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The Legal Response to Violence against Women in the United States of America:
Recent Reforms and Continuing Challenges

Expert Paper prepared by:

Sally F. Goldfarb
Associate Professor
Rutgers University School of Law
Camden, New Jersey, U.S.A.

* The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.
I. INTRODUCTION

For centuries, the legal system in the United States of America routinely ignored or condoned domestic violence, rape and sexual assault, sexual harassment, and other forms of violence against women. One of the major accomplishments of the American feminist movement during the past four decades has been the enactment of ambitious legal reforms designed to confront this legacy. Legal remedies for violence against women have proliferated and now compose a vast body of law based on various sources: the federal and state constitutions; federal, state and local legislation and administrative regulations; and judge-made case law.

Ideally, legal interventions in violence against women should serve a multitude of purposes, including protecting women’s safety, preventing violence, holding perpetrators accountable, providing victims with meaningful redress, identifying violence against women as a form of sex discrimination, enhancing women’s equality, empowering women, raising public awareness, and promoting a sense of public responsibility. As the following brief survey will show, reforms of federal, state, and local law have made substantial progress toward these goals but fall short of fully achieving them.

II. THE VIOLENCE AGAINST WOMEN ACT

In 1994, Congress passed the Violence Against Women Act (VAWA), which was the nation’s first attempt at a multipronged legal response to the epidemic of violence against women. This lengthy and wide-ranging legislation has subsequently been amended, reauthorized, and expanded. It remains both a practical tool for dealing with violence against women and a symbol of national commitment to eradicate the problem.

A. Civil Rights Provision

When originally enacted, VAWA included a provision stating that gender-motivated violent crime is a violation of the victim’s federal civil rights. This provision allowed a victim of a “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.” Plaintiffs relied on VAWA’s civil rights provision in cases alleging domestic violence, rape and sexual assault, and sexual harassment.

An anti-discrimination statute, particularly at the federal level, is a uniquely powerful way to combat violence against women. This type of legislation places violence against women in the larger context of systemic gender inequality and conveys the message that the prohibited 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 case typically results in money damages, which many victims find more helpful than incarceration of the perpetrator.\textsuperscript{11} Furthermore, federal law, unlike state and local law, applies throughout the country, is more visible to the general public, and is viewed as embodying principles that are fundamental to the nation as a whole.\textsuperscript{12} For all these reasons, VAWA’s civil rights provision was a particularly promising vehicle for legal reform.

However, six years after VAWA was signed into law, the United States Supreme Court held that Congress lacked authority under the federal Constitution to enact the civil rights provision.\textsuperscript{13} As a result of this decision, which is open to criticism on numerous grounds,\textsuperscript{14} VAWA’s civil rights provision is no longer in effect. Nevertheless, it continues to be influential. Several states and localities have passed or introduced legislation modeled on VAWA’s civil rights provision.\textsuperscript{15} Federal legislation to restore the civil rights provision in a narrower version that would meet constitutional requirements has been introduced but not enacted.\textsuperscript{16}

B. Other Provisions

Aside from the civil rights provision, the Violence Against Women Act of 1994 contained dozens of other innovative measures. (The civil rights provision was the only section of VAWA that was invalidated by the Supreme Court.) Among its many accomplishments, the legislation made it a federal crime to cross state lines in order to commit domestic violence or to violate a protection order; mandated restitution awards in federal sex crime cases and interstate domestic violence cases; required states to give full faith and credit to protection orders issued in other states; expanded the rape shield protections in the Federal Rules of Evidence; and reformed immigration law to help battered immigrant women escape their abusers.\textsuperscript{17}

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, community domestic violence projects, and rape prevention programs; creation of a national toll-free domestic violence telephone hotline; and research and data collection.\textsuperscript{18} The requirements imposed on grant recipients were devised to serve a variety of goals, such as improving outreach to victims in underserved minority populations and encouraging government agencies to collaborate with non-governmental organizations.\textsuperscript{19} The outpouring of federal funds triggered by VAWA has had enormous positive impact.\textsuperscript{20}

The reforms instituted by the 1994 VAWA legislation have paved the way for further advances. Immigration law provides a good example. The original VAWA legislation permitted abused spouses and children in some circumstances to self-petition for their own immigration status instead of relying on the abuser to do so in his capacity as a U.S. citizen or lawful permanent resident. It also allowed abused immigrants meeting certain requirements to obtain
suspension of deportation proceedings and acquire lawful permanent residency status. When VAWA was amended in 2000, it expanded access to these protections and created new safeguards for victims leaving or attempting to leave an abusive relationship. The 2000 legislation also restored rights to abused immigrants that had been jeopardized by restrictive immigration legislation enacted since 1994. The 2000 version of VAWA created a special category of visas for a limited group of immigrant crime victims who are helpful to the investigation or prosecution of crimes committed against them within the United States. The eligible crimes include domestic violence as well as rape, incest, trafficking, female genital mutilation, and others. In 2005, when VAWA was again amended, protections for abused immigrants were further expanded. The 2005 legislation included the International Marriage Broker Regulation Act, which regulated the burgeoning international marriage broker industry and provided protections for “mail-order brides” brought to the U.S. Meanwhile, advocates for abused immigrants have continued to push for proper implementation of these reforms, including the adoption of appropriate enforcement policies by the federal government.

III. DOMESTIC VIOLENCE

Domestic violence is the type of violence against women that has received the most highly developed legal response. The law in this area encompasses numerous criminal and civil doctrines.

A. Criminal Legislation Prohibiting Domestic Violence

In addition to federal law, all states have criminal statutes that apply to domestic violence. States differ in the extent to which they have adopted laws specifically addressing domestic violence as opposed to relying on general criminal laws, such as assault and battery, to prosecute domestic violence perpetrators. Some scholars have argued that only laws that are specially crafted to criminalize domestic violence can accurately reflect the fact that domestic violence is a pattern of conduct, unlike other crimes that take the form of individual, discrete acts.

Although psychological abuse is one of the most devastating aspects of domestic violence, psychological abuse is far less likely than physical or sexual abuse to be designated as a crime. Defining domestic violence broadly is essential in order to ensure that criminal penalties apply to all forms of abuse.

Despite the criminalization of domestic violence, few domestic violence cases result in substantial prison sentences. Courts are increasingly turning to treatment or counseling programs as sanctions for domestic violence defendants. However, the empirical research conducted to date has failed to demonstrate that batterer intervention programs are effective at reducing recidivism.
B. Compulsory Criminal Justice Interventions

In the past, perpetrators of domestic violence were rarely arrested, prosecuted, and convicted. In reaction to this climate of tolerance for domestic violence, reformers pressed for aggressive interventions by the criminal justice system. Empirical studies suggest that arresting batterers has a deterrent effect on their commission of subsequent abuse. New approaches adopted in many jurisdictions include mandatory arrest policies, which require police to arrest anyone who they have probable cause to believe has committed domestic violence, and “no-drop” prosecution policies, which prevent prosecutors from complying with a victim’s request to drop charges against the abuser.

Feminists are divided on the question of whether compulsory criminal interventions are desirable. While many have welcomed a more vigorous legal response to domestic violence, others express concern that these policies deprive women of autonomy, have a disproportionate impact on minority communities, endanger women by triggering retaliatory violence by the batterer, and increase the likelihood that battered women themselves will be arrested and prosecuted. Although no consensus has emerged, some feminists have steered a middle course by endorsing “pro-arrest” and “pro-prosecution” approaches instead of inflexible, mandatory policies.

A particularly harsh type of mandatory intervention is the practice of jailing a victim who refuses to testify against the abuser. 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. 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.

In fact, even after mandatory policies are adopted, police and prosecutors sometimes fail to comply with them. In the case of Town of Castle Rock v. Gonzales, a woman complained repeatedly to her local police department that her estranged husband had violated a protection order by abducting their three daughters. The police took no action, despite a state statute that instructed police to arrest or seek a warrant for the arrest of an offender who has violated a protection order. The man later killed all three children. After losing her lawsuit in the United States Supreme Court, the plaintiff in this case filed a claim with the Inter-American Commission on Human Rights, which is currently pending.

C. Criminal Defense of Battered Women

When a battered woman is prosecuted for killing or attacking her abuser, it is crucial that she be given an opportunity to show that she was acting in self-defense. Traditionally, the
doctrine of self-defense was interpreted in ways that failed to take into account the circumstances of battered women. Beginning in the 1970s, courts began to accept expert testimony supporting the “battered woman syndrome” defense. This defense was based on the theories of psychologist Lenore Walker, who asserted that battered women experience a cycle of violence that causes them to develop “learned helplessness.” Although the battered woman syndrome defense has been helpful to defendants in some cases, its depiction of all battered women as passive victims can easily backfire in cases where a woman has struck back against her abuser. African-American women, who tend to be stereotyped as strong and aggressive, are particularly unlikely to benefit from the battered woman syndrome. By fostering an image of battered women as psychologically impaired, the battered woman syndrome has negative implications for domestic violence victims in cases where they are seeking child custody or defending themselves against charges of child abuse or neglect. Some legal scholars have called for a more favorable interpretation of the classic doctrine of self-defense instead of invoking a unique “syndrome” for battered women.

D. Civil Protection Orders

Civil protection orders, also known by other names such as restraining orders and injunctions, are a major innovation in the states’ legal response to domestic violence. Beginning in the mid-1970s, they have been authorized by statute in every state and are now the most frequently used legal remedy for domestic violence.

A protection order 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 requiring him to stay a specified distance away from the victim and places that she frequents. A number of features make these orders particularly useful. A protection order 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 ex parte, expedited basis, after which a final order may be granted following notice to the respondent and a hearing. In some jurisdictions, emergency orders are available all day and night, seven days a week. The procedure for obtaining an order is usually designed to be simple enough for a victim to proceed without an attorney, but legal representation improves a victim’s chances of obtaining a favorable outcome.

State laws differ with respect to who may obtain a protection order. Some states exclude same-sex couples, dating relationships, and victims who are minors. Other variables that differ from state to state include what evidence must be offered for an order to be granted, the duration of a temporary or final order, and what types of relief may be provided in the order (such as spousal and child support, child custody and visitation, monetary compensation, a ban on weapon possession, and mandatory counseling for the abuser). Laws that provide for broad coverage and comprehensive relief offer the most benefits to domestic violence victims.
Civil protection orders for domestic violence are not the only type of protection orders that are offered. Criminal protection orders are often available in connection with domestic violence prosecutions, and in some jurisdictions, they are issued automatically in all such cases. Some states have multiple different statutory schemes to provide civil protection orders for elder abuse, stalking, harassment, and other situations, in addition to domestic violence.

Protection orders are among the most effective legal remedies available for domestic violence. 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. Several other studies also show a high level of satisfaction among women who have obtained orders. Studies measuring abusers’ compliance with protection orders are more mixed, with several showing that half or more of abusers committed subsequent abuse against their victims after the issuance of a protection order. Interestingly, the number of women satisfied with their protection orders exceeds the number whose orders have not been violated. This may reflect the fact that the order has reduced the abuse even if it has not eliminated it. It may also reflect the fact that many women feel empowered by the court’s issuance of a protection order, because of the message it communicates to the batterer that his behavior is unacceptable and society takes domestic violence seriously.

Protection orders are not a panacea, however. Their effectiveness depends on proper enforcement. Depending on the facts and the law of the jurisdiction, violation of a temporary or final order may be a felony or misdemeanor, civil or criminal contempt of court, or both. However, enforcement is uneven.

There are additional problems with protection orders. Some women find the process of obtaining an order difficult or intimidating. Others are deterred from seeking an order because they do not want to sever ties with the abuser. Currently, most protection orders prohibit or severely restrict contact between the abuser and victim. Protection orders that forbid further abuse but permit the parties to have ongoing contact are an important option for women who are not ready to end the relationship with the abuser. Orders permitting ongoing contact exist, but they are unavailable in some jurisdictions, underutilized in others, and largely unknown to the general public and much of the legal profession. Consideration should be given to making protection orders permitting ongoing contact more widely available, in order to give battered women access to a fuller array of choices. In order to protect women’s safety, such orders (and indeed all protection orders) should be accompanied by appropriate client counseling, risk assessment, and safety planning procedures.

Some judges, when presented with a victim’s petition for a protection order against the abuser, have issued mutual protection orders that restrict the conduct of both parties. These
orders are difficult to enforce, imply that both parties are equally at fault, and can create serious legal problems for the victim. Although both federal and state laws discourage the issuance of mutual protection orders, they continue to be granted.

E. Civil Damages Actions

Under certain circumstances, domestic violence victims can bring tort actions against the abuser and against the police or other third parties that should have prevented the violence but failed to do so.

Recent doctrinal changes have made it easier for victims to bring civil suits against their abusers. Some states have extended the statute of limitations for domestic violence claims by statute or through the application of rules concerning duress, insanity, and continuing tort. The ancient common law doctrine of interspousal tort immunity, which prohibited one spouse from suing the other, has been abandoned in most states. When a tort claim is contemplated at the time of divorce, some states permit or require the tort claim to be joined with the divorce action, while other states require them to be filed separately. Claims against spouses for emotional distress in the absence of physical violence have faced resistance from some courts and scholars, who take the view that emotional conflict between married couples is normal and that such suits violate the spirit of no-fault divorce. The usefulness of tort suits against abusers is limited by the fact that liability insurance policies rarely cover damages in such cases.

Victims of domestic violence have brought a number of successful lawsuits against police departments that failed to protect them. In a widely publicized case decided in 1984, 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 brutally attacked her. A jury awarded her 2.3 million dollars in damages. This huge award attracted nationwide attention, and many police departments immediately strengthened their policies on responding to domestic violence. Although problems with police enforcement remain, most observers agree that police response to domestic violence has improved dramatically in recent decades, due in part to municipalities’ concern about incurring liability for civil damages.

F. Stalking

Stalking is subject to differing definitions but generally consists of a pattern of repeated behavior such as surveillance, unwanted contact, and harassment. Stalking is frequently committed by current or former spouses and intimate partners, but it can also occur in other contexts. Eighty-seven percent of stalkers are male, and almost eighty percent of victims are female.
In 1990, California became the first state to make stalking a crime. Today, stalking is a crime under the laws of all states. Many states offer civil protection orders to stalking victims under domestic violence statutes or other statutes specifically addressing stalking or harassment. At the federal level, the Violence Against Women Act was amended in 1996 to create a federal criminal offense of interstate stalking; this provision was later expanded when the Violence Against Women Act was amended in 2000 and 2005.

Cyberstalking (that is, the use of the Internet or electronic communication devices to stalk another person) is a growing problem. Some states explicitly cover cyberstalking in their stalking statutes.

G. Child Custody and Visitation

A man who abuses his spouse or partner poses a danger not only to his adult victim but also to his children. Men who abuse women have a high rate of committing child abuse. Even when children are not the intended target of abuse, they can be accidentally injured during an episode of violence between adults. Furthermore, exposure to domestic violence is emotionally traumatic for children and may teach them that abuse of women is normal and acceptable. Domestic violence tends to escalate following separation, and a man may use access to the children as a way to continue abusing and controlling his former spouse or partner. Since a child’s well-being is directly tied to that of his or her primary parent, the safety of both abused women and their children should be a paramount consideration in child custody and visitation decisions.

In 1990, Congress unanimously passed a non-binding resolution urging every state to adopt a statutory presumption against awarding custody to a parent who has committed domestic violence. Many states have followed this recommendation; others, while not adopting a presumption, require domestic violence to be considered as a factor in custody decisions. However, implementation of these statutes is inconsistent. In general, family law courts deciding custody and visitation cases (in the context of divorce, for example) are far less enlightened about domestic violence and its implications than criminal courts and courts deciding civil protection order cases.

Studies show that abusive men continue to fight for and receive custody and unsupervised visitation at high rates. Because of inadequate screening of cases and a lack of coordination among different branches of the legal system, family law courts are often unaware that a family involved in a custody or visitation dispute has a history of domestic violence. Rules designed to deprive abusers of custody and visitation are frequently undermined by laws requiring or preferring joint custody, mediation, and maintaining the child’s contact with both parents. These problems are exacerbated by judges, guardians ad litem, expert witnesses, and
other legal personnel who are biased and/or uninformed about domestic violence. The myth persists that a man’s abuse of his adult partner has no bearing on his fitness as a parent.

There is ample evidence that being a victim of domestic violence actually places women at a disadvantage in custody and visitation proceedings. To a judge or other observer, an abuser might appear more credible, stable, reasonable, and sympathetic than his traumatized victim. Judges and other legal actors often make the unwarranted assumption that women fabricate or exaggerate claims of domestic violence to manipulate the outcome of a child custody or visitation dispute. Fathers’ rights groups have argued vigorously that it is unfair to deny men access to their children and have lent credibility to the concept of Parental Alienation Syndrome, a theory that has never been scientifically validated and that blames mothers for making false abuse allegations and compelling children to reject their fathers. By filing repeated motions for custody and visitation, abusers can use the legal system itself as a vehicle to harass the victim and exhaust her emotional and financial resources.

Court orders requiring that a third party oversee the exchange of children at the beginning and end of visitation, or requiring that visitation periods be supervised by a third party, are becoming increasingly common. Allowing the abuser’s relatives or friends to act as supervisors is dangerous since they may be unable or unwilling to control his behavior. Supervised visitation centers are available in a growing number of locations but are expensive to establish and operate, with the result that demand exceeds supply. The federal government has provided funding to support the establishment of supervised visitation centers. However, the quality of supervised visitation programs is inconsistent. Furthermore, supervision does not eliminate the risk that the abuser will use visitation as an opportunity to harm the adult victim and/or the child.

Some states have statutes or case law recognizing that when available arrangements are inadequate to ensure the safety of the adult victim and/or child, both custody and visitation should be denied to the abusive parent. Nevertheless, it remains extremely rare for a court to deny a father access to his children, even when he has committed domestic violence.

H. Abused Mothers, “Failure to Protect,” and Child Abuse and Neglect

In child abuse and neglect proceedings, abused mothers are sometimes blamed for exposing their children to domestic violence. A recent lawsuit successfully challenged the New York City child protection agency’s practice of automatically finding that children exposed to domestic violence were neglected and removing them from their mothers in order to place them into foster care. Child abuse and neglect proceedings should target the perpetrators of domestic violence rather than the victims and should recognize that the protection of children is often best achieved by protecting their mothers.
Similar issues arise when a battered woman is accused of failing to protect her child from violence perpetrated by the same man who was abusing her. In such cases, the legal system should consider the constraints under which battered women live, rather than simply assuming that the abused mother could have prevented abuse of the child and that she is therefore legally responsible for failing to do so.99

In a promising development, representatives of domestic violence organizations and child protective services agencies collaborated on writing a set of recommendations for courts, community organizations, and others in order protect the safety and well-being of both women and children.100 In communities that received federal funding to implement these recommendations, a study conducted five years later found some improvements in awareness and practices concerning domestic violence and child welfare; however, the study found that institutional change was difficult to achieve and sustain.101

IV. RAPE AND SEXUAL ASSAULT

Reform of laws on rape and sexual assault has been widespread. Since the 1970s, legal changes in some or all jurisdictions include eliminating the resistance requirement, making laws gender-neutral, classifying sexual offenses by degree of severity, and altering the requirements of force and non-consent.102 Some states offer civil protection orders for victims of rape and sexual assault.103

Legal reform has not succeeded in eliminating the difficulties faced by victims of rape and sexual assault in the legal system. In particular, allegations of acquaintance rape are often disbelieved or treated as trivial, and rape myths predicated on sexist stereotypes continue to abound in court, in the media, and in society as a whole.104

A. 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.105 Rape shield laws are weakened by loopholes and by unfavorable judicial interpretations.106 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.107 A preferable approach is found in Federal Rule of Evidence 412, which was amended in the Violence Against Women Act of 1994 so that it now applies to both civil and criminal proceedings.108
B. Marital Rape

Marital rape is extremely traumatic to its victims and should be treated as a serious crime. Under traditional common law rules, a husband could not be charged with raping his wife. No state has preserved the marital rape exemption in its entirety, but the majority of states retain some form of marital immunity – for example, by criminalizing a narrower range of sexual offenses within marriage than outside of it, subjecting sexual offenses within marriage to less severe punishments, or creating special procedural hurdles for marital rape prosecutions.

C. DNA Testing

DNA testing is a technological advance that has been enormously helpful in rape cases as well as homicides. DNA testing is expensive, and there is currently a large backlog of DNA samples awaiting testing. Furthermore, if correct techniques are not used, DNA test results can be misleading. Nevertheless, DNA testing has proven itself as a very useful tool.

V. SEXUAL HARASSMENT IN EMPLOYMENT AND EDUCATION

As a direct result of feminist analysis and advocacy, the United States Supreme Court ruled in 1986 that sexual harassment in the workplace can violate the major federal employment discrimination statute, Title VII of the Civil Rights Act of 1964. Subsequent Supreme Court decisions have strengthened the incentives for employers to establish programs to prevent and remedy sexually harassing behavior by employees. 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. Training programs to educate workers on how to avoid sexual harassment, which were unheard of twenty-five years ago, are now common.

Sexual harassment in educational settings has also been recognized as a form of sex discrimination that is actionable under federal anti-discrimination legislation. Title IX of the Education Amendments of 1972 permits suits for damages and equitable relief in cases involving harassment by peers, teachers, and others.

The effectiveness of these federal remedies is hampered by restrictive technical requirements. For example, Title VII applies only to employers with fifteen or more employees, establishes short time limits for filing a complaint, and places maximum caps on damage awards. Title IX applies only to educational programs or activities receiving federal funding, and the Supreme Court has imposed a high standard for establishing that the school (instead of or in addition to the individual harasser) can be held liable. Some states have sexual harassment laws that are more generous to plaintiffs than their federal counterparts.
VI. GENERAL OBSERVATIONS

Perhaps the most successful aspect of legal reform concerning violence against women in the United States is the sheer number and variety of legal remedies that are available. For instance, depending on the facts and the law of the jurisdiction, a battered wife has the option of seeking any or all of the following: a criminal prosecution, a civil protection order, a divorce, a legal separation, a civil personal injury suit against her husband, a civil rights claim against him, a civil suit (possibly including a discrimination claim) against the police or other third parties for failing to protect her from the abuse, and an award from a government victim compensation program.\(^\text{121}\)

Since the population of the United States is diverse, and the situations of individual women vary, it is important to offer a range of legal interventions. While criminal penalties make an important statement that violence against women is taken seriously as an offense against society, they may not be helpful to all women. Women of color are often reluctant to become involved with the criminal justice system because of its history of discrimination against members of minority groups.\(^\text{122}\) Immigrant women have an additional disincentive for exposing their partners to criminal prosecution, because of the risk that the perpetrator will be deported.\(^\text{123}\)

Although reliable statistics on violence against women are difficult to obtain, there are data suggesting that rates of violence against women decreased during the 1990s and that legal reforms are at least partly responsible for that reduction.\(^\text{124}\) Nevertheless, a number of significant challenges remain.

A. Implementation

In the process of reforming the law concerning violence against women, one of the most pressing challenges is implementation. Progressive laws are worth little if they are not carried out properly by police, prosecutors, judges, and others in positions of power.

Problems with implementation include both underenforcement and overenforcement. For example, in domestic violence protection orders, some judges refuse to include a provision evicting the offender from the home even when the victim has requested it, while other judges insist on including an eviction provision even when the victim does not want it.\(^\text{125}\) At the same time that some police officers fail to arrest domestic violence offenders (even in the presence of mandatory arrest statutes), others automatically arrest anyone suspected of committing domestic violence – including women who fought back in self-defense.\(^\text{126}\) While some prosecutors are reluctant to interfere in the relationship between a domestic violence victim and abuser, others require the victim to separate from the abuser as a prerequisite for receiving assistance.\(^\text{127}\)
Education and training can help actors in the legal system to meet their obligations. Training programs should lead 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. Domestic violence advocacy organizations often participate in training programs for police. 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.\textsuperscript{128}

Structural change is another effective strategy for implementation. In an effort to improve enforcement of domestic violence laws, many localities have adopted a coordinated community response to domestic violence, which consists of an ongoing collaboration among entities such as the judiciary, police, prosecutors, probation, advocacy groups, and social service agencies.\textsuperscript{129} The creation of specialized courts, police units, and prosecutor departments appears to hold promise as a way of developing expertise, improving efficiency, minimizing the burdens on victims, and improving case outcomes.\textsuperscript{130}

Proactive policies can facilitate enforcement of protection orders. Some jurisdictions actively monitor compliance with an order – for example, by using court staff or an independent agency to check police records for incidents involving the abuser and contact the victim to inquire about violations and inform her about her options.\textsuperscript{131} Modern technology permits the use of electronic devices to track a batterer’s whereabouts to ensure that he does not violate restrictions on approaching the victim or designated locations.\textsuperscript{132} However, technological failures and inadequate police response can limit the effectiveness of these devices.\textsuperscript{133}

Because of the difficulty of using legal mechanisms to address violence against women, several commentators have recommended alternatives to the legal system for domestic violence and sexual assault cases. The proposed models include therapeutic or restorative justice approaches, such as victim-offender mediation, sentencing circles, and group conferences.\textsuperscript{134} Although these alternatives reflect a well-intentioned attempt to avoid the excesses and deficiencies of the criminal justice system, they have not been demonstrated to be effective and run the risk of deemphasizing the wrongfulness of violence against women.\textsuperscript{135}

\textbf{B. The Role of Feminist Advocates}

Feminist advocates have played a central role in the adoption and implementation of many legal reforms in the United States. A coalition of women’s groups and other non-governmental organizations was deeply involved in the conception, drafting, and passage of the Violence Against Women Act.\textsuperscript{136} Sexual harassment law owes its existence to feminist consciousness-raising and theorizing.\textsuperscript{137} However, the demise of VAWA’s civil rights provision,
and restrictive judicial interpretations of sexual harassment law, demonstrate the limitations of feminists’ influence.

Ideally, law can be used to benefit non-governmental organizations that represent women’s interests. VAWA authorized grants directly to non-governmental domestic violence and sexual assault programs, and required government agencies applying for certain grants to collaborate with such programs. As a result, those programs have been strengthened.

C. Cultural Change

One of the fundamental goals of feminist activity beginning in the 1970s was to change people’s awareness and perceptions of violence against women. Legal advocacy, along with political and social advocacy, was an important part of that process. Law reform has served as a vehicle for public education. Many government officials, professionals, and ordinary citizens now believe that violence against women is unacceptable.

However, age-old stereotypes and gender bias persist and make themselves felt at every level of society, including the legal system. One reason for the difficulty of implementing legal reform is the significant level of denial and resistance among those in positions of authority. Law has enormous potential to change social norms, but entrenched social norms also have the power to obstruct legal progress. In some instances, organized men’s rights groups have successfully campaigned to undermine the rights of women in the legal system.

D. Meeting Women’s Needs

Victims of violence against women have many different needs, and the legal system has met some of them more fully than others. For example, a battered woman who wants to separate from her abuser can flee to a battered women’s shelter, have her abuser criminally prosecuted and incarcerated, and obtain a civil protection order requiring him to stay away from her and refrain from contacting her. A battered woman who wants to end the violence but continue the relationship with her abuser has far fewer options; indeed, in most cases, the law offers her no help toward that goal. Feminist advocates have called for making the law more responsive to the situations and priorities of individual women.

The law has been relatively ineffective in meeting what many women consider their single most pressing need: material support. There is a strong association between violence against women and women’s poverty, and the association works in both directions. Poor women are at high risk of experiencing violence, and experiencing violence is one of the factors that make and keep women poor. Employment, financial assistance, housing, and child care are among the material goods that women desperately need in order to overcome the impact of violence and attain independence and security for themselves and their children.
Legal reform has made some progress toward meeting women’s material needs. Civil protection orders and tort claims offer the possibility of monetary recovery for victims, particularly if the abuser or other defendant has financial resources or insurance coverage.\textsuperscript{150} Some federal, state, and local laws contain protections for victims of violence against women in the areas of housing and employment; however, these provisions are generally modest in their scope and application.\textsuperscript{151} Federal welfare law was amended in 1996 to create the Family Violence Option, which permits domestic violence victims to be exempted from certain restrictions on receiving public assistance payments. States were given the choice of whether to adopt this policy, and some chose not to do so. Furthermore, in places where the Family Violence Option has been adopted, implementation has generally been inadequate.\textsuperscript{152} Under VAWA, states seeking certain federal grants must certify that they do not require victims to pay for forensic medical exams or for filing and service costs associated with domestic violence prosecutions.\textsuperscript{153} Still, anecdotal evidence indicates that the practice of billing victims for these items has not disappeared.

The piecemeal reforms offering material resources for victims of violence against women are a good start but are insufficient to meet women’s needs. In general, the U.S. legal system is more focused on guaranteeing negative rights (such as the right to be free from government interference with certain freedoms) than positive rights (affirmative government obligations to fulfill basic socioeconomic needs). The law on violence against women is no exception.

E. Access to Legal Resources

To take full advantage of available legal reforms, women must have access to assistance from attorneys, victim advocates, counselors, and interpreters if needed. Although steps have been taken to increase access to these resources, the supply remains inadequate to meet the demand.\textsuperscript{154}

VII. CONCLUSION

Despite significant progress on improving the legal response to violence against women in the United States, much work remains to be done. Domestic violence, rape and sexual assault, sexual harassment, and other forms of violence against women continue to occur at unacceptably high levels. Frequently, women are reluctant to report incidents to authorities and do not avail themselves of existing legal remedies. Law can play a vital role in the effort to end violence against women. Advocates for the rights of women must continue to monitor the legal system to ensure that it lives up to its promise.
Portions of this paper previously appeared in other publications by the author. In the absence of any word that adequately describes those who have experienced violence, this paper uses the well-known term “victim.” The alternative term “survivor,” although preferable in some respects, is relatively unfamiliar to the legal system.

There are significant differences among jurisdictions in what legal rules have been adopted as well as how they are interpreted and implemented. See, e.g., American Bar Association Commission on Domestic Violence, Statutory Summary Charts, http://www.abanet.org/domviol/statutorysummarycharts.html (last visited July 29, 2008) (providing state-by-state comparisons of statutes concerning violence against women). Because of the breadth of the topic, this paper does not purport to be comprehensive.

Pub. L. No. 103-322, 108 Stat. 1902 (1994). In my former capacity as Senior Staff Attorney at the NOW Legal Defense and Education Fund, I was involved in the effort to draft and enact the Violence Against Women Act of 1994; however, the views expressed herein are my own.


As discussed in Part V below, federal civil rights legislation has also been used to prohibit sexual harassment in employment and education.


See Goldfarb, *supra* note 8, at 92, 143.

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).


Id. at 166.


Id. at 504-05.
20 See OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEPARTMENT OF JUSTICE, 2006 BIENNIAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT (describing programs funded by VAWA grants).
23 See supra Part II (discussing the Violence Against Women Act). See also, e.g., 18 U.S.C. § 922(g)(8)-9 (prohibiting the possession of firearms by anyone convicted of a domestic violence misdemeanor or subject to a domestic violence protection order).
24 See, e.g., NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE: A MODEL STATE CODE § 102 (1994) (defining “domestic or family violence” to include actual, attempted, or threatened physical and sexual abuse but not psychological abuse); Joy M. Bingham, Note, Protecting Victims by Working Around the System and Within the System: Statutory Protection for Emotional Abuse in the Domestic Violence Context, 81 NORTH DAKOTA LAW REVIEW 837 (2005) (surveying state laws concerning emotional abuse); Leigh Goodmark, Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women, 23 SAINT LOUIS UNIVERSITY PUBLIC LAW REVIEW 7, 29-30 (2004) (critiquing the legal system’s failure to provide redress for non-physical violence).

See Christopher D. Maxwell et al., U.S. Department of Justice, *The Effects of Arrest on Intimate Partner Violence: New Evidence From the Spouse Assault Replication Program* (2001) (analyzing five studies showing that arrest had a deterrent effect on batterers, but that the deterrent effect was modest in comparison to the relationship between recidivism and such factors as the batterer’s age and prior criminal record); Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 New England Law Review 929 (1994) (arguing that empirical studies demonstrate that arrest is generally the best available method of deterring future violence); but see, e.g., Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, 43 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (asserting that arrest reduced recidivism among some batterers but increased it among others).


See, e.g., Coker, supra note 34, at 843-44; Barbara Hart, *Battered Women and the Criminal Justice System, in Do Arrests and Restraining Orders Work?*, supra note 32, at 98, 109-10.


See Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 William and Mary Law Review 1843, 1890 & n.211 (2002) (citing a study showing that advocacy services increase the likelihood that victims will be willing to testify).

Hanna, supra note 33, at 1901-06.

545 U.S. 748 (2005) (holding that police did not violate plaintiff’s procedural due process rights).

Id.


Goldfarb, supra note 31, at 1503.

For information on protection orders, see, for example, PETER FINN & SARAH COLSON, NATIONAL INSTITUTE OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT (1990); Goldfarb, supra note 31; 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).


See sources cited supra note 47.


Goldfarb, supra note 31, at 1503-04.


For a summary of empirical research concerning women’s satisfaction with protection orders, see Goldfarb, supra note 31, at 1510.

See id. at 1511-12. Most of the subsequent abuse was psychological, rather than physical. Id. at 1512, 1532 n.264.

See generally Goldfarb, supra note 31.
62 For discussion of the issues in this paragraph, see, for example, SCHNEIDER ET AL., supra note 28, at 697-730, 737-43; Jennifer Wriggins, Domestic Violence Torts, 75 SOUTHERN CALIFORNIA LAW REVIEW 121 (2001).
63 BARLETT ET AL., supra note 45, at 497-99 (citing cases based on the equal protection clause or on “special relationship” theory). However, such cases are often unsuccessful. See, e.g., Town of Castle Rock v. Gonzalez, 545 U.S. 748 (2005) (holding that plaintiff did not have a constitutionally protected property interest in police enforcement of a protection order); 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).
65 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 (1986).
66 Zorza, supra note 39, 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 policy. See id. at 54-59.
67 See, e.g., Zorza, supra note 32, at 935.
69 SCHNEIDER ET AL., supra note 28, at 282-83.
71 18 U.S.C. § 2261A; VIOLENCE AGAINST WOMEN OFFICE, supra note 68, at 41.
72 VIOLENCE AGAINST WOMEN OFFICE, supra note 68, at 1-16.
73 Child custody and visitation are sometimes known by other terms such as parenting time, access, etc. Some jurisdictions distinguish between sole and joint custody, and between physical custody (which determines with whom the child lives) and legal custody (which determines who has the authority to make certain decisions about the child).
Visitation and Family Violence

Programs

90 89 88 87 86 supra 85 (2005).


75 See National Council of Juvenile and Family Court Judges, supra note 27, at § 402(1) (recommending that states adopt statutes requiring courts in custody and visitation cases to place primary importance on the safety and well-being of both the child and the adult victim of domestic violence).


80 Meier, supra note 75.


82 Kernic et al., supra note 81.

83 Family Violence Project, supra note 79, at 219; Meier, supra note 75; Allison C. Morrill et al., Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother, 11 Violence Against Women 1076 (2005).

84 Cuthbert et al., supra note 81; Goodmark, supra note 74, at 260-69; Meier, supra note 75, at 707-14; Joan Zorza & Leora Rosen, Guest Editors’ Introduction, 11 Violence Against Women 983, 985-86 (2005).

85 See, e.g., Arizona Coalition Against Domestic Violence, supra note 81; Cuthbert et al., supra note 81; Meier, supra note 75.

86 Meier, supra note 75, at 690-92; Morrill et al., supra note 83, at 1078.

87 Cuthbert et al., supra note 81, at 41, 61; Meier, supra note 75, at 681-86.

88 Meier, supra note 75, at 678-80, 688-90; Zorza & Rosen, supra note 84, at 986-87.

89 Cuthbert et al., supra note 81, at 59-60, 65-68; Zorza & Rosen, supra note 84, at 986.

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Years, Clothing Yields DNA Key to Dozens of Rapes

Killing Force Review of Virginia DNA Cases

Contest and Consent: A Legal History of Marital Rape

Law on Sexual Offenses by Intimates

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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).


116 For a critique of the effectiveness of employers’ sexual harassment policies, procedures, and training programs, see id.


120 See, e.g., L.W. ex rel. L.G. v. Toms River Regional Schools Board of Education, 915 A.2d 535 (N.J. 2007) (rejecting the Title IX liability standard and applying a more lenient standard under state law).


123 See Goodmark, supra note 27, at 37.

124 See Amy Farmer & Jill Tiefenthaler, Explaining the Recent Decline In Domestic Violence, 21 Contemporary Economic Policy 158 (Apr. 2003) (finding that increased access to legal services for battered women is a significant factor in explaining the decline in domestic violence during the 1990s).

125 See Goldfarb, supra note 31, at 1505 n.117.


129 See, e.g., Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond (Melanie F. Shepard & Ellen Pence eds., 1999). See also Lisa A. Goodman and Deborah Epstein, Listening to Battered Women 82-87 (2008) (critiquing the tendency of some coordinated community response programs to subordinate battered women and their advocates to other institutional goals); Renée Römkens, Protecting Prosecution: Exploring the Powers of Law in an Intervention Program for Domestic Violence, 12 Violence Against Women 160 (2007) (describing the dominance of the criminal justice system in an interdisciplinary domestic violence response program).
Specialized domestic violence courts also have potential drawbacks, including a high rate of burnout among judges and other staff and the risk of exposing domestic violence victims to punitive child protection proceedings. See id.  


135 See Fiore & O’Shea, supra note 134, at 18-14 to 18-15; Judith Herman, Justice From the Victim’s Perspective, 11 VIOLENCE AGAINST WOMEN 571 (2005).  

136 Goldfarb, No Civilized System of Justice, supra note 14, at 542-43.  

137 Siegel, supra note 112, at 8-11.  


139 Susan Schechter, Building Comprehensive Solutions to Domestic Violence, in JILL DAVIES, INTRODUCTION TO POLICY ADVOCACY AND ANALYSIS: IMPROVING HOW SYSTEMS RESPOND TO BATTERED WOMEN 1 (National Resource Center on Domestic Violence 2000).  


141 Schechter, supra note 139, at 2.  

142 See generally, e.g., Lynn Hecht Schafran, There’s No Accounting for Judges, 58 ALBANY LAW REVIEW 1063 (1995); Schafran, supra note 104.  

143 See, e.g., SCHNEIDER, supra note 34, at 90-91; Mahoney, supra note 45, at 10-15.  

144 See Renée Rømkens, Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women, 13 YALE JOURNAL OF LAW AND FEMINISM 265 (2001).  

145 See supra note 88 and accompanying text (discussing the impact of fathers’ rights groups on custody and visitation law).  

146 See generally Goldfarb, supra note 31.  

147 See, e.g., GOODMAN & EPSTEIN, supra note 129, at 90-95.


See BATTERED WOMEN, CHILDREN, AND WELFARE REFORM, supra note 148; Taryn Lindhorst et al., Screening for Domestic Violence in Public Welfare Offices: An Analysis of Case Manager and Client Interactions, 14 VIOLENCE AGAINST WOMEN 5 (2008); Römkens, supra note 144, at 269-77.


See SCHNEIDER, supra note 34, at 95-96; BRENTA K. UEKERT ET AL., NATIONAL CENTER FOR STATE COURTS, SERVING LIMITED ENGLISH PROFICIENT (LEP) BATTERED WOMEN: A NATIONAL SURVEY OF THE COURTS’ CAPACITY TO PROVIDE PROTECTION ORDERS (2006); Goldscheid, supra note 15, at 171; Sack, supra note 36, at 1729.