacKinnon and Reva B. Siegel eds., 2004).

²⁶ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (establishing an affirmative defense in certain sexual harassment cases for employers that exercise reasonable care to prevent and correct sexually harassing behavior); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) (same).

²⁷ Joanna L. Grossman, *The Culture of Compliance*, 26 *HARVARD WOMEN'S LAW JOURNAL* 3 (2003).

²⁸ For analysis of the effectiveness of employers' sexual harassment policies, procedures, and training programs, see *id.*

²⁹ Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified in relevant part at 42 U.S.C. § 13981). In my former capacity as Senior Staff Attorney at the NOW Legal Defense and Education Fund, I

“crime of violence motivated by gender” to bring a civil action in federal or state court to recover compensatory and punitive damages, injunctive and declaratory relief, attorney’s fees, and “such other relief as a court may deem appropriate.”³⁰ Six years later, in a decision that has been widely criticized,³¹ the United States Supreme Court held that Congress lacked authority under the federal Constitution to enact this provision.³² As a result, VAWA’s civil rights provision is no longer in effect.³³

Anti-discrimination legislation, particularly at the federal level, is a uniquely powerful way to combat violence against women.³⁴ These statutes place violence against women in the larger context of systemic gender inequality and convey the message that such acts are not merely crimes by one individual against another but are an assault on a publicly-shared ideal of equal rights. Many women find civil suits to be a valuable alternative or supplement to criminal prosecution, because the victim (rather than the prosecutor) is in charge of a civil suit, civil actions are governed by a lower burden of proof than criminal cases, and a successful civil

was involved in the effort to draft and enact the Violence Against Women Act of 1994; however, the views expressed herein are my own.

³⁰ 42 U.S.C. §§ 1988, 13981(c).

³¹ See, e.g., Akhil Reed Amar, *Forward: The Document and the Doctrine*, 114 HARVARD LAW REVIEW 26, 102-09 (2000); Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM LAW REVIEW 57 (2002) [hereinafter Goldfarb, *Use and Abuse of Federalism*]; Sally F. Goldfarb, “No Civilized System of Justice”: *The Fate of the Violence Against Women Act*, 102 WEST VIRGINIA LAW REVIEW 499 (2000) [hereinafter Goldfarb, *No Civilized System of Justice*]; Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act*, 86 CORNELL LAW REVIEW 109 (2000); Catharine MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARVARD LAW REVIEW 135 (2000); Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE LAW JOURNAL 441 (2000); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE LAW JOURNAL 619 (2001).

³² *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress exceeded its powers under the Commerce Clause and Section 5 of the Fourteenth Amendment when it enacted the VAWA civil rights provision).

³³ Several states and localities have passed or introduced legislation modeled on VAWA’s civil rights provision. Goldscheid, *supra* note 7 (manuscript at notes 45-46 and accompanying text). Federal legislation to create a narrower version of the civil rights provision has been introduced but not enacted. *Id.* (manuscript at note 48 and accompanying text.)

³⁴ Goldfarb, *supra* note 9, at 254-59.

case typically results in money damages, which many victims find more helpful than incarceration of the perpetrator.³⁵

Federal law, unlike state law, applies throughout the country, is highly visible to the general public, and is viewed as embodying principles that are fundamental to the nation as a whole.³⁶ Thus, federal civil rights legislation is a particularly potent vehicle for legal reform.

C. Pro-arrest and pro-prosecution policies for domestic violence

Traditionally, police were reluctant to arrest perpetrators of domestic violence. Instead, they ignored the problem or applied ineffective responses like informal mediation or ordering the offender to “walk around the block and cool off.”³⁷ Similarly, prosecutors were reluctant to prosecute domestic violence cases, in part because they perceived victims as unlikely to cooperate with them.³⁸

In recent years, some states and localities have adopted mandatory arrest policies, which require police to arrest anyone who they have probable cause to believe has committed domestic violence. Some states and localities have also established mandatory “no-drop” prosecution policies, which prevent prosecutors from complying with a victim’s request to drop charges against the abuser.³⁹ By taking the decision of whether to drop charges away from the victim, this approach is designed to prevent the abuser from using violence or threats to pressure the victim to halt the prosecution.⁴⁰

Vigorous arrest and prosecution policies make a necessary public statement that domestic violence is a serious crime and an offense against society, not merely a family dispute. However, rigid enforcement of mandatory policies poses a variety

³⁵ Goldfarb, *supra* note 5, at 55-56.

³⁶ See Goldfarb, *Use and Abuse of Federalism*, *supra* note 31, at 92, 143.

³⁷ Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARVARD LAW REVIEW 1849, 1857 (1996).

³⁸ *Id.* at 1860-61.

³⁹ Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE JOURNAL OF LAW & FEMINISM 3, 14-16 (1999) (describing the transition from lenient police and prosecution policies to mandatory arrest and “no-drop” prosecution).

⁴⁰ *Id.* at 15.

of dangers.⁴¹ Such policies often sacrifice the safety and empowerment of individual women. For example, the practices of issuing a subpoena to order a victim to testify against her abuser, and incarcerating her for contempt of court if she refuses to do so, are highly problematic.⁴² Victims can and should be encouraged to testify, and they will often agree to do so, especially if they are provided with supportive counseling and advocacy services.⁴³ However, forcing a woman to testify against her will punishes the victim. With adequate training, police and prosecutors can learn how to gather and use other types of evidence in order to convict batterers without the victim's testimony.⁴⁴

Although early research showed that arresting abusers has a significant effect on reducing recidivism, later studies suggested that in lower-class communities with high unemployment rates, arrest actually leads to higher rates of abuse.⁴⁵ Because being arrested often infuriates the perpetrator, the arrest can place the victim in even greater danger if he is released from custody and she is not provided with access to emergency shelter and other resources. Mandatory arrest policies deter some women from calling the police and have caused many women

⁴¹ In fact, even after mandatory policies are adopted, police and prosecutors sometimes fail to comply with them. *See* *Town of Castle Rock v. Gonzales*, 366 F.3d 1093 (10th Cir. 2004) (en banc), *cert. granted*, 125 S. Ct. 417 (2004) (No. 04-278) (alleging that police failed to obey state law mandating arrest for violation of protection order); Sack, *supra* note 16, at 1697-99 (describing police and prosecutor resistance to mandatory domestic violence enforcement policies); Zorza, *supra* note 3, at 65 (same). Furthermore, mandatory policies do not eliminate police and prosecutor discretion entirely. Sack, *supra* note 16, at 1670 n.66, 1672 n.76, 1696.

⁴² *See* Sack, *supra* note 16, at 1681-82.

⁴³ *See* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WILLIAM AND MARY LAW REVIEW 1843, 1890 & n.211 (citing a study showing that advocacy services increase the likelihood that victims will be willing to testify).

⁴⁴ Hanna, *supra* note 37, at 1901-06.

⁴⁵ Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, in Buzawa & Buzawa, *supra* note 17, at 43. There is considerable controversy over how to interpret the results of the Minneapolis Domestic Violence Experiment, which was the first controlled test of the effects of arresting domestic violence offenders, and subsequent replication studies. *Compare, e.g., id.* (arguing, based on the results of the replication studies, that mandatory arrest laws should be repealed) *with* CHRISTOPHER D. MAXWELL ET AL., NATIONAL INSTITUTE OF JUSTICE, THE EFFECTS OF ARREST ON INTIMATE PARTNER VIOLENCE: NEW EVIDENCE FROM THE SPOUSE ASSAULT REPLICATION PROGRAM (July 2001) (concluding that the replication studies demonstrate that arrest causes a modest reduction in subsequent incidents of domestic violence) *and* Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENGLAND LAW REVIEW 929 (1994) (analyzing the Minneapolis experiment and replication studies and arguing that they demonstrate that arrest is generally the superior method of deterring future violence).

to be arrested for using physical violence in self-defense against their husband's or partner's attacks.⁴⁶

Therefore, a “golden mean” is needed between the two extremes of police and prosecutor inaction and police and prosecutor overreaction. Although the advantages and disadvantages of mandatory criminal justice interventions remain a subject of debate among feminist advocates for battered women,⁴⁷ some advocates support “pro-arrest” and “pro-prosecution” policies in place of inflexible mandatory policies.⁴⁸ Further research is needed to identify which policies afford women the most protection from violence while safeguarding their autonomy within the legal system to the greatest possible extent.

D. Civil suits against police departments

Victims of domestic violence have brought a number of successful lawsuits against police departments that have failed to protect them.⁴⁹ In a notable case from the 1980s, Tracey Thurman sued the city of Torrington, Connecticut, whose police officers repeatedly ignored her complaints about violence by her estranged husband and even stood by and watched as he savagely attacked her.⁵⁰ A jury

⁴⁶ Coker, *supra* note 12, at 1042-49.

⁴⁷ See, e.g., SCHNEIDER, *supra* note 1, at 184-88; Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFFALO CRIMINAL LAW REVIEW 801 (2001); Sack, *supra* note 16; Symposium, *Mandatory Prosecution in Domestic Violence Cases*, 7 UCLA WOMEN'S LAW JOURNAL 169 (1997).

⁴⁸ See, e.g., Coker, *supra* note 47; Epstein, *supra* note 39; Epstein, *supra* note 43; Barbara Hart, *Battered Women and the Criminal Justice System*, in Buzawa & Buzawa, *supra* note 17, at 98, 109-10.

⁴⁹ KATHARINE T. BARLETT ET AL., GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 645-46 (3d ed. 2002) (citing cases based on the equal protection clause or on “special relationship” theory). However, such cases are not always successful. See, e.g., *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) (rejecting a due process claim against a government agency that failed to prevent a father from beating his son); *Eagleston v. Guido*, 41 F.3d 865 (2d Cir. 1994), *cert. denied*, 516 U.S. 808 (1995) (finding that the plaintiff failed to produce sufficient evidence to support her claim that police violated her right to equal protection); *Ricketts v. City of Columbia*, 36 F.3d 775 (8th Cir. 1994), *cert. denied*, 514 U.S. 1103 (1995) (same).

⁵⁰ *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (denying defendant's motion to dismiss).

awarded her 2.3 million dollars in damages.⁵¹ This huge award was widely publicized, and many police departments immediately strengthened their policies on responding to domestic violence.⁵² Although problems with police enforcement remain (as illustrated graphically by the *Gonzales v. Castle Rock* case),⁵³ most observers agree that police response to domestic violence has improved dramatically in recent years, due in part to police departments' concern about incurring liability for civil damages.⁵⁴

E. Rape shield laws

Many victims of rape and sexual assault have felt “revictimized” when questioned by defense attorneys about details of their private sexual conduct. Rape shield laws are designed to prevent introduction of evidence of a victim’s sexual behavior that is unrelated to the acts that are the subject of the legal proceeding.⁵⁵ Rape shield laws are weakened by loopholes and by unfavorable judicial interpretations.⁵⁶ However, if properly drafted and interpreted, they can help protect women’s privacy and avoid introduction of evidence that could prejudice the jury against the victim.

Most state rape shield laws apply only to criminal proceedings.⁵⁷ All rape shield laws should follow the example of Federal Rule of Evidence 412, which was amended in the federal Violence Against Women Act of 1994⁵⁸ so that it now applies to both civil and criminal proceedings.

⁵¹ The case later settled for 1.9 million dollars. Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE LAW JOURNAL 788, 795 n.31.

⁵² *Zorza*, *supra* note 3, at 60. Before *Thurman*, battered women’s advocates had filed lawsuits in Oakland, California and New York City, which also helped bring about improvements in police practices. *See id.* at 54-59.

⁵³ *See supra* note 20 and accompanying text.

⁵⁴ *See, e.g., Zorza*, *supra* note 45, at 935.

⁵⁵ *See* BARTLETT ET AL., *supra* note 49, at 974 (describing state laws).

⁵⁶ *See, e.g., State v. Colbath*, 540 A.2d 1212 (N.H. 1988); Susan Estrich, *Palm Beach Stories*, 11 LAW & PHIL. 5, 21-27 (1992); Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN’S LAW REVIEW 979, 1036 (1993).

⁵⁷ *See* S. Rep. No. 102-197, at 46 (1991).

⁵⁸ *See infra* Part III F.

F. Adopting laws specifically designed to address violence against women

Better enforcement of traditional laws, such as those prohibiting assault and battery, can help many victims of violence against women. However, when existing laws do not fit the circumstances experienced by victims, it is often beneficial to draft new legislation.⁵⁹

A preeminent example of a statute designed especially to combat violence against women is the federal Violence Against Women Act (VAWA) of 1994.⁶⁰ In addition to the civil rights provision discussed in Part IIIB above, this lengthy and ambitious legislation contains dozens of other provisions designed to reduce the frequency of violence against women, provide needed services to victims, hold perpetrators accountable, strengthen law enforcement, and improve research and data collection. Among other measures, the legislation makes it a federal crime to cross state lines in order to commit domestic violence or to violate a protection order; requires states to give full faith and credit to protection orders issued in other states; reforms immigration law to help battered immigrant women escape their abusers; and requires states seeking certain federal grants to certify that they do not require victims to pay for forensic medical exams or for filing and service costs associated with domestic violence prosecutions. The statute authorized the appropriation of 1.62 billion dollars in federal funds to support a broad range of programs, including training of police, prosecutors, and judges; support of battered women's shelters and rape prevention programs; creation of a national toll-free domestic violence telephone hotline; and establishment of a national database to improve local, state and federal law enforcement agencies' ability to record and share information on domestic violence and stalking offenses.⁶¹

VAWA was the nation's first attempt at a wide-ranging legal response to the epidemic of domestic violence, rape and sexual assault, and other forms of

⁵⁹ See Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 959 (2004) (arguing that there is a "disconnect" between battering as it is practiced and battering as it is criminalized, and advocating enactment of a statute that specifically criminalizes battering as a course of conduct).

⁶⁰ Pub. L. No. 103-322, 108 Stat. 1902 (1994).

⁶¹ For a more detailed description of the Violence Against Women Act of 1994, see Goldfarb, *No Civilized System of Justice*, *supra* note 31, at 504-06. The civil rights provision was the only section of VAWA that was invalidated by the Supreme Court.

violence against women.⁶² In addition to its other accomplishments, VAWA drew unprecedented public attention to its subject. During the four years when the legislation was awaiting passage, Congress held a series of legislative hearings in which numerous witnesses revealed the devastating impact of violence against women on individuals, families, communities, and the economy.⁶³ The hearings were widely covered in the media.⁶⁴

G. Providing multiple types of legal remedies for violence against women

As the preceding discussion suggests, the United States currently has a rich and complex mixture of local, state, and federal laws addressing violence against women. Various civil and criminal remedies are available. Innovative approaches have emerged from the executive, legislative, and judicial branches. This diversity is generally an advantage.⁶⁵ Providing multiple ways for women to avail themselves of the legal system increases the likelihood that they will be able to obtain some type of legal relief that is helpful to them. For example, in most jurisdictions, a battered wife has the option of seeking any or all of the following: a criminal prosecution, a civil order of protection, a divorce, a legal separation, and a civil personal injury suit against her husband for money damages.⁶⁶

H. Eliminating vestiges of inequality in the law concerning violence against women

From pre-revolutionary times until the mid-twentieth century, the law of most states overtly treated married women as legally subordinate to their husbands. Although husbands and wives are now officially on an equal footing, the influence of the earlier legal regime lives on. Two pernicious doctrines that are products of

⁶² The statute was subsequently amended, expanded, and reauthorized. *See, e.g.*, Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (2000).

⁶³ *See* Goldfarb, *supra* note 9, at 256-57; Goldfarb, *Use and Abuse of Federalism*, *supra* note 31, at 66-71.

⁶⁴ *See, e.g.*, Eloise Salholz, *Women Under Assault: Sex Crimes Finally Get the Nation's Attention*, NEWSWEEK, July 16, 1990, at 23.

⁶⁵ A potential disadvantage of multiple legal remedies is the lack of coordination among separate proceedings arising from the same facts and affecting the same parties. Some jurisdictions have attempted to address this problem by creating integrated domestic violence courts. *See infra* Part IVD.

⁶⁶ Depending on the facts and the law of the jurisdiction, the victim might also be able to bring a civil rights action against the abuser, *see supra* Part IIIB, and a civil suit against the police for failing to protect her from the abuse, *see supra* Part IIID.

this legacy are interspousal tort immunity, which prevents one spouse from suing the other, and the marital rape exemption, which dictates that the rape of one's spouse is not a crime. Most states have abandoned interspousal tort immunity, but a few have not. All states have abolished the complete marital rape exemption, but most treat marital rape more leniently than other cases of rape. These lingering vestiges of marital inequality should be eliminated.⁶⁷

I. Incorporating awareness of and responsiveness to violence against women in other areas of law

Because violence affects every aspect of a woman's life,⁶⁸ many types of laws must be scrutinized to determine whether they have a positive or negative impact on victims. In recent years, women's rights advocates have attempted to incorporate a sensitivity to violence against women in such diverse areas of law as divorce, child custody and visitation, child abuse and neglect, welfare and public benefits, immigration, employment, and housing.⁶⁹ Although these efforts have not all been successful, they are important and should continue. Even the best laws providing civil and criminal remedies for violence against women are of limited utility if victims are placed at a disadvantage by other legal rules.

J. Using law to enhance women's equality in all spheres

Laws that ensure women's access to employment, housing, health care, economic security, and other resources will strengthen women's position in society and thereby render them less vulnerable to violence and its consequences.

IV. Strategies for implementation and enforcement of good practices in the legal domain

A. Coordinated community approach

It has often been noted that legal interventions for violence against women are most successful when they are integrated with each other and with resources

⁶⁷ For discussion of the issues in this paragraph, see Goldfarb, *Use and Abuse of Federalism*, *supra* note 31, at 70.

⁶⁸ See Goldfarb, *supra* note 9, at 252 & n.4 (summarizing the impact of domestic violence on women's access to education, employment, housing, and child custody).

⁶⁹ See, e.g., SCHNEIDER, *supra* note 1, at 148-78, 196-98; Goldscheid, *supra* note 7 (describing legal reforms involving housing and employment).

outside of the legal domain, such as health care providers, advocacy groups, social service agencies, and other community supports.⁷⁰ A leading example of a coordinated community approach to domestic violence has been developed in the city of Duluth, Minnesota. The Duluth program coordinates different aspects of the legal system (including police, criminal court, civil court, and probation officers), as well as forging links between the legal system and non-governmental resources such as a battered women's shelter and advocacy program.⁷¹ Other localities in the United States and elsewhere have adopted various versions of a coordinated community approach to respond to domestic violence.⁷²

B. Access to legal services

Research data show that being represented by a lawyer is a key determinant of women's success in using the civil legal system as a resource to combat violence and mitigate its effects.⁷³ Many jurisdictions provide a lawyer or trained lay advocate to assist applicants for orders of protection.⁷⁴ With the encouragement of the American Bar Association and many state and local bar associations, some lawyers furnish domestic violence victims with pro bono services (that is, legal representation without a fee).⁷⁵ Law students also provide a significant amount of

⁷⁰ See, e.g., FINN & COLSON, *supra* note 16, at 63; KEILITZ ET AL., *supra* note 17, at xv; Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA LAW REVIEW 1, 48-50 (1999); Sack, *supra* note 16, at 1725-31.

⁷¹ ELLEN PENCE ET AL., COORDINATED COMMUNITY RESPONSE TO DOMESTIC ASSAULT CASES: A GUIDE FOR POLICY DEVELOPMENT (rev. ed. 1996); COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND 3-191 (Melanie F. Shepard & Ellen Pence eds., 1999).

⁷² For descriptions of such programs, see Shepard & Pence, *supra* note 71, at 4, 239-71; Sandra J. Clark et al., U.S. Department of Health and Human Services, *Coordinated Community Responses to Domestic Violence in Six Communities: Beyond the Justice System* (Oct. 1996), at <http://aspe.hhs.gov/hsp/cyp/xsdomvlz.htm>.

⁷³ FINN & COLSON, *supra* note 16, at 19, 22 (describing the need for attorney representation when seeking protection orders); Murphy, *supra* note 17, at 511-12 (reporting that among a sample of battered women in Baltimore, those represented by an attorney were more than twice as likely to obtain protection orders as those without an attorney). See also Farmer & Tiefenthaler, *supra* note 4 (finding that increased access to legal services for battered women is a significant factor in explaining the decline in incidence of domestic violence during the 1990s).

⁷⁴ FINN & COLSON, *supra* note 16, at 22-26; Klein & Orloff, *supra* note 16, at 1058-64.

⁷⁵ MARGARET B. DREW ET AL., AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE 24-36 (2d ed. 2004); FINN & COLSON, *supra* note 16, at 22; Klein & Orloff, *supra* note 16, at 1064.

legal assistance to domestic violence victims.⁷⁶ However, despite an infusion of federal funding for civil legal assistance to battered women,⁷⁷ many women who are victims of violence continue to lack access to attorneys.⁷⁸

C. Education and training

Education and training are crucial to ensuring that all actors in the legal system perform their jobs effectively.⁷⁹ Lawyers, judges, court clerks, police, prosecutors, and those who serve as expert witnesses or consultants in the legal arena (such as social workers, psychologists and psychiatrists) require specialized training to deal with issues concerning violence against women. Training programs should challenge participants to abandon false assumptions about violence against women and deepen their understanding of the problem in all its dimensions, including the role of violence in maintaining women's subordinate status. Training should also focus on proper techniques and procedures for effective enforcement of existing laws.

The National Judicial Education Program to Promote Equality for Women and Men in the Courts, a non-governmental organization, provides model training curricula for judges and prosecutors on rape and sexual assault, among other topics.⁸⁰ Domestic violence advocacy organizations often participate in training programs for police.⁸¹

Many future lawyers gain exposure to academic and practical knowledge about domestic violence through law school domestic violence legal clinics, volunteer programs providing assistance to applicants for orders of protection, specialized courses on domestic violence, and professors who incorporate domestic violence issues into mainstream law school courses.⁸² The American Bar Association Commission on Domestic Violence has published books containing

⁷⁶ See *infra* Part IVC.

⁷⁷ See Sack, *supra* note 16, at 1729 & n.374.

⁷⁸ SCHNEIDER, *supra* note 1, at 95-96; Goldscheid, *supra* note 7 (manuscript at n.81 and accompanying text); Klein & Orloff, *supra* note 16, at 1058-64.

⁷⁹ See, e.g., FINN & COLSON, *supra* note 16, at 62-63; Epstein, *supra* note 39, at 39-45.

⁸⁰ See <http://www.legalmomentum.org/njep/overview.shtml> (last visited June 7, 2005).

⁸¹ See, e.g., Ellen L. Pence & Coral McDonnell, *Developing Policies and Protocols*, in Shepard & Pence, *supra* note 71, at 59-61.

⁸² For descriptions of law school courses and programs on domestic violence, see, for example, SCHNEIDER, *supra* note 1, at 211-27; Sarah M. Buel, *The Pedagogy of Domestic Violence Law*, 11 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & THE LAW 309 (2003).

information and recommendations to assist law school faculty and administrators in educating and training students about domestic violence.⁸³ Several commercially published textbooks on violence against women are available for use in law school classes.⁸⁴

D. Specialized domestic violence courts, prosecutors, and police

Establishing courts, police units, and prosecutor departments that specialize in domestic violence appears to hold promise as a way of developing expertise, improving efficiency, minimizing the burdens on victims, and improving case outcomes.⁸⁵

Specialized domestic violence courts take many different forms. The most ambitious combine diverse components of the legal system (such as criminal and civil proceedings) as well as non-legal services, such as providing victims with access to representatives of domestic violence advocacy agencies.⁸⁶ Although specialized courts pose potential problems, including a heavy psychological toll on judges who handle domestic violence cases day after day,⁸⁷ a study by the Center for Court Innovation concluded that New York State's experiment with a domestic

⁸³ AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, *TEACH YOUR STUDENTS WELL: INCORPORATING DOMESTIC VIOLENCE INTO LAW SCHOOL CURRICULA* (2003), available at <http://www.abanet.org/domviol/teachyourstudents.pdf>; DEBORAH GOELMAN & ROBERTA VALENTE, AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, *WHEN WILL THEY EVER LEARN? EDUCATING TO END DOMESTIC VIOLENCE* (1997).

⁸⁴ BEVERLY BALOS & MARY LOUISE FELLOWS, *LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION* (1994); CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* (2001); NANCY K.D. LEMON, *DOMESTIC VIOLENCE LAW* (2001).

⁸⁵ FINN & COLSON, *supra* note 16, at 30-31; Clark et al., *supra* note 72, at 7, 11; Epstein, *supra* note 39; Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 *FORDHAM LAW REVIEW* 1295 (2000).

⁸⁶ For discussion of different models of specialized domestic violence courts, see sources cited *supra* note 85. See also EMILY SACK, FAMILY VIOLENCE PREVENTION FUND, *CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES* (2002), available at http://endabuse.org/programs/healthcare/files/FinalCourt_Guidelines.pdf; ROBERT V. WOLF ET AL., CENTER FOR COURT INNOVATION, *PLANNING A DOMESTIC VIOLENCE COURT: THE NEW YORK STATE EXPERIENCE* (2004), available at <http://www.courtinnovation.org/dvplanningdiary.pdf>; Julie A. Helling, *Specialized Criminal Domestic Violence Courts* (no publication date), at <http://www.vaw.umn.edu/documents/helling/helling.pdf>.

⁸⁷ On the advantages and disadvantages of specialized domestic violence courts, see generally the sources cited *supra* note 86.

violence court has largely been successful. According to the study, the creation of a specialized court resulted in increases in the rate of convictions and rate of issuance of orders of protection and decreases in the rate of case dismissals and rate of probation violations.⁸⁸

E. Monitoring actors in the legal system and holding them accountable

It is important to monitor actors in the legal system and hold them accountable for their conduct with regard to violence against women. A relatively simple method is a court watch project, where volunteers observe legal proceedings to determine whether the rights of victims are being protected and report their findings to the public.⁸⁹ Similarly, a legislative watch can be conducted at times when the legislature is debating issues concerning violence against women.

A more sophisticated version of the same concept is the establishment of a task force on gender bias in the courts. In forty American states and seven federal judicial circuits, judicial leaders have established task forces composed of judges, lawyers, law professors, community leaders, social scientists, and others to research the question of whether and how the court system manifests bias against women. Many of the task forces have specifically examined the courts' treatment of domestic violence and rape and sexual assault cases. The task force reports have inspired some significant reforms.⁹⁰

When judges, legislators, prosecutors or others are found to be handling violence against women issues poorly, several types of responses are possible. Lawyers (including prosecutors) and judges are subject to a system of professional discipline, which can be initiated by filing a complaint with the appropriate disciplinary agency.⁹¹ Impeachment of elected or appointed officials may also be an option.⁹²

⁸⁸ WOLF ET AL., *supra* note 86, at 1-2, 17.

⁸⁹ Lynn Hecht Schafran, *There's No Accounting for Judges*, 58 ALBANY LAW REVIEW 1063, 1079 (1995).

⁹⁰ For information on task forces on gender bias in the courts, including the role of the National Judicial Education Program in assisting and monitoring the task forces, see Lynn Hecht Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, TRIAL 28 (Feb. 1990); <http://www.legalmomentum.org/njep/genderbias.shtml> (last visited June 7, 2005).

⁹¹ See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 493-533, 671-707 (7th ed. 2005) (describing the system of professional discipline for judges and lawyers);

The media can be very helpful in uncovering and disseminating information about the performance of actors in the legal system. Journalists have revealed some major scandals, including the failure of police departments in Oakland, California and Philadelphia, Pennsylvania to investigate large numbers of rape cases.⁹³ Anecdotal evidence suggests that judges, legislators, prosecutors, and others are deterred from manifesting insensitivity to violence against women for fear of “looking bad in the press.”⁹⁴

F. Use of technology

Technological innovations can assist in the legal response to violence against women. As mentioned above, the federal Violence Against Women Act provided funding for a national registry of orders of protection and a twenty-four-hour toll-free domestic violence telephone hotline.⁹⁵ In addition, some states have implemented computerized databases containing the full text of all orders of protection that have been issued in that state, so that a police officer can quickly determine whether an offender has violated an order and should therefore be arrested. In some jurisdictions, a judge can order a perpetrator of domestic violence to wear an electronic tracking device that records his movements, to ensure that he does not approach the victim. The National Network to End Domestic Violence, a non-governmental organization, has launched a project specifically devoted to the use of technology to combat violence against women.⁹⁶

DNA testing is a recent technological advance that has been enormously helpful in rape and homicide cases. DNA testing is expensive, and there is currently a large backlog of DNA samples awaiting testing. Furthermore, if correct

Schafran, *supra* note 89, at 1081-85 (describing judges disciplined for improper conduct regarding violence against women).

⁹² See Schafran, *supra* note 89, at 1083.

⁹³ Craig R. McCoy et al., *Police Reopen Thousands of Dumped Cases*, PHILADELPHIA INQUIRER, Jan. 16, 2000; *Oakland to Reopen Rape Cases*, SAN FRANCISCO EXAMINER, Sept. 18, 1990, at A-1; *Prosecution Seen As Unlikely In 228 Rape Cases in Oakland*, N.Y. TIMES, Nov. 13, 1990, at B10.

⁹⁴ See Schafran, *supra* note 89, at 1079-81.

⁹⁵ See *supra* Part III F.

⁹⁶ Information in this paragraph is based on a telephone interview with Cindy Southworth, Director of Safety Net Technology Safety Project, National Network to End Domestic Violence (May 10, 2005). For further information, see www.nnedv.org (last visited June 7, 2005).

techniques are not used, DNA test results can be misleading. Nevertheless, DNA testing has proven itself as a very useful tool.⁹⁷

V. Reflections on future efforts to replicate good practices

Many of the practices identified in this paper are too new to permit definitive conclusions to be drawn. Further research is needed to determine whether measures that appear to be good practices will live up to expectations.

This paper has concentrated on experiences in the United States of America. The legal, political, cultural, historical, geographic, and economic characteristics of the United States have all influenced the law's response to violence against women. Thus, the good practice examples described here may not be applicable in other settings. However, it is hoped that the observations and analysis provided in this paper will be useful to the process of creating good practices elsewhere.

One phenomenon that is probably universal is that the process of legal reform is never completed. Once a reform has been achieved, problems with interpretation and implementation inevitably emerge, requiring ongoing monitoring and continuous efforts to ensure that the legal system lives up to its promise.⁹⁸ Thus, the good practices identified in this paper, like all attempts to advance women's rights, should be viewed as a work in progress.

⁹⁷ On the advantages and pitfalls of DNA testing, see, for example, James Dao, *Lab's Errors in '82 Killing Force Review of Virginia DNA Cases*, N.Y. TIMES, May 7, 2005, at A1; Julia Preston, *After 32 Years, Clothing Yields DNA Key to Dozens of Rapes*, N.Y. TIMES, Apr. 27, 2005, at A1; Julia Preston, *Prosecutor Seeks to End Time Limit in Rape Cases*, N.Y. TIMES, Apr. 29, 2005, at B1.

⁹⁸ See, e.g., Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARVARD LAW REVIEW 947, 1006-12 (2002) (describing the conservative backlash in the aftermath of ratification of the Nineteenth Amendment).