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Domestic Violence and Gender Equality: Recognition, Remedy, and (Possible) Retrenchment

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DOMESTIC VIOLENCE AND GENDER EQUALITY: RECOGNITION, REMEDY, AND (POSSIBLE) RETRENCHMENT

*Jennifer Wriggins**

I. INTRODUCTION

MY topic today is domestic violence and gender equality in 2017. And we are talking, of course, about the law. This is a call to remember and fight for basic principles of equality. One principle is, of course, gender equality—the overarching topic of this conference. To quote the Seneca Falls declaration, “We hold these truths to be self-evident that all men and women are created equal.”¹ Another basic principle is that all people are created equal and that racism is wrong. White people are not better or more important than any other people. One of the disheartening aspects of life in the United States is that these truths are not self-evident to millions of Americans; in fact, many strongly disagree.² The narrative of gradual and inevitable progress on race and gender issues that many have championed for the past fifty years has been upended. We live in anything

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1. Declaration of Sentiments and Resolutions: Women’s Rights Convention, held at Seneca Falls, 19-20 July 1848, RUTGERS.EDU, <https://web.archive.org/web/20180315031526/ecssba.rutgers.edu/docs/Seneca.html> (last updated Aug. 2010).

2. See generally Jamelle Bouie, *This Was a White-Power Movement Showing Its Strength*, SLATE (Aug. 12, 2017, 7:46 PM), http://www.slate.com/articles/news_and_politics/politics/2017/08/the_charlottesville_rally_was_a_white_power_movement_showing_its_strength.html (discussing the white supremacy overtones of the recent “Unite the Right” demonstrations in Charlottesville, Virginia); Lauren Meltzer & Tony Dokoupil, *Hate Rising: White Supremacy’s Rise in the U.S.*, CBS NEWS (Aug. 22, 2017, 12:22 AM EDT), <https://www.cbsnews.com/news/hate-rising-cbsn-on-assignment/> (discussing rise of white supremacy based on tracking by Southern Poverty Law Center).

but a “post-racial America,”³ and it is certainly not the time (as if it ever was) to “take a break from feminism.”⁴

Today, I first briefly connect domestic violence and gender equality in Part II. Then, in Part III, I turn to some significant reforms of the U.S. legal system concerning domestic violence—all of them relatively recent. I practiced law for 12 years before becoming a law professor and also have been involved in the movement for LGBTQ equality for a long time. I saw firsthand some of the consequences of not having legal protections and I will tell you about some of them. Part IV outlines some of the shortcomings and critiques of the reforms. Finally, Part V turns to the future—what I think we would be wise to anticipate and to do.⁵

II. DOMESTIC VIOLENCE AND GENDER EQUALITY

Organizers in the second wave of the women’s movement from the 1970s onward have long seen domestic violence as a priority, because they have seen that one place where women are often oppressed and hurt is within families, in intimate relationships, and when ending those intimate relationships.⁶ They believe that violence that takes place in private is as serious as public violence.⁷ Organizers against domestic violence believe that the government should condemn, deter, and punish violence—including within families and relationships—and try to protect those who are victims of violence.⁸ This is not a controversial view of the government’s role, as even libertarians, who favor a limited role for government, agree that the government should “control the use of force and fraud.”⁹

The ideas that domestic violence exists, is wrong, and should be illegal are relatively recent and were fought for. Even the term “domestic violence” as we

3. See *President [Barack] Obama’s Farewell Speech*, BUS. INSIDER (Jan. 10, 2017, 11:45 PM), <http://www.businessinsider.com/watch-president-barack-obama-full-farewell-speech-transcript-2017-1> (noting that race continues to be a divisive force in U.S. society and that equal treatment is still not universal).

4. See generally JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2008) (arguing feminism has an uncritical relationship to its own power and that feminists should take a break from their own presuppositions).

5. A note about the scope of these remarks—guns will not be my subject here, although there is a rich literature about guns and domestic violence.

6. See, e.g., KELLY D. WEISBERG, *DOMESTIC VIOLENCE: LEGAL AND SOCIAL REALITY* 3-27 (2012) (excerpts of foundational sources on these points).

7. See, e.g., ELIZABETH SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 13 (2000) (feminists in women’s movement challenged concept of family privacy that unacceptably hid ‘private’ violence).

8. *Id.* at 153-56.

9. See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 19 (1992). Epstein writes:

This basic insight—law must control the most lawless—lies behind the strong libertarian insistence on the basic rules of ordinary society. It also explains the libertarian’s constant theoretical emphasis that the function of government is to control the use of force and fraud against the person and property of others.

Id.

are using it seems to be a rather new one.¹⁰ While all domestic violence statutes are gender-neutral in their terminology, and while some women commit domestic violence against men, it is still the case that the large majority of domestic violence is committed by men against women.¹¹ Because of the gender-specific incidence and history of domestic violence, the legal recognition of domestic violence as a crime and a wrong is a challenge to male supremacy.¹² Women did not make the common law doctrines that used to bar tort claims between spouses, and neither did they make the legal system that governed their situation. Women did, however, work together to change the culture and legal regime that applies to domestic violence issues, as explained in the next section.

III. REFORMS: RECOGNITION & REMEDY

The movement against domestic violence that began in the 1960s and 1970s was grassroots and highly decentralized in nature.¹³ Organizing began with the establishment of battered women's shelters and other services.¹⁴ The movement then achieved extensive legislative reforms in every state and later had success at the federal level.¹⁵ The cultural and media context began to shift in the 1980s so that domestic violence became more visible.¹⁶ I will trace a few of the most significant initial legal reforms and the general trajectory of the reforms, including some concrete examples of why the initial reforms needed to be modified.

A. *Civil Protection Orders Giving Injunctive Relief*

Before the 1970s, the U.S. legal system had very limited recognition of—and remedies for—domestic violence.¹⁷ Women had to be married and file for divorce before they could request a protective order against a violent spouse.¹⁸ In 1976, only two states had legislation designed to provide injunctive relief for domestic violence.¹⁹ The doctrine of marital privacy was powerful, and it was used to justify

10. See generally Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 1966 DUKE L.J. 415 (using the term “domestic violence” throughout to refer to violence in the states that relates to the civil rights movement for racial equality).

11. See, e.g., Cheryl Hanna, *Domestic Violence*, ENCYCLOPEDIA OF CRIME AND JUSTICE (Joshua Dressler ed., 2002), <https://www.encyclopedia.com/social-sciences-and-law/law/crime-and-law-enforcement/domestic-violence>; SCHNEIDER, *supra* note 7, at 12, 24-25; MICHELE C. BLACK ET AL., CTR. DISEASE CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 2-3 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

12. See, e.g., SCHNEIDER, *supra* note 7, at 22.

13. *Id.* at 20.

14. *Id.* at 20-21.

15. *Id.* at 44.

16. See *infra* at text accompanying notes 37-40.

17. ELIZABETH M. SCHNEIDER, CHERYL HANNA, JUDITH G. GREENBERG & CLARE DALTON, *DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE* 210 (2d ed. 2008) [hereinafter SCHNEIDER ET AL.].

18. *Id.*

19. *Id.*

interspousal immunity.²⁰ Judges would not intervene in ongoing marriages, divorce was hard to get, and if a person suffered injuries during a marriage, there was no way to get tort compensation afterward.

It is important to remember that the legal system was not unified in the way it treated or affected women. For example, consider the situation of African-American women. While their situation is difficult to generalize about, several important aspects of it stand out. First, the U.S. legal system has given little to no respect for marital (and family) privacy of African-Americans, from denying marriage at all during slavery to increased state involvement in African-American families to this day.²¹ Additionally, many aspects of racist culture may affect law enforcement towards African-Americans, from racial stereotypes contributing to a disproportionately heightened use of police violence to the failure to protect African-American men and women from crimes in their communities.²² It is essential to keep this and other differences in mind at all times.

Pennsylvania's Protection from Abuse Act,²³ passed in 1976, which had a protective order mechanism designed for battered women, was a watershed in legislation that led to the passage of similar acts in 45 states and the District of Columbia by 1980.²⁴ All states had a protective order remedy by 1990.²⁵ State remedies have different names but the same basic structure; I will use "protective order" and "protection from abuse order" interchangeably. The statutes typically had a restraining order provision allowing temporary relief without a hearing based on an affidavit in addition to an injunctive provision allowing an order with a longer duration (often a year) after a hearing.²⁶ Violation of the order was a crime.²⁷ The process intended to give victims easy access to the legal system even without lawyers.²⁸

It is hard to overstate the significance of these changes in U.S. law. This all-state protective order mechanism is one of the most significant changes in U.S. law in the twentieth century. The state laws extended injunctive relief for the first time to a wide realm of conduct that had always been insulated from judicial

20. Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 394 (1989); Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2163 (1996).

21. See, e.g., Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQUITY 187, 189-90 (1987); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001).

22. See generally ANGELA J. DAVIS, POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (2017); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997); Lisa M. Martinson, Comment, *An Analysis of Racism and Resources for African-American Female Victims of Domestic Violence in Wisconsin*, 16 WIS. WOMEN'S L.J. 259 (2001).

23. 35 PA. STAT. ANN. §§ 10181-10190.2 (1976), repealed by 23 PA. CONS. STAT. ANN. §§ 6101-6122 (1990).

24. SCHNEIDER ET AL., *supra* note 17, at 210.

25. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (1993).

26. *Id.* at 1031-35.

27. *Id.* at 898-99.

28. SCHNEIDER ET AL., *supra* note 17, at 240.

intervention.²⁹ They provided access to millions of people who previously had no road to relief. Defendants initially brought constitutional challenges to the parts of the protective order laws that allowed defendants to be kept out of their own properties on the basis of *ex parte* testimony.³⁰ These challenges were unsuccessful since judges found the laws sufficiently protective of defendants' property.³¹

B. *Erosion and Abolition of Interspousal Immunity*

Before the last third of the twentieth century, interspousal tort immunity prevented women from bringing tort suits against husbands or ex-husbands.³² The stories from cases where women tried to sue for injuries inflicted by their husbands are chilling; torts include assault, battery, intentional or reckless infliction of emotional distress, and false imprisonment.³³ Interspousal tort immunity was a common law doctrine created by judges, rationalized by a variety of shifting and specious justifications.³⁴ Court decisions and state legislation gradually eroded it.³⁵ In some challenges to the doctrine, women's rights organizations weighed in with *amicus* participation.³⁶ Women now, in theory, can sue in tort for injuries suffered during marriage throughout the United States.³⁷

C. *Media Attention*

As laws were passed in the late 1970s and early 1980s, domestic violence began to receive wider public attention. Two high-profile events in the mid-1980s brought even more awareness. In 1984, the TV movie "The Burning Bed" told the true story of an abused woman who eventually killed her husband yet was not convicted of his murder; the TV movie had a large viewership.³⁸ In 1985, the wife-beating committed by the head of the Securities and Exchange Commission, John Fedders, became a front-page story in the national press. As a result, he resigned

29. Klein & Orloff, *supra* note 25, at 1138-39.

30. SCHNEIDER ET AL., *supra* note 17, at 238.

31. *Id.*

32. Siegel, *supra* note 20, at 2161-62; Tobias, *supra* note 20, at 359; Jennifer Wriggins, *Interspousal Tort Immunity and Insurance "Family Member Exclusions": Shared Assumptions, Relational and Liberal Feminist Challenges*, 17 WIS. WOMEN'S L.J. 251, 252 (2002).

33. *See, e.g.*, Siegel, *supra* note 20.

34. *Id.* at 2161-63; Tobias, *supra* note 20, at 363-64; Wriggins, *supra* note 32, at 252.

35. Wriggins, *supra* note 32, at 252.

36. For example, the Women's Legal Defense Fund submitted an *amicus* brief in *Heacock v. Heacock*, 520 N.E.2d 151 (Mass. 1988) (holding that a divorce did not bar tort damages).

37. Carl W. Tobias, *The Imminent Demise of Interspousal Tort Immunity*, 60 MONT. L. REV. 101, 104-05 (1999) [hereinafter Tobias, *Imminent Demise*]; Wriggins, *supra* note 32, at 252.

38. TIM BROOKS & EARLE F. MARSH, *THE COMPLETE DIRECTORY TO PRIME TIME NETWORK AND CABLE TV SHOWS 1946-PRESENT* 805 (2003) (noting it had the 17th highest viewership of any TV movie).

from his post.³⁹ Although some grumbled that his private life was no one's business as long as he did his job, that view did not prevail.⁴⁰ The Fedders events were the subject of a CBS special, "Shattered Dreams," in 1990.⁴¹ These events and others began to bring domestic violence out of the silence that had surrounded it.

D. Federal Recognition and Remedy

After state recognition of domestic violence, came some federal recognition of the issue. Since family law developed at the state level,⁴² there initially was no way to get one state's domestic violence order recognized in other states. Congress passed a law requiring states to give full faith and credit to other states' protective orders in 1994 as part of the federal Violence Against Women Act (VAWA).⁴³ VAWA transformed the treatment of domestic violence in the United States, creating federal criminal laws against domestic violence, establishing a civil remedy, and creating a pool of funds to support local and state programs battling domestic violence.⁴⁴

While the civil remedy was struck down on Commerce Clause grounds,⁴⁵ the criminal provisions and funding provisions are still good law.⁴⁶

E. Expansion of State Legal Remedies

After the passage of initial domestic violence laws, states continued to refine and expand the laws in the 1980s and 1990s.⁴⁷ I will focus on just two of those expansions.

39. Robert L. Jackson & Zack Nauth, *Fedders Resigns as SEC Chief of Enforcement, Apologizes to Agency*, L.A. TIMES (Feb. 27, 1985), http://articles.latimes.com/1985-02-27/business/fi-8878_1_divorce-trial.

40. *Id.*

41. Patricia Brennan, *Her 'Shattered Dreams'*, WASH. POST (May 13, 1990), https://www.washingtonpost.com/archive/lifestyle/tv/1990/05/13/her-shattered-dreams/d7cd4e2e-9b7d-4912-8861-1809f2626212/?utm_term=.a686874ae60f.

42. Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 788 (2015).

43. 18 U.S.C. § 2265(a) (West, Westlaw through Pub. L. 115-140, 2018). See also Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protective Orders*, 98 NW. L. REV. 827, 829 (2004).

44. DIANE KIESEL, DOMESTIC VIOLENCE: LAW, POLICY, AND PRACTICE 509 (2007).

45. *United States v. Morrison*, 529 U.S. 598, 619 (2000) (striking down VAWA civil remedy allowing victims to sue their abusers as exceeding the Commerce Clause).

46. See generally 18 U.S.C. § 2261 (West, Westlaw through Pub. L. No. 115-140, 2018) (on interstate domestic violence); 18 U.S.C. § 2261A (West, Westlaw through Pub. L. No. 115-140, 2018) (on interstate stalking); 18 U.S.C. § 2262 (West, Westlaw through Pub. L. No. 115-140, 2018) (on interstate violation of protective orders). The Justice Department's Office on Violence Against Women administers a range of grant programs. *Grant Programs*, U.S. DEP'T JUSTICE, <https://www.justice.gov/ovw/grant-programs> (last visited Mar. 25, 2018).

47. SCHNEIDER ET AL., *supra* note 17, at 210.

1. Expansion of People Protected

Early protective order laws were often limited to married or divorced couples.⁴⁸ Gradually, laws were changed to allow unmarried opposite-sex couples who had been cohabiting to obtain protective orders.⁴⁹ However, same-sex couples who had been cohabiting often were left out.⁵⁰

For example, in 1987, a lesbian who claimed to have experienced violence from her former domestic partner tried to get a protection from abuse order in Maine.⁵¹ The law stated that courts could issue protective orders for “family or household members,”⁵² which included individuals living “as spouses.”⁵³ She went to court for help and was turned away. She said that because she and her former partner had been living together while in a relationship, they had been “formerly living as spouses,” and thus she was eligible to obtain a protective order.⁵⁴

However, the former partner claimed that the law simply did not apply to their situation, and as a result, the judge did not have the power to enter the order.⁵⁵ The judge agreed.⁵⁶ His reasoning was noteworthy; he wrote that because lesbians could not get married anywhere in the United States, these lesbians could not have lived “as spouses”—and therefore could not get protection under the law.⁵⁷ Additionally, because they could not get married, they could not be “family or household members,” nor could they obtain coverage under that broad label.⁵⁸ No matter how committed they were to one another, no matter how many years they lived together, and no matter how intertwined their lives and finances were, the lesbian couple could never live “as spouses,” robbing them of the protection of the law.⁵⁹ The word “as” often means “like”⁶⁰; it doesn’t mean “identical to.”

48. *Id.* at 214.

49. *Id.*

50. *Id.*

51. *Sax v. Bowler*, No. 87-CV-PA-697, at *1 (D. Me. Dec. 1 1987) (unpublished) (on file with University of Toledo Law Review).

52. ME. REV. STAT. ANN. tit. 19, § 764(1), (4) (1987), *repealed by* ME. REV. STAT. ANN. tit. 19-A, § 4002(1), (4) (1995).

53. *Id.* § 764(4).

54. *Sax*, No. 87-CV-PA-697, at *2.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. The law did not even require that a couple hold themselves out as spouses. Instead, it provided the opposite: “Holding oneself out to be a spouse is not necessary to constitute ‘living as spouses.’” ME. REV. STAT. ANN. tit. 19, § 764(4) (1985), *repealed by* ME. REV. STAT. ANN. tit. 19-A, § 4002(4) (1995).

60. The *Oxford English Dictionary* lists one of the meanings as “after the manner of, in the likeness of, the same as, like.” Another meaning is “in the character, capacity, or function of.” OXFORD ENGLISH DICTIONARY 478 (1971 ed.). For another example, Google Dictionary lists one definition of “as” as “used to refer to the function or character that someone or something has.” It then lists “like, in the guise of, so as to appear to be” as synonyms. *As*, GOOGLE, <https://www.google.com/search> (enter “define as” in search bar) (last visited Mar. 25, 2018).

Essentially, the judge's position was that no gay relationship could be "like" a married relationship in any way that made members of it worthy of protection from intimate violence.⁶¹ But, heterosexual cohabiting partners—since they could choose to get married—*could* live "as spouses," and so they could receive protection under the law.⁶²

I represented the woman seeking the protective order pro bono. I was appealing the denial to the Maine Supreme Judicial Court when my client decided to drop the case and disappeared from view. If the judge had seen that a gay couple could live "as spouses," my client would have received a protective order. The legislature later expanded the definition of "family or household members" to avoid further misunderstanding and inequitable treatment of homosexual couples.⁶³ Laws in most states now extend coverage to LGBTQ relationships by providing protection to people who have been in intimate relationships.⁶⁴

2. *Expansion of Covered Actions; Stalking*

The original paradigm for protective orders was based on protection tied to people who were or had been married.⁶⁵ Orders were also tied to places, typically the marital home.⁶⁶ What we now think of as stalking was not a legally recognized concept, and it was certainly not a crime.⁶⁷ Protective orders, in turn, did not forbid the conduct now understood as stalking.

A 1998 Department of Justice report defined stalking as "harassing or threatening behavior that an individual engages in repeatedly, such as following a person, appearing at a person's home or place of business, making harassing phone calls, leaving written messages or objects, or vandalizing a person's property."⁶⁸ The first stalking law was passed in California in 1990.⁶⁹ A federal stalking law was then passed in 1996 as an amendment to VAWA and by 2008, all states had stalking laws.⁷⁰

An example from my former practice highlights the importance of stalking protections—be warned, it is awful. In 1988, I represented a man who had a

61. *Sax v. Bowler*, No. 87-CV-PA-697, at *1 (D. Me. Dec. 1 1987) (unpublished) (on file with University of Toledo Law Review).

62. *Id.* at *2.

63. In 1989, the legislature specified that "family or household members" included "individuals presently or formerly living as spouses and for the purposes of this chapter only, includes individuals presently or formerly living together as sexual partners." ME. REV. STAT. ANN. tit. 19, § 762(4) (1989), *repealed by* ME. REV. STAT. ANN. tit. 19-A, § 4002(4) (1995).

64. Klein & Orloff, *supra* note 25, at 832; SCHNEIDER ET AL., *supra* note 17, at 94.

65. SCHNEIDER ET AL., *supra* note 17, at 214.

66. *Id.*

67. *Id.* at 282.

68. *Id.* (quoting U.S. DEP'T OF JUSTICE, STALKING AND DOMESTIC VIOLENCE: THE THIRD ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT 5 (1998)).

69. *Id.* at 282.

70. *Id.* at 281-82.

protective order against him because he had struck his ex-wife.⁷¹ He was a well-respected accountant in a small town in rural Maine.⁷² I represented him regarding whether he had violated the protective order and whether the order should be extended. It was clear that my client repeatedly had followed his ex-wife and probably vandalized her property. Her lawyer tried to prove that my client violated the protective order by merely following her but was not able to do so. The statutory language, quoted in the standard protection from abuse form, stated that “threatening, assaulting, molesting, attacking or otherwise abusing the plaintiff”⁷³ were forbidden, but did not forbid repeated following. What the order did do, however, was tell my client to hand in his guns to the police. He did not do so.

A friend of his, I learned later, told the police that my client had a gun. The police apparently did nothing about the gun. Eventually, he chased her into the house where she had just dropped off her children (from a prior marriage) for day care and executed her with his gun; her children were in the next room. He then turned the gun on himself.⁷⁴ If stalking had been a crime then as it became in Maine in 1995, and if the protective order had prohibited stalking, he could have been arrested and charged with violating the protective order.⁷⁵ She might be alive today.⁷⁶

71. John S. Day, *Farmington Man Kills Ex-Wife Then Turns Gun on Himself*, BANGOR DAILY NEWS (Me.), May 31, 1989, at 1. The lawyers’ files are not available and the only court record we have been able to obtain is the docket sheet. Some of this is from memory as well as from the cited newspaper article.

72. *Id.*

73. ME. REV. STAT. ANN. tit. 19, § 766 (1979), *repealed by* ME. REV. STAT. ANN. tit. 19-A, § 4007(1)(A) (1995). My recollection is that a standard form “Protection from Abuse” order had been issued in the case and had been extended by agreement on one or more occasions. When it was extended, an order to turn in his guns was included.

74. Day, *supra* note 71, at 1.

75. 1995 Me. Laws ch. 668 (codified at ME. REV. STAT. ANN. tit. 17-A, § 210-A(1)(A)(1)-(2)) (forbidding “intentionally or knowingly engag[ing] in a course of conduct directed at or concerning a specific person that would cause a reasonable person: (1) to suffer serious inconvenience or emotional distress; (2) to fear bodily injury”). The statute also forbids more types of conduct. His conduct probably would have met the requirements of the statute.

76. An example from 1986 demonstrating the impact of the lack of a stalking law involves a gay man in Maine, Bob Gravel, who was followed and harassed for being gay by known neighborhood youths who left him threatening notes, followed him, and vandalized his property. He called the police dozens of times. There was a minor crime under which the youths could have been charged known as “harassment,” but it was extremely vague and did not provide any injunctive remedy. ME. REV. STAT. ANN. tit. 17-A, § 506-A(1) (1986) (labeling “harassment” a Class E crime). Eventually he bought a gun (legally) and told the police he was doing that. As the youths were harassing him—with one pounding on his back door, and others around his front entrance too—he shot into the dark alleyway behind his house. One of the youths died. Bob Gravel was charged with manslaughter, but the grand jury refused to indict him. If an injunctive remedy had been available, that young man might be alive today. *Hearing Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 99th Cong. 132, 154-55 (1986) (testimony of Bob Gravel). See also Jennifer Sullivan, *Lewiston Man Slain in Shooting*, LEWISTON DAILY SUN (Me.), Nov. 4, 1985, at 1; George Manlove, *Grand Jury Refuses to Indict in Slaying*, LEWISTON DAILY SUN (Me.), Dec. 12, 1985, at 1.

IV. CRITIQUES OF DOMESTIC VIOLENCE REFORMS

Many scholars have chronicled and analyzed shortcomings of domestic violence law reform and policy. Protective orders often work, and they often do not. Survivors frequently want to drop criminal charges; some prosecutors' offices have adopted no-drop policies.⁷⁷ Debates persist about whether these policies are positive or negative.⁷⁸ In part to encourage police departments to take domestic violence seriously, some states have mandatory arrest laws.⁷⁹ Concerns about these laws include that they undermine autonomy and ignore the fact that many African-American women are reluctant to involve the government in their situation, given the racism and harsh treatment of African-American men within the criminal justice system.⁸⁰ Some have pointed out how protective orders can be particularly problematic for rural women because of transportation and other issues.⁸¹ Some have suggested additional reforms, particularly as to firearms.⁸² Additionally, some have argued for more criminalization and a specific crime for domestic violence,⁸³ while others have argued that criminal reforms fall very short of their goals.⁸⁴

Another critique states that the torts system in the United States does not work for victims of domestic violence.⁸⁵ To explain further, domestic violence is generally tortious as well as often being criminal.⁸⁶ It frequently includes battery, assault, intentional or reckless infliction of emotional distress, and false imprisonment.⁸⁷ These are intentional torts. Everyone, including the prestigious American Law Institute, agrees that intentional torts are more reprehensible than "mere negligence."⁸⁸ And these torts cause mental and physical injury. Given the frequency of domestic violence torts, one would expect significant amounts of tort litigation by victims. After all, there are no doctrinal barriers to these suits, as

77. LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 107 (2012); 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, 16 (2004).

78. See, e.g., Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1865 (1996).

79. See Goodmark, *supra* note 77, at 15-16.

80. GOODMARK, *supra* note 77, at 130. See generally DAVIS, *supra* note 22; KENNEDY, *supra* note 22. See also Martinson, *supra* note 22, at 265-66.

81. See, e.g., Lisa R. Pruitt, *Place Matters: Domestic Violence and Rural Difference*, 23 WIS. J.L. GENDER & SOC'Y 347, 374, 378 (2008).

82. See, e.g., Nicole R. Bissonette, *Domestic Violence Enforcement of Protection from Abuse Orders: Simple Fixes to Help Prevent Intra-Family Violence*, 65 MAINE L. REV. 287 (2011).

83. See Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 1019 (2004).

84. See generally GOODMARK, *supra* note 77, at 19-45.

85. See generally MARTHA CHAMALLAS & JENNIFER WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 63-76 (2010).

86. *Id.* at 68.

87. *Id.* at 66.

88. The American Law Institute states "intentional torts are deemed considerably more serious than torts of mere negligence." RESTATEMENT (THIRD) OF TORTS § 1 cmt. A (AM. LAW INST. 1999).

interspousal immunity has been rescinded, as noted above.⁸⁹ But in reality, there is almost no tort litigation—and so there is no tort compensation for or deterrence of domestic violence.⁹⁰

This is seen by many as completely acceptable and natural.⁹¹ Almost no one sees the lack of litigation as problematic. In our torts system, if you are going to be a victim of a tort and you want compensation for your injuries, generally the best tort to be a victim of is a tort caused by a driver and a car.⁹² Auto injuries have a most-favored injury status in the tort system.⁹³ We have a complex, expensive, and mandatory insurance scheme for auto injuries.⁹⁴ But for domestic violence torts, insurance exclusions and short statutes of limitations guarantee that almost no litigation will be brought.⁹⁵ Our legal system and torts scholarship still send a clear message that intentional torts and domestic violence are unimportant, and that problems of intentional harm have been solved.⁹⁶ The center of tort law, for many scholars, is negligence.⁹⁷ The really interesting and challenging issues to many scholars are products liability, class actions, toxic torts, or cyber breach⁹⁸—anything but domestic violence. This is a double standard of injury; there is no reason on earth that car injuries or any other type of injury should be treated as more important than domestic violence injuries.

One could fill a book with criticisms of domestic violence reforms, including the ways that, despite the legal system's recognition of domestic violence as wrong, criminal, and tortious, the system fails domestic violence survivors more than it should. But we should not forget the positive reforms, the change in the public dialogue, the successes, and the many actors in all parts of the legal system committed to these issues who have made a difference.

V. COMING UP: PUSHBACK AND FIGHT BACK

What can we expect going forward, and what should we do about it? I think we need to anticipate pushback, and we need to continue to insist on the importance of this issue. We may face arguments, mainly at the state level, that some aspects

89. Tobias, *Imminent Demise*, *supra* note 37, at 106.

90. Jennifer Wiggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 133-34, 144-51 (2001).

91. *See id.* at 178-84 (detailing how negligence was established as the core problem of tort law); *id.* at 133-44 (discussing why there are so few lawsuits).

92. *See* Jennifer Wiggins, *Automobile Injuries as Injuries with Remedies: Driving, Insurance, Torts, and Changing the "Choice Architecture" of Auto Insurance Pricing*, 44 LOY. L.A. L. REV. 69, 79-80 (2010) [hereinafter Wiggins, *Automobile Injuries*] (auto accidents are by far the largest single category of tort cases); KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 133-34 (1986) (noting that the tort aspects of a simple car accident are likely to "be overwhelmed by the array of insurance coverage available to the parties").

93. Wiggins, *Automobile Injuries*, *supra* note 92, at 79-80.

94. *Id.* at 74-76.

95. Wiggins, *Domestic Violence Torts*, *supra* note 90, at 135-36, 139.

96. *Id.* at 178-84; CHAMALLAS & WRIGGINS, *supra* note 85, at 70. As the American Law Institute stated, "The problem of accidental injury is what many see as the core problem facing modern tort law." *RESTATEMENT (THIRD) OF TORTS*, at xxi (AM. LAW INST. 1999).

97. Wiggins, *Domestic Violence Torts*, *supra* note 90, at 181-82.

98. *Id.*

of the expanded domestic violence laws are bad policy and should be trimmed; there may be actions at the federal level that mirror this policy as well. Also, we can expect resistance to the Violence Against Women Act reauthorization as well as resistance to enforcement under its criminal provisions.

Groups and individuals that reject gender equality as a value may push back against domestic violence laws. The arguments may not necessarily be based on evidence and may be contradictory in nature. We need to expect the following arguments as standard fare: (1) protective order laws invade family privacy and go “too far”; (2) the laws often just impose “political correctness”; and, (3) the laws treat women as victims, which is wrong because women are actually equal to men, and thus the laws are demeaning to women. In addition, expect to hear contradictory arguments, such as how the laws are unfair to men and attack natural, normal masculinity. The language of grievance will likely be used; some of the same people who are angry about family law and custody also may also be angry about domestic violence laws.

Expect arguments that domestic violence is caused by women. Expect arguments that the laws destabilize families and that they actually make things worse. Do not be surprised by attacks on judges using unrepresentative and incomplete examples of decisions, or by attacks on prosecutors who are enforcing the laws. And expect attacks on specialists such as academics, social workers and others who have expertise in these problems.⁹⁹

Further, do not be surprised by arguments that the laws should not extend to members of LGBTQ couples because they cannot constitute a family. To some, it may send the “wrong message” to include gay couples in a law aimed at family violence because LGBTQ people do not form real families. These same arguments may be extended to unmarried opposite-sex couples. And of course, expect arguments that there is not enough money for enforcement.

We need to continue insisting that domestic violence is wrong, criminal, and tortious. But while we do so, we need to recognize that it can be a hard crime to prove, that protective orders are not perfect, that laws are imperfect remedies, and that women sometimes abuse men. We must acknowledge that racism pervades the legal system and is a huge concern in this context, and we must fight racism at all times and in all forms. We have to continue arguing that private violence is as serious as public violence. We need to keep articulating that domestic violence work is an important part of gender equality, and it is ultimately about a better society for all people. We need to keep insisting, if the claim is made, that it is not about “political correctness;” rather, it is about a society where all people are safe from harm. Domestic violence laws are aimed to protect people from force, which is a central function of government.¹⁰⁰ We can and should proudly say that without the feminist movement, the recognition, remedies, cultural disapprobation, and coast to coast shelters would not be there. Without the insistence that domestic

99. See generally Tom Nichols, *How America Lost Faith in Expertise: And Why That's a Giant Problem*, FOREIGN AFF. (Feb. 17, 2017), <https://www.foreignaffairs.com/articles/united-states/2017-02-13/how-america-lost-faith-expertise>.

100. See EPSTEIN, *supra* note 9, at 19.

violence is wrong, we might still live in a world where interspousal immunity is the law.

We can and must still critique the system, injecting new ways of looking at it. For example, we can still insist that women should be better protected from domestic violence than they currently are. We can insist that there is no real excuse as to why the torts system privileges auto accident injuries while providing no compensation for domestic violence injuries. For law professors, we can still ask why torts courses and scholarship do not focus on domestic violence, and we can insist that they should.¹⁰¹ If policy-based threats to the scope of domestic violence laws materialize, it will be a decentralized, multifaceted fight. Legislative proposals in state legislatures will need to be faced down and fought. Domestic violence lobbies will need to be focused, organized and strong.

Many actors in the legal system can make a huge difference. Making the laws work as best as they can work is essential. Whether it is making sure orders are served promptly, that complainants are treated well and given useful information in court, or prosecuting and defending and judging appropriate cases, lawyers and law students on the ground can make huge contributions to this essential equality work.

101. See generally Jennifer Wriggins, *Domestic Violence in First Year Torts*, 54 J. LEGAL EDUC. 511 (2004) (criticizing accident-centered focus of tort scholarship and suggesting approaches for including domestic violence in the first year torts curriculum); Wriggins, *Domestic Violence Torts*, *supra* note 90 (discussing how foundational torts scholarship, written when interspousal immunity was in force, considered intentional torts relatively simple, rare, and insignificant).