

# **Domestic Violence in the United States**

**A Preliminary Report prepared for Rashida Manjoo,  
U.N. Special Rapporteur on Violence Against Women**

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### I. INTRODUCTION

1. Domestic violence is a distinctive and complex type of violence. The intimate relationship between the victim and the perpetrator is historically construed as private and therefore beyond the reach of law. The often hidden site of the violence buttresses this conceptualization. The victim is often financially dependent on her abuser, and other economic and familial factors complicate the victim's response to abuse. Moreover, women who complain of domestic violence frequently face intimidation, retaliation, and stigmatization, and thus incidents of domestic violence are notoriously under-reported and under-prosecuted throughout the world, including the United States.
2. Any meaningful analysis of the nature and content of the United States' obligations with respect to domestic violence must flow from a comprehensive understanding of the reality that States are obliged to address.<sup>1</sup> Until the United States enacts effective preventative and remedial measures to eradicate violence against women within its borders, the promise of women's rights in the United States will remain a deferred dream.
3. Each year, between one and five million women in the United States suffer nonfatal violence at the hands of an intimate partner.<sup>2</sup> Domestic violence affects individuals in every racial, ethnic, religious, and age group; at every income level; and in rural, suburban, and urban communities. Notwithstanding the prevalence of domestic violence across demographic categories, it is overwhelmingly a crime perpetrated against women. Women are five to eight times more likely than men to be the victims of domestic violence.<sup>3</sup> The Department of Justice reports that between 1998 and 2002 in the United States, 73% of family violence victims were female, 84% of spouse abuse victims were female, and 86% of victims of violence committed by an intimate partner were female.<sup>4</sup>

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<sup>1</sup> See *Report of the Secretary-General: In Depth Study on All Forms of Violence Against Women*, §§ 112-113, delivered to the General Assembly, U.N. Doc. A/61/122/Add.1 (July 6, 2006) (the Secretary General's Report defines domestic violence as including a spectrum of sexually, psychologically and physically coercive acts used against women by a current or former intimate partner without her consent).

<sup>2</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION (hereinafter "CDC"), COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 18 (2003) (estimating 5.3 million intimate partner assaults against women in the United States each year); PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN STUDY 26 (2000).

<sup>3</sup> LAWRENCE A. GREENFELD, ET AL., VIOLENCE BY INTIMATES 38 (1998).

<sup>4</sup> MATTHEW R. DUROSE, ET AL., FAMILY VIOLENCE STATISTICS 1, 10 (2005) (Family violence is defined as any crime in which the victim or offender is related by blood, marriage, or adoption. It thus includes violence by parents against children, violence between siblings, violence by a husband against his wife, *etc.*; but does not include violence between unmarried partners). See also *Petition Alleging Violations of the Human Rights of Jessica Gonzales by the United States of America and the State of Colorado*, with request for an investigation and hearing of the merits, at 21 n. 53, *Gonzales v. USA*, Petition P-1490-05, Inter-Am. Ct. H.R. (Dec. 23, 2005) available at <http://www.aclu.org/files/pdfs/petitionallegingviolationsofthehumanrightsofjessicagonzales.pdf> (hereinafter "Gonzales Petition").

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4. Not only are women more likely than men to experience domestic violence, but they also represent an even greater percentage of victims in the most serious of the assault cases by an intimate partner.<sup>5</sup> Women are also far more likely than men to be the victims of battering resulting in death at the hands of an intimate partner.<sup>6</sup> In 1996 alone, over 1,800 murders were attributed to intimate partners, and nearly 75% of those victims were women.<sup>7</sup> In the United States, more than three women are murdered by their husbands or boyfriends every day, and approximately one-third of women murdered each year are killed by an intimate partner.<sup>8</sup> According to an estimate by the Centers for Disease Control and Prevention, from 1981 to 1998, the number of domestic violence fatalities in the United States exceeded 300,000.<sup>9</sup>
5. Government sources indicate that one-third of women in the United States experience at least one physical assault at the hands of an intimate partner during the course of adulthood.<sup>10</sup> Due to feelings of shame and fear of retribution that prevent women from reporting assault, this statistic may significantly underestimate the incidence of domestic violence in the United States. The historical characterization of domestic violence as a “private” or family matter may also contribute to the under-reporting of domestic violence.<sup>11</sup>
6. Not all women in the United States experience domestic violence with the same frequency. The data suggests that although the domestic violence epidemic cuts across the lines of gender, race, and immigration status – affecting women and men, African Americans, Latinas, American Indian and Alaska Natives and whites, and immigrants and U.S. citizens – it has a particularly pernicious effect on groups which lie at the intersection of these categories: poor ethnic minorities, immigrants, and American Indians and Alaska Native women.
7. While poor minority and immigrant battered women in the United States are among those most in need of governmental support and services, including domestic violence services,

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<sup>5</sup> Gonzales Petition, *supra* note 4, at 21-22.

<sup>6</sup> See COLORADO COALITION AGAINST DOMESTIC VIOLENCE, LAW ENFORCEMENT TRAINING MANUAL 1-5 (2d ed. 2003) (reporting that 42% of all female homicide victims were killed by an intimate partner); CDC, SURVEILLANCE FOR HOMICIDE AMONG INTIMATE PARTNERS (2001) (finding that domestic violence murders account for 33% of all female murder victims and only 5% of male murder victims).

<sup>7</sup> GREENFELD, *supra* note 3, at 1.

<sup>8</sup> SENATOR JOSEPH R. BIDEN, JR., TEN YEARS OF EXTRAORDINARY PROGRESS: THE VIOLENCE AGAINST WOMEN ACT (2004).

<sup>9</sup> CDC, *supra* note 2. Similar statistics in other states reveal the extent of domestic violence-related fatalities across the United States. See, e.g., California Criminal Justice Statistics Center (CJSC), *Review of Domestic Violence Statistics* (recording 187 domestic violence homicides in California in 2003); Chicago Police Department, *Quarterly Domestic Violence Statistical Summary, Year-to-Date* (June 2005) (reporting 17 domestic violence homicides in the first six months of 2005 for the city of Chicago).

<sup>10</sup> BIDEN, *supra* note 8, at 30. According to the National Institute of Justice and the Centers for Disease Control, 26% of women, compared to 8% of men, report having been assaulted by an intimate partner in their lifetime. TJADEN & THOENNES, *supra* note 2, at 9.

<sup>11</sup> See KERRY MURPHY HEALEY & CHRISTINE SMITH, RESEARCH IN ACTION, BATTERER PROGRAMS: WHAT CRIMINAL JUSTICE AGENCIES NEED TO KNOW 1, 2 (1998) (noting that some researchers estimate that “as many as six in seven domestic assaults go unreported”).

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these groups are chronically underserved.<sup>12</sup> This greater need for an effective government response is due, in large part, to the social, familial, and financial isolation experienced by many minority and immigrant women.<sup>13</sup> Nationwide, black women report their victimization to the police at a higher rate (67%) than white women (50%), black men (48%), and white men (45%).<sup>14</sup> African American women account for 16% of the women reported to have been physically abused by a husband or partner in the last five years, but were the victims in more than 53% of the violent deaths that occurred in 1997.<sup>15</sup> A recent study found that 51% of intimate partner homicide victims in New York City were foreign-born.<sup>16</sup> Another study determined that 48% of Latinas reported their partners' violence against them had increased since they immigrated to the United States.<sup>17</sup>

8. The greater level of reported domestic violence among African Americans, Hispanics, American Indian and Alaska Native women and immigrants is attributable, in large part, to the extreme levels of poverty in minority and immigrant communities.<sup>18</sup> African Americans and Hispanics make up 22.8% of the population, but account for 47.8% of those living in poverty.<sup>19</sup> Poor women experience victimization by intimate partners at much higher rates than women with higher household incomes; in the United States between 1993 and 1998, women with annual household incomes of less than \$7,500 were nearly seven times as likely as women with annual household incomes over \$75,000 to experience domestic violence.<sup>20</sup>

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<sup>12</sup> See Committee on the Elimination of Racial Discrimination, Concluding Observations, CERD/C/USA/CO/6 ¶ 26 (March 7, 2008) (“not[ing] with concern that the alleged insufficient will of federal and state authorities to take action with regard to [gender-based] violence and abuse often deprives victims belonging to racial, ethnic and national minorities . . . of their right to access to justice and the right to obtain adequate reparation or satisfaction for damages suffered”).

<sup>13</sup> The vast majority of New York City's Family Court's litigants are minority and immigrant individuals. Leah A. Hill, *Do You See What I See?*, 40 COLUM. J.L. & SOC. PROBS 527, 530 n. 4 (2007) (“While there are no reliable data on the demographics of Family Court users, an informal survey of self-represented Family Court litigants in all five boroughs provides a powerful depiction: of the 1857 respondents surveyed, 48% identified themselves as African-American, 4% Asian, 31% Hispanic. . .”) (citing OFF. OF THE DEPUTY CHIEF ADM’R FOR JUSTICE INITIATIVES, SELF REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES 3 (Dec. 2005), available at [http://nycourts.gov/reports/AJJI\\_SelfRep06.pdf](http://nycourts.gov/reports/AJJI_SelfRep06.pdf)). Significantly, none of the users identified themselves as White. *See Id.*

<sup>14</sup> C.M. RENNISON & S. WELCHANS, A SPECIAL REPORT OF THE BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE (MAY 2000).

<sup>15</sup> WOMEN'S INSTITUTE FOR LEADERSHIP DEVELOPMENT FOR HUMAN RIGHTS, THE TREATMENT OF WOMEN OF COLOR UNDER U.S. LAW 1 (2001), available at <http://www.wildforhumanrights.org/pdfs/treatmentwomen.pdf> (quoting 107, 1<sup>st</sup> 147 Cong Rec H 1 s003 3/20/01).

<sup>16</sup> NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, FEMICIDE IN NEW YORK CITY: 1995-2002 (2004), available at [http://www.nyc.gov/html/doh/downloads/pdf/ip/femicide1995-2002\\_report.pdf](http://www.nyc.gov/html/doh/downloads/pdf/ip/femicide1995-2002_report.pdf).

<sup>17</sup> Mary Dutton, et al., *Characteristics of Help-Seeking Behaviors, Resources, and Services Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. AND POL’Y 245 (2000).

<sup>18</sup> NATALIE J. SOKOLOFF & IDA DUPONT, *Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities*, 11 Violence Against Women 38, 48 (2005), available at <http://vaw.sagepub.com/cgi/content/abstract/11/1/38>.

<sup>19</sup> ANANNYA BHATTACHARJEE, WHOSE SAFETY? WOMEN OF COLOR AND THE VIOLENCE OF LAW ENFORCEMENT 18 (2001) available at <http://www.afsc.org/community/WhoseSafety.pdf> (citing CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS (1999)).

<sup>20</sup> TJADEN & THOENNES, *supra* note 2; *see also* SOKOLOFF & DUPONT, *supra* note 18, at 44 (citing Benson & Fox, 2004; *infra*; Browne & Bassuk, 1997, *infra*; Hampton, Carillo, & Kim, 1998; Raphael, 2000; Rennison & Planty, 2003; Websdale, 1999); West, C. M. (2005). *See also* NATALIE SOKOLOFF, DOMESTIC VIOLENCE AT THE MARGINS:

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Data also indicates that women are at much greater risk of domestic violence when their partners experience job instability or when the couple reports financial strain.<sup>21</sup> Abuse has also been found to be more common among young, unemployed urban residents – a large percentage of whom are racial minorities and immigrants.<sup>22</sup> The majority of homeless women were once victims of domestic violence,<sup>23</sup> and more than half of all women receiving public assistance were once victims of domestic violence.<sup>24</sup> Although accurate statistics on the intersection of race and gender in the homeless population and the population of those receiving public assistance in the United States are not available, statistics do demonstrate that racial minorities make up the majority of the homeless population<sup>25</sup> and that the majority of women receiving public assistance are racial minorities.<sup>26</sup>

9. Thus, combinations of poverty, age, employment status, residence, and social position – not race or culture, per se – may explain the higher rates of abuse within certain ethnic communities.<sup>27</sup> Yet race remains salient because of its inextricable connection with these other factors. Race also plays a significant role in the victimization of at least one group: American Indian and Alaska Native women. Unlike other groups, the majority of American Indian and Alaska Native women reporting intimate partner violence identify their abuser as non-Native. American Indian and Alaska Native women face unique access to justice because determining which government (federal, state, or tribal) is responsible for the investigation and prosecution of violent crimes on Indian lands depends on the race of the perpetrator and the race of the victim.
10. In 1992, the Supreme Court recognized that a staggering 4 million women in the United States suffered severe assaults at the hands of their male partners each year and that between one-fifth and one-third of all women will be the victims of domestic violence in their

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A READER AT THE INTERSECTIONS OF RACE, CLASS, GENDER, AND CULTURE 157-73 (2005) (discussing how the most severe and lethal domestic violence occurs disproportionately among low-income women of color).

<sup>21</sup> MICHAEL L. BENSON & GREER LITTON FOX, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, WHEN VIOLENCE HITS HOME: HOW ECONOMICS AND NEIGHBORHOOD PLAY A ROLE 2 (2004).

<sup>22</sup> R. Hampton, et al., *Violence in Communities of Color*, in FAMILY VIOLENCE AND MEN OF COLOR: HEALING THE WOUNDED MALE SPIRIT 1-30 (Richard Carrillo & Jerry Tello eds., 1998); West, C. M., *Domestic violence in ethnically and racially diverse families: The "political gag order" has been lifted*, in NATALIE SOKOLOFF, DOMESTIC VIOLENCE AT THE MARGINS: A READER AT THE INTERSECTIONS OF RACE, CLASS, GENDER, AND CULTURE 157-73 (2005).

<sup>23</sup> A. Browne & S. Bassuk, *Intimate Violence in the Lives of Homeless and Poor Housed Women: Prevalence and Patterns in an Ethnically Diverse Sample*, 67 AM. J. OF ORTHOPSYCHIATRY 261-278 (1997).

<sup>24</sup> ELEANOR LYON, POVERTY, WELFARE AND BATTERED WOMEN: WHAT DOES THE RESEARCH TELL US? (1998), available at <http://www.mincava.umn.edu/documents/welfare/welfare.pdf>.

<sup>25</sup> National Coalition for the Homeless, "Who is Homeless?: Fact sheet," available at <http://www.nationalhomeless.org/publications/facts.html> (stating that the homeless population was 49% African-American, 35% Caucasian, 13% Hispanic, 2% Native American, and 1% Asian in 2004.)

<sup>26</sup> Poverty and Welfare Fact File, available at [http://www.publicagenda.org/issues/factfiles\\_detail.cfm?issue\\_type=welfare&list=13](http://www.publicagenda.org/issues/factfiles_detail.cfm?issue_type=welfare&list=13) (retrieved Nov. 10, 2007) (citing "Temporary Assistance for Needy Families' Fifth Annual Report to Congress," February 2004, Administration for Children and Families) (reporting that, of recipients of Temporary Assistance for Needy Families, 38.3% are African-American and 24.9% are Hispanic); United States Department of Health and Human Services, "Indicators of Welfare Dependence: Annual Report to Congress 2007," available at <http://aspe.hhs.gov/hsp/indicators07/ch2.htm>.

<sup>27</sup> SOKOLOFF & DUPONT, *supra* note 18, at 48.

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lifetime.<sup>28</sup> Since then, the United States government has been well aware of the scope and severity of domestic assault. Two years later, the United States Congress passed the Violence Against Women Act, reauthorizing and expanding it in 2000 and again in 2005 (collectively “VAWA”). VAWA funds a wide variety of important programs and victim services aiming to address domestic violence in the United States.<sup>29</sup>

11. In the years prior to VAWA, Congress brought together a significant body of research through hearings, testimony, and reports on violence against women and its societal effects in the United States. This research found that up to 50% of homeless women and children are homeless because they are fleeing domestic violence and that “battering ‘is the single largest cause of injury to women in the United States.’”<sup>30</sup> Congress further noted that “arrest rates may be as low as 1 for every 100 domestic assaults.”<sup>31</sup> More recently, in 2002, President George W. Bush noted that in 2000 “almost 700,000 incidents of violence between partners were documented in our Nation, and thousands more [went] unreported. And in the past quarter century, almost 57,000 Americans were murdered by a partner.”<sup>32</sup> Before and after the passage of VAWA, United States officials and agencies have reiterated the grievousness of domestic violence and the heavy toll it inflicts on the country.
12. Unfortunately, in spite of the passage of legislation such as VAWA, the domestic violence epidemic has continued to rage in the United States. The most recent National Crime Victimization Survey (NCVS) reports that incidents of domestic violence increased by 42% and sexual violence by 25% from 2005-2007, and women made up the vast majority of these victims.<sup>33</sup> While it is not clear whether these increased numbers result from increased incidents or increased reporting (or both), the numbers are indeed staggering.
13. The purpose of this briefing paper is to provide a general sense of the key issues that advocates have identified related to domestic violence in the United States. Section II of the briefing paper lays out important federal legal and legislative developments in the area of domestic violence and violence against women. Section III discusses issues related to domestic violence and the criminal justice system, focusing specifically on the role of law enforcement, prosecutors, and the courts. Section IV explores issues related to domestic violence, custody, and economic considerations in family law litigation. Section V discusses intersections between domestic violence and reproductive rights and reproductive/sexual health. Section VI examines issues concerning economic security, employment, and housing as it relates to domestic violence. Section VII examines violence against Native American women, including the particular challenges Native victims and survivors of domestic

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<sup>28</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 891 (1992).

<sup>29</sup> *Gonzales Petition*, *supra* note 4, at 24.

<sup>30</sup> S. Rep. No. 101-545, at 37 (1990) (quoting Van Hightower & McManus, *Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies*, 49 PUB. ADMIN. REV. 269 (1989)).

<sup>31</sup> *Id.* at 38 (citing D.G. Dutton, *Profiling of Wife Assaulters: Preliminary Evidence for Trifocal Analysis*, 3 VIOLENCE AND VICTIMS 5-30 (1988)).

<sup>32</sup> Proclamation No. 7601, 67 Fed. Reg. 62,169 (Oct. 1, 2002); *see also* Proclamation No. 7717, 68 Fed. Reg. 59,079 (October 8, 2003).

<sup>33</sup> *See* U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY, CRIMINAL VICTIMIZATION (2007), available at <http://www.ojp.usdoj.gov/bjs/abstract/cv07.htm>.

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violence encounter in accessing justice and ensuring safety. Section VIII examines issues of trafficking as they relate to domestic violence. Moreover, throughout this briefing paper, we have attempted to address how particular marginalized populations (including racial/ethnic immigrants and minorities) are disproportionately negatively affected by current domestic violence laws, policies, and practices. Finally, we emphasize that many of the issues reflected in this briefing paper intersect and overlap with issues presented in the other briefing papers on violence against women in detention, violence against women in the military, and gun violence.

## II. FEDERAL LEGAL AND LEGISLATIVE DEVELOPMENTS

14. As noted above, VAWA is a comprehensive legislative package first enacted in 1994<sup>34</sup> and reauthorized with new provisions in 2000<sup>35</sup> and 2005.<sup>36</sup> As described below, VAWA will be reauthorized in 2011. The passage of VAWA was unquestionably a bellwether moment in the fight against domestic violence in the United States, but on its own VAWA does not and cannot fulfill the United States' obligation to prevent, investigate, and punish violations of women's rights to be physically safe. Nor does it provide compensation for damages resulting from failures of the United States to do so.
15. VAWA seeks to provide funding for training of police, prosecutors, and advocates in dealing with domestic violence,<sup>37</sup> funds shelters, civil legal services, and other services for domestic violence victims, especially in "demonstration" projects that can be replicated by other organizations,<sup>38</sup> and encourages best practices by states by conditioning receipt of funding on, among other things, states' use of mandatory arrest policies when domestic violence is reported and the removal of fees for applying for protective orders.<sup>39</sup> VAWA further criminalizes certain acts of domestic violence that cross state lines, making them federal, criminal matters,<sup>40</sup> and it requires states, territories, and Native American tribes to give full faith and credit to protective orders made by other states, territories, and tribes.<sup>41</sup> Portions of VAWA, which will be discussed in other sections of this briefing, also provide immigration relief to battered immigrants and seek to prevent discrimination against domestic violence victims who live in certain types of federally funded housing.

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<sup>34</sup> Pub. L. 103-322, Tit. IV, 108 Stat. 1796 (1994).

<sup>35</sup> Pub. L. 106-386, 114 Stat. 1464 (2000).

<sup>36</sup> Pub. L. 109-162, 119 Stat. 2960 (2005).

<sup>37</sup> Pub. L. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

<sup>38</sup> Pub. L. 103-322, § 40221, 108 Stat. 1796, 1926-32 (1994); Pub. L. 106-386, §§ 1201-1202, 114 Stat 1464, 1504-06 (2000); Pub. L. 109-162, § 103, 119 Stat. 2960, 2978 (2005).

<sup>39</sup> Pub. L. 103-322, § 40231, 108 Stat. 1796, 1932-34 (1994); Pub. L. 106-386, § 1104, 114 Stat 1464, 1497 (2000); Pub. L. 109-162, § 102, 119 Stat. 2960, 2975-78 (2005).

<sup>40</sup> 18 U.S.C. § 2261 (interstate domestic violence); 18 U.S.C. § 2261A (interstate stalking); 18 U.S.C. § 2262 (interstate violation of a protection order). A recent opinion of the Attorney General clarifies that these provisions apply to same-sex as well as opposite-sex violence. Whether The Criminal Provisions of the Violence Against Women Act Apply to Otherwise Covered Conduct When the Offender and Victim are the Same Sex, Op. Off. Legal Counsel (Apr. 27, 2010).

<sup>41</sup> 18 U.S.C. § 2265.

16. Yet VAWA fails to accomplish three crucial objectives: (1) it does not provide any direct remedy when abusers or police officers violate victims' rights, (2) it does not require participation by all states or monitor their progress, and (3) it does not fully or adequately fund all the services that are needed for victim safety.

### **A. VAWA Does Not Provide a Federal Court Remedy for Victims of Gender-Based Violence**

17. The 1994 version of VAWA authorized lawsuits in federal court against those who "commit a crime of violence motivated by gender."<sup>42</sup> The Attorneys General of 38 of the 50 states supported this measure on the grounds that the state courts were incapable of addressing gender-based violence adequately.<sup>43</sup> In other words, VAWA as originally passed attempted to provide battered women with a federal remedy against perpetrators of violence. Unfortunately, in 2000 the Supreme Court invalidated this portion of VAWA in *United States v. Morrison*, holding that Congress did not have the authority to create such a cause of action as part of its power to regulate interstate commerce under the United States Constitution or its general police power.<sup>44</sup> Thus, the Supreme Court struck down the United States' first, and so far only, effort to provide a federal venue for punishing private violations of women's right to be free from gender-based violence.

18. In 2005, in *Town of Castle Rock v. Gonzales*, the Supreme Court also ruled that the United States Constitution provides no remedy for a state's failure to enforce a domestic violence restraining order, and thus protect victims of gender-based violence.<sup>45</sup> *Castle Rock* was preceded by *DeShaney v. Winnebago Dep't of Soc. Servs.*,<sup>46</sup> where the Supreme Court found that the Due Process Clause of the Fourteenth Amendment does not provide a remedy when state actors fail to take reasonable measures to protect and ensure a citizen's rights against violation by private actors. No one expects that first responders can prevent every act of private violence, but the effect of the *DeShaney*, *Morrison* and *Gonzales* cases is that even where local and state police are grossly negligent in their duties to protect women's right to physical security, and even where they fail to respond to an urgent call due to negative stereotypes they harbor about victims of domestic violence or about women in general, there is no federal constitutional or statutory remedy.

### **B. VAWA is Non-binding on States and is Primarily a Source of Grants**

19. In the absence of any substantive federal remedy for failure to protect women's rights, VAWA's role in preventing and punishing violence against women is limited primarily to making grants to state and local police and advocacy organizations who seek to implement

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<sup>42</sup> 42 U.S.C. § 13981.

<sup>43</sup> See *United States v. Morrison*, 529 U.S. 598, 653 (2000) (Souter, J. dissenting) (citing *See Crimes of Violence Motivated by Gender*, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 34-36 (1993)).

<sup>44</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>45</sup> *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

<sup>46</sup> 489 U.S. 189 (1989).

training or programming,<sup>47</sup> funding domestic violence service provision and training,<sup>48</sup> providing immigration relief to non-citizen victims of violence,<sup>49</sup> and coordinating interstate recognition of protective orders.<sup>50</sup> VAWA also issues grants to support domestic violence shelters,<sup>51</sup> rape prevention courses,<sup>52</sup> domestic violence prevention and intervention programs,<sup>53</sup> and programs aimed at strengthening law enforcement, victim services, and prosecutorial/judicial responses domestic violence.<sup>54</sup> The Federal Office on Violence Against Women (OVW) was established to administer VAWA grants for projects targeted at improving the issuance and enforcement of Protection Orders, including STOP (Services, Training, Officers, and Prosecutors) grants,<sup>55</sup> ARREST grants to encourage arrest policies and enforcement of protection orders,<sup>56</sup> and other programs aimed at training professionals to improve their responses to violence against women.<sup>57</sup>

20. However, application for and participation in these grants is entirely voluntary on the part of states and stakeholders within the states. For instance, VAWA “conditions state receipt of sizable federal funding on the creation of systems that: (1) ensure that protection orders are given full faith and credit by all sister states; (2) provide government assistance with service of process in protection order cases; and (3) criminalize violations of protection orders,”<sup>58</sup> as well as those which adopt mandatory arrest requirements in domestic violence situations.<sup>59</sup> If a state or locality chooses not to apply for the funding, however, VAWA has no impact at all.

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<sup>47</sup> Pub. L. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

<sup>48</sup> Pub. L. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

<sup>49</sup> Pub. L. 103-322, § 40701, 108 Stat. 1796, 1953-54 (1994); Pub. L. 106-386, § 1503, 114 Stat 1464, 1518-22 (2000); Pub. L. 109-162, Title VII, 119 Stat. 2960, 3053-78 (2005).

<sup>50</sup> Pub. L. 103-322, § 40221, 108 Stat. 1796, 1926-32 (1994); Pub. L. 106-386, § 1101, 114 Stat 1464, 1492-94 (2000); Pub. L. 109-162, § 106, 119 Stat. 2960, 2981-83 (2005).

<sup>51</sup> Pub. L. 103-322, § 40241, 108 Stat. 1796, 1932 (1994); Pub. L. 106-386, § 1202, 114 Stat 1464, 1505-06 (2000). By 2005, shelter grants were being administered through the Family Violence Prevention and Services Act rather than VAWA.

<sup>52</sup> Pub. L. 103-322, § 40151, 108 Stat. 1796, 1920-21 (1994); Pub. L. 106-386, § 1401, 114 Stat 1464, 1512-13 (2000); Pub. L. 109-162, § 302, 119 Stat. 2960, 3004 (2005).

<sup>53</sup> Pub. L. 103-322, § 40271, 108 Stat. 1796, 1937-38 (1994); Pub. L. 106-386, § 1106, 114 Stat 1464, 1497 (2000); Pub. L. 109-162, § 401, 119 Stat. 2960, 3017-23 (2005).

<sup>54</sup> Pub. L. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

<sup>55</sup> Pub. L. 103-322, § 40121, 108 Stat. 1796, 1910-17 (1994); Pub. L. 106-386, § 1103, 114 Stat 1464, 1495-97 (2000); Pub. L. 109-162, § 101, 119 Stat. 2960, 2972-75 (2005).

<sup>56</sup> Pub. L. 103-322, § 40231, 108 Stat. 1796, 1932-34 (1994); Pub. L. 106-386, § 1104, 114 Stat 1464, 1497 (2000); Pub. L. 109-162, § 102, 119 Stat. 2960, 2975-78 (2005).

<sup>57</sup> See Pub. L. 103-322, §§ 40152, 40412, 40421, 40607, 108 Stat. 1796 (1994); Pub. L. 106-386, §§ 1401, 1402, 1405, 1406, 114 Stat. 1464 (2000); Pub. L. 109-162, § 111, 204, 205, 503, 119 Stat. 2960 (2005).

<sup>58</sup> Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J. L. & FEMINISM 3, 12 (1999).

<sup>59</sup> Ryan C. Hasanbasic, *Town of Castle Rock v. Gonzales: The Supreme Court Goes to Great Lengths to Ensure Police Discretion, But at What Cost?* 36 STETSON L. REV. 881, 913 (2007).

21. Indeed, many states do not receive VAWA funding. In 2007, no ARREST grants were made in 19 of the 56 participating states and U.S. territories.<sup>60</sup> Further, in 2007, the median total of grants made by OVW to programs within a single state or territory was approximately \$4.5 million.<sup>61</sup> Alaska, a state with a population of 683,478, received \$15.9 million in funding from OVW; New York, population 19,297,729, received \$18.8 million; and Wyoming, population 522,830, received \$2.3 million.<sup>62</sup> It should be noted that because many VAWA grants are given to localities and local nonprofit organizations rather than to states, VAWA coverage within each state varies. For example, West Virginia was given \$3,617,063 in various VAWA grants in 2007, but \$2.6 million of this funding was granted to local foundations rather than divisions of the state government. The YMCA of Wheeling, West Virginia alone received \$255,000. Similarly, in 2007, only \$2.9 million of the \$5,880,026 total grant money that Georgia received was to state-run DV programs.<sup>63</sup> Without a national scheme mandating legislation and training programs, the level of protection afforded to domestic violence victims varies across jurisdictions, leaving women in many parts of the country suffering from inadequate levels of protection and services.
22. Yet another problem with the VAWA grant programs is that grants are not adequately monitored. “The National Center for State Courts (NCSC) reviewed surveys provided by state court administrators and found a ‘significant number of administrative offices noted that the courts were not receiving all of [a] 5 percent set-aside.’ . . . Delays in spending also continue to plague the efficacy of the funds.”<sup>64</sup> Failure to monitor implementation of the grants greatly diminishes VAWA’s effectiveness.
23. VAWA is a significant funding source for services for victims of domestic violence and their advocates. However, providing funding to encourage states, localities, and agencies to act on a voluntary basis does not by itself fulfill the United States’ duty to provide comprehensive human rights protections for domestic violence victims.<sup>65</sup> The voluntary nature of VAWA grants means that money often fails to reach persons most in need, who live in jurisdictions that lack the political will or the resources to navigate the complex terrain of the funding process.

### **C. VAWA Grants, while Laudable, do not Fulfill the Critical Needs of Domestic Violence Victims**

24. The diverse grants made under VAWA are a tremendous help to domestic violence victims around the country, but the grant amounts do not come close to meeting the total need. This

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<sup>60</sup> See FY 2007 Office on Violence Against Women Grant Activity by State, *available at* <http://www.ovw.usdoj.gov/grant-activities2007.htm>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*; census figures taken from <http://www.census.gov>.

<sup>63</sup> See FY 2007 Office on Violence Against Women Grant Activity by State, *available at* <http://www.ovw.usdoj.gov/grant-activities2007.htm>.

<sup>64</sup> Leila Abolfazli, *Criminal Law: Violence Against Women Act (VAWA)*, 7 GEO. J. GENDER & L. 863, 865-66 (2006).

<sup>65</sup> See, e.g., Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988) ¶¶166, 174, 176.

## Domestic Violence in the United States

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is demonstrated by three basic types of needed funding: shelter for battered women and their families, supervisors to monitor batterers who have visitation rights with their children, and legal counsel to assist with the various civil legal matters that arise from violence within the family.

25. Before the 1970s, there were few, if any, domestic violence shelters for abused women in the United States.<sup>66</sup> Presently there are shelters in every state, but there are still not enough emergency shelters to cover all of the women and children fleeing abusive relationships. Since its inception, VAWA has helped to fund shelter services for battered women and their children.<sup>67</sup> Yet these efforts are still outstripped by the need for more shelter for domestic violence victims and their families.<sup>68</sup> In 2006, 1,898 families were turned away from domestic violence shelters in Virginia,<sup>69</sup> and in the greater Richmond area, population 775,000, there were only 4 domestic violence shelters with a total of 56 beds.<sup>70</sup>
26. Another important problem is the lack of availability of supervisors for batterers' visitation with their children. When a victim of domestic violence flees an abusive home, her abuser is usually eligible for visitation rights with children they have in common. One form of visitation designed to protect women and children from violence or stalking is visitation supervised by social work or mental health professionals at a specially designated center. "Supervised visitation, previously mandated most often in cases of child abuse and neglect, has become much more common in domestic violence cases. Judges may see it as the only responsible arrangement in cases with a history of domestic violence."<sup>71</sup> However, paying supervisors and funding their facilities is expensive, and many poor families cannot afford it. "The most pressing issue with supervised visitation centers is simply an undersupply to meet the demand for centers that can handle domestic violence cases, with the appropriate safety protocols. The undersupply is directly linked to a lack of funding and intermittent funding."<sup>72</sup> Although VAWA began funding supervised visitation centers in 2000 and continued in 2005,<sup>73</sup> these monies have decreased each year since 2003, as Congress fails time and again to approve the funding amount it previously authorized.<sup>74</sup>

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<sup>66</sup> Women/Children Fleeing Abuse, <http://www.npr.org/news/specials/housingfirst/whoneeds/abuse.html>

<sup>67</sup> See P.L. 103-322 § 40241; P.L. 106-386 § 1202. By 2005, shelter grants were being administered through the Family Violence Prevention and Services Act rather than VAWA.

<sup>68</sup> In fact, the Humane Society of America estimates there are three times the number of shelters for homeless animals as for abuse victims. See Hay El Nasser, American Journal: "No Kill" Pet Shelters Grow in Popularity, Detroit News, Sept. 15, 1997, at A2 (stating that there are approximately 5,000 animal shelters in the United States).

<sup>69</sup> *Id.*

<sup>70</sup> Bill Wasson, Abused who leave find few safe places, Times-Dispatch, October 27, 2007, <http://www.timesdispatch.com/cva/ric/news>.

<sup>71</sup> O'Sullivan et al., *Supervised and Unsupervised Parental Access in Domestic Violence Cases: Court Orders and Consequences*, Final technical report submitted to the National Institute of Justice (March 2006) at 33, available at <http://www.ncjrs.gov/pdffiles1/nij/grants/213712.pdf>.

<sup>72</sup> *Id.*

<sup>73</sup> P.L. 106-386 § 1301; P.L. 109-162 § 306.

<sup>74</sup> "Assistance for 16.527: Supervised Visitation, Safe Havens for Children (FY 2000-2006)", FedSpending.org, available at [http://www.fedspending.org/faads/faads.php?&sortby=r&record\\_num=all&detail=-1&datatype=T&reptype=a&database=faads&cfda\\_program\\_num=16.527](http://www.fedspending.org/faads/faads.php?&sortby=r&record_num=all&detail=-1&datatype=T&reptype=a&database=faads&cfda_program_num=16.527). "Funding for the provisions of VAWA is subject to congressional review every fiscal year, a power which Congress has, sadly, sought to wield freely. For example, in 2004, funding for VAWA's supervised visitation centers, educational and training programs, rural and

27. A victim's ability to obtain a civil order of protection may be further hampered by her lack of access to counsel. The Supreme Court, in *Gideon v. Wainwright*,<sup>75</sup> established the right of an indigent defendant to state-provided counsel in criminal cases, but the right to counsel has not been extended to civil cases.<sup>76</sup> Although some states have chosen to expand a civil right to counsel, nowhere in the United States is the right to counsel in civil cases comprehensive.
28. The civil legal matters which entangle the lives of domestic violence victims often involve a person's interests in "shelter, sustenance, safety, health and child custody," which are deemed "fundamental economic and social rights . . . in many of the world's constitutions and in international human rights treaties, but which are not explicitly protected by the federal United States Constitution."<sup>77</sup> Funding has been allocated under VAWA since 1998 for civil legal assistance for domestic violence victims,<sup>78</sup> especially for the purpose of obtaining protective orders, but once again the need vastly outstrips the funding available.
- D. VAWA Will Be Reauthorized in 2011**
29. The provisions of VAWA that provide funding for services and projects will expire in 2011 and will need to be reauthorized by Congress at that time. This provides opportunities to improve funding and encourage funding of projects that will meet emergent needs. The United States Senate Judiciary Committee has already held hearings, including on June 10, 2009 and May 5, 2010 (emphasizing the importance of VAWA during times of economic crisis), to report on how VAWA is currently being used and which topics should be addressed in the near future.<sup>79</sup> A hearing on the importance of VAWA's transitional housing provisions has been postponed.<sup>80</sup>
30. The priorities of the United States Department of Justice Office on Violence Against Women in the 2011 reauthorization are to provide more resources to programs on violence prevention

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campus violence prevention initiatives, and grants to encourage arrests was less than the authorized amounts, and successive decreases are projected for fiscal years 2005 and 2006." *Defense of Others and Defenseless "Others,"* 17 YALE JOURNAL OF LAW AND FEMINISM 327, 330 n.107 (2005).

<sup>75</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>76</sup> See *Lassiter v. Dep't of Soc. Servs of Durham County, N. C.*, 452 U.S. 18 (1981) (no automatic right to civil counsel in termination of parental rights case). In comparison, "[i]n approximately two-thirds of the [Council of Europe] countries, the right to counsel covers a wide spectrum of civil matters [including] family law, housing, consumer and debt cases, personal injury claims, public benefits, [and] employment and labor law" as a result of the European Court of Human Rights' ruling in *Airey v. Ireland*, 32 Eur. Ct. HR Serv A (1979): [1979]2 E.H.R.R. 305. Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World?*, 15 TEMP. POL. & CIV. RATS. L. REV. 769, 779 (2006).

<sup>77</sup> Northeastern University School of Law, Program on Human Rights and the Global Economy, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases* (December 2006) [hereinafter *In the Interests of Justice*], available at <http://www.slaw.neu.edu/clinics/RightToCounsel.pdf>.

<sup>78</sup> See, e.g., P.L. 106-36 § 1201; P.L. 109-162 § 103.

<sup>79</sup> See, e.g., the texts of statements made at these hearings at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4562> (June 10, 2009) and <http://judiciary.senate.gov/hearings/hearing.cfm?id=4562> (May 5, 2010).

<sup>80</sup> See <http://judiciary.senate.gov/hearings/hearing.cfm?id=4858>.

(especially exposure of children to violence, teen dating violence, homicide prevention, and bystander intervention training) and sexual assault (especially criminal justice).

### **III. DOMESTIC VIOLENCE AND THE CRIMINAL JUSTICE SYSTEM**

#### **A. Background**

31. In recent decades, U.S. public attitude toward state intervention in the home has undergone a significant change. As a result, federal, state, and local legislation has introduced certain legal remedies to domestic violence victims and, in many instances, introduced policies and structures in police agencies designed to respond to the domestic violence epidemic.<sup>81</sup>
32. Legal remedies, however, generally remain restricted to state and local courts. Recent Supreme Court rulings have dramatically limited the federal causes of action available to survivors of domestic violence.<sup>82</sup> At the local level, however, victims may turn to the judicial system and law enforcement officials with an expectation that the state will act to protect them from violence. State and local officials are expected to rely on civil protection orders, mandatory arrest policies, and criminal prosecutions to ensure victims' safety (though, as discussed below, such mechanisms are often not used or used inappropriately by such officials).
33. Civil protection orders are an essential means of protecting battered women. In an effort to require police to effectively respond to domestic violence, states across the country began as early as 1970 to adopt legislation authorizing judges to issue civil restraining orders (also known as orders of protection) to victims of domestic violence who demonstrate that they fear future physical harm from their abuser.<sup>83</sup> Today, all 50 states have passed such

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<sup>81</sup> “According to the 1990 Law Enforcement Management and Administrative Statistics Survey (LEMAS), 93% of the large local police agencies (agencies with more than 100 officers) and 77% of the sheriffs' departments have written policies concerning domestic disturbances. In addition, 45% of the large local police agencies and 40% of the sheriffs' departments have special units to deal with domestic violence.” Marianne W. Sawpits, U.S. Dep't of Justice, *Bureau of Justice Selected Findings: Domestic Violence: Violence between Intimates* 5, NCJ-149259 (Nov. 1994), <http://www.ojp.usdoj.gov/bjs/pub/pdf/vbi.pdf>.

<sup>82</sup> In addition to the *Gonzales* decision, in *United States v. Morrison*, 529 U.S. 598, 627 (2000), the Supreme Court struck down a narrow portion of the Violence Against Women Act that would have allowed for a federal civil rights cause of action to remedy domestic violence. In *DeShaney v. Winnebago Dep't of Soc. Servs.*, 489 U.S. 189 (1989), the Supreme Court found that the Due Process Clause of the Fourteenth Amendment does not provide a remedy when state actors fail to take reasonable measures to protect and ensure a citizen's rights against violation by private actors. See the Brief for New York Legal Assistance Group, et al. as Amici Curiae Supporting Jessica Gonzales, *Jessica Gonzales v. The United States*, Case No. 12.626, Inter-Am. C.H.R. (October 22, 2008) [hereinafter Brief for New York Legal Assistance Group] for a full discussion of VAWA's implications.

<sup>83</sup> Carolyn N. Kop, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of “Efficacy,”* 11 S. CAL. INTERDIS. L.J. 361, 362 (2002) (clarifying that even though there are other reform policies such as implementing mandatory arrests or pro-arrest police procedures, creating domestic violence units in prosecutors' offices, and setting up treatment programs for abusive spouses, most states have adopted civil restraining orders as the remedy). See generally, Leigh Goodmark, *Law Is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 10–11 (2004). Protective orders typically enjoin a respondent from harming or contacting the holder of the order and can also address child

legislation.<sup>84</sup> Civil protection orders, which vary from state to state, often order the respondent to stay away from the petitioner, not contact her, move out of the petitioner's residence, follow custody and visitation orders, and pay child support if children are involved. Violators of such orders are subject to civil contempt as well as criminal penalties.

34. Additionally, twenty-one states and the District of Columbia have enacted legislation that requires police officers to make an arrest when there is probable cause to believe that someone has engaged in specified domestic violence crimes or has violated a restraining order.<sup>85</sup> These "mandatory arrest laws" (also sometimes referred to as "pro-arrest laws") were intended to reduce police discretion in responding to domestic violence.<sup>86</sup> Some of these mandatory and pro-arrest policies were adopted in response to VAWA, which specifically required these policies as a condition for various grants to state and local governments.<sup>87</sup> They also illustrate public frustration with the inadequacy of police response and encourage police to treat domestic violence as a crime.
35. Criminal prosecution constitutes another tool for ensuring victims' safety. Many state prosecutors follow no-drop, or mandatory prosecution policies in an effort to increase the prosecution of domestic violence offenders.<sup>88</sup> These policies appear to result in an increase in prosecution and conviction rates, and a decrease in prosecutorial diversion and deferred adjudication.<sup>89</sup> If permitted to proceed in court, however, domestic violence case dispositions often fall far short of a conviction, instead opting for unproven treatment

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custody and visitation, possession of a joint residence, payment of child or spousal support, etc.

<sup>84</sup> Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1858 (2002); ABA Commission on Domestic Violence, *Domestic Violence Civil Protection Orders (CPOs) By State*, June 2007, <http://www.abanet.org/domviol/docs/DVCPOChartJune07.pdf>.

<sup>85</sup> ANDREW R. KLEIN, *THE CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE* 95 (Cengage Learning 2003). See also Neal Miller, Institute for Law and Justice, *Domestic Violence: A Review of State Legislation Defining Police and Prosecution Duties and Powers* 28 n.86 (Jun. 2004), available at <http://www.ilj.org/publications> (citing ALASKA STAT. § 18.65.530; ARIZ. STAT. ANN. § 13-3601(B); COLO. REV. STAT. § 18-6-803.6; CONN. GEN. STAT. ANN. § 6b-38b(a); D.C. CODE ANN. § 16-1031; IOWA CODE ANN. §§ 236.12(2); KANS. STAT. ANN. § 22-307(b)(1); LA. REV. STAT. ANN. § 46-2140; MISS CODE ANN. § 99-3-7 (3); NEV. REV. STAT. § 171.137; N.J. STAT. ANN. 2C: 25-21; N.Y. CRIM. PROC. LAW § 140.10(4)(c); OHIO REV. CODE ANN. §§ 2935.032(A)(1)(a), 2935.03 (B)(1) (discretionary); OR. REV. STAT. § 133.055(2)(a); R.I. GEN. LAWS § 12-29-3; S.C. CODE ANN. § 16-25-70(B); S.D. CODIFIED LAWS ANN. § 23A-3-2.1; UTAH CODE ANN. § 77-36-2.2(2); VA. CODE ANN. § 19.2-81.3; WASH. REV. CODE ANN. § 10.31.100(2)(c); WIS. STAT. ANN. § 968.075(2); MO. REV. STAT. § 455.085.1).

<sup>86</sup> Some research shows that, in practice, these laws do not curb police discretion entirely. Despite a clear call from many state legislatures that police must arrest the abuser when responding to a report of domestic violence, judicial interpretation of these statutes has tended to tolerate police discretion. See Carole Kennedy Chaney & Grace Hall Saltzstein, *Democratic Control and Bureaucratic Responsiveness: The Police and Domestic Violence*, 42 AM. J. POL. SCI. 745, 749 (1998) (citing research findings that, despite mandatory arrest policies, police departments and officers enjoy considerable discretion in responding to domestic violence complaints). For example, in *Donaldson v. City of Seattle*, the court held that police do not need to seek out and arrest an abuser if he has already fled the scene of the abuse by the time the police arrive. 831 P.2d. 1098, 1104 (Wash. Ct. App. 1992). See also ANDREW R. KLEIN, *THE CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE* 95 (2004).

<sup>87</sup> See generally, Goodmark, *supra* note 83.

<sup>88</sup> Erica L. Smith, et al., U.S. Dep't of Justice, *Bureau of Justice Statistics Special Report State Court Processing of Domestic Violence Cases* 3, NCJ 214993 (Feb. 2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/scpdvc.pdf>.

<sup>89</sup> *Id.*

programs instead of sanctions for the criminal conduct.<sup>90</sup> Some batterers are sent to diversion programs, meaning charges will be dismissed and they will not be found guilty if they comply with minimal restrictions.<sup>91</sup> Since there is usually no monitoring to determine batterer compliance with court mandates, absent arrest, the batterer can flaunt to the victim his disobedience of court orders.<sup>92</sup>

36. While mandatory arrest laws and the criminal justice system are important tools in many respects for preventing domestic violence and protecting victims, they are also viewed by many advocates – particularly those from minority and immigrant communities – with skepticism. Many women of color, including African Americans, Hispanics, and other racial minorities, are particularly reluctant to turn to the police and courts as a source of protection from violence because these institutions have traditionally been viewed as oppressive rather than protective of minorities and immigrants.<sup>93</sup> Law enforcement’s historic relationship with poor communities of color has been characterized by excessive use of force and brutality against men, women, and children, mass incarceration of young men of color, and growing numbers of incarcerated women of color.<sup>94</sup> Minority women are also arrested more often than white women when the police arrive at the scene of a domestic violence incident.<sup>95</sup> In particular, police are more likely to arrest African-American women due to stereotypes of them as overly aggressive.<sup>96</sup> Unfortunately, many advocates argue, “many of the women most in need of government aid are made more vulnerable by these very interventions.”<sup>97</sup>
37. The experiences of immigrant women of color are further complicated by their realities as immigrants in the United States. Many immigrant women are unaware of governmental services available to victims of domestic violence. The government has done little to communicate about domestic violence or the remedies available to immigrant communities and individuals. Moreover, due to the rising anti-immigrant sentiment in the country, the historic deportations of Latinos, Latinas, Haitians, and other immigrants of color, and the government’s post-9/11 targeting of South Asians, Arabs, and Muslims, many immigrant women fear that they or their family members will be deported or will suffer criminal

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<sup>90</sup> See Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1526 (1998) (noting batterer’s counseling programs are more typical).

<sup>91</sup> Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. REV. 79, 104 (1994).

<sup>92</sup> Emily J. Stack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1726 (2004).

<sup>93</sup> Natalie J. Sokoloff & Ida Dupont, “Understanding Violence Against Marginalized Women in Diverse Communities,” in *Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities* 48 (2005), available at <http://vaw.sagepub.com/cgi/content/abstract/11/1/38>. See also Urban Justice Center, *Race Realities in New York City* (2007).

<sup>94</sup> *Id.*

<sup>95</sup> Goodmark, When is a Battered Woman Not a Battered Woman? When She Fights Back, 20 *Yale Journal of Law and Feminism* 75 (2008); Donna Coker, “Special Issue Feminism And The Criminal Law: Crime Control and Feminist Law Reform,” in *Domestic Violence Law: A Critical Review*, 4 *Buff. Crim. L. R.* 801, 810-811 (2001); E. Assata Wright, “Not a Black and White Issue: For Battered and Abused Latinas and Black Women, Dialing 911 May Be Risky Business.” *On The Issues*. Long Island City, Jan. 31, 1998, at 42.

<sup>96</sup> Goodmark, *supra* note 95. See generally Wright, *supra* note 95 at 42.

<sup>97</sup> See *Id.* at 42.

consequences as a result of reporting domestic violence to the police or the courts. This fear is especially acute when the batterer is the primary breadwinner for a family or couple, and where the victim has children. Finally, even when immigrant women seek to access governmental services, the police and the court system often do not provide sufficiently multilingual services that would allow them to communicate meaningfully with police and judges. Batterers, who often speak English with greater proficiency than their female partners, often exploit the government's failure to provide multilingual police services by framing the victim as the batterer to law enforcement, resulting in the victim's inability to file a police report against her batterer, and sometimes resulting in her arrest.<sup>98</sup>

### B. Prevalence, Effects and Consequences

38. Most domestic violence victims do not report the abuse and do not seek police assistance. According to a 2000 Department of Justice study, only about one-quarter of women who were physically assaulted by an intimate partner reported the incident to the police.<sup>99</sup> Fifty-two percent of women who were stalked by an intimate partner reported the stalking to the police.<sup>100</sup> Less than one-fifth of women raped by an intimate partner reported their rape to the police.<sup>101</sup> Women who do not report intimate partner violence to the police commonly list three main reasons for keeping silent: the private nature of the relationship, their fear of retaliation from their abuser, and their feeling that the police would not respond adequately to the abuse.<sup>102</sup>
39. While judicial orders of protection do not eliminate the risk of continuing abuse or homicide, they may decrease it.<sup>103</sup> Reports indicate some 86% of the women who receive protection orders state the abuse either stopped or was greatly reduced.<sup>104</sup> One study found, however, that among sixty-five abused women applying and qualifying for a protection order against a sexual intimate, only half of the women actually received the order.<sup>105</sup> Another study found

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<sup>98</sup> As described in Chapter VII, Native American domestic violence victims also have a complicated relationship with the criminal justice system and limited legal remedies. For a full discussion of the impact of recent Supreme Court rulings on American Indian and Alaska Native women, see Brief for Amicus Curiae Sacred Circle, National Resource Center to End Violence Against Native Women, et al. supporting Jessica Gonzales, *Jessica Gonzales v. The United States*, Case No. 12.626, Inter-Am. C.H.R. (October 22, 2008) [hereinafter Brief for Amici Curiae Sacred Circle].

<sup>99</sup> TJADEN AND THOENNES, *supra* note 2; Lawrence A. Greenfeld et al., U.S. Dep't of Justice, *Bureau of Justice Statistics Factbook: Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* 38 NCJ 167237 (Mar. 1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf>.

<sup>100</sup> TJADEN AND THOENNES, *supra* note 2.

<sup>101</sup> *Id.*

<sup>102</sup> Greenfeld et al., *supra* note 99.

<sup>103</sup> Am. Bar Ass'n, Comm'n on Domestic Violence, *Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases* (2007), available at <http://www.abanet.org/domviol/docs/StandardsCommentary.pdf>.

<sup>104</sup> James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Response*, 35(4) CRIME, LAW & SOCIAL CHANGE 363 (2001).

<sup>105</sup> J. Gist et al., *Women in Danger: Intimate Partner Violence Experienced by Women That Qualify and Do Not Qualify for a Protection Order*, 19 BEHAVIORAL SCIENCES & LAW 1 (2001). See also Report to the California Attorney General, *Keeping the Promise: Victim Safety and Batterer Accountability* 1, 35–36 (2005); Jane C.

that 60% of protective orders were violated in the year after issue and nearly a third of women with protective orders reported violations involving severe violence and injury to themselves.<sup>106</sup>

40. The inadequate treatment of domestic violence cases in court begins in the pleading stage. Battered women who come to courthouses seeking a judicial remedy are often asked to fill out standardized forms, sometimes with the help of a clerk or lay advocate. While these forms may increase efficiency and make the court experience less frightening, they also limit the ability of women to tell their full story with specificity. Many immigrant survivors face an additional disadvantage in the pleading stage because they must rely on translators and interpreters to tell their stories, and even the best interpreters can make mistakes that affect the survivors' credibility.<sup>107</sup>
41. Hearings on petitions for protection order are too often cursory and curtailed by courts.<sup>108</sup> These quick summary proceedings have mixed consequences for survivors, and are also controversial from a due process/defendants' rights perspective. On the one hand, they allow petitioners to access judicial remedies without the time and expense of a full trial.<sup>109</sup> On the other, such quick hearings do not permit petitioners to fully describe the incidents that brought them to court.<sup>110</sup> During these truncated proceedings, judges sometimes refuse to hear crucial evidence.<sup>111</sup> Courts may categorically refuse to hear some issues central to a petitioner's case, like child support, or may issue a boilerplate order without considering the unique facts of the case.<sup>112</sup> Such truncated hearings are especially difficult for victims who need interpreters (often immigrant women), as the process of interpreting itself takes up time,

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Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U.J. GENDER SOC. POL'Y & L. 499, 509 (2003).

<sup>106</sup> U.S. Dep't of Justice, Nat'l Inst. of Justice, *Legal Interventions in Family Violence: Research Findings and Policy Implications* 50, NCJ 171666 (July 1998), available at [www.ncjrs.gov/pdffiles/171666.pdf](http://www.ncjrs.gov/pdffiles/171666.pdf).

<sup>107</sup> WEAVE clients have worked with interpreters who interpolate what they think would be helpful, whether or not the survivor has said something, so petitions end up bearing little resemblance to the petitioner's experience.

<sup>108</sup> For example, the average time in New Jersey for hearings was five minutes and forty-five seconds. Lisa Memoli & Gina Plotino, *Enforcement or Pretense: The Courts and the Domestic Violence Act*, 15 WOMEN'S RATS. L. REP. 39, 47 (1993). In Massachusetts, courts allotted as little as an average of two minutes for a hearing. Ptacek, *supra* note 104 (reporting that in some courts studied in Massachusetts, a judge disposed of 8 consecutive civil protection order hearings in less than 18 minutes).

<sup>109</sup> Deborah M. Weismann, *Gender-Based Violence as Judicial Anomaly: Between "The Truly Nation and the Truly Local,"* 42 B.C. L. REV. 1081 (2001).

<sup>110</sup> 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). Indeed, these summary proceedings create controversy regarding the defendant's due process rights.

<sup>111</sup> See Memoli & Plotino, *supra* note 108; Ptacek, *supra* note 104, at 161.

<sup>112</sup> 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 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, 195, 206 (1993) (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 proceeding); Bernadette Dunn Sewell, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. 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).

eating away the precious few minutes that a victim may have to tell her story. Survivors also face judicial pressures to resolve their issues outside of the protection order process. Judges have sometimes asked that battered women file separate protection order, divorce, and custody actions, further confusing and frustrating petitioners, many of whom appear *pro se*.<sup>113</sup> In addition, judges often encourage survivors to negotiate with their batterers, even though many studies have documented the ways in which it is undesirable—and perhaps even damaging—for the parties to mediate in domestic violence cases.<sup>114</sup>

42. Moreover, police often fail to respond to reports of domestic violence and/or restraining order violations, further hindering a battered woman's search for protection and justice. Nationally, victims of domestic violence report that in 75% of cases law enforcement takes longer than five minutes from the time of the call for service.<sup>115</sup> In 10% of cases nationwide, police failed to respond at all to reports of domestic violence.<sup>116</sup> One New York City woman, for instance, reported the violation of her protective order thirteen times before the police finally came and arrested her abuser.<sup>117</sup>
43. Even police officers who do respond to a victim's call often fail to treat the abuse as criminal, and thus often do not arrest perpetrators. Thirty percent of cases where victims request police assistance fail to result in an official report.<sup>118</sup> The National Violence Against Women Survey examined arrest rates by offense and found consistently that domestic violence assailants were arrested or detained less than half the time: in 47% of rape cases, 36% of physical assault cases, and 28% of stalking cases.<sup>119</sup> Indeed, police are still less likely to make an arrest when a husband feloniously assaults his wife than in other felony assault cases.<sup>120</sup> The police are also less likely to arrest in cases involving poor, non-white, and urban-resident battered women than in cases involving white, wealthier, and suburban-resident battered women.<sup>121</sup> Indeed, these low arrest rates might exacerbate the prevalence of

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<sup>113</sup> Catherine F. Klein & Leslye E. Roof, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993). These separate proceedings are unnecessary hurdles for any petitioner. Pro se litigants have particular difficulty negotiating these separate proceedings, compounded by the fact that many of them fear facing their batterer face-to-face in court. *Id.*

<sup>114</sup> 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). Although summary proceedings and judicial emphasis on out-of-court resolutions have allowed crowded state dockets to meet the increasing demand for protection orders, this judicial treatment of domestic violence cases may add to the damaging perception that these claims are not worthy of the courts' attention. Weismann, *supra* note 109, at 1091-93. Especially for women of color and immigrant women, this perception leaves survivors feeling increasingly helpless, unable to access remedies against their batterers. Courts' current treatment of domestic violence cases also misses an opportunity for judicial education about the complications surrounding domestic violence, as well as an opportunity for appropriate and uniquely tailored relief.

<sup>115</sup> Greenfeld et al., *supra* note 99.

<sup>116</sup> *Id.*

<sup>117</sup> Mary Haviland, et. al., Urban Justice Center, *The Family Protection and Domestic Violence Intervention Act of 1995: Examining the Effects of Mandatory Arrest in New York City* 35 (2001).

<sup>118</sup> Greenfeld et al., *supra* note 99, at 20.

<sup>119</sup> TJADEN AND THOENNES, *supra* note 2.

<sup>120</sup> Edem F. Avakame & James J. Fyfe, *Differential Police Treatment of Male-on-Female Spousal Violence*, 7 VIOLENCE AGAINST WOMEN 22, 35-6 (2001).

<sup>121</sup> *Id.*

domestic violence, given that available data indicates men arrested for assaulting their female partners are approximately 30% less likely to assault their partners again than men who are not arrested.<sup>122</sup>

44. Additionally, many officers encourage informal resolution between the parties, urging the victim to “work it out” with the abuser.<sup>123</sup> In one study, 40% of police departments explicitly encouraged mediation, and one half had no formal policy on domestic violence.<sup>124</sup> A national survey shows that police attempts at mediation or separation of the parties so they can “cool off” is also common.<sup>125</sup> Statistics show that when police do respond to a violation of a protective order by arresting the offender, they reduce the risk of re-offense.<sup>126</sup>
45. Mandatory arrest laws have increased the rates of arrests. For example, before the District of Columbia adopted a mandatory arrest policy, police arrested abusers in only 5% of domestic violence cases.<sup>127</sup> After adoption of a mandatory arrest policy, police arrested abusers in 41% of cases.<sup>128</sup> After the adoption of a mandatory arrest policy in New York City, felony domestic violence arrests increased by 33% and arrests for violation of protection orders increased by 76%.<sup>129</sup> Nonetheless, not every jurisdiction has a mandatory arrest policy, and even those with such a law on the books do not always yield effective, consistent practices. Despite a mandatory arrest policy in the District of Columbia, in the above-mentioned 2004 survey, 62% of victims surveyed reported that responding police officers took reports; 7% of victims were arrested with the batterer; 4% were arrested while their abusers were not; and 29% reported the police were reluctant to arrest the batterer.<sup>130</sup> In one California jurisdiction, where the police department has a policy requiring arrest, officers failed to make arrests in at least 30% of cases where visible injuries were present.<sup>131</sup>
46. Many advocates have expressed concerns about mandatory arrest laws. Apart from the low arrest rate of abusers following a police report of domestic violence, another troubling trend is the practice of “dual arrest,” whereby the victim is arrested alone or alongside her abuser. In jurisdictions with mandatory arrest policies, police will often “either throw up their hands, arrest both parties and leave it to the courts to sort out, or choose to arrest the woman because

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<sup>122</sup> Christopher Maxwell et al., Nat’l Inst. for Justice, *Research In Brief, The Effect of Arrest on Intimate Partner Violence: New Evidence from the Spouse Assault Replication Program* 9 (Jul. 2001).

<sup>123</sup> Machaela M. Hector, Comment, *Domestic Violence As a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 650 (1997).

<sup>124</sup> *Id.*

<sup>125</sup> See Hector, *supra* note 123, at 649. See Donaldson, 831 P.2d at 1105 (Wash. Ct. App. 1992) (“[A] common police response to domestic violence calls was to treat the matter as a family quarrel, try to mediate the situation and walk the abuser around so he could ‘cool off.’”).

<sup>126</sup> Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1854 (2002); Susan L. Kibitz et al., National Ctr. For State Courts, *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence* (1997).

<sup>127</sup> U.S. Attorney General’s Task Force on Family Violence, *U.S. Dept. of Justice Final Report* 10–26 (1984).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Survey conducted by Survivors and Advocates for Empowerment (SAFE), Washington, DC (2004).

<sup>131</sup> Women’s Justice Center, *Online Handbook: Advocating for Women in the Criminal Justice System in Cases of Rape, Domestic Violence and Child Abuse*, available at [http://www.justicewomen.com/handbook/part1\\_problem.html](http://www.justicewomen.com/handbook/part1_problem.html) (last visited Jan. 13, 2011).

she may appear to be the aggressor to the untrained eye.”<sup>132</sup> Research shows that most of the women who were arrested following reports of domestic abuse were acting in self-defense.<sup>133</sup> One study suggests the dual arrest rate for intimate partner violence is only about 2%,<sup>134</sup> but other sources indicate that in some areas women make up almost a quarter of domestic violence arrestees.<sup>135</sup> These practices are particularly harmful to battered women.

47. Problems for the battered woman do not end with the arrest; she also faces the prospect of having her children removed by child protective services, being charged inappropriately, being pressured to plea bargain, being wrongfully convicted, having her arrest and conviction history used against her in subsequent custody proceedings, losing her job, and having the batterer use the threat of criminal prosecution to continue to control her.<sup>136</sup> These prospects can be daunting to all women, but particularly to women of color and immigrant women, who are already disproportionately affected by domestic abuse. Police, therefore, must respond appropriately to domestic violence calls and follow mandatory arrest policies by arresting the abuser, both to ensure public safety and to avoid exposing the victim to additional harm.
48. Another problem exists where police officers technically do respond, but fail to conduct adequate investigations or keep appropriate records, thereby harming the victim’s chances of obtaining meaningful protection. Although the police do take official reports in the majority of reported incidents, nationally they are more likely to take reports when an incident involves strangers and not intimate partners.<sup>137</sup> As reported in a 2002 survey of survivors in Santa Rosa, California, in one-third of the cases, the officers did not ask victims about the presence of firearms.<sup>138</sup> In almost half of the cases, officers did not take photographs, even though victims had visible injuries.<sup>139</sup> In 27% of the cases, officers did not ask victims about the perpetrator’s history of abuse.<sup>140</sup> In no case in which the victim needed an interpreter did the officer provide one.<sup>141</sup> A victim’s inability to communicate with the police officers clearly impedes evidence gathering and the creation of records. Failing to create and maintain

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<sup>132</sup> Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1680 (2004); accord Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN’S L.J. 339, 344 (1995); see also Goodmark, *supra* note 83, at 23.

<sup>133</sup> Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 831 (2001); Joan Zorza, *Must We Stop Arresting Batterers? Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 980 (1994).

<sup>134</sup> David Hirschel et al., *Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Cases*, Report Submitted to U.S. Dep’t of Justice, Doc. No. 218355 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf>.

<sup>135</sup> Holly Maguigan, *Wading Into Professor Schneider’s “Murky Middle Ground” Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL’Y & L. 426, 442 (2003).

<sup>136</sup> Goodmark, *supra* note 83, at 23.

<sup>137</sup> Sawpits, *supra* note 81.

<sup>138</sup> Women’s Justice Center, *supra* note 131.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

## Domestic Violence in the United States

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records and gather evidence has obvious implications for holding abusers accountable and permitting survivors to access legal remedies.

49. Inadequate recordkeeping and reporting of domestic violence-related crimes are also commonplace within police departments.<sup>142</sup> Accurate statistics on police response to domestic violence are difficult to obtain, if they exist at all. An open records request involving a representative sample of police departments across the United States has revealed that very few police departments keep specific or disaggregated data on domestic violence arrests or complaints.<sup>143</sup> Domestic violence crimes are also consistently miscategorized or undercategorized by officers responding to calls for service.<sup>144</sup>
50. Criminal prosecution statistics reveal a disturbing trend whereby alleged abusers are rarely prosecuted. In a 2002 Department of Justice study of 16 large urban counties, about half of domestic violence offenders facing prosecution were convicted; of those convicted, 80% were sentenced to jail or prison.<sup>145</sup> Even so, only 18% of those defendants were convicted of felonies.<sup>146</sup> Conviction rates vary drastically depending on the location, however, with some counties reporting a 17% conviction rate, and others reporting an 89% conviction rate.<sup>147</sup> Such statistics create a belief among domestic violence victims that no recourse exists for them and that there will be no punishment for their abusers.
51. The phenomena discussed above concerning the inadequate response to domestic violence by our criminal justice system has particularly harmful effects on minority and immigrant populations. Women of color may be reluctant to report domestic violence or sexual assault because of negative and discriminatory interactions with law enforcement and the court system, or due to sexually discriminatory treatment in their communities by law enforcement and the courts.<sup>148</sup> Immigrant women may also fear deportation as a consequence of calling the police. One study in Arizona found African Americans were more likely to be sentenced to prison than Caucasians, even where general statistics revealed that domestic violence perpetrators were generally less likely to be convicted than those charged with the same crime without a domestic violence designation.<sup>149</sup> Another study found that 66% of domestic

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<sup>142</sup> See, e.g., Betty Caponera, *Incidence and Nature of Domestic Violence in New Mexico V: An Analysis of 2004 Data from the New Mexico Interpersonal Violence Data Central Repository* (June 2005).

<sup>143</sup> In November 2005, the American Civil Liberties Union submitted open records requests to thirteen representative police departments across the United States asking for data and statistics pertaining to domestic violence crimes committed in the departments' jurisdictions during the years 1999-2005. To date, eight police departments have responded.

<sup>144</sup> Phone Conversation between Counsel for Petitioner and Kim Brooks, Legal Advisor to the Baton Rouge Police Department, Nov. 29, 2005.

<sup>145</sup> Erica L. Smith and Donald J. Farole, Jr., Ph.D., U.S. Dep't of Justice, *Bureau of Justice Statistics Special Report State Court Processing Statistics: Profile of Intimate Partner Violence Cases in Large Urban Counties 1*, NCJ 228193 (Oct. 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pipvcluc.pdf>.

<sup>146</sup> *Id.* at 2.

<sup>147</sup> *Id.* at 6.

<sup>148</sup> Coker, *supra* note 133, at 831; See The Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, Report on Eliminating Racial and Gender Bias From Pennsylvania's Courts 548 (Mar. 3, 2003), available at <http://216.104.174.12/bias.shtml> [hereinafter PA Court Report]. See also Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 819-20 (2000).

<sup>149</sup> David Wells, Arizona Coalition Against Domestic Violence, *Domestic Violence Prosecutions: Inequalities by*

violence survivors arrested along with abusers (dual arrest cases) or arrested as a result of a complaint lodged by their abuser (retaliatory arrest cases) were African American or Latina.<sup>150</sup>

52. Given the potentially grim consequences of inadequate assistance to abuse victims and prosecutors' monopoly on access to remedies in criminal court, it is unconscionable to condone the dearth of safety-enhancing sentences. Yet, sentences—even for recidivist batterers—remain relatively lenient.<sup>151</sup> The results of those light dispositions may greatly endanger victims.<sup>152</sup> Problematic judges disregard precedent, misuse evidentiary rules, and block admissible expert testimony, among other troublesome practices.<sup>153</sup>

### C. Law and Policy Problems

53. Although intimate partner violence is now proscribed by criminal law, the legal system's indifference is characterized by low prosecution and conviction rates.<sup>154</sup> One factor contributing to low conviction rates is anachronistic evidentiary rules that exclude prior domestic violence acts within the same relationship.<sup>155</sup> Because prosecutors are not permitted to introduce key relevant evidence at trial, securing a conviction has become even more difficult.

#### i. Confrontation Clause Problems

54. Another evidentiary problem emerges in the recent practice of evidence-based prosecution.<sup>156</sup> For those jurisdictions that adopted the practice, evidence-based prosecution had improved

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*Gender and Race Perpetuated in Arizona 1* (September 2003), available at <http://www.asu.edu/news/research/ACADVReport.PDF>. Imprisonment as remedy is not the position advocated for in this report. In fact, with recidivism rates at high as 32% incarceration is clearly inadequate and often inappropriate. See U.S. Dep't of Justice, Bureau of Justice Statistics, Domestic and Sexual Violence Data Collection: A Report to Congress under Violence Against Women Act (July 1996), available at <http://www.ncjrs.gov/pdffiles/alldom.pdf>.

<sup>150</sup> Mary Haviland, et al., Urban Justice Center, *The Family Protection and Domestic Violence Intervention Act of 1995: Examining the Effects of Mandatory Arrest in New York City* (2001), available at [http://www.connectnyc.org/cnyc\\_pdf/Mandatory\\_Arrest\\_Report.pdf](http://www.connectnyc.org/cnyc_pdf/Mandatory_Arrest_Report.pdf).

<sup>151</sup> Cynthia D. Cook, *Triggered: Targeting Domestic Violence Offenders in California*, 31 MCGEORGE L. REV. 328, 333 (2000).

<sup>152</sup> See Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 234 (2003).

<sup>153</sup> See Erica Beecher-Monas, *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 LOY. L. REV. 81 (2001).

<sup>154</sup> See Hanna, *supra* note 90, at 1523–24.

<sup>155</sup> Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1465 (1996) (footnote omitted). As Professor Myrna Raeder has noted, “our criminal laws and evidentiary rules carry with them gender-biased views originating at a time when women's lives were devalued and the typical male perspective on domestic femicide was that the victim provoked her husband by her words or deeds.”

<sup>156</sup> In response to the high numbers of domestic violence victims understandably afraid to take part in the court process, prosecutors in the early 1990s began focusing on comprehensive evidence collection to facilitate the trial going forward even without direct victim testimony. See Goodmark, *supra* note 83, at 17–18. Known as “evidence-based prosecution,” this effort was premised on law enforcement officers procuring sufficient evidence in the course of their investigation to focus the court's attention on the batterer's criminal conduct, rather than the victim's absence, minimization, or recantation. In some jurisdictions, the practice emerged as the primary means by which

the state's ability to hold perpetrators responsible for their family violence crimes<sup>157</sup> while taking victims out of the danger loop. However, in the 2004 case of *Crawford v. Washington*, the United States Supreme Court decided that if testimonial statements are to be admitted at trial without the in-court testimony of the declarant, the accused must have a prior opportunity to confront the declarant *and* that witness must be unavailable to testify.<sup>158</sup> Therefore, if a woman refuses to testify because she is afraid of seeing her abuser in the courtroom, the case might be dismissed on the grounds of the abuser's right to confront witnesses. As a result of *Crawford* and its progeny, *Davis v. Washington* and *Hammon v. Indiana* (decided together)<sup>159</sup> and *Giles v. California*,<sup>160</sup> domestic violence offenders have increased their witness tampering and intimidation because they are often rewarded with case dismissal due to the victim's refusal to testify in court.<sup>161</sup> No category of prosecutions has been more severely hampered by the *Crawford*, *Davis* and *Giles* cases than those involving domestic violence.<sup>162</sup> Because they receive so little state assistance to combat prolific witness tampering, 80–90 % of abuse victims are unwilling to testify at trial and may have their cases dismissed on the grounds of the Confrontation Clause.<sup>163</sup>

55. Criminal prosecutions rarely lead to felony sanctions against batterers, creating a culture of impunity that further imperils domestic violence victims. The *Crawford-Davis-Giles* cases increase victim danger on many fronts.<sup>164</sup> First, the primacy of live witness testimony provides heightened incentive for batterers to obstruct victim access to prosecutors and courts. Second, because *Davis* imposes a stringent “emergency only” standard of admissibility for victim statements, government agents may attempt to protract initial investigations. Third, in *Giles*, the Supreme Court held that, even if a batterer kills his victim, he can still keep her past statements out of the trial, pursuant to his confrontation

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prosecutors brought domestic violence cases forward, using hearsay exceptions such as excited utterances, (Most states model their excited utterance statutes after the Federal Rule of Evidence 803(2), *see, e.g.*, IND. R. EVID. 803(2) defining “excited utterance” as “a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition”) or statements as to physical or mental condition, when the victim was not available to testify for the state. *See* FED. R. EVID. 803(3).

<sup>157</sup> *See* Goodmark, *supra* note 83, at 18.

<sup>158</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>159</sup> *Davis v. Washington & Hammon v. Ind.*, 547 U.S. 813, 832-33 (2006) (“This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall.”).

<sup>160</sup> *Giles v. California*, 554 U.S. 353 (2008).

<sup>161</sup> Tom Lining, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857 (2009).

<sup>162</sup> Jeanine Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. CAL. L. REV. 213, 215 (2005); Tom Lining, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 281 (2006).

<sup>163</sup> Lining, *supra* note 162, at 281. (“Approximately eighty percent of accusers in domestic violence cases refuse to cooperate with the government at some point in the prosecution”); Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 3 (2002) (citing figure that 90% of domestic violence victims do not cooperate with prosecutors); Lisa Marie DeSancitis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 370 n.64 (1996).

<sup>164</sup> Lining, *supra* note 162, at 284–85.

rights, unless the state can prove his intent was to prevent her testimony.<sup>165</sup> Finally, some misguided prosecutors are now using material witness warrants to jail victims as a means of ensuring they will be present at trial.<sup>166</sup> These trends present ever-increasing obstacles that are often overwhelming enough to prevent victims from filing charges even when facing grave danger.<sup>167</sup>

56. Domestic violence victims thus face greater peril as a result of recent Supreme Court jurisprudence and many of their hard won gains have been diminished. With new testimonial and cross-examination paradigms on the admissibility of hearsay statements in criminal cases, well-intentioned prosecutors are greatly hampered in their efforts to go forward when victims are too frightened to testify.<sup>168</sup>

ii. *Police Discretion and Immunity Problems*

57. This judicial accommodation of police discretion contradicts research showing that mandatory arrest policies benefit women fleeing domestic violence. In addition to contravening public support for policies that protect survivors, such accommodation dramatically weakens the protective capacity of civil protection orders and renders them a weak tool for remedying domestic violence. As discussed *supra*, without mandatory arrest policies (and sometimes, even with them), police fail to make arrests consistently. A purely local—as opposed to federal—judicial response to domestic violence contributes to the misperception of domestic violence as a strictly isolated occurrence.<sup>169</sup> Such responses “divest violence against women of its systemic character, and belie a common view that claims of gender-based violence are more anecdotal than structural, more idiosyncratic than institutional.”<sup>170</sup>

58. Immunity protections can also limit the judicial remedies available to survivors of domestic violence. Although widely criticized, the doctrine of inter-spousal tort immunity still exists in

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<sup>165</sup> *Giles*, 554 U.S. at 2687–88 (holding that the theory of forfeiture by wrongdoing is not an exception to the Sixth Amendment’s confrontation requirement because it was not an exception established by the Founders).

<sup>166</sup> See Tom Lining, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 787 (2005) (discussing the regrettable practice of jailing victims; one respondent to a recent survey of district attorneys’ offices noted, “[u]nfortunately, some of the victims have had to remain in custody until the trial, which is a terrible message we are sending to the victim, her children, the defendant and society” (internal quotation marks omitted)); Percival, *supra* note 162, at 241 (discussing harm to the accuser when prosecutor jails her to assure her attendance at the trial of the alleged batterer).

<sup>167</sup> See Tom Lining, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1366 (2005) (arguing that difficulties created by the Supreme Court’s new confrontation jurisprudence dissuades some victims from participating in criminal cases); Percival, *supra* note 162, at 241 (“Victims, particularly those already familiar with the criminal justice system, will begin to distrust prosecutors and the system and will be less likely to report future crime. Fear of prosecutors taking extreme measures could cause domestic violence advocates and shelters to advise victims against coming forward.”).

<sup>168</sup> See, e.g., David Feign, *Domestic Silence: The Supreme Court Kills Evidence-Based Prosecution*, Mar. 12, 2004 (“The *Crawford* decision, by insisting on the right of an accused to confront the witness, rather than just a tape recording or police report, wipes away a judge’s ability to admit any of this evidence without the actual witness being subject to cross-examination.”), available at <http://www.slate.com/id/2097041>.

<sup>169</sup> Weismann, *supra* note 109, at 1091–93.

<sup>170</sup> *Id.*

some jurisdictions. For example, in Georgia and Louisiana, an abused spouse is barred from bringing a tort claim against her abusive spouse.<sup>171</sup> Qualified immunity of state actors also poses a barrier: the governing statute, 42 U.S.C. § 1983, is applicable in all jurisdictions and prevents a survivor of domestic violence from bringing a suit against a governmental actor who made a mistake in enforcing or refusing to enforce her restraining order.<sup>172</sup> In order to bring a successful § 1983 claim, an abused woman would have to show that a state actor denied her a constitutional right.<sup>173</sup>

### iii. *Lack of Federal Remedies and State Bias*

59. Finally, the absence of federal judicial remedies may have a disparate impact on the development of standards affecting immigrant survivors seeking protection. In recent years, anti-immigrant rhetoric has increased so sharply throughout the United States that many people, including some in law enforcement, believe immigrants' access to the courts should be sharply limited.<sup>174</sup> As one scholar notes, "Judges who discriminate on the basis of immigration status reflect acceptance, consciously or otherwise, of a pervasive societal narrative that constructs an expanding notion of unworthiness and 'illegality' regarding undocumented immigrants. . . . Deeply ingrained and consistently reinforced conceptions of undocumented immigrants as 'illegal' shape the way they are perceived and treated."<sup>175</sup>
60. Congressional findings suggest a pervasive bias in various state justice systems against victims of gender-motivated violence<sup>176</sup> such that a woman victimized by domestic violence seeking judicial remedy faces further injustice. A Massachusetts study and New Jersey task force both found that racial, ethnic, and sexual preference biases were obstacles to seeking and receiving justice for survivors of domestic violence.<sup>177</sup> African American women victims of domestic violence are less likely to be believed by judges and jurors.<sup>178</sup> One study found that "women of color are often not seen as victims and thus do not receive appropriate

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<sup>171</sup> See *Boblitz v. Boblitz*, 462 A.2d 506, 510 (Md. Ct. App. 1983) (noting that it was not until 1965 that courts began to depart from the rule stated in *Thompson*). Those still adhering to the rule include Georgia (*see Larkin v. Larkin*, 601 S.E.2d 487 (Ga. Ct. App. 2004)) and Louisiana (*see Hamilton v. Hamilton*, 522 So.2d 1356, 1359 (La. Ct. App. 1988)). Today, the doctrine is widely criticized. *See Bozman v. Bozman*, 830 A.2d 450, 466 (Md. 2003) (stating "[t]he majority of the States, we discovered, were of the view that the doctrine was outdated and served no useful purpose, that 'there presently exists no cogent or logical reason why the doctrine of interpositional tort immunity should be continued.'").

<sup>172</sup> *See Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1115 (10th Cir. 1991).

<sup>173</sup> *Id.* The holding in *Gonzales* demonstrated how difficult it is to bring a cause of action successfully against a defendant acting under the color of state law. Nicole M. Quedsted, *Refusing to Remove an Obstacle to the Remedy: The Supreme Court's Decision in Town of Castle Rock v. Gonzales Continues to Deny Domestic Violence Victims Meaningful Recourse*, 40 AKRON L. REV. 391 (2007).

<sup>174</sup> *See generally* David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J. L. & POL'Y 45 (2005).

<sup>175</sup> *Id.* at 57.

<sup>176</sup> *United States v. Morrison*, 529 U.S. 598, 666 (2000) (citing S. Rep. No. 103-138, at 38, 41-42, 44-47 (1993); S. Rep. No. 102-197, at 39, 44-49 (1991); H. R. Conf. Rep. No. 103-711, at 385 (1994)).

<sup>177</sup> *Id.*

<sup>178</sup> Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 100 (2008).

attention” from judges and advocates involved in their cases, resulting in minimization and dismissal of their allegations of domestic abuse.<sup>179</sup>

61. Without federal causes of action available to survivors of domestic violence, these cases are being confined to over-burdened and underfunded state dockets, further discriminating against domestic violence victims and limiting the access of women of color and immigrant women to appropriate judicial remedies. Relegating domestic violence disputes to state dockets has logistical implications: state dockets have tighter schedules and less funding than do federal courts.<sup>180</sup> Litigating domestic violence disputes at the state level also has an important impact on judicial understanding of domestic violence; each jurisdiction adopts its own method of judicial education, as well as its own remedy.<sup>181</sup>

### D. Recommendations

62. The United States should be encouraged:
- a. To explore more uniform remedies for victims of domestic violence. The lack of federal causes of action under VAWA inhibits the United States from meeting its obligations to prevent, investigate, and punish those who violate women’s rights to physical safety and to provide victims with a court remedy. Providing for federal causes of action under VAWA would promote greater accountability and more even implementation of VAWA within the states, as opposed to utilizing VAWA primarily as a voluntary funding source. Federal causes of action would also mitigate current discrimination and allow women—regardless of location or race—to seek judicial protection from intimate partner violence.
  - b. To publicly recognize that its current laws, policies, and practices too often condone domestic violence, promote discriminatory treatment of victims, and have a particularly detrimental effect on poor, minority, and immigrant women. The United States should take meaningful steps to rectify this situation by sending an unequivocal message that it is a national priority to curb violence against women and protect women and children from acts of domestic violence. The government also should initiate more public education campaigns that condemn violence in the home;

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<sup>179</sup> C. Cuthbert et al., Wellesley Center for Women, *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts* 37 (2002). Study participants noted that low-income African-American women are stereotyped as being aggressive, drug-abusing, and lacking in credibility.

<sup>180</sup> Weismann, *supra* note 102, at 1091–93.

<sup>181</sup> *Id.* This approach means that, for a battered woman in Connecticut, the only “long-term” protection order available to her lasts for just six months, while in neighboring New York, a protection order may be issued for up to five years. ABA Commission on Domestic Violence, *Domestic Violence Civil Protection Orders (CPOs) By State*, (June 2007), <http://www.abanet.org/domviol/docs/DVCPOChartJune07.pdf>). In Maryland, the survivor may have her hearing before a judge who has not been trained in the unique dynamics of domestic violence. *See e.g.*, Raymond McCaffrey, Dan Morse & Daniel de Vise, *Slaying Suspect's Wife Warned of Risk to Children: Md. Courts Found Insufficient Threat*, WASH. POST, April 1, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/31/AR2008033100887.html>). A few miles away, in the District of Columbia, a battered woman’s case will be heard by a judge sitting on a special domestic violence bench and may result in a year-long protection order. WomensLaw.org, *District of Columbia: Restraining Orders* (last visited Oct. 15, 2008). These few miles may mean the arbitrary difference between meaningful protection and none at all.

## Domestic Violence in the United States

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- programs to educate men and women, boys and girls, about women's human rights; and initiatives that promote domestic violence survivors' knowledge of their rights and the legal remedies available to them.
- c. To improve data collection on domestic violence and violence against women, including, *inter alia*, information on police response to domestic violence and the impact of interactions with the criminal justice system on victim safety and batterer recidivism, and assessing the disproportionate impact that such violence has on poor, minority, and immigrant women. Such data should be disaggregated by sex, race, age, and disability. National statistical offices and other bodies involved in the collection of data on violence against women must receive necessary training for undertaking this work.
  - d. To promote and protect the human rights of women and children and exercise due diligence in responding to domestic violence. This could be done by providing technical assistance and incentives to states to make domestic violence restraining orders more specific, in order to ensure that the police effectively enforce the terms of those restraining orders in accordance with state law. The government could establish meaningful standards for enforcement and impose consequences for a failure to enforce.
63. Local and national dialogues should be initiated with all relevant stakeholders to consider the effectiveness, in theory and applied, of expedited proceedings, mandatory arrest policies, mandatory prosecution policies, and evidentiary standards. These issues tend to provoke controversy or discord, and merit further review. Open and informed community dialogues could form a space to rethink many of the unanswered questions, unintended effects of policies, and unresolved issues raised in this report. This dialogue remains urgent, especially in light of both the increased skepticism regarding the state's response to domestic violence and the proven disparate impact of these responses on women of color, indigenous women, and immigrant women.
64. Existing mechanisms for protecting victims and punishing offenders should be reevaluated since, as discussed above, many calls for help typically result in neither arrests nor prosecutions, and, thus, have extremely low rates of conviction. This inadequate treatment of domestic violence cases further endangers victims.
65. Both domestic and international advocates should strongly advise that Congress promptly ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as a framework for responding to domestic violence concerns. Ratification of CEDAW would signal to the global community that the United States prioritizes, at the federal level, the right of women to special measures of protection from domestic and gender-based violence.

### IV. DOMESTIC VIOLENCE AND CHILD CUSTODY, AND ECONOMIC CONSIDERATIONS IN FAMILY LAW LITIGATION

#### A. Background and Prevalence

66. A substantial body of empirical research confirms that domestic violence has serious negative effects on children.<sup>182</sup> Numerous studies show an alarming co-occurrence of domestic violence and child physical and sexual abuse. The weight of the research demonstrates that 30% to 60% of children living in homes where domestic violence occurs are also physically or sexually maltreated.<sup>183</sup> It is beyond dispute that children who suffer from direct physical and/or sexual abuse often experience multiple emotional and behavioral problems,<sup>184</sup> as well as a variety of trauma symptoms, including nightmares, flashbacks, hyper-vigilance, depression, and regression to earlier stages of development.<sup>185</sup> Significantly, studies show that children who are *exposed* to domestic violence,<sup>186</sup> but who have not been physically or sexually abused themselves, exhibit levels of emotional and behavioral problems, trauma symptoms, and compromised social and academic development comparable to children who are direct victims of physical and sexual abuse.<sup>187</sup> Consequently, domestic violence is known to have multiple, seriously detrimental effects on children even when children are not themselves the direct targets of parental aggression.
67. Research also confirms that men who batter are likely to parent very differently from other fathers.<sup>188</sup> Violent fathers tend to be under-involved with their children and more likely to use negative parenting practices, such as spanking, shaming, and exhibiting anger towards their children.<sup>189</sup> Other parenting deficits common to violent fathers include systematically undermining and interfering with the other parent's authority, utilizing controlling and

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<sup>182</sup> Wolfe, D.W., Crooks, C.V., Lee, V., McIntyre-Smith, A., & Jaffe, P.G. (2003). The Effects of Exposure to Domestic Violence on Children: A Meta-Analysis and Critique. *Clinical Child and Family Psychology Review*, 6:171-187.

<sup>183</sup> Edleson, J.L. (1999). The Overlap Between Child Maltreatment and Woman Battering. *Violence Against Women*, 5(2), 134-154; Appel, A.E., & Holden, G.W. (1998). The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal. *Journal of Family Psychology*, 12:578-599.

<sup>184</sup> Grych, J.H., Juries, E.N., Swank, P.R., McDonald, R., and Norwood, W.D. (2000). Patterns of Adjustment Among Children of Battered Women. *Journal of Consulting and Clinical Psychology*, 68:84-94.

<sup>185</sup> Graham-Bergmann, S.A. & Levendosky, A.A. (1998). Traumatic Stress Symptoms in Children of Battered Women. *Journal of Interpersonal Violence*, 13:111-128.

<sup>186</sup> Exposure to domestic violence includes, among other things, seeing or hearing the violence itself, being forced to be a part of one or more violent episodes, and witnessing the after-effects of violence by seeing the abused parent physically harmed or the abusive parent being arrested or removed from the home. Edelson, J. (1999). Children's Witnessing of Adult Domestic Violence. *Journal of Interpersonal Violence*, 14(8):839-870.

<sup>187</sup> United Nations Children's Fund, *Behind Closed Doors: The Impact of Domestic Violence on Children*, 2006; Jaffe, P.G., Wolfe, D.A., & Wilson, S.K. (1990). *Children of Battered Women*. Newbury Park, CA: Sage Publications.

<sup>188</sup> Edelson, J.L., & Williams, O.J., eds. *PARENTING BY MEN WHO BATTER: NEW DIRECTIONS FOR ASSESSMENT AND INTERVENTION* (Oxford University Press, 2007).

<sup>189</sup> Holden, G.W., & Ritchie, K.L. (1991). Linking Extreme Marital Discord, Child Rearing, and Child Behavior Problems: Evidence from Battered Women. *Child Development*, 62(2):311-327; Holden, G.W., Stein, J.D., Ritchie, K.L., Harris, S.D., & Juries, E.N. (1998). Parenting Behaviors and Beliefs of Battered Women, in G.W. Holden, R. Geffner, & E.N. Juries (Eds.), *Children Exposed to Marital Violence: Theory, Research and Applied Issues* (pp. 185-222). Washington, DC: American Psychological Association.

authoritative parenting styles, having unreasonable expectations of other family members, refusing to accept input from others, remaining inflexible, and elevating their own needs above those of their children.<sup>190</sup> In addition, violent parents tend to be very poor role models, impeding their children's development of healthy relationships and conflict resolution skills.<sup>191</sup>

68. While it is often assumed that domestic violence and its impact on children end once a battered parent separates from her abuser, research demonstrates otherwise. First, it is now known that the effects of trauma, once engrained, do not go away on their own, but survive even when the threat that created the trauma is removed.<sup>192</sup> Second, studies show that domestic violence often *first starts* and frequently escalates at the time of separation.<sup>193</sup> Third, abusive partners often intensify stalking, harassment, and other non-violent coercive tactics upon separation, where physical proximity is less likely.<sup>194</sup> In addition, where children are involved, abusive parents often utilize custody proceedings to continue their campaign of abuse against their former partners.<sup>195</sup> Indeed, the threat to seek custody is a common strategy used by abusive parents to enhance post-separation power and control over a former partner.<sup>196</sup> Finally, children often remain the bridge that keeps their parents connected long after the parents have physically separated.<sup>197</sup> In light of this reality, it is not uncommon for abusive parents to use their children as instruments of ongoing coercive control even after separation, often during visitation exchange.<sup>198</sup> In one recent study, 88% of women surveyed reported that their abusers had used their children to control them in

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<sup>190</sup> Bancroft, L., & Silverman, J. (2002). *THE BATTERER AS PARENT*, Thousand Oaks, CA: Sage Publications; Levendosky, A.A., & Graham-Bergmann, S.A. (2000). Mothers' Perceptions of the Impact of Woman Abuse on their Parenting. *Violence Against Women*, 6(3):247-271.

<sup>191</sup> Jaffe, P.G., Crooks, C.V., & Bala, N. (2009). A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes. *Journal of Child Custody*, 6:169-188.

<sup>192</sup> Jean Clinton, M.D., & Linda C. Neilson, LL.B., Ph.D. Assessing Alienation in the Context of Domestic Violence and Child Brain Development. Panel presented at the 47<sup>th</sup> Annual Conference of the Association of Family & Conciliation Courts, Denver, CO (June 4, 2010).

<sup>193</sup> Jaffe, P.G., Crooks, C.V., & Poisson, S.E. (2003). Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes. *Juvenile & Family Court Journal*, Fall:57-67; Floury, R.E., Sullivan, C.M., & Bybee, D.I. (2000). When Ending the Relationship Does Not End the Violence. *Violence Against Women*, 6:1363-1383; Mahoney, M.R. (1991). Legal Images of Battered Women: Redefining the Issue of Separation. *Michigan Law Review*, 90:1-94.

<sup>194</sup> Frederick, L. (2008). Questions About Family Court Domestic Violence Screening and Assessment. *Family Court Review*, 46(3):523-530.

<sup>195</sup> Scott, K.L., Crooks, C.V., Francis, K.J., & Kelly, T. (2002). Caring Dads: Program Description and Directions. Panel presented at the Victimization of Child and Youth Conference, Portsmouth, NH, August 2002.

<sup>196</sup> Jaffe, *supra* note 193, at 57-67.

<sup>197</sup> In one recent study, 89% of the women surveyed stated that their children witnessed domestic violence before or during the custody and visitation process. Seventy-one percent of the children were reportedly abused by the violent parent, and 53% of the abuse was reported to have occurred during visitation. Seventy-three percent of the children expressed fear of the abusive parent. And, in the face of these statistics, 58% of the cases studied were decided in favor of joint custody, notwithstanding the reported abuse. Rhode Island Coalition Against Domestic Violence, "Safety for children," March 2010, *available at* [http://www.ricadv.org/images/stories/RICADV\\_SafetyChildrenLORES.pdf](http://www.ricadv.org/images/stories/RICADV_SafetyChildrenLORES.pdf).

<sup>198</sup> Bancroft, L., & Silverman, J.C., *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE* (Sage Publications, 2000).

various ways and to varying degrees not only during their relationships, but beyond.<sup>199</sup>

69. The harsh interplay between domestic violence and custody disputes is not rare. Studies show that 25 to 50 percent of disputed custody cases involve domestic violence.<sup>200</sup> When abused women attempt to leave their abusive relationships, they are often threatened with the loss of their children.<sup>201</sup> Batterers are more likely than non-abusive fathers to seek sole custody of their children,<sup>202</sup> and are just as likely to gain custody as non-abusive fathers.<sup>203</sup>

### B. Law and Policy Problems

70. As a result of an increasingly sophisticated understanding of domestic violence, including its detrimental impact on adult victims and children, and its corresponding relevance to child custody determinations, both legislative bodies and professional organizations in the United States have taken strong action to discourage custody awards to violent parents. In 1990, for instance, the United States House of Representatives passed House Concurrent Resolution 172 which “express[ed] the sense of Congress that, for purposes of determining child custody, evidence of spousal abuse should create a statutory presumption that it is detrimental to the child to be placed in the custody of an abusive parent.”<sup>204</sup> In 1989, and then again in 1994, the American Bar Association (“ABA”) passed resolutions calling for statutory presumptions against allowing custody to batterers.<sup>205</sup> In 1994, the National Council of Juvenile and Family Court Judges added a rebuttable presumption against allowing custody to batterers to its Model Code on Domestic and Family Violence.<sup>206</sup> The American Psychological Association added its recommendation in 1996 that states adopt statutes giving custody preference to the non-violent parent whenever possible.<sup>207</sup> Currently, nearly all states in the U.S. require the court to consider domestic violence when making

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<sup>199</sup> Marisa L. Beebe, Deborah Bybee and Cris M. Sullivan, “Abusive men’s use of children to control their partners and ex-partners.” *European Psychologist*, Vol. 12, No. 1 (2007).

<sup>200</sup> Susan Kibitz, *Domestic Violence and Child Custody Disputes: A Resource Handbook for Judges and Court Managers* (Williamsburg, VA, National Center for State Courts, 1997).

<sup>201</sup> In one study, 80% of women interviewed reported that their abuser threatened to take away their children and, thereafter, used the court system to gain custody of the children. Ten percent of victim/mothers in that study said that they stopped reporting abuse for fear of losing their children. Thirty-seven percent of women surveyed lost custody of their children despite being the primary caretaker. Voices of Women Organizing Project, Battered Women’s Resource Center, “Justice Denied: How Family Courts in NYC Endanger Battered Women and Children.” May, 2008. Available at <http://www.vowbwrc.org/pdf/JusticeDeniedRep.pdf>.

<sup>202</sup> Judith M. Reichler and Nancy S. Erickson, “Custody, domestic violence and a child’s preference,” *Domestic Violence Report*, vol. 8, No. 5 (June/July 2003), p. 65, 66 (citing R. Lundy Bancroft and Jay G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (Thousand Oaks, CA, Sage, 2002), p. 98—129).

<sup>203</sup> Mary A. Kernic and others, “Children in the crossfire: child custody determinations among couples with a history of intimate partner violence,” *Violence Against Women*, vol. 11, No. 8 (August 2005), p. 991—1021.

<sup>204</sup> H. Con. Res. 172 (1990).

<sup>205</sup> American Bar Association Model Joint Custody Statute, 15 *Family Law Reporter* (BNA) 1494 (1989).

<sup>206</sup> National Council of Juvenile & Family Court Judges, *Family Violence: A Model State Code*, §401 (1994).

<sup>207</sup> American Psychological Association, *Report of the APA Presidential Task Force on Violence and the Family* (1996).

custody awards,<sup>208</sup> and twenty-two states, plus the District of Columbia, have legislative presumptions against joint custody where domestic violence has occurred.<sup>209</sup>

71. Despite extensive research on the detrimental effects of domestic violence on children and the risks that attend unrestricted parental access where domestic violence has occurred, many courts are still reticent about assessing the impact of domestic violence on children when crafting custody arrangements.<sup>210</sup> A number of empirical studies confirm that courts frequently fail to identify and consider domestic violence and fail to provide adequate safety protections in court orders, even where a history of substantiated violence is known to exist.<sup>211</sup> This same phenomenon has been observed in the context of child custody mediations, child custody evaluations, and visitation determinations.<sup>212</sup>
72. Because domestic violence and its impact on children and their battered parents is neither consistently identified nor adequately accounted for in child custody determinations, the safety of domestic violence victims and their children is compromised in family courts today across the United States.
73. Like custody proceedings, child protection proceedings are governed mostly by state and local law, although similar standards are utilized nationally. Using New York as a representative example, child protection proceedings may be initiated at the discretion of the agency administering child protective services if an investigation by the agency reveals credible evidence to support a report or complaint alleging child maltreatment.<sup>213</sup> The presence of domestic violence in the home has been used as the credible evidence needed to support the allegations of child endangerment contained in a report or complaint.<sup>214</sup> Proceedings have been initiated against the parent who has been the victim of domestic

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<sup>208</sup> American Bar Association Commission on Domestic Violence, “Child Custody and Domestic Violence by State, available at <http://www.abanet.org/domviol/docs/Custody.pdf>.

<sup>209</sup> *Id.*

<sup>210</sup> Meier, J.S. (2003). Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining Solutions, *Journal of Gender, Social Policy and the Law*, 11:657, 667 (internal citations omitted).

<sup>211</sup> See, Silverman, J.G. (2004). Child Custody Determinations in Cases Involving Intimate Partner Violence: A Human Rights Analysis. *American Journal of Public Health*, 94:951 (courts frequently fail to consider documentation of domestic violence in custody determinations); Kernic, M.A., et al. (2005). Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence. *Violence Against Women*, 11:991 (courts frequently fail to identify domestic violence and provide adequate safety protections in court orders, even where a history of substantiated violence is known to exist).

<sup>212</sup> Johnson, N.E., et al. (2005). Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect. *Violence Against Women*, 11:1022 (mediators are just as likely to recommend joint legal and physical custody in domestic violence cases as in cases where there are no allegations of domestic violence); Bow, J. (2006). Review of Empirical Research on Child Custody Practice, *Journal of Child Custody*, 3: 23, 39 (even where child abuse and domestic violence are documented in the court record, they are often not addressed in the final custody report); Horvath, L.S. (2002). Child Custody Cases: A Content Analysis of Evaluations in Practice. *Professional Psychology: Research and Practice*, 33: 557 (domestic violence is largely overlooked by custody evaluators and often plays no role in custody determinations even when it is noted in evaluators’ reports); O’Sullivan, C.S., et al., *Supervised and Unsupervised Parental Access in Domestic Violence Cases: Court Orders and Consequences*, FINAL TECHNICAL REPORT SUBMITTED TO THE NATIONAL INSTITUTE OF JUSTICE (March 2006) (history of domestic violence has little impact on court ordered visitation arrangements).

<sup>213</sup> *Nicholson v. Williams*, 203 F. Supp. 2d 153, 166-167 (E.D.N.Y. 2002)

<sup>214</sup> *Id.* at 208-09.

violence, alleging neglect on the part of the victim for failing to protect the child from witnessing domestic violence.<sup>215</sup> Once court proceedings are initiated, the court has the power to order removal of a child if “necessary to avoid imminent danger to the child’s life or health.”<sup>216</sup> Although the National Council of Juvenile & Family Court Judges Guidelines and agency “best practices” indicate that victims of domestic violence should not be deemed unfit parents based upon the batterer’s actions, this rule is not always adhered to in practice.<sup>217</sup>

### C. Effects and Consequences

#### i. Child protection proceedings

74. Adult victims of domestic violence are often blamed for failing to protect their children. Instead of taking steps to remove the batterer from the home and hold him accountable, child protection systems allege neglect on the part of the abused caregiver and remove the children from her custody.<sup>218</sup> The manner in which many states apply ‘failure to protect’ statutes against the non-offending caregiver results in re-victimization of battered women by the unjust removal of children from their care.
75. These results often occur whether or not the adult victim has consented to the batterer’s presence in the home,<sup>219</sup> despite estimates that one-half to two-thirds of all abuse occurs when women are single, separated, or divorced.<sup>220</sup> This practice of victim-blaming allows the batterer to continue to deprive the woman of power and control over her life, even after she has taken steps to separate herself and her children from the abusive partner.
76. When a woman does not take steps to leave an abusive partner, it may be used as evidence against her in child protection proceedings.<sup>221</sup> However, this presumption of neglect ignores the reality that domestic violence often escalates upon separation from the abuser, and that it is the victim who best understands her unique situation, including the risks which leaving

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<sup>215</sup> *Id.* at 200.

<sup>216</sup> *Id.* at 167.

<sup>217</sup> National Council of Juvenile & Family Court Judges Family Violence Department, “Effective intervention in domestic violence and child maltreatment cases: guidelines for policy and practice,” 1999. Available from [http://www.ncjfcj.org/images/stories/dept/fvd/pdf/greenbook%20\\_final\\_4-5-07.pdf](http://www.ncjfcj.org/images/stories/dept/fvd/pdf/greenbook%20_final_4-5-07.pdf).

<sup>218</sup> See Evan Stark, “The battered mother in the child protective service caseload: developing an appropriate response”, *Women’s Rights Law Reporter*, vol. 23 (Spring 2002); *Nicholson v. Williams*, 181 F. Supp. 2d 182 (E.D.N.Y. 2002), *supplemented by* 203 F. Supp. 2d 153 (E.D.N.Y. 2002) and *supplemented and modified by* 294 F. Supp. 2d 369 (E.D.N.Y. 2003) and 2004 WL 1304055 (E.D.N.Y. Jun. 14, 2004).

<sup>219</sup> Rebecca Kitty, “WATCH’s monitoring of open CHIPS cases in Hennepin County juvenile court,” May 23, 2001. Available from <http://www.watchmn.org/sites/default/files/2001%20CHIPS%20report%20-%20Final.pdf>.

<sup>220</sup> Stark, *supra* note 218 at 118, note 18 (citing Susan Schechter and Jeffrey L. Edleson, “In the best interest of women and children: a call for collaboration between child welfare and domestic violence constituencies.” Available from <http://www.mincava.umn.edu/papers/wingsp.htm>; Bruce Rounsaville and Myrna M. Weismann, “Battered women: a medical problem requiring detection, *International Journal of Psychiatry Medicine*, vol. 8 (1978), p. 194).

<sup>221</sup> See Jeanne A. Fugate, *Who’s failing whom? A critical look at failure-to-protect laws*, 76 N.Y.U. L. Rev. 272 (2001); Kitty, *supra* note 219.

may pose for herself and her children.<sup>222</sup> The manner in which child protection systems require an abuse victim to meet someone else's (i.e., caseworker, judge, etc.) expectations regarding actions that should be taken for the safety of herself and her children further undermines her autonomy and may actually exacerbate the danger of abuse.

77. When a victim does draw attention to her domestic violence experience by reaching out for help, the result can be an investigation by child protective services, a finding that she is a neglectful parent and, ultimately, the termination of her parental rights.<sup>223</sup> This deters many women from reporting instances of abuse,<sup>224</sup> causing them to forego the pursuit of security and justice out of fear that they will lose their children.

ii. *Custody proceedings in divorce and family courts*

78. Additionally, victims of domestic violence involved in custody proceedings reported court systems that were broken or biased against them in the administration of justice<sup>225</sup> and deviations in the judicial process that resulted in violations of due process. For example, victims have reported *ex parte* communications between one party and the judge, disallowance of witness testimony that would support the victim's story, inaccurate or lack of access to hearing transcripts, legal guardians who were ineffective representatives of the child victims, and the use of unsubstantiated allegations leading to removal of custody.<sup>226</sup>

79. Often, decisions made throughout the custody proceedings by various actors, many of whom are "advocates" of the victim/mothers, actually placed the children in danger.<sup>227</sup> For example, victim/mothers reported that they were told by their attorneys, legal guardians, or the judges not to oppose visitation, even when the mothers felt it was unsafe to allow the abusers access to the children or the children themselves protested the visitation.<sup>228</sup> Frequently, courts failed to grant victim/mothers adequate child support, the direct result of which was a contested custody dispute. In one study, 58% of women interviewed reported that requesting child support triggered retaliation by the abuser, often in the form of custody battles.<sup>229</sup>

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<sup>222</sup> Stark, *supra* note 218 at 118-123, note 18 (citing Susan Schechter and Jeffrey L. Edleson, "National council of juvenile and family court judges: effective intervention in domestic violence and child maltreatment: guidelines for policy and practice," June 1999). Available from <http://www.vaw.umn.edu/documents/executvi/executvi.html>.

<sup>223</sup> *Id.* at 118, n.18.

<sup>224</sup> See Marna Anderson, Sarah Coulter and Donna McNamara, "Reasonable efforts or unrealistic expectations: a look at Hennepin county child protection cases," May 4, 2010 ("Another [CHIPS worker] shared her concern that some women are afraid to call 911 even if they are experiencing increased violence when they are trying to leave an abusive relationship because they fear 'getting tangled up' with child protection."). Available from [http://www.watchmn.org/sites/default/files/WATCH%20Report\\_LR.pdf](http://www.watchmn.org/sites/default/files/WATCH%20Report_LR.pdf).

<sup>225</sup> Voices of Women, *supra* note 201.

<sup>226</sup> *Id.* Victims reported they were denied access to forensic evaluations that resulted in their children being removed from their custody, were accused of alienating their children, or were given a psychiatric label, often with slim or unsubstantiated evidence to support the allegations.

<sup>227</sup> *Id.*

<sup>228</sup> Peter G. Jaffe, Nancy Lemon and Samantha Poisson, *Child Custody and Domestic Violence: A Call for Safety and Accountability* (Thousand Oaks, CA, Sage, 2003); Chris O'Sullivan, "Estimating the population at risk for violence during child visitation", *Domestic Violence Report*, vol. 5, No. 5 (2000), p. 65-66, 77-79.

<sup>229</sup> Voices of Women, *supra* note 201.

80. Victims also reported their voices went unheard in custody proceedings and they were advised by their advocates and court personnel to refrain from mentioning domestic abuse during custody disputes. In one study, half of the women interviewed stated their own attorneys told them that the mention of domestic abuse would hurt their case, and the other 50% were advised by court personnel, including mediators, to ignore their experience as domestic abuse victims.<sup>230</sup>
81. When domestic violence is not identified and when a history of domestic violence is not accounted for in custody proceedings, custody and/or unrestricted access to the child may be granted to the abusive parent, thereby threatening the safety and wellbeing of the child and his or her battered parent.

*iii. Economic Considerations in Family Law Litigation*

82. Custody litigation in domestic violence cases is often driven both by the abuser's ongoing attempts to control the mother as well as a desire to avoid paying child support.<sup>231</sup> The origin of many so-called fathers' rights groups was overlaid by their members' avoidance of child support obligations.<sup>232</sup> Obtaining custody of the child not only circumvents the need to pay child support to the mother, but also typically imposes upon the mother the obligation to pay the child support to the abuser. All jurisdictions in the United States employ a version of child support guidelines that makes court-ordered payment of child support primarily formulaic as well as automatic upon the request of the custodial parent.<sup>233</sup>
83. Several problems arise when a mother seeks court-ordered support. Very often, her initial request is made during a hearing for a civil protection order that she seeks in an attempt to end the abuse. Even if she does not seek custody of the children during the protective order process, she may seek an order of support, knowing that she cannot otherwise remain independent. While some courts enter child support orders as part of the protective order process,<sup>234</sup> many courts do not even when their jurisdiction's statute provides the court with

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<sup>230</sup> *Id.*

<sup>231</sup> Barbara J. Hart, et al., *Child Custody*, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE 234 (2<sup>nd</sup> Ed. 2004) ("Child custody litigation often becomes a tool for batterers to maintain or extend their control and authority over the abused parent after separation."). Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J. OF L. & FEMINISM 291, 298 (1992) ("When a woman wants custody of her children and her ex-husband has no real interest in getting custody, he may nonetheless threaten a custody battle to increase his bargaining power and reduce the amount of child support he will have to pay.").

<sup>232</sup> "Fathers' rights" is a term used to describe those organizations whose aim is to undermine mothering as well as the credibility of women and children who raise claims of abuse. These groups are not to be confused with groups that promote responsible fatherhood.

<sup>233</sup> Catherine F. Klein and Leslye Roof, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 999 (1993) ("The institution of child support guidelines in practically every jurisdiction resulted from the federal requirements under 42 U.S.C.S 666, which makes determination of child support awards in civil protection order cases a relatively simple process. It provides the courts and litigants with an objective standard upon which to calculate an equitable child support award.").

<sup>234</sup> *See, e.g.,* *Baca v. Baca*, 568 S.E.2d 746, (Ga. Ct. App. 2002).

explicit authority to enter orders of support. This places the burden on abused women's advocates to appeal the denial of support under a civil protection order.<sup>235</sup> Given the difficulties that abused women encounter in finding adequate representation of any sort, finding appellate counsel can be even more difficult.

84. When a court fails to order support (whether spousal or child support), a battered woman is less likely to have the resources to adequately defend against the father's petition for custody. Without adequate resources, she is less able to hire counsel. In addition, she often cannot provide adequate housing for her children and meet their other needs, factors which can lead to her losing custody in a circular and distressing irony.
85. Should a mother decide not to engage the civil protection order process, she might find herself waiting weeks, if not months, for a hearing on child support under the divorce or legal separation process. Delay can be a powerful tool of control for the abusive father. Continuances and other postponements can empower the abuser who knows that without adequate financial resources, the mother is likely forced to return to him or risk losing custody of her children.<sup>236</sup>
86. Women are not likely to fare well in court without competent counsel. Battered women have indicated that access to legal counsel is the most important factor in their ability to successfully leave an abusive relationship.<sup>237</sup> Primarily, this is due to the ability to access orders of financial support and custody. Access to funds to retain counsel has been cited as a primary need of women as well of a source of attaining gender equity within the court system.<sup>238</sup> The problem of insufficient or non-existent attorney fee awards was identified two decades ago, yet the problem persists.<sup>239</sup>

### D. Recommendations

87. Based on the discussion presented above, as well as the findings of organizations such as the Arizona Coalition Against Domestic Violence, the National Resource Center on Domestic Violence, the Pennsylvania Coalition Against Domestic Violence, and the Wellesley Centers

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<sup>235</sup> See, e.g., *Hayes v. Gibbs*, 2008 WL 682493 (Ohio Ct. App. 2008).

<sup>236</sup> Catherine F. Klein and Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 992 (1993) ("Economic dependence is frequently the reason the victim returns to the offender.").

<sup>237</sup> See Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L. Q. 719, 721-722 (1999) ("The first theme focuses on a call to action: a reminder that representation is often fundamental to an abuse victim's ability to access legal remedies for safety. For decades there has existed a crisis in the dearth of legal representation available for battered women, particularly in the areas of child custody, visitation, and divorce litigation").

<sup>238</sup> Mass. Gender Bias Study (1989) at 746-747 ("The first and most serious is lack of access to adequate legal representation: many women cannot obtain the assistance they need, particularly in the crucial first days and months after separation. Women without legal representation (*pro se*) find the system difficult to navigate, and free legal services are often not available to them. Private counsel may be unwilling to represent women because of the difficulty obtaining adequate awards of counsel fees during, and sometimes after, a trial.").

<sup>239</sup> *Id.*

## Domestic Violence in the United States

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for Women's Battered Mothers' Testimony Project,<sup>240</sup> we make the following recommendations:

88. Courts should develop policies and protocols that will improve their capacity to identify, differentiate and account for domestic violence and its impact on children and battered parents in order to arrive at safe and appropriate parenting arrangements.
89. Courts should be required to consider any history of domestic violence in determinations of custody, including prior orders of protection and domestic violence criminal convictions.
90. Judges, court personnel, and guardians ad litem should be required to undergo training regarding post-separation abuse, domestic violence, and child abuse.
91. Courts should utilize a multi-disciplinary approach to custody evaluations involving experts in domestic abuse, child abuse, and mental health in the process.
92. Custody evaluators should be trained to recognize that men who commit domestic violence against their partners often commit other types of crimes, including child abuse.
93. Judges should be required to prepare written findings of fact and conclusions of law to support their custody orders.
94. "Friendly parent" statutes and policies should be eliminated, because they fail to adequately protect a parent who fears harm to herself and her children.
95. Failure to protect statutes should not be used to blame victims of domestic violence and unjustly remove children from the custody of non-offending caregivers.
96. Mediators should assess whether it is appropriate to terminate settlement negotiations and/or to institute safety precautions whenever a history of domestic violence is revealed through court records, screenings, prior protective orders, criminal records, or otherwise. Mandatory face-to-face mediations between the parties should be eliminated.
97. Courts should design custody transition plans to protect domestic abuse victims.

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<sup>240</sup> See Arizona Coalition Against Domestic Violence, "Domestic violence and custody", June 2009. Available from <http://www.azcadv.org/domestic-violence-info/domestic-violence-fa/facts-and-statistics/domesticviolenceandcustody/top>; Arizona Coalition Against Domestic Violence, "A human rights approach to child custody and domestic violence," June 2003; Saunders, "Child custody" (see footnote 39); Carrie Cuthbert and others, Battered Mothers' Testimony Project, Wellesley Centers for Women, "Battered mothers speak out: a human rights report on domestic violence and child custody in the Massachusetts family courts" (November 2002).

V. DOMESTIC VIOLENCE, REPRODUCTIVE RIGHTS, & REPRODUCTIVE/SEXUAL HEALTH

A. Background

98. One aspect of the control which abusers exercise over their partners is limiting access to contraception and reproductive health services.<sup>241</sup> Current policies create numerous barriers to women seeking reproductive health services: financial obstacles, shortages of facilities, unnecessary restrictions and delays, and stigma against women seeking contraception and abortion services. The barriers created by these restrictive laws and policies disproportionately affect women experiencing intimate partner violence by adding legal and practical barriers to those they already face at home.<sup>242</sup> Additionally, pregnancy, particularly unplanned pregnancy, is frequently a time of escalating violence. Thus, in instances where women choose to end their pregnancies, it is essential that they are able to obtain safe abortions without unnecessary delay to protect themselves from the risk of increased violence by their partners and from the even greater financial and emotional dependency the birth of a child would bring.<sup>243</sup>
99. The United States has failed to guarantee access to reproductive health and abortion services for all women and, in particular, for victims of domestic violence. Laws singling out abortion providers for burdensome regulations have limited the number of providers and the availability of services, forcing women to travel great distances to receive care.<sup>244</sup> Biased counseling and mandatory delay laws often force women to make multiple visits to a clinic before obtaining an abortion. When an abuser is closely monitoring a woman's behavior, these requirements make it difficult or impossible for a woman to maintain her confidentiality and can prevent her from obtaining a timely abortion.<sup>245</sup> All of these laws may limit women's, and particularly battered women's, access to abortion and may ultimately prevent them from ever getting the services they need. Compounding the effect of these laws is the failure of law enforcement to take effective measures against threats to clinics, their staff, and their patients. Police have failed to protect clinics' security. In addition to making it more difficult for clinics to remain open, this lack of enforcement has enabled protestors to intimidate and harass patients, often by threatening to make their identity public. This harassment, while harmful to all, is particularly devastating to women who must both have an abortion and keep it secret for their own safety.

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<sup>241</sup> See Jeanne E. Hathaway et al., *Impact of Partner Abuse on Women's Reproductive Lives*, 60 J. Am. Med. Women's Health Ass'n 42 (2005).

<sup>242</sup> See Declaration of Lenore Walker (hereinafter "Walker Decl."), at ¶¶ 13-14. (on file with author).

<sup>243</sup> See *Id.* at ¶ 23.

<sup>244</sup> CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS: ABORTION PROVIDERS FACING THREATS, RESTRICTIONS, AND HARASSMENT, 37 (2009).

<sup>245</sup> See Walker Decl., *supra* note 234, at ¶ 16.

### B. Prevalence

100. In abusive relationships, the male partner generally makes decisions regarding birth control.<sup>246</sup> Women report a lack of reproductive control regarding decisions on contraceptive use and whether to get an abortion.<sup>247</sup> Abusive partners use tactics including forced or coerced sex, refusal to use or let their partner use birth control, birth control deception, and preventing their partners from getting desired abortions.<sup>248</sup> Sexually abusive partners often refuse to use condoms, and women fear their partners' response to condom negotiation as it may result in more abuse.<sup>249</sup> As a result, women experiencing intimate partner violence are less likely to use condoms.<sup>250</sup> Additionally, there is a strong correlation between intimate partner violence and birth control sabotage, with the severity of the sabotage increasing along with the severity of the violence.<sup>251</sup> Women report hiding birth control use from their partners and suffering abuse if they are discovered.<sup>252</sup> Other women do not use birth control due to fear of negative repercussions.<sup>253</sup> Because women experiencing intimate partner violence are subject to contraceptive control, it is important that they have access to methods that can be used without partner knowledge or cooperation.<sup>254</sup>

101. Studies show a significant number of women experiencing intimate partner violence also experience sexual assault in their relationship and report significantly more gynecological conditions.<sup>255</sup> In one study, 90.9% of abused women reported sexual assault; these women were 3.4 times more likely to report unwanted pregnancy than non-abused women.<sup>256</sup> Forced and coerced pregnancy is one form of abuse; pregnancy can ensure that the victim will

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<sup>246</sup> Daniel Rosen, "I Just Let Him Have His Way": Partner Violence in the Lives of Low-Income, Teenage Mothers, 10 VIOLENCE AGAINST WOMEN 6 (2004).

<sup>247</sup> Margaret Abraham, *Sexual Abuse in South Asian Immigrant Marriages*, 5 VIOLENCE AGAINST WOMEN 591, (1999).

<sup>248</sup> Jeanne E. Hathaway et al., *Impact of Partner Abuse on Women's Reproductive Lives*, 60 J. AM. MED. WOMEN'S HEALTH ASS'N 42 (2005).

<sup>249</sup> Gina M. Wingood & Ralph J. DiClemente, *The Effects of an Abusive Primary Partner on the Condom Use and Sexual Negotiation Practices of African-American Women*, 87 AM J. PUB. HEALTH 1016 (1997). See also Jacquelyn C. Campbell, *Health consequences of intimate partner violence*, 359 THE LANCET 1331 (2002) (literature review citing other studies); Anita Raj et al., *Abused women report greater male partner risk and gender-based risk for HIV; findings from a community-based study with Hispanic women*, 16 AIDS CARE 519 (2004).

<sup>250</sup> Wingood & DiClemente, *supra* note 249.

<sup>251</sup> CENTER FOR IMPACT RESEARCH, DOMESTIC VIOLENCE AND BIRTH CONTROL SABOTAGE: A REPORT FROM THE TEEN PARENT PROJECT (2000).

<sup>252</sup> *Id.*

<sup>253</sup> Rosen, *supra* note 246.

<sup>254</sup> Law Students for Reproductive Justice ("LSRJ") and National Women's Law Center, *IPV Fact Sheet: If You Really Care About Intimate Partner violence, You Should Care About Reproductive Justice*, 2 (2010), [http://lsrj.org/documents/Webinar\\_Wednesdays\\_IPV.pdf](http://lsrj.org/documents/Webinar_Wednesdays_IPV.pdf).

<sup>255</sup> Judith McFarlane et al., *Intimate Partner Sexual Assault Against Women: Frequency, Health Consequences, and Treatment Outcomes*, 105 AM. C. OBSTETRICIANS AND GYNECOLOGISTS 99 (2005) (finding that 68% of abused women interviewed were also sexually assaulted); Jacquelyn C. Campbell & Karen L. Soeken, *Forced Sex and Intimate Partner Violence: Effects on Women's Risk and Women's Health*, 5 VIOLENCE AGAINST WOMEN 1017 (1999) (finding that 45.9% of battered women were also experiencing forced sex by their partners).

<sup>256</sup> Anita Raj, et al., *South Asian Victims of Intimate Partner Violence More Likely Than Non-Victims to Report Sexual Health Concerns*, 7 J. IMMIGRANT HEALTH 85 (2005).

remain financially dependent and under the batterer's control.<sup>257</sup> Batterers may use various techniques of contraceptive control and sabotage to dictate their partners' sexual and reproductive lives and keep them financially and physically dependent and vulnerable.<sup>258</sup> Batterers often rape their partners while also denying them access to contraceptives, frequently resulting in pregnancies during which they may escalate their abuse.<sup>259</sup>

102. Pregnancy can be a dangerous time for abused women, as it is one of the times when abusers frequently escalate their level of violence from psychological to physical.<sup>260</sup> When pregnancy is unintended, the risk of violence is even greater, and there is a clear correlation between unintended pregnancy and escalated rates of abuse.<sup>261</sup> Women with unplanned or unwanted pregnancies make up nearly 70% of all women who are physically abused during pregnancy.<sup>262</sup>

### C. Effects and Consequences

#### i. Access to Abortion

103. In many parts of the United States there is a shortage of abortion providers due to harassment and attacks on providers,<sup>263</sup> the stigma surrounding the provision of abortion services in the United States,<sup>264</sup> and laws that unfairly target abortion providers for extra regulations with attendant burdensome costs.<sup>265</sup> The shortage makes it more difficult for women in abusive situations to access abortion. Many women seeking services must travel large distances, often to neighboring states.<sup>266</sup> This is particularly difficult for women with limited financial resources or no access to transportation or childcare.<sup>267</sup> The lack of services within a reasonable distance, compounded by other laws and requirements that delay women's access, and funding restrictions (described below), may lead to significant or insurmountable delays for IPV survivors who need to obtain services without their abusers' knowledge. Legal restrictions on reproductive health services that impose delays and barriers on access to care have a disproportionate effect on survivors of intimate partner violence because of the significant challenges they may already face in getting to a clinic and their heightened need for confidentiality.

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<sup>257</sup> Letter from Sabrina Salomon, on behalf of the Domestic Violence and Sexual Assault Council of Greater Miami, et al., to Charlie Crist, Governor of Florida (May 10, 2010) (on file with author).

<sup>258</sup> LSRJ, *IPV Fact Sheet*, *supra* note 254, at 2.

<sup>259</sup> Letter to Gov. Crist, *supra* note 257.

<sup>260</sup> Walker Decl., *supra* note 242, at ¶ 12.

<sup>261</sup> Jacquelyn C. Campbell et al., *The Influence of Abuse on Pregnancy Intention*, 5 WOMEN'S HEALTH ISSUES 214, (1995). *See also* Walker Decl., *supra* note 242, at ¶ 12.

<sup>262</sup> Melissa Moore, *Reproductive Health and Intimate Partner Violence*, 31 FAM. PLAN. PREPS. 302 (1999).

<sup>263</sup> CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS, *supra* note 244, at 34.

<sup>264</sup> *Id.* at 49, 60.

<sup>265</sup> Law Students for Reproductive Justice ("LSRJ"), *State Laws Regulating Reproductive Rights*, 5 (2010), [http://lsrj.org/documents/10\\_State%20Laws%20Regulating%20Repro%20Rights.pdf](http://lsrj.org/documents/10_State%20Laws%20Regulating%20Repro%20Rights.pdf) LSRJ State Laws.

<sup>266</sup> CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS, *supra* note 244, at 37.

<sup>267</sup> *Id.*

*ii. Mandatory Delays*

104. Many states have mandatory delay and biased counseling laws for abortion. These requirements are expensive and burdensome and have no medical justification. In their most onerous form, these laws require women to receive in-person counseling and then wait before returning to the health care provider a second time to have an abortion. This may prevent women from obtaining an abortion at all.<sup>268</sup> South Dakota recently passed a law creating a three day waiting period, the longest in the country.<sup>269</sup> Abused women are subject to close monitoring by their abusers, such that going to the clinic without detection is hard, and having to go twice makes it significantly more difficult to obtain an abortion.<sup>270</sup> An abuser may engage in such tactics as monitoring the mileage on the car and checking up or calling the woman at home or at work to make sure she is there.<sup>271</sup> If he discovers she is not where she is supposed to be, he will usually engage in abuse.<sup>272</sup> These restrictions can be especially burdensome for women who have escaped their abusers and sought safety in shelters as it forces them to leave the shelters and put their physical security in jeopardy twice.<sup>273</sup>
105. Even if abused women are able to make two visits to a clinic, they will rarely be able to do so on consecutive days. Women who must travel long distances to visit an abortion provider would often not be permitted to stay overnight by their abusers or would be unable to do so without facing suspicion and increased violence when they return.<sup>274</sup> Women may also fear that their children would be subject to abuse in their absence.<sup>275</sup> Thus, the mandatory waiting period, in effect, will be much greater than 24 hours for these women.<sup>276</sup>
106. Mandatory waiting periods and counseling requirements may also impose additional financial burdens on abused women that may prevent them from returning for the second trip. An abused woman is unlikely to have access to her own money and may be cut off from contacting family and friends by her abuser's control.<sup>277</sup> Some states have passed, or are considering passing, mandatory ultrasound requirements prior to an abortion that may force women to stay in a battering relationship longer as the added costs of the ultrasound deplete the resources needed to leave an abusive partner.<sup>278</sup> The delay caused by these laws will

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<sup>268</sup> Walker Decl., *supra* note 242, at ¶¶ 13-14.

<sup>269</sup> Chet Brokaw, *South Dakota Law Mandates Three-day Wait on Abortions*, Associated Press, March 23, 2011, available at [http://www.boston.com/news/politics/articles/2011/03/23/south\\_dakota\\_law\\_mandates\\_three\\_day\\_wait\\_on\\_abortions/](http://www.boston.com/news/politics/articles/2011/03/23/south_dakota_law_mandates_three_day_wait_on_abortions/).

<sup>270</sup> *Id.* at ¶ 16.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS, *supra* note 244, at 89.

<sup>274</sup> Walker Decl., *supra* note 242, at ¶ 17.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at ¶ 18.

<sup>278</sup> Letter to Gov. Crist, *supra* note 257.

exacerbate women's financial difficulties because abortion becomes more expensive as pregnancy progresses.<sup>279</sup>

### *iii. Funding Restrictions*

107. Under the Hyde Amendment, federal Medicaid funds may not be used for abortions except in cases of rape or incest, or threat to the woman's life.<sup>280</sup> Even though states are obligated to provide funding for abortions under these exceptions, available data shows that in 2006, 24 out of the 33 states that should be covering abortions under these circumstances did not spend any money on abortions.<sup>281</sup> Requirements that victims go through the experience of reporting and certifying the rape or incest that led to the pregnancy present a considerable barrier to reimbursement.<sup>282</sup> The Hyde Amendment makes no exception for survivors of IPV.<sup>283</sup> Even if a woman's pregnancy resulted from sexual assault by her partner, she may be deterred by the stringent administrative and reporting requirements.

### *iv. Late Abortions*

108. Young women, women with health issues, and women living in shelters or dangerous situations, such as IPV survivors, are at greater risk of requiring later abortions.<sup>284</sup> Abused women in particular will be forced to delay abortions both to avoid their abusers' discovery of their actions and to raise money for the additional financial burdens.<sup>285</sup> Barriers to women's access to abortion are compounded when they seek abortions later in their pregnancies. Some women may end up being delayed beyond the gestational limits of the clinic.<sup>286</sup> Because of legal restrictions and the need for doctors with specific expertise, many clinics only offer abortions until the end of the first or during the early second trimester.<sup>287</sup> For later abortions, women often must travel even greater distances.<sup>288</sup> Thus, in addition to the difficulties abused women face in traveling to access services without detection by their abuser, they may be forced to travel even further because of the scarcity of providers offering second trimester abortions. Later abortions are more complicated (sometimes requiring more than one day) and expensive procedures, adding additional financial and logistical burdens and medical risks.<sup>289</sup>

### *v. Harassment and Patient Confidentiality*

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<sup>279</sup> Walker Decl., *supra* note 242, at ¶ 18.

<sup>280</sup> CTR. FOR REPROD. RIGHTS, WHOSE CHOICE?: HOW THE HYDE AMENDMENT HARMS POOR WOMEN, 19 (2010).

<sup>281</sup> *Id.* at 35.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 25.

<sup>284</sup> *Id.*

<sup>285</sup> Walker Decl., *supra* note 242, at ¶ 15.

<sup>286</sup> *Id.*

<sup>287</sup> CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS, *supra* note 244, at 48.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

109. Patient confidentiality can be threatened by mandatory counseling requirements and the harassing actions of anti-abortion “protestors.” South Dakota recently passed a law requiring that women go to “pregnancy service centers,” disclose their pregnancies and be counseled against abortion, even if they do not want the counseling. The law does not include an exception for women in abusive situations who fear disclosure of their situation to strangers.<sup>290</sup> Protestors of abortion clinics have threatened escorts and tried to stop cars from entering so they could throw leaflets through car windows, yell, and trespass.<sup>291</sup> Protestors may try to prevent women from entering the clinic by hanging on to them as they walk.<sup>292</sup> Protestors undermine women’s trust in the medical services they are seeking, as patients are intimidated by false statements that protestors make regarding the safety, risk, and nature of abortion.<sup>293</sup> Patients are also worried about protecting their identities.<sup>294</sup> Protestors have threatened patient confidentiality by uploading footage of patients on YouTube.<sup>295</sup> If protestors recognize a patient, they may threaten to tell her neighbors and employers about the visit.<sup>296</sup> In one instance, a protestor took photos of patients and escorts and told them, “You won’t be smiling on your deathbed.”<sup>297</sup> Many patients are upset by or fear encountering protestors.<sup>298</sup> This distress and fear prevents some women from visiting a clinic at all.<sup>299</sup> One provider observed that on days when more protestors were present the no-show rate would go up.<sup>300</sup> This is especially problematic for women who face the increased costs of having a later abortion or exceeding the gestational limit.<sup>301</sup> For women experiencing intimate partner violence, the risk that their visit to the clinic may be revealed to their partners and the additional delays caused by subsequent harassment present particularly difficult barriers.

### D. Law and Policy Problems

110. Access to sexual and reproductive healthcare has been recognized as part of the fundamental human rights of women, including the right to health and life, the right to equality and non-discrimination, and the right to reproductive self-determination. The United Nations committees that oversee compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Covenant on Civil and Political Rights (ICCPR) have consistently criticized restrictive abortion laws as violations of the right to life.<sup>302</sup> The right to health includes “the right to attain the highest standard of

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<sup>290</sup> A.G. Sulzberger, *Women Seeking Abortion in South Dakota to Get Anti-Abortion Advice*, N.Y. Times, March 22, 2011, available at <http://www.nytimes.com/2011/03/23/us/23sdakota.html>.

<sup>291</sup> *Id.* at 74-75.

<sup>292</sup> *Id.* at 84.

<sup>293</sup> *Id.* at 102.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 74-75.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 84.

<sup>298</sup> *Id.* at 87.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 102.

<sup>301</sup> *Id.*

<sup>302</sup> See, e.g., CTR. FOR REPROD. RIGHTS, BRINGING RIGHTS TO BEAR: ABORTION & HUMAN RIGHTS 5 & n.52 (2008) (citing multiple Concluding Observations from the Committee on the Elimination of All Forms of Discrimination

sexual and reproductive health.<sup>303</sup> To fulfill this right, governments must provide access to “a full range of high quality and affordable health care, including sexual and reproductive services.”<sup>304</sup>

111. The Beijing Platform for Action recognized that “the ability of women to control their own fertility forms an important basis for the enjoyment of other rights,” and “neglect of women’s reproductive rights severely limits their opportunities in public and private life, including opportunities for education and economic and political employment.”<sup>305</sup> Support for women’s right to reproductive self-determination derives from provisions in a number of human rights instruments that ensure autonomy in decision-making about intimate matters, including protection of the long-recognized rights to physical integrity,<sup>306</sup> privacy,<sup>307</sup> and free and responsible decision-making with respect to the number and spacing of one’s children.<sup>308</sup>
112. Targeted Regulation of Abortion Providers (TRAP) laws limit women’s access to abortion by singling out the medical practices of doctors who provide abortions with requirements that are often different and more burdensome than those imposed on the medical practices of doctors who provide comparable services. Forty-four states have TRAP laws. Twenty-two states (AL, AZ, AR, CT, FL, IN, KY, LA, MI, MN, MS, MO, NE, OK, NC, PA, RI, SC, SD, TX, UT, WI) have health facility licensing schemes specific to abortion providers regulating clinic staffing, construction and practices.<sup>309</sup> Abortion providers are subject to discriminatory regulation because of the service itself or because they provide abortions after the first trimester.<sup>310</sup> TRAP laws are not based on medical evidence about safe abortion care but are meant to raise the costs of abortion providers.<sup>311</sup> Because such laws make it difficult

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Against Women where the Committee has urged states to provide safe abortion services or ensure access where abortion is permitted by law).

<sup>303</sup> *Programme of Action of the International Conference on Population and Development*, Cairo (hereinafter *ICPD Programme of Action*), Egypt, Sept. 1994, ¶ 7.3 at 513, U.N. Doc. A/CONF.171/13/Rev.1 (1995).

<sup>304</sup> Committee on Economic Social and Cultural Rights, *General Comment 14, The Right to the Highest Attainable Standard of Health*, ¶ 21, (22<sup>nd</sup> Sess., 2000) U.N. Doc. E/C.12/2000/4 (2000).

<sup>305</sup> *Beijing Declaration and the Platform for Action, Fourth World Conference on Women*, Beijing, China, Sept. 4-15 1995, ¶ 97, U.N. Doc. A/CONF.177/20 (1996).

<sup>306</sup> See Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), art. 3, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, G.A. res. 2200A (XXI), U.N. GAOR 21<sup>st</sup> Sess., Supp. No. 16, arts. 6.1, 9.1, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976).; Convention on the Rights of the Child *adopted* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44<sup>th</sup> Sess., Supp. No.49, arts 6.1, 6.2 U.N. Doc. A/44/49 (1989) (*entered into force* Sept. 2, 1990); *ICPD Programme of Action*, *supra* note 303, at paras. 7.3, 7.15, 8.34; *Beijing Declaration and the Platform for Action*, at paras. 96, 106, 108

<sup>307</sup> See ICCPR, at art. 17.1; CRC at arts. 16.1, 16.2, *ICPD Programme of Action*, *supra* note 303 at para. 7.45, *Beijing Declaration and Platform for Action*, at paras. 106, 107.

<sup>308</sup> See Convention on the Elimination of All Forms of Discrimination against Women, *adopted* Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34<sup>th</sup> Sess. Supp. No. 46, art. 16 (1.e), U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 12 (*entered into force* Sept. 3, 1981); *ICPD Programme of Action*, *supra* note 303 at principle 8; *Beijing Declaration and the Platform for Action*, at para. 223.

<sup>309</sup> LSRJ, *State Laws*, *supra* note 265, at 5.

<sup>310</sup> CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS, *supra* note 244, at 49.

<sup>311</sup> *Id.*

for abortion clinics to stay open and discourage new doctors from entering the field, these laws undermine the availability of abortion services and women's access.<sup>312</sup>

113. Law enforcement is often unresponsive to providers' concerns about harassment and intimidation tactics.<sup>313</sup> Attempts to form liaisons with local police have failed to change police response to threats against clinic workers.<sup>314</sup> Police have failed to make any arrests in response to protestor disruption, even when protestors entered a clinic.<sup>315</sup> Hostile protestors are arrested, only to be released soon after and resume their illegal activities.<sup>316</sup> The lack of police response has reduced protestors' fear of consequences, encouraging their illegal activities.<sup>317</sup>
114. Many states have mandatory counseling and delay laws. State laws vary as to whether counseling must be in-person, whether information must be given orally and/or in writing, the content of the information, if state-produced written materials are offered, if information must be given by specific medical professionals, and whether an ultrasound must be taken.<sup>318</sup> Thirty-four states have counseling requirements, mandatory delays, or both. Eight states (LA, MS, OH, UT, WI, IN, SD, and MO) have two-trip requirements.<sup>319</sup> Some states require an ultrasound.<sup>320</sup> Providers agree there is no medical reason for mandatory delay and biased counseling laws.<sup>321</sup> Clinics already provide an informed consent and counseling process to ensure patients understand the risks and process of an abortion and are comfortable with their decision.<sup>322</sup> Biased counseling requirements are not useful to the clinics' procedures and often require providers to convey false, confusing, or misleading information.<sup>323</sup>
115. Although the Supreme Court has held that women have a constitutional right to have an abortion, case law on abortion fails to take the needs of IPV victims seriously. In *Planned Parenthood v. Casey*, the Supreme Court held that a spousal notification requirement could result in a woman's abuse and struck down that part of the law as an undue burden on women's right to have an abortion.<sup>324</sup> The Court, however, upheld a counseling and 24-hour waiting period requirement,<sup>325</sup> and lower courts have continued to do so without adequately

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<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 25.

<sup>314</sup> *Id.* at 85.

<sup>315</sup> *Id.* at 76.

<sup>316</sup> *Id.* at 74.

<sup>317</sup> *Id.* at 85.

<sup>318</sup> *Id.* at 46.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 3; Chet Brokaw, *South Dakota Law Mandates Three-day Wait on Abortions*, Associated Press, March 23, 2011, available at [http://www.boston.com/news/politics/articles/2011/03/23/south\\_dakota\\_law\\_mandates\\_three\\_day\\_wait\\_on\\_abortions/](http://www.boston.com/news/politics/articles/2011/03/23/south_dakota_law_mandates_three_day_wait_on_abortions/).

<sup>321</sup> CTR. FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS, *supra* note 244, at 46.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 47.

<sup>324</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>325</sup> *Id.*

considering the impact on women’s ability to obtain abortion services.<sup>326</sup> In *Cincinnati Women’s Service v. Taft*, the Sixth Circuit upheld an in-person counseling and 24-hour waiting period requirement despite evidence that the in-person meeting would be “all but impossible” for women experiencing IPV.<sup>327</sup> However, in assessing whether the restriction constituted an undue burden on access to abortion, the court only considered those women for whom the law would create a complete prohibition and refused to take into account other types of harm short of preventing an abortion.<sup>328</sup> Further, despite the fact that the law would completely preclude a significant proportion of battered women from obtaining an abortion, the court found that it placed no undue burden on the right to abortion.<sup>329</sup> Insisting that the barriers imposed by the law did not make obtaining abortion impossible, the court did not consider the other serious difficulties the law would impose on victims of intimate partner violence that might be sufficient to render the law unconstitutional.<sup>330</sup>

### E. Recommendations

116. To the United States Government:

- a. Make contraception available as part of the minimum benefits of every health insurance plan, including methods of contraception that women can use independently and without detection by their partners.
- b. Repeal federal funding restrictions on abortion, including the Hyde Amendment.

117. To State and Local Governments:

- a. Repeal mandatory delay and biased counseling laws.
- b. Repeal TRAP laws and regulate abortion providers in the same manner as other medical care providers.

118. To the Medical Community and Healthcare Providers:

- a. Advocate the repeal of laws restricting access to abortion, such as mandatory delay, counseling, and TRAP laws.
- b. Ensure that women receiving care are not coerced in their reproductive decision-making.

## VI. ECONOMIC (IN)SECURITY, EMPLOYMENT, AND HOUSING

### A. Domestic Violence and Poverty

#### i. Background and Prevalence

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<sup>326</sup> Kathryn Colbert, Linda J. Wharton, & Susan Frietsche, *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 Yale J.L. & Feminism 317, 357-39 (2006).

<sup>327</sup> *Cincinnati Women’s Services v. Taft*, 468 F.3d 361, 372 (6th Cir. 2006).

<sup>328</sup> *Id.* at 372-73.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

## Domestic Violence in the United States

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119. Domestic violence and poverty are intricately interwoven. While intimate partner violence occurs at all socioeconomic levels, it impacts women living below the poverty level disproportionately because of the stress they experience and their limited escape routes.<sup>331</sup>
120. According to recent studies, between 9% and 23% of women receiving public assistance report having been abused in the past 12 months and over 50% report experiencing physical abuse at some point in their adult lives.<sup>332</sup>
121. According to a recent National Institute of Justice (NIJ) study, violence against women in intimate relationships occurs more often and with greater severity in economically disadvantaged neighborhoods. This trend means that economically distressed families experience twice the rate of intimate violence as higher income families and that elevated rates of domestic violence occur within populations vulnerable to poverty.<sup>333</sup>
122. The NIJ found that women whose male partners experienced two or more periods of unemployment over the 5-year study were almost three times as likely to be victims of intimate violence as were women whose partners had stable jobs.<sup>334</sup> The results also indicated that, as the ratio of household income to needs goes up, the likelihood of violence goes down. Families who reported extensive financial strain had a rate of violence more than three times that of couples with low levels of financial strain.<sup>335</sup>

### ii. *Effects and Consequences*

123. Efforts to escape violence can also have devastating economic impacts. Leaving a relationship might result in a corresponding loss of employment, housing, health care, childcare, or access to spousal income. Criminal and civil legal remedies, for example, may take time away from work or job training, resulting in lost wages or loss of employment. Mental and physical health problems, whether temporary or more long-term, can likewise diminish the ability to work, participate in job training or education programs, or comply with government benefit requirements.
124. Similarly, domestic violence can hinder child support enforcement and threaten the receipt of TANF (Temporary Assistance to Needy Families) benefits. In order to qualify for assistance, TANF applicants must cooperate with state efforts to collect support; if they fail to do so,

Comments  
assertions.

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<sup>331</sup> M. Davis, *The economics of abuse: How violence perpetuates women's poverty*, in R. Brandeis (Ed.), *Battered Women, Children, and Welfare Reform: The Ties That Bind*, 17-30 (Thousand Oaks, CA: Sage, 1990); L. Greenfield, M. Rand, D. Craven, P. Klaus, C. Perkins, C. Ringel, et al. (1998). *Violence by Intimates*. Washington, DC: Bureau of Justice Statistics (NCJ-167237); L. Heyse & C. Garcia-Moreno. (2002). *Violence by Intimate Partners. World Report on Violence and Health*. Geneva: World Health Organization; A. Kaplan. (1997). Domestic violence and welfare reform. *Welfare Information Network: Issues Notes: 1-9*, p. 395; D. Kurtz. (1999). Women, welfare, and domestic violence. In G. Mink, (Ed.), *Whose Welfare?* (pp. 132-151). Ithaca, NY: Cornell University Press; J. Ptacek. (1999). *Battered Women in the Courtroom*. Boston: Northeastern University Press; Raphael, J. (2000). *Saving Bernice: Battered Women, Welfare and Poverty*. Boston, MA: Northeastern University Press.

<sup>332</sup> Jill Davies, Policy Blueprint on Domestic Violence and Poverty 4 (2002).

<sup>333</sup> BENSON AND FOX, *supra* note 21, at 1.

<sup>334</sup> *Id.* at 2.

<sup>335</sup> *Id.*

they risk denial or termination of assistance.<sup>336</sup> Ultimately, some battered women must choose to either enforce child support, which may result in retaliatory violence, or to abandon the pursuit of support, which could result in the loss of their TANF benefits and a potential long-term income source.

125. The role of economic distress in fueling domestic violence has particular consequences for groups experiencing high rates of poverty. African American women, for example, experience intimate partner violence at a rate 35% higher than that of white women and about 2.5 times the rate of women of other races.<sup>337</sup> According to the National Violence Against Women Survey (NVAWS), African American women also experience higher rates of intimate partner homicide than their white counterparts. In 2007, black female homicide victims were twice as likely as white female homicide victims to be killed by a spouse (0.96 and 0.50 per 100,000, respectively). Black females were four times more likely than white females to be murdered by a boyfriend or girlfriend (1.44 and 0.34 per 100,000, respectively).<sup>338</sup>
126. Researchers have attributed such disparities largely to economic factors. African Americans and whites with high incomes, for example, experience virtually identical rates of domestic violence.<sup>339</sup> While African Americans with moderate incomes still have a significantly higher rate of intimate violence than their Caucasian counterparts, this trend can be explained at least in part by the tendency for neighborhood economic disadvantage to increase the risk of domestic violence in tandem with personal financial distress. The role of community stability is particularly relevant for African Americans, whose neighborhood options do not always mirror individual economic status; for instance, while 36 percent of African American couples may be considered economically disadvantaged, more than twice as many live in disadvantaged neighborhoods.<sup>340</sup>
127. Abused immigrant women are similarly likely to experience economic hardship. Immigrant women often suffer higher rates of battering than United States citizens because they may come from cultures that accept domestic violence or have less access to legal and social services than United States citizens. Additionally, immigrant batterers and victims may believe that the penalties and protections of the United States legal system do not apply to them. Battered immigrant women who attempt to flee may not have access to bilingual shelters, financial assistance, or food. It is also less likely that they will have the assistance of a certified interpreter in court, when reporting complaints to the police or a 911 operator, or in acquiring information about their rights and the legal system.<sup>341</sup>

### *iii. Law and Policy Problems*

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<sup>336</sup> 42 U.S.C. § 608(a)(2).

<sup>337</sup> Women of Color Network, *Facts & Stats: Domestic Violence in Communities of Color* 2 (2006).

<sup>338</sup> Shannon Catalano, Erica Smith, Howard Snyder, and Michael Rand, *Bureau of Justice Statistics Selected Findings: Female Victims of Violence* 3 (2009).

<sup>339</sup> BENSON AND FOX, *supra* note 21, at 4.

<sup>340</sup> *Id.*

<sup>341</sup> Family Violence Prevention Fund, *The Facts on Immigrant Women and Domestic Violence* (2002).

## Domestic Violence in the United States

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128. While TANF's Family Violence Option (FVO)<sup>342</sup> allows states to exempt victims of domestic violence from program requirements in cases where compliance would make it more difficult to escape domestic violence or penalize victims of such violence, state and local implementation has often proven ineffective and inadequate. Comment  
sentence/p
129. This problem stems primarily from the failure of TANF offices to identify victims of domestic violence. Multiple reports and surveys across the country indicate a stark disparity between the probable number of victims applying for TANF benefits and the number actually identified at the TANF office. One recent study, for example, concluded that domestic violence screenings failed to identify 86% of the likely total women who were victims of recent violence.<sup>343</sup>
130. In addition, TANF offices may have institutional problems with implementing FVO policies. Unlike earlier public assistance programs in which the federal government designed uniform program requirements, TANF provides funding to the states to design and administer their own programs, leading to considerable variation from one region to the next. Comment
131. Since the FVO is not a mandatory provision of TANF, states have a great deal of flexibility in devising their policies. For example, states can opt to limit the circumstances under which program requirements may be waived. Some offer waivers only in cases of ongoing violence; others also provide waivers where compliance would penalize those still struggling with the consequences of past abuse.<sup>344</sup>
132. Due to the decentralized way in which states administer benefits, FVO implementation also varies by locality. While the FVO is initially adopted through legislative or administrative action at the state level, its implementation is left to local government agencies which inevitably vary in culture and resources. As a result, even states with relatively strong FVO legislation can lack uniformity in application from one locality to another. Comment
133. While immigrants who have been "battered or subjected to extreme cruelty" by a United States citizen spouse or a parent may receive public assistance under the Professional Responsibility and Work Opportunity Reconciliation Act (PRWORA), the Department of Housing and Urban Development has yet to reconcile Section 214 of the Housing and Community Development Act of 1980, which imposes restrictions on the use of assisted housing by non-resident aliens, with these expanded eligibility provisions. As a result, public housing authorities currently lack clear guidance regarding the eligibility status of this population.<sup>345</sup>
134. The key national organizations that have worked on this issue include: Legal Momentum, Center for Community Change, Women of Color Network (a project of the National

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<sup>342</sup> 42 U.S.C. § 602(a)(7).

<sup>343</sup> National Law Center on Homelessness & Poverty, *Shortchanging Survivors: The Family Violence Option for TANF Benefits* 5 (2009).

<sup>344</sup> For a state by state summary of FVO provisions, see [http://www.legalmomentum.org/assets/pdfs/www6-6\\_appendix\\_d\\_family\\_violence\\_option.pdf](http://www.legalmomentum.org/assets/pdfs/www6-6_appendix_d_family_violence_option.pdf).

<sup>345</sup> National Housing Law Project, *Overview: Immigration Status and Federally Assisted Housing* 3 (2010).

Resource Center on Domestic Violence), National Women’s Law Center, CLASP, Center for American Progress (Half in Ten campaign), Low Income Families’ Empowerment through Education (LIFETIME), and the Institute for Women’s Policy Research.

### *iv. Recommendations*

135. Since job instability, and not merely employment status itself, is a major risk factor for violence against women, legislators should support policies and practices that provide job stability rather than those that promote periodic layoffs and rehiring.
136. In light of findings about how neighborhood types and economic distress increase the risk of intimate violence, service providers should target women who live in the most disadvantaged neighborhoods.
137. Because economic distress has been shown to increase the risk of violence, service providers might choose to address the economic resources of these women and specifically, their need for cash assistance.
138. The U.S. Department of Health and Human Services (HHS) should provide funding for research into the effectiveness of TANF programs in addressing domestic violence and other barriers to success for TANF applicants/participants, examine current domestic violence screening policies throughout the country to identify best practices, actively promote these practices through enhanced federal guidance, and conduct outreach with TANF offices to ensure they understand the framework of the federal law.
139. Congress should enact H.R. 4978,<sup>346</sup> proposed by Rep. Gwen Moore (D-WI), making the FVO a mandatory, rather than optional, component of the TANF program in order to encourage more uniform implementation throughout the country.
140. State and local agencies should facilitate TANF applicant/participant access to good cause domestic violence waivers via improved legislation and regulatory guidance, enhanced funds to support outreach and advocacy, better communication with stakeholders, and improved applicant screening for domestic violence.
141. Local public assistance offices should improve outreach to and collaboration with domestic violence service providers, provide comprehensive training on domestic violence for all caseworkers and administrators, and regularly monitor the number of FVO applications received and waivers granted.
142. Congress should amend—either independently or through the reauthorization of the Violence Against Women Act—Section 214 of the Housing and Community Development Act of 1980 to conform its immigrant eligibility provisions to those of the Professional Responsibility and Work Opportunity Reconciliation Act.

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<sup>346</sup> For text of the legislation, see [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h4978ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4978ih.txt.pdf).

### B. Domestic Violence and Employment

#### *i. Background, Prevalence, Effects and Consequences*

143. Domestic and sexual violence can significantly affect the workplace. On average, 1.7 million violent crimes occur on the job.<sup>347</sup> Approximately 36,500 people each year are raped and sexually assaulted at work, eighty percent of whom are women.<sup>348</sup> Homicide by an intimate partner constitutes three percent of workplace murders.<sup>349</sup>
144. Experiencing domestic or sexual violence is also a direct cause of workplace problems for the vast majority of victims who work. Batterers often exercise control over victims by preventing them from going to work or harassing them on the job.<sup>350</sup> The work lives of survivors are also disrupted if they need to seek housing or medical or legal help in response to abuse. Three studies collected by the U.S. General Accounting Office found that between 24 and 52 percent of victims of domestic violence reported that they were either fired or had to quit their jobs as a result of abuse.<sup>351</sup> Up to 96% of domestic violence victims have experienced employment difficulties because of abusers and violence.<sup>352</sup> These statistics represent a troubling reality: thousands of employees who are suffering from intimate partner abuse are at great risk of losing their jobs, which will in turn render them more dependent on their abusers and less able to escape the cycle of violence.
145. Currently, a victim is vulnerable to being rejected for or fired from a position when an employer learns that she may have been subjected to abuse. An employer may act on outdated, but commonly held, notions about victims: that they enjoy abuse because they have stayed in a violent relationship or their attire or behavior must have invited sexual assault. Gay and lesbian victims of domestic violence face unique issues; they may not want to disclose abuse to an employer because they fear exposing their sexual orientation or face misconceptions about the dynamics of domestic violence in their relationships.
146. When employers are free to discriminate against survivors, survivors are forced to make the difficult choice between suffering in silence or risking loss of their income, as many abusers exercise complete control over their partners' finances.<sup>353</sup> A legal system that tolerates such obstacles to safe employment discourages victims of these crimes from reporting their abuse or otherwise taking steps to protect themselves.

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<sup>347</sup> Diets T. Duhart, U.S. Dep't of Justice, Bureau of Justice Statistics, *Violence in the Workplace 1993-1999* 2 (2001).

<sup>348</sup> *Id.* at 2-3.

<sup>349</sup> *Id.* at 10.

<sup>350</sup> Richard M. Dolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence*, 56 *J. Soc. Issues* 655, 664-70 (2000).

<sup>351</sup> U.S. Gen. Acct. Office, *Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients* 19 (1998).

<sup>352</sup> U.S. Dep't of Labor, Women's Bureau, *Domestic Violence: A Workplace Issue* 1 (1996).

<sup>353</sup> Susan L. Pullet, *Economic Abuse: The Unseen Side of Domestic Violence*, *NYSBA Journal* 40 (Feb. 2011).

## Domestic Violence in the United States

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### *ii. Law and Policy Problems*

147. In general, the United States operates on an employment-at-will system. An employee can be fired for any reason, or no reason at all, unless the law prohibits it.
148. There is no federal law protecting victims of domestic violence from being fired because they have experienced abuse or because they need to seek leave to address safety, medical, mental health, or legal concerns arising from domestic violence.
149. Some states have passed laws that address the employment rights of survivors, but many gaps exist. A handful of states allow victims to take leave to deal with medical needs, court appearances, and safety issues, but the vast majority do not. At present, only ten states and the District of Columbia<sup>354</sup> provide some form of leave specifically to domestic violence victims, but even in some of those states, leave is restricted to a particular purpose, such as court appearances. Thus, a victim who needs time off to address other compelling health and safety issues may be left without protection. Only three states explicitly prohibit employers from firing employees because they are domestic violence victims.<sup>355</sup> Connecticut and Rhode Island bar employers from penalizing victims who have attended court or obtained restraining orders.<sup>356</sup>
150. While some courts have recognized that domestic violence victims who are fired should be able to sue for wrongful discharge from employment, other courts have held that employers can fire employees simply because they are domestic violence victims.<sup>357</sup>
151. Despite the prevalence of domestic and sexual violence, employers have done little in response. More than 70% of workplaces in the United States do not have a formal program or policy that addresses workplace violence, and only 4% train their employees on domestic violence and its impact on the workplace.<sup>358</sup> Many employers refuse to accommodate survivors' need for time off to attend court dates or doctors' appointments, making it all but impossible for survivors to address the violence in their lives while financially supporting themselves.
152. The key national organizations that have worked on this issue include: the ACLU Women's Rights Project, Legal Momentum, Corporate Alliance to End Partner Violence, and Peace At Work.

### *iii. Recommendations*

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<sup>354</sup> See Cal. Lab. Code §§ 230, 230.1; Colo. Rev. Stat. § 24-34-402.7; D.C. Code §§ 32.131.01, 32.131.02; Fla. Stat. § 741.313; Haw. Rev. Stat. § 378-72; 820 Ill. Comp. Stat. 180/1-180/45; K.S.A. §§ 44-1131, 44-1132; 26 Me. Rev. Stat. § 850; N.Y. Penal L. § 215.14; N.C. Gen. Stat. §§ 50B-5.5, 95-270(a); Or. Rev. Stat. §§ 659A.290, 659A.885; Wash. Rev. Code § 49.76.

<sup>355</sup> 820 Ill. Comp. Stat. 180/30; K.S.A. §§ 44-1131 & -1132; N.Y. Exec. L. § 296-1(a) & 292 (34)

<sup>356</sup> Conn. Gen. Stat. § 54-85b; R.I. Gen. Laws § 12-28-10.

<sup>357</sup> Compare *Danny v. Laidlaw Transit Services*, 165 Wash. 2d 200 (2008) with *Imes v. City of Asheville*, 163 N.C. App. 668, *offs*, 359 N.C. 182 (2004).

<sup>358</sup> U.S. Dep't of Labor, Bureau of Labor Statistics, Survey of Workplace Violence Prevention (2006).

153. Federal and/or state laws must be amended to prohibit discrimination against survivors of domestic violence, sexual assault, and stalking and to provide emergency leave when employees need time off to address safety, health, housing, and legal concerns. These laws should require employers to make reasonable accommodations to support victims of domestic violence. Because batterers frequently seek to harass victims at work, survivors may need basic accommodations from their employers to ensure their safety, such as a change in telephone number or seating assignment, installation of a lock, a schedule modification, emergency leave, or job reassignment. These accommodations allow survivors to continue to financially support themselves while imposing a minimal burden on their employers.
154. The government should continue to work to ensure that unemployment compensation is readily available to victims of domestic violence. The American Recovery and Reinvestment Act of 2009 (ARRA) included several provisions for modernizing state unemployment insurance systems, such as providing access to unemployment insurance benefits to various groups who were not previously covered by state laws, including victims of domestic violence.<sup>359</sup> Under ARRA, the federal government provided incentive payments to states that chose to make changes to their unemployment insurance systems. In response, many states, although not yet all, passed laws that guaranteed unemployment compensation to victims who had been forced to leave their jobs due to violence. Even where states do provide coverage, however, laws vary as to whether the claimant or their family member must have been subject to or feared domestic violence, sexual assault or stalking, and each state has different requirements for eligibility and documenting the violence.
155. The federal and state governments should encourage all employers to adopt and implement policies addressing the needs of victims of domestic violence. These policies should address issues like emergency leave, enforcing a restraining order at the workplace, and making safety-related accommodations at work.

### C. Domestic Violence and Housing

#### *i. Background, Prevalence, Effects and Consequences*

156. The home and domestic violence are inextricably linked. More than 70% of intimate partner violence occurs at or near the victim's home.<sup>360</sup> Women living in rental housing experience intimate partner violence at nearly four times the rate of women who own their own homes.<sup>361</sup> Because abusers often seek to limit their partners' ability to find or keep a job, those groups of women who are the most vulnerable to the loss of housing and who are the least likely to be able to locate affordable new housing are at the greatest risk of domestic violence.

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<sup>359</sup> Pub. L. No. 111-5, Division B, Title II, Sec. 2003 (Jan. 6, 2009).

<sup>360</sup> Shannon Catalano et al., U.S. Dep't of Justice, NCJ 228356, *Female Victims of Violence 1* (2009), available at <http://www.ojp.usdoj.gov/bjs/abstract/fvv.htm>.

<sup>361</sup> *Id.*

157. Across the United States, domestic violence is a primary cause of homelessness for women and their children. Up to half of homeless women report that they are homeless as a direct result of abuse.<sup>362</sup> Under “one-strike” or “crime-free” policies, domestic violence victims in government-subsidized and private housing have been evicted because of the violence, even though they were the victims.<sup>363</sup> Because of leases that obligate tenants for the entire term of the lease, many victims choose to stay in a dangerous situation as they cannot afford a new home on top of paying off their existing lease obligation. Furthermore, in many localities, the laws have actually worsened for victims. More cities and towns are passing ordinances that penalize tenants for repeated calls to police.<sup>364</sup> Victims of domestic violence and stalking are particularly affected because they are likely to need to reach out to police more than once.
158. When the government authorizes or condones the eviction of a victim of domestic violence, it sends a pernicious message to all of us: keep violence a secret or risk homelessness. This message is dangerous because the steps a victim undertakes to end an abusive relationship – such as calling the police or obtaining a protective order – are the very steps likely to escalate an abuser’s violence, make the abuse public, and expose her to the risk of discrimination and eviction.

### ii. Law and Policy Problems

159. The federal Violence Against Women Act (VAWA) was amended in 2005 to prohibit discrimination against victims of domestic violence, dating violence, and stalking in public

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<sup>362</sup> See, e.g., Center for Impact Research, *Pathways to and from Homelessness: Women and Children in Chicago Shelters* (January 2004) (finding 56 percent of women in Chicago shelters had been victims of domestic violence, and domestic violence was the immediate cause of homelessness for 22 percent of women in Chicago shelters), available at <http://www.impactresearch.org/documents/homelessnessreport.pdf>; Wilder Research Center, *Homeless in Minnesota 2003* (February 2004) (finding 31 percent of homeless women in Minnesota homeless because of domestic violence), available at <http://www.wilder.org/download.0.html?report=536>; National Conference of Mayors, *Hunger and Homelessness Survey* (December 2003) (finding 36 percent of cities surveyed identified domestic violence as major cause of homelessness), available at [http://usmayors.org/pressreleases/documents/hunger\\_121803.asp](http://usmayors.org/pressreleases/documents/hunger_121803.asp); Missouri Association for Social Welfare, *Homelessness in Missouri: The Rising Tide* (May 2002) (finding 27 percent of all homeless persons to be survivors of domestic violence and identifying domestic violence as a primary cause of homelessness), available at [http://www.masw.org/publications/homeless/report\\_text.pdf](http://www.masw.org/publications/homeless/report_text.pdf); Institute for Children and Poverty, *The Hidden Migration: Why New York City Shelters Are Overflowing with Families* (April 2002) (finding almost half of all homeless parents in New York City have been abused and one quarter of all homeless parents are homeless as a direct result of domestic violence), available at <http://www.icpny.org/PDF/reports/foster.pdf?Submit1=Free+Download>; Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 *Clearinghouse Review* 420 (1991) (citing 1990 study finding that 50 percent of homeless women and children are fleeing abuse).

<sup>363</sup> See ACLU Letter to Senate Committee on Banking, Housing, and Urban Affairs Leadership Urging Implementation of the 2005 Violence Against Women Act, March 11, 2008, available at <http://www.aclu.org/womens-rights/aclu-letter-senate-committee-banking-housing-and-urban-affairs-leadership-urging-imple>. For more information about cases, see [www.aclu.org/fairhousingforwomen](http://www.aclu.org/fairhousingforwomen).

<sup>364</sup> Cari Fais, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 *Colum. L. Rev.* 1181 (June 2008), available at <http://www.columbialawreview.org/assets/pdfs/108/5/Fais.pdf>.

## Domestic Violence in the United States

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housing and Section 8-funded housing.<sup>365</sup> These legal protections do not apply to the vast majority of housing in the United States, such as federally subsidized housing that does not fall under the public housing and Section 8 programs, or private housing that receives no federal subsidy. They also do not apply to victims of sexual assault and do not provide any avenue to file complaints for violations of VAWA.

160. The Department of Housing and Urban Development (HUD), public housing authorities, and affected owners have inadequately implemented VAWA's housing protections. For example, while VAWA requires public housing authorities to incorporate VAWA into the annual plans they submit to HUD, many have failed to do so.<sup>366</sup> HUD issued an interim rule on VAWA in January 2009, basically reiterating the statutes. Advocates across the country filed comments in response, calling for a final rule that provides clear guidance that would help victims access the protections guaranteed under the law.<sup>367</sup> A final rule was issued in October 2010, adopting many of the advocates' comments but rejecting others, including a recommendation that public housing authorities be required to provide emergency transfers when a tenant is threatened in her current public housing unit.<sup>368</sup> Further guidance is needed to fully protect survivors' housing.
161. Currently, only 11 states and the District of Columbia have laws prohibiting housing discrimination against victims of domestic violence, and only 14 states and the District of Columbia have enacted legislation that allows domestic violence victims to terminate a lease early to escape a violent living situation.<sup>369</sup>
162. The key national organizations that have worked on this issue include: the ACLU Women's Rights Project, National Law Center on Homelessness & Poverty, the National Network to End Domestic Violence, the National Housing Law Project, and the Sargent Shriver National Center on Poverty Law.

### iii. Recommendations

163. The United States should recognize that discrimination against survivors of domestic violence, sexual assault, and stalking is a form of sex discrimination. Housing policies must

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<sup>365</sup> 42 U.S.C. §§ 1437d, 1437f.

<sup>366</sup> National Law Center on Homelessness and Poverty, *Insult to Injury: Violations of the Violence Against Women Act* (April 2009), available at [http://www.nlchp.org/content/pubs/Insult\\_To\\_Injury\\_VAWA\\_Apr\\_%2020095.pdf](http://www.nlchp.org/content/pubs/Insult_To_Injury_VAWA_Apr_%2020095.pdf).

<sup>367</sup> See ACLU Coalition Comments to HUD regarding the VAWA Interim Rule (Jan. 29, 2001), available at <http://www.aclu.org/womens-rights/aclu-coalition-comments-hud-regarding-vawa-interim-rule>.

<sup>368</sup> 75 Fed. Reg. 66,246, 66,253 (Oct. 27, 2010).

<sup>369</sup> See Ark. Code § 18-16-112; Cal. Health and Safety Code § 34328.1; Col. Rev. Stat. Ann. §§ 13-40-104(4), 107.5(5); 25 Del. Code. § 5316; D.C. Code §§ 2-1404.01, -02, 2-1402.21(f), 42-3505.01, .07, .08.; Ind. Code § 32-31-9(1)-(15); M.D. Code Ann., Real Prop § 8-5A-05; N.C. Gen. Stat. §§42-40, 42-42.2, 42-42.3, 42-45.1; Ore. Rev. Stat. §§ 90.453, .456, .459; R.I. Gen. Laws §§ 34-37-1, 2, 2.4, 3, 4; Wash. Rev. Code Ann. §§ 59.18.570, 575, 580, 585; 2009 W.I. Act 95. See also Ariz. Rev. Stat. Ann. § 33-1318; Cal. Civ. Code § 1946.7; 25 Dec. Code. §§ 5141(6); D.C. Code §§ 2-1404.01, -02, 2-1402.21(f), 42-3505.01, .07, .08; 765 ILCS 750/1; Ind. Code § 32-31-9(1)-(15); M.D. Code Ann., Real Prop. §§ 8-5A-02 -04; Minn. Stat. § 504B.206; N.J.S.A. 46:8-9.5 - 9.7; N.Y. Real Prop. Law §§ 227-c; N.D. Century Code § 47-16-17.1; N.C. Gen. Stat. §§ 42-40, 42-42.2, 42-42.3, 42-45.1; Ore. Rev. Stat. §§ 90.453, .456, .459; Tex Prop. Code § 92.016; Wash. Rev. Code Ann. § 59.18.352.

not exclude applicants or evict tenants based on the abuse they have experienced. The federal government should codify this anti-discrimination principle by extending the housing protections enacted in 2005 in VAWA to survivors of sexual assault and, at a minimum, to other forms of federally-funded housing, such as housing funded by the Low Income Housing Tax Credit and USDA Rural Housing. State governments should pass laws that prohibit discrimination and provide victims with options to ensure their safety, including early lease termination.

164. To meet its “due diligence” obligations, the United States must take reasonable measures to more effectively implement VAWA so that its protections are extended to all tenants living in public housing and Section 8-subsidized housing. Further implementation of VAWA should include, after consultation with advocates for domestic violence survivors and other stakeholders, the issuance of comprehensive VAWA guidance and the designation of HUD staff to coordinate policy-making regarding domestic violence and investigate complaints regarding violations of VAWA.

165. The United States must make available more affordable, secure housing options for those fleeing domestic violence, so that escape from abuse does not end in homelessness. As states slash funding for domestic violence shelters, transitional housing, and long-term housing, it has become even more vital for federal housing programs to prioritize the needs of domestic violence survivors. For example, victims of abuse should be given preference for admission to public housing and Section 8 housing programs; only about a third of public housing authorities grant such preferences.

166. Local ordinances that mandate or encourage the eviction of tenants, such as domestic violence and stalking survivors, because they have called the police should be repealed. These laws punish victims who seek help and burden their right to government assistance.

## VII. VIOLENCE AGAINST NATIVE AMERICAN WOMEN

### A. Background, Prevalence, Effects and Consequences

167. American Indian and Alaska Native women (Indian women<sup>370</sup>) face greater rates of domestic violence and sexual assault than any other group in the United States.<sup>371</sup> Despite this horrific fact, United States law has diminished the authority of American Indian and Alaska Native nations to safeguard the lives of Indian women. The jurisdictional limitations the United States places on Indian nations have created a systemic barrier that denies Indian women access to justice and prevents them from living free of violence or the threat of violence.

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<sup>370</sup> See, e.g., 25 U.S.C. § 1903 (defining an “Indian” for jurisdictional purposes as any individual who is a member of an Indian tribe, or is an Alaska Native and a member of an Alaska Native Regional Corporation).

<sup>371</sup> See, e.g., P.L. No. 109-162 § 901 (2006).

168. Violence against Indian women in the United States has reached epidemic proportions. Violence against Indian women greatly exceeds that of any other population in the United States.<sup>372</sup> Every hour of every day an Indian woman is the victim of sexual and physical abuse.<sup>373</sup> Indian women are 2.5 times more likely to experience violence than other women in the United States.<sup>374</sup> The statistics of the United States Department of Justice report that 1 in 3 Indian women will be raped at some point in their life and that 3 in 5 will be physically assaulted.<sup>375</sup> Indian women are also stalked at a rate more than double that of any other population.<sup>376</sup>
169. Indicating the severity of the violence committed on a daily basis against Indian women, homicide was one of the leading causes of death for Indian women in 2004, outranking heart disease, cancer, diabetes and other such illnesses.<sup>377</sup> Intentional homicide is the third leading cause of death for Indian girls and women between the ages of ten and 24. Some counties within the United States have rates of murder of Indian women that are over ten times the national average.<sup>378</sup>
170. The United States Department of Justice reports reflect a high number of inter-racial crimes, with white or black offenders committing 88% of all violent victimizations of Indian women from 1992 to 2001.<sup>379</sup> Nearly 4 of 5 Indian victims of sexual assault described the offender as white.<sup>380</sup> Three out of four Indian victims of intimate partner violence identified the offender as a person of a different race.<sup>381</sup>
171. The epidemic of violence against Indian women in the United States jeopardizes their human rights to life, security of the person, freedom from discrimination, equal protection under the law, and access to effective judicial remedies. The inadequate response of the

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<sup>372</sup> *Id.*

<sup>373</sup> Brief of Amici Curiae The National Network to End Domestic Violence, Sacred Circle, National Resource Center to End Violence Against Native Women, et al. in Support of Respondents at 4, *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., et al.*, No. 07-411 (2008) [hereinafter “Long Brief”].

<sup>374</sup> See Steven W. Perry, U.S. Dep’t of Justice, *American Indians and Crime* 8 (2004).

<sup>375</sup> See Patricia Tjaden & Nancy Thoenne, U.S. Dep’t of Justice, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey* 22 ex. 7 (2000).

<sup>376</sup> See U.S. Dep’t of Justice, *Domestic Violence and Stalking, The Second Annual Report to Congress Under the Violence Against Women Act (1997)*; U.S. Dep’t of Justice, *Stalking and Domestic Violence, The Third Annual Report to Congress Under the Violence Against Women Act (1998)*.

<sup>377</sup> See Melanie Heron, Center for Disease Control, *Deaths: Leading Causes for 2004*, National Vital Statistics Reports, Vol. 56, Number 5 (2004). In 2007, a total of 10,007 Indian people were listed as missing by the National Crime Information Center. See NCIC Missing Person and Unidentified Person Statistics for 2007, U.S. Dep’t of Justice (2008).

<sup>378</sup> Ronet Bachman, et al, *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known* (National Institute of Justice 2007).

<sup>379</sup> Patricia Tjaden & Nancy Thoenne, U.S. Dep’t of Justice, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey* 22 (2000).

<sup>380</sup> See *Id.* at 9.

<sup>381</sup> Lawrence A. Greenfield & Steven K. Smith, U.S. Dep’t of Justice, *American Indians and Crime* 8 (1999) (noting that among American Indian victims, “75% of the intimate victimizations and 25% of the family victimizations involved an offender of a different race,” a much higher percentage than among victims of all races as a whole).

United States to the epidemic of violence against Indian women adversely impacts entire Indian nations, which already suffer from the worst socio-economic status of any population in the United States. United States laws have created a law enforcement void that appears to condone violence against Indian women and permits perpetrators to act with impunity on Indian lands.

172. As a result, in the United States, where most perpetrators of violence against Indian women go unpunished, the majority of Indian women will have their lives interrupted by violence. Many feel that a violent attack is inevitable. An advocate for survivors of sexual abuse from a tribe in Minnesota describes it not as a question of *if* a young Indian woman is raped, but *when*. Studies show that violent offenders are likely to commit additional acts of violence when they are not held responsible for their crimes.<sup>382</sup> Dr. Lisak, a leading researcher on sexual assault predators in the United States, described the inherent danger that the inadequate response presents to the lives of Indian women: “Predators attack the unprotected. The failure to prosecute sex crimes against American Indian women is an invitation to prey with impunity.”<sup>383</sup>
173. Because women play central and crucial roles in Native communities, this violence disrupts the stability and productivity of their families, their communities and the entire Native nation. By every measure, American Indians and Alaska Natives continue to rank at the bottom of every scale of economic and social well-being. Violence against Native women contributes to the marginalization of Indian and Alaska Native communities. This violence undermines the ability of Native women to provide positive and safe environments for their children. Studies have found that women victimized by violence are more likely to seek public assistance, and anecdotal evidence suggests that they are more likely to self-medicate with alcohol and drugs to deal with the violence and injustice they have experienced. Reducing violence against Native women gives them the ability to create better environments for their children and decreases their children’s risk of experiencing violence, alcoholism, drug abuse and other social ills.

### B. Law and Policy Problems

174. There are 565 federally recognized Indian nations in the United States, including more than 200 Alaska Native villages,<sup>384</sup> which retain sovereign authority over their lands and peoples.<sup>385</sup> Indian tribal governments are pre-existing sovereigns that possess inherent authority over their people and territory, including the power “necessary to protect tribal self-

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<sup>382</sup> David Lisa & P.M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 *Violence and Victims* 1 (2002).

<sup>383</sup> *Id.*

<sup>384</sup> Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 *Fed. Reg.* 18,553 (Apr. 4, 2008).

<sup>385</sup> *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9<sup>th</sup> Cir. 1983) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)) (“Indian tribes have long been recognized as sovereign entities, ‘possessing attributes of sovereignty over both their members and their territory.’”). *See also* *Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

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government [and] to control internal relations.”<sup>386</sup> Indian nations also have such additional authority as Congress may expressly delegate.<sup>387</sup> The basis for tribal authority is their inherent need to determine tribal citizenship, to regulate relations among their citizens, and to legislate and tax activities on Indian lands, including certain activities by non-citizens.<sup>388</sup> Indian nations have broad legislative authority to make decisions impacting the health and safety of the community including tribal civil and criminal justice responses to violence against women and services for victims. Tribal law enforcement officials are often the first responders to violence against women committed within their communities.

175. The United States, without the agreement of or consultation with Indian nations, imposed legal restrictions upon the inherent jurisdictional authority that American Indian and Alaska Native nations possess over their respective territories.
176. These restrictions, described in detail below, have created systemic barriers that deny Indian women access to justice and prevent them from living free of violence or the threat of violence.
177. Unlike other local communities in the United States, Indian nations and Alaska Native villages cannot investigate and prosecute most violent offenses occurring in their local communities. Tribes cannot effectively protect Indian women from violence by providing adequate policing and effective judicial recourse against violent crimes in their local communities because they cannot prosecute non-Indian offenders<sup>389</sup> and they can only sentence Indian offenders to prison terms of up to three years.<sup>390</sup>
178. These limitations are a key factor creating and perpetrating the disproportionate violence against Indian women.<sup>391</sup> As a result, Indian women cannot rely upon their tribal governments for safety or justice services and are forced to seek recourse from foreign federal or state government agencies. The response of federal and state agencies is typically inadequate given the disproportionately high number of domestic and sexual violence crimes committed against Indian women.<sup>392</sup>

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<sup>386</sup> *Montana v. United States*, 450 U.S. 544, 564 (1981). See also Cohen’s Handbook on Federal Indian Law §4.01[1][a] (Nell Newton ed. 2005); Vine Deloria, Jr. & David E. Wilkins, *Tribes, Treaties, and Constitutional Tribulations* 26 (1999) (describing the constitutional status of tribal governments, which existed prior to and independent of the United States Constitution).

<sup>387</sup> *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

<sup>388</sup> *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.* 554 U.S. \_\_\_\_ (2008), available at <http://supreme.justia.com/us/554/07-411/>.

<sup>389</sup> *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

<sup>390</sup> Tribal Law and Order Act of 2010, P.L. No. 111-211 (2010).

<sup>391</sup> Amnesty International, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA 2*, 6-8 (April 2007), available at [[www.amnesty.org.ru/library/pdf/AMR510352007ENGLISH/\\$File/AMR5103507.pdf](http://www.amnesty.org.ru/library/pdf/AMR510352007ENGLISH/$File/AMR5103507.pdf)] (finding that there is a clear pattern of discriminatory and inadequate law enforcement in cases of violence against Indian women) [hereinafter “Maze of Injustice”].

<sup>392</sup> *Id.* at 8.

179. The major legal barriers obstructing the ability of Indian nations to enhance the safety of women living within the jurisdictional authority of Indian nations include:
- a. The assumption of federal jurisdiction over certain felony crimes under the Major Crimes Act (1885);
  - b. The removal of criminal jurisdiction over non-Indians by the U.S. Supreme Court in *Oliphant v. Suquamish Tribe* (1978);
  - c. The imposition of a one-year, per offense, sentencing limitation upon tribal courts by the U.S. Congress through passage of the Indian Civil Rights Act (1968),<sup>393</sup>
  - d. The transfer of criminal jurisdiction from the United States to certain state governments by the U.S. Congress through passage of Public Law 53-280 and other similar legislation (1953); and
  - e. The failure to fulfill treaties signed by the United States with Indian nations as recognized by the court in *Elk v. United States* in 2009.
180. Due to these legal restrictions imposed by the United States federal government on Indian nations, criminal jurisdiction on Indian lands is divided among federal, tribal, and state governments.
181. Which government has jurisdiction depends on the location of the crime, the type and severity of the crime, the Indian status of the perpetrator, and the Indian status of the victim.
182. The complexity of this jurisdictional arrangement contributes to violations of women's human rights because it causes confusion over who has the authority to respond to, investigate, and prosecute violence against Indian women.
- a. *Removal of Tribal Criminal Jurisdiction over Non-Indians*
183. Inherent tribal criminal jurisdiction over crimes committed by non-Indians was stripped by the United States Supreme Court in 1978. The Supreme Court ruled in *Oliphant v. Suquamish Tribe* that Indian nations lack the authority to impose criminal sanctions on non-Indian citizens of the United States who commit crimes on Indian lands.<sup>394</sup> For the last thirty years, Indian nations have been denied criminal jurisdiction over non-Indians and the authority to prosecute non-Indians committing crimes on Indian lands. When a non-Indian commits physical or sexual violence against an Indian woman on Indian lands, the Indian nation does not have the authority to prosecute the offender. Yet, nationally, non-Indians commit 88% of all violent crimes against Indian women.<sup>395</sup>

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<sup>393</sup> *But see* P.L. No. 111-211 (2010) (expanding tribal court sentencing authority under ICRA to three years when specific conditions are met).

<sup>394</sup> *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

<sup>395</sup> Patricia Tjaden & Nancy Thoene, U.S. Dep't of Justice, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey 22* (2000).

184. Either the United States, or—in cases where the United States has delegated this authority to the state—the state government, has the authority to prosecute non-Indian offenders committing crimes on Indian lands. As the United States Civil Rights Commission pointed out, the problem is that the *Oliphant* decision did not place any responsibility on the United States government or its delegates to prosecute non-Indian offenders on Indian lands. In the words of the Commission, “[T]he decision only dealt with limitations to tribal power, not the federal responsibility to compensate for those limitations based on the trust relationship. The Court did not *require* the federal government to protect tribes or prosecute non-Indian offenders who commit crimes on tribal lands.”<sup>396</sup> If the United States or the state government does not prosecute the non-Indian offender, then the offender goes free without facing any legal consequences for his actions, and the Indian woman is denied any criminal recourse against her abuser.
185. Federal authorities, who are often the only law enforcement officials with the legal authority to investigate and prosecute violent crimes in Indian communities, have regularly failed to do so.<sup>397</sup> Prior to the passage of the Tribal Law and Order Act in July 2010, United States federal prosecutors were not required to and did not release official reports detailing the crimes they choose not to prosecute. The United States Senate Committee on Indian Affairs conducted an “Oversight Hearing to Examine Federal Declinations to Prosecute Crimes in Indian Country” on September 18, 2008.<sup>398</sup> Federal United States Attorney for North Dakota Drew Wrigley refused to provide data about the crimes his office failed to prosecute. He stated that providing the information would mislead the public and jeopardize criminal investigations. United States Attorney General Michael Mukasey affirmed Wrigley’s reasons for not providing the information.
186. According to a recent United States Government Accountability Office study, from 2005 through 2009, U.S. attorneys failed to prosecute 52% of all violent criminal cases, 67% of sexual abuse cases, and 46% of assault cases occurring on Indian lands.<sup>399</sup> As these numbers indicate, Indian women are routinely denied their right to adequate judicial recourse. This treatment separates Indian women from other groups under the law. The United States’ restriction of tribal criminal authority combined with its failure to effectively police and prosecute these violent crimes violates its obligation to act with due diligence to protect Indian women from violence and punish perpetrators in accordance with international human rights standards.

### *b. Transfer of Federal Criminal Jurisdiction to Certain State Governments*

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<sup>396</sup> U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, 67 (2003) (italics in original), available at [http://www.usace.army.mil/CECW/TribalIssues/Documents/quiet\\_crisis.pdf](http://www.usace.army.mil/CECW/TribalIssues/Documents/quiet_crisis.pdf).

<sup>397</sup> Mary Claire Jalonick, *DOJ Will Not Provide Indian Crime Data*, News From Indian Country (Sept. 2008), available at [http://indiancountrynews.net/index.php?option=com\\_content&task=view&id=4641&Itemid=33](http://indiancountrynews.net/index.php?option=com_content&task=view&id=4641&Itemid=33).

<sup>398</sup> *Id.*

<sup>399</sup> United States Government Accountability Office, U.S. Department of Justice Declinations of Indian Country Criminal Matters 3 (December 13, 2010).

187. Under the United States Constitution, governmental relations with Indian nations are the function of the federal government.<sup>400</sup> In 1953, in violation of this responsibility and without consultation with Indian nations, the United States Congress passed Public Law 280, delegating criminal jurisdiction over Indians on Indian lands to some states.<sup>401</sup> While this delegation of authority did not alter the authority of Indian nations in those states, it had a devastating impact on the development of tribal justice systems and the safety of Indian women.<sup>402</sup>
188. In Public Law 280 states, the state government has the criminal jurisdiction normally exercised by the federal government over crimes on Indian lands. The state government has exclusive jurisdiction over non-Indians and felony jurisdiction over Indians. Accordingly, when a non-Indian commits physical or sexual violence against an Indian woman on Indian lands, the state has exclusive jurisdiction over the offender. When an Indian commits physical or sexual violence against an Indian woman on Indian lands, only the state government has the criminal authority to impose a sentence of more than three years.
189. Like the United States government, states often fail to prosecute criminal cases occurring within Indian lands.<sup>403</sup> The criticisms of United States prosecutors and their failure to prosecute violent crimes also apply to state prosecutors. The failure to prosecute crimes occurring on Indian lands, however, is often more acute in these states because they do not receive any additional funding from the United States to handle these cases.<sup>404</sup> This often results in the understaffing of police on Indian lands and reluctance on the part of state prosecutors to take cases.

### *c. Limitations on Sentencing Authority of Tribal Courts*

190. United States law also limits tribal authority over Indian perpetrators on their own lands.<sup>405</sup> Indian nations have concurrent criminal authority with the federal government under the Major Crimes Act and may prosecute crimes committed by Indians,<sup>406</sup> but under the recently amended Indian Civil Rights Act (ICRA) tribal courts can sentence Indian offenders to up to three years in prison (with a total of 9 years for consecutive sentences for separate offenses) and a fine of up to \$15,000. However, this enhanced sentencing authority (the Tribal Law and Order Act enacted in July 2010 increased tribal court sentencing authority from up to one year in prison and a \$5,000 fine to the current standards) can only be exercised when certain protections are provided to the accused. While a tremendous step forward for some Indian nations, the reality is that most tribes do not have the resources to

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<sup>400</sup> U.S. Const. Art. 1, § 8.

<sup>401</sup> P.L. 280, § 7, 67 Stat. 588, 590 (1953). For information on jurisdiction under P.L. 280, see Carole E. Goldberg-Ambrose, *Public Law 280: State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. Law Review 535-94 (1975).

<sup>402</sup> Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century?*, 38 CONN. L. REV. 697 (2006).

<sup>403</sup> *Id.*

<sup>404</sup> Goldberg & Champagne, *supra* note 402.

<sup>405</sup> 18 U.S.C. §§ 1152, 1162 (providing for federal jurisdiction over crimes in Indian country).

<sup>406</sup> 18 U.S.C.A. §§ 1152, 1153; *see also* United States v. Kagama, 118 U.S. 375 (1886) (upholding the constitutionality of the Major Crimes Act).

meet the requirements under the Act, and are thus effectively still limited to the one year sentencing cap. It may take a significant amount of time before any tribes are able to take advantage of this enhanced sentencing authority. As a result, when an Indian commits violence against an Indian woman, the Indian nation can prosecute the offender, but the woman is still denied an effective remedy because the tribal court can only sentence the offender to a maximum of three years in prison and may only be able to sentence the offender to a one year prison term.

191. The complexity of this jurisdictional arrangement contributes to violations of Indian women's human rights by denying Indian women the rights to:

- a. equality and equal protection of the laws by subjecting them to a law enforcement scheme distinct from all others in the United States;
- b. life and security by allowing perpetrators to commit acts of rape and domestic violence without legal consequence for their violence; and
- c. access to justice by denying them legal recourse and allowing for an ongoing pattern of violence that often increases in severity and frequency over time.

d. *Other Issues Faced by Tribal Courts, Prosecutors, and Law Enforcement*

192. In the past decade, Indian nations have developed the infrastructure for tribal justice system components to provide safety to women within their jurisdiction, including tribal police departments, codes, and courts.

193. Many Indian nations have developed their own law enforcement departments. Police powers follow the criminal jurisdiction of the tribal, federal, and state governments in Indian country.<sup>407</sup> Tribal law enforcement have the authority to stop all persons and detain them for the purpose of transferring the person to federal or state authorities. They do not have the authority to arrest or investigate crimes committed by non-Indians. Tribal law enforcement are subject to nearly all the same jurisdictional complications associated with the authority to prosecute. In some circumstances, the effects of the jurisdictional maze may be lessened by practical necessity, by inter-governmental agreements, or by statutes.

194. Many Indian nations have developed domestic violence codes.<sup>408</sup> They have supported personnel and training of tribal law enforcement, tribal courts, prosecutors, and probation officers. Tribal courts have also ordered that offenders enroll in re-education programs, and tribes have supported programs to encourage boys and young men to respect women.<sup>409</sup> According to Indian women's organizations working to end domestic violence against

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<sup>407</sup> For a fuller discussion of law enforcement issues on Indian lands, see Maze of Injustice, *supra* note 391.

<sup>408</sup> See, e.g., Office on Violence Against Native Women and the National Center on Full Faith and Credit, Violence Against Native Women: A Guide for Practitioner Action 15 (2006); Melissa Tatum, *Law Enforcement Authority in Indian Country*, 4 Tribal L.J. 2 (2003/2004). For an example of a tribal domestic violence code, see the Navajo Nation Domestic Abuse Protection Act, IX Navajo Trib. Code § 1601 *et seq.* (1993).

<sup>409</sup> See, e.g., Cangleska Inc. Men's Re-Education Program, at [<http://www.cangleska.org/Mens%20program.htm>].

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Indian women, “At the tribal level, efforts are coordinated to create a system of safety for women seeking safety and protection within the tribal jurisdiction.”<sup>410</sup>

195. Efforts by Indian nations, however, are diluted by a lack of essential resources. Indian women are greatly disadvantaged by the lack of basic services for victims of sexual and physical violence within tribal jurisdictions. There is an acute need for basic education on domestic violence and sexual assault among law enforcement personnel.<sup>411</sup> Many health clinics and hospitals on Indian lands do not have rape kits or Sexual Assault Nurse Examiners.<sup>412</sup>
196. Funding for law enforcement on Indian lands is also inadequate. States spend an average of one hundred thirty one dollars per year on each person in providing law enforcement services.<sup>413</sup> The United States spends considerably less per year per individual on law enforcement within tribal jurisdictions.<sup>414</sup> Many Indian nations have only a few police officers to cover their vast territories.<sup>415</sup> For example, within the state of Alaska, at least eighty Alaska Native Villages lack any form of law enforcement services. This public safety crisis confronting Indian nations is well documented,<sup>416</sup> and often attributed to the United States government’s failure to provide adequate resources for essential criminal justice services.<sup>417</sup>
197. Lacking the necessary criminal authority to prosecute non-Indian offenders, tribal courts have used civil laws and remedies to respond to cases of violence against Indian women. United States laws restrict tribal civil jurisdiction,<sup>418</sup> but Indian nations exercise limited civil jurisdiction. In general, “the inherent sovereign powers of an Indian Tribe do not extend to the activities of non-members of the tribe.”<sup>419</sup> This principle is “subject to two exceptions: The first exception relates to non-members who enter consensual relationships with the tribe

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<sup>410</sup> Brief of Amici Curiae The National Network to End Domestic Violence, Sacred Circle, National Resource Center to End Violence Against Native Women, et al. in Support of Respondents at 4, *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., et al.*, No. 07-411 5a (2008) [hereinafter “Long Brief”].

<sup>411</sup> See, e.g., Guide for Practitioners, *supra* note 408, at 23-24.

<sup>412</sup> Maze of Injustice, *supra* note 391, at 53-58 (finding that there is a clear pattern of discriminatory and inadequate law enforcement in cases of violence against Indian women).

<sup>413</sup> A Quiet Crisis, *supra* note 396, at 75.

<sup>414</sup> *Id.* (“It is estimated that tribes have been 55 and 75 percent of the resources available to non-Indian communities, a figure that is even more exaggerated considering the higher crime rates.”).

<sup>415</sup> *Id.* at 75-76; Law and Order in Indian Country: Hearing Before the Senate Committee on Indian Affairs, 110<sup>th</sup> Cong. 8 (June 21, 2007) (statement of Chairman Marcus Wells, Jr., Three Affiliated Tribes of the Fort Berthold Reservation) (noting the “catastrophic shortage of law enforcement personnel” on the Reservation due to unfilled Bureau of Indian Affairs police positions).

<sup>416</sup> See, e.g., Maze of Injustice, *supra* note 391, at 42; Examining the Prevalence of and Solutions to Stopping Violence Against Indian Women: Hearing Before the Senate Committee on Indian Affairs, 110<sup>th</sup> Cong. (Sept. 27, 2007); Law and Order in Indian Country: Field Hearing Before the Senate Committee on Indian Affairs, 110<sup>th</sup> Cong. (March 17, 2008); Law and Order in Indian Country: Hearing Before the Senate Committee on Indian Affairs, 110<sup>th</sup> Cong. (May 17, 2007); Law and Order in Indian Country: Hearing Before the Senate Committee on Indian Affairs, 110<sup>th</sup> Cong. (June 21, 2007).

<sup>417</sup> See generally A Quiet Crisis, *supra* note 396.

<sup>418</sup> See, e.g., *Montana v. United States*, 450 U.S. 544 (1980).

<sup>419</sup> *Id.* at 565.

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or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare."<sup>420</sup> Domestic relationships are one of the most common "consensual relations" between Indians and non-Indians.

198. Indian nations have used civil laws and remedies against non-Indian offenders, including civil contempt proceedings, banishment, tribal specific remedies such as suspension of certain tribal benefits, issuance of tribal protection orders, monetary penalties, community service, restitution, civil commitment, forfeiture, treatment and classes, and posting of a peace bond.<sup>421</sup>
199. Tribes historically banished batterers and rapists from their communities, giving women and the community the confidence that their villages and communities were safe. Today numerous Indian tribes such as the Eastern Band of Cherokee Indians maintain and continue this practice to exclude batterers and rapists from their tribal jurisdictional boundaries. Banishment prevents a woman, and many times her children, from being forced to flee her community and home due to violence. The necessity of "hiding" or "exiling" battered women is a tragic statement about the inability of a community to protect a woman from such abuse. Unlike state and county governments, Indian tribes have the authority to protect their members by restricting perpetrators of such crimes from entering their borders.
200. Indian nations have the inherent authority to issue civil protection orders to protect both Indian and non-Indian women from domestic abusers on Indian lands. They regularly issue civil protection orders to prevent future violence, award temporary custody of children, and resolve other urgent issues.<sup>422</sup> Tribal law enforcement enforces tribal protection orders on Indian lands.
201. Once Indian women leave tribal lands, they must rely on other jurisdictions for the enforcement of their tribal protection orders. If these jurisdictions do not enforce tribal protection orders, then Indian women are left unprotected because no other law enforcement has the authority to enforce the orders. States are primarily responsible for the enforcement of protection orders outside of tribal jurisdictions. Many states, however, do not recognize and enforce tribal protection orders. For example, in 2003, the State of Alaska instructed state troopers to disobey a state court order recognizing a tribal court protection order and claimed that both orders were illegal.<sup>423</sup>
202. In *Town of Castle Rock, Colo. v. Gonzales*, the United States Supreme Court held that the United States Constitution does not require state law enforcement to investigate or enforce alleged violations of domestic violence protection orders.<sup>424</sup> Thus, state law enforcement

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<sup>420</sup> *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997).

<sup>421</sup> Halle Bongar White, et al., *Creative Civil Remedies Against Non-Indian Offenders in Indian Country, Roundtable on Creative Civil Remedies Against Non-Indians in Indian Country, 2008 Report* (2008).

<sup>422</sup> Guide for Practitioners, *supra* note 408, at 16.

<sup>423</sup> Sheila Tomey, *Trouble in Perryville*, Anchorage Daily News (Nov. 3, 2003), available at [<http://dwb.adn.com/front/story/4325477p-4335352c.html>].

<sup>424</sup> 545 U.S. 748 (2005).

choose whether to enforce these orders, and may always choose not to.<sup>425</sup> They often choose not to enforce these orders because they face no consequences for not enforcing them. Decisions by local law enforcement leave Indian women vulnerable to ongoing violence by domestic abusers.

203. Federal courts have further undermined the safety of Indian women by holding that tribal courts do not have jurisdiction to issue domestic violence protection orders requested by a non-member Indian woman against her non-Indian husband.<sup>426</sup> In *Martinez*, an Alaska Native woman residing on the Suquamish Reservation sought a domestic violence protection order against her non-Indian husband in the Suquamish Tribal Court. The federal district court held that the Tribal Court did not have the authority to issue the protection order because the issuance of the order was not necessary to protect tribal self-government and the non-Indian's conduct was not a menace to the safety and welfare of the Tribe.
204. The *Martinez* decision fails to recognize the current reality of life within a Native community and the importance of tribal courts of maintaining law and order in Native communities. Non-member Indians and non-Indians as well as member Indians live within the territorial boundaries of most Native communities. The tribal court may be the most responsive institution to meet the needs of the residents of the Native community (Native communities are often located in rural areas, physically distant from state courts and police stations). The court's ruling may cause many victims of domestic and sexual violence seeking a protection order from a tribal court to question whether such an order will increase their safety.
205. Orders of protection are a strong tool to prevent future violence but are only as strong as their recognition and enforcement. The *Martinez* decision undermines the safety of all women living on tribal lands because it suggests that tribal courts can only issue protection orders to protect their own members. It also makes it difficult for women living and being abused on tribal lands to seek any recourse against non-Indian abusers because it is unclear which government authority can issue a protection order against them if the tribal government cannot.
206. Congress took essential steps to address the systemic barriers denying access to justice for Indian women in the Safety for Indian Women Title of the Violence Against Women Act of 2005 (VAWA). Dedicated tribal leaders, advocates and justice personnel are prepared to implement these amendments to federal code and programs established under this Title. Unfortunately, since passage of this landmark legislation, implementation of key provisions has been stymied, and federal departments charged with the responsibility of implementation have minimized the need for immediate action.<sup>427</sup> The demonstrated lack of will on the part

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<sup>425</sup> *Id.*

<sup>426</sup> *See, e.g., Martinez v. Martinez*, Case No. C08-5503 FDB, Order Denying Defendants' Motions to Dismiss and Granting Plaintiff Declaratory and Injunctive Relief (W.D. Wash. Dec. 16, 2008).

<sup>427</sup> Restoration of Native Sovereignty and Safety for Native Women, Vol. XIV 17, 22-26 (Oct. 2010), available at [[http://www.clanstar.org/wp-content/up/2010/09/sovereignty\\_safety\\_volxiv.pdf](http://www.clanstar.org/wp-content/up/2010/09/sovereignty_safety_volxiv.pdf)].

of federal government is not only demoralizing, but life threatening to the women the statute was intended to protect.

207. For example, Congress responded to the epidemic of violence committed against Indian women by creating a new federal felony, *Domestic Assault by a Habitual Offender*, within the 2005 VAWA. This new felony enhances the punishment available for domestic violence and sexual assault perpetrators that have at least two prior convictions of domestic violence or sexual assault.<sup>428</sup> The habitual offender provision of the 2005 VAWA includes tribal court convictions as among the convictions that count towards an offender being indicted under it.
208. Federal courts, however, have refused to recognize tribal court convictions as the basis for an indictment for domestic assault by a habitual offender. The United States District Court for North Dakota recently dismissed a federal indictment under the habitual offender provision stating that it violated the offender's Sixth Amendment right to counsel because he was not afforded an attorney during his previous tribal court prosecutions even though tribal courts are not constitutionally required to provide counsel in their proceedings.<sup>429</sup>
209. In *Cavanaugh v. United States*, a federal prosecutor sought to prosecute Roman Cavanaugh as a habitual offender after he assaulted his domestic partner on the Spirit Lake Indian Reservation because Cavanaugh had been convicted of domestic abuse in tribal court on three prior occasions. Although Cavanaugh's tribal court convictions for domestic abuse were not at issue in the case, the United States District Court dismissed Cavanaugh's federal indictment as a domestic violence habitual offender ruling that the statute violates his Sixth Amendment right to counsel under the United States Constitution. While Cavanaugh as a citizen of the United States is protected by the U.S. Constitution, the Constitution does not govern Indian tribes or matters before tribal courts. The ICRA and tribal law govern tribal courts proceedings. Unlike the Constitution, the ICRA does not require a tribe to provide counsel but states that no tribe shall "deny to any person in a criminal case the right ... at his own expense to have the assistance of counsel."<sup>430</sup> While Indian tribes can choose to provide an indigent defendant a court appointed attorney, they are not required to do so by the ICRA. The tribal court convictions of Cavanaugh met the requirements of ICRA and the Spirit Lake Nation Law and Order Code. The Spirit Lake Tribal Court informed Cavanaugh, as required by ICRA and its Law and Order Code, that he had the right to an attorney at his own expense. Congress recognizing that tribal courts are not required to provide indigent offenders court appointed attorneys and did not include this requirement under the habitual offender provision of VAWA 2005.
210. The *Cavanaugh* decision undermines the safety – and equality – of Indian women because habitual offenders of domestic violence against Indian women, who have been convicted in tribal court, will not face the same enhanced penalties as other habitual offenders. By refusing to accept tribal court convictions as a basis for indictment as a habitual offender, the *Cavanaugh* decision suggests that domestic violence against Indian women is not a

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<sup>428</sup> 18 U.S.C. § 117.

<sup>429</sup> *Cavanaugh v. United States*, 680 F. Supp. 2d 1062 (2009).

<sup>430</sup> 25 U.S.C. § 1302(6).

serious crime. Habitual offenders can continue to abuse and violate Indian women and will face no legal recourse for their crimes.

211. Recently, Congress enacted the Tribal Law and Order Act, which is a step towards the eradication of violence against Indian women. If implemented, the Act has the potential to decrease violence against Indian women by allowing tribal government to exercise increased sentencing authority over Indians, requiring federal prosecutors to share information on declinations of Indian country cases, and requiring more training for and cooperation among tribal, state, and federal agencies. Congress, however, has yet to appropriate any funds for the implementation of the Act.

### **C. Recommendations**

212. The United States, in consultation and cooperation with Indian nations, should increase its efforts to prevent and punish violence and abuse against women by assisting Indian nations in their efforts to respond to sexual and physical violence against women within Indian lands.
213. The United States should reaffirm the inherent authority of Indian tribal governments to enforce tribal law over all persons for all crimes on tribal lands regardless of race or political status.
214. The United States should implement VAWA fully by following the recommendations of tribal leaders at the annual consultation as mandated by section 903 of Title IX of VAWA, and
- a. Ensure that state authorities comply with the full faith and credit provision of VAWA by recognizing and effectively enforcing tribal court protection orders;
  - b. Permit Indian law enforcement agencies, in cases of domestic violence, dating violence, sexual assault, and stalking, to enter information into, and obtain information from federal criminal databases;
  - c. Ensure enforcement of the firearms possession prohibition that includes tribal law convictions under section 908; and
  - d. Ensure enforcement of the domestic assault by a habitual offender provision under section 909.
215. Establish state accountability for the prevention, investigation, prosecution, and punishment of sexual and physical violence against Indian women in states where the state has jurisdiction over these crimes, and in particular, address the unique circumstances of Alaska Native women.
216. Establish in consultation and cooperation with Indian nations a national reporting system to investigate and prosecute cases of missing and murdered Indian women.
217. Implement fully the Tribal Law and Order Act in conjunction and consultation with Indian nations.

## VIII. DOMESTIC VIOLENCE AND TRAFFICKING

### A. Background

218. “There are several common ways in which domestic violence and human trafficking overlap: there are individuals whose experience with domestic violence makes them vulnerable to traffickers; there are trafficking victims who are vulnerable to domestic violence upon their escape from trafficking; and there are the ‘intersection’ cases which contain the elements of both domestic violence and human trafficking, occurring simultaneously.”<sup>431</sup>
219. There is a well-established nexus between domestic violence and human trafficking; “[r]esearch has shown a clear link between sex trafficking and both pre-trafficking domestic violence and trafficking-related gender-based violence.”<sup>432</sup> However, despite the fact that the relationship between these forms of violence against women is overwhelming, it is still frequently not considered or understood. One study found that nearly 70% of adult trafficking victims reported experiencing abuse prior to being trafficked.<sup>433</sup> Women frequently become trapped in relationships where they are increasingly isolated from friends and relatives and therefore have no one to turn to in order to escape their abusers. Consequently, in their efforts to leave, they often find themselves removed from their communities, without money or an awareness of options, and are increasingly susceptible to being trafficked. Domestic violence situations serve as a “push factor” that leads many women and young girls into the hands of traffickers, where they again experience gender-based violence.<sup>434</sup>
220. The United States is confronted by the challenge of combating the human trafficking of both citizens and non-citizens. Despite substantial efforts to prevent trafficking, the United States remains a source, transit, and destination country for trafficking.<sup>435</sup> Like domestic violence, human trafficking has no geographic, ethnic, or economic boundaries.<sup>436</sup> Reports by law enforcement indicate that trafficking victims can be found in both affluent and impoverished neighborhoods, and evidence illustrates the varying nature of trafficking and

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<sup>431</sup> American Bar Association, Meeting the Legal Needs of Human Trafficking Victims: An Introduction for Domestic Violence Attorneys & Advocates 7 (2009), [http://www.abanet.org/domviol/pdfs/DV\\_Trafficking.pdf](http://www.abanet.org/domviol/pdfs/DV_Trafficking.pdf).

<sup>432</sup> See generally United States State Department, 2009 TRAFFICKING IN PERSONS REPORT, at 41 (2009) 41 [hereinafter TIP 2009]; see also Dorchen A. Leidholt, *Prostitution and Trafficking in Women: An Intimate Relationship*, in PROSTITUTION, TRAFFICKING AND TRAUMATIC STRESS 167, 174 (Melissa Farley ed., 2003); U.S. Department of State, Topics of Special Interest, Office to Monitor and Combat Trafficking in Persons, available at <http://www.state.gov/g/tip/rls/tiprpt/2009/123128.htm>. The 2009 TIP Report contained for the first time a special section on the relationship between Domestic Violence and Human Trafficking. Unfortunately, the 2010 report, which is the first to include an evaluation of trafficking in the U.S., does not contain such a section, and does not have any reference to the nexus between these two issues.

<sup>433</sup> TIP 2009, *supra* note 432, at 41.

<sup>434</sup> *Id.*

<sup>435</sup> United States State Department, 2010 TRAFFICKING IN PERSONS REPORT, at 338 (2010) [hereinafter TIP 2010].

<sup>436</sup> See Sarah M. Buel, *Fifty Obstacles To Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW 19 (1999).

the diverse groups of people who end up as victims.<sup>437</sup> However, immigrants, minorities, and undocumented women and young girls are especially vulnerable to trafficking, while gender based discrimination intersects with these other characteristics making some women doubly or triply marginalized.<sup>438</sup>

221. Sex trafficking is widely prevalent throughout the United States. Women and young girls are preyed upon as a result of vulnerabilities such as poverty, abuse, and low self-esteem, often the result of years of violence at the hands of a parent/guardian, spouse, or intimate partner. To keep trafficking victims from escaping, traffickers often confiscate passports, refuse to pay wages, threaten families, and physically, sexually, and emotionally abuse victims. These tactics of power and control employed by pimps and traffickers are often indistinguishable from those used by batterers in most domestic violence situations.<sup>439</sup> As they are trafficked, girls and women may continue to have an intimate relationship with their trafficker. These relationships regularly mirror those in which there is intimate partner violence.<sup>440</sup>

### B. Prevalence

222. Accurate statistics on the number of people trafficked to and within the United States are difficult to determine due to the hidden, illicit, and insufficiently researched nature of human trafficking. This difficulty in turn makes it hard to delineate the extent to which trafficking victims are also victims of other forms of gender-based violence. In 2005, the United States Department of State estimated that 40,000 to 50,000 women, men, and children were trafficked into the United States annually.<sup>441</sup> Yet in 2006 the State Department estimated the numbers at 14,500-17,500, and the 2010 Trafficking in Persons

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<sup>437</sup> See generally Laurence E. Rothenberg, Deputy Assistant Attorney General, Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs, Address before the United States House of Representatives Committee on the Judiciary 4 (October 31, 2007).

<sup>438</sup> UNIFEM, Ending Violence against Women and Girls Programming Essentials 3 (March 2010), available at [www.endvawnow.org/files/137c-programming\\_essentials\\_feb2010\\_en.pdf](http://www.endvawnow.org/files/137c-programming_essentials_feb2010_en.pdf); Report of the U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, at 1, U.N. Doc. A/61/122/Add.1 (July, 6 2006), available at <http://www.un.org/womenwatch/daw/vaw/v-sg-study.htm>; See The Special Rapporteur on Violence Against Women, Its Causes and Consequences, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women 55, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000).

<sup>439</sup> See generally, See Evelina Giobbe et al., A Facilitator's Guide to Prostitution: A Matter of Violence Against Women (Denise Gouache ed., 1990); Evelina Giobbe, *An Analysis of Individual, Institutional and Cultural Pimping*, 1 MICH. J. GENDER & L. 33 (1993).

<sup>440</sup> Daniel Sheridan & Dawn VanPelt., *Intimate Partner Violence in the Lives of Prostituted Adolescents*, in MEDICAL, LEGAL AND SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION 423-435 (S. W. Cooper, R. J. Estes, A. P. Giardino, et al. eds., 2005).

<sup>441</sup> United States Department of State, *Trafficking in Persons Report* (2005), <http://www.state.gov/g/tip/rls/tiprpt/2005> (As with adults, there is a lack of data on the sex trafficking of children in the U.S). See, e.g., Sara Ann Friedman, ECPAT-USA, Alternative Report to the Initial Report of the United States of America to the U.N. Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography § II (2007), available at <http://www.ecpatusa.org/pdfs/AlternativeReportUSAFinal2007.pdf>.

Report (TIP) did not include any estimates.<sup>442</sup> If the 2006 numbers are accurate, they possibly represent at least an improvement in policing of trafficking victims into the country. However, these figures do not consider the individuals who have already been trafficked into the United States and remain victims of trafficking, nor do they include those trafficked domestically. This focus is problematic.<sup>443</sup>

223. Domestic trafficking is in fact the most prevalent form of trafficking; it is important for the United States government to include statistics on intra-country trafficking, so that the gravity of this problem can be better addressed. The 2010 TIP contained some intra-country statistics, though not overall estimations. Moreover, despite the report's lack of overall statistics on trafficking, the State Department still put itself in the highest tier for countries having the best anti-trafficking records.

224. Within the United States the type of trafficking a victim experiences seems to be statistically related to whether or not they are a citizen. United States citizen victims of trafficking are more likely to be found in sex trafficking than labor trafficking, while it has been reported that 82% of trafficked foreign adults are victims of labor trafficking.<sup>444</sup> Efforts to combat sex trafficking in the United States often target foreign victims, but in light of these statistics, more policies and services must be provided for United States citizen victims of sex trafficking. It is also important to note that many victims of labor trafficking may become victims of sex trafficking as labor traffickers frequently sexually abuse their workers.<sup>445</sup>

### C. Effects and Consequences

225. Although trafficking victims and victims of domestic violence often overlap, experience similar kinds of abuse, and are served by the same agencies, practices for assisting these victims should be tailored for the specific needs of the victim. The issues for victims who

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<sup>442</sup> Compare US State Department *Trafficking in Persons Report* (2006), [http://www.humantrafficking.org/countries/united\\_states\\_of\\_america](http://www.humantrafficking.org/countries/united_states_of_america) with TIP 2010, *supra* note 432, at 340 (“Despite the mandates of 2005 and 2008 amendments to the TVPA, uniform data collection for trafficking crimes or numbers of victims among federal, state and local law enforcement agencies did not occur during the reporting period.”).

<sup>443</sup> Jonathan Torres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 631-632 (2009). (noting “The fact that the international number is often cited without the intra-country number ignores the majority of the victims of these abuses. Aside from overlooking the large numbers of domestic trafficking victims around the globe, focusing on the international number serves to enable the U.S. public to conclude that it does not happen ‘over here.’”).

<sup>444</sup> TIP 2010, *supra* note 432, at 338.

<sup>445</sup> See LARRY J. SIEGEL, *CRIMINOLOGY* 410 (10<sup>th</sup> ed. 2009) (noting that “While some individuals are trafficked directly for purposes of prostitution or commercial sexual exploitation, other trafficked persons and even those trafficked for legitimate work may become victims of interpersonal violence.”); see also, Amnesty International, *Sexual Violence: A Fact Sheet*, available at <http://www.amnestyusa.org/violence-against-women/sexual-violence/page.do?id=1108442>.

experience both trafficking and domestic abuse may be different than those who have experienced domestic abuse but not trafficking.<sup>446</sup>

226. Domestic violence shelters that house trafficking victims, many of which do so because of lack of shelters specifically for such victims, must tailor some policies for them, such as: developing exceptions to rules for length of stay (as trafficking victims frequently necessitate longer stays in shelters), allowing international phone calls to the families of internationally trafficked women, and housing minors without a related adult.<sup>447</sup> Advocates have noted that “[s]ometimes there is an added cultural obstacle to caring for both types of victims in the same facility: in some socially conservative populations, victims of domestic violence resent the perceived stigma of prostitution attached to the victims of sex trafficking with whom they are cohabitating.”<sup>448</sup> Because our society has greater familiarity with domestic violence than human trafficking, there is greater discrimination against victims of trafficking. Also, victim support groups in shelters are often not designed to address the issues and feelings of victims who have experienced both trafficking and domestic violence. For example, one service provider told a story of a trafficking client in a domestic violence shelter who was so depressed that she was sleeping every day until two o’clock in the afternoon, and she felt like the domestic violence victims in the shelter were ridiculing her for this behavior.<sup>449</sup> These challenges were noted in the 2009 TIP stating: “assisting victims of [trafficking and domestic violence] in one setting is very challenging. It should only be attempted when the facility can provide a safe and supportive environment and when staff are properly trained to understand the safety, legal, medical, mental health, social, and cultural needs of the victims.”<sup>450</sup>
227. The average age of entry into commercial sexual exploitation in the United States is 13-14 years old.<sup>451</sup> Children involved in the sex trade come from all segments of the population, though many are from disadvantaged and isolated communities, making them increasingly vulnerable to traffickers.<sup>452</sup> Estimates indicate that nearly 1 out of 3 children who run away from home will be coerced into sex work; this means that 150,000 minors enter prostitution

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<sup>446</sup> See e.g. Amy R. Siniscalchi & Bincy Jacob, *An Effective Model of Case Management Collaboration for Victims of Human Trafficking*, 3 JGSWP 1, 6 (2010) (“[v]ictims of trafficking may not share the same feelings towards their traffickers as domestic violence victims feel towards their abusive partners.”).

<sup>447</sup> List of Stand-Alone Trafficking Shelters Nationally, Provided by National Human Trafficking Resource Center (Oct. 29, 2010) (Due to funding constraints, one recent study found that there are only 11 stand-alone trafficking centers in all of the U.S., and 4 are in CA.). See also Asian & Pacific Islanders American Health Forum, Trafficking: Considerations & Recommendations for Battered Women’s Advocates 4 (2008), available at [http://www.apiahf.org/images/stories/Documents/publications\\_database/dv\\_trafficking-considerationsrecs-2008.pdf](http://www.apiahf.org/images/stories/Documents/publications_database/dv_trafficking-considerationsrecs-2008.pdf); see also STEPHEN WARPATH, U.S. AGENCY FOR INT’L DEV., EXAMINING THE INTERSECTION BETWEEN TRAFFICKING IN PERSONS AND DOMESTIC VIOLENCE 24, 25 (2007), [http://nicosia.us embassy.gov/USpolicy/TIP-DV\\_study072307.pdf](http://nicosia.us embassy.gov/USpolicy/TIP-DV_study072307.pdf).

<sup>448</sup> TIP 2009, *supra* note 432, at 41.

<sup>449</sup> Telephone Interview with Lauren Pessa, Human Trafficking Fellow, My Sisters’ Place (Nov. 8, 2010).

<sup>450</sup> TIP 2009, *supra* note 432, at 41.

<sup>451</sup> United States Department of Health and Human Services, Senior Policy Operating Group on Trafficking in Persons Subcommittee on Domestic Trafficking Final Report 70 (August 2007) [hereinafter UDHHS Report 2007].

<sup>452</sup> *Id.* at 70.

each year.<sup>453</sup> Many of these young girls are running away from domestic abuse, as it has been reported, “[i]n the United States, many domestically trafficked victims are teenage runaways who have been victims of past sexual abuse, and recruited by pimps in the bus stations and streets of urban centers.”<sup>454</sup> Seventy five to ninety percent of all 13-18 year old girls who work in prostitution have previously been victims of some form of abuse.<sup>455</sup> Furthermore, “[m]ore than two-thirds of sex trafficked children suffer additional abuse at the hands of their traffickers.”<sup>456</sup> Thus, these girls enter into an endless cycle of abuse, losing valuable life-skills training and years of school; they are increasingly susceptible to future cycles of gender violence even if they get away from their traffickers or pimps.<sup>457</sup> More services must be made available to these girls seeking to escape commercial sexual exploitation.<sup>458</sup> Also, school counselors, child protection services, the juvenile justice system, and other government entities responsible for the protection of vulnerable children should be aware of the susceptibility of young women who come from abusive homes to domestic trafficking and sexual exploitation.

228. The United States government provides funding to NGOs that service trafficking victims. However, funding in this area remains deficient as the number of identified victims continues to increase while the amount of government funding remains constant.<sup>459</sup> There is also a lack of federal funding to specifically assist United States citizens and lawful permanent resident sexual trafficking victims.<sup>460</sup> Further, since many organizations that are primarily domestic violence service agencies also become the main providers of assistance to trafficking victims, staff and administration are often overextended. Thus, more overhead funds need to be granted for trafficking instead of the current per capita system. The State Department highlights one problem with the current funding structure in the most recent TIP report when noting that more funding is needed for legal service providers in

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<sup>453</sup> Washington State Office of Attorney General: Human Trafficking, <http://www.atg.wa.gov/HumanTrafficking/SexTrafficking.aspx>.

<sup>454</sup> Donna M. Hughes ET AL., *Sex Trafficking of Women in the United States: International and Domestic Trends*, 23 (Coalition Against Trafficking in Women 2001), available at [http://www.uri.edu/artsci/wms/hughes/sex\\_traff\\_us.pdf](http://www.uri.edu/artsci/wms/hughes/sex_traff_us.pdf); see also generally RICHARD J. ESTES & NEIL ALAN WEINER, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO* 146-50 (2001).

<sup>455</sup> UDHHS Report 2007, *supra* note 451, at 70.

<sup>456</sup> Eva J. Klein, *Prostitution of Children and Child-Sex Tourism: An Analysis of Domestic and International Responses*, ABA Center on Children and the Law 33 (1999).

<sup>457</sup> *Id.* at 70.

<sup>458</sup> See <http://www.gems-girls.org> (GEMS, in New York City, is an example of an organization dedicated to assisting girls who have experienced commercial sexual exploitation, and the only one in the State of New York). See also [http://www.fbi.gov/about-us/investigate/vc\\_majorthefts/cac/innocencelost](http://www.fbi.gov/about-us/investigate/vc_majorthefts/cac/innocencelost) (The Innocence Lost Initiative is a collaboration of victim assistance providers and federal and state law enforcement authorities working together to combat child victims of sex trafficking).

<sup>459</sup> TIP 2010, *supra* note 432, at 341 (noting “[w]hile there has been a 210 percent increase in certifications of foreign victims over the past five years, there has been no corresponding increase in funding for services.”)

<sup>460</sup> See THE ADVOCATES FOR HUMAN RIGHTS, *SEX TRAFFICKING SEX TRAFFICKING NEEDS ASSESSMENT NEEDS ASSESSMENT FOR THE STATE OF MINNESOTA* 36 (Sept. 2008) (“Although Congress specifically found that trafficking occurs within the US when it passed the TVPA reauthorization of 2005, the \$30 million it appropriated for services for trafficked U.S. citizens and lawful permanent residents was never included in the budgets for fiscal years 2006 and 2007.”).

this area.<sup>461</sup> One way to ensure some funding for agencies that assist trafficking victims is to simplify the process of confirming them as victims of trafficking and monitor confirmations to ensure non-discrimination in the determinations made by law enforcement; service providers have reported that sometimes law enforcement do not want to issue confirmations for undocumented immigrants.

229. The prevalence of mail order brides in the United States is both a trafficking and domestic violence issue. A report to Congress stated that, “informational and power imbalances inherent in [International Mail Order Bride] matches suggest that the incidence of domestic violence in these relationships is higher than the national average.”<sup>462</sup> By recognizing these women primarily as potential domestic violence victims, however, the law governing mail order brides, the International Marriage Broker Regulation Act, has made the issue one of domestic violence when it could also be considered a trafficking issue.<sup>463</sup> It has been argued that this industry should be considered trafficking, and that the domestic violence frequently found in these relationships should be considered a subset of the trafficking problem.<sup>464</sup> Further, as the promoters of internet brides are sometimes also sex tourism promoters, these problems should be considered jointly.<sup>465</sup>
230. In the United States, societal norms must be changed to stop the rampant domestic violence and human trafficking. Men who perpetrate violence against their spouse or intimate partner have similar characteristics to perpetrators of violence against trafficked women and girls. This characteristic has been described as an expectation of service, and “[i]n the child prostitution prevention and domestic violence movements, the expectation of services is viewed as a characteristic that leads to violence and exploitation.”<sup>466</sup> It must be recognized that sex trafficking, like domestic violence, is a form of gender-based domination and control and is a violation of human rights.

### D. Law and Policy Problems

231. In both trafficking and domestic violence cases a number of human rights are violated, including the right to personal liberty and autonomy, the right to bodily integrity,<sup>467</sup> the

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<sup>461</sup> TIP 2010, *supra* note 432, at 340-41.

<sup>462</sup> Robert J. Schools, Appendix A: The "Mail Order Bride" Industry and Its Impact on U.S. Immigration, in IMMIGRATION & NATURALIZATION SERVS., INTERNATIONAL MATCHMAKING: A REPORT TO CONGRESS 4, 19 (1999), available at [http://www.uscis.gov/files/article/Mobrept\\_full.pdf](http://www.uscis.gov/files/article/Mobrept_full.pdf) [hereinafter INS REPORT].

<sup>463</sup> Kirsten M. Linder, *Love, Honor, or Control: Domestic Violence, Trafficking, and the Question of How to Regulate the Mail-Order Bride Industry*, 16 COLUM. J. GENDER & L. 551, 555 (2007).

<sup>464</sup> *Id.* at 568.

<sup>465</sup> See International Matchmaking Organizations: A Report to Congress (1999); Asjlyn Loder, *Mail Order Brides Find US Land of Milk, Battery*, Women's E-News (July 13, 2003).

<sup>466</sup> See Norma Hotaling & Leslie Levites-Martin, *Increased Demand Resulting in the Flourishing Recruitment and Trafficking of Women and Girls*, 13 HASTINGS WOMEN'S L.J. 117, 124 (2002).

<sup>467</sup> See Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), art. 3, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, G.A. res. 2200A (XXI), U.N. GAOR 21<sup>st</sup> Sess., Supp. No. 16, arts. 6.1, 9.1, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976); Convention on the Rights of the Child *adopted* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44<sup>th</sup> Sess., Supp. No.49, arts 6.1, 6.2 U.N. Doc. A/44/49 (1989) (*entered into force* Sept. 2, 1990); *Programme of Action*

right to freedom of movement and expression, freedom from torture or other cruel or inhuman treatment,<sup>468</sup> the right to be free from discrimination,<sup>469</sup> and the right to be free from forced labor and slavery.<sup>470</sup>

232. The most recent human rights instrument to combat trafficking is the United Nations Trafficking in Persons Protocol - Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.<sup>471</sup> This protocol defines trafficking, and through its definition, highlights the overlap in structures of dominance in trafficking and domestic violence. The definition includes coercion, abuse of power, and position of vulnerability and states that consent is irrelevant when these conditions exist.<sup>472</sup>
233. In cases of both domestic violence and trafficking, police often arrest rather than protect the victim.<sup>473</sup> Such actions further traumatize already tortured women. “As seen from law enforcement misunderstanding of domestic violence, police officer comprehension of victim issues is crucial to cases entering into the criminal justice system. In addition to critical reforms needed in state laws on sex trafficking, officers must be trained to view victims as victims, and not persons complicit in the crimes of their perpetrators.”<sup>474</sup> Although trainings across the United States have taught law enforcement to identify victims of trafficking and investigate their cases, continued trainings and oversight are needed.

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*of the International Conference on Population and Development*, Cairo, Egypt, Sept. 513, 1994, ¶ 7.3, U.N. Doc. A/CONF.171/13/Rev.1 (1995), at paras. 106, 107; *Beijing Declaration and the Platform for Action, Fourth World Conference on Women*, Beijing, China, Sept. 4-15 1995, ¶97, U.N. Doc. A/CONF.177/20 (1996), at paras. 106, 107.

<sup>468</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984); See Rhonda Copeland, *Intimate Terror: Understanding Domestic Violence as Torture*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 116-152 (Rebecca J. Cook ed., 1994).

<sup>469</sup> See Convention on the Elimination of All Forms of Discrimination against Women, *adopted* Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34<sup>th</sup> Sess. Supp. No. 46, art. 16 (1.e), U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 12 (entered into force Sept. 3, 1981).

<sup>470</sup> International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 8, 999 U.N.T.S. 172, 175; the European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, art. 4, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

<sup>471</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000, G.A. Res. 55/25, U.N. GAOR, 55<sup>th</sup> Sess., Annex II, U.N. Doc. A/RES/55/25 (2001) [hereinafter Trafficking Protocol], *available at* <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html>.

<sup>472</sup> *Id.* at art. 3(a).

<sup>473</sup> See Valla Rajah, Victoria Frye, & Mary Haviland, *Aren't I a Victim? Notes on Identity Challenges Relating to Police Action in a Mandatory Arrest Jurisdiction*, 12 *VIOLENCE AGAINST WOMEN* 897-916 (Oct. 2006) (Prostitution is a crime in most states so police often arrest victims of trafficking and they are criminally charged.); see e.g. Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 *GEO. IMMIGR. L.J.* 337, 381 (2007).

<sup>474</sup> Jennifer A. Kurhn & Alison L. Stankus, *Effective Implementation of the Trafficking of Persons and Involuntary Servitude Articles: Lessons from the Criminal Justice System Response to the Illinois Domestic Violence Act*, 28 *N. ILL. U. L. REV.* 215, 258 (1998).

234. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) is the most recent version of the federal anti-trafficking legislation that was first passed in 2000.<sup>475</sup> This version has some significant improvements from the previous incarnation of the law, including better legal relief for minors. However, there are still areas that need improvement, such as the requirement that victims participate in prosecution of the trafficker in order to receive immigration protection.
235. To receive benefits, trafficking victims must be certified for eligibility under a program known as TVPA Certification.<sup>476</sup> Federal authorities are in charge of issuing federal certification, and for the few states that offer state funds, such as New York, state authorities are in charge. To receive certification, victims must cooperate with the prosecution of their traffickers. Another requisite for prosecution is that the prosecutor must decide to pursue the investigation and prosecution. Thus, whether victims receive benefits and protected status is often left into the arbitrary and discriminatory hands of government officials.<sup>477</sup> Conversations with service providers also suggest that frequent follow-ups with authorities are often required to receive certification.<sup>478</sup> As victims of both trafficking and domestic violence doubly fear turning to authorities for assistance, this procedural barrier may be a real hindrance to victims seeking the services they need.
236. Immigration policy also presents significant challenges for many trafficking and domestic violence victims. In the United States, depending on the situation of a foreign trafficked woman she is eligible for different kinds of immigration relief. She may be eligible for the two kinds of T-Visas, a U-Visa, VAWA relief, or asylum.<sup>479</sup> The 2010 TIP states that for a trafficking victim in the United States to receive a T-Visa “[t]estimony against the trafficker, conviction of the trafficker, or formal denunciation of the trafficker is not required, nor is sponsorship or approval by an investigating agency.”<sup>480</sup> However, in the

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<sup>475</sup> Cf. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (codified in scattered titles of the U.S.C.) [hereinafter TVPRA of 2008].

<sup>476</sup> Trafficking Victims Protection Act, 22 U.S.C.A. § 7105(b)(1)(E) (Since 2008, an exception to this is that foreign children upon identification can receive benefits and services without a requirement of cooperating with the police.).

<sup>477</sup> April Rigger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J.L. & GENDER 231, 250-251 (2007).

<sup>478</sup> TIP 2010, *supra* note 432, at 340. Noting that “[v]ictim advocates sometimes encountered difficulties securing law enforcement assistance to request public benefits and immigration relief.”

<sup>479</sup> *See Id.* at 341 (“The TVPA provides two principal types of immigration relief to foreign trafficking victims: 1) continued presence, which allows temporary immigration relief and may allow work authorization for potential victims who are also potential witnesses in an investigation or prosecution and 2) T nonimmigrant status or ‘T visas,’ which generally allow for legal immigration status for up to four years for victims who cooperate with reasonable law enforcement requests for assistance with an investigation or prosecution.”); Supreme Court of the State of New York, Appellate Division, First Department, *Lawyer’s Manual on Domestic Violence: Representing the Victim* 372 (Jill Laurie Goodman & Dorchen A. Leidholdt eds. 5<sup>th</sup> Ed. 2006) [hereinafter NYC Lawyer’s Manual], available at [www.probono.net/ny/family/library.cfm](http://www.probono.net/ny/family/library.cfm) (“[If the victim] has suffered substantial physical or mental abuse as the result of having been prostituted or trafficked and cooperates with the investigation or prosecution of her exploiters, she may be eligible for a three year U Visa...[If the victim] in good faith married her pimp, trafficker, or customer, if he was a US citizen or permanent resident, and if she was subjected to ‘battering or extreme cruelty,’ she may be eligible for a battered spouse waiver or to self-petition under the Violence Against Women Act.”); INA §§ 101(a)(42); 8 USC. §§ 1101(a)(42), 1158 (2001).

<sup>480</sup> TIP 2010, *supra* note 432, at 342.

next sentence, the report states that “such support counts in an applicant’s favor.”<sup>481</sup> This seems to suggest that the objective of the Act is prosecution of the trafficker and not protection of the victim. For some victims, the terror of testifying is a considerable barrier, especially in cases where they fear for the protection of their family members. This fear may be further exacerbated in cases of trafficking victims who are also victims of domestic abuse. For example, if the trafficker is also the victim’s spouse, then there may be great fear of repercussions for the victim’s family. The implementation of this law may also cause greater violence against women by traffickers, as the traffickers realize the importance of testimony in prosecutions, they may use increased violence to ensure against testimony.<sup>482</sup>

237. Statistics on T visa applications reflect the difficulty of obtaining such a visa. From fiscal year 2001 to the end of fiscal year 2007, the Department of Homeland Security issued only 1,008 T visas to survivors of sex and labor trafficking nationwide, and another 906 T visas to their family members.<sup>483</sup> This total represents a small fraction of trafficking victims.<sup>484</sup> The system may be improving, however, as in 2009 alone 313 T visas were granted to trafficking victims and 273 were issued to members of their immediate families.<sup>485</sup>

238. There are also trafficking/domestic violence victims who have claims to asylum. “If [the victim’s] ordeal as a victim of trafficking or prostitution resulted in persecution in her country of origin or if [she] faces a well-founded fear of future persecution because traffickers and/or their confederates may persecute her upon her return to her native country, she may be eligible for asylum.”<sup>486</sup> However, the one-year time limit on filing a claim after entering the United States can be an impossible obstacle for trafficking victims.<sup>487</sup> The circumstances of trafficked women such as entrapment in violent situations, imprisonment, psychological illness, and/or linguistic barriers, can prevent them from filing timely asylum applications.

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<sup>481</sup> *Id.*

<sup>482</sup> See Letter from The Coalition Against Trafficking in Women, to Peter Kreisler, Acting Attorney General of the United States 2 (Oct. 5, 2007), *available at* [www.justice.gov/olp/pdf/catw-letter.pdf](http://www.justice.gov/olp/pdf/catw-letter.pdf).

<sup>483</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2007, at 49 (2007), <http://www.state.gov/documents/organization/82902.pdf> (reporting issuance of 729 T visas to survivors of trafficking and 645 T visas for their family members through FY 2006) (This figure was reached by adding figures from two different reports.); U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF THE U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 20-21 (2008). (Reporting approval of 279 T visas for survivors of trafficking and 261 T visas for family members in FY 2007).

<sup>484</sup> WOMEN’S COMM’N FOR REFUGEE WOMEN & CHILDREN, THE U.S. RESPONSE TO HUMAN TRAFFICKING: AN UNBALANCED APPROACH 20 (2007), [http://www.womenscommission.org/pdf/us\\_trfkg.pdf](http://www.womenscommission.org/pdf/us_trfkg.pdf) (citing Alison L. Darrell, Calvin Edwards & Company, Trafficking Victim Outreach Grant: The Results, Presentation at the U.S. Dep’t of Health & Human Servs. Conference on Survivors of Sex Trafficking (Sept. 28, 2006), results from a 2006 survey of eighteen recipients of federal funds for street outreach demonstrate that only 3.9% of victims found by these organizations ultimately received a T visa.).

<sup>485</sup> TIP 2010, *supra* note 432, at 341.

<sup>486</sup> NYC Lawyer’s Manual, *supra* note 479, at 372.

<sup>487</sup> Human Rights First, The One-Year Asylum Deadline and the BIA: No Protection, No Process (Oct. 2010), *available at* <http://www.humanrightsfirst.org/pdf/1YD-report-FULL.pdf>.

239. The majority of states now have some form of human trafficking legislation, but the protection and assistance offered under these laws varies greatly.<sup>488</sup> Five states do not have any laws on the books for the crime of trafficking (HI, MA, SD, WV, and WY).<sup>489</sup> Additionally, there are states that have human trafficking laws, but their laws are weak for a variety of reasons (AK, AR, CO, OH, SC, OR, and VA).<sup>490</sup> Also, under state law many trafficking victims are arrested instead of offered services and support because most state laws criminalize prostitution. All fifty states do prohibit the prostitution of children, and there are some promising initiatives such as the Safe Harbor Act passed in New York, which decriminalizes prostitution for minors; CT, WA, and IL have similar laws and FL has pending safe harbor legislation.<sup>491</sup> Other states and the federal government should follow and build on this example.<sup>492</sup>
240. Case law on human trafficking highlights the intersection of the issue with domestic violence and some of the obstacles involved in these types of cases. For example, in the case of *United States v. Carreto*, one of the largest sex-trafficking cases in the country, the traffickers had attracted many of their victims by marrying them.<sup>493</sup> Law enforcement was not alerted to this case by their own efforts or by a tip from the victims.<sup>494</sup> Trafficking victims are often afraid to come forward not only because of fear for their own lives, but those of their families.<sup>495</sup> Last, when it came to sentencing in this case, the lawyer for one

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<sup>488</sup> TIP 2010, *supra* note 432, at 342 (“Only nine of 50 states offered state public benefits to trafficking victims. Eighteen permitted victims to bring civil lawsuits in state court. Seven encouraged law enforcement to provide the required accompanying documentation for T visa applications. Eighteen instituted mandatory restitution. Nine states required that victims’ names and/or locations be kept confidential.”).

<sup>489</sup> See The Polaris Project, <http://www.trendtrack.com/texis/cq/viewrpt?event=49f99ef0e9#MA>. The states of MA and HI do have pending legislation.

<sup>490</sup> 2010 Polaris Project State Rating Map, <http://www.polarisproject.org/content/view/297> (July 2010) (Laws were evaluated on the following 10 categories: (1) Sex trafficking; (2) Labor trafficking; (3) Asset forfeiture for human trafficking crimes; (4) Training on human trafficking for law enforcement; (5) Human trafficking commission, task force, or advisory committee; (6) Posting of a human trafficking hotline; (7) Safe harbor; (8) No requirement for force, fraud, or coercion for minors; (9) Victim Assistance; and (10) Civil remedy).

<sup>491</sup> TIP 2010, *supra* note 432, at 339; See Opening Statement of Sen. Dick Durbin, Senate Judiciary Committee, Subcommittee on Human Rights and Law, (Feb. 24, 2010), *available at* [http://judiciary.senate.gov/hearings/testimony.cfm?id=4389&wit\\_id=747](http://judiciary.senate.gov/hearings/testimony.cfm?id=4389&wit_id=747); Illinois Governor Signs Bill Protecting Sexually Exploited Children (August 23, 2010), *available at* <http://www.polarisproject.org/content/view/301/1/>.

<sup>492</sup> The Body Shop, Stop Trafficking of Children and Young People, <http://www.thebodyshop-usa.com/beauty/stop-sex-trafficking> (The national beauty chain, The Body Shop, has taken on a campaign along with the Somali May Foundation and ECPAT to get all states to enact safe harbor laws).

<sup>493</sup> *United States v. Carreto*, No. 04-140 (FB) (E.D.N.Y. June 1, 2006).

<sup>494</sup> *Three Mexicans Plead Guilty in New York Human-Trafficking Case*, STATES NEWS SERVICE, (Apr. 6, 2005) (Authorities were alerted to the case when an anonymous tip was made to the U.S. Embassy in Mexico).

<sup>495</sup> Katrina Lynne Baker, *Stein Center Colloquium on Legal Issues Surrounding Guantanamo Bay: Don't Forget the Family: A Proposal for Expanding Immediate Protection to Families of Human Trafficking Survivors*, *Protection 30 Fordham Int'l L.J.* 836, 838 (2007) (“There are many reasons why victims of human trafficking do not come forward to tip off law enforcement officials - many may have to do with the current legislation...[E]xtending the protections afforded to family members of human trafficking survivors is essential to meeting the goals of anti-trafficking efforts.”); *see also* Testimony of Wendy Patten, U.S. Advocacy Director, Human Rights Watch, in U.S. Congress, Senate Committee on Judiciary, Subcommittee on Constitution, Civil Rights and Property Rights, *Examining U.S. Efforts to Combat Human Trafficking and Slavery*, hearings, 108th Cong., 2nd sess., (July 7, 2004) (“Other advocacy groups...contend that forcing victims to aid in the investigation and prosecution of traffickers may endanger the victims’ families who remain in the home country especially when the trafficker is deported back to

defendant argued that the 50-year sentence was too long because no one had died in the case.<sup>496</sup> This argument highlights the lack of societal acceptance and understanding of the severity of trafficking and domestic violence situations.

241. On September 14, 2010, anti-trafficking experts and organizations recorded a victory when Craigslist agreed to permanently and completely remove all Craigslist Adult and Erotic Services sections. This victory came following efforts including numerous protests outside Craigslist's offices. This is one example of the success of a strategic grassroots campaign to combat trafficking. Anecdotal accounts from law enforcement and service providers show some initial hurdles to the Craigslist win, such as new difficulties with locating traffickers and trafficking victims. Additionally, some ads for trafficking victims still exist on other sections of the Craigslist website and other sites such as backpages are still utilized by traffickers.<sup>497</sup>

### E. Recommendations

242. For the Federal Government:

- a) Ensure abused women and their families are protected when testifying against their trafficker/batterer.
- b) Increase efforts to prosecute those responsible for trafficking, especially for commercial sexual exploitation.
- c) Make implementation of the TVPRA victim centered by such means as shifting the focus from prosecution to the protection of victims.
- d) Improve coordination of government services for trafficked United States citizen children.
- e) Increase funding for service providers to specifically assist trafficking victims.
- f) Follow the mandate of the TVPA to tabulate and study the extent of the trafficking problem, including compilation of accurate numbers on the rates of trafficking into and within the United States
- g) Reorient anti-trafficking campaigns to align with the standards set by the United Nations High Commissioner on Human Rights and revise the Trafficking Victims

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the country. They argue that there needs to be some mechanism to either ensure the victims' families' safety in their home country or reunite the families with the victims in the United States.”)

<sup>496</sup> Acceptance Speech of Pamela Chen, Assistant U.S. Attorney, Eastern District of New York, Wellstone Award Freedom Network 2010 Conference, Washington, D.C. (Mar. 18, 2010).

<sup>497</sup> Laura Sydell, *Beyond Craigslist, Many Markets For Sex Traffickers*, NPR, Sept. 14, 2010, <http://www.npr.org/templates/story/story.php?storyId=129863089>.

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Protection Act to align its definition of human trafficking with the Palermo Protocol.

- h) Ensure comprehensive services and legal support is provided for victims of trafficking.

243. For State and Local Governments:

- a) Better train law enforcement to identify trafficking victims and ensure they are willing to undertake victim protection measures.
- b) Adopt anti-trafficking laws that include: asset forfeiture for human trafficking crimes; training on human trafficking for law enforcement; human trafficking commission, task force, or advisory committee; posting of a human trafficking hotline; safe harbor; no requirement for force, fraud, or coercion for minors; victim assistance; and civil remedies.

244. For Service Providers:

- a) Ensure trafficking victims receive services specific to their needs.
- b) Educate law enforcement and service providers in identifying trafficking victims in seemingly domestic violence cases and domestic violence victims in seemingly trafficking cases.

## **IX. CONCLUSION**

245. Domestic violence is prevalent throughout the United States, and its consequences are pervasive. The abuses and hardships faced by women experiencing intimate partner violence in the U.S. do not stop with physical battering. Battered women are often subject to a range of problems that are inextricably linked to domestic violence: dual arrest, inappropriate charges, and wrongful convictions; the loss of custody of their children, who will also experience detrimental effects linked to domestic violence; violations of their reproductive rights and right to sexual health; and the loss of employment, housing, and economic security. Domestic violence is also linked to trafficking in the U.S. as victims of trafficking almost always inevitably experience the same abuse as victims of domestic violence, and the associated problems faced by trafficked women mirror those faced by battered women.

246. Although domestic violence affects women of all groups, it is largely influenced by contextual factors such as poverty and residence, making some groups of women, including African-Americans, Latinos, American Indian and Alaska Native women and immigrants, more susceptible to such abuse and its consequences. The consequences of domestic violence are often exacerbated by some of the current U.S. policies, federal legal and legislative factors that create barriers to justice for battered and trafficked women.

247. Despite the persistence of domestic violence and its associated problems in the United States, there are significant opportunities for gain. In this report we hope to have provided the Special Rapporteur not only with the necessary information about the human rights abuses of women experiencing domestic violence in the U.S., but also with an overview of the ongoing advocacy and opportunities for reform. We once again thank the Special Rapporteur for her devotion of time and resources to the important but difficult questions of the treatment of battered and trafficked women in the U.S. We hope this report will aid her in her endeavor to effectively support reform and shine light on these pressing human rights issues.