

United Nations  Nations Unies

**United Nations Office on Drugs and Crime
United Nations Division for the Advancement of Women**

Expert Group Meeting on good practices in legislation on violence against women
United Nations Office at Vienna, Austria
26 to 28 May 2008

**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.*

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I. INTRODUCTION¹

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.² 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.³

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.⁴ This lengthy and wide-ranging legislation has subsequently been amended, reauthorized, and expanded.⁵ 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When originally enacted, VAWA included a provision stating that gender-motivated violent crime is a violation of the victim's federal civil rights.⁶ This provision allowed a victim of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."⁷ Plaintiffs relied on VAWA's civil rights provision in cases alleging domestic violence, rape and sexual assault, and sexual harassment.⁸

An anti-discrimination statute, particularly at the federal level, is a uniquely powerful way to combat violence against women.⁹ 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.¹⁰ 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.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.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.¹³ As a result of this decision, which is open to criticism on numerous grounds,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.¹⁵ Federal legislation to restore the civil rights provision in a narrower version that would meet constitutional requirements has been introduced but not enacted.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.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.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.¹⁹ The outpouring of federal funds triggered by VAWA has had enormous positive impact.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 US. citizen or lawful permanent resident. It also allowed abused immigrants meeting certain requirements to obtain

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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.²¹ In 2005, when VAWA was again amended, protections for abused immigrants were further expanded.²² 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.²³ 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.²⁴

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,²⁵ 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.²⁶

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.²⁷ 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.²⁸ Courts are increasingly turning to treatment or counseling programs as sanctions for domestic violence defendants.²⁹ However, the empirical research conducted to date has failed to demonstrate that batterer intervention programs are effective at reducing recidivism.³⁰

B. Compulsory Criminal Justice Interventions

In the past, perpetrators of domestic violence were rarely arrested, prosecuted, and convicted.³¹ 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.³² 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.³³

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.³⁴ 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.³⁵

A particularly harsh type of mandatory intervention is the practice of jailing a victim who refuses to testify against the abuser.³⁶ 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.³⁷ 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.³⁸

In fact, even after mandatory policies are adopted, police and prosecutors sometimes fail to comply with them.³⁹ In the case of *Town of Castle Rock v. Gonzales*,⁴⁰ 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.⁴¹ 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.⁴²

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

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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.”⁴³ 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.⁴⁴ 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.⁴⁵

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.⁴⁶

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.⁴⁷

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.⁴⁸ 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).⁴⁹ Laws that provide for broad coverage and comprehensive relief offer the most benefits to domestic violence victims.

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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.⁵⁰ 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.⁵¹

Protection orders are among the most effective legal remedies available for domestic violence.⁵² 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.⁵³ Several other studies also show a high level of satisfaction among women who have obtained orders.⁵⁴ 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.⁵⁵ 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.⁵⁶ 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.⁵⁷

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.⁵⁸

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.⁵⁹

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

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orders are difficult to enforce, imply that both parties are equally at fault, and can create serious legal problems for the victim.⁶⁰ Although both federal and state laws discourage the issuance of mutual protection orders, they continue to be granted.⁶¹

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.⁶²

Victims of domestic violence have brought a number of successful lawsuits against police departments that failed to protect them.⁶³ 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.⁶⁴ A jury awarded her 2.3 million dollars in damages.⁶⁵ This huge award attracted nationwide attention, and many police departments immediately strengthened their policies on responding to domestic violence.⁶⁶ 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.⁶⁷

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.⁶⁸

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In 1990, California became the first state to make stalking a crime. Today, stalking is a crime under the laws of all states.⁶⁹ Many states offer civil protection orders to stalking victims under domestic violence statutes or other statutes specifically addressing stalking or harassment.⁷⁰ 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 2005.⁷¹

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.⁷²

G. Child Custody and Visitation⁷³

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.⁷⁴ 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.⁷⁵ 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.⁷⁶

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.⁷⁷ Many states have followed this recommendation; others, while not adopting a presumption, require domestic violence to be considered as a factor in custody decisions.⁷⁸ However, implementation of these statutes is inconsistent.⁷⁹ 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.⁸⁰

Studies show that abusive men continue to fight for and receive custody and unsupervised visitation at high rates.⁸¹ 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.⁸² 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.⁸³ These problems are exacerbated by judges, guardians ad litem, expert witnesses, and

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other legal personnel who are biased and/or uninformed about domestic violence.⁸⁴ 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.⁸⁵ To a judge or other observer, an abuser might appear more credible, stable, reasonable, and sympathetic than his traumatized victim.⁸⁶ 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.⁸⁷ 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.⁸⁸ 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.⁸⁹

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.⁹⁰ Allowing the abuser's relatives or friends to act as supervisors is dangerous since they may be unable or unwilling to control his behavior.⁹¹ 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.⁹² The federal government has provided funding to support the establishment of supervised visitation centers.⁹³ However, the quality of supervised visitation programs is inconsistent.⁹⁴ 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.⁹⁵ Nevertheless, it remains extremely rare for a court to deny a father access to his children, even when he has committed domestic violence.⁹⁶

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.⁹⁷ 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.⁹⁸

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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 to 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.¹⁰⁹ 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.¹¹⁰

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.¹¹¹

V. SEXUAL HARASSMENT IN EMPLOYMENT AND EDUCATION

As a direct result of feminist analysis and advocacy,¹¹² 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 1964.¹¹³ Subsequent Supreme Court decisions have strengthened the incentives for employers to establish programs to prevent and remedy sexually harassing behavior by employees.¹¹⁴ 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.¹¹⁵ Training programs to educate workers on how to avoid sexual harassment, which were unheard of twenty-five years ago, are now common.¹¹⁶

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.¹¹⁷

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.¹¹⁸ 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.¹¹⁹ Some states have sexual harassment laws that are more generous to plaintiffs than their federal counterparts.¹²⁰

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.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.¹²² Immigrant women have an additional disincentive for exposing their partners to criminal prosecution, because of the risk that the perpetrator will be deported.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.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.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.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.¹²⁷

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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.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.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.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.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.¹³² However, technological failures and inadequate police response can limit the effectiveness of these devices.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.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.¹³⁵

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.¹³⁶ Sexual harassment law owes its existence to feminist consciousness-raising and theorizing.¹³⁷ However, the demise of VAWA's civil rights provision,

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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.¹³⁸ 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.¹³⁹ 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.¹⁴⁰ Many government officials, professionals, and ordinary citizens now believe that violence against women is unacceptable.¹⁴¹

However, age-old stereotypes and gender bias persist and make themselves felt at every level of society, including the legal system.¹⁴² One reason for the difficulty of implementing legal reform is the significant level of denial and resistance among those in positions of authority.¹⁴³ Law has enormous potential to change social norms, but entrenched social norms also have the power to obstruct legal progress.¹⁴⁴ In some instances, organized men's rights groups have successfully campaigned to undermine the rights of women in the legal system.¹⁴⁵

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.¹⁴⁶ Feminist advocates have called for making the law more responsive to the situations and priorities of individual women.¹⁴⁷

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.¹⁴⁸ 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.¹⁴⁹

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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.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.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.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.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.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.

¹ Portions of this paper previously appeared in other publications by the author.

² 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.

³ 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.

⁴ 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.

⁵ *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).

⁶ Pub. L. No. 103-322, title IV, subtitle C, 108 Stat. 1941-42 (codified in relevant part at 42 U.S.C. § 13981).

⁷ 42 U.S.C. §§ 1988, 13981(c).

⁸ 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).

⁹ Sally F. Goldfarb, *Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice*, 11 *AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & THE LAW* 251, 254-59 (2003).

¹⁰ As discussed in Part V below, federal civil rights legislation has also been used to prohibit sexual harassment in employment and education.

¹¹ Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 *OHIO STATE LAW JOURNAL* 1, 55-56 (2000).

¹² *See* Goldfarb, *supra* note 8, at 92, 143.

¹³ *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).

¹⁴ *See, e.g.*, Goldfarb, *supra* note 8; Sally F. Goldfarb, “No Civilized System of Justice”: *The Fate of the Violence Against Women Act*, 102 *WEST VIRGINIA LAW REVIEW* 499 (2000) [hereinafter cited as Goldfarb, *No Civilized System of Justice*]; Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act*, 86 *CORNELL LAW REVIEW* 109 (2000); Catharine MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 *HARVARD LAW REVIEW* 135 (2000).

¹⁵ 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).

¹⁶ *Id.* at 166.

¹⁷ For a more detailed description of the Violence Against Women Act of 1994, see Goldfarb, *No Civilized System of Justice*, *supra* note 14, at 504-06.

¹⁸ *Id.* at 504-05.

¹⁹ See Pub. L. No. 103-322, title IV, subtitles A & B, 108 Stat. 1903-41 (1994).

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).

²¹ 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).

²² Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, title VIII, 119 Stat. 2960 (2006).

²³ *Id.* at subtitle D; Leslye E. Orloff & Hema Sarangapani, *Governmental and Industry Roles and Responsibilities With Regard to International Marriage Brokers: Equalizing the Balance of Power Between Foreign Fiancés and Spouses*, 13 VIOLENCE AGAINST WOMEN 469 (2007).

²⁴ 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).

²⁵ 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).

²⁶ 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). 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).

²⁷ 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).

²⁸ ELIZABETH M. SCHNEIDER ET AL., DOMESTIC VIOLENCE AND THE LAW 339-44 (2d ed. 2008).

²⁹ Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WILLIAM & MARY LAW REVIEW 1505 (1998).

³⁰ See, e.g., SHELLY JACKSON ET AL., U.S. DEPARTMENT 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 JOURNAL OF EXPERIMENTAL CRIMINOLOGY 239 (2005).

³¹ For an overview of the history of the legal system's response to domestic violence, 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, 1494-99 (2008).

³² 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?*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 43 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (asserting that arrest reduced recidivism among some batterers but increased it among others).

³³ 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); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARVARD LAW REVIEW 1849 (1996). See also AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, DOMESTIC VIOLENCE ARREST POLICIES BY STATE (Nov. 2007), <http://www.abanet.org/domviol/statutorysummarycharts.html> (follow "DV Arrest Policies" link) (listing state laws on arrest for domestic violence).

³⁴ See, e.g., ELIZABETH M. 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).

³⁵ 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.

³⁶ See Hanna, *supra* note 33, 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. The State of California recently enacted legislation prohibiting the incarceration of sexual assault or domestic violence victims for refusing to testify about the crime. 2008 Cal. Legis. Serv. Ch. 49 (West) (S.B. 1356 amending Cal. Civ. Proc. Code § 1219).

³⁷ 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).

³⁸ Hanna, *supra* note 33, at 1901-06.

³⁹ Sack, *supra* note 36, 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) (same).

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

⁴¹ *Id.*

⁴² See Caroline Bettinger-Lopez, Jessica Gonzales v. United States: *An Emerging Model for Domestic Violence & Human Rights Advocacy in the United States*, 21 HARVARD HUMAN RIGHTS JOURNAL (forthcoming 2008).

⁴³ See LENORE E. WALKER, *THE BATTERED WOMAN* (1979).

⁴⁴ See Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery, and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WISCONSIN LAW REVIEW 1003.

⁴⁵ For further discussion of battered woman syndrome and related issues, see KATHARINE T. BARLETT ET AL., *GENDER AND LAW* 520-25 (4th edition 2006); SCHNEIDER, *supra* note 34, at 29-34, 79-83; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICHIGAN LAW REVIEW 1, 34-43 (1991).

⁴⁶ Goldfarb, *supra* note 31, at 1503.

⁴⁷ 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).

⁴⁸ See Shannon Little, *Challenging Changing Definitions of Family in Same-Sex Domestic Violence*, 19 HASTINGS WOMEN'S LAW JOURNAL 259 (2008); Pamela Saperstein, *Teen Dating Violence: Eliminating Statutory Barriers to Civil Protection Orders*, 39 FAMILY LAW QUARTERLY 181 (2005).

⁴⁹ See sources cited *supra* note 47.

⁵⁰ Jeannie Suk, *Criminal Law Comes Home*, 116 YALE LAW JOURNAL 2 (2006).

⁵¹ American Bar Association Commission on Domestic Violence, *Statutory Summary Charts*, <http://www.abanet.org/domviol/statutorysummarycharts.html> (last visited July 29, 2008).

⁵² Goldfarb, *supra* note 31, at 1503-04.

⁵³ SUSAN L. KEILITZ ET AL., *CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE* ix (1997).

⁵⁴ For a summary of empirical research concerning women's satisfaction with protection orders, see Goldfarb, *supra* note 31, at 1510.

⁵⁵ See *id.* at 1511-12. Most of the subsequent abuse was psychological, rather than physical. *Id.* at 1512, 1532 n.264.

⁵⁶ *Id.* at 1514.

⁵⁷ See Karla Fisher & Mary Rose, *When "Enough Is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQUENCY 414 (1995).

⁵⁸ See, e.g., Goldfarb, *supra* note 31, at 1516-17. Strategies for improving enforcement of protection orders are discussed in Part VI.A below.

⁵⁹ See generally Goldfarb, *supra* note 31.

⁶⁰ Sack, *supra* note 36, 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).

⁶¹ Sack, *supra* note 36, at 1683-84; AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, STATES PERMITTING OR PROHIBITING MUTUAL PROTECTIVE ORDERS WITHOUT A SEPARATE PETITION (July 2007), <http://www.abanet.org/domviol/statutorysummarycharts.html> (follow “Statutes Prohibiting Mutual Protective Orders” link).

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).

⁶⁴ *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (denying defendant’s motion to dismiss).

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.

⁶⁸ VIOLENCE AGAINST WOMEN OFFICE, U.S. DEPARTMENT OF JUSTICE, STALKING AND DOMESTIC VIOLENCE: REPORT TO CONGRESS 3 (2001).

⁶⁹ SCHNEIDER ET AL., *supra* note 28, at 282-83.

⁷⁰ AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOS) BY STATE (Aug. 2007), <http://www.abanet.org/domviol/statutorysummarycharts.html> (follow “Civil Protection Orders: Domestic Violence” link); AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, STALKING/HARASSMENT CIVIL PROTECTION ORDERS (CPOS) BY STATE (Aug. 2007), <http://www.abanet.org/domviol/statutorysummarycharts.html> (follow “Civil Protection Orders: Stalking/Harassment” link).

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).

⁷⁴ On the impact of domestic violence on children, see, for example, Goldfarb, *supra* note 31, at 1519-20; Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 WEST VIRGINIA LAW REVIEW 237, 239-52 (1999).

⁷⁵ Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUVENILE & FAMILY COURT JOURNAL 1, 33-34 (1992); Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW 657, 704-05 (2003).

⁷⁶ 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).

⁷⁷ H.R. Con. Res. 172, 104 Stat. 5182, 101st Cong. (1990).

⁷⁸ AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.11 comment c (2000); Nancy K.D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WILLIAM MITCHELL LAW REVIEW 601 (2001).

⁷⁹ Lemon, *supra* note 78; The Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAMILY LAW QUARTERLY 197, 211-12 (1995) [hereinafter cited as Family Violence Project].

⁸⁰ Meier, *supra* note 75.

⁸¹ See, e.g., ARIZONA COALITION AGAINST DOMESTIC VIOLENCE, BATTERED MOTHERS' TESTIMONY PROJECT: A HUMAN RIGHTS APPROACH TO CHILD CUSTODY AND DOMESTIC VIOLENCE (2003); CARRIE CUTHBERT ET AL., BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS (Wellesley Centers for Women 2002); Goodmark, *supra* note 74, at 260; Mary A. Kernic et al., *Children in the Crossfire: Child Custody Determinations Among Couples With a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991 (2005).

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.

⁹⁰ See generally Debra A. Clement, *A Compelling Need for Mandated Use of Supervised Visitation Programs*, 36 FAMILY AND CONCILIATION COURTS REVIEW 294 (1998); Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAMILY LAW QUARTERLY 229, 239-40 (1995).

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- ⁹¹ See, e.g., Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAMILY LAW QUARTERLY 719, 736-37 (1999); Straus, *supra* note 90, at 249-50.
- ⁹² See Clement, *supra* note 90; Family Violence Project, *supra* note 79, at 221; Straus, *supra* note 90.
- ⁹³ OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEPARTMENT OF JUSTICE, GUIDING PRINCIPLES: SAFE HAVENS: SUPERVISED VISITATION AND SAFE EXCHANGE GRANT PROGRAM (2007); OFFICE ON VIOLENCE AGAINST WOMEN, *supra* note 20, at 133-41.
- ⁹⁴ Clement, *supra* note 90, at 302; Straus, *supra* note 90, at 235.
- ⁹⁵ See AMERICAN LAW INSTITUTE, *supra* note 78, at § 2.11 comment f; Goodmark, *supra* note 74, at 259; Klein & Orloff, *supra* note 47, at 988-90.
- ⁹⁶ See, e.g., Family Violence Project, *supra* note 79, at 216; Kernic et al., *supra* note 81; Straus, *supra* note 90, at 239-40.
- ⁹⁷ *Nicholson v. Scopetta*, 820 N.E.2d 840 (N.Y. 2004); *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002).
- ⁹⁸ See Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 KENTUCKY LAW JOURNAL 613 (2004-05).
- ⁹⁹ SCHNEIDER, *supra* note 34, at 148-68; G. Kristian Miccio, *A Reasonable Battered Mother?: Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARVARD WOMEN'S LAW JOURNAL 89 (1999).
- ¹⁰⁰ SUSAN SCHECHTER & JEFFREY L. EDLESON, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE (1999); Meier, *supra* note 75, at 660, 715.
- ¹⁰¹ THE GREENBOOK NATIONAL EVALUATION TEAM, THE GREENBOOK INITIATIVE FINAL EVALUATION REPORT (2008).
- ¹⁰² See BARTLETT, *supra* note 45, at 790-821.
- ¹⁰³ AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, SEXUAL ASSAULT CIVIL PROTECTION ORDERS (CPOS) BY STATE (Aug. 2007), <http://www.abanet.org/domviol/statutorysummarycharts.html> (follow "Civil Protection Orders: Sexual Assault" link).
- ¹⁰⁴ BARTLETT, *supra* note 45, at 790-821; Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S LAW REVIEW 979 (1993).
- ¹⁰⁵ See BARTLETT, *supra* note 45, at 797 (describing state laws).
- ¹⁰⁶ See, e.g., *State v. Colbath*, 540 A.2d 1212 (N.H. 1988); Susan Estrich, *Palm Beach Stories*, 11 LAW & PHILOSOPHY 5, 21-27 (1992); Schafran, *supra* note 104, at 1036.
- ¹⁰⁷ See S. Rep. No. 102-197, at 46 (1991).
- ¹⁰⁸ Pub. L. No. 103-322 § 40141 (1994).
- ¹⁰⁹ Schafran, *supra* note 104, at 1020-21.
- ¹¹⁰ See Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS LAW JOURNAL 1465 (2003); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIFORNIA LAW REVIEW 1371 (2000).
- ¹¹¹ On the advantages and pitfalls of DNA testing, see, for example, James Dao, *Lab's Errors in '82 Killing Force Review of Virginia DNA Cases*, N.Y. TIMES, May 7, 2005, at A1; Julia Preston, *After 32 Years, Clothing Yields DNA Key to Dozens of Rapes*, N.Y. TIMES, Apr. 27, 2005, at A1; Julia Preston, *Prosecutor Seeks to End Time Limit in Rape Cases*, N.Y. TIMES, Apr. 29, 2005, at B1.

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- ¹¹² 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).
- ¹¹³ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).
- ¹¹⁴ *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).
- ¹¹⁵ Joanna L. Grossman, *The Culture of Compliance*, 26 *HARVARD WOMEN'S LAW JOURNAL* 3 (2003).
- ¹¹⁶ For a critique of the effectiveness of employers' sexual harassment policies, procedures, and training programs, see *id.*
- ¹¹⁷ 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).
- ¹¹⁸ See 42 U.S.C. § 2000e *et seq.*; GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW* (2d ed. 2007).
- ¹¹⁹ See 20 U.S.C. § 1681 *et seq.*; *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).
- 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).
- ¹²¹ For a discussion and critique of victim compensation programs, see Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 *TULANE LAW REVIEW* 167 (2004).
- ¹²² Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STANFORD LAW REVIEW* 1241 (1991); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 *BOSTON COLLEGE THIRD WORLD LAW JOURNAL* 231, 243-51 (1994).
- 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.
- ¹²⁶ See Sack, *supra* note 36, at 1680-81, 1697-99.
- ¹²⁷ See Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 *OREGON LAW REVIEW* 945, 1000 (2004); Hanna, *supra* note 29, at 1520-21.
- ¹²⁸ See <http://www.legalmomentum.org> (follow "National Judicial Education Program" link) (last visited July 29, 2008).
- 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).

¹³⁰ See Goldfarb, *supra* note 31, at 1517. 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.*

¹³¹ See FINN & COLSON, *supra* note 47, at 53, 57; *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARVARD LAW REVIEW 1498, 1512, 1517 (1993).

¹³² 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).

¹³³ See Darren Gowen, *Remote Location Monitoring - A Supervision Strategy to Enhance Risk Control*, 65-SEP FEDERAL PROBATION 38 (2001).

¹³⁴ See, e.g., LINDA G. MILLS, *INSULT TO INJURY* (2003) (promoting the use of “Intimate Abuse Circles”); Christine Fiore & 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 eds., 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 & Mary P. Koss, *Incorporating Feminist Theory and Insights Into a Restorative Justice Response to Sex Offenses*, 11 VIOLENCE AGAINST WOMEN 693 (2005) (analyzing an experimental restorative justice program for sex offenses in light of feminist concerns about restorative justice methods).

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.

¹³⁸ Pub. L. No. 103-322, title IV, subtitles A & B, 108 Stat. 1903-41 (1994).

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).

¹⁴⁰ See, e.g., Katherine Triantafillou, *Massachusetts’ New Legislation to Help Battered Women*, 27 JUDGES’ JOURNAL 20, 22 (1988) (describing the enactment of domestic violence laws as a form of public education).

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 Römkens, *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.

¹⁴⁸ See generally BATTERED WOMEN, CHILDREN, AND WELFARE REFORM (Ruth A. Brandwein ed., 1999); Jody Raphael, *Battering Through the Lens of Class*, 11 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW 367 (2003).

¹⁴⁹ See Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS LAW REVIEW 1009 (2000).

¹⁵⁰ Erika A. Sussman, *The Civil Protection Order as a Tool for Economic Justice*, THE ADVOCATE'S QUARTERLY, 2006 Issue 3 at 1; Wriggins, *supra* note 62.

¹⁵¹ See NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, STATE LAW AND LEGISLATION TO ENSURE HOUSING RIGHTS FOR SURVIVORS OF DOMESTIC AND SEXUAL VIOLENCE (2008), <http://www.abanet.org/domviol/statutorysummarycharts.html> (follow "State Housing Laws for Survivors of Violence Against Women" link); Goldscheid, *supra* note 15, at 169-79; Erica L. Smock & Tammy L. Kuennen, *Protecting Victims of Violence Through Housing Legislation*, 8 DOMESTIC VIOLENCE REPORT 17 (2003).

¹⁵² 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); Römken, *supra* note 144, at 269-77.

¹⁵³ Pub. L. No. 103-322, title IV, subtitles A & B, 108 Stat. 1903-41 (1994).

¹⁵⁴ See SCHNEIDER, *supra* note 34, at 95-96; BRENDA 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.