

GENDER-BASED VIOLENCE AS JUDICIAL ANOMALY: BETWEEN "THE TRULY NATIONAL AND THE TRULY LOCAL"

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Abstract: In *United States v. Morrison*, the Supreme Court struck down the federal civil rights remedy for gender-based violence in the Violence Against Women Act. Notwithstanding evidence considered by Congress documenting the economic impact of domestic violence, and despite the inability of state and local systems to address gender-based violence claims, the Court determined that Congress lacked the necessary authority. The author argues that *Morrison* is remarkable in what it reveals about the legal status of women as mediated in multiple levels of judicial transactions. She contends that the decision reflects attitudes ingrained in the nation's judicial culture. Specifically, the doctrines used by the Court to oppose adjudicating cases of violence against women are themselves derived from, and analogous to, the arguments used by state courts to avoid hearing such claims. The Article explores the day-to-day practices by which state courts adjudicate domestic violence cases and outlines the need for new legal strategies to address gender-based violence.

INTRODUCTION

On May 15, 2000, in *United States v. Morrison*,¹ the United States Supreme Court, by a five to four vote, struck down as unconstitutional the federal civil rights remedy for gender-based violence contained in the Violence Against Women Act (VAWA).² VAWA was enacted in 1994 after four years of lengthy congressional hearings.³ More than one

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¹ 529 U.S. 598, 627 (2000).

² Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 16, 20, 28, and 42 U.S.C.) [hereinafter VAWA or the Act]. The Civil Rights Remedy of the Act is found at 42 U.S.C. §§ 13981-14040 (1994).

³ See generally *Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong. (1994) [hereinafter

hundred witnesses testified, and hundreds of reports and statements documenting the problem of gender-based violence were submitted. Committees of both houses of Congress scrutinized the failure of state legal structures to provide relief to victims, and the tragic consequences of that failure.⁴ The federal statute, supported by most states, was historic because it authorized victims of gender-based violence to bring civil rights actions against their attackers in federal courts.⁵

Congress based its authority to establish the civil rights remedy on its Commerce Clause powers and on Section 5 of the Fourteenth Amendment.⁶ In enacting VAWA, Congress determined that violence against women is a national problem that limits women's ability to participate in the national economy as fully productive citizens.⁷ VAWA provided a remedy for a "national tragedy played out every day in the lives of millions of American women at home, in the workplace, and on the street."⁸ Congress recognized that claims of gender-based violence raised questions of sufficient public concern to warrant a federal judicial forum "reserved for issues where important national interests predominate."⁹

1994 H.R. Hrg.]; *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. (1993) [hereinafter 1993 H.R. Hrg.]; *Violence Against Women: Fighting the Fear: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. (1993) [hereinafter Nov. 1993 S. Hrg.]; *Violent Crimes Against Women: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. (1993) [hereinafter Apr. 1993 S. Hrg.]; *Hearing on Domestic Violence: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. (1993) [hereinafter Feb. 1993 S. Hrg.]; *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. (1992) [hereinafter 1992 H.R. Hrg.]; *Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong. (1991) [hereinafter 1991 S. Hrg.]; *Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. (1990) [hereinafter 1990 S. Hrg.]; *Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong. (1990) [hereinafter 1990 S. Labor Hrg.]. For a useful examination of the history of VAWA, see generally Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1 (1996).

⁴ See 1994 H.R. Hrg., *supra* note 3; 1993 H.R. Hrg., *supra* note 3; Nov. 1993 S. Hrg., *supra* note 3; Apr. 1993 S. Hrg., *supra* note 3; Feb. 1993 S. Hrg., *supra* note 3; 1992 H.R. Hrg., *supra* note 3; 1991 S. Hrg., *supra* note 3; 1990 S. Hrg., *supra* note 3; 1990 S. Labor Hrg., *supra* note 3.

⁵ See 1993 H.R. Hrg., *supra* note 3.

⁶ H.R. CONF. REP. NO. 103-711, at 385 (1994) reprinted in 1994 U.S.C.C.A.N. 1839, 1853. See also S. REP. NO. 101-545, at 33 (1990).

⁷ H.R. CONF. REP. NO. 103-711, *supra* note 6, at 385. See also S. REP. NO. 101-545, *supra* note 6, at 33.

⁸ S. REP. NO. 102-197, at 39 (1991).

⁹ This phrase was used by Chief Justice of the United States Supreme Court William Rehnquist in his 1991 "Year-End Report on the Federal Judiciary" in which he urged oppo-

By reconceptualizing the phenomenon of gender-based violence as a condition disrupting the lives of women in ways public and profound, the legislative findings, and the legislation itself, relocated the protection of women from local to national forums. Women were then able to use the new law to obtain immediate pecuniary and injunctive relief from damage caused by domestic violence, rape, and sexual assault.¹⁰ Of far greater significance, however, VAWA promised to address the larger structural inequalities at the heart of violence against women by authorizing a remedy that recognized gender-based violence as a fundamental civil rights issue, for which economic relief could be provided.¹¹

Morrison challenged the Act as unconstitutional. Notwithstanding the vast body of evidence documenting the economic impact of rape and domestic violence, and despite the documented inability of state and local systems to address gender-based violence claims, the Su-

sition to the federal jurisdictional provisions of VAWA. Speech reprinted at 138 CONG. REC. S443-44 (Jan. 27, 1992). See also Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. Rev. 1682, 1688 (1991).

¹⁰ Prior to *Morrison*, cases which upheld the constitutionality of VAWA included *Williams v. Bd. of County Comm'r of Wyandotte County*, No. 98-2485-JTM, 1999 U.S. Dist. LEXIS 13532, *1, *1 (D. Kan. Aug. 24, 1999); *Kuhn v. Kuhn*, 98 C2395 (N.D. Ill. July 14, 1999); *Wright v. Wright*, No. Civ-98-572-A (W.D. Okla. Apr. 27, 1999); *Ericson v. Syracuse Univ.*, 98 Civ. 3435, 1999 WL 212684 *1, *1 (S.D.N.Y. Apr. 13, 1999); *Culbertson v. Doan*, No. C-1-97-965 (S.D. Ohio Apr. 8, 1999); *Doe v. Mercer*, 37 F. Supp. 2d 64, 64 (D. Mass. 1999); *Liu v. Striuli*, 36 F. Supp. 2d 452, 452 (D. R.I. 1999); *Griffin v. City of Opa-Locka*, No. 98-1550-CIV- HIGHSMITH (S.D. Fla. Aug. 27, 1998); *C.R.K. v. Martin*, No. 96-1431-MLB (D. Kan. Jul. 10, 1998); *Time v. DeLong*, No. 8:98CV43 (D. Neb. June 22, 1998); *Mattison v. Click Corp.*, No. 97-CV-2736, 1998 U.S. Dist. LEXIS 720 *1, *1, 72 Empl. Prac. Dec. (CCH) (P. 45,209) (E.D. Pa. Jan. 27, 1998); *Ziegler v. Ziegler*, 28 F. Supp. 2d 601, 601 (D. Wash. 1998); *Crisonino v. New York City Hous. Auth.*, 985 F. Supp. 385, 385 (S.D.N.Y. 1997); *Anisimov v. Lake*, 982 F. Supp. 531, 531 (N.D. Ill. 1997); *Seaton v. Seaton*, 971 F. Supp. 1188, 1188 (D. Tenn. 1997); *Doe v. Father Hartz*, 970 F. Supp. 1375, 1375 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998); *Doe v. Doe*, 929 F. Supp. 608, 608 (D. Conn. 1996). In addition to *Brzonkala*, *Bertero v. Bertero*, No. 96-3445-A, 1999 U.S. Dist. LEXIS 8181 (M.D. La., May 28, 1999), held the Act to be unconstitutional. For a synopsis of these cases, see <http://www.nowldef.org/html/courts/courts.htm> (last visited Jan. 23, 2001).

¹¹ Civil remedies allow the victimized woman to act on her own behalf, in contrast with criminal remedies which are implemented by the state as sovereign authority. See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 20 (1999) (noting that affirmative relief granted in civil protection orders reduces a battered woman's reliance on the criminal justice system); Linda G. Mills, *On The Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225, 1252 (1996) (noting that primary reliance on criminal remedies may inhibit a woman from initiating her own efforts to obtain assistance).

preme Court determined that Congress lacked the authority to legislate such a remedy.¹²

In addition to establishing this civil rights remedy, VAWA authorized a number of new programs and created new federal crimes; but *Morrison* challenged only the civil rights portion of the Act.¹³ Civil rights actions not only express paramount public values, they are, by nature, potentially transformative of public values as well.¹⁴ The demise of VAWA suggests that the judicial system is unable to sustain the necessary commitment to the normative goal of ameliorating gender-based violence.

Morrison presents a decision rich with possibilities of doctrinal analysis from many perspectives. Generally, it is a noteworthy judicial restriction on the power of Congress to legislate federal civil rights remedies under the Commerce Clause and Section 5 of the Fourteenth Amendment. The decision establishes significant federal jurisprudential principles sure to be the subject of wide-ranging analyses.

But to those attentive to issues concerning violence against women, the *Morrison* decision is particularly remarkable in what it reveals about the legal status of women as mediated in multiple levels of judicial transactions. The decision gave narrative order to the hierarchy of legal values within which women have been "put in their place." The high court judged gender-based violence claims to be of marginal importance to the national interest.

If this view were confined only to the Supreme Court, the problem would be grave, but not without solution. In fact, however, *Morrison* reflects attitudes deeply ingrained in the judicial culture of the nation. Although framed in terms of federal jurisdictional principles, the doctrines which the Court used to oppose and avoid adjudicating cases of violence against women are themselves derived from, and analogous to, the very arguments used by state courts to avoid hearing gender-based violence claims.

¹² *Morrison*, 529 U.S. at 627.

¹³ Chief Justice Rehnquist had previously stated his opposition to both VAWA's criminal and civil rights provisions. See *supra* note 9. Eventually, the Chief Justice ceased his criticisms of the criminal remedy and limited his ongoing opposition to the civil remedies provided by the Act. See Nourse, *supra* note 3 at 16. The criminal remedy is codified at 18 U.S.C. § 2261(a)(1) and was on surer footing than the civil rights remedy because it contained a jurisdictional element. See *Morrison*, 529 U.S. at 613.

¹⁴ See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 869 (1997) (noting that civil rights laws have potentially transformative value, particularly for disempowered groups).

The reasons given in *Morrison* mirror state responses to requests for civil remedies in the form of civil protection orders,¹⁵ beginning with the Court's decision to side-step the evidence concerning the structural nature of gender-based violence.¹⁶ State courts, too, often dismiss evidence that contextualizes domestic violence and addresses its social characteristics.¹⁷ The symmetry stands in even sharper relief through a comparison of the Court's invocation of federalism as reason to avoid gender-based violence claims with its counterpart in state court explanations for avoiding the issuance of civil protection orders.¹⁸

In striking down a federal claim for gender-based violence, the *Morrison* Court declared that "the Constitution requires a distinction between what is truly national and what is truly local."¹⁹ This pronouncement served to divest violence against women of its systemic character, and belies a common view that claims of gender-based violence are more anecdotal than structural, more idiosyncratic than institutional.

The reluctance to hear gender-based violence cases often leads the courts to adopt procedures that have as effect, if not intent, the dilution of the legal merits of claims. State court efforts to abbreviate the fact-finding process and to encourage out-of-court resolutions contribute to the perception that the legal issues raised in these claims are not worthy of the court's attention.²⁰ Claims of congested state court dockets currently constitute one of several justifications for the summary treatment of civil domestic violence cases.²¹ Just as the Supreme Court in *Morrison* avoided federal review by confining claims to the state, the state courts shun these cases by curtailing the hearing process, thereby reducing them to quasi-judicial controversies, or consigning them outside of the legal system altogether.²²

¹⁵ In state court, civil remedies are often sought in domestic violence protection order proceedings. For an excellent overview of civil protection order remedies, see generally Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).

¹⁶ See *infra* notes 124-131 and accompanying text.

¹⁷ See *infra* notes 230-236 and accompanying text.

¹⁸ See *infra* Parts I and II.

¹⁹ *Morrison*, 529 U.S. at 599.

²⁰ See *infra* notes 178-186, 196-201 and accompanying text.

²¹ See *infra* notes 158, 161 and accompanying text.

²² See Naomi R. Cahn, *Family Law, Federalism and the Federal Courts*, 79 IOWA L. REV. 1073, 1105 (1994) (noting that the federalism rhetoric has the effect of confining women's issues to the private sphere).

The *Morrison* decision thus relegated women to the very system that Congress determined was incapable of providing meaningful relief. The decision therefore invites an examination of the theoretical, as well as the practical, aspects of the judicial and legal culture in which the issue of gender-based violence appears unable to obtain sympathetic attention. The *Morrison* decision represents a setback at a moment when other means to combat violence against women seem "ever more elusive and uncertain."²³ The question thus looms, under the circumstances, what alternative remedies are available?

This Article moves within the tense and contradictory space between the failures and promises of the law. Decades of legal scholarship have contributed to a deeper understanding of the nature of violence against women. The *Morrison* decision makes clear the need for additional work. The defeat of VAWA reveals the relentlessness with which the courts may act to categorize gender-based violence as an issue of marginal importance.²⁴

This condition requires an analysis of the normative system from which the legal culture derives its bearings. The discussion must move beyond simply criticizing the law for its self-evident failure to live up to its ideals. More importantly, the discussion must address the sources of these failures by examining the processes which create inequalities and allow them to pass into legal sensibility as conventional wisdom.²⁵ The empirical data gathered during the VAWA hearings, including the substantiation of the failure of state systems, provide a useful point of departure for reexamining the state civil protection order process.

The demise of VAWA and the *Morrison* decision underscore the need to contest these mechanisms and continue the pursuit of legal reforms for battered women. New approaches must move beyond a critique of the inadequacies of the law and contemplate legal strategies at the micro-level in order to enhance progressive lawyering in

²³ See Mills, *supra* note 11, at 1249 (citing Jane Flax, *Beyond Equality: Gender, Justice and Difference*, in BEYOND EQUALITY AND DIFFERENCE 193, 195 (Gisela Bock & Susan James eds., 1992)).

²⁴ See Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMAN. 575, 577 (1998) (noting that the analysis of legal systems requires an understanding of the categories of meaning which define participants' experiences).

²⁵ See JOHN CONLEY & WILLIAM M. O'BARR, JUST WORDS 13 (1998) (demonstrating the need to expose the mechanisms that produce inequalities in the legal process).

gender-based violence matters.²⁶ The perspectives of everyone engaged in this effort, including theorists, practitioners, and litigants, are needed to transform the legal culture as it relates to violence against women.

Part I provides an overview of VAWA's significance as a product of legislative processes in which gender-based violence was examined as a national problem with economic and civil rights implications. It addresses the attitudes that necessitated legislative compromises, causing VAWA proponents' ultimate failure to transform the problem of violence against women from an issue of the private realm to a matter of public concern.²⁷ This section concludes with an examination of the *Morrison* decision, and evaluates how the Supreme Court recategorized VAWA's legislative evidence in order to return gender-based violence claims to the state courts.

Part II explores the day-to-day practices by which state courts adjudicate domestic violence cases.²⁸ By examining the operation of the law, and the legal culture, in the context of civil protection order hearings, this section seeks to explore the ways that the law's malfunction in state courts perpetuates itself within the legal system and insinuates itself in other forums. Part II also considers the consequences of the law's failures, ranging from the denial to women of the right to confront the violence, to outcomes that devalue their claims and endanger their persons. An examination of these issues at the state level tests the theories of localism that influence *Morrison's* legal treatment of gender-based violence.²⁹

Part III outlines the need for new legal strategies to address gender-based violence. Legal practitioners must respond to the challenges posed by the resilience with which the law has underwritten

²⁶ Cf. Margaret M. Russell, *De Jure Revolution?*, 93 MICH. L. REV. 1173, 1194 (1995) (suggesting that critical theoretical insights about the law be combined with the demands of legal practice to affect micro-level decisions of client representation).

²⁷ See Judith Resnik, *Trial as Error; Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 968 (2000) (examining legal cultural determinants by which a hierarchy of values is expressed, and noting that some cases are considered "important" matters, to be contrasted with "ordinary," "routine," "run of the mill," or "garden variety" cases).

²⁸ See J. Harvie Wilkinson III, *The Question of Process*, 98 MICH. L. REV. 1387, 1391 (2000) (noting that how a decision is reached may be as important as the decision itself).

²⁹ See Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 205 (1999) (reviewing a theory of localism that suggests that state courts are better suited to respond to legal issues that arise within families). Adler notes the difficulty in differentiating between violence against women and family law issues that pulls the former into the sphere of theories of localism. *Id.* at 253.

the social and political status quo.³⁰ This section urges the use of specific legal strategies as mechanisms for elevating gender-based violence issues as legal claims. This part also continues the work of other domestic violence scholars and practitioners who have articulated the need to develop litigation strategies that inform the courts about the nature of domestic violence, reveal the relationship between power and the social function of violence, and demonstrate the ways in which domestic violence has fully assumed the dimensions of a public problem. Part III moves to micro-level proposals, derived from the previous discussions, for obtaining practical relief for battered women.

I. THE VIOLENCE AGAINST WOMEN ACT AND *UNITED STATES V. MORRISON*

A. *The Violence Against Women Act—An Overview*

In September 1994 Congress passed the Violence Against Women Act, a historic legislative enactment which recognized the nexus between gender-based violence and women's equality, and addressed the persistent failure of the states' legal systems to provide adequate legal redress to victims.³¹ VAWA incorporated measures designed to respond to the wide-ranging consequences of domestic violence: It funded a variety of programs, including women's shelters,³² a national domestic abuse hotline,³³ rape education and prevention programs,³⁴ and training for federal and state judges.³⁵

In addition to funding services and improving existing legal responses to domestic violence, the Act expanded legal remedies for gender-based violence. It created new relief measures designed for immigrants whose abusive spouses obstructed access to lawful status in the United States.³⁶ It criminalized the crossing of state lines for the purpose of "harassing, intimidating, or injuring a spouse or intimate

³⁰ See Yamamoto, *supra* note 14, at 846-47 (summarizing progressive race scholars' view that the law serves to protect and maintain social and political status quo).

³¹ *Supra* note 2.

³² 8 U.S.C. § 1154(a) (1994).

³³ 42 U.S.C. § 10461(e) (2) (E) (1995).

³⁴ 42 U.S.C. § 10418 (1994).

³⁵ *Id.* §§ 13701, 13991, 13992, 14036.

³⁶ *Id.* § 14051, 8 U.S.C. § 1154(a) (1994). (Remedies are generally limited to immigrant spouses of U.S. citizens or lawful permanent residents, and in some circumstances, immigrants who have children with abusive U.S. citizens).

partner,"³⁷ and provided for interstate enforcement of orders of protection.³⁸ The Act's most controversial provision created a federal civil rights remedy "to protect the civil rights of victims of gender-motivated violence and to promote public safety, health, and activities affecting interstate commerce."³⁹

The Act had an extensive legislative history.⁴⁰ For more than four years, Congress assembled a voluminous record of oral testimony and written documentation about the problem of gender-based violence. Over one hundred witnesses testified during the course of at least nine hearings. Experts provided research findings and evidence documenting the consequences of violence against women. In public testimony, victims of violence detailed their horrific experiences. Witnesses included battered women, rape victims, shelter and rape crisis program advocates, law enforcement officials, lawyers with expertise in domestic violence, state attorneys general, judges, legal and other academic scholars, social scientists, and physicians.⁴¹ Documentation of the extensive nature and consequences of gender-based violence was introduced from businesses and professional associations, judicial organizations, medical groups, feminist research centers, and other women's groups.⁴²

Throughout the four years of hearings, Congress focused principally on two concerns: the impact of violence against women on the interstate economy, and inadequate responses by states resulting in the denial of equal protection of the laws to victims of gender-based violence.⁴³ The findings in these areas were the underpinnings of legislation which assigned to the federal courts issues that were historically considered off-limits to the federal judiciary.⁴⁴

³⁷ 18 U.S.C. §§ 2261-2262 (1994).

³⁸ *Id.* § 2265.

³⁹ 42 U.S.C. § 13981(a) (1994). The remedy specified that a person who commits a "crime of violence motivated by gender" shall be liable to the individual injured for compensatory and punitive damages, injunctive and declaratory relief, and other relief a court may deem appropriate. 42 U.S.C. § 13981(c) (1994).

⁴⁰ See *supra* note 3.

⁴¹ See *supra* note 3.

⁴² See 1991 S. Hrg., *supra* note 3; S. REP. NO. 101-545, *supra* note 6, at 37.

⁴³ Congress examined the problem of violence against women generally and exhaustively, but the greater part of the debate and hearings was devoted to these issues. See Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 112-13 (2000). See generally Nourse, *supra* note 3, *passim* (detailing the legislative history of the Act).

⁴⁴ H.R. CONF. REP. NO. 103-711, *supra* note 6, at 385; accord, S. REP. NO. 103-138, at 54. See H.R. CONF. REP. NO. 103-711, *supra* note 6, at 385-86; S. REP. NO. 103-138, at 38,

The hearings confirmed that victims of gender-based violence are inhibited from engaging in interstate travel and pursuing interstate employment or businesses,⁴⁵ that they are denied employment opportunities due to the danger of gender-based assaults at certain times of the day or at particular locations,⁴⁶ that their productivity in the workplace is reduced, and that, as a result, they are unemployed and under-employed.⁴⁷ Violence against women was found to limit the right to travel, diminish national productivity, reduce consumer spending, and increase medical and other health care expenditures.⁴⁸ Testimony demonstrated that the actions of perpetrators were deliberately targeted towards preventing women from engaging in any economic endeavors.⁴⁹

Testimony and documentation received by Congress chronicled women's experiences of gender-based violence. The narratives presented to Congress illustrated the ways in which gender-based violence interferes with a victim's ability to discharge everyday functions. Testimony, often in the first person, provided accounts of brutal and terrorizing assaults, and powerfully documented how the experience of rape and violence interrupts jobs and careers, interferes with personal movement in public spaces, and looms as ongoing trauma unlikely to subside with the passage of time.⁵⁰

41-55; S. REP. NO. 102-197, *supra* note 8, at 33-35, 41, 43-47; Resnik, *supra* note 27, at 1004-06 (noting that the federal judiciary has attempted to limit violence against women claims to the state courts); Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2202 (1996) (noting that VAWA's remedies were considered to target concerns historically treated as being appropriately relegated to the states).

⁴⁵ H.R. CONF. REP. NO. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.A.N. 1839, 1853; S. REP. NO. 103-38, *supra* note 44, at 54; *accord* S. REP. NO. 102-97, *supra* note 8, at 53; S. REP. 101-545, *supra* note 6, at 43.

⁴⁶ See 1991 S. Hrg., *supra* note 3, at 92 (testimony of Prof. Bert Neuborne).

⁴⁷ S. REP. NO. 101-545, *supra* note 6, at 37; 1991 S. Hrg., *supra* note 3, at 241; 1994 H.R. Hrg., *supra* note 3; Feb. 1993 S. Rep., *supra* note 3.

⁴⁸ S. REP. NO. 103-38, at 41 (1993); H.R. REP. NO. 103-395, at 26; 1990 S. Hrg., *supra* note 3, at Pt. 1.

⁴⁹ 1991 S. Hrg., *supra* note 3, at 242 (study showed one-third of battered women reported that their abusers prevented them from working). See 1994 H.R. Hrg., *supra* note 3 (testimony of Karla Digirolamo whose husband kept her at home); Apr. 1993 S. Hrg., *supra* note 3, at 55, 57-58 (testimony of Barbara Wood, Executive Director, Turning Point, describing a husband who stalked wife at work, during breaks and during lunchtime).

⁵⁰ 1990 S. Hrg., *supra* note 3, at Pt. 1, 22-23 (testimony of Nancy Ziegenmeyer). One young woman testified about her experiences in the aftermath of a rape, detailing how she lost her job and was forced to drop out of school, resulting in the loss of funding for her college education. Rape had deprived her of the simple pleasure of taking walks alone. 1991 S. Hrg., *supra* note 3, at 131-33 (testimony of Amy Kaylor). The accounts revealed the horror brought on by domestic violence. One mother told of finding her daughter dead

Evidence from employers supported victim testimony and demonstrated that gender-based violence is inexorably connected to women's economic equality and autonomy.⁵¹ Business associations detailed the negative impact of violence on both employers and employees.⁵² Business interests also enumerated the ways in which they are adversely affected by the consequences of gender-based violence, including increased employee health problems, absenteeism, rising medical costs, and disruption at the workplace as a result of deliberate interference by abusers with victims' ability to function on the job.⁵³ Employers reported that women who are insecure in their homes or in public places, and who experience the psychological impact of gender-based violence, suffer significant curtailment of their employment options.⁵⁴ In sum, the far-reaching economic nature and consequences of gender-based violence convinced Congress that there was sufficient justification, and Constitutional authority, to pursue a federal remedy under the Commerce Clause.⁵⁵

Congressional examination also focused on state criminal and civil justice systems, exposing the difficulties endured by women seeking protection and remedies from state courts.⁵⁶ An "existing bias and discrimination in the state justice system," Congress concluded, "often deprives victims of gender[-]motivated crimes the equal protection and redress of the laws to which they [are] entitled."⁵⁷ Formal legal

and essentially unrecognizable after having been shot in the head by her abusive former boyfriend, after unsuccessful requests for the police and the courts to intervene. She described the overwhelming stress, insomnia, and terror she suffers in the aftermath of that tragedy. *Violence Against Women, Hearing Before A Subcomm. of the Senate Appropriations Comm.*, 104th Congress, First Session, Special Hearing, Sept. 1995 at 13-15 (testimony of Donna Lawson). The very experience of victimhood was characterized by one witness as the relegation to an unfamiliar status in which she was viewed as "the architect of [her] own suffering," deprived of her identity as an autonomous individual with goals and aspirations or the ability to survive. 1990 S. Hrg., *supra* note 3, Pt. 1, at 30 (testimony of Marla Hanson).

⁵¹ 1991 S. Hrg., *supra* note 3, at 237-41. See Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 495 (1999) (noting that feminists' efforts to curb family violence relate to their concerns about equality and individual autonomy for women).

⁵² 1991 S. Hrg., *supra* note 3, at 237 (evidence provided by the National Federation of Business and Professional Women, Inc., an organization whose goals are "advancing the economic equity, self-sufficiency, and full participation in the work force for all working women").

⁵³ 1991 S. Hrg., *supra* note 3, at 239-40 (noting increased employer costs related to medical expenses).

⁵⁴ See *id.* at 240-41.

⁵⁵ H.R. CONF. REP. NO. 103-711, *supra* note 6, at 385; see also S. REP. NO. 103-138, at 29 (1994).

⁵⁶ H.R. CONF. REP. NO. 103-711, *supra* note 6, at 385.

⁵⁷ *Id.*

barriers as well as informal judicial practices, moreover, were found to have engendered systemic discrimination against victims of gender violence.

Witnesses testified about psychological distress endured during trials of their assailants: One woman described the experience as "far more traumatizing than the attack on the street" in which her face was repeatedly slashed.⁵⁸ Testimony also revealed racist and degrading treatment by law enforcement,⁵⁹ while anecdotal evidence and newspaper articles reported indecorous behavior on the part of judges, prosecutors, and law enforcement officers.⁶⁰

Congress examined gender bias reports, previously commissioned by the highest courts of the states, which provided "overwhelming evidence that gender bias permeates the court system and that women are most often its victims."⁶¹ In the words of the Senate report, women are treated as though their complaints of domestic violence

⁵⁸ One witness who was the victim of a brutal assault described the criminal proceedings against her assailants: The judge refused to restrain a defense attorney's baseless efforts to humiliate her by referring to her as, among other things, a prostitute. 1990 S. Hrg., *supra* note 3, Pt. 1, at 42 (testimony of Marla Hanson). See also 1991 S. Hrg., *supra* note 3, at 135 (testimony of Gill Freeman, Chair of the Florida Supreme Court Gender Bias Study Implementation Commission, formerly Vice Chair of the Florida Supreme Court Gender Bias Study) (noting that "rape remains a crime in which the victim is often as traumatized by the system as they are by the assailants themselves").

⁵⁹ One Latina witness recounted her experiences with the police, who told her that she should not file a report against her abuser since abuse was part of her culture. 1993 S. Hrg., *supra* note 3, at 12 (testimony of Loretta Baca); 1991 S. Hrg., *supra* note 3, at 136 (testimony of Gill Freeman) (testifying to the widespread abusive practices of judges and law enforcement officers who act on the belief that women who are raped bring about the sexual assault). Ms. Freeman's testimony also detailed the acquittal of a rapist because the victim was wearing a lace miniskirt and therefore was thought to have invited the rape, and detailed a judge's refusal to sentence a confessed rapist to jail because he felt sorry for him being involved with such a pathetic woman, whom he recalled from a divorce case he had handled several years ago. *Id.* at 136. She recounted a judge interrupting a prosecutor in the presentation of a rape case of a college student who was attacked at 11:30 p.m. while she was at the mailbox sending a letter to her mother, asking "What in the world was the woman doing in the streets late at night?" Ms. Freeman also described coercive investigations of victims of sexual assault who were forced to take polygraphs and were badgered by police officers who repeatedly asked, "Were you forced?" *Id.* at 136-56.

⁶⁰ 1991 S. Hrg., *supra* note 3, at 136, 146 (testimony of Gill Freeman) (recounting this comment made by a judge to a rapist during sentencing: "[T]ake the woman out to dinner first, like the rest of us."). One newspaper article reports of a judge who jailed two victims of sexual assault because they were reluctant to testify against their assailants. One of the victims, initially sentenced to 60 days without bail, described her fear of going forward with the prosecution, noting that the presence of the assailant and his family intimidated her. Christina Cheakalos, *Broward Judge Jailed Second Sex Crime Victim*, MIAMI HERALD, July 31, 1989, at 1A.

⁶¹ 1991 S. Hrg., *supra* note 3, at 43-44.

are "trivial, exaggerated or somehow their own fault."⁶² Neither state nor federal criminal laws were found to provide adequate protection to victims of gender-based violence.⁶³ Congress was encouraged by both state and federal attorneys general to make findings on the inadequacy of state and local civil remedies, specific legal obstacles, and pervasive gender bias within the state court systems.⁶⁴

Testimony recounting experiences with state justice systems also revealed the insidious effects of informal but ingrained responses to gender-based violence.⁶⁵ The evidence indicated that, despite state civil protection order statutes that allow courts to grant broad relief in domestic violence matters, state courts' lack of interest in these matters resulted in consistent failure to issue effective protective orders.⁶⁶ Judges testified as to how an absence of judicial empathy undermined the actual availability of legal relief authorized by legislatures.⁶⁷ Evidence also recounted judicial determination "to keep families together" as a motivation for granting custody of children to abusers, thereby forcing women to stay, despite proof of abuse.⁶⁸

In the end, the hearings revealed the existence of a legal culture in state courts infused with the belief that problems of gender-based violence were inappropriate for judicial resolution.⁶⁹ This belief was made operational by legal procedures and court practices which ig-

⁶² *Id.* at 46.

⁶³ 1993 H. Hrg., *supra* note 3, at 96 (testimony of James P. Turner, Acting Assistant U.S. Attorney General for the Civil Rights Division).

⁶⁴ 1993 H.R. Hrg., *supra* note 3, at 34-36 (letter from 41 Attorneys General urging Congress to pass VAWA); 1993 H.R. Hrg., *supra* note 3, at 96, 106-07, (testimony of James P. Turner).

⁶⁵ One witness, Sarah Buel, a formerly battered woman, who at that time was an attorney with the Harvard Legal Aid Bureau, testified: "What terrifies me is that I don't think things have changed very much in spite of the fact that we do have laws and shelters." Her prepared testimony indicated that despite the laws that have been passed, courts were not providing statutory relief in civil protection orders. 1990 S. Labor Hrg., *supra* note 3, at 28-29, 34, 38-39.

⁶⁶ Civil protection orders omit provisions ordering abusers to vacate premises, ordering child support, and making custody provisions. 1990 S. Labor Hrg., *supra* note 3, at 34, 38-39 (testimony of Sarah Buel). Testimony was also provided which indicated that despite state statutes prohibiting the issuance of mutual restraining orders, such orders continued to be an ongoing problem in state court. Feb. 1993 S. Hrg., *supra* note 3, at 5 (testimony of Sarah Buel).

⁶⁷ Apr. 1993 S. Hrg., *supra* note 3, at 27 (testimony of Judge Michael R. Murphy).

⁶⁸ See *id.* at 63 (testimony of Patricia Millard).

⁶⁹ These claims were identified by state courts as "family problems," or "sexual miscommunication." 1991 S. Hrg., *supra* note 3, at 37.

nored statutory protections and marginalized these claims.⁷⁰ These accumulated state failures provided Congress with an additional rationale for creating VAWA's civil rights remedy.⁷¹

VAWA required four years and at least fourteen versions before its passage, suggesting the conflict and contention that marked its legislative course.⁷² Alternative bills were introduced in both the Senate and the House seeking to eliminate the civil rights provisions.⁷³ The federal judiciary, led by the Chief Justice of the United States Supreme Court, registered its disapproval from the outset.⁷⁴ Remonstrations were focused on the prospect of federal court involvement in "a whole host of domestic relations disputes"⁷⁵ and fear that the civil rights remedies "[would] be invoked as a bargaining tool within the context of divorce negotiations and add a major complicating factor to an environment which is often acrimonious as it is."⁷⁶ Chief Justice Rehnquist called the proposed Act "an additional burden on the judiciary" that would overload the court docket.⁷⁷

The language of the bill was ultimately redrafted in response to concerns that the scope of the remedy could include "routine" acts of domestic violence and sexual assault.⁷⁸ The new wording narrowed

⁷⁰ See 1991 S. Hrg., *supra* note 3, at 46 (noting that law reform failed to eradicate stereotypes in the court); 1991 S. Hrg., *supra* note 3, at 44 (legal practices continued to shine a spotlight of suspicion on the victim); 1991 S. Hrg., *supra* note 3, at 135 (noting pervasive gender-biased treatment of these matters).

⁷¹ H.R. CONF. REP. NO. 103-711, *supra* note 8, at 385.

⁷² See Nourse, *supra* note 3, at 7.

⁷³ *Id.* at 13, 34. In 1991, Senator Dole introduced the Women's Equal Opportunity Act, which omitted the civil rights provision. *Id.* at 13. In 1993, Representative Schumer, for tactical reasons, introduced an alternative bill to the House Subcommittee on Crime and Criminal Justice which eliminated the civil rights remedy, hoping it would be restored at the full Committee level; however, no such progress was made in the full committee. *Id.* at 34.

⁷⁴ See Epstein, *supra* note 11, at 20; Mills, *supra* note 11, at 1252.

⁷⁵ The Chief Justice objected that the Act would federalize domestic relations law and overburden the courts. See 1993 H.R. Hrg., *supra* note 3, at 74-76. Eventually, the Chief Justice ceased his criticisms of the criminal remedy and limited his ongoing opposition to the civil remedies provided by the Act. See Nourse, *supra* note 3, at 16.

⁷⁶ 1993 H.R. Hrg., *supra* note 3, at 74-75.

⁷⁷ See 1993 H.R. Hrg., *supra* note 3, at 74-75; Epstein, *supra* note 11, at 20; Mills, *supra* note 11, at 1252.

⁷⁸ Victoria Nourse, who was Special Counsel to the Senate Committee on the Judiciary for the 102d (1991-1992) and the 103d (1993-1994) Congresses, recounted the concerns repeatedly raised as to whether the civil rights remedy "would cover minor or trivial incidents" and "trivial" matters." Nourse, *supra* note 3, at 14, 17. Supporters were required to provide ongoing assurance to Congress (and the federal courts) that the Act would not be unduly burdensome on the federal courts, and that the remedy would not cover "everyday domestic violence cases." See 1991 S. Hrg., *supra* note 3, at 69-70. One bill sponsor who

the definition of "crime of violence" and added language that required a specific demonstration of gender animus.⁷⁹ The Act specified that in order to pursue a civil rights remedy, a plaintiff would have to demonstrate that the defendant committed a felony—thus curtailing the usefulness of the remedy for battered women who suffer repeated misdemeanor assaults.⁸⁰ The Act specifically precluded a federal court from considering any pendent claims "seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."⁸¹ The Act also barred the removal to federal court of any state court action asserting VAWA's civil rights remedy.⁸²

B. *The Violence Against Women Act: Significance and Shortcomings*

The enactment of VAWA provided useful opportunities for the articulation of public values. Legislative bodies are often viewed as incapable of achieving transformative change—even less capable than courts, which are perceived as independent and less subject to special interest pressures and to the necessity of compromise.⁸³ The legislative history of VAWA reveals a successful departure from traditional law-making because it rested on a method of discourse posturing as impersonal, general, and neutral.⁸⁴ Throughout the public hearings, human stories unfolded, in narrative form, which informed members

sought to restrict the scope of the remedy suggested that the act of rape by a man while telling a woman that he loved her could not and would not give rise to a claim under the Act. See Siegel, *supra* note 44, at 2200.

⁷⁹ 42 U.S.C. § 13981 (1994).

⁸⁰ *Id.* Where assaults or beatings rise only to a level of a misdemeanor, the fact that they are a part of an ongoing pattern will not save these restrictions, further demonstrating the limitations of the remedy. See Andrea Brenneke, *Civil Rights for Battered Women: Axiomatic and Ignored*, 11 LAW & INEQ. 1, 59 (1992) (noting that limiting the civil rights provision of VAWA to felonies impairs domestic violence victims' ability to bring an action).

⁸¹ 42 U.S.C. § 13981 (e) (4) (1994). See also 1993 S. Hrg., *supra* note 3, at 51 (noting that the civil rights remedy will not involve the federal judiciary in divorce or domestic relations matters).

⁸² 28 U.S.C. § 1445(d) (1994).

⁸³ See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1016 (1989) (noting that political science scholars describe the legislature as "paralyzed and unable to take constructive action" and likely to enact weak laws as a result of unprincipled compromises and deference to special interests).

⁸⁴ See Robert P. Aponte Toro, *Sanity in International Relations: An Experience in Therapeutic Jurisprudence*, 30 U. MIAMI INTER-AM. L. REV. 659, 682 n.60 (1999) (citing EFREN RIVERA-RAMOS, *THE LEGAL CONSTRUCTION OF AMERICAN COLONIALISM: AN INQUIRY INTO THE CONSTITUTIVE FORCE OF LAW* 34 (1996)) (noting that the principle attributes of legal discourse are "its pretenses of impersonality, generality, and neutrality, which provide the foundation for its claim of formal rationality.").

of Congress of the realities of gender-based violence, and this method of story-telling contributed to the accomplishment of a major legal reform.⁸⁵ VAWA witnesses thus avoided a form of truncated discourse, frequently forced upon victims in court proceedings, which often deprives them of their opportunity to convey their reality without being demeaned or revictimized, or having their accounts disaggregated.⁸⁶ Personal stories underscored the human costs of gender-based violence and introduced legislators to the relationship between violence against women and women's inequality.⁸⁷ Public congressional testimony offered in narrative form served to spur legislative changes, and it continues to resonate as an effective discursive model for revealing the magnitude of the problems associated with gender-based violence.⁸⁸

VAWA's legislative process also provided an important public—and national—forum in which to emphasize the structural nature of gender-based violence. Throughout the Congressional hearings, accounts of the tactics and strategies used by perpetrators of gender-based violence paralleled the catalogue of state failures to provide equal protection of the laws to women. Where these accounts converged, the construction of women as victims of gender-based violence emerged in sharp relief. These descriptions often transcended specific incidents of violence and implicated a social and political dynamic involving public structures and institutions.⁸⁹ The statistics produced before Senate and House subcommittees demonstrated that the magnitude of the problem is so great that it eclipses all other forms of harm to women.⁹⁰ The prevalence of gender-based violence

⁸⁵ See *supra* note 3.

⁸⁶ See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2428 (1988) (arguing that when communicating facts in the context of the courts, much of the original meaning and impact can be lost).

⁸⁷ See Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Reform*, 21 HOFSTRA L. REV. 1243, 1291-92 (1993) (noting that providing narratives to judges as well as to lawmakers focuses the decision-makers on human costs and the human dimension of the problem).

⁸⁸ See Goldscheid, *supra* note 43, at 116 (noting that Congress relied on the substantial testimony about the consequences of domestic violence and sexual assaults in passing VAWA); see also ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 111 (2000) (commenting on the power of narrative and noting that facts are not only recounted by narrative but are constituted by it).

⁸⁹ LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 26 (1988). Gordon's premise throughout her path-breaking book is that family violence is a problem closely linked to societal norms and political conflicts.

⁹⁰ Some of the statistical data included data on battering (4 million each year; one every 15 seconds), rape (more than 2000 every week, one every 6 minutes) and victim

suggests that violence against women is countenanced in social ethics, legal institutions, and normative behaviors expressed in a range of relationships both public and private.⁹¹

This is not to suggest that the pain, trauma, and losses associated with gender-based violence can be erased by an effective state response. But throughout the hearings, violence against women was clearly identified as a confluence of oppressive circumstances, some of which were manipulated by perpetrators, and others which were determined by institutional patterns and judicial cultural conventions. This understanding provided the foundation for federal remedies to address the multiple causes and consequences of gender-based violence.

VAWA's achievement in passing a federal civil rights remedy also created possibilities for reforming the deleterious legal culture that explains much of the courts' treatment of claims of gender-based violence. By allowing a federal civil rights cause of action, these claims might be litigated on par with other civil rights matters, in accordance with just procedures and practices that stand in sharp contrast with the unjust treatment afforded by state courts that was documented in the legislative hearings.⁹² By creating a federal remedy in a federal forum, the possibility that gender-based violence would be afforded additional respect and proper treatment was enhanced.

The successes realized by the enactment of VAWA notwithstanding, the Act's potential was limited. Compromises narrowed the scope of the remedy and belied the opposition that remains a formidable obstacle to the treatment of violence against women cases as "important"—that is—as federal cases.⁹³ VAWA's short-lived civil rights rem-

gender (95% of all domestic violence victims are women). See 1993 H.R. Hrg., *supra* note 3, at 26; 1993 S. Hrg., *supra* note 3, at 38; 1991 S. Hrg., *supra* note 3, at 36.

⁹¹ "One assault does not make a battered woman; she becomes that because of her socially determined inability to resist or escape: her lack of economic independence, law enforcement services, and quite likely, self confidence." GORDON, *supra* note 89, at 285. Gordon describes domestic violence as being "sanctioned and controlled through culture—religious belief, law, and, most importantly, the norms of friendship, kinship, and neighborhood groups." *Id.*

⁹² See *supra* notes 55–67 and accompanying text.

⁹³ The equating of "federal" with "important" means that simply locating certain issues within the province of the federal judiciary guarantees their significance. Aggregated concerns affecting a whole nation are considered federal issues; concerns that are distinct and restricted to a particular place are viewed as local. See Adler, *supra* note 29, at 203–04 (contrasting the significance assigned to matters allocated to federal courts with local issues excluded from federal jurisdiction, thus considered less profound concerns). When matters are entrusted to the federal courts, they are deemed significant, in contrast with disaggregated and particularized concerns assigned to the localities. See Resnik, *supra* note 27, at

edy was an exception to the customary devolution to the state courts of cases involving violence against women, yet it nonetheless failed to provide a structural breakthrough on the federalism question with regard to gender-based violence and women's concerns generally.⁹⁴ Although the VAWA hearings exposed the myth that state courts possessed greater expertise in handling claims of violence against women, the premise that state courts nonetheless retained greater expertise in "routine" acts of domestic violence, sexual assaults, and family law matters in general remained unchallenged.⁹⁵

The disclaimers and assurances, and perhaps most importantly, the assumptions about the impropriety of locating these matters in the federal courts, loomed large throughout the legislative discussions.⁹⁶ Civil rights deprivations were discursively linked to "[mere] domestic relations disputes."⁹⁷ Additionally, the invocation of congested court dockets served as an argument against the remedy.⁹⁸ Whatever the pretext, these matters had been peremptorily considered untouchable by, and unworthy of, the federal courts. The federal judiciary's hostility to the intended location of remedies for gender-based violence in a federal forum suggests a hierarchical structure of the law and of values in the legal system, such that gender-based violence claims are assigned minimal importance as a matter of course.⁹⁹

969 (noting that federal courts are superior, "not in the constitutional sense of the Supremacy Clause but in the cultural sense of the meaning and import of the work").

⁹⁴ See generally Adler, *supra* note 29; Cahn, *supra* note 22.

⁹⁵ This is ironic in light of the evidence of pervasive gender bias in the state court systems. See Cahn, *supra* note 22, at 1091-92 (noting and contesting assumptions about the competency of state courts to handle family law matters); Resnik, *supra* note 9, at 1755 (referring to the undermining of the "imagined state competence" of state court judges in family law matters).

⁹⁶ See *supra* notes 75-85 and accompanying text.

⁹⁷ See Nourse, *supra* note 3, at 16 n.85.

⁹⁸ For a useful discussion of congested court dockets as pretext, see generally, Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 989 (1998). Rhode examines the rhetoric of excessive litigation and overcrowded court dockets and challenges claims that seek to demonstrate evidence of dramatic growth in litigation as "statistical sleights of hand." *Id.* at 996-97. Senator Joseph Biden pointedly addressed this issue during the VAWA hearings, stating "I don't know a whole lot of Federal judges . . . that any of us would think are so overburdened with work that they are bent at the back and their brow is constantly occupied with beads of sweat." 1992 H.R. Hrg., *supra* note 3, at 11 (statement of Sen. Joseph Biden).

⁹⁹ See Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 173 (2000) (arguing that the invocation of principles of federalism provides cover for maintaining social arrangements of male power). See Cahn, *supra* note 22, at 1097 (noting that federalism is invoked to screen federal courts from having to hear these cases); Resnik, *supra* note 27, at 1004 (noting that family matters are considered

Legislative process is marked by discussions and debates in which the social and legal soundness of any proposed law is tested. But opposition to VAWA emerged through a rhetorical pattern insinuating issues of gender and hierarchy, revealing a persistent resistance to the transformation of domestic violence from a "mere" family dispute into a civil rights violation of national import. This pattern may be seen as re-emerging in the Supreme Court's decision that struck down the Act, albeit altered and cloaked within concerns for a proper division between state and national power.

C. Christy Brzonkala and *United States v. Morrison*

In September 1994, as VAWA passed into law, Christy Brzonkala alleged that she was assaulted and repeatedly raped by two men (Antonio Morrison and James Crawford) shortly after enrolling as a freshman at the Virginia Polytechnic Institute.¹⁰⁰ She filed a complaint with Virginia Tech, a state-funded university.¹⁰¹ Morrison admitted to having sexual relations with Brzonkala against her will and was sentenced to a two-semester suspension.¹⁰² After a process of appeals and rehearings, in part due to Virginia Tech's mishandling of the complaint,¹⁰³ Morrison's punishment was set aside as excessive.¹⁰⁴ Brzonkala suffered trauma as a consequence of the rape, dropped out of school, and required psychiatric counseling.¹⁰⁵ Virginia Tech, charged with providing redress and remedy, had neglected to communicate a policy against gender-based violence: In the case of Christy Brzonkala, the school declined to sanction it.¹⁰⁶

In December 1995, Brzonkala filed suit in federal court under VAWA's civil rights provision. The District Court dismissed the action, holding that Congress exceeded its powers under the Commerce

"intrinsically" state court matters); Siegel, *supra* note 44, at 2197 (pointing out the changing rules and rhetoric invoked for the purpose of avoiding a federal cause of action for gender-based violence claims). Cf. B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. Rev. 1, 2 (1993) (noting that sexual harassment claims are considered to be of questionable status).

¹⁰⁰ *United States v. Morrison*, 529 U.S. 598, 602-04 (2000).

¹⁰¹ *Id.* at 603.

¹⁰² *Id.*

¹⁰³ *Id.* Virginia Tech allegedly made an error in bringing a complaint against the school's sexual assault policy which had not been widely distributed to all students.

¹⁰⁴ *Id.*

¹⁰⁵ *Morrison*, 529 U.S. at 602-03. See also Brief Of Petitioner Christy Brzonkala at 4, *United States v. Morrison*, 529 U.S. 598 (2000), available at 1999 WL 1034453.

¹⁰⁶ Brief Of Petitioner Christy Brzonkala at 5, *Morrison*, available at 1999 WL 1034453.

Clause and Section 5 of the Fourteenth Amendment when it enacted the civil rights portion of the Act.¹⁰⁷ On appeal, the Fourth Circuit Court of Appeals reversed, holding that Brzonkala had both stated a claim under the Act and that the Act was constitutional.¹⁰⁸ An *en banc* court vacated the panel decision and agreed with the district court judge that the Act was unconstitutional.¹⁰⁹

The Supreme Court granted certiorari, and the United States intervened to defend the Act's constitutionality. On May 15, 2000, declaring that "the Constitution requires a distinction between what is truly national and what is truly local," the Court struck down VAWA's civil rights provisions as unconstitutional.¹¹⁰ Before the Court's decision, the Act had been upheld as constitutional, and used successfully by women across the country to obtain damages for injuries they suffered in domestic violence assaults, rapes, and other sexual assaults.¹¹¹ Forty-one state attorneys general filed as amici supporting the constitutionality of VAWA and emphasized the need for federal leadership on the issue of violence against women.¹¹²

In a five-to-four decision, the Court rejected both the Commerce Clause and Section 5 of the Fourteenth Amendment as proper constitutional bases for the Act.¹¹³ The Court considered separately the two themes of the legislative findings regarding the economic effect of gender-based violence and the states' failure to provide relief to victims—the first in connection with the Commerce Clause and the second as it related to Section 5 of the Fourteenth Amendment. As to the Commerce Clause argument, the Court characterized gender-based violence as non-economic and non-commercial activity, and thus avoided consideration of its aggregate economic effects.¹¹⁴ The Court expressed concern that without judicially enforced limits on Congressional power under the Commerce Clause, virtually any activity could be construed as having an economic impact in the aggregate, result-

¹⁰⁷ *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 935 F. Supp 772, 772 (W.D. Va. 1996).

¹⁰⁸ *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949, 949 (4th Cir. 1997).

¹⁰⁹ *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 820 (4th Cir. 1999).

¹¹⁰ *Morrison*, 529 U.S. at 617-18.

¹¹¹ See S. REP. NO. 102-197, *supra* note 8, at 39.

¹¹² 1993 H. Hrg., *supra* note 3, at 34-36 (Attorneys' General Letter). See Goldscheid *supra* note 43, at 119, 120 (including 38 states, the District of Columbia, and two U.S. territories).

¹¹³ *Morrison*, 529 U.S. at 627.

¹¹⁴ *Id.* at 609-13.

ing in the obliteration of the division of state and national power.¹¹⁵ In reaching its conclusions regarding the extent of the commerce power, the Court relied on *United States v. Lopez*,¹¹⁶ in which the Court struck down a federal criminal statute enacted pursuant to the Commerce Clause, finding it to be unrelated to commerce.¹¹⁷ The Court criticized a "method of reasoning," which it described as a "but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce," as insufficient for providing justification for Commerce Clause authority.¹¹⁸

The Court also rejected Section 5 of the Fourteenth Amendment as a basis of support, holding that VAWA's civil rights remedy was not fashioned to counteract and redress unequal state laws or proceedings, but, rather, was targeted at private conduct.¹¹⁹ The Court acknowledged that the legislative record supported congressional findings that state judicial systems were flawed and, by design, nonresponsive to women's claims of violence.¹²⁰ But by characterizing the statute as corrective relief directed at the actions of private individuals, and not towards state actors, the Court came to the conclusion that VAWA lacked a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."¹²¹

D. Underlying Morrison

The legal issues raised in *Morrison* were constructed first during the debates on VAWA, and then following the passage of the Act. The decision since has been reviewed and analyzed from a number of different perspectives.¹²² To those concerned with relocating domestic

¹¹⁵ *Id.* at 615.

¹¹⁶ 514 U.S. 549, 549 (1995).

¹¹⁷ *Morrison*, 529 U.S. at 609-16. *Lopez* struck down the federal Gun Free School Zone Act (GFSZA), which made it a federal crime to possess a gun within a certain distance of a school. *Lopez*, 514 U.S. at 561.

¹¹⁸ *Morrison*, 529 U.S. at 615.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 619.

¹²¹ *Id.* at 626.

¹²² Much of the legal and scholarly analysis supporting the constitutionality of the Act was made a part of the legislative history. See 1991 S. Hrg., *supra* note 3, at 83-105 (testimony of Professors Burt Neuborne and Cass Sunstein). Like many significant issues waiting to be resolved by the Supreme Court, Commerce Clause and Section 5 issues were closely examined before the Court's opinion was issued and since the Act. Several articles were written which foreshadowed most, if not all of the Court's opinion. See, e.g., William

violence claims to a national forum, earlier resistance to categorizing these claims as civil rights violations and the federal judiciary's discomfort with the prospect of adjudicating them in federal courts appears to underlie the Court's rejection of the Act.¹²³ A fair reading of the decision suggests that the Court manipulated traditional (and gender-neutral) paradigms of economic vs. non-economic activity, state power vs. national power, and state action vs. private action in support of its Commerce Clause and Fourteenth Amendment interpretations that denied VAWA's achievement.

1. Commerce Clause Issues

The majority restored the understanding of gender-based violence as a non-economic and private matter inappropriate for federal courts by quieting the legislative evidence. The Court avoided a review of the nature and dimensions of the legislative findings in its decision by the undifferentiating application of *Lopez* and, at best, a cursory application of the law to the legislative facts.¹²⁴ No mention was made of VAWA's legislative evidence demonstrating not only that the syndrome of gender-based violence impacts the economy, but that the violent acts themselves are often specifically economic in purpose and

G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 RUTGERS L. REV. 1139, 1139 (1996); Senator Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 HARV. J. ON LEGIS. 1, 1 (2000); Brenneke, *supra* note 80, at 1; David M. Fine, *The Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence*, 84 CORNELL L. REV. 252, 252 (1998); Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 1 (2000); Sarah B. Lawsky, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 YALE L.J. 783, 783 (2000); Nourse, *supra* note 3, at 1; Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison*, 75 N.Y.U. L. REV. 150, 150 (2000); Carolyn Peri Weiss, *Title III of the Violence Against Women Act: Constitutionally Safe and Sound*, 75 WASH. U. L.Q. 723, 723 (1997). For analyses since the Court's opinion, see also Goldscheid, *supra* note 43, at 109; MacKinnon, *supra* note 99, at 135.

¹²³ See MacKinnon, *supra* note 99, at 139 (noting that VAWA's compromises in deference to the opposition of the Judicial Conference foreshadowed its demise).

¹²⁴ Unlike *Lopez*, which challenged a criminal statute, VAWA's provisions provided civil rights protections historically enacted by Congress and assigned to the federal courts to safeguard. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 294 (1964) (upholding the public accommodations provisions of the Civil Rights Act of 1964 which prohibited racial discrimination in restaurants under the Commerce Clause powers). And unlike *Lopez*, where Congress had made no findings regarding harm to interstate commerce flowing from the regulated activity, the findings of such harm occasioned by violence against women were overwhelming. See Fine, *supra* note 122, at 267-68 (analyzing the inapplicability of *Lopez* to VAWA).

are often deliberately designed to prevent a woman's economic independence.¹²⁵

The congressional findings in VAWA were entitled to great weight and judicial deference, particularly where they were established after arduous, fact-intensive, and lengthy investigation into the complexities of gender-based violence.¹²⁶ Although Congress has the institutional capacity to determine the facts of gender-based violence and its impact on the daily lives of its victims, the Court nonetheless side-stepped its function of evaluating legislative judgement for rationality, entering a realm outside its competence.¹²⁷ Rather than being guided by the congressional findings and their illumination of the problem of gender-based violence, the Court avoided the substance of the findings and instead repudiated Congress' "method of reasoning."¹²⁸ This allowed the Court to substitute its own view that gender-based violence has only indirect and attenuated effects on commerce. But facts are facts: As the dissent noted, Congress' method of reasoning "may be challenged, and some of the figures arrived at may be disputed. But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned."¹²⁹

Furthermore, there was virtual silence on the civil rights nature of the Act and its effort to target invidious discrimination against an identified discrete group.¹³⁰ This silence was compounded by the Court's failure to consider all of the legislative evidence holistically.

¹²⁵ See *supra* note 47 and accompanying text.

¹²⁶ Activity which is proposed to be regulated is within the commerce power if a rational basis exists for Congress' determination that it sufficiently affects interstate commerce. See *Lopez*, 514 U.S. at 557; *Preseault v. ICC*, 494 U.S. 1, 17 (1990); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981); *Katzenbach*, 379 U.S. at 303-04.

¹²⁷ See *Walter v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) (holding that "[w]hen Congress makes findings on essentially factual issues . . . those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue"); A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On The Record" Review of Federal Statutes*, 86 CORNELL L. REV. 328, 370 (2001) (noting that the purposes of reviewing the record do not apply to a review of congressional enactments). Such review is inconsistent with constitutional provisions and established jurisprudential doctrines designed to shelter the federal legislative process from the threat of judicial intrusion. See *id.* at 376.

¹²⁸ *Morrison*, 529 U.S. at 615.

¹²⁹ *Id.* at 634 (Souter, J., dissenting).

¹³⁰ See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964) (discriminatory impact of private conduct is not an impermissible motive or purpose for regulation under the Commerce Clause); *Goldscheid*, *supra* note 43, at 132 (noting the Court's refusal to recognize the civil rights nature of the Act).

The Court, having previously approved congressional legislation of intrastate activity under the Commerce Clause, where states were unable to address the regulated conduct, once again had the opportunity to consider that very issue in *Morrison*.¹³¹ By submerging the legislative evidence of the states' failures in its consideration of the Commerce Clause argument, the Court avoided permitting regulation of gender-based violence on that ground.

Having quieted the evidence, the Court next restored domestic violence to its historic category of family disputes, distancing it from the realm of civil rights violations. By slighting the legislative evidence about the unique nature of the conduct at issue in VAWA, the Court stripped away its particular features, such that gender-based violence could be scrutinized for Commerce Clause purposes as "any conduct," without reference to its structural significance as revealed in the legislative hearings.¹³² Having reduced gender-based violence to "any conduct," or even any criminal conduct, the Court then discursively linked it with family law issues traditionally set aside for state regulation and jurisdiction.¹³³ The Court acknowledged that, in the aggregate, family law matters, including marriage, divorce, and child rearing, affect the national economy—only to express its fear that VAWA would expose federal courts to adjudicating them.¹³⁴ Through this rhetorical practice of connecting the adjudication of family law issues

¹³¹ See *Pérez v. United States*, 402 U.S. 146, 150 (1971); see also MacKinnon, *supra* note 99, at 150-51 (noting the Commerce Clause's history of upholding legislation for social equality).

¹³² *Morrison*, 529 U.S. at 611 (emphasis added) (relying on *Lopez* in which the court noted that "any conduct" might be seen as having commercial affect in order to rationalize its ruling that VAWA's regulated activity was not appropriate for regulation under the Commerce Clause).

¹³³ *Id.* at 615 ("Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."). This linkage is particularly troublesome because family relationships were not an element of the civil rights act of VAWA.

¹³⁴ *Id.* Justice Breyer (joined by Justices Stevens, Souter and Ginsberg) in his dissent criticizes the majority in this regard, suggesting that subject matters considered appropriate for federal court jurisdiction may be changing in response to evolving social complexities. The dissent contends this potentiality is "not . . . a jurisprudential defect, so much as it reflects a practical reality" and suggests that scientific, technological, economical and environmental change "makes it impossible for courts to develop meaningful subject-matter categories" which might be reasonably excluded from Commerce Clause regulations. *Id.* at 1776 (Breyer, J., dissenting).

with gender-motivated crimes of violence, the Court prohibited the transformation of these issues to a national civil rights concern.¹³⁵

Finally, by identifying the adjudication of family law issues as a chamber of horrors into which the Court would be dragged if VAWA were upheld, the Court not only recategorized the problem, but reinforced the low-caste nature of family law cases.¹³⁶ Although there is no constitutional imperative relegating these issues to state courts,¹³⁷ and despite the debunking of the myth of state court expertise, the Court nonetheless refused to engage in the task of shaping national norms related to gender-based violence and women's legal concerns.¹³⁸

2. Issues Regarding Section 5 of the Fourteenth Amendment

The Court relocated gender-based violence claims from a national arena to a local forum by resegregating the public and private factors that underscore the tragedy of gender-based violence. By rejecting the Fourteenth Amendment claim on the ground that the Act remedied private actions, the Court reinforced the public/private dichotomy that has long plagued women's issues in general and issues of violence against women in particular.¹³⁹ It was the very intersection of gender-motivated violence by private actors with the states' failure to provide equal protection of the laws which underlay the need for a

¹³⁵ See AMSTERDAM & BRUNER, *supra* note 88, at 165 (describing linguistic processes by which issues may be shaped); see also Laura E. Little, *Hiding With Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinion*, 46 UCLA L. REV. 75, 80 (1998) (noting the observations of Court's use of rhetoric to formulate legal interpretations of the federal constitution).

¹³⁶ *Morrison*, 529 U.S. at 616 (referring to "the specter" of federal courts adjudicating family law issues). Jill Hasday notes that in *Lopez*, the Court "could agree on little else except that Congress's commerce power does not reach 'family law (including marriage, divorce, and child custody)'" (citing *Lopez*, 514 U.S. at 564) and that the majority repeated this proposition no less than four times. Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1298 (1998).

¹³⁷ See Cahn, *supra* note 22, at 1073 (pointing out that no provision in the Constitution nor federal diversity statutes prevents family law cases from being adjudicated in the federal courts); Hasday, *supra* note 136, at 1299 (noting that there is no historical basis for consigning family law matters to the local powers).

¹³⁸ See Resnik, *supra* note 27, at 1010 (suggesting that federal judges should work with state judges in the making of public decisions which affect norm definitions in this area). By this standard, family law issues would be properly adjudicated in the federal courts when affecting identifiable national issues. See Adler, *supra* note 29, at 256-57.

¹³⁹ See generally, Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071 (1995) (discussing domestic violence issues particularly and the problem of the public/private dichotomy).

federal civil rights action.¹⁴⁰ The interrelationship between a private actor/abuser and the states that failed to provide a remedy left women vulnerable to harm and should have been sufficient for the Court to uphold VAWA.¹⁴¹

Private actions motivated by gender animus were properly transformed by VAWA into public civil rights concerns. The states' failure to provide protection against such violations constituted another civil rights violation.¹⁴² The civil rights provision was enacted to afford a remedy, not only for discriminatory violence, but also for the disparate treatment at the hands of state systems. The combination of forces at work which leave women vulnerable justified such a remedy.¹⁴³

By providing a federal remedy, VAWA unhinged gender-based violence from its historic private and local domain, and marked a reconceptualization of domestic violence as a pressing public and national social problem. VAWA situated both the causes and consequences on an economic and political map, identified it as a civil rights concern, revealed the structural nature of the problem, and declared state systems' treatment of the issues unequal and discriminatory. The Act moved beyond the more socially accepted model of criminal intervention and granted plaintiff status to battered women, conferring upon them a civil rights cause of action in the name of national interests.

The Act stands in stark contrast to the Court's decision, which reflexively reclassified the problem as non-economic activity and as domestic disputes inappropriate for federal court intervention.¹⁴⁴ Its

¹⁴⁰ See *supra* note 88 and accompanying text.

¹⁴¹ As the Court points out, in *United States v. Guest*, 383 U.S. 745, 756 (1966), such active connivance was found in upholding the constitutionality of a federal statute criminalizing conspiracies to deprive blacks of equal access to state facilities on the basis that the indictment expresses alleged state involvement. See *Morrison*, 529 U.S. at 622-23. As Catharine MacKinnon points out, this state involvement was achieved because the conspiracy involved a plan to cause the arrest of blacks. MacKinnon, *supra* note 99, at 157. The legislative findings demonstrating that the states deprived women of equal protection of the laws after a gender motivated attack should have been sufficient in *Morrison*.

¹⁴² See *DeShaney v. Winnebago County Dep't. of Social Servs.*, 489 U.S. 189, 197 n.3 (1989) (a state may not deny protective services to "certain disfavored minorities without violating the Equal Protection Clause").

¹⁴³ See MacKinnon, *supra* note 99, at 153 (arguing that neither history nor precedent require that statutes enacted pursuant to the Fourteenth Amendment address only state action and that, further, both favor the upholding of VAWA).

¹⁴⁴ See Goldscheid, *supra* note 43, at 129-30 (noting that Congress intended to regulate domestic violence as a civil rights violation historically and firmly regulated by federal judicial authority).

defeat sheds light upon a problematic legal culture within which these claims must be resolved, and highlights the difficulty in changing styles of discourse about gender-based violence.

In the end, the Court returned women to state systems that routinely use procedures which suffer from and perpetuate institutionalized gender inequality. Although several fronts on which to combat gender-based violence remain, most women will once again be restricted to the states. The next challenge will be to demand states do what the Supreme Court claims they do best: regulate families and crime.¹⁴⁵

II. DOMESTIC VIOLENCE AND THE LEGAL MECHANISMS OF FAILURE

The method by which VAWA's civil rights remedy met its demise is consistent with the historical hierarchies that have cast gender-based violence in terms of domestic disputes, routine assaults, and as a burden on the judiciary.¹⁴⁶ The Supreme Court's decision in *United States v. Morrison* reflects and reproduces the problems that gave rise to the federal remedy in the first place; it replicates and is replicated in the unfavorable treatment that domestic violence claims receive in state courts. Thus, an understanding of VAWA's defeat is enhanced by an examination of domestic violence law in the state courts, revealing a cultural system with accumulated practices and procedures by which the relative importance of these claims can be measured.¹⁴⁷

This section describes the legal culture of domestic violence in state courts. It serves as a topographical study of civil protection order proceedings and describes the values, practices, beliefs, behaviors, and myths that set the rules for how domestic violence claims are handled. It reviews the mechanisms by which this culture is maintained and perpetuated, and examines the deleterious results of this legal culture for battered women. Just as important, state civil remedies, now the principal means for obtaining relief, also deserve closer

¹⁴⁵ See *Morrison*, 529 U.S. 598, 618 (2000) (stating that there was no better example of police power granted to the states and denied the federal government than "suppression of violent crime and vindication of its victims").

¹⁴⁶ See *supra* notes 74–76 and accompanying text; Siegel, *supra* note 44, at 2119 (noting the historical principles by which domestic violence claims were rendered as private concerns).

¹⁴⁷ See Engle Merry, *supra* note 24, at 575–76 (noting that law serves as a symbolic and cultural system which is revealed as a series of practices and discourses); J. Harvie Wilkinson III, *supra* note 28, at 1396 (describing the law as a phenomenon of culture, and citing PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999)).

scrutiny in order to fashion strategies to improve outcomes in domestic violence cases.

A. Civil Protection Orders Generally

Civil protection orders are court orders used for prohibiting acts of domestic violence committed by one party against another.¹⁴⁸ These orders can be issued in all states to protect a victim from continued violence.¹⁴⁹ Eligibility for relief varies from state to state, but the goals are consistent: to provide victims immediate and long-term protection from the violence inflicted by a domestic partner.¹⁵⁰ To accomplish these goals, most state statutes authorize comprehensive relief and may offer significant protection to battered women.¹⁵¹ Judges have authority to structure legal protection to reduce the possibility of subsequent serious injury or death in these civil matters,

¹⁴⁸ See Klein & Orloff, *supra* note 15, at 814. See also *Developments in the Law: Legal Responses to Domestic Violence II. Traditional Mechanisms of Response to Domestic Violence*, 106 HARV. L. REV. 1505, 1510 [hereinafter *Legal Responses to Domestic Violence*] (defining civil protection orders).

¹⁴⁹ See Epstein, *supra* note 11, at 11.

¹⁵⁰ Eligibility varies both in terms of the status of the party entitled to relief and the precipitating acts warranting an order. See BARBARA J. HART, *STATE CODES ON DOMESTIC VIOLENCE: ANALYSIS, COMMENTARY AND RECOMMENDATIONS* 1992, at 5 (noting that most state statutes specify eligible abused persons as family or household members, broadly defined as spouses or persons who have lived together, parents and children, current or former sexual or intimate partners, and, on occasion, persons who have been in dating or intimate relationships with each other). Prohibited behavior includes, but is not limited to, causing or attempting to cause physical harm, placing another in fear of imminent harm, and various sexual relations crimes. *Id.* at 6. See *Legal Responses to Domestic Violence*, *supra* note 148, at 1510 (noting that civil protection orders are designed to prevent future abuse).

¹⁵¹ See Epstein, *supra* note 11, at 11 (noting that every state has a domestic violence injunction statute and that the majority of these provide for comprehensive or ancillary relief). At least half the states authorize attorney fees and other costs, and at least one-fourth of the states permit monetary compensation to be awarded to the victim. See HART, *supra* note 150, at 5, 15-17. In this article, the term "comprehensive relief" refers to the enumerated provisions found in most statutes that allow judges to include within a domestic violence injunction determinations of child custody, visitation terms, child support, spousal support, exclusive use of the home, possession of personal property, confiscation of weapons, attorneys fees, and other relief designed to keep a woman safe from abuse. This relief is often referred to as ancillary or supplementary to what is often considered the primary aspect of relief: restraining or prohibiting further acts of violence. The author is grateful to the suggestions of Valerie Despres, Coordinating Attorney for North Carolina Legal Services Domestic Violence Project, that the term "ancillary" may suggest somehow that this relief is secondary to the issue of protection from harm and that the term "comprehensive relief" may better reflect the nature of the remedy. See Susan L. Keilitz, *Civil Protection Orders: A Viable Justice System Tool for Deterring Domestic Violence*, *VIOLENCE AND VICTIMS*, Vol. 9, No. 1, at 82 (1994).

thereby providing courts with a wider range of dispositional powers than in criminal cases.¹⁵²

The effectiveness of domestic violence injunctions, however, depends on whether a judge orders comprehensive relief which not only enjoins further violence but also remediates the consequences of past violence.¹⁵³ Civil protection injunctions can provide affirmative relief for battered women by setting conditions, creating opportunities, and distributing resources as needed. For example, an order may include provisions which grant exclusive use of the parties' residence to the battered woman, make custody and visitation determinations, order child and spousal support where applicable, grant to the victim other personal property likely to enhance her safety while denying the abuser possession of other property with which he may carry out further harm, and order the abuser to a batterer's treatment program.¹⁵⁴ This form of relief can be a means of legal intervention that respects and restores women's ability to lead their own lives without intrusion by abusers.

Civil protection orders present, to the parties and to the courts, challenges which are often related to the emergency nature of domestic violence matters. They are expedited proceedings scheduled on short notice in order to maximize protection for the victim.¹⁵⁵ Hearings are set within two weeks or less of filing, usually without discovery.¹⁵⁶ Victims often appear pro se and may have a difficult time navigating the legal system, particularly in light of the fear they may experience of facing the batterer in court.¹⁵⁷ Judges express concern

¹⁵² See *Cruz-Foster v. Foster*, 597 A.2d 927, 929 (D.C. 1991); Peter Finn and Sarah Colson, *Civil Protection Orders: Legislation, Current Court Practice and Enforcement*, 2 NAT'L INST. OF JUSTICE (1990).

¹⁵³ Finn & Colson, *supra* note 152, at 33; Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: an Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 167 (1993). See Lenore M.J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 PSYCHOL. PUB. POL'Y & L. 43, 77-78 (1995); see also Deborah Knight, *Protection Orders: How Effective Are They?*, NAT'L BULL. ON DOMESTIC VIOLENCE PREVENTION, Dec. 1995, Vol. 1 No. 6, at 2-3 (interviewing Lois Cantor, Director of Northeastern University Law School's Domestic Violence Clinic who states that: "The more comprehensive and specific the order is about what the abuser cannot do, the better.").

¹⁵⁴ See HART, *supra* note 150, at 14-17, 23 (noting that the usefulness of protection orders is dependent on provisions that are specific, comprehensive, and precise. Orders must spell out with specificity the terms of "no contact."); see also Finn & Colson, *supra* note 152, at 33.

¹⁵⁵ HART, *supra* note 150, at 7-8, 25; See Klein & Orloff, *supra* note 15, at 1040, 1054.

¹⁵⁶ Klein & Orloff, *supra* note 15, at 1054.

¹⁵⁷ *Id.* at 1048-49.

over their inability to dedicate sufficient time to fashion comprehensive protection orders.¹⁵⁸

Although progress has been made through state legislative enactments, there is a critical disjuncture between formal law on the one hand, and the implementation of the statutes by the courts in matters involving domestic violence, on the other.¹⁵⁹ Women are often unable to obtain comprehensive relief within the domestic violence injunction hearing process.¹⁶⁰ Domestic violence proceedings are often truncated; battered women may be precluded from presenting their evidence, which may result in denial of orders.¹⁶¹ Alternatively, judges often encourage parties to negotiate outside the formal adjudicatory process, rather than to litigate, even though it has been well established that mediation is undesirable in domestic violence matters.¹⁶² Judges frequently fail to grant relief such as custody and child sup-

¹⁵⁸ See *infra* notes 178–181 and accompanying text.

¹⁵⁹ See generally Kim Susser, *Weighing the Domestic Violence Factor in Custody Cases: Tipping the Scales in Favor of Protecting Victims and Their Children*, 27 FORDHAM URB. L.J. 875 (2000) (noting that despite state statutory changes requiring courts to consider domestic violence when making a custody determination, courts continued to ignore domestic violence as a factor); see also Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 432 (1991) (suggesting that bad outcomes in battered women's homicide cases are more a result of the judicial application of statutory definitions rather than the statutory provisions themselves).

¹⁶⁰ See *supra* notes 65–66 and accompanying text; Kinports & Fischer, *supra* note 153, at 195, 197 (noting a study of the impact of domestic violence statutes revealed that judges were not awarding the full range of remedies provided); HART, *supra* note 150, at 24 n.219 (reporting on a study indicating that judges were awarding significantly less relief than requested by battered women); *Meeting the Legal Needs of Battered Women in North Carolina*, in NORTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE (1995) [hereinafter NC SURVEY] (reporting on statewide survey of domestic violence programs indicating that judges regularly fail to issue "meaningful protection orders" and that most judges fail to include provisions for custody, child support, visitation, and exclusive use of possession of the home) (on file with the author); JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* 129 (1999) (noting that judges often do not order child support in domestic violence proceedings as it is not considered important). See also Simon, *supra* note 153, at 47 (noting that, historically, domestic violence injunctions have not been readily available to victims at all).

¹⁶¹ See Lisa Memoli & Gina Plotino, *Enforcement or Pretense: The Courts and the Domestic Violence Act*, 15 WOMEN'S RTS. L. REP. 39, 47 (1993) (noting that the average time for each domestic violence case to be heard in New Jersey was approximately 5 minutes and 45 seconds); PTACEK, *supra* note 160, at 161 (reporting that in some courts studied in Massachusetts, a judge disposed of 8 consecutive civil protection order hearings in less than 18 minutes. He makes a "favorable" comparison with another judge who took 1 hour and 45 minutes to dispose of the same number. The second judge spent an average of 13 minutes per hearing as opposed to approximately 2 minutes per hearing spent by the first judge).

¹⁶² See generally Kelly Rowe, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855 (1985).

port, notwithstanding specific statutory authority to do so.¹⁶³ They often refuse to restrict visitation, despite proof of threats of violence.¹⁶⁴

The challenges posed by expedited schedules, time constraints, pro se litigants, and other daily complications in the legal system, must be considered in order to correct difficulties with the law. These problems are serious, but they are perhaps easier to remedy—if not to suffer—than problems that arise from systemic inequality. In domestic violence cases, the law's malfunctioning results from an even more deleterious set of relations between the legal system and a group of litigants. The historic belief that domestic violence matters have no legitimate place in the courts is centrally implicated in the failure of the legal system to address them.

At issue are deeper structural problems which provide the ingredients for the subordinated treatment of gender-based violence claims. The legacy of past indifference to domestic violence claims, whereby wife beating found countenance in doctrinal law, continues to insinuate itself in modern jurisprudence.¹⁶⁵ While the law has evolved from the blatant legal sanctioning of wife abuse to a standard that declares such matters to be private concerns beyond its reach, these principles continue to act on court decisions in a less covert fashion, but always with devastating consequences.¹⁶⁶ Despite shifting forms that often obscure the most flagrant forms of inequality, the perpetuation of certain judicial practices expresses a view that domestic violence claims are unwelcome in the courts.

B. *Examining Operational Difficulties: Domestic Violence Claims in the Courts*

In the state courts, domestic violence claims suffer as a result of processes and predilections that require investigation and analysis. This section explores the stratification and development of hierarchical values that affect gender-based violence as a legal claim, the cate-

¹⁶³ Epstein, *supra* note 11, at 43 (noting almost half of the domestic violence agencies from across the country report that judges refuse to grant relief such as custody, child support, and other forms of financial relief in domestic violence hearings).

¹⁶⁴ Chris O'Sullivan, *Estimating the Population at Risk for Violence During Child Visitation*, DOMESTIC VIOLENCE REPORT, June/July 2000, Vol 5, No. 5, at 65, 79 (noting that courts in New York City and Westchester, N.Y. rarely exercise the option of denying visitation when there is a risk of violence).

¹⁶⁵ See Siegel, *supra* note 44, at 2197 (arguing that despite a change in rules and rhetoric, there may be no substantive changes with regard to the treatment of gender violence).

¹⁶⁶ *Id.* at 2119, 2120.

gorization of disputes as private or public, and the insinuation of prejudices into the decision-making process. This discussion serves to examine the mechanisms which render battered women's claims unsuccessful in the courts.

1. Hierarchy and Status

Domestic violence cases, like family law cases in general, are no more welcomed by state judges than they are by the federal judiciary.¹⁶⁷ In the hierarchy of legal tasks, the nature of the judicial work in domestic violence cases is assigned lesser status; it is considered less important work, less prestigious, often trivial in nature.¹⁶⁸ Domestic violence claims usually entail imprecise and sometimes conflicting factual accounts and judges often resent the need to sort through the facts, particularly with unrepresented litigants.¹⁶⁹ Judges often regard these cases as "burdensome, fact-bound and often protracted . . . disputes."¹⁷⁰ They are seen as steerage cases—legal actions of low status that are bothersome and difficult.¹⁷¹ That most domestic violence suits

¹⁶⁷ See Epstein, *supra* note 11, at 42–43 (observing that judges consider domestic violence matters as "unimportant work"); Martha Minow, *Forming Underneath Everything that Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 819 (1985) (noting that family law's low status within the profession is well-known).

¹⁶⁸ See *Advocating for Victims of Domestic Violence*, 20 WOMEN'S RTS. L. REP. 73, 77 (1999) [hereinafter *Advocating for Victims*] (panel discussion featuring a newly appointed judge assigned to domestic violence cases who stated that matters she considers trivial, i.e., "if someone just gives the other person a shove," nonetheless may be brought to court under the domestic violence statute); Judith Resnik, *Visible on "Women's Issues,"* 77 IOWA L. REV. 41, 48 (1991); see also Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 FAM. L.Q. 617, 630 (1999) (noting the low status of family law cases and its implications for domestic violence cases).

¹⁶⁹ Cf. Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 963 (1990) (describing comparable negative reactions of federal judges when adjudicating "routine" claims which require them to decipher conflicting accounts about what happened, particularly where there is no attorney). Because most state statutes set forth a mechanism for pro se representation, there are more plaintiffs in domestic violence injunction proceedings representing themselves than in other cases, including custody and divorce cases which are less likely to be litigated pro se. See HART, *supra* note 150, at 7 (noting that two-thirds of state statutes have provisions which enable abused persons to file pro se).

¹⁷⁰ Cahn, *supra* note 22, at 1097.

¹⁷¹ SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN—LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* 14–15 (1990) (noting that interpersonal cases are regarded as "garbage cases" and low-status matters).

are presented by women attorneys and poor peoples' lawyers may also detract from their perceived importance.¹⁷²

Judges generally take a dim view of sitting on the family court bench where civil domestic violence claims are typically adjudicated.¹⁷³ Newly appointed judges are frequently assigned to family courts, sometimes at the expense of the litigants whose complex domestic violence cases serve as judicial on-the-job training.¹⁷⁴ Family court is often regarded as so undesirable that judges are assigned with the promise of a "promotion" to general civil or criminal divisions and are allowed to rotate out after one year.¹⁷⁵ Judges are usually grateful to escape assignment to specialized domestic violence courts.¹⁷⁶ Al-

¹⁷² Karen Czapskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 258-60 (1993) (noting that although there are no exact figures, it is likely that female lawyers represent battered women more frequently than male lawyers). *Id.* at 249 (noting that gender bias against women litigants cannot be eliminated until the female lawyers who frequently represent them are no longer the subject of bias themselves). Recent Department of Justice VAWA grants have increased the number of legal services lawyers devoted to claims of domestic violence, and legal services programs report a significant percentage of their work is related to spouse abuse claims. See Civil Legal Assistance Project Summaries, available at <http://www.ojpp.usdoj.gov/vawo/stategrants.htm> (last visited September 9, 2000). See Marc Galanter, "Old and in the Way": The Coming Demographic Transformation of The Legal Profession and its Implications for the Provision of Legal Services, 1999 WIS. L. REV. 1081, 1107 (1999) (indicating that even experienced legal services attorneys may lack the indicia of status).

¹⁷³ See Pearson, *supra* note 168, at 628 (noting that judges on the family court display lack of interest, of temperament, or understanding with respect to family law cases generally); see also Cahn, *supra* note 22, at 1091; Billie Lee Dunsford-Jackson, et al., *Unified Family Courts: How Will They Serve Victims of Domestic Violence*, 32 FAM. L.Q. 131, 131 (1998) (discussing Family Court processing of domestic violence claims); Frances G. Hill, *What's Family Court, and What's in It for The Lawyer*, in RES GESTAE, 26 (Nov. 20, 2000) (noting pilot family courts to handle domestic violence claims); Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1290 (2000) (noting that family courts handle domestic violence claims).

¹⁷⁴ See Memoli & Plotino, *supra* note 161, at 49 n.143; see also *Advocating for Victims*, *supra* note 168, at 78 (quoting remarks by a judge who notes that new judges are assigned to family and domestic violence courts to learn by "baptism by fire" despite the difficulty of these cases); Andrea Weigil, *Special Court Caught in Crossfire*, NEWS & OBSERVER, (Raleigh, N.C.), Oct. 12, 2000, at B1 (noting complaints about the fact that untrained and inexperienced judges and prosecutors are assigned to North Carolina's Wake County special domestic violence court).

¹⁷⁵ See Memoli & Plotino, *supra* note 161, at 49 n.143; see also Cahn, *supra* note 22, at 1091.

¹⁷⁶ See ENGLE MERRY, *supra* note 171, at 15 (those who handle "interpersonal" cases in the court have the lowest status); Ellen K. Solender, *Report on Miscommunication Problems Between the Family Courts and Domestic Violence Victims*, 19 WOMEN'S RTS. L. REP. 155, 159 (1998) (noting that family court judges were pleased with the establishment of a separate civil protection order court so that they could be "relieved of this burdensome part of their docket").

though judicial education is considered critical as a means to improve the treatment of domestic violence claims, and proposals to improve court responses to the problem often include formal judicial education programs, judges are often reluctant to include domestic violence issues in their training programs.¹⁷⁷

Dislike of domestic violence claims leads judges to dispense what may best be described as perfunctory justice.¹⁷⁸ Under the guise of maintaining judicial efficiency, battered women's cases are hurried through. In some jurisdictions, the average time allotted for each domestic violence case ranges from between two minutes and fifteen seconds and five minutes and forty-five seconds.¹⁷⁹ Other courts schedule approximately forty civil protection cases with the expectation of hearing only two to three cases.¹⁸⁰ Complaints about excessive litigation and over-crowded dockets are repeated without sufficient supporting empirical evidence.¹⁸¹

With efficiency as a pretext, courts may categorically refuse to consider issues properly raised in civil protection order proceedings.¹⁸² They may dismiss custody issues outright, particularly where

¹⁷⁷ See Laura Gatland, *Courts Behaving Badly*, 83 A.B.A. J. 30, 31 (1997) (noting that judges are reluctant to participate in judicial education programs about domestic violence, citing Judith Resnik, "If you [told] a group of judges, 'Let's have a seminar on constitutional law,' they wouldn't say, 'We don't need to talk about that. We've already talked about that.'"); Lynn Hecht Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1072-74 (1995) (noting that judicial education is critical but is lacking in many states); Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 166 (1996) (describing feminist education campaigns that are designed to remove gender bias from the courts, and judicial education programs as a feminist strategy for improving outcomes for battered women in the courts).

¹⁷⁸ See Tsai, *supra* note 173, at 1293-94 (describing cursory treatment of domestic violence cases in court).

¹⁷⁹ See *supra* note 160 and accompanying text.

¹⁸⁰ Margaret Martin Barry, *The Downside of Benign Intent*, 5 AM. U. J. GENDER SOC. POL'Y & L. 433, 437 (1997) (noting that in the D.C. area, although forty civil protection order hearings were often scheduled each day, the courts could only accommodate two to three hearings). See PTACEK, *supra* note 160.

¹⁸¹ See Rhode, *supra* note 98, at 996-97 (noting that if there is an increase in civil litigation, business, not domestic violence cases, are the largest and fastest growing category of civil litigation); see also ENGLE MERRY, *supra* note 171, at 17 (questioning the debate about litigiousness and noting that there is "no clear evidence that the litigation explosion has touched the lower courts").

¹⁸² See, e.g., V.C. v. H.C., Sr., 257 A.D.2d 27, 31 (N.Y. App. Div. 1999) (trial court refusing to consider exclusive use of the residence in a protection order hearing); see also Kinports & Fischer, *supra* note 153, at 195, 206 (noting that judges believe that women should be satisfied with relief limited to prohibiting further acts of violence and that other issues, including custody, can be taken care of in a divorce); Bernadette Dunn Sewell, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U.

women appear pro se despite statutory provisions authorizing custody awards, and instead require battered women to file separation, divorce, or custody actions.¹⁸³ Courts are often unwilling to consider property and financial support issues although properly raised in civil protection order proceedings.¹⁸⁴ Judges may even be unwilling to hear testimony about the violence itself.¹⁸⁵ Their demeanor reflects their decisions: they may act bored, impatient, or otherwise indicate that they are in a hurry to get through the proceedings, and often reveal little empathy for the battered woman.¹⁸⁶

2. Domestic Violence as Private Matters

Domestic violence cases suffer as a result of the courts' general dislike for matters involving personal problems.¹⁸⁷ Courts equate domestic violence claims with "family problems, as private matters, as sexual miscommunication."¹⁸⁸ When cast in the private realm, the matter moves into "spheres of activity that are or ought to be free of governmental involvement."¹⁸⁹ The dichotomy between the public and the private exercises a strong hold on the judiciary, despite efforts to expose the fallacy that most issues can be strictly categorized solely as either.¹⁹⁰ Adherence to the distinction between public and private

L. REV. 983, 1011 (1989) (noting that judges often believe that domestic violence is an isolated event best handled by another court or social service agency).

¹⁸³ See Kinports & Fischer, *supra* note 153, at 195, 206; NC SURVEY, *supra* note 160 (noting that judges routinely told women who appeared pro se in domestic violence injunction proceedings that they needed to hire an attorney to seek custody).

¹⁸⁴ See Kinports & Fischer, *supra* note 153, at 205.

¹⁸⁵ See Symposium, *Women, Children, and Domestic Violence: Current Tensions and Emerging Issues*, 27 FORDHAM URB. L.J. 567, 590 (2000) (comments from Leah Hill describing the "quieting of violence" where judges refused to allow domestic violence victims to describe the incidents fully).

¹⁸⁶ See PTACEK, *supra* note 160, at 101; *see, e.g.*, Kathleen Waits, *Battered Women and Their Children: Lessons from One Woman's Story*, 35 HOUS. L. REV. 29, 57 (1998) (quoting a battered woman's story: "The judge seemed bored and annoyed when I started to cry. He asked 'How much longer is this going to take? Are we almost done here?'").

¹⁸⁷ See ENGLE MERRY, *supra* note 171, at 1 (observing that courts in this country do not like addressing problems that arise between neighbors, friends, lovers, and spouses).

¹⁸⁸ See *supra* note 69 and accompanying text.

¹⁸⁹ Anita L. Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175, 1177 n.11 (2000) (quoting ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 33 (1988)).

¹⁹⁰ See Penelope E. Andrews, *Globalization, Human Rights and Critical Race Feminism: Voices from the Margins*, 3 J. GENDER RACE & JUST. 373, 396 (2000) (observing that this construct harms women in the context of international law as well); William N. Eskridge, Jr., *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 776-77 (1991) (calling for the rejection of the public/private dichotomy as a "coher-

fuels courts' determination to avoid judicial involvement in these matters.¹⁹¹

Narrative accounts of domestic violence unfold in court within the context of personal or intimate relationships. The narratives often appear to judges as problems relating to personality flaws, relationships gone bad, anger and jealousy, and hence are easy to reject as legal problems.¹⁹² Judges decline to consider factors outside the relationship which might facilitate understanding of the context of domestic violence, including economic, political, and socio-cultural dimensions of the problem.¹⁹³ As a result, few opportunities are available to expose the formations of power within relationships that are related less to privacy issues than to patriarchy, where women are routinely prevented from exercising choices to stay or to leave, and where the harm that occurs is visited upon women as a category rather than a woman as an individual.

By confining the problem to the boundaries of personal relationships, moreover, domestic violence is represented as a deviation from idealized notions of family values.¹⁹⁴ Victims are often blamed for causing and/or contributing to the abuse they have suffered.¹⁹⁵ The proposition of domestic violence as deviant behavior between intimate partners not only allows judges to discount a victim's credibility, but also creates additional incentive for judges to decline to identify the patterns and larger consequences of these acts.

The characterization of the issue as private also has consequences for the method of intervention. In family law cases generally, there is a trend toward the privatization of dispute resolution. This demon-

ent way of thinking about political legitimacy and social order"); G. Kristian Miccio, *Notes From The Underground: Battered Women, the State, and Conceptions of Accountability*, 23 HARV. WOMEN'S L.J. 133, 155 (2000) (noting that such dichotomy results in state collaboration with batterers and the perpetuation of violence).

¹⁹¹ See Pearson, *supra* note 168, at 621 (noting that mediation has become the predominant method of resolving domestic matters).

¹⁹² See ENGLE MERRY, *supra* note 171, at 14 (arguing that courts view cases such as domestic violence claims as interpersonal disputes which are not welcomed in the court); Kinports & Fischer *supra* note 153, at 201 (courts considering domestic violence as just "a fight between two people").

¹⁹³ See Kinports & Fischer, *supra* note 153, at 200-01 (noting courts' refusal to consider anything but the specific incident that triggered the filing of the petition).

¹⁹⁴ See DEBORAH RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* 114 (1997) (noting that battering relationships are described as "somasochistic on both sides" despite the lack of support for such pronouncement).

¹⁹⁵ *Id.* See also Solender, *supra* note 176, at 156 (describing the results of a study where judges in domestic violence claims had difficulty understanding that domestic violence was not provoked or otherwise related to the actions of the victim).

strates, in not so subtle ways, the lower value with which courts view these cases.¹⁹⁶ Family law cases, often including domestic violence matters, are regularly referred to mediation, attorney masters, and non-lawyer court counselors.¹⁹⁷ Judges who may champion the notion of private settlements as the best resolution, fail to discriminate among the types of cases which are suitable for such dispositions.¹⁹⁸ Judges favor attorneys who compromise and present consent orders for approval by the court.¹⁹⁹ Judges assign responsibility for domestic violence elsewhere and defend their preferred position of judicial insulation in order to avoid the difficult task of intervention in domestic

¹⁹⁶ See Clare Dalton, 31 NEW ENG. L. REV. 319, 366 (1997) (noting that some lawyers would prefer not to represent victims because they may face hostility when they do); Epstein, *supra* note 11, at 42 (reporting that judges do not want these cases in their courtroom); Zanita E. Fenton, *Mirrored Silence: Reflections on Judicial Complicity in Private Violence*, 78 OR. L. REV. 995, 1009 (1999) (noting that judges treat domestic violence as private matters).

¹⁹⁷ See Pearson, *supra* note 168, at 621 (noting that by 1998, all but six states had statutes that included family mediation of some type). Courts may require parent education programs. *Id.* at 622-23. "Parent coordinators" or "domestic case managers" may be assigned by courts where parties file a certain number of motions in a family matter, and intake workers may be required to screen family law litigants to determine to which alternative dispute resolution they must be referred. *Id.* at 626. Some unified family courts require case management, much of which relies heavily on non-attorney court counselors or case managers and includes mandatory use of alternative dispute resolution techniques. See also O'Neill v. Stone, 721 So.2d 393, 394 (Fla. Dist. Ct. App. 1998) (domestic violence proceeding referred to a general master/attorney), Mallin v. Mallin, 541 N.E.2d 116, 116 (Ohio Ct. App. 1988) (noting that a domestic violence claim had been heard by a referee); Cheryl Daniels Howell, *North Carolina's Experiment with Family Court*, POPULAR GOV'T, Vol. 65, Summer 2000, at 15, 17. Despite the research and some state statutes which discourage domestic violence from being mediated, these cases are also referred for private dispute resolution; Amy B. Levin, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?* 47 UCLA L. REV. 813, 829 (2000) (noting that courts often refer domestic violence cases to mediators who are untrained in the dynamics of domestic violence).

¹⁹⁸ This is generally true in both federal and state courts. See Resnik, *supra* note 27, at 1000 (noting the "federal judiciary's growing commitment to party accord and informal processes").

¹⁹⁹ Martin Barry, *supra* note 180, at 433-34 (noting that judges try to encourage consent orders to avoid having to hear contested cases). In North Carolina, one judge has fashioned his own "consent" order which he urges litigants to consider. The order has no findings of fact nor conclusions of law and gives no indication of wrongdoing by the perpetrator nor vindication to the battered woman who has sought court intervention. There is pressure, however subtle, exerted on the parties to enter into this "consent" order in lieu of a hearing. Barbara Hart, a national domestic violence expert has noted that domestic violence attorneys often practice before judges who do not like attorneys who litigate family law issues. They prefer attorneys who conciliate and settle their cases. Barbara Hart (unpublished written comments, July 30, 1999) (on file with author).

violence matters.²⁰⁰ They shirk their responsibility to hear testimony, to make findings, to determine outcomes, and otherwise to treat these cases like cognizable legal claims.²⁰¹

3. Gender Bias: The Court's Compass

The beliefs that domestic violence issues are less important, private, and not the courts' concerns are often related to and expressed as biases of judges, affecting the outcome of each case.²⁰² Bias may be understood as a result of cognitive functions and experiential deficits. But perhaps more importantly, it must be discerned as a condition that gives shape to the legal cultural practices and structures by which women experience discouraging outcomes in court.

Judges are dependent on cognitive strategies shaped by their past experiences that result in stereotypical assumptions.²⁰³ The vast majority of judges who generally endeavor to be fair-minded draw on a reservoir of views and presumptions that may operate at a subtle and unintentional level.²⁰⁴ But judges make decisions which affect the lives of others and thus are responsible for recognizing and countering the

²⁰⁰ Cf. Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1338 (1999). Bandes describes the mechanisms used by judges to avoid taking a stand against police brutality and illuminates judicial mechanisms which parallel those of judges who avoid domestic violence issues. She notes that there is a strong preference for judicial insulation which judges maintain by invoking various devices to assure that they do not have to take a stand against the status quo.

²⁰¹ Martin Barry, *supra* note 180, at 437 (noting that judges prefer not having to make any decisions in domestic violence cases). See, e.g., *In re V.C.*, 257 A.D.2d at 31 (where the trial court is reported to have refused to consider a victim's request for exclusive use of the residence after findings of abuse, stating, "If the petitioner wants the apartment she will have to take appropriate action in the appropriate court. This is not the court for this. You can have a hearing for 20 months and I will never rule on who gets this apartment. It's not before me.").

²⁰² See Gatland, *supra* note 177, at 30. See generally Andrew Beckerman-Rodau, *A Jurisdictional Approach to Common Law Legal Analysis*, 52 RUTGERS L. REV. 269, 269 (1999) (describing a theoretical framework for analyzing judicial decision-making which includes the individual biases of judges).

²⁰³ See Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 575 n.81 (1998); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1500 (1998) (observing that legal analysis is affected by a judge's "range of personal and political preferences," and a "specialized cultural competence" [based on] his knowledge and experience "in the law").

²⁰⁴ See Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 10-11 (1994) (noting that natural mental processes of categorization allow a judge to use information efficiently but not without compromising impartiality in the decision-making process).

resulting impairment to impartiality.²⁰⁵ Regardless of intent, in domestic violence cases, the effect of cognitive strategies may impair reasoning, distort the facts, reduce battered women's claims to stereotypes, and result in systematically biased decisions.²⁰⁶

Experiential deficits skew the courts' understanding of the experiences of battered women. Judges, both male and female, often lack an understanding of the circumstances in which battered women must calculate survival strategies on a daily basis.²⁰⁷ The problem is compounded further by the fact that most presiding judges are men. In fact, men are not ordinarily victimized by an intimate partner.²⁰⁸ The choice between domestic violence and homelessness is not one men often confront. Child abuse or neglect allegations for remaining in an abusive relationship are not charges that men ordinarily face.²⁰⁹

In these cases, prevailing assumptions about independent and autonomous individuals who freely choose to be, or not to be, in an abusive relationship are based on cultural norms which are contrary

²⁰⁵ *Id.* at 20 (calling on judges to take steps to counter the influence of bias on their decisions and when unable to do so in a specific case, to disqualify themselves). See generally Penny J. White, *Surviving the Politics of Judging*, 20 J. NAT'L ADMIN. L. JUDGES 149 (2000) (noting that by accepting the responsibilities of being a judge, one must counter facets of human nature).

²⁰⁶ Psychologists and behavioral scientists describe the mechanisms by which a process of categorization allows a judge to use information efficiently but not without compromising impartiality in the decision-making process. See Nugent, *supra* note 204, at 10-11; AMSTERDAM & BRUNER, *supra* note 88, at 24 (noting that "category systems are often used hegemonically, as instruments of power" and that gender-based category systems place women at the bottom). Cf. Guggenheim & Hertz, *supra* note 203, at 571 (describing how the distorting influences of managing information results in bias in juvenile cases).

²⁰⁷ Although the numbers of women judges have been increasing, it has yet to be determined if they adjudicate in a manner sufficiently different from their male counterparts. See generally Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 891 (1995). The process of judicial selection and socialization may minimize differences in values between men and women judges. *Id.* at 906 n.112. However, studies demonstrate that at least in the area of employment discrimination, a judge's gender is an important factor. *Id.* This is likely a result of women judges having been subjected to gender discrimination themselves or because they can better empathize with those who have. *Id.* That women judges would more easily empathize with victims of domestic violence is a plausible assumption.

²⁰⁸ Ninety-five percent of victims are women. Klein & Orloff, *supra* note 15, at 808.

²⁰⁹ *Id.* An estimated 50% of the homeless population are women and children fleeing abuse. See Joan Zorza, *Women Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 420, 420 (1991). Forty-four percent of cities surveyed by the U.S. Conference of Mayors identified domestic violence as a primary cause of homelessness; see also Lynn Hecht Schafran, *Is the Law Male? Let Me Count The Ways*, 69 CHI.-KENT L. REV. 397, 408 (1993) (noting that it is common to blame mothers but not fathers for children's problems); Waxman & Trupin, *A Status Report on Hunger and Homelessness in America's Cities*, 1997 U.S. Conference of Mayors, Washington, D.C.

to the realities of those women who are without such choices.²¹⁰ Ideological axioms that define "leaving" as the logical and rational response to domestic violence create a construct whereby women who do not conform to this convention are viewed with suspicion and skepticism.²¹¹

Judges' experiential deficits act as disincentives to ameliorating the condition of battered women. Lack of experience creates difficulties for judges who are required to sort out conflicting accounts of violence. In contested hearings, abusers underestimate the use of violence and under-report both the frequency with which they resort to violence or other controlling acts, and the gravity of any resulting injuries.²¹² Judges lacking personal experience with domestic violence, without knowledge of the sociology of the autonomy of women in relationships, often search for familiar elements as a means to reconcile conflicting testimony.²¹³ The oft-repeated cases of women who recount that they were battered because dinner was cold, late, overcooked, or undercooked, cannot be reasonably construed by

²¹⁰ Martha Mahoney explains that because courts perceive women as possessing the means to leave an abusive relationship, leaving becomes the normal response. "Once exit is defined as the appropriate response to abuse, then staying can be treated as evidence that abuse never happened." Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1285 (1992) [hereinafter Mahoney, *Exit*]. See also Hunter, *supra* note 177, at 162 (noting that judges may believe that if the abuse was as bad as described by the victim, she would have left the relationship. "[F]ailure to leave works against the woman's credibility; either the abuse did not occur at all or it was not as severe as she claimed."); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 64 (1991) [hereinafter Mahoney, *Legal Images*] (noting that the law assumes that women can choose to leave although women's choices are in fact coerced).

²¹¹ See Czapanskiy, *supra* note 172, at 252 (quoting a judge in a domestic violence case who stated to the battered woman: "I don't believe anything that you're saying. The reason I don't believe it is because I don't believe that anything like this could happen to me. If I was you and someone had threatened me with a gun, there is no way that I would continue to stay with them. There is no way that I could take that kind of abuse from them. Therefore, since I would not let that happen to me, I can't believe it happened to you."). A narrow understanding of important social issues frequently contributes to the law's injustice. Cf. Yamamoto, *supra* note 14, at 847 (discussing the court's narrow understanding of race and racial discrimination as one explanation for the courts' hostility toward such claims).

²¹² Russell P. Dobash et al., *Separate and Intersecting Realities: A Comparison of Men's and Women's Accounts of Violence Against Women*, 4 VIOLENCE AGAINST WOMEN 382, 395-96, 399-400, 402-04, 407 (1998).

²¹³ See Epstein, *supra* note 11, at 39 (judges are swayed by myths about domestic violence, and in particular that women have the opportunity to leave a violent relationship when they want); Mahoney, *Exit*, *supra* note 210, at 1285. The erroneous assumptions about domestic violence which pervade the court make it much less likely that a judge will be willing to believe a woman's account of abuse.

judges as stating a motive for violence against an intimate partner.²¹⁴ Judges have difficulty reconciling the testimony with their own experiences and understandings.

As a result, judges seek to construct another purpose or provocation for the abuser's wrong-doing that satisfies a need for motive. Seeking motives in such cases is problematic, because it sets up a process of atomizing and individuation of incidents in a dynamic situation that should be understood as a complex pattern of power and control. Motives, however, offer something legally tangible, a signpost in an otherwise uncharted terrain with which judges reconstruct circumstances of abuse largely as cause and effect, provocation and reaction.²¹⁵ The issues of the case thus assume a form recognizable to a judge, but unreal to a battered woman.

Bias as ignorance may also transform itself into obvious discrimination against women who bring domestic violence claims to court, manifesting itself in disrespectful and insensitive treatment.²¹⁶ Gender bias studies have documented cruel and shocking remarks made by judges during domestic violence hearings.²¹⁷ A Georgia judge recently ordered a defendant in a domestic violence case to take his victim out to dinner once a week and "try to work it out."²¹⁸ Another judge pondered from the bench whether it was possible for a married man to walk away without physically abusing his wife if he found her in bed with another man.²¹⁹ Yet another judge determined that an estranged husband's attack on his wife, from whom he had been separated for over a year, was provoked by the fact that she had been on a camping

²¹⁴ Czapanskiy, *supra* note 172, at 254–58.

²¹⁵ See Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 *Tex. L. Rev.* 1929, 1930 (1991) (arguing that judges may make serious errors because of their inability to identify with the person whose case is before them; instead, they base their decisions on their own experiences and understandings which they assume to be neutral or truthful).

²¹⁶ See Kinports & Fischer, *supra* note 153, at 207.

²¹⁷ See Hecht Schafran, *Accounting for Judges*, *supra* note 177, at 1064–67; Epstein, *supra* note 11, at 40 (describing demeaning comments made by judges who mistreat victims of domestic violence such as "oh, it's you again," "how long are you going to stay this time?," and "if you go back . . . one more time, I'll hit you myself").

²¹⁸ See Margaret Graham Tebo, *Equal Justice*, 86 *A.B.A. J.* 44, 44 (Sept. 2000).

²¹⁹ See Hecht Schafran, *supra* note 177, at 1064–67; Epstein, *supra* note 11, at 40 (describing a Florida judge who, after hearing testimony that a man had doused his wife with lighter fluid and set her on fire, burst into song in open court, crooning, "You light up my wife," to the tune of "You Light Up My Life," and another case in New York where a judge began a hearing with the comment, "Well, well, well, we had a little domestic squabble, did we? Naughty, naughty. Let's kiss and make up and get out of my court.").

trip with her boyfriend.²²⁰ Judges also punish women for crying or displaying emotions in court: In a case in Tampa, Florida, a woman who sought a domestic violence protection order against her estranged husband (accused of raping her) was sentenced to spend a day in the county jail after becoming emotionally overwrought and running out of the courtroom crying because the judge refused to grant her request for relief.²²¹

Bias allows judges to jettison judicial standards of decency and resort to the "word from the underground" about the "fallacy" of domestic violence claims and the lack of trustworthiness of women who file them.²²² Battered women's credibility is thus diminished because they are often considered manipulators and liars intent on using the court to achieve some wrongful purpose, such as revenge or advantage in a divorce case.²²³ When a woman seeks to control the circumstances in which her abuser can see the children of the relationship, she is viewed as vindictive and punitive.²²⁴

²²⁰ See Hecht Schafran, *supra* note 177, at 1064-67.

²²¹ See Bill Duryea, *Women's Reaction to Ruling Leads to Jail*, ST. PETERSBURG TIMES (Fla.), Dec. 1995, at 1A; Waits, *supra* note 186, at 57 (describing how crying and emotionalism had negative affects on a judge during a domestic violence hearing).

²²² See *Advocating for Victims*, *supra* note 168, at 76 (remarks of a judge assigned to domestic violence cases who claimed difficulty distinguishing the *really serious and true* domestic violence cases and apparently relied on "word from the underground" that the domestic violence statute is manipulated) (emphasis added). The judge, in her panel remarks, neither describes any cases anecdotally nor offers any data to support her confidence in the "word from the underground" as guidance for her opinion that domestic violence complaints are filed not because of violence but "when there is an issue of whether someone stays in the marital residence".

²²³ PTACEK, *supra* note 160, at 70 (noting that historical characterizations of women as liars and manipulators who are dishonest in their claims of domestic violence have made a comeback in recent years as evidence of a backlash against the modest gains made by the battered woman's movement). See Dalton, *supra* note 196, at 366 (women are often thought to fabricate domestic violence accusations of "manipulating the system for their own advantage, distorting the truth," and setting out to use the domestic violence proceeding as a means to leverage gain in divorce or custody proceedings. In fact, it appears there are no empirical studies to support the allegation that women routinely fabricate stories of abuse anywhere. *Id.* at 366 n.137. There are, however, studies that demonstrate the opposite: that documented instances of women abusing the protective order process are rare and, in any event, no greater than any other crimes. See Susser, *supra* note 159, at 883-84 (citing a study by the American Psychological Association).

²²⁴ Dalton, *supra* note 196, at 367; ENGLE MERRY, *supra* note 171, at 1, 14 (observing that courts consider plaintiffs who bring interpersonal cases to court as using the court to fight with their lover or spouse).

Credibility issues are critical in domestic violence cases, where a battered woman's testimony may be the only available evidence.²²⁵ But her account can be affected by fear and trauma, hampering her ability to speak with clarity and force while recounting the abuse.²²⁶ Paradoxically, if she does speak with confidence and authority, she may appear without vulnerability and fear, without—in other words—those traits most commonly associated with victimhood. She will not conform to the stereotype of a battered woman, likewise impugning the credibility of her story in the eyes of a judge.²²⁷

The power of bias may also insinuate itself in the invocation of neutral rules which are implemented according to values and assumptions of the judge, but which are often injurious to battered women.²²⁸

²²⁵ See Alison M. Jaggar, *Sexual Equality as Parity of Effective Voice*, 9 J. CONTEMP. LEGAL ISSUES 179, 191 (1998) (noting that women will not be listened to as a result of the phenomenon of "downward social constitution" where disregard for what a person is saying is likely to increase when "relatively privileged people are in conversation with those who belong to what" has been categorized as "'diminished social categories,' that is to groups that are disrespected or stigmatized." Thus, judges may listen inattentively, or interrupt, or not respond with the seriousness that is appropriate to the person's concerns. Some suggest that women have difficulty in being believed because they are regarded as "less worthy of belief than men for the sole reason that they are women." See Kathy Mack, *Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process*, 4 CRIM. L.F. 327, 328 n.3 (1993). But see Hunter, *supra* note 177, at 165 (noting that not all women exhibit powerless speech and that factors such as class, education, race, and ethnicity are important factors).

²²⁶ Battered women who are likely to suffer from stress and fear may be affected in their ability to provide their narrative in a variety of ways. They may speak with little affect, in a flat or numb voice. This may be due to fear, to the fact that they are frozen with fear, thinking of all of the threats which have been communicated to them which would come to pass if they took the very step they have taken—told someone about the abuse—that someone being a judge. They may actually suffer from Post-Traumatic Stress Disorder. See Mary Ann Dutton & Catherine L. Waltz, *Domestic Violence: Understanding Why It Happens and How to Recognize It*, FAM. ADVOC. Winter 1995, at 14–18. And if their attorney seeks to explain their otherwise inappropriate demeanor, they are likely to suffer because the judge will consider them pathological which may in turn affect the level of credibility they are accorded and threaten their ability to gain custody. See Solender, *supra* note 176, at 158 (judges who come to believe that because of domestic violence, women suffer diminished capacity and are incapable of taking care of themselves may grant custody to the abuser).

²²⁷ See CONLEY & O'BARR, *supra* note 25, at 32 (noting the sexual double bind in women's testimony. If she is emotional, she may be considered flighty and less than credible—if she is poised and in control, she does not fit the stereotype.); Mahoney, *Exit*, *supra* note 210, at 1306 (stating that "[l]aw forces upon us a discourse of victimization. Either you are on the playing field of liberal competition, in which case you require no protection, or you prove into a category as a victim who is being kept off the field.").

²²⁸ For example, the effects of gender and gender bias on the rules of evidence have been explored by feminist legal theorists, particularly in the difficult area of battered women's use of self-defense. See Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 862–63 (1990) (noting that so-called neutral rules mask the political and social

Legal procedures that appear objective and neutral are neither, when the biases harbored by a judge are infused in their application.²²⁹ Judges who do not understand that abusive behavior is a dynamic with connected and controlling characteristics, and not isolated instances of assault, may apply the evidentiary requirement of relevancy in a fashion that precludes women from testifying about their history of assaults.²³⁰ Judges thereby focus on an incident of alleged physical harm and limit testimony and evidence to a specific event or to incidents which are closely related chronologically.²³¹ This is particularly problematic if the most recent episode, prompting the request for relief, is not the worst episode a woman has endured.²³² Thus, if a

viewpoints that enter into decision-making; they hide the ideologies of judges and fail to serve women's needs); Fenton, *supra* note 196, at 999 (referring to strict adherence to abstract rules of law as formalism which operates to silence battered women); Hunter, *supra* note 177; Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 416 (1991) (noting the manipulation of facially neutral evidentiary rules, which are applied in ways that take into account traditional male perspectives which harm women's interests); Marilyn MacCrimmon, *The Social Construction of Reality and the Rules of Evidence*, 25 U. BRIT. COLUM. L. REV. 36, 36 (1991).

²²⁹ See Kinports, *supra* note 228, at 431 (noting that whether a fact may be considered relevant depends in part on the listener's experiences and point of view); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 396 (1990) (suggesting that procedural devices are interrelated with the substantive issue as well as the parties and reflect attitudes about both).

²³⁰ In one reported case, a woman seeking a domestic violence order was prevented from describing events considered irrelevant because they took place two years before the most recent incident: "We're not going back that far." The woman was granted a protection order but the judge refused to order the abuser out of the house. The victim was later beaten to death with a baseball bat by her abuser husband in front of their 12-year old son. See PTACEK, *supra* note 160, at 8 (observing that judges often narrow the focus to discrete incidents); Naomi R. Cahn, *Speaking Differences: The Rules and Relationships of Litigants' Discourses*, 90 MICH. L. REV. 1705, 1717 (1992) (pointing out that the determination of relevant facts draws upon subjective views despite the seeming neutrality of evidentiary rules); Kinports & Fischer, *supra* note 153, at 201 (pointing out that judges often refuse to allow a pattern or history of domestic violence to be presented); Memoli & Plotino, *supra* note 161, at 39. In a case in North Carolina heard in February 2000, a judge determined that violence that occurred approximately two weeks before the incident which provoked the complainant to file for a domestic violence injunction was "too remote" to consider. (Trial transcript on file with author).

²³¹ See, e.g., Karen Tracy, Note, *Building a Model Protective Order Process*, 24 AM. J. CRIM. L. 475, 481 (1997) (noting that in some jurisdictions, time limitations between assaults and filing for relief are imposed to reduce court costs and, as a result, judges' understanding of the protracted dynamics of domestic violence is distorted).

²³² Many women who experience abuse do not seek protection orders after the first incident, or even after egregious incidents. One reason for this is that it may not be safe for them to do so. See Mahoney, *Legal Images*, *supra* note 210, *passim* (explaining separation violence and the danger of leaving). The problem is compounded when women seek protection orders based on threats of physical abuse although state statutes authorize the

woman waits to seek relief until a subsequent assault—one that does not produce injuries or does not rise to a sufficient level of outrage in the judge's perspective—she may be denied that relief because she is precluded from testifying about a prior, more violent course of conduct she has experienced.²³³

The result is a fragmentation of testimony which distorts stories in ways that negate the experiences of battered women and deny a more complete understanding of gender-based violence.²³⁴ Without evidence documenting the history of violence and the connections between emotional abuse, threats, and physical harm, patterns of domestic violence rarely will be discernible. Furthermore, important connections between battered women themselves remain obscured,²³⁵ impeding the recognition of domestic violence as a public problem with larger social implications, and confining it to individual idiosyncrasies without larger meaning.²³⁶

C. *Perpetuating the Marginalization of Domestic Violence Claims*

Flawed and biased judicial processes and decision-making mechanisms coalesce to form a cultural system with structures and practices that marginalize domestic violence in the courts.²³⁷ These mechanisms may reproduce themselves in ways that are not overtly discriminatory, and that produce negative results unintentionally, but

granting of such orders where there have been threats unaccompanied with actual physical violence. In such instances, where threats are lodged, even where there has been prior violence, the absence of immediately recent violence may defeat a claim for relief. See Kinports & Fischer, *supra* note 153, at 190–91 (noting that threats of shooting or stabbing where there has been past violence is still not sufficient to obtain a civil protection order).

²³³ See Kinports & Fischer, *supra* note 153, at 190 (observing that some judges will distinguish between whether a batterer's fist was open or closed in deciding whether to grant relief).

²³⁴ See Kinports, *supra* note 228, at 419–30 (providing a feminist critique of the law of evidence as a whole).

²³⁵ See Hunter, *supra* note 177, at 131 (noting that "the decontextualized examination of disaggregated incidents can leave a case in shreds"); Yamamoto, *supra* note 229, at 396.

²³⁶ Cf. Bandes, *supra* note 200, at 1318 (describing the ways in which claims of police brutality are reshaped by the court as detached incidents. According to Bandes, this makes claims of government misconduct less threatening and easier to dismiss than if the patterns and coherent structure were revealed in court).

²³⁷ ENGLE MERRY, *supra* note 171, at 577 (law as culture is expressed as practices and systems). See John MConley & William M. O'Barr, *Crime And Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 5, 9 (1997) (noting a cultural theory stating that shared beliefs and practices that comprise culture can take on a life of their own, ultimately dictating the day-to-day behavioral choices of its constituents).

they nevertheless perpetuate the inferior legal status of these cases. For example, bureaucratic responses and administrative adaptations, shaped by a discourse and practice that devalue these claims, may diminish the effectiveness of recourse to the court system even as that system attempts, in good faith, to respond to the growing number of domestic violence litigants. Similarly, lawyers who handle domestic violence claims may unwittingly conform their conduct and practices to the constricted culture of domestic violence law, thereby contributing to and reinforcing it unintentionally.

These cultural practices may be insulated from correction by their very consequences within and outside of the judicial system: The subordination of domestic violence in the courts prevents education of the trial judge, who hears, at best, a disaggregated version of events. When civil domestic violence proceedings are limited at the trial level, so too are the opportunities for a transformation in the law that might occur if these claims were allowed to be presented fully, for the development of appellate law is hindered as well.²³⁸ The result is that individual cases may be predictably doomed, and there is diminished hope of elevating domestic violence cases, as a group, to the class of respected legal claims.²³⁹ At the same time, in and out of the courts there is evidence of a backlash toward battered women based on a perception that they have an unfair advantage and play on public sympathy.²⁴⁰ Moreover, increased attention to domestic violence has resulted in unfounded assumptions about progress in the courts and has produced skepticism, if not outright denial, that serious problems persist, making needed reforms all the more difficult to achieve.

1. Structural Designs and Limitations

The increase in requests for orders of protection, which has resulted largely from the passage of remedial statutes and the successes of the battered women's movement in educating the public, has tended to bureaucratize the judicial response to domestic violence.²⁴¹ Standardized forms are available from court clerks who often assist in their completion.²⁴² Lay advocates are sometimes available in the

²³⁸ See Yamamoto, *supra* note 14, at 886 (noting that court hearings have the potential to be "cultural performances, events that produce transformations in socio-cultural practices and in consciousness").

²³⁹ See Kinports & Fischer, *supra* note 153, at 214-15.

²⁴⁰ PTACEK, *supra* note 160, at 70; see Dalton, *supra* note 196, at 366.

²⁴¹ PTACEK, *supra* note 160, at 69.

²⁴² HART, *supra* note 150, at 7, 9.

court to assist battered women.²⁴³ These changes are often designed to allow women greater efficiency in accessing the courts without the need for attorneys, while providing some assistance to make the court experience less frightening.

But increased efficiency does not necessarily produce increased justice.²⁴⁴ The use of standardized forms containing boilerplate language frequently limits the ability of women to explain their case.²⁴⁵ Complicated patterns of abuse are reduced to a box-checking format that eviscerates meaning from the content of the domestic violence experience. Although such forms facilitate access to court, a plaintiff's ability to substantiate her claims is undermined by the use of pre-printed allegations that inherently discourage pleading claims with specificity.²⁴⁶ Lawyers generally use these forms as well, and, in the process, fail to recount their client's full story in a complaint.²⁴⁷ This is particularly problematic in domestic violence cases where there is no discovery and little opportunity for persuasion. Thus, although the complaint is one of the principal means for communicating any claim, it is difficult to use for that purpose in cases of domestic violence.²⁴⁸

Form orders are also available to judges in domestic violence matters. The uniformity of these orders is useful to law enforcement agencies who enter them in databases for enforcement purposes. But the forms inhibit the development of findings of fact and conclusions of law.²⁴⁹ Judges indicate their decision in these cases by checking a

²⁴³ *Id.* at 11–12.

²⁴⁴ See Yamamoto, *supra* note 229, at 352.

²⁴⁵ See Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 772 (1995) (noting the importance for civil rights lawyers to "go beyond the boilerplates, which do not lend themselves to portraying the unique position of their clients, who are socially marginalized underdogs").

²⁴⁶ See, e.g., *Buda v. Humble*, 517 N.W.2d 622, 625 (Neb. Ct. App. 1994) (order of protection granted but then reversed because the plaintiff's adoption of preprinted allegations was found to be too general to support a finding).

²⁴⁷ See Eastman, *supra* note 245, at 768–69 (observing that pleadings which once were considered "the quintessence of the law" have been "worn down by waves of reform to simplicity and plainness" yet still maintain great importance).

²⁴⁸ See *infra* note 369 and accompanying text.

²⁴⁹ See, e.g., *Price v. Price*, 514 S.E.2d 553, 554 n.2 (N.C. Ct. App. 1999) (reversal for failure to enter findings of facts and conclusions of law. The court of appeals noted that the form order was used and included several boxes, and that it was useful to accommodate the large number of domestic violence cases, but that the trial court should not neglect its responsibility to make necessary findings and conclusions); *Mechtel v. Mechtel*, 528 N.W.2d 916, 921 (Minn. Ct. App. 1995) (noting that court, which relied on pre-printed forms, erred in failing to make findings of fact).

box, with little attention to the unique details in a particular case. This, in turn, diminishes the impact of the court's message on the defendant, and may actually create enforcement problems.²⁵⁰ It also may result in an order which is difficult to sustain on appeal.²⁵¹

The creation of specialized domestic violence courts represents another administrative response to the increase in domestic violence claims.²⁵² The development of these integrated courts, designed to handle all aspects of domestic violence matters, is generally motivated by both organizational convenience and genuine interest in improving the court process.²⁵³ But the efficacy of these courts in improving judicial outcomes is not altogether clear.²⁵⁴ Some studies indicate that officials who work in specialized courts are just as likely to implement the law half-heartedly as their counterparts in courts of broader jurisdiction.²⁵⁵ In addition, specialized courts are not immune from the problem of gender bias.²⁵⁶ Furthermore, they have been reported to expose women to an increased risk of being charged with failure to protect their children from the batterer's abuse.²⁵⁷

Finally, although domestic violence cases present unique problems and may require enhanced training and courtroom safety precautions, a separate court for domestic violence claims isolates them from other legal claims and suggests that they are not only different, but also less important.²⁵⁸ The existence of special courts may excuse or discourage other judges from undertaking any training, notwith-

²⁵⁰ See David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 128 (2000) (noting difficulty in achieving compliance with court orders where judges fail to clearly formulate their terms).

²⁵¹ *Brandon v. Brandon*, 513 S.E.2d 589, 655 (N.C. Ct. App. 1999) (civil order of protection overturned on appeal due to the failure of the trial court to make findings).

²⁵² Some of these courts focus on criminal intervention as opposed to civil cases. See Tsai, *supra* note 173, at 1296; see also Susan K. Knipps & Greg Berman, *New York's Problem-Solving Courts Provide Meaningful Alternatives to Traditional Remedies*, 72 JUNE N.Y. ST. B.J. 8, 9 (2000).

²⁵³ See Knipps & Berman, *supra* note 252, at 9; Tsai, *supra* note 173, at 1296; see also Epstein, *supra* note 11, at 28-29.

²⁵⁴ See Epstein, *supra* note 11, at 46 (noting that in one study in the District of Columbia, despite the creation of a specialized domestic violence court, the percentage of domestic violence injunctions issued in contested cases decreased).

²⁵⁵ Pearson, *supra* note 168, at 1311-12.

²⁵⁶ *Id.* at 1312.

²⁵⁷ See Epstein, *supra* note 11, at 5, 34.

²⁵⁸ See Fine, *supra* note 122, at 298 (noting that while a separate court system offers administrative convenience, unique treatment sends the message that domestic violence is in some way different from "normal" legal issues and reduces the effectiveness of legal intervention).

standing the fact that domestic violence issues are likely to appear in a variety of legal causes and claims.²⁵⁹ These courts may become overly routinized, placing emphasis on efficiency and speed.²⁶⁰ Ultimately, special domestic violence courts may be an administrative expedience with the net effect of further stigmatizing domestic violence cases.²⁶¹

Both standardized forms and specialized domestic violence courts may be seen as well-intended developments which have had the unforeseen consequence of informalizing domestic violence proceedings instead of ensuring serious legal consideration. Domestic violence claims, particularly where judges perceive them as being handled by clerks and lay advocates, are reduced to quasi-legal experiences which reinforce the legal system's propensity to prevent them from being presented as formal legal claims at all. The potential benefits of these reforms are often undermined by systemic operational and cultural failures in the legal system's treatment of domestic violence claims. Without a transformation in the culture of the law, the legal system remains fraught with risks for battered women, giving rise to skepticism about the value and purpose of these new developments, and demanding ongoing scrutiny of them.

2. The Effect on Lawyers

The subordinated legal culture of domestic violence claims is likely to influence lawyers' conduct.²⁶² The belief that time constraints in the courts' area factor in the perfunctory treatment given these issues may cause attorneys to present abridged versions of their cases. Attorneys often waive opening or closing statements or limit the number of witnesses in an effort to fit the case within the "five minutes and forty-five seconds" allotted to the entire proceeding.²⁶³ Attorneys also withhold requests for certain forms of relief for fear of angering judges.²⁶⁴ Judicial indications of the low importance of these

²⁵⁹ See Hecht Schafran, *supra* note 177, at 1078-79; Deborah Goelman & Roberta Valente, *When Will They Ever Learn, Educating to End Domestic Violence A Law School Report*, ABA COMMISSION ON DOMESTIC VIOLENCE, *passim* (1997) (noting the potential intersection of domestic violence issues with almost all other areas of the law).

²⁶⁰ See Epstein, *supra* note 11, at 38.

²⁶¹ See Fine, *supra* note 122, at 298-99.

²⁶² See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 486 (1990).

²⁶³ See Memoli & Plotino, *supra* note 161, at 47.

²⁶⁴ O'Sullivan, *supra* note 164, at 65, 78 (noting that some attorneys indicated that they do not request a denial of visitation despite the danger to a woman and her children in order to avoid risking the anger of a judge).

cases create disincentives for writing briefs.²⁶⁵ Without opening or closing arguments, without facts or legal theories, the court is given little to interpret.²⁶⁶ These deterrents reduce the opportunities to practice the kind of law that might otherwise elevate the treatment of domestic violence cases on par with other civil cases. They also diminish the opportunity to educate judges about domestic violence issues.

The marginalization of domestic violence cases often affects attorneys' perceptions of the nature of their work.²⁶⁷ Even legal services attorneys who most frequently represent domestic violence victims exhibit an attitude discounting these cases as routine "service" cases rather than complex "impact" litigation.²⁶⁸ Pro bono attorneys are often reluctant to handle domestic violence, or any family law, matters.²⁶⁹ They too are affected by the low status assigned to these claims.²⁷⁰ When they do agree to handle domestic violence cases as part of their pro bono responsibilities, they are often lured by assurances that cases will be disposed of quickly, and that any related custody, visitation, or child support matters will be handled in separate proceedings.²⁷¹

²⁶⁵ Kinports & Fischer, *supra* note 153, at 214-15 (noting that abbreviated hearings deter consideration in the making of an appellate record).

²⁶⁶ See Barbara Bezdek, *Silence in the Court*, 20 HOFSTRA L. REV. 533, 577 (1992) (suggesting that interpretation as a critical function of the courts is unlikely to occur without the stages of a trial including openings, summation, the presentation of evidence and legal argument). Without presentation of facts and the opportunity to interpret them, judges have little or no opportunity to make determinations that will help either the individual claimant or those like her. See John Frazier Jackson, *The Brandeis Brief—Too Little, Too Late: The Trial Court as a Superior Forum for Presenting Legislative Facts*, 17 AM. J. TRIAL. ADVOC. 1, 1 (1993) (discussing the judicial decision-making process where judges can make policy as "shopping for facts").

²⁶⁷ See Dalton, *supra* note 196, at 367 (noting attorney reluctance to handle these matters and hostility toward these claims).

²⁶⁸ "Service" and "impact" work are terms that refer to the alleged division between categories of cases traditionally handled by legal services programs. Service work refers to the individual and perhaps more routine case; impact work refers to those cases that, either through class action mechanisms or a more complicated set of facts and circumstances, seek systemic relief applicable to many people. Although it is acknowledged that this paradigm is a consistently useful description, it nonetheless represents a hierarchy of work within legal services. See Margulies, *supra* note 139, at 1071-72, 1089-90 (noting the neglect of domestic violence issues by legal services and poverty law scholars who fall trap to the public/private distinction).

²⁶⁹ See Dalton, *supra* note 196, at 367 (suggesting that some lawyers, if given the chance, would prefer not to represent victims of domestic violence).

²⁷⁰ *Id.*; see Cahn, *supra* note 22, at 1114 (noting that historically, family law has been devalued in theory and practice and remains devalued in the courts).

²⁷¹ A common model for pro bono arrangements with legal services programs or law school advocacy programs is to request that private attorneys handle the protection order

Nor are lawyers immune from the myth of the manipulative woman pursuing a vindictive domestic violence claim.²⁷² This may be due, in part, to the construction of evidentiary obstacles, either by the dynamic of domestic violence or by operational failures within court processes, which cause attorneys to focus only on that part of the battered woman's narrative which they may expect to be admissible.²⁷³ As a result, lawyers may hear a disaggregated story which affects their understanding of the issues and impairs the credibility of their clients. In addition, attorneys, like judges, may have difficulty believing accounts of events beyond the realm of their personal experiences.²⁷⁴ This cannot but affect efforts to achieve justice for their battered women clients.

3. Restricting the Development of Domestic Violence Law

Judges who circumscribe the presentation of domestic violence cases are likely to remain uninformed about the dimensions of the problem, and they experience difficulty recognizing the relationship of domestic violence to other areas of the law. Because legal proceedings serve as a forum for the expression of community values and offer a venue for testing beliefs and reexamining and developing social norms, the absence of legal dialogue that deprives battered women of the opportunity to present their stories all but precludes the possibility of a sympathetic legal response that would influence the outcome of their claims.

Perfunctory treatment of civil cases at the trial level, moreover, results in limited hearings and undeveloped factual records such that

proceedings without regard to custody, visitation, or child support. These matters are referred to organized legal services programs. This arrangement through discursive and legal practice bifurcates relief proceedings and implies that protection orders which openly contain "stay away" or no "further assault provisions" are effective. Interview with Ann Piccard, former Pro Bono Coordinator, Bay Area Legal Services, Tampa, Florida, and Debbie Segal, former Executive Director, Atlanta Volunteer Lawyers Foundation (stating that pro bono attorneys who may be willing to undertake representation in protection order cases are reluctant to accept any contested custody matters). *See also* Survey responses from domestic violence attorneys with legal services of North Carolina. (Notes and responses on file with author).

²⁷² *See* Hecht Schafran, *supra* note 209, at 405 (describing difficulties male attorneys have believing their clients in related matters).

²⁷³ *See supra* notes 225–236 and accompanying text.

²⁷⁴ *See* Hecht Schafran, *supra* note 209, at 405 (describing a male attorney's confession that he had a difficult time believing his client's sexual harassment claim, "confusing [her] desperate cries for justice with hysteria"); Hunter, *supra* note 177, at 162.

the possibility of appellate decisions is reduced.²⁷⁵ Few indeed is the number of appellate decisions arising out of appeals filed by women denied adequate relief.²⁷⁶ The dearth of appellate cases is all the more ironic in light of the claim that domestic violence cases congest the courts: The small number of civil appellate decisions are typically generated by defendants who have appealed the issuance of an order against them.²⁷⁷

The failure to obtain relief results in formidable obstacles to appeals. A woman denied an emergency or ex parte order for relief may not appeal that interlocutory decision.²⁷⁸ Denied relief at the initial stages of the lawsuit, it is unlikely that she will continue to pursue a final order from which an appeal could be taken.²⁷⁹ A final hearing at which a skeletal "stay away" order is granted, but which lacks custody relief, may produce no record.²⁸⁰ Battered women who appear pro se are unlikely to take cognizance of the procedural requirements for a record. Even when women are represented by attorneys, the abbreviated domestic violence process results in a lack of proper concern for the record.

Without the presentation of evidence and law, and without quality fact-finding at the trial level, the opportunity to promote the development of the law through appellate review is all the more difficult. The appellate process benefits from the upward transport of fully explored factual and legal claims. The denial of opportunities to develop appellate law has far-reaching consequences. The prospects for the improvement of the quality of future lower court procedures and decisions are diminished, as are the prospects of elevating the status of domestic violence matters as legal claims. Any likelihood of changing the legal culture concerning domestic violence suffers commensurately.

²⁷⁵ Kinports & Fischer, *supra* note 153, at 215 (noting that abbreviated hearings deter consideration with the making of an appellate record).

²⁷⁶ See *infra* note 349 and accompanying text.

²⁷⁷ *Id.* One study noted that the few appeals that are filed are more likely to involve the abuser challenging the issuance of the order than the petitioner appealing its denial. Kinports & Fischer, *supra* note 153, at 214-15.

²⁷⁸ See Kinports & Fischer, *supra* note 153, at 215.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

4. Progress and the Masking of Inequalities

Denial that battered women face difficulties in the courts persists, despite heightened awareness of the problem.²⁸¹ Ironically, this denial is related to increased attention to, and awareness of, domestic violence issues. As a social problem, domestic violence has gained widespread publicity.²⁸² Newspaper editorials praise legislative efforts to toughen laws against domestic violence and new policies enhance law enforcement responses. Studies report the deterrent effects of mandatory arrest, pro arrest, no-drop policies, and other devices that increase sanctions against domestic violence offenders.²⁸³

Much of the legal response to domestic violence has been in the form of criminal law remedies.²⁸⁴ Criminal remedies, however, must be distinguished from civil relief, because criminal remedies are not always responsive to the needs of battered women.²⁸⁵ They do not provide women with the resources to establish secure lives with their children at home, at the workplace, or in their communities.²⁸⁶

Moreover, attention to criminal remedies actually contributes to skepticism that battered women continue to face difficulties in the courts.²⁸⁷ In fact, the contention that gender inequality persists is met with incredulity.²⁸⁸ Deborah Rhode notes that social scientists who demonstrate the prevalence of the problem of domestic violence are

²⁸¹ For a comprehensive overview of the persistent denial of gender inequality, see generally RHODE, *supra* note 194.

²⁸² See *id.* at 3.

²⁸³ See Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 1 (1992).

²⁸⁴ See Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits*, in SERIES: NIJ RESEARCH REPORT, Washington, D.C. (1996) (discussing the proliferation of criminal intervention strategies and the research that describes them and commenting that little research has focused on civil remedies).

²⁸⁵ Mills, *supra* note 11, *passim*.

²⁸⁶ In fact, improved civil outcomes may reduce the need for intervention by the criminal justice system. See Epstein, *supra* note 11, at 19–20 (citing a study which demonstrated that the types of relief afforded by full and complete civil protection orders which provide resources and conditions for escaping abusive relationships are what often reduces a battered woman's reliance on the criminal justice system).

²⁸⁷ See Bassler, *supra* note 122, at 1159–64. Bassler argues, for example, that notwithstanding the VAWA findings that state systems routinely failed battered women, no federal remedy was needed because of the adequacy of state remedies, specifically noting the civil protection order scheme. *Id.*

²⁸⁸ See RHODE, *supra* note 194, at 108 (documenting persistent denial of gender inequality in the courts and the "countercurrent of . . . denial").

described in the media as alarmists and exaggerators.²⁸⁹ Claims that domestic violence cases suffer in the courts are received with disbelief and dismissal, and are met with a view that women have undeserved advantages.²⁹⁰

The appearance of progress can lead to complacency and create barriers to future progress.²⁹¹ Actual failures are both masked and exacerbated by reforms shaped by and implemented at the margins of the legal system. New laws are passed, leading to the assumption that the problems have been addressed.²⁹² The challenge is to recognize and support those reforms that genuinely provide battered women meaningful support, while at the same time expose formalities of reform that neither improve conditions for battered women nor permit further change.

D. *Examining Outcomes: Consequence for Battered Women*

The legal system's operational failures are experienced most acutely by battered women who are denied relief. The harm they suffer is not simply an encounter with a system that devalues their claims, but the outcome of such an encounter as well. The marginalization of these claims exacerbates the already dangerous situation for battered women, because it makes them unable to gain meaningful access to an important institution where values are communicated.²⁹³ A description of the negative outcomes suffered by the large class of people whose claims are marginalized serves to refute the Court's assertion in *Morrison* that no "civilized system of justice could fail to provide . . . a remedy" to victims of gender-based violence.²⁹⁴ Indeed, such an examination suggests a lack of a civilized system of justice.

²⁸⁹ *Id.* at 108. This is true despite the fact that much of the data comes from the American Medical Association, the U.S. Surgeon General, and the Department of Justice. *Id.*

²⁹⁰ *Id.* at 3.

²⁹¹ *Id.* at 14 (noting that the successes of the women's movement have undercut the urgency of further reforms).

²⁹² *Id.* at 16.

²⁹³ See Florentino P. Feliciano, *The Application of Law: Some Recurring Aspects of the Process of Judicial Review and Decision-Making*, 37 AM. J. JURIS. 17, 47-48 (1992). Cf. Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1, 54 (1992) (noting that courts create identities through the law).

²⁹⁴ *United States v. Morrison*, 529 U.S. 598, 627 (2000).

1. Endangering Women's Lives

The marginalization of domestic violence claims has dire consequences for battered women. Most immediately, women denied effective protection from violence are placed in a dangerous situation. While protection orders do not fully eliminate gender-based violence and, of course, rarely offer foolproof guarantees, they do seem to reduce the number of violent incidents.²⁹⁵ Women who obtain civil protection orders that both enjoin further contact by the abuser, and stabilize their custody situations with resources adequate to support their independence, are more likely to appeal to legal solutions, should they need them, in the future.²⁹⁶

A woman is endangered when a judge treats her request for a hearing as spiteful and wasteful of the court's time. Under these circumstances, the court's stance is hardly distinguishable from the abuser's. The denial of relief to a battered woman often emboldens her abuser who, persuaded that the law will not intervene, is encouraged to act with a new sense of impunity.²⁹⁷ Acts of violence thus go unpunished, and the belief that the woman somehow deserves the treatment she receives is validated by the court.²⁹⁸

Judges who refuse to adjudicate custody claims in domestic violence proceedings, and who instead require women to file separate divorce or custody proceedings, create risky situations. Women are endangered by the delays that result from such bifurcated proceedings, and they often cannot afford attorneys to bring custody actions—which are much more difficult to negotiate pro se.²⁹⁹ Furthermore, orders resulting from custody or divorce actions are not likely

²⁹⁵ PTACEK, *supra* note 160, at 164 (86% of women surveyed said that their domestic violence protection order either stopped or reduced the abuse).

²⁹⁶ Linda G. Mills, *The Case Against Mandatory State Interventions: A Reply to Evan Stark*, in 6 DOMESTIC VIOLENCE REPORT 1, 14 (Oct./Nov. 2000) (noting that battered women are less likely to tolerate domestic violence when they receive the kind of support that enables them to move forward).

²⁹⁷ See ENGLE MERRY, *supra* note 171, at 3 (describing the risks of resorting to the courts where women may further enrage their husbands or lovers by going to court but being unsuccessful in their ability to get protection); Dalton, *supra* note 196, at 366.

²⁹⁸ See PTACEK, *supra* note 160, at 110–11 (pointing out that the attitude of the judge is apparent to both parties and has implications for both).

²⁹⁹ Almost every state statute provides that civil protection orders are remedies that are in addition to other civil and criminal remedies. Klein & Orloff, *supra* note 15, at 895. See THE FAMILY VIOLENCE DEPARTMENT OF THE NATIONAL COUNSEL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE: IMPROVING COURT PRACTICE (1990) (noting that battered women should use any and all legal remedies without having to choose between them).

to be as effective as a custody provision that is part of a domestic violence injunction, the violation of which triggers an immediate law enforcement response with far more substantial repercussions.³⁰⁰

Without full presentation of the evidence, judges may jeopardize battered women and their children by making rulings which reflect only a partial and distorted understanding of the consequences of domestic violence. Thus, women who frequently relocate from place to place to avoid harassment may be penalized in custody hearings for appearing unstable.³⁰¹ Abbreviated hearings in which women are denied the opportunity to explain the effects of domestic violence may result in batterers getting custody, even though they may be the very cause of this apparent instability.³⁰²

It is often dangerous, and always difficult, for women to seek protection orders, but those who opt for relief have determined that the greater peril lies without a protection order.³⁰³ The request for a domestic violence injunction is frequently a measure of last resort, evidencing the despair engendered by the kind of violence and manipulation that limits a woman's ability to be self-sufficient and to exercise personal independence.³⁰⁴ A battered woman is likely to be in a weaker economic and physical position than her abuser, and is thus hindered in her ability to deal with violence without legal assistance.³⁰⁵ Simply put, she desperately desires and needs help from the law.

The failures of the legal system are not easily remedied elsewhere. Some solutions can only be achieved through the formal acts of the legal system. The courts alone have the legal power to reduce the ability of an abuser to do physical harm or to make threats.³⁰⁶

³⁰⁰ Most domestic violence statutes mandate special police protection and enforcement; orders are kept on file with police officers, and violations can result in warrantless arrests, simplifying police tasks and resulting in faster enforcement. In contrast, civil contempt remedies for violation of a custody or divorce order are less effective in keeping a woman and her children safe. See HART *supra* note 150, at 11, 19-20 (noting police registries for orders of protection and arrest provisions for violations).

³⁰¹ See Solender *supra* note 176, at 158 (noting that judges will give custody of the children to the abuser if they believe the victim has become "incapable of fending for herself").

³⁰² *Id.*; Waits, *supra* note 186, at 58.

³⁰³ PTACEK, *supra* note 160, at 145.

³⁰⁴ See ENGLE MERRY, *supra* note 171, at 16 (noting that people who bring "interpersonal cases" to court are often desperate because all other efforts have failed and there are no alternatives).

³⁰⁵ *Id.* at 62-63.

³⁰⁶ PTACEK, *supra* note 160, at 6.

Only the courts can order a person to vacate a residence, award custody, and determine conditions for visitation or order child support.³⁰⁷ The court's response may immediately diminish the possibility of continued abuse as well as influence choices made by battered women as to how best protect themselves in the future.³⁰⁸

Battered women with children are exposed to a threat of another sort when they are discouraged from seeking court intervention in domestic violence proceedings. If they do not seek to protect their children from domestic violence, they risk accusations of child abuse or neglect.³⁰⁹ They face the prospect of state intervention in another type of legal proceeding—one that they have not initiated and cannot control. When raised in a legal proceeding initiated by a battered woman, incidents that may have been considered by the court to be a burdensome private family dispute are transformed into quasi-criminal acts, and the resources of the state may be marshaled against her. The legal mechanisms of failure in domestic violence claims punish a battered woman who has acted against the violence, even as she is simultaneously blamed for appearing to have taken no action.³¹⁰

2. Antitherapeutic Outcomes and Procedural Justice

The indifference with which domestic violence claims typically are treated affects women beyond the potential deficiencies of a court order.³¹¹ In domestic violence matters, the law has the potential to

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 120 (citing several studies demonstrating that institutional responses to women's efforts to seek relief can have significant impact on how women define future strategies to protect themselves).

³⁰⁹ G. Kristian Miccio, *A Reasonable Battered Mother?: Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89, 89, 91–92 (1991) (noting that the state blames the mother for failure to protect the children when there is domestic violence in the home while the state's own inaction and failure/refusal to intervene to protect her becomes irrelevant).

³¹⁰ *Id.* at 91–92.

³¹¹ The study of therapeutic jurisprudence examines the law as a social force which may shape therapeutic or anti-therapeutic outcomes. See generally David Wexler, *supra* note 250; David B. Wexler, *Therapeutic Justice and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES, 263 (1999); David B. Wexler, *Therapeutic Jurisprudence in A Comparative Law Context*, 15 BEHAV. SCI. & L., 233 (1997); David B. Wexler, *Putting Mental Health into Mental Health Law—Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 1 (1992); Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184 (1997). For an overview of therapeutic jurisprudence as applied to domestic violence, see Simon, *supra* note 153. Theories about procedural justice describe both the instrumental and normative perspectives of the law's ability to obtain consensus about resolution of disputes and to inspire compliance with the law. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

serve as a therapeutic agent in helping to restore emotional well-being and physical safety to battered women.³¹² Many battered women are beset by self-blame and shame. They have repeatedly been told by their abusers that no one will believe them. The very act of seeking court intervention demonstrates a woman's determination to challenge that message. Perfunctory justice denies battered women the benefits of the impartial but authoritative judicial recognition that they have suffered harm.³¹³

Victims of domestic violence who seek orders of protection are not only asking for an acknowledgment of the wrong to which they have been subjected, they are also asking for a forum where they can be heard and confront their abusers.³¹⁴ When the process affords victims procedural fairness, including participation, dignity, and a sense of trust, the court process is transformed into a value unto itself.³¹⁵ The validation of a battered woman's claim is then an "inescapable by-product" of judicial process and review of the problem.³¹⁶ Within the enclave of the public courthouse, a battered woman may experience a redistribution of power in her favor.³¹⁷ Marginalization of her claim, however, destroys this opportunity. Judicial conduct which undermines her efforts confirms an outcome predicted by the abuser and denies any transformative possibility.³¹⁸

³¹² *Id.* at 62. Wexler, *Therapeutic Jurisprudence in A Comparative Law Context*, *supra* note 311, at 233-46.

³¹³ See Nathalie Des Rosiers et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL'Y & L. 433, 440 (1998) ("It is through the words and behavior of the adjudicator that the survivors seem to seek society's acknowledgment of the harm.").

³¹⁴ See Cahn, *supra* note 230, at 1710 (reviewing John Conley and William O'Barr's findings that litigants, even if they win, will be dissatisfied if they don't get to tell their story); Tom R. Tyler, *The Role of Perceived Injustice in Defendant's Evaluation of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 67 (1984) (noting responses to questions about perceptions of fairness in the handling of their cases; 26% of the respondents noted having the opportunity to present evidence; followed by 12% who stated the judge's manner and 12% who noted the nature of the outcome received).

³¹⁵ Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 63 (1994) (noting the process concerns include participation, dignity and trust).

³¹⁶ Feliciano, *supra* note 293, at 32.

³¹⁷ In a study of the civil claims of victims of sexual violence, the findings demonstrated that women want more than monetary damages. See Des Rosiers et al., *supra* note 313, at 433. The opportunity to confront the perpetrator was essential to producing a positive outcome. *Id.* at 443. In the judicial setting, the survivors experienced a sense of control of the interaction, and thus more of the power. *Id.* at 437, 444.

³¹⁸ Subordination of domestic violence claims may have a negative affect on the actions and attitudes of abusers and deny them benefits that derive from full and fair processes. Judges who engage in a courtroom discourse and render a decision which affirms

Civil protection orders offer the possibility of providing resources and safety to battered women and their children. But treating these claims as unworthy of the courts' time results in contorted outcomes for victims. The mechanisms that produce these results must be understood, and judges and attorneys should be required to maintain heightened vigilance to eradicate their effects. Without this commitment, domestic violence will remain categorized as quasi-legal and trivial family disputes, thereby obscuring the need to consider issues that can be resolved only through attitudinal, structural and cultural changes to the legal system.

III. MOVING FORWARD IN THE SPHERE OF LEGAL PRACTICE

The difficulties described in VAWA's legislative compromises, together with the *United States v. Morrison* decision, and the perfunctory treatment of domestic violence claims in state courts, underscore what Naomi Cahn has described as the "tension between theory and practice [that] stems from the inevitable, and important questions about whether the legal process can meaningfully address women's needs."³¹⁹ For battered women, the legal process reveals debilitating inadequacies and exacts a cost on those who appeal to the law in pursuit of legal redress. The courts are the authoritative institutions "where most of the activities making up social life within . . . society simultaneously are represented, contested, and inverted."³²⁰ Thus,

that an abuser's behavior is illegal and incompatible with public values may impact that individual and motivate him to reconsider his behavior. See Kinports & Fischer, *supra* note 154, at 208; Simon, *supra* note 153, at 58 (suggesting that a therapeutic approach to domestic violence matters offers the possibility of cognitive therapy to a batterer whereby he is confronted with his "faulty thinking"). Similarly, an abuser, like the battered woman, should be allowed to participate, must be treated with dignity, and his rights, along with those of the battered woman, must be acknowledged. See Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 439 (1992). Fair process may enhance his respect for the law, affect his behavior and encourage compliance with the law. See TYLER, *supra* note 314, at 57 (noting that procedural justice provides a sense of legitimacy about the law which is likely to encourage people to obey the law). Furthermore, women may also be endangered if they get domestic violence orders without the court allowing an evidentiary hearing, as such orders may be subject to appeal and reversal. See, e.g., Erhart v. Erhart, 776 S.W.2d 450, 450, 451 (Mo. Ct. App. 1997); Elstun v. Elstun, 600 N.W.2d 835, 840 (Neb. 1999); Muldrew v. Mixon, 654 N.Y.S.2d 912, 912 (App. Div. 1997); Miller v. Miller, 875 P.2d 1195, 1196 (Or. Ct. App. 1994); Lewis v. Lewis, 689 So.2d 1271, 1273 (Fla. Dist. Ct. App. 1997).

³¹⁹ Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398, 1398 (1992).

³²⁰ Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L. J. 625, 628 (1990).

those who remain excluded from the courts' domain suffer loss of dignity and power.

Despite the tenacity of historical beliefs and long-held misconceptions, an ongoing challenge to misguided values and practices within the courts is necessary in order to adapt legal culture to shifting social paradigms.³²¹ An examination of VAWA's demise and an investigation of the marginalization of domestic violence in state courts promises useful insights into court practices, and thus may assist in challenging the status quo.³²² This is not to suggest that gender-based violence will be eliminated by reliance on the legal process.³²³ But legal culture insinuates itself into other social and political processes, just as the consequences of operational failures inside the courtroom have repercussions outside of it.³²⁴ The challenge is to make the legal system responsive to social needs, and to use an improved legal culture to change society.

A. Pursuing Legal Solutions in State Courts

The legal culture that shapes the behavior of federal and state courts produces the assumptions that contribute to the marginalization of domestic violence claims. Each court system responds to developments in the other.³²⁵ As noted in Part II, for example, the *Morrison* decision was influenced by local court practices. It follows that obtaining improved processes in state courts, without abandoning the pursuit of federal remedies, could improve the future disposition of federal courts to adjudicate gender-based violence claims.³²⁶

The VAWA legislative process and its subsequent demise should serve as inspiration for efforts to transform legal culture. The strategies that contributed to the Act's short-lived success provided infor-

³²¹ See Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1689, 1693 (1989) (noting that the invention of the law is not a one-way process but is affected by those who struggle to use it).

³²² See Yamamoto, *supra* note 14, at 834-35 (noting the need to translate critical legal theory into practical concepts for political lawyers).

³²³ See Kevin R. Johnson, *Lawyering for Social Change: What's A Lawyer To Do?*, 5 MICH. J. RACE & L. 201, 205-06 (1999) (warning about the limits of litigation and the need to look beyond the courtroom in order to achieve social change).

³²⁴ See Engle Merry, *supra* note 24, at 578 (describing law as a cultural system that can be imposed on other cultural systems).

³²⁵ *Id.* (noting that legal procedures expressed at either the local or national level bear on one another).

³²⁶ See Resnik, *supra* note 27, at 1006 (noting the possibility of shared and overlapping work between state and federal courts).

mation useful for educating courts so they may reconceptualize domestic violence as an important and public matter.³²⁷ Particular attention should be given to state courts, for this venue cannot be abandoned without prejudicial consequences on the claims of women who seek remedies for gender-based violence. Further, because their state court claims now, necessarily, serve as the principal vehicle for reforming the legal culture, micro-level strategies to improve the use of state courts on behalf of battered women have the greatest potential and urgency.³²⁸

Multiple perspectives are required in order to change legal culture in the state courts. Awareness of the theoretical terrain and of critical legal insights complements the legal strategies of practitioners. When these perspectives are joined in the context of real-world experiences of battered women litigants, practical guidance for improving conditions in the courts may emerge. This approach offers promising possibilities; it goes beyond pronouncements about the need for change and identifies the conditions for creating change. In the process, battered women and their advocates can endeavor to define legal justice by giving it content, rather than just reference to the law.³²⁹

B. Framing Legal Projects: Prescription for Change

1. The Characteristics of Transformative Strategies

Legal projects best suited to changing the legal culture of state courts must respect the dignity of the litigant, her basic right to equality, and the significance of the issue of gender-based violence. Women should have the opportunity to narrate and record their accounts of abuse and to receive recognition of the harms they have suffered. Legal strategies should seek to elevate domestic violence protection cases to the same status conferred upon other legal claims by encouraging courts to read pleadings, hear evidence, take testimony, evaluate legal arguments, and issue findings of facts and conclusions of law—and lawyers should always be conscious of the consequences of a

³²⁷ See *supra* notes 83–89 and accompanying text.

³²⁸ See Eskridge, *supra* note 83, at 1084. Eskridge describes the possibilities of influencing judges and locates them within the spheres of the “interpretive community,” identified as “legislators, academics, other judges and the parties themselves.” The expectations of this community may require judges to act in ways that transcend their personal biases.

³²⁹ See Robin West, *The Zealous Advocacy of Justice in a Less than Ideal Legal World*, 51 STAN. L. REV. 973, 988 (1999).

failure to do so. These strategies should provide opportunities for judicial education while holding judges accountable for unreasonable behavior and legal errors. Litigants should provide the court with sufficient information to facilitate a general understanding about battered women's circumstances in order to improve the law. Appropriate legal responses should also target prevailing societal attitudes, to raise public awareness of the policy implications of domestic violence. Most importantly, all strategies should result in meaningful protection for battered women.

2. Appellate Law Strategies

Catharine MacKinnon has noted that women seeking relief "in superior forums, disputing male sovereigns by appealing to higher sovereigns" have had little success.³³⁰ The *Morrison* decision appears to confirm her argument. But, the tactics required to move domestic violence cases out of the margins and to develop a corpus of appellate law may nonetheless bring about transformative change in the culture. Appellate law enhances the significance of the matters it touches, and may be used to counter the trial courts' view that gender-based violence claims are of lesser value.³³¹ Because their obligations are distinct from those of trial courts, appellate courts are designed to engage in a deliberative and collaborative process that often requires enhanced judicial competencies.³³² Battered women who seek appellate review derive authority from higher echelons of a powerful institution in order to secure their rights.³³³

³³⁰ MacKinnon, *supra* note 99, at 176.

³³¹ See Robert A. Carp & Ronald Stidham, *Judicial Process in America*, 4th ed., CONGRESSIONAL QUARTERLY (1998) (noting that an analysis of cases appealed in United States Courts of Appeals for the Third, Fifth, and Eighth Circuits revealed a shift in the substance of these cases on appeal where cases considered routine were then given greater political significance).

³³² Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 848 n.126 (1994) (contrasting courts of appeals that are structurally suited to a process that promotes accuracy with trial courts whose obligations require them to move through fast-paced trials). See Steven Shavell, *The Appeals Process as A Means of Error Correction*, 24 J. LEGAL STUD. 379, 423 (1995) (suggesting that the appeals process may require superior judicial skills and that appellate courts are often of higher quality than trial courts).

³³³ See Anna-Marie Marshall, *Closing the Gaps: Plaintiffs in Pivotal Sexual Harassment Cases*, 23 LAW & SOC. INQUIRY 761, 763 (1998) (noting that litigants may borrow governmental power when seeking relief from the courts). This may be particularly true when litigants seek to obtain court relief in regulating behavior. *Id.* at 764.

Appellate pronouncements that establish judicial principles and ratify legal gravity can serve to dispel the perception that gender-based violence cases are private problems to be resolved outside of the courts. Appellate rulings may correct judges who act on biases and who fail to treat battered women's claims with dignity and respect.³³⁴ By affirming legal principles to which lower courts must adhere, appellate courts help delineate the boundaries of acceptable behavior of perpetrators even as they regulate the conduct of trial courts.³³⁵ Appellate decisions act as inducements for trial judges to consider judicial norms as they are defined by higher courts.³³⁶ Judges conscious of the possibility of reversal are highly likely to consider appellate precedent when reaching decisions at the trial level.³³⁷

An attorney's disinclination to develop the case, which often leads to the waiver of opening statements or of trial objections, may be counteracted by having an appellate strategy. When considering the need to make a record for appeal, attorneys will not forego attempts to make offers of proof or omit an array of evidence demonstrating the context and nature of the problem.³³⁸ Appellate strategies at the trial level demand systematic preparation and full representation of battered women, including the development of pleadings and the preparation of a hearing transcript to record the courtroom proceedings. Such a course demands attention to the usual important details of a trial: exhibits, legal arguments, trial briefs, and proposed

³³⁴ Caminker, *supra* note 332, at 818 (noting that established legal principles require courts to follow precedents established by higher courts).

³³⁵ Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1606 n.1 (1995) (noting that appellate courts improve the accuracy of prospective trial court decisions). As members of a larger judicial community, judges are influenced by other court decisions in ways that extend beyond appellate law doctrine. See Sisk et al., *supra* note 203, at 1384 (describing the influences upon judicial consideration of constitutional issues as including the prior rulings of judicial colleagues).

³³⁶ See Catherine Stone, *Preservation of Error: From Filing the Lawsuit Through Presentation of Evidence Foreword*, 30 ST. MARY'S L.J. 993, 993 (1999) (asserting that appellate courts afford trial courts an understanding that their decisions are integrated into the broader legal system); Note, *Sympathy as a Legal Structure*, 105 HARV. L. REV. 1961, 1973 (1992) (describing how judicial norms are influenced by consideration of how other judges may decide cases).

³³⁷ See Note, *supra* note 336, at 1975 ("The tendency to reach decisions acceptable to their colleagues is perhaps strongest among those at the bottom of the judicial hierarchy who generally fear being reversed.").

³³⁸ See *infra* note 365 and accompanying text.

findings of facts and conclusions of law.³³⁹ These efforts cannot but improve policies and practices among attorneys representing battered women.

4. Appellate Strategies: An Empirical Review

As noted in Part II, significant obstacles prevent battered women from appealing their cases.³⁴⁰ Without a developed body of appellate law in civil domestic violence protection order cases, the degree to which appellate courts distinguish themselves from current trial court practice in the handling of these matters is difficult to determine. In order to assess existent appellate case law for the purposes of this Article, two surveys were undertaken to identify reported appellate decisions resulting from appeals by battered women who were unsuccessful in the trial courts concerning civil orders of protection.³⁴¹ Because of the limited number of appellate cases to draw upon, the potential efficacy of undertaking an appellate strategy in the trial courts remains difficult to judge. However, those appellate decisions reviewed do compare favorably with problematic trial court outcomes and hold out promise that this may be a useful legal strategy.³⁴²

³³⁹ See Fenton, *supra* note 196, at 1004 (arguing that stories of abuse must be recounted in court opinions).

³⁴⁰ See *supra* notes 274–279 and accompanying text.

³⁴¹ Each survey, completed in September 2000, included the fifty states and the District of Columbia and used a different legal database, each designed to approach the question in a different manner. This was done in order to uncover the broadest spectrum of domestic violence civil case law at the appellate level. Different approaches meant that each survey did not find identical cases, although many overlapped both surveys. It is also not assumed that the two surveys found every appellate case existent at the time. Although the survey for this Article scrutinized cases appealed by petitioners denied relief at the trial level, it should be noted that appellate courts considering appeals by batterers against whom orders of protection had been entered have also resulted in improved outcomes for battered women. See, e.g., *McCoy v. McCoy*, 625 N.E.2d 883, 886 (Ill. Ct. App. 1993) (upholding the award of custody to the petitioner despite no proof of abuse of the children, declaring that once one member of the household is abused, the court has maximum discretionary power to include other members who may be at risk); *Blistein v. Blistein*, 569 N.E.2d 1357, 1361–62 (Ill. Ct. App. 1991) (court upheld ancillary relief in a civil protection order although the husband had not physically abused his wife, noting that threats and harassment, including pulling a telephone from the wall, demonstrated risk of future abuse); *Coburn v. Coburn*, 674 A.2d 951 (Md. 1996) (reviewing extensive legislative history and purpose of the domestic violence statute and pronouncing that evidence of past abuse is admissible in order to accomplish preventative purposes of the statute).

³⁴² Of the approximately 40 reported decisions on appeals by battered women in domestic violence injunction cases reviewed, 75% of them were reversed and/or remanded. Similarly, a study of appellate decisions in criminal cases where battered women were convicted of homicide and other felonies committed against their abusive partners demon-

a. Correcting the Operational Failures

A review of appellate decisions reveals that some state appellate courts have addressed problems that exist at the trial level, discussed in Part II of this Article, related to stigmatizing domestic violence claims as trivial or private disputes. Several appellate courts have stressed the public importance of these cases, noting their "wide ranging ramifications."³⁴³ One appellate court exhorted trial judges "not to underestimate their ability to influence the respondent's behavior."³⁴⁴ The appellate court's cogent plea to trial judges to "communicate a powerful message about the justice system's view of domestic violence within their own courtrooms" underscores the political significance of these cases.³⁴⁵

Appellate courts have determined that a trial court has a non-discretionary duty to hear domestic violence matters.³⁴⁶ They have instructed that such proceedings must be full evidentiary hearings, notwithstanding the crowded court calendars,³⁴⁷ and in one case, criticized a trial judge's efforts to abbreviate the fact-finding process.³⁴⁸ Appellate courts have required fair and neutral application of the rules of evidence, including consideration of past conduct and

strated positive results for the defendant women. The study revealed a reversal rate of 40%, substantially higher than the national average for criminal appeals. See Maguigan, *supra* note 160, at 432-34; see also Martin Barry, *supra* note 180, at 433, 436 (noting that in the District of Columbia, the appellate court has "consistently ruled that the domestic violence statute is remedial and is to be interpreted in favor of those who seek protection"); cf. Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 50 (1994) (noting that Hawaiian appellate courts held out hope and uncertainty for Native Hawaiian breach of trust claimants).

³⁴³ *Marquette v. Marquette*, 686 P.2d 990, 993 (Okla. Ct. App. 1984); see also *Harper v. Harper*, 537 So.2d 282 (La. Ct. App. 1988) (noting need to counter social problems created by domestic violence); *Cesare v. Cesare*, 713 A.2d 390, 398 (N.J. 1998) (noting that domestic violence is a serious problem which historically has not received adequate attention in the courts).

³⁴⁴ See *Felton v. Felton*, 679 N.E.2d. 672, 680 (Ohio 1992) (quoting Judge Michael J. Voris, *The Domestic Violence Civil Protection Order and the Role of the Court*, 24 AKRON L. REV. 423, 432 (1990)).

³⁴⁵ *Id.*

³⁴⁶ *State ex rel. Marshall v. Hargreaves*, 725 P.2d 923 (Or. 1986); see also *Conklin v. Conklin*, 586 N.W.2d 703, 706 (Iowa 1998) (reversing the trial court for dismissing a civil protection order hearing when the husband/perpetrator filed a divorce action before the hearing for a permanent order of protection).

³⁴⁷ See generally *Strollo v. Strollo*, 828 P.2d 532 (Utah Ct. App. 1992); *Cruz-Foster v. Foster*, 597 A.2d 927 (D.C. 1991).

³⁴⁸ *In re V.C. v. H.C., Sr.*, 257 A.D.2d 27, 35 (N.Y. App. Div. 1999).

previous incidents of abuse.³⁴⁹ They have prohibited trial courts from avoiding domestic violence proceedings by requiring alternative dispute resolution in other venues.³⁵⁰ One appellate ruling determined that domestic violence cases are inappropriate for private or out-of-court resolutions.³⁵¹ Another appellate decision held that the trial court erred in directing the parties to meet with a court counselor to discuss the "issues at hand" and declared that the trial court itself was required to hear testimony and make findings of fact.³⁵² Similarly, another appellate court ruled that courts themselves—and not private agencies—are the appropriate decision-makers when custody and visitation issues are raised in the context of domestic violence matters.³⁵³

Appellate courts have confronted the issue of gender bias, and, in one decision, reprimanded the trial court for rationalizing domestic violence by finding that the husband's admitted acts of abuse were justified.³⁵⁴ The court noted that the trial court's actions "raise[d] an appearance of gender bias" by excusing domestic violence, and it emphasized a judge's obligation to perform judicial duties impartially and to eliminate gender bias from the courtroom.³⁵⁵ In another case, an appellate court reversed a trial court for refusing "to even consider" certain relief, as well as for committing clear errors for which

³⁴⁹ See *Strollo*, 828 P.2d at 534–35 (reversing a trial court's denial of an order of protection despite mootness issues where the victim had ultimately obtained an order from a different judge, noting that a refusal to consider past conduct would impair the prophylactic purpose of the statute); *Cesare*, 713 A.2d at 402 (noting need to consider the history of abuse in evaluating a domestic violence complaint); *Cruz-Foster*, 597 A.2d at 930–31 (stressing the importance of the past history in domestic violence cases and requiring consideration of the "entire mosaic").

³⁵⁰ *Conklin*, 586 N.W.2d 703; *Hall v. Hall*, 408 N.W.2d 626 (Minn. Ct. App. 1987); *In re Kampa v. Kampa*, 703 N.Y.S.2d 486 (App. Div. 2000); *Strollo*, 828 P.2d 532 (Utah Ct. App. 1992); *Felton*, 679 N.E.2d at 677.

³⁵¹ *Sroka v. Sroka*, 700 N.E.2d 916, 917 (Ohio Ct. App. 1997) (reversing a trial court's decision denying an order of protection where, although the defendant admitted to assaulting the petitioner, the decision nonetheless advised the batterer to "try to control [himself]" as a means of resolving the matter).

³⁵² *Mechtel v. Mechtel*, 528 N.W.2d 916, 918–19 (Minn. Ct. App. 1995).

³⁵³ *Vogt v. Vogt*, 455 N.W.2d 471, 475 (Minn. 1990) (noting that it is the "court's job to decide . . . [domestic violence] cases no less than others, and it is important, too, that the court, not some agency, is perceived by the parties as the decision-maker when it decides").

³⁵⁴ *Huesers v. Huesers*, 560 N.W.2d 219, 222 (N.D. 1997) (stating that "domestic violence is only mitigated when it is committed in self defense," and that "domestic violence which is provoked by 'button pushing'—in this case the wife bragging about other men 'hitting on her,' and 'skinny-dipping' with another man—is not acceptable and cannot be weighed against the perpetrator"). (*Huesers* was an appeal by an abused wife not from a denial of an order of protection, but rather raised the issue of domestic violence in a divorce action).

³⁵⁵ *Id.* at 223–24.

there was "no logical rationale" and which, in effect, punished the victim of abuse.³⁵⁶ The appellate court specified that a different judge would be required to hear the matter on remand. This suggests a lack of confidence in the trial judge and is a way to inform other judges about the boundaries of appropriate judicial behavior.³⁵⁷

b. *Addressing Bureaucratic Responses*

Appellate opinions have also addressed problems associated with bureaucratic responses to domestic violence claims.³⁵⁸ One appellate court reminded the trial court of its responsibilities to go beyond form orders to make necessary findings of fact and conclusions of law.³⁵⁹ Another appellate decision chastised a trial court for dismissing a pro se form petition which, although inartfully drawn, pled enough facts to provide notice. This court observed that pre-hearing dismissals could result in the petitioner's possible injury or even her death.³⁶⁰ Another appeals court disapproved of the form developed by the state court administrative offices because it inhibited appropriate consideration of the issues on appeal.³⁶¹

c. *Improving Outcomes for Battered Women*

Appellate courts have directed trial courts to construe civil protection order statutes liberally in order to ensure that intended legislative results are achieved.³⁶² They have reversed trial courts which granted orders of protection without awarding exclusive use of the residence to victims, declaring that this practice is both erroneous and dangerous.³⁶³ Other appellate decisions, related to custody and

³⁵⁶ See *In re V.C.*, 257 A.D.2d at 36.

³⁵⁷ *Id.*

³⁵⁸ See notes 244–250 and accompanying text.

³⁵⁹ *Price v. Price*, 514 S.E.2d 553, 554 (N.C. Ct. App. 1999) (*Price* was an appeal brought by a woman against whom her ex-husband had obtained a protection order after accusing her of spilling pasta and spices on the floor).

³⁶⁰ *Smith v. Smith*, 513 N.W.2d 728, 731–32 (Iowa 1994).

³⁶¹ *Brandon v. Brandon*, 513 S.E.2d 589, 593 (N.C. Ct. App. 1999) (*Brandon* was an appeal by the defendant).

³⁶² See generally *Maldonado v. Maldonado*, 631 A.2d 40 (D.C. 1993); *Merola v. Merola*, 536 N.Y.S.2d 842 (App. Div. 1989); *Alford v. Garzone*, 964 P.2d 944 (Okla. Ct. App. 1998); *Strollo*, 828 P. 2d 532; *Swenson v. Swenson*, 490 N.W.2d 668 (Minn. Ct. App. 1992); *Cruz-Foster*, 597 A.2d 927.

³⁶³ *In re V.C.*, 257 A.D.2d at 33–34 (noting that ancillary relief issues in family violence matters are the "very mandate" of the statute); *Merola*, 536 N.Y.S.2d 842; see also *Swenson*, 490 N.W.2d 668.

visitation, have been instructive, and have required trial courts to grant custody as part of a domestic violence injunction in order to assure the safety of victims and their children.³⁶⁴

The potential efficacy of appellate law in domestic violence cases is revealed by decisions in which trial courts are directed to hold meaningful hearings, avoid fragmentation of evidence, expand opportunities to contextualize domestic violence incidents, and order comprehensive relief. Further, by requiring the development of findings of fact and conclusions of law while acknowledging the practical problems of crowded court calendars, the appellate courts make an important statement that these cases may not be relegated to a lesser status where the tasks of adjudication are truncated. The small body of appellate law in this area indicates that the appellate courts have accomplished what commentators contemplate of appellate courts: they have corrected the errors of lower courts.³⁶⁵ Whether they can achieve a deeper transformation of the legal culture by fulfilling the appellate court function of improving the prospective outcomes from such courts remains to be seen.

C. *Practical Applications*

The use of general legal strategies to create courts that are more responsive to the needs of battered women depends on the adoption of specific legal tactics. It entails a case plan that conveys the battered woman's narrative, obliges a court to hear evidence, and provides background information in order to contextualize domestic violence and link it to social issues. A case plan should incorporate tactics that make a record and preserve the right to appeal, and should contrast

³⁶⁴ See *Crippen Jr., v. Crippen*, 610 So.2d 686 (Fla. Dist. Ct. App. 1992) (confirming custody award to battered wife in a domestic violence order despite husband's custody order from another state); *Hall v. Hall*, 408 N.W. 626, 629 (Minn. Ct. App. 1987) (no error in imposing supervision of visitation although there was no domestic violence directed toward children where purpose of such ancillary relief is to minimize risk of additional problems to petitioner); *Baker v. Baker*, 494 N.W.2d 282, 285-86 (Minn. 1992) (comparing the purpose of custody provisions within domestic violence statutes with custody as part of marital dissolution statute, and statutes relating primarily to welfare of children and noting that custody in domestic violence matters is necessary to assure the safety of the victim as well as the children and does not have to reference standards in dissolution statutes).

³⁶⁵ See Eric J. Magnuson & Michael J. McGuire, *Preserving Appellate Issues*, 25 FALL-Brief 48 n.3 (1995) (noting that the record on appeal consists of three items: the original papers and exhibits filed in the district court; the transcript of the proceedings; and a certified copy of the docket entries prepared by the clerk of district court).

with the cases marred by disincentives to invest resources as discussed in Part II.³⁶⁶

1. Pleadings and Narrative

Pleadings serve as the means through which battered women frame their legal claims. A complaint is more than a simple hurdle that must be overcome to gain access to court. A carefully framed account offers a judge insight into a battered woman's experiences. It is a way to give narrative form to a battered woman's story.³⁶⁷ Pleadings can recover untold stories and disentangle pernicious stereotypes.³⁶⁸ They should employ a descriptive device that permits "legal decision makers [to] recognize both the existence and closeness of the problem of domestic violence."³⁶⁹

The complaint is often the first opportunity for a judge to engage the claims of a lawsuit. First impressions created by complaints are likely to resonate throughout a hearing. Well-drafted complaints can be critical in motivating judges to develop solutions that better reflect the dynamics of power in domestic violence and in encouraging judges to implement the best relief available under statute. Moreover, narrative pleadings that amplify the facts and circumstances of domestic violence are even more essential where the parties do not engage in discovery processes. Given limited opportunities for persuasion and presentation of information, and the reduced fact-finding role played by trial judges in these matters, the importance of the complaint is self-evident.³⁷⁰

As noted in Part II, form pleadings used in domestic violence cases are indeed useful to battered women who are navigating the courts *pro se*. But boilerplate language often prevents the complete portrayal of women's circumstances and the strategies they often employ in order to resist and survive.³⁷¹ Form pleadings privilege brevity

³⁶⁶ See *supra* note 342 and accompanying text.

³⁶⁷ See *supra* note 343 and accompanying text.

³⁶⁸ See Minow, *supra* note 167, at 821 ("urging scholars, for example, "to look for the omitted stories of ordinary people, and in particular, the experiences of women, to make sense of the meanings of social and legal patterns in the lives of people affected by them, and in turn, creating or resisting them").

³⁶⁹ See Murphy, *supra* note 87, at 1268.

³⁷⁰ Cf. Eastman, *supra* note 245. Eastman explores the importance of the initial pleading in a civil rights lawsuit and argues that the important elements of client stories have been omitted in pleadings but must and can be re-introduced. *Id.* at 768.

³⁷¹ See Delgado, *supra* note 86, at 2428 (noting that having to state facts in a legal form sterilizes them); Eastman, *supra* note 245, at 792 (describing how modern rules of plead-

over content. Although the forms are designed to facilitate access to the courts for women appearing pro se, they should not be a device for preventing battered women from telling their stories. Attorneys have an obligation to do more.

Attorneys should resist the enervating effects of the legal structure where a battered woman's story is framed in concise and conclusory legal terms.³⁷² Narrative form must be given to the story of those relationships in which men routinely use violence, or the threat of violence, to dominate women, and particular attention should be paid to the circumstance of relationships from which women are unable to extricate themselves.³⁷³ A careful incorporation of women's narratives in written form may achieve success in the courts in much the same fashion as verbal accounts influenced the legislative outcome in VAWA.³⁷⁴

Complaints that develop factual accounts and legal theories allow the story-telling process to unfold and thus help with the process of judging at both the trial and appellate levels.³⁷⁵ Complaints, in the form of legal narrative that describes the experiences of a battered

ings in an effort to eliminate technical pleading requirements excuse "thin" pleadings when "thick" ones are necessary in order to relate the compelling facts). The forms suggest that little other than checking the boxes is required to support a request for relief which may then result in a dismissal of the action for insufficient pleadings. See *Buda v. Humble*, 517 N.W.2d 622, 625 (Neb. Ct. App. 1994) (dismissing an injunction entered on insufficient pleadings where the petitioner used preprinted forms and did little more than check the boxes).

³⁷² To the extent that form complaints are required to be used or their non-use is confusing to law enforcement, attorneys can expand the space between the boxes on the form by attaching longer narratives as supplementary affidavits.

³⁷³ See Mahoney, *supra* note 210, at 1285.

³⁷⁴ See *supra* notes 84-88 and accompanying text; Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1953-54 (19) (contrasting two abortion cases, *Roe v. Wade* and *Thornburgh v. American College of Obstetricians and Gynecologists*). Cain states that in the former, there were no stories of women who needed abortions or the accounts of unwanted pregnancies and suggests that as a result, the decision in *Roe* focuses on the medical issues while excluding the realities faced by women in need of abortions. In contrast, in *Thornburgh*, the National Abortion and Reproductive Rights Action League (NARAL) strategically decided to use the briefs as an opportunity to describe first-person accounts of the women desperate for abortions. Cain suggests that by including these stories which detailed the pain and grief of women who could not access safe and legal abortions, the resulting Supreme Court decision reflects the stories of women who suffered unwanted pregnancies. *Id.* at 1953-54.

³⁷⁵ Cain, *supra* note 374, at 1953 (noting that by developing the use of story telling, the judging process is improved). See also Kirk Heilbrun, *Prediction Versus Management Models Relevant to Risk Assessment: The Importance of Legal Decision-Making Context*, 21 LAW AND HUMAN BEHAVIOR 347, 349 (1997) (stating that "[i]n theory, at least the quality of the information provided to a decision-maker should affect the quality of the decision").

woman and her efforts to escape the abuser's control, should also be made a part of the record.³⁷⁶ Complaints thus provide a vehicle for describing the consequences of domestic violence and presenting possible solutions to both trial and appellate courts.

2. Offers of Proof, Narrative, and Evidentiary Hearings

In domestic violence cases, offers of proof require the court to hear what it may wish to avoid.³⁷⁷ A trial tactic designed to encourage judges to allow evidence and to preserve the record, offers of proof can be accomplished in a variety of ways. These include a narrative presentation by the attorney, a series of questions and answers with the witness, or a written offer in the form of a memorandum.³⁷⁸ Because offers must be stated with specificity, the preferred procedure may be to question the battered woman in court.³⁷⁹ Proffering the live testimony of the battered woman not only eliminates any question as to the content of the proposed evidence, but it also gives the trial court an opportunity to hear the full story. The opportunity to introduce narrative in the form of an offer of proof may enable a judge to understand the dynamic and circumstances of domestic violence, and thus motivate him or her to allow the evidence.

Offers of proof counter a judge's predilection to hurry through with domestic violence cases. An offer of proof made in accordance with the appropriate rules may not be easily refused without the court committing reversible error.³⁸⁰ Attorneys who are unsuccessful in preventing judges from unfairly compressing the time allotted to these cases through offers of proof assure an arguable appellate point. Ei-

³⁷⁶ AMSTERDAM & BRUNER, *supra* note 88, at 139 (noting the intimate and essential link between narrative and the law).

³⁷⁷ In order to preserve a ruling excluding evidence as error for review, the substance of the evidence must be known by an offer of proof unless otherwise apparent from the context. See generally FED. R. EVID. 103(a) & (b).

³⁷⁸ Magnuson & McGuire, *supra* note 365, at 49.

³⁷⁹ Thomas A. Demetrio, *Trial Practice*, 14-JUN CBA Rec. 58, 59 (2000).

³⁸⁰ See Demetrio, *supra* note 379, at 60 (failure to make offer of proof excused where trial judge is hostile and refused to allow counsel to make offer of proof); Polly Jessica Estes, *Preservation of Error: From Filing Lawsuit Through Presentation of Evidence*, 30 ST. MARY'S L. J. 997, 1085 (1999) (asserting that it is error for a judge to refuse to allow an attorney to make an offer of proof); Lewis Kapner, *Offers of Proof*, 21 FAM. L. Q. 265, 269 (1987) (noting that it may be error for a judge to refuse an offer of proof if made in the correct fashion and in good faith); Judge Lawrence W. Pierce, *Appellate Advocacy: Some Reflections from the Bench*, 61 FORDHAM L. REV. 829, 835 (1993) (noting that where an attorney insists on making an offer of proof, and it is rejected, the issue may be preserved for appellate purposes).

ther alternative may assist in reconciling a judge to the fact that these cases are entitled to evidentiary hearings and to be treated like other legal claims. Offers of proof provide attorneys a way to expand their case presentation by preparing documentary evidence.

It must be noted that offers of proof in domestic violence cases tried without juries are awkward.³⁸¹ The judge deciding whether the evidence should be admitted hears that evidence at the same time. Avoiding the prejudicial effect of improper evidence is a legitimate concern and must be addressed through reliance upon both the ethical and professional responsibilities of attorneys and the discretion of judges. However, as this Article suggests, the problem with the introduction of evidence in civil domestic violence proceedings lies more with judges who resist the adjudication than with attorneys who attempt to introduce improper evidence.

3. Social Science Research³⁸²

Courts have relied on social science research in cases in which new law is created, existing law is modified, or where statutes are interpreted.³⁸³ Social science research, a description of reality derived from empirical data, assists judges in the exercise of discretion.³⁸⁴ Its findings can provide principles that are relevant to situations that extend beyond a particular investigation.³⁸⁵ In domestic violence cases, the introduction of social science research often provides context and comprehensibility in sorting through the facts of a specific case.³⁸⁶

³⁸¹ See Kapner, *supra* note 380, at 269.

³⁸² For an excellent overview of evidentiary concerns in domestic violence cases, see generally Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43 (2000).

³⁸³ See John Monahan & Laurens Walker, *Social Science Research in Law—A New Paradigm*, in LAW AND PSYCHOLOGY (Martin Lyon Levine ed., 1995); see also Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197, 198 (2000) (pointing out that in deciding what the law ought to be, judges must look beyond cases, statutes, rules and regulations). Margolis notes that cases, including those that require statutory interpretation, often involve policy decisions that are improved when social science research is submitted. *Id.* at 219.

³⁸⁴ See Margolis, *supra* note 383, at 198.

³⁸⁵ See Monahan & Walker, *supra* note 383, at 5 (comparing the similarities between social science research and the law in their abilities to arrive at principles and conclusions that are applicable beyond a particular situation).

³⁸⁶ See Aiken & Murphy, *supra* note 382, at 46 (noting that lawyers may offer clinically based testimony about domestic violence that assesses relationships and opines about the effects of violence in a particular case, but they often overlook social framework testimony which "put[s] clinical data in perspective" and "clarifies the contradictions and misconceptions regarding domestic abuse").

The introduction of sociological evidence has proven to be instructive.³⁸⁷

Empirical evidence that facilitates an understanding of domestic violence and aids in the resolution of factual disputes should be admissible through an expert or in the form of journal articles and text excerpts.³⁸⁸ Social science research may also be introduced in the form of "Brandeis briefs,"³⁸⁹ which includes legislative factual evidence.³⁹⁰ These briefs may be presented to the trial judge or to an appellate court.³⁹¹

In domestic violence cases lacking fully developed factual records, briefs containing sociological materials can instruct a court on the broader implications of a ruling. This may be persuasive in obtaining a particular decision to benefit the litigant and in achieving a policy outcome that advances the interests of battered women in general. Research that sheds light on the impact of domestic violence on the economic stability of battered women, or on the circumstances of their homelessness, or on the physical and psychological devastation

³⁸⁷ See Judge Cindy S. Lederman & Neena M. Malik, *Family Violence: A Report on the State of the Research*, 73-DEC. FLA. B.J. 58, 59 (1999) (encouraging the introduction of social science research into domestic violence claims); Jackson, *supra* note 266, at 8 (1993) (citing Kenneth L. Karst and noting that in some matters, "courts need 'to be informed on matters far beyond the facts of the particular case'"). Several reported appellate decisions with favorable outcomes for battered women discussed in this Part rely extensively on social science research. See, e.g., *Felton*, 679 N.E.2d 672; *Baker*, 494 N.W.2d 282; *Cesare*, 713 A.2d 390; *Coburn*, 674 A.2d 951; *Marquette*, 686 P.2d. 990.

³⁸⁸ Aiken & Murphy, *supra* note 382, at 47, 52 n.43. As the authors note, learned treatise evidence is introduced upon an expert's opinion that it is authoritative, or by judicial notice.

³⁸⁹ A "Brandeis brief" is a legal document named for a brief submitted by Louis D. Brandeis in *Muller v. Oregon*, 208 U.S. 412 (1908) in which he introduced all of the existing social science research relevant to the issue of the length of working hours and women's health. Margolis, *supra* note 383, at 199 n.12. These briefs are generally introduced at the appellate level and provide evidence in the form of statistical data and surveys, reports of public investigative committees, or scientific discussion by experts. Jackson, *supra* note 266, at 2 n.6 (citing BLACK'S LAW DICTIONARY).

³⁹⁰ Legislative facts are those which "inform a court's legislative judgment on questions of law and policy" and "help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take." Margolis, *supra* note 383, at 198-99 (citing Kenneth Culp Davis).

³⁹¹ See Jackson, *supra* note 266, at 2-3 (suggesting that the trial court is the superior court for the introduction of legislative or general facts that do not concern the immediate parties and that by introducing legislative facts at the trial level, there is a greater opportunity for controlling fact-finding at the appellate level); Margolis, *supra* note 383, at 203-05 (noting that there are no prohibitions or procedural bars for the introduction of non-legal materials or the citing of factual information in support of appellate arguments even when it has not been introduced at the trial level).

visited upon their children, enables judges to understand the benefits of issuing orders with terms that touch a wide range of conditions affecting victims of domestic violence.³⁹²

The legislative and judicial process in VAWA enhanced the usefulness of social science research in domestic violence claims. A vast corpus of testimony and research was submitted during the legislative hearings and adopted as congressional findings. The Supreme Court, while disagreeing with the constitutional significance of the findings, did not disturb their substance.³⁹³ The comprehensive record of evidence created in the course of VAWA's passage remains useful in state court civil proceedings.

4. Concern for Methodology

The legal strategy chosen to achieve legal relief for battered women should not, as Katharine Bartlett warned, "recreate the illegitimate power structures [that they are] trying to identify and undermine."³⁹⁴ At first glance, the use of expanded legal tactics or of appellate practices, both of which require time and resources, may appear to be limited to women who are not only represented by attorneys, but whose representation will extend beyond the trial level. The implementation of formal and rigorous legal practices at the trial level is difficult, if not impossible, for the many women who appear pro se. Standards that imply increased trial preparation, enhanced development of evidence, and the submission of briefs may discourage those pro bono attorneys who seek to limit their representation, or may otherwise make representation too costly for them to undertake.

Battered women who represent themselves pro se have little alternative other than to use the boxes on a complaint form. At present,

³⁹² See Margolis, *supra* note 383, at 213 (noting that this type of evidence is defined as having the ability to demonstrate the general effect of a legal rule in order to encourage a judge to make a particular rule). The possible misuse of social science research, however, also looms as a potential danger to battered women. Empirical data and studies may be mischaracterized and some social science data may be inherently flawed and unreliable. See Margolis, *supra* note 383, at 232-33. Thus, attorneys are required to be diligent in the use of empirical information and to develop interdisciplinary insights to assist them in identifying valid research findings to support battered women's claims and refute the manipulation of data or the introduction of unreliable findings.

³⁹³ See generally *United States v. Morrison*, 529 U.S. 598 (2000).

³⁹⁴ Bartlett, *supra* note 228, at 831. See also Katharine T. Bartlett, *Cracking Foundations as Feminist Method*, 8 AM. U.J. GENDER SOC. POL'Y & L. 31, 32 (1999) (noting that methodological issues are critical to feminist legal theory).

they may be obliged to curtail their stories in exchange for easier access to the court. Attorneys who represent battered women, however, should be expected to uncover opportunities to provide the kind of representation that can change the legal culture and improve outcomes. Attorneys who regularly represent battered women often have a working relationship with domestic violence programs, and their heightened appreciation of the devastation of domestic violence may create the incentive to employ legal strategies aimed at transforming court processes. Other attorneys who represent battered women should do no less than guarantee the comprehensive representation that they would provide in any other type of case they handle. The benefits of legal strategies implemented in one case may have far-reaching consequences. Attorneys who educate trial judges during an individual case, or obtain a favorable appellate decision, improve the process for all women, whether pro se or represented by counsel.

D. Other Strategies

Legal strategies employed at the individual case level are not the only choices available to battered women who seek a more responsive legal system. Judicial education, courtwatch programs, class-action litigation on related issues, amicus briefs, media coverage, and successful lobbying for legislative changes may also influence judges who would otherwise prefer to push these matters aside. Heightened public attention to judicial animosity toward domestic violence matters has been shown to improve outcomes in civil protection order cases.³⁹⁵ Media attention has also had a significant impact on the behavior of judges.³⁹⁶

Class actions may garner the collective support of countless women affected by a government agency's misinformed and punitive practice while remediating those practices in federal court. A recent federal class action lawsuit filed on behalf of battered women with children challenged the New York City child welfare agency's practice of removing children from homes in which domestic violence was present.³⁹⁷ This action challenged institutional responses to domestic

³⁹⁵ See PTACEK, *supra* note 160, at 56 (noting that the public spotlight on judicial hostility created pressure for official responses and achieved some changes).

³⁹⁶ *Id.* at 60, 61 (demonstrating that judges hear public humiliation in the media and media attention impacts the manner in which domestic violence cases are treated).

³⁹⁷ *Nicholson et al. v. Williams et al.*, No. 00-CV-2229 (E.D.N.Y. filed June 15, 2000).

violence in which battered women are treated as though they are responsible for the violence they suffered.

Amicus briefs filed in high-profile lawsuits, and in other cases relevant to the legal claims of battered women, may serve to unite the movement to end gender-based violence by helping to reveal to courts the widespread support for proper legal treatment of domestic violence issues. Elizabeth Schneider and others, for example, were instrumental in writing and organizing amicus support on critical domestic violence legal issues in Hedda Nussbaum's litigation against Joel Steinberg.³⁹⁸ The strategies outlined above may have the effect of elevating domestic violence claims to the same status as civil rights issues, worthy of the court's time and attention. They bring together the shared wisdom and collective strength of women who have endured and resisted domestic violence in the pursuit of change.

Finally, legislative changes may be appropriate to the extent that poor outcomes for battered women in the courts are sometimes a result of poor or absent statutes. Legislators should regularly review civil protection order statutes to determine the adequacy of their provisions.³⁹⁹ For example, state statutes should mandate that custody determinations in domestic violence proceedings must be determined in accordance with the safety needs of women and children. They should clarify that the traditional standards for evaluating custody and visitation in custody and divorce matters, i.e., "the best interest of the child" and the "rights of the children to access to both parents," must be applied in the context of domestic violence statutes, which have the goal of keeping victims safe from further acts of violence.⁴⁰⁰ Statutes should also be amended to clarify the need for, and encourage the provision of, financial support to address the economic costs of separation and stabilization for a battered woman and her children.⁴⁰¹

³⁹⁸ See *Amicus Brief, Nussbaum v. Steinberg*, (arguing for a tolling of New York's statute of limitations in tort actions where the consequences of domestic violence incapacitate a litigant, preventing her from filing her claims in accordance with the statute of limitations). Several reported appellate decisions favorable to battered women discussed *supra* in this Part were supported by amicus briefs. See, e.g., *Felton*, 679 N.E.2d 672; *Vogt*, 455 N.W. 2d 471; *Baker*, 494 N.W.2d 282; *In re V.C.*, 257 A.D.2d 27.

³⁹⁹ Barbara Hart, *Draft Recommendations to the Department of Justice: Civil Protection Orders*, July 3, 2000 (on file with author) (noting that in 1999, 33 state legislatures supplemented their domestic violence codes).

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

Legislative efforts to reinstate a civil rights remedy either on the federal or state level should be considered.⁴⁰²

Legislative mandates will always be dependent on the contextual understandings of judges who interpret and implement them.⁴⁰³ The difficulties battered women face are more the result of the misapplication of the law than of the content of the law itself.⁴⁰⁴ Because statutory law is largely satisfactory, these problems are not likely to be solved by statutory changes.⁴⁰⁵ While judicially-created law has, to some extent, been relied upon to promote social change (although successes customarily experience counteraction from the existing social order), it is the judicial system and not the legislative system that presents the greatest resistance to challenging gender-based violence.⁴⁰⁶ Certainly this is one lesson to be drawn from VAWA's legislative enactment and its subsequent judicial demise. Thus, an enhanced understanding of the failure in the courts, together with strategies to improve judicial outcomes for battered women, may provide the greatest hope for combating gender-based violence.

CONCLUSION

Any issue is considered and framed in accordance with the social, cultural and political influences that exist at any particular moment in history.⁴⁰⁷ The passage of VAWA and the court struggle for its implementation are part of the process of framing issues surrounding violence against women. Legislation and litigation act together to foster a new environment which gives impetus to changes. VAWA reflects a process of lengthy public debate that produced a recognition of the structural causes and consequences of gender-based violence and brought the issue to a national forum. *United States v. Morrison* is a re-

⁴⁰² See Goldscheid, *supra* note 43, at 136 (discussing several approaches on the federal level which might address the concerns in *Morrison* in order to reinstate VAWA). In addition, the NOW Legal Defense and Education Fund has proposed that states pass state civil rights remedies and has released a model version. (On file with the author).

⁴⁰³ See Maguigan, *supra* note 159, at 404-05 (criticizing proposals for statutory changes to self-defense statutes as a panacea for difficulties faced by battered women defendants in the courts). See also Susser, *supra* note 159, at 19.

⁴⁰⁴ Maguigan, *supra* note 159, at 432.

⁴⁰⁵ *Id.* at 437.

⁴⁰⁶ See Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547, 551 (1995).

⁴⁰⁷ GORDON, *supra* note 89, at 3 (asserting that family violence is "historically and politically constructed," according to the political climate and the strength of forces in opposition).

mind that the courts defend the status quo. It confirms that the judiciary often avoids issues that challenge dominant paradigms, which are then defended by invoking a myriad of obtuse legal conventions "that operate systematically and consistently to the benefit of certain persons and groups at the expense of others."⁴⁰⁸

"Individual women," as James Ptacek observed, "are assaulted by individual men, but the ability of so many men to repeatedly assault, terrorize, and control so many women draws on institutional collusion and gender inequality."⁴⁰⁹ This collusion takes many forms, but it is particularly striking in its manifestation as diminished opportunity for examination of gender-based violence issues by the courts. Limitations in domestic violence hearings prevent the development of the entire story of this problem, and the results of this are dismal: Facts are omitted, sequences are interrupted, and consequences are ignored. Neither the specific abusive behaviors, nor the problematic social relationships which give rise to them, are successfully regulated. Battered women generally obtain no relief, and they gain no resources, either rhetorical or precedential.⁴¹⁰ Individual rights are not adjudicated, and public values are not articulated.

The unwillingness of the courts to intervene serves to legitimize domestic violence.⁴¹¹ Battered women are denied both their safety and their opportunity to generate social change through the litigation process in which courts reflect and affect public values. These consequences of the law's destructive engagement with the issue of domestic violence require continued efforts to improve the likelihood that courts will be responsive to the interests of battered women. In the end, battered women need the courts to act, to decide, to regulate, and to improve the conditions of their real-world lives.⁴¹² Reliance on the law to restructure social relationships or transform social realities may create unrealistic expectations.⁴¹³ But when a battered woman

⁴⁰⁸ See Yamamoto, *supra* note 14, at 850.

⁴⁰⁹ PTACEK, *supra* note 160, at 9.

⁴¹⁰ See Lucie White, *Goldberg v. Kelly: On The Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 871 (1990) (noting that lawsuits contribute to improving conditions by providing a rhetorical resource for subordinated groups).

⁴¹¹ See PTACEK, *supra* note 160, at 11 (noting that a key element of state power is the courts which, through their inaction, legitimate violence).

⁴¹² See Eskridge, *supra* note 191, at 708 (noting that "law's legitimacy must depend on substantive justice and not procedural correctness").

⁴¹³ See Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 479 (1998) (acknowledging the dangers in some legal remedies, e.g., reparations, as "leaving undisturbed attendant social realities").

can get a protection order that gives her exclusive use of the home, custody of her children, child support, and the sole set of keys to the family car, the relief is real and immediate and there is little danger of misplaced confidence in the legal system. When her abuse is recognized in national and state forums as a civil right violation for which she is entitled to compensation, she experiences at least a partial vindication. This type of relief is not illusory or merely symbolic. It provides women with the resources they need to make independent choices about their lives and safety, and gradually transforms the legal culture, with an attendant change in public values and concerns.