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

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*\* The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations. The author notes that this paper may be subject to revision.*

## 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 comprise 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.<sup>1</sup>

## 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.<sup>2</sup> This lengthy and wide-ranging legislation has subsequently been amended, reauthorized, and expanded.<sup>3</sup> 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When originally enacted, VAWA included a provision stating that gender-motivated violent crime is a violation of the victim's federal civil rights.<sup>4</sup> 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."<sup>5</sup> Plaintiffs relied on VAWA's civil rights provision in cases alleging domestic violence, rape and sexual assault, and sexual harassment.<sup>6</sup>

An anti-discrimination statute, particularly at the federal level, is a uniquely powerful way to combat violence against women.<sup>7</sup> 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.<sup>8</sup> Many women find civil suits to be a valuable alternative or

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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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> As a result of this decision, which is open to criticism on numerous grounds,<sup>12</sup> 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.<sup>13</sup> Federal legislation to restore the civil rights provision in a narrower version that would meet constitutional requirements has been introduced but not enacted.<sup>14</sup>

## 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; reformed immigration law to help battered immigrant women escape their abusers; and criminalized the possession of firearms by those subject to domestic violence protection orders.

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 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.<sup>15</sup> The outpouring of federal funds triggered by VAWA has had an enormous positive impact.<sup>16</sup>

The reforms instituted by VAWA have paved the way for further advances. To give just one illustration, 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

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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 non-immigrant U-visa 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.<sup>17</sup> In 2005, when VAWA was again amended, protections for abused immigrants were further expanded.<sup>18</sup> 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.<sup>19</sup>

### 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

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.<sup>20</sup>

Although psychological abuse is often the most devastating aspect of domestic violence, psychological abuse is far less likely than physical or sexual abuse to be designated as a crime.<sup>21</sup> Defining domestic violence broadly is essential in order to ensure that criminal penalties apply to all forms of abuse.

#### 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. 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,<sup>22</sup> and “no-drop” prosecution policies, which prevent prosecutors from complying with a victim’s request to drop charges against the abuser.<sup>23</sup>

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Feminists are divided on the question of whether compulsory criminal interventions in domestic violence 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.<sup>24</sup> 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.<sup>25</sup>

A particularly harsh type of mandatory intervention is the practice of jailing a victim who refuses to testify against the abuser.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

In fact, even after mandatory policies are adopted, police and prosecutors sometimes fail to comply with them.<sup>29</sup> 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.<sup>30</sup>

### C. Criminal Defense of Battered Women

When a battered woman kills or attacks her abuser and is prosecuted for doing so, 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 1970's, 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

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for a more favorable interpretation of the classic doctrine of self-defense instead of invoking a unique “syndrome” for battered women.<sup>31</sup>

#### 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. Since the mid-1970’s, 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.<sup>32</sup>

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).<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

Protection orders are among the most effective legal remedies available for domestic violence.<sup>36</sup> 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.<sup>37</sup> Several other studies also show a high level of satisfaction among

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women who have obtained orders.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup>

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.<sup>42</sup>

There are additional problems with orders of protection. Some women find the process of obtaining an order difficult or intimidating. Others are deterred from seeking an order of protection 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 case evaluation, client counseling, risk assessment, and safety planning procedures.<sup>43</sup>

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.<sup>44</sup> Although both federal and state law discourage the issuance of mutual protection orders, they continue to be granted.<sup>45</sup>

#### 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

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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.<sup>46</sup>

Victims of domestic violence have brought a number of successful lawsuits against police departments that failed to protect them.<sup>47</sup> 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 savagely attacked her.<sup>48</sup> A jury awarded her 2.3 million dollars in damages.<sup>49</sup> This huge award attracted nationwide attention, and many police departments immediately strengthened their policies on responding to domestic violence.<sup>50</sup> 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.<sup>51</sup>

#### F. Stalking

In 1990, California became the first state to make stalking a crime. Within eight years, all fifty states had enacted anti-stalking laws. Stalking is subject to differing definitions but generally consists of a pattern of following, monitoring, and/or harassing another person. It is frequently a component of domestic violence but can also occur in other contexts. Eighty-seven percent of stalkers are male, and approximately three-quarters of victims are female.<sup>52</sup> Many states include stalking in domestic violence protection order statutes; some have special statutes that offer protection orders for stalking outside of the domestic violence setting.<sup>53</sup> At the federal level, the Violence Against Women Act was amended in 1996 to create a federal criminal offense of interstate stalking.

#### IV. RAPE AND SEXUAL ASSAULT

Reform of laws on rape and sexual assault has been widespread. Since the 1970's, changes brought about by reformers 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 nonconsent.<sup>54</sup> Some states offer protection orders for victims of rape and sexual assault.<sup>55</sup>

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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.

#### 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.<sup>56</sup> Rape shield laws are weakened by loopholes and by unfavorable judicial interpretations.<sup>57</sup> 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.<sup>58</sup> A preferable approach is found in Federal Rule of Evidence 412, which was amended in the federal Violence Against Women Act of 1994 so that it now applies to both civil and criminal proceedings.

#### B. Marital Rape

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.<sup>59</sup>

#### 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.<sup>60</sup>

### V. SEXUAL HARASSMENT IN EMPLOYMENT AND EDUCATION

As a direct result of feminist analysis and advocacy,<sup>61</sup> the United States Supreme Court decided 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.<sup>62</sup> Subsequent Supreme Court decisions have strengthened the incentives for employers to establish programs to prevent and remedy sexually harassing behavior by employees.<sup>63</sup> Amid a growing number of

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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.<sup>64</sup> Training programs to educate workers on how to avoid sexual harassment, which were unheard of twenty-five years ago, are now common.<sup>65</sup>

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.<sup>66</sup>

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 damages suit against the police or other third parties for failing to protect her from the abuse, and an award from a government victim compensation program.

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. Although 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. Immigrant women have an additional disincentive for exposing their partners to criminal prosecution, because of the risk that conviction will lead to deportation.

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.<sup>67</sup> 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. 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. While some prosecutors are reluctant to interfere in the relationship between a domestic violence victim and abuser, others insist that the victim separate from the abuser as a condition of offering assistance.

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.<sup>68</sup>

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. 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.<sup>69</sup>

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. 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.<sup>70</sup> However, technological failures and inadequate police response can limit the effectiveness of these devices.<sup>71</sup>

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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.<sup>72</sup> 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.<sup>73</sup>

#### 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.<sup>74</sup> Sexual harassment law owes its existence to feminist consciousness-raising and theorizing.<sup>75</sup> 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 authorizes grants directly to non-governmental domestic violence and sexual assault programs, and requires 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 about violence against women.<sup>76</sup> 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.<sup>77</sup> 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

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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.<sup>78</sup>

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 women poor.<sup>79</sup> 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.<sup>80</sup>

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. Both federal law and the law of some states 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.<sup>81</sup> Federal welfare law was amended 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 many chose not to do so. Furthermore, in places where the Family Violence Option has been adopted, implementation has generally been poor.<sup>82</sup> 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. Still, anecdotal evidence indicates that victims continue to be billed for these items.

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 American legal system is more focused on guaranteeing negative rights (such as the right to be free from discrimination or 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, lay legal advocates, counselors, and interpreters if needed. Although steps have

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been taken to increase access to these resources, the supply remains inadequate to meet the demand.<sup>83</sup>

## 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 and ensure that it lives up to its promise.

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<sup>1</sup> 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* (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.

<sup>2</sup> 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.

<sup>3</sup> See, e.g., Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006); Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (2000).

<sup>4</sup> Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified in relevant part at 42 U.S.C. § 13981).

<sup>5</sup> 42 U.S.C. §§ 1988, 13981(c).

<sup>6</sup> Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *Fordham Law Review* 57, 74-75 (2002) (citing cases).

<sup>7</sup> 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, 254-59 (2003).

<sup>8</sup> As discussed in Part V below, federal civil rights legislation has also been used for sexual harassment in employment and education.

<sup>9</sup> Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 *Ohio State Law Journal* 1, 55-56 (2000).

<sup>10</sup> See Goldfarb, *supra*, *Fordham Law Review* at 92, 143.

<sup>11</sup> *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).

<sup>12</sup> See, e.g., Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *Fordham Law Review* 57 (2002); Sally F. Goldfarb, "No Civilized System of Justice": The Fate of the Violence Against Women Act, 102 *West Virginia Law Review* 499 (2000).

<sup>13</sup> Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down But Not Ruled Out*, 39 *Family Law Quarterly* 157, 165-66 (2005).

<sup>14</sup> *Id.* at 166.

<sup>15</sup> For a more detailed description of the Violence Against Women Act of 1994, see Goldfarb, *supra*, *West Virginia Law Review* at 504-06.

<sup>16</sup> See U.S. Dep't 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).

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<sup>17</sup> For a summary of immigration provisions of the 1994 and 2000 legislation, see Janice Kaguyutan et al., *The Violence Against Women Act of 1994 and 2000: Immigration Protections for Battered Immigrants*, 6 *Domestic Violence Report* 33 (2001).

<sup>18</sup> *Violence Against Women and Department of Justice Reauthorization Act of 2005*, Pub. L. No. 109-162, 119 Stat. 2960, Title VIII (2006).

<sup>19</sup> See, e.g., National Network to End Violence Against Immigrant Women et al., *Joint Press Release: Government's Newly-Announced Directive Will Benefit Thousands of Immigrant Victims of Domestic Violence* (Apr. 24, 2008).

<sup>20</sup> See Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 *George Washington Law Review* 552 (2007); 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). See also Tracey Peter, *Domestic Violence in the United States and Sweden: A Welfare State Typology Comparison Within a Power Resources Framework*, 29 *Women's Studies International Forum* 96, 101 (2006) (describing Swedish legislation creating the crime of "gross violation of a woman's integrity," which permits a conviction for a series of abusive acts within an intimate relationship in addition to convictions for each individual crime).

<sup>21</sup> See, e.g., National Council of Juvenile and Family Court Judges, *Family Violence: A Model State Code* sec. 102 (1994) (defining "domestic or family violence" to include actual, attempted, or threatened physical and sexual abuse/violence but not psychological/emotional 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).

<sup>22</sup> Studies have shown that arrest has a deterrent effect on subsequent domestic violence. See CHRISTOPHER D. MAXWELL ET AL., U.S. DEP'T 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 likelihood of subsequent abuse was more strongly correlated with the batterers' age and prior criminal record than with whether or not they were arrested for a given act of domestic violence); 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).

<sup>23</sup> Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 *Harvard Law Review* 1849 (1996); 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). See also American Bar Association Commission on Domestic Violence, *Domestic Violence Arrest Policies By State* (Nov. 2007) (listing state laws on arrest for domestic violence).

<sup>24</sup> See, e.g., ELIZABETH SCHNEIDER, *Battered Women and Feminist Lawmaking* 184-88 (2000) (describing the controversy over mandatory arrest and no-drop prosecution policies); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 *BUFFALO CRIMINAL LAW REVIEW* 801 (2001) (analyzing the dangers that aggressive criminal responses to domestic violence pose to women); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservativization of the Battered Women's Movement*, 42 *HOUSTON LAW REVIEW* 237, 265-67 (2005) (describing domestic violence advocates' ambivalence about the adoption of mandatory criminal interventions); Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 *JOURNAL OF LAW & POLICY* 463, 504-06 (1996) (expressing concern about the impact of mandatory arrest policies on women of color).

<sup>25</sup> See, e.g., Coker, *supra*, *Buffalo Criminal Law Review* at 843-44; Barbara Hart, *Battered Women and the Criminal Justice System, in Do Arrests and Restraining Orders Work?* 98, 109-10 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

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<sup>26</sup> See Hanna, *supra*, Harvard Law Review at 1865-66, 1891-92; Emily J. Sack, Battered Women and the State: The Struggle for the Future of Domestic Violence Policy, 2004 Wisconsin Law Review 1657, 1681-82.

<sup>27</sup> 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).

<sup>28</sup> Hanna, *supra* note \*, Harvard Law Review at 1901-06.

<sup>29</sup> Sack, *supra* note \*, at 1697-99 (describing police and prosecutor resistance to mandatory domestic violence enforcement policies); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 46, 65 (1992) 65 (same).

<sup>30</sup> Town of Castle Rock v. Gonzalez, 545 U.S. 748 (2005) (holding that police did not violate plaintiff's procedural due process rights). The plaintiff in this case subsequently filed a claim with the Inter-American Commission on Human Rights, which is currently pending.

<sup>31</sup> For further discussion of battered woman syndrome and related issues, see Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICHIGAN LAW REVIEW 1, 36 (1991); Schneider, *supra*, at 29-34, 79-83.

<sup>32</sup> 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); 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).

<sup>33</sup> Court orders requiring abusers to receive counseling are controversial. Although well-designed batterer intervention programs seem to help some men change their patterns of abusive beliefs and behavior, the empirical research conducted to date has failed to demonstrate their effectiveness at preventing recidivism. See, e.g., SHELLY JACKSON ET AL., U.S. DEP'T OF JUSTICE, BATTERER INTERVENTION PROGRAMS: WHERE DO WE GO FROM HERE? (2003); Lynette Feder & David B. Wilson, *A Meta-Analytic Review of Court-Mandated Batterer Intervention Programs: Can Courts Affect Abusers' Behavior?*, 1 J. EXPERIMENTAL CRIMINOLOGY 239 (2005).

<sup>34</sup> Jeannie Suk, Criminal Law Comes Home, 116 Yale Law Journal 2 (2006).

<sup>35</sup> American Bar Association Commission on Domestic Violence, Statutory Summary Charts.

<sup>36</sup> See Sally F. Goldfarb, Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?, 29 Cardozo Law Review 1487, 1503-04 (2008).

<sup>37</sup> Susan L. Keilitz et al., Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence ix (1997).

<sup>38</sup> For a summary of empirical research concerning women's satisfaction with protection orders, see Goldfarb, *supra*, Cardozo Law Review at 1510.

<sup>39</sup> See *id.* at 1512. Most of the subsequent abuse was psychological, rather than physical. *Id.* at 1512, 1532 n.264.

<sup>40</sup> *Id.* at 1514-15.

<sup>41</sup> See Karla Fisher & Mary Rose, When "Enough Is Enough": Battered Women's Decision Making Around Court Orders of Protection, 41 Crime & Delinquency 414 (1995).

<sup>42</sup> See, e.g., Town of Castle Rock v. Gonzalez, 545 U.S. 748 (2005). Strategies for improving enforcement of protection orders are discussed in Part VI.A below.

<sup>43</sup> See generally Goldfarb, *supra*, Cardozo Law Review.

<sup>44</sup> Sack, *supra*, at 1682-84; Elizabeth Topliffe, Note, Why Civil Protection Orders Are Effective Remedies for Domestic Violence But Mutual Protective Orders Are Not, 67 Indiana Law Journal 1039 (1992).

<sup>45</sup> American Bar Association Commission on Domestic Violence, Statutes Prohibiting Mutual Protective Orders; Sack, *supra*, at 1683-84.

<sup>46</sup> For discussion of the issues in this paragraph, see, for example, Elizabeth M. Schneider et al., Domestic Violence and the Law: Theory and Practice 697-730 (2d edition 2008).

<sup>47</sup> Katharine T. Barlett et al., Gender and Law: Theory, Doctrine, Commentary 497-99 (4th edition 2006) (citing cases based on the equal protection clause or on "special relationship" theory). However, such cases are often

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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).

<sup>48</sup> *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (denying defendant's motion to dismiss).

<sup>49</sup> 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.

<sup>50</sup> *Zorza*, supra, *Journal of Criminal Law and Criminology* 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.

<sup>51</sup> See, e.g., *Zorza*, supra, *New England Law Review* at 935.

<sup>52</sup> *Schneider et al.*, supra, 282.

<sup>53</sup> American Bar Association Commission on Domestic Violence, *Statutory Summary Charts*.

<sup>54</sup> See *Bartlett*, supra, 790-821.

<sup>55</sup> American Bar Association Commission on Domestic Violence, *Civil Protection Orders: Sexual Assault*.

<sup>56</sup> See *Bartlett*, supra, at 79 (describing state laws).

<sup>57</sup> 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).

<sup>58</sup> See S. Rep. No. 102-197, at 46 (1991).

<sup>59</sup> See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 *California Law Review* 1371 (2000).

<sup>60</sup> On the advantages and pitfalls of DNA testing, see, e.g., 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.

<sup>61</sup> 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).

<sup>62</sup> *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

<sup>63</sup> *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).

<sup>64</sup> Joanna L. Grossman, *The Culture of Compliance*, 26 *Harvard Women's Law Journal* 3 (2003).

<sup>65</sup> For a critique of the effectiveness of employers' sexual harassment policies, procedures, and training programs, see *id.*

<sup>66</sup> See *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

<sup>67</sup> 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).

<sup>68</sup> See <http://www.legalmomentum.org> (last visited May 12, 2008).

<sup>69</sup> Specialized domestic violence courts also have potential disadvantages, including a heavy psychological toll on judges and the risk of exposing domestic violence victims to punitive child protection proceedings.

<sup>70</sup> See Diane L. Rosenfeld with Kirstin Scheffler, *GPS Monitoring Systems for Batterers: Exploring a New Paradigm of Offender Accountability and Victim/Survivor Safety*, 12 *Domestic Violence Report* 49 (2007).

<sup>71</sup> Darren Gowen, *Remote Location Monitoring - A Supervision Strategy to Enhance Risk Control*, 65-SEP *Fed. Probation* 38 (2001).

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<sup>72</sup> See, e.g., LINDA G. MILLS, *INSULT TO INJURY* (2003) (promoting the use of “Intimate Abuse Circles”); Christine Fiore and Kristen O’Shea, *Women in Violent Relationships – Experiences With the Legal and Medical Systems*, in *INTIMATE PARTNER VIOLENCE* 18-1, 18-14 to 18-15 (Kathleen A. Kendall-Tackett & Sarah M. Giacomoni editors, 2007) (surveying proposals for alternative approaches); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons From Navajo Peacemaking*, 47 *UCLA Law Review* 1 (1999) (examining the Navajo peacemaking model and concluding that it has both benefits and shortcomings); C. Quince Hopkins et al., *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 *ST. LOUIS U. PUB. L. REV.* 289 (2003) (addressing feminist arguments for and against restorative justice methods).

<sup>73</sup> See Fiore & O’Shea, *supra*, at 18-14 to 18-15; Judith Herman, *Justice From the Victim’s Perspective*, 11 *Violence Against Women* 571 (2005).

<sup>74</sup> Goldfarb, *supra*, West Virginia Law Review at 542-43.

<sup>75</sup> Reva B. Siegel, Introduction, in *Directions in Sexual Harassment Law* 1, 8-11 (Catharine A. MacKinnon and Reva B. Siegel eds., 2004).

<sup>76</sup> Susan Schechter, *Building Comprehensive Solutions to Domestic Violence* 1, in Jill Davies, Introduction to *Policy Advocacy and Analysis: Improving How Systems Respond to Battered Women* (National Resource Center on Domestic Violence 2000).

<sup>77</sup> See, e.g., Katherine Triantafillou, *Massachusetts’ New Legislation to Help Battered Women*, 27 *JUDGES’ J.* 20, 22 (1988) (describing the enactment of domestic violence laws as a form of public education).

<sup>78</sup> See generally Goldfarb, *supra*, *Cardozo Law Review*.

<sup>79</sup> See generally Ruth A. Brandwein, *Battered Women, Children, and Welfare Reform: The Ties That Bind* (1999).

<sup>80</sup> Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 *U.C. Davis Law Review* 1009 (2000).

<sup>81</sup> See American Bar Association Commission on Domestic Violence, *State Housing Laws for Survivors of Violence Against Women*; Goldscheid, *supra*, at 169-79.

<sup>82</sup> Brandwein, *supra*.

<sup>83</sup> See American Bar Association Commission on Domestic Violence, *Foreign Language Interpreters in Court*; Goldscheid, *supra*, at 171.