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Legal Remedies for Domestic Violence in Chile and the United States: Cultural Relativism, Myths, and Realities*

Katherine M. Culliton**

I. INTRODUCTION***

This article addresses certain dilemmas created by applying cultural relativism to international women's rights. By closely examining the Chilean women's movement against domestic violence, this article also

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Special thanks is also owed to the many women's rights and human rights advocates in Chile who contributed to this article; they are too numerous to mention here, but are cited throughout the text of the article, and are enormously appreciated and admired. In Chile, Diego Portales University Law School, especially Professor Nancy de la Fuente, the University of Valparaíso Law School, especially Rector Agustín Squella, and the National Ministry for Women, especially María Elena Valenzuela and Jimena Ahumada, provided invaluable institutional support and resources. One truly appreciates the time shared, and the opportunity to learn through interchange and a bit of participation. Many thanks, especially to the kind and professional support staff of these institutions. Finally, I am grateful to the editors and staff of *Case Western Reserve Journal of International Law* for their utmost professionalism, and for compiling, verifying, and improving a year's worth of drafts, along with citations in Spanish, as the legal and political situation we were addressing changed rapidly from Chile. Of course, any mistakes are mine.

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At the time of publication, the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322 was enacted. [hereinafter *The Crime Bill*]. The Crime Bill incorporated many of the provisions of the U.S. Violence Against Women Act of 1991, including its civil rights provisions discussed extensively herein. — Editor.

addresses the issue of whether and how international women's rights should vary based on local cultural norms. To this end, an interdisciplinary analysis of the Chilean legal system's treatment of violence against women is presented. For comparative purposes, the United States' legal mechanisms for dealing with domestic violence issues is also discussed. This comparison reveals that, in terms of institutional and structural problems, the two systems have more similarities than differences.

This analysis focuses on domestic violence studies, legislative proposals and processes, case law, actors in the legal system,¹ and social, economic, and cultural factors.² This research demonstrates, among other things, that domestic violence is a problem of grave and epidemic proportions in both countries.³ Violence against women spreads across all classes in both societies, and affects about fifty percent of the women in each country.⁴ Furthermore, contrary to the prevalent myths about

¹ The Chilean legal system is a civil law system, significantly different from the United States' common law system in that cases are not the major source of law. Because the primary source of law in a civil law system is codified legislation, cases and judicial reasoning are not always well-documented or even reported. See JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 54-64 (1969) (detailing the superiority of codified legislation in a civil law system); *id.* at 144 (noting that *stare decisis* is not required); *id.* at 87-88 (describing the civil law tradition that judges should merely apply, not interpret, statutes); *id.* at 141-48 (noting the importance of doctrines on the application of legislation and legal theories, not necessarily case law, in a civil law system). See also Jorge Correa, *La Cultura Jurídica Chilena en Relación a la Función Judicial*, in *LA CULTURA JURÍDICA CHILENA* 75-94 (Agustín Squella ed., 1992) (explaining that Chilean legal tradition tends to abscond judicial reasoning by setting forth decisions that "merely apply" legislation).

For the above reason, evaluation of the Chilean law as it affects cases and the women victims of domestic violence who attempt to use the legal system stems from research of legal and interdisciplinary studies by women's rights agencies, news reports, interviews with those working with victims, and the little published case law that was available. See generally Sofia Vergara Aldunate, *Guía Práctica para Ubicar las Fuentes Formales de Derecho* 11-13 (describing current teaching materials at the Diego Portales University Law School which indicate that Supreme Court and Appellate Court decisions are published; whereas opinions of lower tribunals are not necessarily published — and are generally unannotated when published — so that doctrine and analysis become important sources to uncover jurisprudence) (on file with the *Case W. Res. J. Int'l L.*).

² Research for this article was conducted in Chile from June to August 1991, and then updated from Chile from September 1993 to September 1994. Documents were gathered from Chilean governmental and non-governmental organizations working on domestic violence. Some of these organizations were international organizations, and many were women's rights organizations, but all focused on domestic violence. Also, interviews with Chilean activists, leaders of organizations working on domestic violence, members of Congress, attorneys, judges, law professors and students, victims of domestic violence, and other Chilean women and men, were conducted. Findings from research in the United States were then used as points of comparison.

³ See *infra* notes 97-119 and accompanying text.

⁴ See *infra* notes 100, 105-06, 264-73 and accompanying text.

Latina women, many aspects of the problem cross the cultural and social boundaries between Chile and the United States. In fact, the situation of women in the United States sometimes compares unfavorably with that of Chilean women.⁵

The research further indicates that, in both countries, battered women face nearly identical barriers to effective legal assistance, and that these barriers are inherent in each legal system.⁶ Since these institutionalized barriers to relief are present in both countries, each country's particular cultural, economic, and social factors associated with domestic violence would not preclude the enactment of substantive reforms designed to resolve problems in each of their legal systems. Therefore, the United States and Chile could share common solutions to the problems associated with the treatment of domestic violence cases within their respective legal systems. Coincidentally, new legislation in both countries would attempt to remedy the domestic violence problem.

In essence, the U.S. Violence Against Women Act and the Intrafamily Violence Act initiated by the Chilean National Ministry for Women (SERNAM) would create similar remedies to mutual problems regarding each legal systems' treatment of domestic violence cases.⁷ The striking similarity of these solutions provides a means to strengthen international cooperation and expand the application of international human rights laws. A woman's fundamental right to effective State protection from domestic violence⁸ is a norm⁹ which applies to both

⁵ See *infra* notes 88, 123-43, 199-208 and accompanying text.

⁶ See *infra* notes 75-92 and accompanying text.

⁷ The Violence Against Women Act was introduced by Senator Biden in 1989. VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. (1991). See also *infra* notes 414, 419-22 and accompanying text (analyzing the similarity of the United States and Chilean legislation).

The Chilean Intrafamily Violence Act was recently enacted after being introduced by the National Ministry for Women (Servicio Nacional de la Mujer) [hereinafter SERNAM], President Francisco Aylwin (1989-1993), and House Members Adriana Muñoz and Sergio Aguiló, in February, 1990. SERNAM's version of the Act was approved by the Chilean House (*Cámara de Diputados*) and passed the mandatory legal review of their judiciary committee (*Comisión de Constitución, Legislación y Justicia, Cámara de Diputados*) in November, 1991. *Proyecto de Ley Sobre Violencia Intrafamiliar*, BOLETÍN 451-07 (1990), as ratified MENSAJE 221-323 (1991) [hereinafter SERNAM Intrafamily Violence Act]. After this step, the Act was sent to the Senate Judiciary Committee (*Comisión de Constitución, Legislación y Justicia, Sala de Senadores*). Another version of the Act, proposed by Senator Miguel Otero, resulted from the Senate Committee and was introduced to the Senate floor in October, 1993. *Proyecto de Ley Sobre Violencia Intrafamiliar*, BOLETÍN 451-07 (1993) [hereinafter Otero's Intrafamily Violence Act] (author's translation on file with *Case W. Res. J. Int'l. L.*). See also *infra* notes 454-70 and accompanying text.

⁸ This right is found in the norms addressing fundamental human rights in every major human rights instrument. See *Universal Declaration of Human Rights*, G.A. Res. 217 A (III),

Chile and the United States.

Parts II and III of the article critically analyze the "cultural relativism" theory's application to women confronting domestic violence in Chile, by examining and exposing the various myths about Latin American women. It also illustrates that many, if not most, of the barriers to ending violence against women are structural and not exclusively cultural. Part V analyzes the legal issues and problems faced by battered women in the Chilean legal system, and the similarity to those of battered women in the United States legal system. Part VI reviews the Chilean Intrafamily Violence Act, compares it briefly to legislation in the United States, and analyzes the value of legislative reforms within the political context of the Chilean women's movement. The conclusion is that certain theories of "cultural relativism" — e.g., ethnocentric myths about Hispanic or Latina women, or Third World women, or women in general — present no reason to thwart the development of international women's rights proposed by Latin American women. In fact, it becomes obvious that both international policymakers and women in the United States could benefit and learn from the distinctly Latina, Chilean women's movement.

II. ON CULTURAL RELATIVISM

In recent years, Latin American women have undertaken a far-reaching campaign against domestic violence.¹⁰ The Chilean women's

U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948). This declaration prohibits gender discrimination with respect to treaty provision, *id.* art. 2(1); guarantees equality before the law, *id.* art. 7; guarantees the right to life, liberty, and security of the person, *id.* art. 3; prohibits torture, cruel, inhuman, or degrading punishment or treatment, *id.* art. 5; and guarantees the right to effective judicial recourse for human rights violations. *Id.* art. 8.

⁹ The international legal community has only recently recognized "women's rights as human rights," and has only very recently begun the work of codifying norms that express and, moreover, might uphold and enforce, a woman's fundamental right to be free from domestic violence. See *Convention on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 19*, U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), 11th Sess., U.N. Doc. CEDAW/c/1992/L.1/Add.15 (1992) [hereinafter *Gen. Recommendation No. 19*]. From 1980 to 1991, international accords condemned violence against women, but did not contemplate domestic violence as a violation of fundamental human rights worthy of international enforcement mechanisms. *Violencia: Acuerdos Internacionales, Reconocer y Hacer*, 1 BOLETÍN 10-11 (1993) [hereinafter *Acuerdos Internacionales*] (describing the 21 U.N. accords on this issue).

¹⁰ See, e.g., *Regional Network Against Domestic Violence and Sexual Violence Expanded*, WOMEN'S HEALTH J., Jan.-Mar. 1991, at 20 (discussing the creation of the Latin American and Caribbean Network Against Domestic and Sexual Violence); Gayne Villagómez, *La Situación Jurídica de Mujer*, in ENTRE LOS LÍMITES Y LAS RUPTURAS 321-29 (1991) (discussing proposals for legal reforms in Ecuador). See also *Women's Human Rights: Toward an Integral View*, 1 BOLETÍN, RED FEMINISTA LATINOAMERICANA Y DEL CARIBE CONTRA LA VIOLENCIA DOMÉSTICA

movement is perhaps the most compelling example of Latin American feminist ideology and political activism of this era.¹¹ The Chilean Intrafamily Violence Act could be a model for using international human rights norms to enact substantive legal remedies to combat domestic violence and defend women's fundamental human rights.¹² With further study, domestic violence legislation and legal reforms enacted or currently proposed in a number of Latin American and Caribbean nations¹³ might serve as models to defend the international legal norm that States are obligated to investigate, prosecute, and punish violence against women.¹⁴ This Article's conclusion discusses how the Chilean model could be used in the United States.

Despite Latin American women's push for the enactment of substantive legal remedies to combat domestic violence, a number of degrading myths about Latina women create real obstacles to the development of legal norms enforcing fundamental rights. These myths operate on a local, national, and international level.

On a local level, police in the United States generally fail to respond to calls for intervention from battered women when the phone call comes from a Hispanic or Latina woman.¹⁵ The police justify their

Y SEXUAL 19, 20 (1993) [hereinafter *Integral View*].

¹¹ See THE WOMEN'S MOVEMENT IN LATIN AMERICA: FEMINISM AND THE TRANSITION TO DEMOCRACY (Jane S. Jacquette ed., 1989) (reviewing the women's movement in South American nations). See also Patricia Chuchryk, *Feminist Anti-Authoritarian Politics: The Role of Women's Organizations in the Transition to Democracy in Chile*, in THE WOMEN'S MOVEMENT IN LATIN AMERICA: FEMINISM AND THE TRANSITION TO DEMOCRACY 149, 150 (Jane S. Jacquette ed., 1989) (During the transition to democracy, Chilean women adopted a "dual agenda" of fighting to overturn the Pinochet dictatorship and espousing "women's rights as human rights.").

¹² See *infra* notes 141-42.

¹³ To date, new legislation codifying domestic violence as a crime has been passed in four nations in the region (Puerto Rico, Costa Rica, the Bahamas, and Barbados), similar legislation has been proposed before the Congresses of five other countries (Argentina, Chile, Peru, Brazil, and Colombia), preliminary legislative studies have been undertaken in another five countries (Nicaragua, Panama, Uruguay, Venezuela, and Bolivia), and reforms of already existing penal codes to improve prosecution of domestic violence have been introduced in four countries (Venezuela, Peru, Bolivia, and Ecuador). *América Latina y el Caribe: Legislación Sobre Violencia Doméstica y Sexual*, 1 BOLETÍN, RED FEMINISTA LATINOAMERICANA Y DEL CARIBE CONTRA LA VIOLENCIA DOMÉSTICA Y SEXUAL 8 (1993) [hereinafter *Legislación*].

¹⁴ See *Advancement of Women: Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. GAOR 3d Comm., 47th Sess., A/C.3/47/L.22 (1992); *Gen. Recommendation No. 19*, *supra* note 9. Further studies could determine which of the legislative proposals referenced above rely directly on principles of international human rights, as in the case of Chile's proposed domestic violence legislation, and then could use such information to establish that the enactment of such legislation is an international legal obligation. *Id.* at 7 (mandating that State parties include the legislative reforms necessary to fulfill the obligation to investigate, prosecute, and punish violence against women).

¹⁵ See Request for Law Student Externship/Clinical Placements for Credit at AYUDA Legal

inaction by blaming the problem on "the Latino culture."¹⁶ Among legal services in general, a more respectful, client-centered approach would honor the wishes of Latina women who are seeking legal intervention.¹⁷ Rather than dismissing domestic violence as an unsolvable problem of "the Latino culture," legal services should use specialized remedies to resolve the particular problems in each woman's case that act as barriers to relief from the violence.¹⁸ A similar type of interdisciplinary, client-centered approach to domestic violence cases has worked well in Chile.¹⁹ However, some social services agencies and courts in the United States, citing cultural differences, tend to rule out the possibility of utilizing legal remedies to protect immigrant women, including women of Latin American origin,²⁰ who are battered in the

Aid, Inc. and Clinica Legal Latina (1992) (describing the necessity for adequate legal protection of Latinas in Washington, D.C. and the organizations' attempt to fulfill this need). In Washington, D.C., which has a very large Latino population, a Spanish-speaking woman who was raped called the police three times immediately after the incident, but they failed to understand or forward her emergency call to a Spanish-speaking officer. Avis Thomas-Lester & Patrice Gaines-Carter, *Suspect is Charged in Rape Case Marked by 911 Controversy: Spanish-Speaking Victim Couldn't Get Help*, WASH. POST, Aug. 2, 1992, at B3.

¹⁶ *Violence Against Women: Victims of the System: Hearings on S. 15 Before the Committee on the Judiciary, United States Senate*, 102d Cong., 1st Sess. (1991).

¹⁷ See, e.g., Stacey Brustin, *Expanding Our Version of Legal Services — The Hermanas Unidas Project*, 1 AM. U.J. GENDER & LAW 39-60 (1993).

¹⁸ Clients are given the opportunity to get support from Latinas and members of their community who are undertaking and leading a campaign to end domestic violence. Moreover, legal remedies, in the form of civil orders from family courts, with any necessary or appropriate criminal sanctions, child support, separation, and divorce decrees, immigration matters, and advocacy programs to permit access to various social services are fashioned according to the client's wishes and her particular circumstances. Thus, in this way, the underlying causes of domestic violence are addressed rather than focussing simply on its symptoms. *Id.*

¹⁹ This approach is distinguished by: (1) a team of service providers, including the lawyer, who together can provide more complete and successful assistance by giving attention to the social and personal context of the client's life; (2) a client-centered approach whereby the client and her assistants identify the problem and issues surrounding it and create a strategy to resolve it, including appropriate legal actions; and (3) as an essential part of the strategy, re-uniting and expanding the client's access to social networks, to repair her isolation and access the support of similarly situated women.

²⁰ Carol A. Douglas, *Latin American Immigrant Women: Battered in the U.S.*, OFF OUR BACKS, May 1990, at 3 reprinted in WOMEN'S HEALTH J., Apr.-June 1990, at 56. Ms. Vásquez, a case worker at the Domestic Violence Program of the Virginia Department of Human Services, relates that local police and judges treat Latina women seeking intervention condescendingly:

I know situations where the battered woman was detained because the husband twisted around the story and the policemen believed him We have many instances of authorities getting impatient with dealing with people of a different culture and throwing the case out of court They [immigrant Latina women] see the judge as an authority figure. In some cases, the judge tells the woman to go back to her husband and she does.

United States.

On a national level, in both the United States and Chile, the enactment of substantive legal reforms to combat domestic violence is hampered by academics and policymakers who believe that "other" classes of women: that is, poor women,²¹ Latina women,²² or women of color,²³ depending on the context, are more tolerant of male violence than the upper classes.²⁴ This mentality is related to the belief that violence against women is caused by poverty, alcoholism,²⁵ or by "different," "other," or "lesser" circumstances and cultures, and therefore, the legal system can do nothing about it.

The above myths are all superimposed on the myth that battered women, in general, do not want legal intervention, that the problem is their fault, and therefore, the legal system is not responsible for the problem.²⁶ A combination of race, class, and gender discrimination relegates the problem to a private, untouchable arena which is far outside

Id. at 58.

Ms. Vásquez also sees the Latina client's culture as a major barrier to utilizing the legal system, when in fact, the legal system is itself imposing obstacles to the victim's access to legal remedies. *Id.* For example, in the midst of the most dangerous time of an abusive relationship, when legal relief is sought but denied, the safest and many times the only option for battered women is to stay in the marriage. About three-quarters of the domestic violence assaults reported to the authorities take place after the woman has left home. Jan Hoffman, *When Men Hit Women*, N.Y. TIMES, Feb. 16, 1992, (Magazine), at 23, 65.

²¹ DORIS COOPER MAYO, CONFLICTO FAMILIAR: CARACTERÍSTICAS SOCIALES Y VARIABLES ASOCIADAS EN LA EXTREMA POBREZA 37 (1986) (ISIS Int'l Document No. 00839.00). See also *supra* notes 288-90 and accompanying text.

²² See Douglas, *supra* note 20, at 56 (proposing cultural reasons as to why immigrant Latina women hesitate to use shelters and legal intervention).

²³ See Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775, 779-84 (1991).

²⁴ A critical analysis of the above mentality shows that culture is rarely the root of the problem. Although women of color, including Latina women, have been mythologized as more tolerant of male violence, the problem is generally that women of color have historically been discriminated against and abused in United States society, that they continue to be discriminated against in the legal system in the United States, and that, as a result, they have less resources to combat violence and harassment. *Id.* This same analysis applies to the immigrant Latina women who are battered in the United States. Douglas, *supra* note 20, at 56.

²⁵ See Interview with Rodrigo Silva, family law attorney, Santiago, Chile (July 31, 1991) (expressing the opinion that it is the pressures of poverty that cause men to drink and beat their wives) (on file with the *Case W. Res. J. Int'l L.*).

²⁶ According to one Argentine researcher, these myths are institutionalized in legal systems throughout the world. Cecilia Vila, *Violencia Familiar: Mujeres Golpeadas*, 22 OPÚSCULOS DE DERECHO PENAL Y CRIMINOLOGÍA 9 (1988) (examining legal systems and myths surrounding domestic violence in the United States, Brussels, China, Chile, Argentina, and England).

the realm of the legal system.²⁷ As will be shown *infra*, none of the myths backing this belief system are true in the case of Chile.

At times, the belief that different cultural backgrounds preclude the use of substantive legal remedies for Latina women is couched in terms of a better understanding of the Latino culture, or as an attempt to open the traditionally white, middle-class, United States feminist movement to women of color.²⁸ In fact, women of color, Latin American women, and Third World women have built their own women's rights movements.²⁹ Furthermore, the social and political circumstances and motives of Latina women, Third World women, and women of color are not, as is sometimes assumed, homogenous.³⁰ This issue arose at a recent WORLDNET teleconference on "Women's Movements in Latin America and their Impact on Democracy" held by the United States Embassy offices in Chile, Mexico, and Nicaragua, where an expert in the United States on the Latin American women's movement communicated with local invitees in each embassy office.³¹

María Elena Valenzuela, a representative of Chile's National Ministry for Women (SERNAMEC) pointed out that the United States presentation failed to account for the differences among Latina women, and was generally unaware of the high level of political participation and organization already achieved by Chilean women.³² For example, the expert from the United States explained how women should increase their political power by increasing their participation, overcoming their hesitation to do so, formulating a consensus, and by attending United Nations

²⁷ See Winston, *supra* note 23.

²⁸ See generally ELIZABETH V. SPELLMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988).

²⁹ See generally *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* (Chandra T. Mohanty et al. eds., 1991).

³⁰ Chandra Talpade Mohanty criticizes this aspect of traditional Western feminist scholarship as implicitly upholding colonial relations of power, emphasizing that such scholarship translates into a political practice: "It is in this process of discursive homogenization and systematization of oppression of women in the third world that power is exercised in much of recent Western feminist discourse, and this power needs to be defined and named." CHANDRA T. MOHANTY, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* 51, 54 (Chandra T. Mohanty et al. eds., 1991) [hereinafter *Under Western Eyes*].

³¹ The WORLDNET conference is an international deliberation, performed via telecommunications conferencing, sponsored by the United States Embassy's Information and Cultural Services. The 1993 conference was entitled *Los Movimientos Femininos en Latinoamérica y su Impacto en la Democracia* and was held on October 18, 1993. (film footage available through the U.S. State Department).

³² María Elena Valenzuela, Remarks at the WORLDNET Conference (Oct. 18, 1993) (film footage available through the U.S. State Department).

conferences. She also commented several times that the difference between the United States and Latin America was *machismo*, and that "*la sociedad machista*" is a phenomenon of Latin America.³³ Ms. Valenzuela later commented that the expert in the United States was a "pontificator."³⁴

In 1991, U.S. State Department officials in Chile commented that Chilean women are "very traditional" and not interested in women's rights,³⁵ and the present staff of the Embassy's Cultural Affairs Department was "unaware" of the advances of the Chilean women's movement.³⁶ Chilean women's issues are addressed "to a small extent" by the political section of the State Department Embassy, but mostly dealt with by the U.S. Information Agency's Cultural Affairs department.³⁷ Through very recent efforts, U.S. Embassy officials are becoming aware of the Chilean women's movement just outside their door.³⁸ As will be demonstrated, the Chilean women's movement in particular contradicts monolithic and stereotypical myths about "the Latino culture."

On an international level, an ethnocentric view of Latin American women is couched in the neutral language of "cultural relativism,"³⁹

³³ Jane Jacquette, Remarks at the WORLDNET Conference (Oct. 18, 1993) (film footage available through the U.S. State Department).

³⁴ Interview with María Elena Valenzuela, Assistant Director of SERNAM, in Santiago, Chile (Oct. 18, 1993) (on file with the *Case W. Res. J. Int'l L.*). When asked what structural problems existed in democratic systems that prevented women's full political participation, Professor Jacquette answered that women should get better organized and active, and find a consensus because there was dissension among Chilean women. Remarks of Jane Jacquette, *supra* note 33. These generalized suppositions were addressed to Chilean women the day after a two-day conference held by the Chilean National Ministry for Women, which addressed the subject of increasing women's political participation, and was attended by 1,000 women's rights activists in Santiago on October 20-21, 1993 (notes from the conference on file with the *Case W. Res. J. Int'l L.*).

³⁵ In 1991, a member of the United States Embassy in Chile stated that Chilean women are much too traditional to be interested in women's rights, and they were unaware of any Chilean women's rights groups. Interview with Caryn Lindsay, Assistant Cultural Affairs Officer, United States Embassy to Chile, in Santiago, Chile (July 1, 1991) (on file with the *Case W. Res. J. Int'l L.*). In fact, 99 women's rights groups were active in Chile at the time. *Instituciones al Servicio de la Mujer* (Servicio Nacional de la Mujer, Chile), July 1990.

³⁶ Telephone Interview with Carol Wilder, Cultural Affairs Officer at the United States Embassy to Chile, in Santiago, Chile (Oct. 18, 1993) (on file with the *Case W. Res. J. Int'l L.*).

³⁷ *Id.* (The Cultural Affairs department provides information about United States culture abroad.)

³⁸ *Id.*

³⁹ "Cultural relativism" is an international law theory stating, in brief, that due to cultural differences, and to avoid further imperialism, international law and policymakers should be cautious not to enact universal norms that would impose Western cultural values on developing countries. See, e.g., Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM.

borrowing from and twisting the arguments of people from the Southern Hemisphere.⁴⁰ As many women from developing countries have argued, echoing the discourse of women of color in the United States and Western Europe,⁴¹ the development of international law concerning women is overly influenced, if not controlled, by White, Western, or Northern women.⁴² However, the traditional, international policymaker's view⁴³ of "cultural relativism" precludes the simultaneous honoring of local culture and development of fundamental and enforceable human rights law for women,⁴⁴ even when that is exactly what women from the

Rts. Q. 400 (1984).

⁴⁰ Cultural relativism has high value, in both theory and substance, when used as a tool to overcome imperialism and ensure that international policymakers listen to, respect, and include the decisions and values of people from less-powerful nations. See generally Tom G. Svensson, *Right to Self-Determination: A Basic Human Right Concerning Cultural Survival*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVE 363 (Abdullahi Ahmed An-Nafim ed., 1992). It can also be used as a tool to enlighten Western or Northern peoples to the benefits of other cultures. See generally Josiah A.M. Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 HUM. RTS. Q. 309 (1987) (arguing that Westerners should study African culture to gain a broader understanding of culture).

⁴¹ See, e.g., Valerie Amos & Pratibha Parmar, *Challenging Imperial Feminism*, 17 FEMINIST REV. 3 (1984). See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (arguing that there can be no "unitary" woman's experience).

⁴² See, e.g., *Under Western Eyes*, supra note 30, at 51. See also Alda Facio, *Fracaso para Unas, Éxito para Otras*, FEMPRESS, July 1993, at 1.

⁴³ Most United Nations professional staff and government representatives are men. Gayle Kirshenbaum, *U.N. Exposé: Inside the World's Largest Men's Club*, MS., Sept.-Oct. 1992, at 16-19 ("Of the 178 states, only three delegates — Belize, Jamaica, and the Bahamas — have women ambassadors as heads.")

⁴⁴ In a textbook chapter about the relationship between cultural integrity and universal norms, two cases are related that demonstrate the trend to minimize women's rights as compared to other human rights. In the first case, the Human Rights Committee decided that Iran's practice of amputations and lashings of criminals could not be justified by Islamic law or the right of nations to determine the value of their own culture, finding that:

No State can claim to be allowed to disrespect basic, entrenched rights such as the right to life, freedom from torture, . . . and the right to a fair trial which are provided for under the Universal Declaration and the International Covenants on Human Rights, on the ground that departure from these standards might be permitted under national or religious law.

FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 321 (1990).

The second case, invites an analysis of the value of cultural integrity over universal human rights norms. In the *Lovelace* case, an indigenous woman of Canada sought to move back to her people's homeland after being divorced, but was denied equal access to tribal membership because she had married outside the tribe. This rule was applied to women, but not to men. Rather than ruling that gender discrimination was a violation of universal human rights, the Human Rights Committee decided in favor of Ms. Lovelace based on each individual's right to the enjoyment of their own culture, which it interpreted as indigenous peoples' right to live in their homeland. *Id.* at 75-80 (relating the text of the *Lovelace* case). In sum, the cultural relativism analysis is seen as compelled in cases involving women's rights, although universal norms are

“South” want.⁴⁵ As Alda Facio, a Costa Rican feminist and regional and international leader, recently wrote:

For centuries, sexual discrimination and violence in general has been whipped against women of all the regions of the world without distinctions as to race, ethnicity, age, socioeconomic condition, political or religious beliefs, *or any other distinction that has served as an excuse to discriminate against groups of human beings that do not conform to the paradigm constructed by the dominant group, white men.*⁴⁶

However, the support for the development of any substantive human rights law for women is severely stunted by a strict cultural relativism⁴⁷ and a markedly sensationalist,⁴⁸ backward view of women in countries such as Chile.⁴⁹

applied to other cases. *See infra* note 47 and accompanying text. In contrast, the international right to freedom from racial or ethnic discrimination has never been questioned in this manner. Anne F. Bayefsky, *The Principle of Equality in International Human Rights Law*, 11 HUM. RTS. L.J. 1 (1990).

⁴⁵ Women from the “South” have been the agents in the development of “universal” international human rights norms addressing the issue of violence against women from the beginning of the history of these developments in the United Nations system in the mid-1970’s. *See generally Acuerdos Internacionales, supra* note 9, at 10-11.

⁴⁶ Facio, *supra* note 42, at 1 (author’s translation) (emphasis added).

⁴⁷ *The Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. Doc. A/Res/34/180 (1980), is a very weak convention compared to other international human rights instruments, because the United Nations body charged with enforcement has relatively little power. Charlotte Bunch, *Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486, 496 (1990); Hillary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613 (1991). Enforcement of the Women’s Convention is further hampered by numerous reservations surrounding certain provisions of the Convention by the government representatives of signatory countries, who claim that local culture or religion would prohibit compliance with all of the Convention’s provisions. Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT’L L., 643, 687-707 (1990). However, this debilitating level of reservations is not tolerable according to traditional — not women’s — international human rights law and policy. *See id.* at 648-56 (explaining that reservations to multilateral human rights treaties are not objectionable unless they frustrate the “object and purpose of the treaty . . .”).

⁴⁸ The most recent United States Congressional debate on ratification of the Convention on the Elimination of All Forms of Discrimination Against Women focussed almost exclusively on the inferior status of women in developing countries and issues such as bride-burning and female circumcision. 137 CONG. REC. H8112-13 (daily ed. Oct. 21, 1991) [hereinafter U.S. CONGRESSIONAL DEBATES]. The resolution called for ratification by the United States of the Convention, which at the time was already ratified by 108 other nations, including more Latin American than Western countries. SENATE COMM. ON FOREIGN RELATIONS & HOUSE COMM. ON FOREIGN AFFAIRS, 102D CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990 1696 -1701 (Joint Comm. Print 1991).

⁴⁹ *See supra* notes 34-35.

The number of recent codifications of women's rights as fundamental human rights⁵⁰ are a result of women, most notably Latin American women,⁵¹ organizing a worldwide movement around the domestic violence issue, and proving beyond doubt that the problem crosses all cultural boundaries.⁵² The March, 1993, working document for the U.N. Draft Declaration on Violence Against Women submitted to the General Assembly includes a provision stating that: "States must condemn violence against women and not invoke any custom, tradition, or religious consideration to avoid their obligation to procure its elimination."⁵³ In the next steps of enforcing women's rights in the international arena, the cultural relativism argument will probably arise again. However, many Latin American women do not see their culture as an unchanging, omnipotent obstacle to enjoyment of their fundamental human rights, but

⁵⁰ See, e.g., *Vienna Declaration*, U.N. World Conference on Human Rights, June 14-25, 1993, paras. 18, 28, 36-38, U.N. Doc. No. A/CONF.157/23 (1993). Paragraph 38 "calls upon the General Assembly to adopt the draft declaration on violence against women and urges States to combat violence against women in accordance with . . . [the] provisions" requiring States to investigate, prosecute, and punish domestic violence, and codify the principle that domestic violence is a violation of a woman's fundamental human rights to life, physical integrity, human dignity, and freedom from gender discrimination. *Id.* para. 38. Cf. *The Equal Status and Human Rights of Women*, U.N. GAOR Preparatory Comm., 4th Sess., at 40-42, U.N. Doc. A/CONF.157/PC/98 (1993).

⁵¹ For example, Sonia Picado has convincingly argued that numerous preexisting international human rights treaties, especially those of the inter-American system, defend women's fundamental human rights with respect to a number of issues. SONIA PICADO SOTELA, INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS, MUJER Y DERECHOS HUMANOS, DECENIO DE NACIONES UNIDAS: IGUALDAD DESARROLLO Y PAZ 1-45 (1986). Within the current international political arena, Latin American women's rights proposals are the strongest. It was out of the Latin American and Caribbean regional conference that the emphasis on women's rights as fundamental human rights, and most especially the World Conference resolutions concerning violence against women, originated.

⁵² For example, more than 700,000 activists and the governments of 171 countries signed a declaration at the 1993 United Nations World Conference on Human Rights emphasizing the importance of eliminating violence against women in both public and private life and eliminating the sexual discrimination in the administration of justice. Also at this conference, the Tribunal on Violence Against Women successfully achieved the inclusion of 90% of its proposals in the Final Declaration of the Conference, including a declaration that women's rights are an inalienable, integral, and indivisible part of universal human rights, and that the declarations condemning violence against women must be backed by effective judicial measures to enforce women's fundamental human rights. The media reported strife among the world's representatives to this general human rights conference, where there was a "great step forward" for women's rights. The media ignored "the fight for more than two years of women's movements around the world undertaken so that the World Conference would not render invisible the violations of women's human rights." Facio, *supra* note 42, at 1.

⁵³ *Acuerdos Internacionales*, *supra* note 9, at 11 (citing article 4 of the Working Group of the Commission on the Juridical and Social Condition of Women of the Economic and Social Counsel's recommendation to the General Assembly).

instead see the issue of difference as a problem of power.⁵⁴

The stereotyping of Latin American women as more tolerant of male violence is a result of ethnocentrism and colonialism.⁵⁵ According to recent analysts, building bridges of understanding and political coalitions among women's movements is a viable answer to the dilemmas of cultural relativism.⁵⁶ Furthermore, building representative political coalitions is a much better approach than the usual ethnocentric attempt to "include" women of color in White women's movements.⁵⁷ On the international level, the current work at hand

implies working with the real differences among women and not only talking about those difference, [but] also to consolidate a feminist movement for the human rights of women that, without losing its local perspective, makes an international impact in this world that is more and more inter-related and interdependent—something that has already been initiated.⁵⁸

In contrast, ethnocentric cultural relativism is an excuse for pontificat-

⁵⁴ Interview with Isabel Duque, Documentalist for ISIS Internacional and Executive Coordinator of the Chilean Network Against Domestic and Sexual Violence, in Santiago, Chile (Oct. 15, 1993) (on file with the *Case W. Res. J. Int'l L.*).

⁵⁵ The process Chandra Talpade Mohanty identifies operates as follows:

This connection between women as historical subjects and the re-presentation of Woman produced by hegemonic discourses is not a relation of direct identity, or a relation of correspondence or simple implication. It is an arbitrary relation set up by particular cultures [Some] feminist writings . . . discursively colonialize the material and historical heterogeneities of the lives of women in the third world, thereby producing/re-presenting a composite, singular 'third world woman'—an image which appears arbitrarily constructed, but nevertheless carries with it the authorizing signature of Western humanist discourse.

Under Western Eyes, *supra* note 30, at 53.

⁵⁶ Jennifer Nedelsky, *The Challenges of Multiplicity*, 89 MICH. L. REV. 1591, 1600-06 (1991) (reviewing ELIZABETH V. SPELLMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988)). Nedelsky proposes to reform the traditional feminist process by making decisions collectively to ensure that the resultant norms are based on a consensus that takes difference into account. *Id.* Building political coalitions among women's organizations across racial and national boundaries, *when the particular, self-selected agendas of different women's organizations coalesce on a particular issue*, is seen as a positive strategy by Third World women who are seeking not to be overpowered by White, European-American feminist agendas. See CHANDRA T. MOHANTY, *Cartographies of Struggle: Third World Women and the Politics of Feminism*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* 1 (Chandra T. Mohanty et al. eds., 1991) [hereinafter *Cartographies*].

⁵⁷ See *Cartographies*, *supra* note 56. Although surely influenced by culture, it is with the idea of building bridges of understanding that the author attempts to translate and relate information about the Chilean women's movement to a United States audience.

⁵⁸ Facio, *supra* note 42, at 1 (author's translation).

ing,⁵⁹ and the official bias for the refusal by the United States to sign international treaties that protect women's fundamental rights.⁶⁰

Despite the fact that violence against women appears in differing forms in various cultures worldwide, there are common areas of agreement about what reforms are needed to overcome the political and legal origins of violence against women.⁶¹ Furthermore, the typical view that the United States is the world leader in the international development of women's rights⁶² actually hinders possible advancements and remedies suggested by Latin American women.

This mentality flies in the face of the stunning development of the Chilean and Latin American women's movement to enact national and international legal remedies to combat domestic violence. Latin American women are leading the effort in international human rights bodies to develop a woman's fundamental right to freedom from violence.⁶³ Even their government representatives, acting at the prompting of a regional political campaign,⁶⁴ have drafted and enacted *the strongest* international treaty on violence against women,⁶⁵ the Inter-American Convention to Prevent, Prosecute and Punish Violence Against Women.⁶⁶ Within

⁵⁹ Remarks of María Elena Valenzuela, *supra* note 32. In addition to her other remarks about "*la sociedad machista*" in Latin America, the United States presenter stated that the difference between the United States and Latin America was that a woman's image in the home in Latin America made the idea of women entering politics difficult to accept, and that although the vision of women in politics was lacking in the United States, this is even more true in Latin America. Remarks of Jane Jaquette, *supra* note 33. Despite her emphasis on these overly generalized differences, Professor Jaquette did mention that these conditions were changing in Latin America. *Id.*

⁶⁰ See *infra* note 72 and accompanying text.

⁶¹ See generally FREEDOM FROM VIOLENCE: WOMEN'S STRATEGIES AROUND THE WORLD (Margaret Schuller ed., 1992) (presenting case studies of women organizing against abuse in Sri Lanka, India, Pakistan, Malaysia, Thailand, Sudan, Zimbabwe, Mexico, Bolivia, Brazil, Chile, and the United States). This point has become more than evident in the United Nations arena. Facio, *supra* note 42, at 1 (discussing the 1993 U.N. World Conference on Human Rights).

⁶² In the debate in the United States on the possible ramifications of the Convention on the Elimination of All Forms of Discrimination Against Women, co-sponsor Representative Bloomfield stated: "[i]n many countries, women still do not have the same legal or constitutional rights as men." U.S. CONGRESSIONAL DEBATES, *supra* note 48. While discussing cultural relativism, Representative Meyers argued that "we in the West . . . denounce these practices regardless of their foundation." *Id.*

⁶³ See *Advancement of Women: Violence Against Migrant Women Workers*, U.N. GAOR, 47th Sess., A/C.3/47/L.24 (1992); *Gen. Recommendation No. 19*, *supra* note 9.

⁶⁴ *Id.*

⁶⁵ A few of the pending United Nations resolutions contemplate an individual complaint mechanism to enforce the stated rights, but it is more likely that this system will continue to rely on State Parties reports to the CEDAW as a method of enforcement. *Acuerdos Internacionales*, *supra* note 9, at 10-11.

⁶⁶ Draft Inter-American Convention on the Prevention of Violence Against Women,

the United Nations, Latin American women's proposals are the boldest and their movement the strongest.⁶⁷ In sum, although women from the Southern Hemisphere have good reason to continue to argue for fair representation and an international women's agenda that reflects their own politics, "[t]he media image . . . that women in the South have problems, and women in the North have answers,"⁶⁸ is entirely incorrect with respect to the situation of Latin American women's rights activists and the women they represent.

But the U.S. State Department's human rights reports presume that the Latino culture makes Latin American women more tolerant of male violence than women in the United States.⁶⁹ On the other hand, the White culture in the United States, while culpable of fostering violence against women, is never cited by these same officials as the reason for the high level of domestic violence in the United States.⁷⁰ This discriminatory belief system has certain staying power as policy. For example, while Latin American governments endorsed the Inter-American Conven-

OEA/ser.L/II/7.4, CIM/doc. 4/92, as adopted pending receipt of all government's comments, OEA/ser.L/II/7.4, CIM/doc. 6/92 arts. 7-14 (1992) (discussing the reliance on the preexisting individual complaint procedures in the Inter-American system, which the Convention's provisions would enhance, not render superfluous). This treaty will be addressed for enactment, and is expected to pass at the June, 1994, General Assembly Session of the Organization of American States.

⁶⁷ See generally Facio, *supra* note 42; *supra* notes 51-54 and accompanying text.

⁶⁸ Gayle Kirshenbaum, *After Victory, Women's Human Rights Movement Takes Stock*, Ms., Sept.-Oct. 1993, at 20 (quoting Puerto Rican feminist activist and teacher María Suarez). Also the 1993 United Nations Human Rights Conference held in Vienna, "explicitly recognized violence and other forms of abuses against women as human rights violations," and called on the U.N. to name a Special Rapporteur on violence against women. *Id.* It also sought to appropriately strengthen the Convention on the Elimination of All Forms of Discrimination Against Women. *Id.*

⁶⁹ See the U.S. State Department's review of the state of international women's rights in Latin America, which fails to report progress made by the Latin American women's rights movement and blames violence against women on "the Latino culture." U.S. DEP'T OF STATE, 102D CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990, 581 (1991) [hereinafter STATE DEP'T COUNTRY REPORTS] (speculating that, in Cuba, even though statistics concerning "wife-beating" are unknown it is probable that "[d]ue to cultural traditions, . . . instances are probably underreported."); *id.* at 593 (stating that gender inequality in the Dominican Republic is rooted in traditional social roles, not the legal system); *id.* at 605 (stating that in Ecuador, "culture, ideology, tradition and myth" are seen as the sources of gender inequality). These reports are provided annually to the United States Congress to aid in its policy formulations. *Id.* at 1.

⁷⁰ See U.S. CONGRESSIONAL DEBATES, *supra* note 48. However, events of the predominant culture in the United States, such as Super Bowl Sunday, increase the battering of women. More women seek protection at domestic violence shelters on the day after Super Bowl Sunday than any other day of the year. Pamela Erens, *Is Super Bowl Sunday Battering Sunday?*, GLAMOUR, Feb. 1992, at 20 (citing executive directors of shelters across the United States).

tion to Prevent, Prosecute and Punish Violence Against Women,⁷¹ the United States withheld support, stating that governments should have only a limited role in "modifying social and cultural patterns of conduct."⁷²

This Article demonstrates that the misguided cultural relativism previously discussed is racism or ethnocentrism. The official misunderstanding in the United States of Latin American women not only blocks the development of substantive international legal remedies and the appropriate response of the legal system in the United States to the needs of Latina women, but also inhibits the ability of Latina women to choose for themselves. The refusal by the United States to ratify international women's rights treaties, while at the same time pretending to serve as a world model for the protection of women's rights,⁷³ invites even more hypocritical treatment and official minimization of every woman's rights.

Precisely because misguided cultural relativism is an obstacle to the development of concrete, effective laws and policies to uphold women's fundamental rights—whether at the local, national, or international level—this Article analyzes the Chilean women's movement to end domestic violence. The Chilean women's movement presents a compelling break from the traditional, ethnocentric myths about Latina women.

III. MYTHS AND REALITIES

*MYTH: Because domestic violence is caused by non-legal, social, or cultural problems, the problem is not caused by the legal system, and, therefore, the legal system can do nothing about the problem.*⁷⁴

The United States and Chilean legal systems both fail victims of domestic violence in three ways:

⁷¹ See *Observations Received from Governments on the Preliminary Suggested Text of an Inter-American Convention Dealing with Women and Violence*, Twenty-Sixth Assembly of Delegates, Inter-American Commission of Women, Organization of American States (CIM-OAS), OEA/Ser.L/II.2.26, CIM/doc.5/92 (Sept. 14, 1992) (presenting the comments of Barbados, Canada, Paraguay, Peru, Saint Vincent and the Grenadines, Trinidad and Tobago, and Venezuela); See also *Reply of the Gov't of Venezuela*, OEA/ser.L/II/2.26, CIM/doc. 5/92 add. 3 (1992); *Reply of the Gov't of Chile*, OEA/ser.L/II/2.26, CIM/doc. 5/92 add. 4 (1992); *Reply of the Gov't of Brazil*, OEA/ser.L/II/2.26, CIM/doc. 5/92 add. 7 (1992). Although not all governments have submitted a written, official reply, no Latin American government opposed the treaty.

⁷² *Reply of the Gov't of the United States*, OEA/ser.L/II/2.26, 10 (1992) [hereinafter *U.S. Reply*].

⁷³ See U.S. CONGRESSIONAL DEBATES, *supra* note 48.

⁷⁴ See, e.g., STATE DEP'T COUNTRY REPORTS, *supra* note 69; See generally *U.S. Reply*, *supra* note 72.

- (1) Both fail to effectively investigate and prosecute domestic violence; and
- (2) both ineffectively sentence batterers under general criminal assault statutes; and
- (3) women in both countries lack protection from retributive assaults and continued battering.⁷⁵

Effective legal measures are lacking in most of the United States: only fifteen states have laws that work to prosecute and sanction batterers and protect the victim from continued violence.⁷⁶ In the remaining thirty-five states, the legal system leaves batterers unprosecuted and victims unprotected from continued violence. Even when the U.S. Violence Against Women Act is fully enacted, it will not be a complete remedy because it does not obligate states to enact reforms. Instead, it only provides federal grants to states which might enact such reforms.⁷⁷ Some progress is being made on the local level by utilizing a mandatory arrest and immediate protection system, which can decrease the incidence of repeated battering by forty to sixty percent.⁷⁸

In the Chilean legal system, similar structural problems resulted from the failure to "label" domestic violence as a crime, and the failure of judges and other legal actors to prosecute domestic violence under general assault statutes.⁷⁹ A 1990 study showed that 83.3% of battered

⁷⁵ See *infra* notes 79-82, 84, 86, 91-92 and accompanying text (analyzing such inadequacies in the Chilean legal system). Cf. VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. (1991). This U.S. legislation, in describing the need for the Violence Against Women Act, notes that "[s]tudy after study commissioned by the highest courts of the States — from Florida to New York, California to New Jersey, Nevada to Minnesota — has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men." *Id.* at 43-44 n.10 (citing studies of eighteen State court systems). Based on studies demonstrating that current sentencing provisions in the United States are not effective, the proposed Violence Against Women Act suggests the adoption of "model" state laws that provide for sentencing geared toward ending the cycle of domestic violence. *Id.* at 17, 24, 59. Because women in the United States are left without adequate protection under the law, domestic violence victims often are faced with continued and retributive assaults, some of which lead to homicide. Hoffman, *supra* note 20, at 25. Without adequate protection from the legal system, the cycle of domestic violence continues.

⁷⁶ Hoffman, *supra* note 20, at 25.

⁷⁷ S. REP. NO. 197, §§ 312, 315.

⁷⁸ Hoffman, *supra* note 20 (describing the results of the mandatory arrest system implemented in Duluth, Minnesota, and its adoption, in various forms, in other states and municipalities).

⁷⁹ The term "typification" refers to the legislation setting forth the elements of a crime, which is practically essential to the criminalization of any act in a civil law system. See MERRYMAN, *supra* note 1, at 87; Correa, *supra* note 1 (stating that judges are known to "merely apply" the codified law). However, Chilean judges do in fact interpret legislation and apply their own, rather hidden, value judgments. *Id.* As is the case in the United States, existing Chilean

women's injuries were considered "light injuries,"⁸⁰ which, according to the provisions of the Chilean Penal Code, are punishable as a misdemeanor and may be sentenced with either short-term imprisonment or a fine.⁸¹ Usually only small fines were imposed, even though fifty-two percent of these women had brought more than three complaints of battering.⁸² Problems obtaining the proof necessary to demonstrate the gravity of the injuries, due in part to the slowness of the mandatory medical-legal bureaucracy, cause the great majority of cases adjudicated to be treated as "light" injuries.

Some Chilean police, responding to an intensive training program by SERNAM, are beginning to provide effective assistance in domestic violence cases.⁸³ However, Chilean medical personnel, including the legal-medical personnel at State hospitals, continue to mistreat victims, support the batterers, and minimize injuries.⁸⁴ In Chile, any person, including a health care provider, teacher, or counsellor, is required by law to report all known cases of physical assault to the criminal justice system,⁸⁵ but they have generally failed to do so in domestic violence cases.

penal laws criminalize physical assaults, but the legal system tends to minimize these assaults in domestic violence situations. Nelly González, Oficina Legal de la Mujer, "Violencia Doméstica": Análisis Crítico de Sentencias y Expedientes (1989) (unpublished manuscript, on file with the *Case W. Res. J. Int'l L.*).

⁸⁰ CARMEN G. QUIROZ, EL MACHISMO Y LA VIOLENCIA INTRAFAMILIAR 14 (1993) (ISIS Int'l, Document No. 00385.06).

⁸¹ See CÓDIGO PENAL, art. 494 (Chile) (defining "light" injuries, and prescribing that the penalty for "light" injuries is a minimum to medium-grade prison sentence, or a fine of five times the offender's monthly salary).

⁸² QUIROZ, *supra* note 80.

⁸³ Interview with Ximena Ahumada, Head of SERNAM's Domestic Violence Program, in Santiago, Chile (Oct. 22, 1993) (on file with the *Case W. Res. J. Int'l L.*); Interview with Soledad Larraín, then-Assistant Director of SERNAM's Police Training Project, in Santiago, Chile (Aug. 1, 1991) (on file with the *Case W. Res. J. Int'l L.*); Interview with María Elena Valenzuela, *supra* note 34 (stating that the program is to expand to nationwide training in police academies throughout 1994). Each interviewee commented that the hierarchal structure and obedience of authority among the Chilean police made their program very effective.

⁸⁴ MIRTHA U. GONZÁLEZ, VIOLENCIA DOMÉSTICA: ESTRATEGIAS LEGALES Y EXPERIENCIAS JUDICIALES 22-23 (1993).

⁸⁵ CÓDIGO DE PROCEDIMIENTO PENAL [C. CRIM. P.] art. 84 (Chile). See also Interview with Alberto Teke, Director of the Medical-Legal Department of the University of Chile, in Santiago, Chile (July 15, 1991) (Dr. Teke is the Director of the State agency that reviews all medical-legal issues presented in the courts.) (on file with the *Case W. Res. J. Int'l L.*); Interview with Alberto Teke, Director of the Medical-Legal Department of the University of Chile, in Santiago, Chile (July 22, 1991) (on file with the *Case W. Res. J. Int'l L.*). See generally NORMAS Y DOCUMENTOS: ÉTICA MÉDICA (1986) (discussing the teaching materials used to instruct students that there is an ethical duty to assist battered women, based on human rights treaties and principles).

During the past two years, some Chilean judges have begun to prosecute and sanction domestic violence more effectively.⁸⁶ In a pilot project organized by SERNAM to coordinate police protection and prosecution,⁸⁷ judicial intervention terminated the violence in a very high percentage of cases.⁸⁸ This project resulted in better protection for battered women than the best "model" programs in the United States.⁸⁹ Also, a much higher percentage of batterers were threatened with imprisonment, instead of receiving the usual small fine.⁹⁰ However, for many Chilean women, the legal system is still not a safe or effective solution to end domestic violence.⁹¹ The continued systematic failure of

⁸⁶ Cf. *infra* notes 290-99 and accompanying text (describing the recent jurisprudence of Judge Amanda Valdovinos who uses her judicial discretion to pardon batterers).

⁸⁷ The Center, which works in the same building and in tandem with the local police in the municipal district of Santiago, considers the following as foundations for their success in ending domestic violence:

1. Requiring that the police, through a letter from the Center, accompany the woman to collect her belongings when she has been forced to abandon the home.
2. Requiring that the tribunal officially notifies the local police, where the woman lives, that they should provide immediate help, as a measure of protection, to the woman in case of new aggressions.
3. That in addition to the report of the social services agency, a psychological report from the professionals at the Center is considered by the tribunal as a form of proof [of violence].
4. Accompanying the aggrieved woman to the appearances and comparisons of proof [throughout the judicial process]; this accompaniment permits her to confront the aggressor, providing an important step in the process of overcoming her fear of the aggressor.

MIRTHA ULLOA & ERIKA VARGAS, EVALUACIÓN DEL TRABAJO DE TRIBUNALES DEL EQUIPO JURÍDICO ATENCIÓN DE MUJERES VÍCTIMAS DE VIOLENCIA DOMÉSTICA: PERIODO OCTUBRE 1990 - SEPTIEMBRE 1991 75 (ISIS Int'l, Document No. 03385.08) [hereinafter EVALUACIÓN] (author's translation).

⁸⁸ Aggression was successfully terminated in 29 out of 40 cases; in two cases the violence was repeated; and in nine cases the results were unknown. *Id.* at 72. Also, the Center's work increased the number of cases prosecuted by about ten percent. *Id.* at 68 (comparing statistics from before the Center's founding in 1991).

⁸⁹ Cf. Hoffman, *supra* note 20 (describing a "model" program in Duluth, Minnesota, where judicial intervention is a key component in preventing further assaults).

⁹⁰ EVALUACIÓN, *supra* note 87, at 75. Even when these sentences were suspended, pending judicial monitoring of the case, the threat of a prison sentence and the very act of being sentenced as a "criminal" ended the violence in the great majority of cases. *Id.* at 76.

⁹¹ QUIROZ, *supra* note 80. Note that SERNAM's pilot projects are only operating in the municipal districts and the related criminal tribunal jurisdictions of Conchalí, La Florida, and Santiago, which are all within the city limits of Santiago. But the Center is not accessible for every woman in Santiago. For example, battered women living in Santiago's 11th criminal district are subject to the jurisdiction of a judge who encourages them to pardon their husbands. See Interview with Amanda Valdovinos, Criminal Judge for the 11th District, Santiago, in Santiago, Chile (Oct. 18, 1993) (on file with the *Case W. Res. J. Int'l L.*).

the legal system to prosecute domestic violence cases, sanction batterers, and protect victims only exposes more battered women to continued violence.⁹²

The striking similarity of the problems faced by United States and Chilean battered women attempting to use their legal systems demonstrates that these problems are rooted, albeit not exclusively, in the legal systems themselves. Moreover, the fact that legal reforms such as mandatory arrest laws and increased police protection significantly decrease the likelihood of continued aggression serves to illustrate how the violence can be ended by resolving problems inherent in the legal systems.⁹³

*MYTH: Violence against women is more prevalent in Latin America than the United States.*⁹⁴

Domestic violence exists at similarly high levels in every culture.⁹⁵ On an international level, studies are beginning to show fairly equal levels of violence against women, particularly in North and South America.⁹⁶ In the United States, the Senate Judiciary Committee conducted national research on violence against women and reported that the number of assaults against women by male partners has reached epidemic proportions.⁹⁷ Every hour in the United States, 200 women are assaulted by men.⁹⁸ The perpetrators are usually their male partners.⁹⁹ Four million women per year are severely assaulted by their

⁹² See also GONZÁLEZ, *supra* note 84, 5-8 (relating cases of women mistreated by authorities, many of whom were seeking criminal sanctions). Cf. *supra* notes 87-90 (discussing the results of women assisted by SERNAM's Pilot Project in Santiago).

⁹³ See *supra* notes 78, 87-90 and accompanying text.

⁹⁴ See STATE DEP'T COUNTRY REPORTS, *supra* note 69. See generally *U.S. Reply*, *supra* note 72.

⁹⁵ ROXANNA CARRILLO, *BATTERED DREAMS: VIOLENCE AGAINST WOMEN AS AN OBSTACLE TO DEVELOPMENT* 5 (1992).

⁹⁶ *Id.* at 5-6.

⁹⁷ Characterization of this situation as an "epidemic" is borrowed from Senator Joseph Biden, Chair of the Senate Judiciary Committee and sponsor of the Violence Against Women Act. *Women and Violence: Hearings Before the Senate Committee on the Judiciary*, 101st Cong., 2d Sess. 3 (1990). See also S. Rep. 197, 102d Cong., 2d Sess. 36-37 (1991) ("Every 15 seconds, a woman is battered . . . Last year, more women were beaten by their husbands than were married . . . [A]s figures have skyrocketed, our attention has waned . . . Our society has, up until now, chosen not to appreciate the significance of these figures. We have systematically underestimated the problem, in seriousness, in scope, and intensity.").

⁹⁸ *20/20 Special Edition: Pushed to the Edge* (ABC television broadcast, Sept. 17, 1991).

⁹⁹ *Id.*

male partners.¹⁰⁰ Domestic violence is the leading cause of injury among women in the United States, as about one-third of the women treated in emergency rooms are treated for injuries resulting from domestic violence.¹⁰¹ In Chile, one in three women treated at the public medical-legal clinics were victims of domestic violence; and seventy-four percent of these women were beaten by their male partners.

In the 1980's, domestic violence refugees constituted almost half of the female homeless population in the United States,¹⁰² resulting in one million battered women per year being turned away because shelters were full.¹⁰³ Domestic violence permeates all ethnic, social, and economic classes in the United States,¹⁰⁴ with fifty percent of women in the United States reporting abuse at some time in their lives.¹⁰⁵

Similarly, fifty percent of Chilean women experience domestic violence at some time in their lives, and about twenty-five percent live in a permanently violent situation.¹⁰⁶ As in the United States, many more women than men are victims of domestic violence, and the perpetrators are usually their male partners.¹⁰⁷

A typical assault produces grave injuries. Domestic violence is cyclical, and will continue to escalate until effective intervention occurs.¹⁰⁸ In the United States, if reported and properly tried by the legal system, one-third of all domestic violence incidents would be classified

¹⁰⁰ *Women and Violence: Hearings Before the Senate Committee on the Judiciary*, 101st Cong., 2d Sess. 117 (1990) (Presenting the testimony of Dr. Angela Browne, representing the National Coalition Against Domestic Violence and the National Woman Abuse Prevention Project.).

¹⁰¹ Cynthia Diehm & Margo Ross, *Battered Women*, in *THE AMERICAN WOMAN*, 1988-89: A STATUS REPORT 292 (1st ed. 1988). See also VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. 36 n.10 (1991) (quoting former Surgeon General Everett C. Koop's 1989 statement that battering is "the single largest cause of injury to women in the United States[]").

¹⁰² SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* xiv (1991).

¹⁰³ WOMEN AND HOUSING TASK FORCE, NATIONAL LOW-INCOME HOUSING COALITION, *UNLOCKING THE DOOR: AN ACTION PROGRAM FOR MEETING THE HOUSING NEEDS OF WOMEN* 8 (1990).

¹⁰⁴ *Women and Violence: Hearings Before the Senate Committee on the Judiciary*, 101st Cong., 2d Sess. 117 (1990).

¹⁰⁵ FALUDI, *supra* note 102, at 360.

¹⁰⁶ Servicio Nacional de la Mujer, *Apuntes* (1991) (pamphlet for police training programs) (on file with the *Case W. Res. J. Int'l L.*).

¹⁰⁷ GONZÁLEZ, *supra* note 84, at 5 (noting that women are the victims in seventy-five percent of domestic violence cases, men in two percent of cases, and in the remaining cases there is mutual violence).

¹⁰⁸ See generally LENORE E. WALKER, *THE BATTERED WOMAN* (1979).

as felony rape, robbery, or aggravated assault; and the remaining two-thirds would "involve bodily injury at least as serious as the injury in ninety percent of all robberies and aggravated assaults."¹⁰⁹ These categories of crime are all considered serious offenses, yet the majority of domestic violence cases are routinely prosecuted as misdemeanors.¹¹⁰ In Chile, battered women report being slapped, punched, kicked, beaten with objects, grabbed, receiving fractures, burned, raped by close family members, and raped by force.¹¹¹ Additionally, 49.1% reported being battered at least once a week, 11.4% three times a week, and 23.7% were battered daily.¹¹² As in the United States, the great majority of cases adjudicated are treated as misdemeanors and punished only by a small fine.¹¹³

Under the Chilean Penal Code all injuries that do not cause a lengthy loss of work or prolonged medical treatment are considered "light" injuries and misdemeanors.¹¹⁴ Furthermore, even with the judicial discretion to punish offenders built into the Penal Code, even "very grave" cases are rarely sanctioned by Chilean judges.¹¹⁵ As will be discussed in part II *infra*, the amount of discretion judges have to sanction domestic violence under the Chilean Penal Code is a subject of conflict. Advocates are working, via legislation, education, and advocacy, to change judicial interpretations that only allow the imposition of fines.

Similarly, in the United States, the fact that most domestic violence cases are adjudicated as misdemeanors is nonsensical, given the gravity of the injuries and the fact that domestic violence is a continuing and escalating problem. At least one-third of all women murdered every year in the United States are victims of domestic violence.¹¹⁶ Between 2,000

¹⁰⁹ VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. 38 (1991) (citing NATIONAL INSTITUTE OF JUSTICE, "CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 4 (1990)).

¹¹⁰ Hoffman, *supra* note 20, at 25.

¹¹¹ The gravity of the injuries and violence statistically increases among women battered for a longer period of time. CECILIA MOLTEDO CASTAÑO ET AL., ESTUDIO SOBRE VIOLENCIA DOMESTICA EN MUJERES POBLADORAS CHILENAS 25, 29 (1989) (ISIS Int'l Document No. 1394.00) (comparing statistics of women battered over a two-year period) (English translation of Spanish original on file with Case W. Res. J. Int'l. L.).

¹¹² See *id.* at 34.

¹¹³ See *supra* notes 80-82 and accompanying text.

¹¹⁴ See *supra* notes 80-81 and accompanying text; *infra* notes 339-50 and accompanying text.

¹¹⁵ See *supra* notes 80-82 and accompanying text; *infra* notes 291-328 and accompanying text.

¹¹⁶ VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. 38 (1991) (citing FBI UNIFORM CRIME REPORTS (1990)). For example, a Vermont study found that, in that state, a woman "is more likely to be murdered as a result of domestic violence than as a result of a confrontation with a stranger." VERMONT SUPREME COURT & VERMONT BAR

and 4,000 women are murdered every year by their male partners, many *after* they sought, but failed to receive, legal intervention.¹¹⁷ Women cannot escape the violence without better protection from the legal system: as many as three-quarters of the domestic violence assaults reported take place *after* a woman has left an abusive partner,¹¹⁸ and the majority of battered women who are murdered are murdered *after* they have left home.¹¹⁹ Similarly, in Chile the risk of injury increases *after* a battered woman has sought legal intervention.

*MYTH: The United States is more "advanced" than Chile and other Latin American nations, and therefore, women enjoy better rights and a better position in society in the United States.*¹²⁰

In the supposedly more "advanced" nations of the Northern Hemisphere, despite the long struggle of women's rights activists, significant reforms are necessary to ensure that the legal systems intervene on behalf of battered women when called upon to do so.¹²¹ The Latin American women's movement also has a long history, paralleling the origins of the United States and Western European women's movement. Because domestic violence reflects a structural inequality between men and women, analyses should address the position of women in society and in the structures of power in a nation, as well as the level and nature of women's power in the structures of society and politics.¹²²

For instance, the gender pay gap in Chile is currently less than the disparity in the United States.¹²³ Chilean women have almost the same

ASS'N, GENDER AND JUSTICE 1 (1991).

¹¹⁷ S. REP. NO. 197, at 25 (citing NATIONAL WOMAN ABUSE PREVENTION PROJECT). *See also id.* at 34-37 (Nationwide examples include: Kansas City, where deaths occurred after battered women made more than five complaints to the police; and Newport News, where in cases of deaths due to domestic violence, police had been called earlier in 50% of cases.).

¹¹⁸ Hoffman, *supra* note 20, at 65.

¹¹⁹ FALUDI, *supra* note 102, at 360 (citing Dr. Leanore Walker's testimony before the American Psychiatric Association).

¹²⁰ *See* STATE DEP'T COUNTRY REPORTS, *supra* note 69; U.S. CONGRESSIONAL DEBATES, *supra* note 48; *supra* notes 31-34.

¹²¹ *See infra* notes 120-43 and accompanying text.

¹²² *See* FALUDI, *supra* note 102, at xviii-xix.

¹²³ FALUDI, *supra* note 102, at 363-99 (discussing the feminization of poverty); *id.* at xiii (noting that the United States has the highest gender pay gap in the developed world and that 80% of working women hold low-paying, "pink-collar" jobs). *Cf.* María E. Hirmas & Enrique Gomariz, Servicio Nacional de la Mujer, La Situación de la Mujer Chilena, En Cifras 5-9 (1990) (noting the lowering gender pay gap and increasing number of professional women, but like the United States, there is markedly less representation of women in the most powerful positions)

level of education as Chilean men.¹²⁴ Women represent thirty-one percent of the population working outside the home; and although unemployment is slightly higher among women than men, these statistics do not reflect the number of women who work at home, both professionally and as mothers and homemakers.¹²⁵

In 1990, there were more women in the Chilean legislature than in the United States Congress;¹²⁶ Chilean women legislators have long fought for an agenda on behalf of women's rights.¹²⁷ In 1991, while the Reagan and Bush administrations were severely cutting government programs for women,¹²⁸ the Chilean National Ministry for Women (SERNAM) was founded as an executive ministry empowered to review the status of women in the Chilean government and introduce corrective legislation when necessary.¹²⁹ SERNAM operates according to Chile's international legal obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention) and other international human rights instruments.¹³⁰ SERNAM's creation was based, in part, on a proposal by women's rights activists.¹³¹

[hereinafter Situation of Chilean Women in Statistics].

¹²⁴ Marta Lagos Cruz-Coke & Ema Lagos Campos, *Estudios y Encuestas*, 1 MUJERES CHILENAS 1, 6 (1992).

¹²⁵ *Id.* at 8-10. Cf. *Según Estudio Especializado que Mandó a Hacer y Difundió el INE: Importante Caída en el Empleo para Mujeres*, LA SEGUNDA (Santiago, Chile), Aug. 5, 1991, at 13, 32.

¹²⁶ Compare FALUDI, *supra* note 102, at xiii with Situation of Chilean Women in Statistics, *supra* note 123, at 21.

¹²⁷ Mariana A. Oyarzun, La Participación de las Mujeres Chilenas en el Siglo XX 12-15 (July, 1991) [hereinafter Political Participation] (on file with the *Case W. Res. J. Int'l L.*). Until the military dictatorship in 1983, female political participation was "growing, and at a good level internationally, similar to the presence of Congress Members in the United States, France or England." *Id.* at 12. Between 1949 and 1973, Chilean women in Congress were quite effective, "as good of Parliamentarians as men," united on issues specifically affecting women, and passed legislation to augment women's rights. *Id.* at 13-15. In spite of the Pinochet military dictatorship's repression of women's rights, the women's movement grew dramatically during this time. *Id.* at 15-18.

¹²⁸ FALUDI, *supra* note 102, at 259 (The Reagan administration terminated or weakened many federal programs for women's rights, including domestic violence programs.).

¹²⁹ Ley No. 19.023, tit. I, art. 2 (Jan. 3, 1991) (Chile).

¹³⁰ See, e.g., SERVICIO NACIONAL DE LA MUJER, INFORME DE ACTIVIDADES SERVICIO NACIONAL DE LA MUJER: NOVIEMBRE - DICIEMBRE 1990 (1991); SERVICIO NACIONAL DE LA MUJER, INFORME DE ACTIVIDADES SERVICIO NACIONAL DE LA MUJER: ENERO - MARZO 1991 (1991); SERVICIO NACIONAL DE LA MUJER, INFORME DE ACTIVIDADES SERVICIO NACIONAL DE LA MUJER: ABRIL - JUNIO 1991 (1991).

¹³¹ Interview with María Elena Valenzuela, Assistant Director, SERNAM, in Santiago, Chile (July 2, 1991) (Ms. Valenzuela participated in the drafting of the proposal while she was in exile in Mexico during the Chilean military dictatorship.) (on file with the *Case W. Res. J. Int'l L.*).

Among other things, the agency provides legal assistance to battered women, works with police and the medical community to improve services for victims of domestic violence, conducts outreach educational services and media campaigns, coordinates the activities of other agencies and non-governmental organizations, and provides research, analysis facilities, and reports.¹³²

Since its founding, SERNAM has sponsored legislation that abolished legal inequities in the marriage contract and the care of children (enacted in 1991),¹³³ and additional legislation that protects women working in the informal sector and creates family leave for both mothers and fathers (enacted in 1993).¹³⁴ SERNAM currently is formulating an affirmative action plan for equal opportunities in Chilean politics, in its broad definition, which addresses issues ranging from the composition of Congress to the care of children.¹³⁵ It has also introduced other legislative proposals which would improve the prosecution of rape, require paid maternity leave, and mandate salary-sharing for housework and childrearing.¹³⁶

However, the Chilean legal system retains many inequalities, such as a higher penalization of adultery for women.¹³⁷ Also, marital rape is not criminalized — marital sex is considered a “duty of the marriage”¹³⁸ — and, by law, remarriage after the death of a spouse or annulment is prohibited for a longer period of time for women than

¹³² *Id.*; Interview with María Elena Valenzuela, Assistant Director, SERNAM, in Santiago, Chile (Oct. 14, 1993) (on file with the *Case W. Res. J. Int'l L.*). See also Interview with Ximena Ahumada, *supra* note 83.

¹³³ See also CARLOS A. GONZÁLEZ MOYA, LEY NO. 18.802: NUEVA LEY DE LA MUJER (1991).

¹³⁴ Servicio Nacional de la Mujer, *Salió la Ley, La Nueva Ley: Ley 19.250, Contrato Individual y Protección a las (los) Trabajadoras (es)* (1993) (on file with the *Case W. Res. J. Int'l L.*).

¹³⁵ Servicio Nacional de la Mujer, Address at Encuentro Internacional: Políticas de Igualdades de Oportunidades (Oct. 20-21, 1993) [hereinafter *Politics of Equal Opportunity Conference*] (Noting that, based on international legal norms, Argentina and Spain require that a fair proportion of political offices must be held by women.)

¹³⁶ *Reportaje: Reformas Legales Propuestas por SERNAM*, REVISTA MUJER, Sept., 1993, at 15.

¹³⁷ According to the Chilean Penal Code, women commit the crime of adultery when they have any sexual relations outside of marriage, but for men extramarital sexual relations are only criminalized when “scandalous.” The maximum sentence for women adulterers is five years imprisonment, but the maximum sentence for men is only 540 days. Nelly González, *Criticas Paradigmáticas al Sistema Legal Chileno, con Énfasis en la Problemática de la Mujer y el Derecho*, in CAJA DE HERRAMIENTAS (Oficina Legal de la Mujer ed., 1990). See also *infra* note 178 and accompanying text (noting that the crime of adultery is rarely prosecuted).

¹³⁸ González, *supra* note 137, at 39.

men.¹³⁹ In the United States, comparable problems might include a post-divorce decrease in a woman's economic status, with a concomitant increase in a man's post-divorce economic status,¹⁴⁰ and the failure of most states to penalize marital rape.¹⁴¹

SERNAM's Intrafamily Violence Act is based on international legal obligations that require the elimination of all forms of discrimination against women.¹⁴² If adopted by the United States, the Women's Convention's higher level of rights for women would require, at the very least, an equal rights amendment to the United States Constitution.¹⁴³

MYTH: Chilean society is more "machista" than is the United States;

¹³⁹ *Id.*

¹⁴⁰ Annemette Sorensen, *Estimating the Economic Consequences of Separation and Divorce: A Cautionary Tale from the United States*, in *ECONOMIC CONSEQUENCES OF DIVORCE: THE INTERNATIONAL PERSPECTIVE* 263 (Lenore J. Weitzman & Mavis Maclean eds., 1992).

¹⁴¹ See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 397 (5th ed. 1989); *Developments in the Law — Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1501, 1533 (1993) (relating recent statistics that "one in seven married or formerly married women has been raped by her husband[]"); Thomas R. Bearrows, Note, *Abolishing the Marital Exemption for Rape: A Statutory Proposal*, 1983 U. ILL. L. REV. 201; Jaye Sitton, Comment, *Old Wine in New Bottles: The "Marital" Rape Allowance*, 72 N.C. L. REV. 261 (1993) (noting that, in spite of reform movements, many states have simply made marital rape a lesser crime than non-marital rape); Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1253 (1986) (discussing the equal protection issues inherent in marital rape exemptions).

¹⁴² See, e.g., *Propone Proyecto de Ley Sobre Violencia Intrafamiliar*, Mensaje 221-323, BOLETIN 157-07, para. 1.1 (1991) [hereinafter Message] (citing United Nations Charter); *id.* para. 1.2 (citing the Universal Declaration of Human Rights); *id.* para. 1.3 (citing the Charter of the Organization of American States and the American Convention on Human Rights); *id.* para. 1.4 (citing the 1983 Seventh U.N. Congress on Crime and Delinquency and Intrafamily Violence, the 1986 Meeting of Experts of the U.N. Subcommittee on Prevention of Violence Against Women, the U.N. Convention on the Elimination of All Forms of Discrimination Against Women, and the U.N. Convention on the Rights of Children); *id.* para. 1.5 (directing that the sovereign must recognize that the "organs of the State . . . respect and promote . . . [the] guaranteed rights of this Constitution, so that the international treaties ratified by Chile are encountered as enforceable"); *id.* para. 1.6 (listing Art. 19 constitutional rights to life, physical and psychological integrity, right to equality before the law, "as the constitution guarantees for *all people*") (emphasis in original).

¹⁴³ See Rita E. Hauser, *Women's Legal Rights: International Covenants an Alternative to the ERA?*, 84 AM. J. INT'L L. 313 (1990) (book review); Barbara Stark, *Women's Legal Rights: International Covenants an Alternative to ERA?*, 12 WOMEN'S RTS. L. REP. 51, 53-54 (1990) (alluding to the fact that federalism issues must be considered before adopting the Women's Convention). See also Bayefsky, *supra* note 44 (noting that international human rights norms prohibit all forms of discrimination against women); WILLIAM B. LOCKHART, ET AL., *CONSTITUTIONAL LAW* 1339-62 (7th ed. 1991) (De facto discrimination against women is not illegal in the United States.).

therefore, the problem of violence against women must be worse.¹⁴⁴

According to Chilean women, there is definitely an identifiable element of "machismo" in the culture and society of Chile.¹⁴⁵ Chilean culture is indeed different in many respects from the United States culture. For example, Chilean culture is generally more collective than United States culture.¹⁴⁶ However, not only is the incidence of domestic violence in the United States equivalent to that in Chile,¹⁴⁷ but also a culture of sexism and repression of women in the United States has been identified and linked with the high incidence of violence.¹⁴⁸

With respect to women's rights in both the United States and Chile, politics, power, and culture are all highly interrelated.¹⁴⁹ Sexism exists in Chile, but it is intimately related to the social and political power of men and women. Activists also point out that such sexism is identifiable in every culture throughout the world, including the United States.¹⁵⁰ The tendency to stereotype Latin American women by labeling their political positions and the human rights violations they suffer as purely cultural phenomena¹⁵¹ is the most likely reason that the cultural term "machista" is used to explain away the situation of Latina women.

A "social revolution," with profound cultural changes, is necessary

¹⁴⁴ See Remarks of Jane Jacquette, *supra* note 33; U.S. State Department Country Reports, *supra* note 73.

¹⁴⁵ Interview with María Elena Valenzuela, *supra* note 131. See also Interview with Amanda Valdovinos, *supra* note 91.

¹⁴⁶ With respect to the situation of battered women in general, the collective spirit of the Chilean culture has distinct advantages for women seeking help; there is, perhaps, less victim-blaming than in the United States. On the other hand, Chilean women are much less accustomed to thinking in terms of individual rights, which, in some cases, can create an obstacle. Interview with María Elena Valenzuela, *supra* note 131.

¹⁴⁷ See *supra* notes 105-07 and accompanying text.

¹⁴⁸ See generally FALUDI, *supra* note 102.

¹⁴⁹ See Politics of Equal Opportunity Conference, *supra* note 135 (A panel of scholars addressed culture and its relation to women's power in national political and legal systems.). Also, Senator Joseph Biden, sponsor of the U.S. Violence Against Women Act, remarked that:

None of the proposals in this bill, alone or together, are likely to end violence against women. However, the legislation is an important step in the direction of developing *what we need most — a national consensus that society will not tolerate this kind of violence and the terror its [sic] spawns.*

VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. 35 (1991) (emphasis added).

See also *Women and Violence: Hearings Before the Senate Committee on the Judiciary*, 101st Cong., 2d Sess. 117 (1990).

¹⁵⁰ QUIROZ, *supra* note 80, at 11.

¹⁵¹ See *infra* notes 215-25 and accompanying text. See Also *WOMEN, CULTURE, AND POLITICS IN LATIN AMERICA* (Emilie Bergmann et al. eds., 1990).

to end violence against women in Chile.¹⁵² But the same is true in the predominantly White culture of the United States.¹⁵³ Labelling violence against women as a problem of "the Latino culture" is another way of maintaining the overall political and societal status quo. It blames the victim by placing the onus on her own culture.¹⁵⁴

Finally, aside from the fact that traditional policy makers have rarely listened to Latin American women, "culture" is a changing phenomenon subject to the influence of political action. For example, the transition of democracy in Chile "has produced a notable increase in the presence of the issue of women in public opinion and the means of communication, as it has become a part of the action of the government."¹⁵⁵ As a representative of SERNAM explains the position of women in Chilean culture: "[r]ecently, we have been undergoing a very strong transition, in society, culture, and economically . . . a change in roles."¹⁵⁶

*MYTH: Battered Latina women do not want the intervention of the legal system.*¹⁵⁷

Interviews of battered women in Chile show that many do want legal assistance, but were afraid to use the legal system because it caused more danger and "in the end, the law protected and sheltered the man more than it helped [the battered women]."¹⁵⁸ The provisions of SERNAM's Intrafamily Violence Act were based on conversations with battered women and their advocates, and incorporate their suggested legal reforms. As discussed *supra*, the Latin American women's movement has been especially focussed on legislative initiatives, expanding legal services for battered women, and creating international legal remedies to combat violence against women.¹⁵⁹ From the grass-roots level to the national political arena to the international legal arena, Latin

¹⁵² Interview with Cecilia Moltedo, then-Coordinator of the Center for Attention to Women Victims of Domestic Violence, Santiago, Chile (July 31, 1991) (on file with the *Case W. Res. J. Int'l L.*).

¹⁵³ See generally FALUDI, *supra* note 102; DEBORAH RHODE, JUSTICE AND GENDER (1989).

¹⁵⁴ Additional excuses for legal systems' tolerance of violence against women include blaming education, social status, or that it exists only in underdeveloped countries. QUIROZ, *supra* note 80, at 13 (relaying such typical excuses).

¹⁵⁵ Cruz-Coke & Campos, *supra* note 124, at 11.

¹⁵⁶ Interview with María Elena Valenzuela, *supra* note 131.

¹⁵⁷ See *supra* notes 16, 20-22, 26 and accompanying text.

¹⁵⁸ MOLTEDO CASTAÑO ET AL., *supra* note 111, at 37.

¹⁵⁹ *Integral View*, *supra* note 10, at 20-21.

American women are expressly seeking the intervention of the legal system to combat domestic violence. The current debate among the Latin American women's movement is not whether legal intervention is an appropriate answer to the domestic violence problem, but rather what is the best strategy to quickly win the reforms necessary to compel the intervention of the legal system on behalf of battered women.¹⁶⁰

*MYTH: Latin America, and especially Chile, is so Catholic and "traditional" that women are much more hesitant to leave an abusive marriage than women in the United States.*¹⁶¹

Chile is an overwhelmingly Catholic country, and, due to the historical influence of the Catholic Church, is one of the few countries in the world where both divorce and abortion are illegal.¹⁶² Opinion polls of Chilean women show that they are in favor of legalizing abortion,¹⁶³

¹⁶⁰ *Violencia Domestica: ¿Leyes o Reformas?*, 1 BOLETÍN, RED FEMINISTA LATINOAMERICANA Y DEL CARIBE CONTRA LA VIOLENCIA DOMÉSTICA Y SEXUAL 6 (1993).

¹⁶¹ See Interview with Amanda Valdovinos, *supra* note 91 (stating that she offers battered women the chance to pardon their husbands and continue living together, "because we are in a Latin American country"). However, Judge Valdovinos would also require a cessation of the violence based on these same values, and would utilize increased sanctions in cases of continued violence. *Id.*

¹⁶² Juanita Rojas, *¿Se Acabará la Mente?*, DIVORCIO, June 3-9, 1991, at 22-27. Chile is one of the few countries in the world where divorce is illegal. *Id.* Many aspects of the topic of abortion were discuss recently at the *Simposio Nacional: Leyes para la Salud y la Vida de Mujeres, Hablemos de Aborto Terapéutico*, in Santiago, Chile (Sept. 28-29, 1993).

Similarly, in Ireland, divorce is illegal, but — in contrast to Chile — this ban stems directly from a constitutional provision stating that Irish law must follow Catholic values. See 8 E. BLAUNSTEIN & G. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 24 (1988) (IRISH CONST. pmb. & art. 41.3.2) (consecrating Irish law to the values of the Catholic Church and banning divorce). The extent of Catholicism's influence on Irish rulings on family law and women's rights is quite extensive. See William E. Schmidt, *Girl, 14, Raped and Pregnant, Is Caught in Web of Irish Law*, N.Y. TIMES, Feb. 18, 1992, at A1, A13 (travelling to England to obtain an abortion after incest is prohibited); see also James F. Clarity, *Irish High Court Explains Decision*, N.Y. TIMES, Mar. 5, 1992, at A8; *Excerpts From Statements: How the Judges Reasoned*, N.Y. TIMES, Mar. 6, 1992, at 8.

¹⁶³ Laura Sau, Remarks at the *Simposio Nacional: Leyes para la Salud y la Vida de las Mujeres: Hablemos de Aborto Terapéutico* (Sept. 28, 1993) (presenting statistics from survey of 600 women from various sectors of Chile's Fifth Region) (on file with the *Case W. Res. J. Int'l L.*).

Similarly, the foremost Irish expert on Church-State relations cautions that the influence of Catholic values and the Church should not be overestimated, and that comparisons with other legal systems should be evaluated within the real-political context of colonialism, which is a historical force responsible for the Irish consecration of *their* values in the 1937 Constitution:

[British analysts use provisions of the Irish Constitution as] proof of the sectarian nature of the Irish state. Yet these same observers often forget or

with favorable arguments made by Catholics for Choice.¹⁶⁴ In Chile, divorce for cause is available if there is grave mistreatment or adultery; however, more causes of action are available for men than women, and also, couples remain legally bound.¹⁶⁵ After this type of divorce, future relationships are criminalized as adulterous.¹⁶⁶ Although it has been historically difficult for battered women to win a divorce on the grounds of grave mistreatment,¹⁶⁷ some recent cases have applied this norm to domestic violence cases.¹⁶⁸

Opinion polls of both men and women indicate that the majority of the population is in favor of legalizing divorce,¹⁶⁹ and the newly elected government has promised to propose such a law.¹⁷⁰ About twelve to

choose to ignore the formal sectarianism enshrined in the British Constitution. The Church of England is the established church

G.W. Hogan, Book Review, 19 IRISH JURIST 366, 367 (1984) (reviewing JOHN A. ROBILLIARD, RELIGION AND THE LAW (1984)).

¹⁶⁴ Catholics for Choice also campaigns in favor of the legalization of abortion in the United States where abortion rights currently are under attack in many states. Lois H. Oppenheim, *Los Desafíos Feministas en la Era de Clinton*, 3 MUJERES EN ACCIÓN 31, 32 (1993) (mentioning the conservative composition of the Supreme Court and federal judiciary after Reagan-Bush nominations).

Furthermore, like Chile, Irish society and political life is changing rapidly and incorporates a local brand of feminism. Irish President, Mary Robinson, is a Catholic and a declared feminist who has campaigned to legalize contraception, divorce, homosexuality, and freedom of information on abortion. Her 1990 election would not have come about were it not for the profound changes in Irish society favoring women's rights. N. McCafferty, *Ireland: Ironic Yarns from a "Slightly Constitutional" Country*, MS., May/June, 1992, at 16. This same political force convinced the High Court to rule against the anti-abortion sentiment cited *supra* note 162. *Id.*; see also Clarity, *supra* note 162; Schmidt, *supra* note 162.

¹⁶⁵ SANDRA GONZÁLEZ & MARÍA NORERO, 3 LOS DERECHOS DE LA MUJER EN LAS LEYES CHILENAS 122 (1990).

¹⁶⁶ CÓDIGO PENAL, arts. 282, 383 (Chile).

¹⁶⁷ GONZÁLEZ & NORERO, *supra* note 165, at 128.

¹⁶⁸ Interview with Amanda Valdovinos, *supra* note 91.

¹⁶⁹ Cruz-Coke & Campos, *supra* note 124, at 57. Furthermore, this nationwide survey on the attitudes of gender roles found that:

- The idea that women should obey their husbands is rapidly changing, especially among women; *id.* at 38;
- Chilean women valued marriage and children more so than Spanish women or women in the United States, but less than Mexican, Japanese, or Indian women; *id.* at 40-41;
- Generally, Chileans ranked family as slightly less important in their lives than Americans, but valued work 10 percent more; *id.* at 49;
- Americans ranked religion as slightly more important in their lives than Chileans. *Id.*

¹⁷⁰ *Partidos de la Concertación: Harán Observaciones al Programa de Frei*, EL MERCURIO Oct. 17, 1993, at C4; *El Divorcio Sea Resuelto en el Próximo Gobierno*, EL MERCURIO, Oct. 17, 1993, at D5.

fifteen percent of Chileans, including judges, politicians, and Catholics, are separated or have had their first marriage annulled.¹⁷¹ However, annulment is not a very useful for victims of domestic violence, as it requires the consent of both spouses.¹⁷² A result of the legal prohibition of divorce is that sixty percent of Chilean children are considered illegitimate¹⁷³ and 28.5% of Chilean families are single-parent.¹⁷⁴ More men than women are considered married, and more women than men consider themselves as in live-in partnerships.¹⁷⁵ A current provision of the Penal Code mandates increased sanctions for assaults on family members, but does not apply to unmarried couples.¹⁷⁶

Since, in reality, many Chileans separate and enter new relationships, Chilean judges have developed some norms to protect the rights of unmarried couples.¹⁷⁷ Post-separation "adultery" is rarely prosecuted, although the charge is sometimes leveled against women in child custody cases.¹⁷⁸ In general, a patriarchal culture is identifiable among Chilean judges which generally works against battered women and women's

¹⁷¹ Cruz-Coke & Campos, *supra* note 124, at 55; Rojas, *supra* note 162, at 22.

¹⁷² GONZÁLEZ & NORERO, *supra* note 165, at 130 (noting, also, that annulment or separation makes it difficult for a woman to receive monetary support, although she typically will be responsible for the care of the children).

¹⁷³ Rojas, *supra* note 162 (citing 1990 UNESCO statistics).

¹⁷⁴ Cruz-Coke & Campos, *supra* note 124, at 55.

¹⁷⁵ PAULA QUINTANA ET AL., CASA DE LA MUJER, LA MUJER EN LA V REGIÓN: DATOS PARA UNA DIAGNÓSTICO 13 (1990) (ISIS Int'l Document No. 0269.00).

¹⁷⁶ CÓDIGO PENAL, art. 400 (Chile) (prescribing increased penalties for criminally injuring the following relations: father, mother, child — whether legitimate or illegitimate — any other ascendent or descendent, or spouse). This provision may be inapplicable to unmarried couples in domestic violence cases. Interview with Amanda Valdovinos, *supra* note 91.

¹⁷⁷ Correa, *supra* note 1, at 91 (citing Samuel Durán, *Situación de Parejas no Casadas*, in 77 GACETA JURÍDICA (1986)). Dr. Correa makes the point that, despite the stated judicial-cultural norm that judges only apply and do not create law, in this case and others, judges have in fact reinterpreted and expanded legislative protections according to changing social realities and values. *Id.*

¹⁷⁸ The Chilean Civil Code states that, in cases of divorce for cause, custody of minor children goes to the mother, unless "because of her deprivation there will be fear that she would pervert them." CÓDIGO CIVIL [C. CIV.], art. 223 (Chile). Furthermore, "the circumstances of the mother being an adulteress causing the divorce must be considered as an important antecedent to resolve the issue of her inability. [This provision] will also apply, if it is the case, to the father." *Id.* The last sentence was added by the 1989 New Law for Women. *Id.* at n.1. However, a mother's post-divorce relations with a new partner have been held to render her legally unfit for custody, based on the argument that she might "pervert" or cause a "moral danger" to her minor children, especially a female child. Such "moral danger" is a cause for a judge to remove custody. CÓDIGO CIVIL [C. CIV.], art. 225 (Chile). See Custody Petition of Carlos Enrique Ojeda, Case No. 54,757 (Santiago Ct. App. Nov. 16, 1989); Sentence of Santiago Tribunal for Minors, Judge María Angelica Pizarro, Case No. 54,757 (Santiago Ct. App. Jan. 11, 1990) (awarding custody to the father on similar grounds).

rights.¹⁷⁹ Similarly, according to the U.S. Senate Judiciary Committee and numerous studies of gender bias among judges in the United States, the patriarchal values of judges in the United States works to severely diminish the rights of battered women.¹⁸⁰

The reality of Chilean society and the mentality of Catholic culture may not present an insurmountable obstacle to renegotiating or ending abusive marriages. Throughout the legislative debate of the Intrafamily Violence Act, the issue of "family values" did not arise as an insurmountable obstacle, even among conservative Catholic legislators.¹⁸¹

*MYTH: Due to political and socioeconomic problems, the law is not a feasible option for battered women in developing, Latin American nations.*¹⁸²

Legal literacy and the ability to legally defend one's rights are concepts which can work well for women in developing countries.¹⁸³ Given the history of dictatorships in Latin America, one would not expect high trust for government protection of human rights. In spite of this, the Latin American women's rights movement views improving legal remedies as essential and necessary to the elimination of violence against women.¹⁸⁴ Similarly, Chilean women believe that legal reforms

¹⁷⁹ NELLY GONZÁLEZ, OFICINA LEGAL DE LA MUJER, VIOLENCIA DOMÉSTICA Y LEGALIDAD 5 (1989).

¹⁸⁰ VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. 43-44 n.10 (1991) (citing gender bias studies in state legal systems).

¹⁸¹ Conservative Senator Miguel Otero, who drafted the version of the Intrafamily Violence Act for the Chilean Senate, while emphasizing family values, says both that: (1) Domestic violence should cease because "[t]he family is the pillar of society, and every person has an obligation to their children. No human being can develop themselves in an environment of violence and hate." And, (2) "[d]ivorce is not an absolute right; there is an obligation to stay married and provide the children with family surroundings that allow them to mature in surroundings with affection, rules, morality and security." Interview with Miguel Otero, Chilean Senator, in Santiago, Chile (Oct. 22, 1993) (on file with the *Case W. Res. J. Int'l L.*). (Senator Otero is from the Renación Nacional party, which backed the Pinochet regime, and holds his Senate office by virtue of it being reserved by the former military government under the transition to democracy scheme set forth in the 1989 Chilean Constitution.). See also Interview with María Elena Valenzuela, *supra* note 131

¹⁸² See STATE DEP'T COUNTRY REPORTS, *supra* note 69.

¹⁸³ See generally EMPOWERMENT AND THE LAW: STRATEGIES OF THIRD WORLD WOMEN (Margaret Schuler ed., 1986); LEGAL LITERACY: A TOOL FOR WOMEN'S EMPOWERMENT (Margaret Schuler & Sakuntala Kadrigamar-Rajasingham eds., 1992).

¹⁸⁴ *Integral View*, *supra* note 10, at 19 (legislative activities are "viewed as complements to direct action in the search for an integral response to the problem), 21 (the women's movement is "arriving at the conclusion that this same violence [against women] affects women's human

are indispensable in the campaign to end domestic violence.¹⁸⁵

The introduction of new legislation, chosen as an important step in the Chilean campaign, has been viewed as an impetus to a widespread social revolution against domestic violence.¹⁸⁶ The rationale is that legislation can be a means of social change and education, which is an idea that works fairly well in Chile. Chile is a very "legalistic" society,¹⁸⁷ has a high literacy rate,¹⁸⁸ and developments in the law are accessible to the general populace.¹⁸⁹ Chileans tend to follow the law, therefore, changes in the law to advance women's rights can have a powerful effect in society.¹⁹⁰

For example, when batterers are told that marital law has changed so that women are no longer obligated to "obey and follow" their husbands, they tend to comply.¹⁹¹ Similarly, when battered women are instructed about their legal rights and are provided with adequate legal assistance and protection, they are more likely to confront the batterer in court.¹⁹² In Chile, the actual content of the law is so important to the people that the Ministry of Justice, commenting on SERNAM's legislative proposals, stated that: "[w]ithout legal modifications Chileans will not accept the change."¹⁹³ In Chile, "the law instructs the paths and

rights"). See also *Legislación*, *supra* note 14, at 8-9 (legal reforms have been proposed and/or accomplished in 18 Latin American and Caribbean nations).

¹⁸⁵ Interview with Cecilia Moltedo, *supra* note 152.

¹⁸⁶ *Id.* See also Interview with Nancy de la Fuente, Diego Portales Law School, in Santiago, Chile (July 24-25, 1991) (Ms. de la Fuente is the founder of the Chilean Association of Women Judges.) (on file with the *Case W. Res. J. Int'l L.*); Interview with Soledad Larrain, *supra* note 83; Interview with Adriana Muñoz, Congressional Representative, in Santiago, Chile (Aug. 1, 1991) (Ms. Muñoz was co-sponsor of the Intrafamily Violence Act.) (on file with the *Case W. Res. J. Int'l L.*); Interview with María Elena Valenzuela, *supra* note 131.

¹⁸⁷ See generally Correa, *supra* note 1.

¹⁸⁸ Only 8.3% of the population is absolutely illiterate while 18% are functionally illiterate. QUINTANA, *supra* note 175, at 3 (showing little variation among illiteracy rates between men and women).

¹⁸⁹ For example, pamphlets containing transcripts of new laws are sold on street corners in Santiago. See GONZÁLEZ MOYA, *supra* note 133.

¹⁹⁰ Interview with Isabel Duque, *supra* note 54 (citing, as an example, the cholera epidemic which swept the region in 1991, but resulted in only a few cases in Chile because of the strict adherence to regulations requiring strict disinfection of fruits and vegetables).

¹⁹¹ Interview with Cecilia Moltedo, *supra* note 152. When batterers justify their actions by blaming their wives, Ms. Moltedo reminds them that although an official marriage license previously stated that wives should "obey and follow" their husbands, the law was amended in 1989 so that husbands can no longer demand and enforce their wives' obedience. *Id.* She asks them to read their pre-1989 marriage licenses and compare them with the new law. *Id.* Normally, the batterers' response is to change their behavior in order to comply with the new law. *Id.*

¹⁹² EVALUACIÓN, *supra* note 87, at 76.

¹⁹³ "Sin Modificaciones Legales los Chilenos no Aceptan el Cambio", REVISTA MUJER, Sept.,

reflects the values of the society."¹⁹⁴ In this context, legislation is an appropriate tool to effectuate and accelerate the social revolution to end violence against women.

*MYTH: The women's rights movement is more "advanced" in the United States than in Latin America, because Latin American women are not as politically active.*¹⁹⁵

During the years when there was a backlash against women's rights in the United States, the Chilean women's movement was making significant progress and adding a new generation of feminists.¹⁹⁶ In the United States, after a decade of regression cumulating in 1991,¹⁹⁷ a

1993, at 16, 17 (Interview with the Minister of Justice, Francisco Cumplido.) [hereinafter *Cumplido Interview*] (on file with the *Case W. Res. J. Int'l L.*).

¹⁹⁴ *Id.*

¹⁹⁵ See *supra* notes 31-34.

¹⁹⁶ See Chuchryk, *supra* note 11.

¹⁹⁷ In 1991, the United States media was dominated by two cases where powerful men were acquitted of allegedly violating women's rights. Supreme Court nominee Clarence Thomas was accused of sexual harassment, but ultimately approved by the Senate. However, prior to his approval, the male-dominated Senate Judiciary Committee investigated only after a record number of phone calls from women to the Senate demanding a hearing. Marshall Ingwerson, *Charges Against Thomas Cast Doubt on Senate*, CHRISTIAN SCI. MONITOR, Oct. 10, 1991, at 1. Despite the compelling testimony of Law Professor Anita Hill, the Senate ultimately confirmed Clarence Thomas' Supreme Court nomination. See Tom Shales, *The Hard-to-Watch Drama That Left No One Unscathed*, WASH. POST, Oct. 12, 1991, at D1 (Republicans on the Judiciary Committee "embarked on a character assassination" of Hill, who underwent "merciless, snide, supercilious interrogation." These hearings "gave viewers an extremely discouraging picture of the committee at work and an equally discouraging view of the Senate, maybe of the whole government.") Anita Hill repeatedly was asked by Senators whether she "fantasized" the abuse. Ruth Marcus, *Thomas, Allies Step Up Counterattack*, WASH. POST, Oct. 13, 1991, at 1.

The nationally broadcast nomination hearings were quickly followed by national broadcasts of the William Kennedy Smith rape trial, where a member of the powerful Kennedy family was acquitted of rape charges. Evidence from three other women alleging that Kennedy Smith had raped them was discluded, but the judge allowed the defense attorney to inquire about the accusers prior abortions and prior sexual conduct. *Smith Trial Jurors Remain Confident Verdict was Right*, B. GLOBE, Dec. 15, 1991, at 29. Again, in a case of a woman's word against a man's, the woman was not believed. See David Margolick, *Smith Acquitted of Rape Charges After Brief Deliberation by Jury*, N.Y. TIMES, Dec. 12, 1991, at 1.

Neither of these cases involved easy-to-prove facts mostly because the alleged crimes occurred in private, and the legal system's decision rested on whether the testimony of the alleged victim or the man she accused was true. Lori Heise, reviewing legal systems' treatment of women victims around the world, commented that "[t]he hoopla over the prosecution of the William Kennedy Smith rape case suggests that one famous [male] defendant still attracts far more attention than thousands of unknown [women] victims." Lori Heise, *When Women Are Prey*, WASH. POST, Dec. 8, 1991, at C1. Nevertheless, these cases further undercut the backlash against

new wave of feminism has hit the United States and women's rights are coming back onto the national political agenda.¹⁹⁸ In Chile, the women's rights movement was not stunted by a cultural backlash during the 1980s,¹⁹⁹ and the level of activism has since been increasing.²⁰⁰ One difference is that in Chile, the issue of domestic violence was brought to public attention eight years ago; whereas in the United States this issue arose about twenty years ago.²⁰¹ On the other hand, in other Latin American countries, the women's movement has been working on the issue of domestic violence for decades.²⁰² Another difference is that the Chilean movement could be more effective:

The Chilean movement to end intrafamily violence is responding to the problem in a distinctly different manner than the formula proposed by the feminists of the "North." It is working in nearly all levels: in the government, in non-governmental organizations, in feminist groups and in the organizations of the poor areas. The focus areas to overcome the problem of domestic violence include increasing awareness, assistance, treatment, and prevention. What is common in all these efforts, however, is their integral development.²⁰³

women's rights on the national political agenda.

¹⁹⁸ After the "Year of the Woman" in 1992, women's activism and the political climate for women's rights improved dramatically, but much work remains to be done to achieve women's equality in the United States. Oppenheim, *supra* note 164, at 31-38 (presenting a historical survey of women's rights and the women's movement in the United States from the 1970s until early 1993). During the Reagan and Bush years, among the women's movement, "the liberal group[s] were attacked as radicals by the conservatives, [and] those for the liberation of women were considered as a group attacking the basic values of the country." *Id.* at 32. In response to the Clarence Thomas hearings and other events, women in the United States, in large numbers, protested inequality and backed Bill Clinton for President and his campaign promises to advance women's rights. Women gained a number of new, high level political offices following the 1992 elections. Reviewing the media's reaction and the status of women's rights and political positions after the 1992 elections, there are "indicators that the degrading attitudes against women are a constant in North American society, but there are also big changes in public expectations." *Id.* at 33-38.

¹⁹⁹ Although the military government (1973-1989) repressed women's rights, the Chilean women's movement made significant gains. See *infra* notes 221-38 and accompanying text.

²⁰⁰ See generally REVISTA MUJER, Sept. 1993 (presenting articles relating the activities of women of Chilean and other nationalities).

²⁰¹ VIOLENCIA INTRAFAMILIAR Y LA SITUACIÓN DE LA MUJER EN CHILE 3 (1993) (ISIS Int'l Document No. 03454.00) (investigation of Soledad Larráin) [hereinafter VIOLENCIA INTRAFAMILIAR]. However, the issue of domestic violence was not high on the political agenda during the 1992 United States election campaign. Oppenheim, *supra* note 164, at 33-38.

²⁰² *Integral View*, *supra* note 10, at 20.

²⁰³ KATHERINE FROHLICH, ¿REFUGIOS PARA MUJERES MALTRATADOS EN CHILE? 2 (1993) (ISIS Int'l, Document No. 03803.00) (author's translation).

The problem with the myth that women are culpable as politically inactive is the underlying belief that the women's movement is solely responsible for changing the legal system's policy of discrimination against women. In the United States, some legal actors would like to see the women's movement singlehandedly reform the legal system.²⁰⁴ In Chile, those who are against legal reforms claim that "only societal organizations" can convince battered women to use the legal system, which is not seen as culpable.

The Chilean woman's political message is clear and has been presented in a concerted campaign against violence, but the social change underway is impossible to effectuate without the cooperation of the national legal and political systems.²⁰⁵ As Argentine official Haydée Birgin commented at SERNAM's International Meeting on the Politics of Equal Opportunities, which was attended by over 1,000 women in Santiago, Chile, because "the feminist revolution was outside the sphere of the [traditional] political powers, there is a need to normalize, transform, and legalize its transformation of society to the political [arena]."²⁰⁶ However, as far as creating the conditions in which this transformation can occur, that is the responsibility of the traditional power brokers.²⁰⁷ The conference also related information about women's political campaigns to transform Chilean society, culture, media, workplaces, families, laws, and politics of all types, with the overall goal of creating equal opportunities for women.²⁰⁸ The theme of the conference was that legislative affirmative action programs to create

²⁰⁴ Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1777 (1991) (arguing that sociological roots of violence against women have been institutionalized in the legal system, and that reform is the responsibility of the legal system, not the feminist movement). Yet, a debate still exists in feminist theory in the United States over the issue of how law should be placed in the context of society. A concurrent debate is whether the feminist movement in the United States has focussed too heavily on legal reforms and should re-focus on social change. See RHODE, *supra* note 153, at 252-53 ("[A]ssault rates are lower in societies where women have gained greater influence, respect, and socioeconomic status."); Ruthann Robson, *Gender and Other Disadvantages: A Review of Justice and Gender*, 18 FLA. ST. U. L. REV. 883, 887 (1991) (analyzing Catharine MacKinnon's position that: "[Rhode's book] recognizes the power of the state and consciousness — and legitimacy — conferring power of law as political realities that women ignore at their peril.").

²⁰⁵ *Cumplido Interview*, *supra* note 193, at 17.

²⁰⁶ Director of the Argentine Senate Committee of National Resources and Human Development Haydée Birgin, Address at Encuentro Internacional: Políticas de Igualdades de Oportunidades (Oct. 20, 1993) (Ms. Birgin was a member of the panel entitled *Igualdades de Oportunidades y su Relación con el Diseño y Aplicación de la Política Pública.*) (on file with the *Case W. Res. J. Int'l L.*).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

equal opportunities in government are essential to effectuate women's political power.²⁰⁹

Given the demonstrated level of women's political activism in Chile, it is clear that the purported lack of political participation by women is not a cause of the legal system's non-responsiveness to violence against women. Actually, the contrary is true:

During the last four years [since the end of the dictatorship], Chile has openly recognized another obstacle for the participation of women in the transition to democracy. That obstacle has been named, adequately, intrafamily violence. Here in Chile, as in other countries, it has been one of the biggest obstacles for the democratic participation of women in society.²¹⁰

MYTH: There are so many other human rights problems in Latin America that ending violence against women is not high on the political agenda.

Despite all of the problems in Latin America, the human rights movement and the struggle for democracy has spurred the growth, not the repression of the women's rights movement.²¹¹ Women have gained significant political power during the last two decades in spite of the forces of repression during this time of dictatorial rule in the Southern Cone. As discussed *infra*, this has provided an impetus to advance women's rights.

In the 1970s, following the lead of the *Madres de la Plaza de Mayo*,²¹² women in the Southern Cone courageously became the first

²⁰⁹ Politics of Equal Opportunities Conference, *supra* note 135 (A Plan for Equal Opportunities was outlined at the closure of the conference, and the idea received favorable feedback from all the major political parties in Chile.).

²¹⁰ FROHLICH, *supra* note 203.

²¹¹ See, e.g., Chuchryk, *supra* note 11 (discussing the "dual agenda" adopted among women political activists in Chile).

²¹² In Argentina, heavily armed police officials were dispersed among the *Madres* of the *Plaza de Mayo* in order to monitor their protests and conversations. JEAN-PIERRE BOUSQUET, *LAS LOCAS DE LA PLAZA DE MAYO* 120 (6th ed. 1984). Some women were tortured and "disappeared" because they were inquiring about their disappeared relatives. See generally NUNCA MÁS: THE REPORT OF THE ARGENTINA NATIONAL COMMISSION ON THE DISAPPEARED (1986) [hereinafter NUNCA MÁS] (describing the disappearance of thousands of men and women during the Argentine military regime of 1976-1979). Junta officials regularly surveilled and attempted to infiltrate the *Madres*. BOUSQUET, *supra* note 212, at 127-28. The *Madres* operated without the institutional resources of traditional political actors, and were turned away and officially negated by church officials. *Id.* at 119 (describing how a priest officially negated the *Madres* any status as auxiliaries of the church); *id.* at 129 (noting that when armed officials blockaded the *Madres*' protests in the *Plaza de Mayo*, the religious authorities closed the doors of the Plaza's cathedral to prohibit any refuge there).

sector of society to publicly protest grave human rights violations.²¹³ By the end of the 1980s, women were authors of successful campaigns to overturn dictatorships in a number of Latin American nations.²¹⁴

Historically, Latin American women's political actions, however, were mythologized and minimized by the United States and Western societies.²¹⁵ Similar conduct occurred among the traditional male powers from both the left²¹⁶ and the right²¹⁷ in Latin America.²¹⁸ During

²¹³ The Argentine Junta took power in March, 1976, and engineered a culture of fear and repression so strong that none of the traditional political groups could provide effective opposition. In April of 1977, the *Madres de la Plaza de Mayo* defied the prohibition against public meetings and organized the first public protest, it was then that "the generals lost their first battle." BOUSQUET, *supra* note 212, at 42. See also Churchryk, *supra* note 11 (discussing the parallel women's movement to end the dictatorship in Chile).

²¹⁴ See generally THE WOMEN'S MOVEMENT IN LATIN AMERICA: FEMINISM AND THE TRANSITION TO DEMOCRACY, *supra* note 11 (describing women-based, successful campaigns to overthrow dictatorships throughout Latin America).

²¹⁵ See, e.g., J.M. TAYLOR, *EVA PERÓN: THE MYTHS OF A WOMAN* 34-71 (1979) (detailing Eva Perón's life history and her extensive political power in Argentina during and after the Presidency of her husband, Juan Perón). Eva Perón also applied herself to winning the right to vote for women in Argentina. *Id.* at 76.

²¹⁶ According to middle-class Argentine Peronists, "Saintly Eva," or "Our Lady of Hope," was described as a mystical, intuition-based martyr who was created by a male political genius, her husband Juan Perón. She was seen as virginal, motherly, blond, and the guardian of the purity of the Peronist movement. As the "saintly spirit" of the Peronist movement, she is mistakenly said to have deferred to her husband on political matters: she was the spirit of the Peronist movement and he was the brains; she was ruled by intuition and he by reason; she was seen as a feminine martyr, while he took on political office out of a military sense of responsibility. *Id.* at 95-97. From the left, the fact that Eva Perón was an aggressive leader, who even engineered the purchase of arms for revolutionaries when threatened by a coup, *id.* at 56, was minimized by her image as a "*cabecita negra*" — i.e. a dark-haired, non-European woman — ruled by intuition. *Id.* at 131. Although admired as a revolutionary *compañera* of the left, her womanly role was to be supportive of Juan Perón and the movement, and to forego any personal power. *Id.* at 138-42.

²¹⁷ From the right-wing and the Argentine military, Eva Perón was seen as a dark, evil, voluptuous whore, and bastard child of the interior who had overstepped the boundaries of a proper woman's role. *Id.* at 89. The political influence and power she accumulated over the years was seen as an anti-feminine, vulgar abuse of her sexual influence. *Id.* at 78-79.

²¹⁸ All of the above myths echo the combination of race, class, and gender discrimination operating against Latina women in the world power structure:

In different formulations and different contexts, Argentineans have explicitly described *Evita's leadership not as political, but as spiritual, moral or religious*. At the time of her death Eva Perón was arguably the most powerful woman in the world. But Argentineans . . . remember her special power as *emotional and intuitive, violent, mystical, uninstitutionalized More than political authority, she exercised a sway*

Id. at 11 (emphasis added).

These myths have been traced to the patriarchal nature of Western society which tends to label women with myths based on gender stereotypes that minimize their roles in relation to

the dictatorships in Argentina (1976-1983)²¹⁹ and Chile (1973-1989),²²⁰ women political activists were characterized as highly emotional²²¹ and stereotypically feminine,²²² while men took credit for women's political formation and success.²²³ Also, the gender-based torture of female political prisoners — including rape and sexual harassment by male military officials²²⁴ — was not addressed by the international human rights community.²²⁵ At the same time, non-traditional

superior, male power. *Id.* at 10-19.

²¹⁹ See generally David Rock, *Antecedents of the Argentine Right*, in *THE ARGENTINE RIGHT: ITS HISTORY AND INTELLECTUAL ORIGINS, 1910 TO THE PRESENT 1* (Sandra McGee Deutch & Ronald H. Dolkart eds., 1993).

²²⁰ See generally MARK FALCOFF, *MODERN CHILE 1970-1989: A CRITICAL HISTORY* 295-312 (1989) (describing the 16 year dictatorial regime of General Augusto Pinochet Ugarte).

²²¹ The Mothers of the Plaza de Mayo were branded "Las Locas de la Plaza de Mayo" — i.e., "The Crazy Women of the Plaza de Mayo" — and "mothers of subversives" by the military government. Adolfo Pérez Esquivel, *Preface* of JEAN-PIERRE BOUSQUET, *LAS LOCAS DE LA PLAZA DE MAYO* 11 (6th ed. 1984) (explaining that the term "locas" is mistaken, and that they should more realistically be named "Courageous Women;" however, the book continues to use the term "locas" throughout its entire text).

²²² Women's protests and political actions opposing military dictatorships in the Southern Cone have been minimized by such caricatures, when, in fact, their well-organized protests were the most effective political strategy for overturning the dictatorships. See, e.g., Gloria Bonder, *The Study of Politics from the Standpoint of Women*, 35 INT'L SOC. SCI. J. 569, 581 (1983) (reviewing the *Madres de la Plaza de Mayo* as valuing "life over politics" and "love over ideology": "Neither . . . [the government's] threats nor their rifles are a match for the faith of a mother."). Others have analyzed their movement as unorganized and too focussed on their emotional roles as mothers to advance women's political power.

Far from being anti-feminist or unorganized, the *Madres* selected Alicia Moreau de Justo, the 90-year-old feminist and founder of the *Asemblea Permanente de Derechos Humanos*, to bring their petitions to the Junta officials who ultimately responded to the daily protest of over 1,000 women from various regions of Argentina in the *Plaza de Mayo*. BOUSQUET, *supra* note 212, at 123-29 (Although the Junta officials received the *Madres'* representatives, they refused to acknowledge any contact with, or knowledge of, the allegedly missing persons.).

²²³ In the preface to the book *LAS LOCAS DE LA PLAZA DE MAYO*, Nobel Prize winner Adolfo Pérez Esquivel described the history of the *Madres'* campaign from an outsider's perspective, using the "we" form to refer to traditional political actors. The "we" in the Pérez Esquivel's discourse is implicitly male, by virtue of including the male author and political actor. According to Pérez Esquivel, "We thought it was necessary to organize *them* as an institution, in order to make their actions profound," and "[w]e reflected with them," to create a campaign where the women symbolically represented "mothers of all the sons." The women were sent on tours of Europe with a mandate from traditional leftist institutions to become this symbol for the world. This type of symbolism deprives the *Madres* of their political agency: like Eva Perón, their skills were minimized by a mythology representing a feminine ideal being driven by a rational, male political strategist. Pérez Esquivel, *supra* note 221, at 12 (emphasis added). Similarly in Chile, women historically provided much of the political work and impetus for the human rights movement, but were blocked from obtaining positions of power within the traditional left. Political Participation, *supra* note 127, at 18.

²²⁴ See generally *supra* note 212.

²²⁵ *Id.* A Northern analyst of torture during the Dirty War in Argentina counts beatings and

political action by women transformed and expanded politics in general in the Southern Cone, and such action laid the foundation for more grass-roots participation and the adding of human rights issues to national political agendas.²²⁶

Fighting human rights abuses such as governmental torture spurred a parallel, rapidly growing involvement of Latin American women fighting for *their* human rights — especially the fundamental right to be free from violence.²²⁷ These issues arose, in part, because of the military dictatorships' repression of women's rights in order to create a "modern," "Western," and "Christian" society.²²⁸ In particular, the Chilean dictatorship arose with the support of the United States.²²⁹ More recently, the situation in Peru is another example demonstrating how the lack of democracy and the repression of women's rights are interrelated in Latin America.²³⁰

rape of women prisoners as torture accompanied by rape, while he counts the rape of male political prisoners as Freudian, psychosexual torture. FRANK GRAZIANO, *DIVINE VIOLENCE: SPECTACLE, PSYCHOSEXUALITY & RADICAL CHRISTIANITY IN THE ARGENTINE DIRTY WAR* 38 (1992). In 1992, the U.N. Special Rapporteur on Torture declared that the rape of female political prisoners is within the definition of torture, adding that this was necessary because of the long-standing failure of the international human rights community to condemn it as a human rights violation. *Summary of Record of the 21st Meeting of Economic and Social Council's Commission on Human Rights*, 48th Sess., 21st mtg. at 8, U.N. Doc. E/CN.4/1992/SR.21 (1992).

²²⁶ IAN GUEST, *BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS* 52-62 (1990); Jessica Neuwirth, *Towards a Gender-Based Approach to Human Rights Violations*, 9 WHITTIER L. REV. 399 (1987).

²²⁷ Parallels have been drawn between the military regime's State sponsored violence, which included the gender-based torture of women political prisoners, and State tolerated violence against women. MARIA T. MARSHALL & MARIA E. VALENZUELA, *FACULTAD LATINOAMERICANA DE CIENCIAS SOCIALES, LA MUJER Y EL MIEDO* 1-8 (1986) (ISIS Int'l Document No. 00165.00); MARIA E. VALENZUELA & MARIA T. MARSHALL, *FACULTAD LATINOAMERICANA DE CIENCIAS SOCIALES, MUJER: VIDA COTIDIANA Y VIOLENCIA* 1-10 (1986) (ISIS Int'l Document No. 00164.00) (relating the patriarchal violence of the military regime with other forms of violence against women in everyday life); Ximena Bunster, *La Tortura de Presas Políticas*, FEM, Dec.-Jan. 1984-85, at 43.

²²⁸ GRAZIANO, *supra* note 225, at 147-201 (citing the Argentine Military Training Manual No 14 (1976) as including "women's rights" on a list of "subversives" during the years of the Junta; "subversives" were to be eliminated as poisonous to modern society). *See also* Chuchryk, *supra* note 11, at 150 (relating that the Pinochet regime, in enforcing its plan of "modernization," abolished most women's rights legislation); Jane S. Jacquette, *Women and Modernization Theory: A Decade of Criticism*, 34 WORLD POL. 267-84 (1982); Political Participation, *supra* note 127, at 23 (The Pinochet regime reduced the Chilean National Office for Women, founded in 1972 as an executive ministry for women's rights, to an agency devoted to enforcing women's role in the home as mother and wife.).

²²⁹ *See* HARRY ROSITZKE, *THE CIA'S SECRET OPERATIONS: ESPIONAGE, COUNTERESPIONAGE, AND COVERT ACTION 194-95* (1977).

²³⁰ The current Peruvian "Constitutional Congress", which was established after an 1992 autoup and the closing down of the democratic Congress, has enacted a new Constitution that

Currently, in the campaign against violence against women, activists are using the slogan: "Democracy, without the human rights of women, IS NOT DEMOCRACY."²³¹ However, in 1991, the United States Embassy in Chile refused to answer the question of whether support by the United States of overseas democracies would include women's rights as part of the criteria for the definition of a democracy.²³²

The Latin American campaign for women's human rights remains connected to the more general human rights agenda, and is considered part of the social revolution necessary to ensure peace:

Women, then, proclaim the indivisibility of their human rights, considering that "as long as women have no right to live without violence, and the necessary measures to resolve structural violence against them are not adopted, there can be no advancement towards the construction of a sustainable peace process."²³³

Furthermore, the campaign for women's human rights has never been seen to necessitate the abandonment of other human rights issues.²³⁴ On the contrary:

This [recognition and enforcement of women's rights as human rights] does not mean that the human rights community should abandon other issues, rather that it should incorporate gender perspectives into these and see how this broadens their scope of action. The idea is that wom-

eliminates the provision "women's rights are no less than the rights of men." *Integral View*, *supra* note 10, at 20.

²³¹ CHILEAN NETWORK AGAINST DOMESTIC AND SEXUAL VIOLENCE, JOIN THE CAMPAIGN (1993) (This leaflet, distributed in downtown Santiago on November 2, 1993, advertised the International Day for No More Violence Against Women, with the slogan "Vote for NO MORE VIOLENCE against women.").

²³² James Dandridge, the U.S. Counselor for Public Affairs at the U.S. Embassy in Chile when presenting a summary of the history of Chile for a general audience of United States citizens, was asked: "Whether U.S. support of democracy in other countries included the criteria of minimal rights for women, for example, in the 1991 Gulf War, how is it that the United States said they were supporting democracy in Kuwait, where women are not allowed to vote?" The Counselor and his staff refused to answer the question, even after it was rephrased to the general question of whether United States support for democracy overseas includes women's rights. Interview with James Dandridge, U.S. Counselor for Public Affairs, U.S. Embassy to Chile, Santiago, Chile (July 1, 1991) (on file with the *Case W. Res. J. Int'l L.*). The author's question was then directed by the staff to Caryn Lindsay, Assistant Cultural Affairs Officer, and answered with the comment that Chilean women are "very traditional" and not interested in women's rights. Interview with Caryn Lindsay, *supra* note 35.

²³³ *Integral View*, *supra* note 10, at 19 (quoting *Diagnósticas y Estrategias Sobre los Derechos Humanos de las Mujeres*, LA NUESTRA (San José, Costa Rica), Dec. 3-5, 1992).

²³⁴ Chuchryk, *supra* note 11 (discussing the "dual agenda" adopted by Chilean women during both the dictatorship and the transition to democracy).

en possess instruments to eliminate human rights discrimination. According to international law, human rights are historically determined and thus susceptible to evolution through the incorporation of new categories of people who may acquire the status of human beings in the eyes of society.²³⁵

The Chilean woman's political experience with respect to general human rights issues has resulted in a political voice that is being heard by more traditional powers. Recently elected Chilean President Eduardo Frei included the eradication of domestic violence and the respect of women's rights in his election platform.²³⁶ As a candidate, Eduardo Frei also promised SERNAM the financial support necessary to effectuate and enforce the Intrafamily Violence Act.²³⁷ In 1993, the Chilean Network Against Domestic and Sexual Violence, which connects every interested organization, was inaugurated with the purpose of carrying out the mandate behind the Intrafamily Violence Act. Although legal reforms, among other measures designed to combat domestic violence in Latin America are not yet fully enacted,

[t]he actions carried out by women at different levels, especially information and training, self-help groups, and, more recently, national and regional networks, have helped put the issue of violence against women on the political and social agenda of every Latin American country.²³⁸

IV. COMMON MYTHS INSTITUTIONALIZED IN LEGAL SYSTEMS

Argentine researcher Cecilia Vila has studied legal systems from seven different cultures and found that each has institutionalized certain myths about battered women, and used these myths to justify inaction in domestic violence cases. The five myths identified by Ms. Vila are analyzed with respect to the Chilean and United States legal systems.²³⁹

²³⁵ *Integral View*, *supra* note 10, at 20 (citing Charlotte Bunch, *Hacia una Revisión de los Derechos Humanos*, in *LA MUJER AUSENTE: DERECHOS HUMANOS EN EL MUNDO* (1991); CECILIA MEDINA, *HACIA UNA GARANTÍA MÁS EFECTIVA DEL USEFRUCTO DE LOS DERECHOS HUMANOS EN EL SISTEMA INTERAMERICANO* (1993)).

²³⁶ Presidential candidate Eduardo Frei, Address at Santiago, Chile (Sept. 25, 1993) (on file with the *Case W. Res. J. Int'l L.*). See also *Ante Congreso Pleno: Aylwin Entrega Hoy el Mando a Eduardo Frei*, *EL MERCURIO*, Mar. 11, 1994, at 1 (reporting the election of Eduardo Frei to the office of President of the Republic of Chile).

²³⁷ Interview with María Elena Valenzuela, *supra* note 131.

²³⁸ *Integral View*, *supra* note 10, at 21.

²³⁹ The first five myths are translated directly from Vila, *supra* note 26.

(1) *The first myth identified is that domestic violence can be defined in terms of sickness. That is, women have masochistic or weak personalities, while batterers have psychopathic or alcoholic personalities. This myth obscures the structural and legal aspects of the battered woman's problems.*²⁴⁰

Alcohol is actually present in only fifty percent of the domestic violence cases in Chile.²⁴¹ Similarly, the myth that batterers have some mental illness, thereby explaining the violence, is not supported in fact. Batterers do not fall into a single, determinable psychiatric category.²⁴² In fact, psychological treatment of batterers has had mixed results. One psychologist in the United States specializing in mandatory treatment programs for batterers has found that, despite treatment, there is a high rate of recurrence because, in many cases, the problem goes much deeper than what outpatient treatment is able to repair. He recommends further study and the increased use of imprisonment due to the batterers' continued violent attitudes towards women.²⁴³ Additionally, the same researcher found that battered women who receive adequate protection from the batterer have almost a fifty percent chance of ending the violence in their lives.²⁴⁴

Furthermore, studies in both the United States and Chile indicate that the psychological characteristics of the battered woman syndrome²⁴⁵ are traceable to the effects of the violence.²⁴⁶ In Chile, the

²⁴⁰ *Id.* at 15-16.

²⁴¹ QUIROZ, *supra* note 80, at 13.

²⁴² *Id.*

²⁴³ Hoffman, *supra* note 20.

²⁴⁴ *Id.* at 25.

²⁴⁵ FALUDI, *supra* note 102, at 360 (describing Dr. Lenore Walker's testimony before the American Psychiatric Association regarding the helplessness and powerlessness felt by those suffering from battered woman syndrome). *Cf.* State v. Kelly, 478 A.2d 364, 375-80 (N.J. 1984) (establishing the reliability and relevance of expert testimony on "battered woman's syndrome" as admissible evidence in support of arguments that a battered woman accused of murder acted in self-defense). While the decision rests on the legal issue of reasonable belief of imminent danger in the context of a lack of effective legal remedies for self-protection, the text of the expert testimony heard by the court instead focuses on the psychology of the battered woman, to explain to the jury why the woman did not leave her abusive marriage, inventing a new and rather degrading legal issue. *See* ROGER LANGLEY & RICHARD C. LEVY, WIFE BEATING: THE SILENT CRISIS 112-14 (1977), *cited with approval in id.* ("Some women . . . become so demoralized and degraded by the fact that they cannot predict or control the outcome of the violence that they sink into a psychological paralysis and become unable to take any action at all to improve or alter the situation. There is a tendency in battered women to believe in the omnipotence or strength of their battering husbands . . .").

²⁴⁶ LANGLEY & LEVY, *supra* note 245, at 112-14 (While the American Psychological Asso-

most telling psychological characteristic of 222 battered women interviewed was the fear of violent retaliation for seeking escape.²⁴⁷ The great majority abhorred the violence and wanted it to stop.²⁴⁸

Domestic violence typically begins after a couple has begun living together, making it difficult for women to avoid the problem in advance.²⁴⁹ Although some battered women consider domestic violence to be "normal" due to the existence of violence in their family history,²⁵⁰ these very same women desire outside assistance to end the pattern of violence in their lives.²⁵¹

In Chile, instead of blaming the victim for assumed psychological shortcomings, advocates and Congressional members alike are beginning to recognize psychological violence as a form of violence against women. Unlike the U.S. Violence Against Women Act, the Intrafamily Violence Act penalizes psychological violence.²⁵² Although the Intrafamily

ciation contemplated labelling the "battered women's syndrome" with the diagnosis of "masochism," Lenore Walker presented evidence that the cause of the symptoms was the near impossibility of escaping the relationship without being subjected to retaliatory beatings.). See also QUIROZ, *supra* note 80. Referring to Casa de la Mujer la Morada's experience with 200 battered women of different ages and social classes, Ms. Quiroz relates that these women "suffer principally from fear" because they have no safe place to go. *Id.* at 14. Then there is a great deterioration of their self-esteem, "due to this anguishing situation," a tendency to minimize the violence because of their fear of the batterer, and isolation, because "the man generally ends up controlling her activities and external contacts." *Id.* at 14-15. The ambivalence seen in battered women is a result of the reduced decisionmaking capacity and an effect of living in a violent situation with little chance of a safe exit; but, at the same time, these women wanted the violence to end. *Id.* at 15.

²⁴⁷ Not only was there a high incidence of continued and retaliatory beatings when women attempted to use the legal system, the two main reasons that other women did not make legal complaints were the legal system's tolerance of domestic violence and a fear of increased violence for making a complaint. See MOLTEDO CASTAÑO ET AL., *supra* note 111, at 37-38.

²⁴⁸ See *id.* at 35-36 (pointing out that 51.4% of women tried to defend themselves, 65.9% were enraged, 65.9% said they wanted the situation to change, 40.7% wanted to separate or divorce, 35.6% wanted to retaliate, and 56.2% said they felt impotent). In contrast, only 3% of women felt merciful, 3.7% felt culpable, 6.7% thought it was normal, and 5.9% felt resigned because "that is the way a woman must live." *Id.*

²⁴⁹ VIOLENCIA INTRAFAMILIAR, *supra* note 201, at 7 (noting that in 7% of the cases, domestic violence began before the couple began living together; in 35.5% of the cases it began during the first year of living together; in 35.5% of the cases, it began between the second and fifth year of living together; and in 21% of the cases it began between the sixth and fifteenth year of living together).

²⁵⁰ MOLTEDO CASTAÑO ET AL., *supra* note 111, at 29-30.

²⁵¹ They identified better laws to defend them and economic assistance as the two most important factors necessary to overcome domestic violence. *Id.* at 41. These interviews were used to formulate the provisions of SERNAM's Intrafamily Violence Act. Interview with Cecilia Moltedo, *supra* note 152; Interview with María Elena Valenzuela, *supra* note 131; Interview with Adriana Muñoz, *supra* note 186.

²⁵² SERNAM Intrafamily Violence Act, *supra* note 7, art. 1 (as approved by the House)

Violence Act does not define psychological violence, general working definitions include "insults, put-downs or offenses proffered by the aggressor[.]"²⁵³ threats of violence and death threats,²⁵⁴ or constant complaints about a woman's conduct or denials. A project effectuating Chilean Penal Code article 296, which penalizes threats as a crime, has been established.²⁵⁵ Although women must prove that the threat is accompanied by the realistic chance that it will be acted on,²⁵⁶ the law's penalties and resultant judicial monitoring has proven to be fairly successful in preventing further aggressions.

Psychological violence almost always precedes physical domestic violence, but it is also a separately defined act of violence against women in Chile.²⁵⁷ Chilean research and analysis indicates that the effects of psychological violence are sometimes as grave as those of physical violence.²⁵⁸ Consistent with this analysis, the latest research shows that 33.5% of Chilean women suffer from psychological violence.²⁵⁹

(2) The second common misconception is that the woman did something to provoke the violence. This misconception is based on the belief that there is a "natural" familial hierarchy where the woman must obey the husband; and, in cases of disobedience, the husband's "enforcement" is legally justifiable.²⁶⁰

How a battered woman supposedly "provokes" violence has no rhyme nor reason. Instead, typically a system of constant, but unpredictable, violence is highly interrelated with the man's exercise of control and power over the woman.²⁶¹ The victim is unable to predict which behavior will please the batterer and prevent the violence, and is unable to prevent further torture by changing her behavior.²⁶² Typical-

("Whoever mistreats [defined family members] by act or word shall be sanctioned according to Article 7 this law."); Otero's Intrafamily Violence Act, *supra* note 7, art. 1 ("The act of intrafamily violence will be understood to be every action that implies a mistreatment that significantly effects the physical or mental health of [a defined family member].").

²⁵³ GONZÁLEZ, *supra* note 84, at 15.

²⁵⁴ *Id.*

²⁵⁵ EVALUACIÓN, *supra* note 87, at 77 (citing Art. 296 of the Chilean Penal Code).

²⁵⁶ *Id.*

²⁵⁷ GONZÁLEZ, *supra* note 84, at 13.

²⁵⁸ *Id.* See also Interview with Miguel Otero, *supra* note 181.

²⁵⁹ VIOLENCIA INTRAFAMILIAR, *supra* note 201, at 11.

²⁶⁰ See generally Vila, *supra* note 26.

²⁶¹ MOLTEDO CASTAÑO ET AL., *supra* note 111, at 25-29.

²⁶² *Id.* at 30-31.

ly, the batterer exercises increasing control over the woman's behavior, preventing her from leaving home or from expressing herself within the home, resulting in her isolation and an apparently more passive, submissive, and stereotypically female role.²⁶³ The violence continues and increases, notwithstanding that the woman adopted and complied with the role. In other words, the battered woman's syndrome is imposed and enforced by the batterer.²⁶⁴

On the other hand, assertive and empowered action by battered women tends to increase the violence. The act of making a complaint or attempting to escape from an abusive relationship is very dangerous.²⁶⁵ In the United States, some women's attempts to become more assertive and in control of their lives has been linked to increased repression and violence by the men in their lives.²⁶⁶ In Chile, one study demonstrates that thirty-three percent of battered women were their family's primary providers, and that they were then beaten *because* they did not fulfill this role to their husband's standards.²⁶⁷

In both the United States and Chile, the facts that aggression tends to increase *after* a battered woman seeks outside assistance,²⁶⁸ and that the respective legal systems do not adequately protect women from continued violence,²⁶⁹ results in the battered woman's fear of leaving the abusive relationship.²⁷⁰ These facts also help to explain the battered woman's purported passivity and this myth's interpretation of the exaggerated gender stereotypes.²⁷¹

²⁶³ *Id.*

²⁶⁴ QUIROZ, *supra* note 80, at 14-15.

²⁶⁵ See *supra* notes 116-19 and accompanying text.

²⁶⁶ FALUDI, *supra* note 102, at 443-53 (Illustrative cases include a husband emphatically increasing his violence after his wife tries to get a better job; workers at a plant sexually assaulting women trying to move into better-paying, traditionally male positions; employers implementing a policy that forces women to either transfer to the lower-paying, traditionally female positions, or get sterilized. In all of these cases, only protracted litigation proved successful in correcting the general employment discrimination issues, but did not compensate for the violence experienced by women throughout the process.).

²⁶⁷ In contrast, another myth postulates that a woman choosing to work upsets her husband's sense of his masculine role, and that this reversal of the gender roles is a cause of domestic violence.

²⁶⁸ For example, psychological violence typically ensues once the battered woman seeks outside assistance. See generally *supra* note 252.

²⁶⁹ See *supra* note 75 and accompanying text.

²⁷⁰ QUIROZ, *supra* note 80, at 14 (noting that a result of the failures of legal systems is that battered women suffer principally from fear because they have no safe refuge).

²⁷¹ *Id.* (discussing the isolation imposed by the batterer and the deterioration of the victim's self-esteem due to abuse).

(3) (4) *The third and fourth myths identified by Ms. Vila can be addressed and dismissed in conjunction with one another.*

Ms. Vila's third myth is that a battered woman who wanted to leave an abusive relationship could do so at her discretion. By failing to account for the panic of the woman confronting her aggressor and the lack of outside assistance, this myth institutionalizes the legal system's acquittal when the woman refuses to leave.²⁷² The fourth myth identified by Ms. Vila is that a woman so desiring could make a legal complaint about the violence. Not only does this myth fail to account for the serious risk of increased aggression, the lack of prosecution in the legal system, and the lack of protection for the victim, but it also produces a "bureaucratic" attitude among the State's legal officials.²⁷³

(5) *The final myth identified by Vilas in her cross-cultural study is that the problem is relegated to the lower classes.*

This myth, although backed by faulty academic studies, is reflective of the social class system and is based on a tendency to denigrate the individual suffering from domestic violence.²⁷⁴ This myth is used to justify inaction by the legal system under the theory that poverty must first be reduced before domestic violence can be eliminated.²⁷⁵

In reality, domestic violence exists at the same high levels in the United States regardless of economic class.²⁷⁶ Additionally, recent Chilean studies show that domestic violence exists not only among the poor, but also in the middle and upper classes. A 1989 study of 222 poor women found that 80.2% had suffered domestic violence at least once, while 62.6% were battered by their husbands, boyfriends, or a male family member within the past year.²⁷⁷ However, this study noted that

²⁷² See generally Vila, *supra* note 26.

²⁷³ *Id.*

²⁷⁴ *Id.* See also CENTRE FOR SOC. DEV. AND HUMANITARIAN AFF., VIOLENCE AGAINST WOMEN IN THE FAMILY, U.N. Doc. ST/CSDHA/2, U.N. Sales No. E/89/IV.5 (1989) (reporting a high level of violence against women in both the developed and developing nations around the world, and concluding that although a lack of economic development or "modernization" has served as an excuse to eschew the use of national and international legal reforms, the myth that violence against women is caused solely by poverty or underdevelopment is false).

²⁷⁵ See generally Vila, *supra* note 26.

²⁷⁶ See generally *Women and Violence: Hearings Before the Senate Committee on the Judiciary*, 101st Cong., 2d Sess. (1990).

²⁷⁷ MOLTEDO CASTAÑO ET AL., *supra* note 111, at 24-28. The participants lived in extreme poverty — below the subsistence level. *Id.* at 23-24. The group studied was very specific: con-

poverty cannot be the sole cause of violence since the woman's economic dependence on her husband was not the only issue at hand.²⁷⁸ Also, violent manifestations of frustration were directed at women, not men such as bosses or co-workers.²⁷⁹ A woman's lack of economic means to leave a violent relationship reflects a social structure in which men have more economic power than women.²⁸⁰ This feminization of poverty is problematic in the United States as well. For example, in the 1980s, almost half of all homeless women, the fastest growing segment of the homeless population, were escaping domestic violence.²⁸¹

Earlier Chilean studies on domestic violence were conducted primarily among the lower classes.²⁸² However, in 1992, the first thorough study to include the upper, middle, and lower classes²⁸³ verified what victims' advocates had long claimed: domestic violence is present throughout all Chilean class levels.²⁸⁴ This study indicates that, while middle and lower classes of women experience physical violence on similar levels of frequency, upper-class women also experience physical violence.²⁸⁵ Also, the degree of psychological violence was similar in all three classes.²⁸⁶

A proponent of this fifth myth argues that poor battered women are in the "*machista* subculture" of the lower classes "*because they have been beaten all of their conjugal lives.*"²⁸⁷ Interviews indicate that poor battered women abhor the violence and wish, not only that the law

tacts were made with women's organizations, community groups, and workshop centers in seven Chilean cities. *Id.* at 13 (pointing out that 222 of the 560 women who were originally interested completed the entire study).

²⁷⁸ *Id.* at 24.

²⁷⁹ *Id.* (suggesting that the violence was gender motivated).

²⁸⁰ *Id.*

²⁸¹ FALUDI, *supra* note 102, at xiv (citing WOMEN AND HOUSING TASK FORCE, NAT'L LAW-INCOME HOUSING COALITION, UNLOCKING THE DOOR: AN ACTION PROGRAM FOR MEETING THE HOUSING NEEDS OF WOMEN 6, 8 (1988)).

²⁸² See VIOLENCIA INTRAFAMILIAR, *supra* note 201, at 1.

²⁸³ *Id.*

²⁸⁴ See *Battered from the Beginning*, 1 WOMEN'S HEALTH J. 20 (1991); Maria E. Meza, *Violencia Conyugal — Quien te Quiere ¿Te Aporrea?: Aunque no hay Estadísticas, el Problema en Chile es Mucho Más Grave de lo Que Se Cree: Traspasa Edades y Clases Sociales*, PAULA, Feb. 1989, at 33 (relating case histories of upper and middle-class women); Interview with Rodrigo Silva, *supra* note 25 (stating that 15-20% of his upper-class female clients involved in separation, child custody, or support cases told him their husband beat them).

²⁸⁵ VIOLENCIA INTRAFAMILIAR, *supra* note 201, at 4. On the greater intensity of injuries among the upper class, see González, *supra* note 79, at 5 (noting that the proportion of grave injury cases, as compared to light injury cases, is higher in upper-class areas).

²⁸⁶ VIOLENCIA INTRAFAMILIAR, *supra* note 201, at 4.

²⁸⁷ COOPER MAYO, *supra* note 21, at 37.

would protect them, but also that they were more financially independent so they could leave the abusive relationship.²⁸⁸ The flip side of the myth is that domestic violence is considered a "taboo" subject among Chile's upper and middle classes, and that makes seeking outside assistance more difficult.²⁸⁹ Similarly, the misguided misconception of cultural relativism that women in the United States enjoy superior rights to women in developing countries prevents the enactment of international legal remedies that would benefit women in the United States. A similar misconception has been used to justify the failure to use sanctions in the upper classes in Chile that would be considered appropriate among the poor. The "sanction" of encouraging a battered woman to pardon her husband is currently being used in a middle-to-upper class jurisdiction in Santiago because the judge believes domestic violence is a problem of the lower classes and "insists that . . . [domestic violence] is the exception in my jurisdiction."²⁹⁰

V. THE CHILEAN LEGAL SYSTEM: HIDDEN JUDICIAL DISCRETION IN DOMESTIC VIOLENCE CASES

A. Penal Sanctioning Processes

Judge Valdovinos also monitors cases to see if the violence continues, and is willing to impose further penalties, including imprisonment, upon repeated incidents.²⁹¹ Judicial discretion allows her to impose a series of sanctions from a list she has created for use in domestic violence cases.²⁹² Predominately, Judge Valdovinos "pardon[s]"

²⁸⁸ See MOLTEDO CASTAÑO ET AL., *supra* note 111, at 41 (discussing two of these women's main recommendations for resolving domestic violence: better laws to protect them and economic independence).

²⁸⁹ Interview with Ximena Ahumada, Head of SERNAMEC's Domestic Violence Program, in Santiago, Chile (July 29, 1991) (on file with the *Case W. Res. J. Int'l L.*); Interview with Rodrigo Silva, *supra* note 25.

²⁹⁰ Interview with Amanda Valdovinos, *supra* note 91 (Stating that "in the lower class areas, like Pudahuel and Renca, violence is an everyday act. My jurisdiction is a middle- and upper-class jurisdiction, so there is less violence." She adds that while pardoning and therapeutic activities, such as dance and literature classes for the woman, work in her jurisdiction, "because when the woman feels better, everyone around her feels better," she would recommend mandatory rehabilitation of batterers in the lower classes since "they grew up seeing their father beat their mother, and think violence is normal."). However, even conservative Senator Miguel Otero is bothered by this myth, stating that his legislative proposals "would not only apply to the lower classes, but also to the upper classes. There is family violence in the upper classes." Interview with Miguel Otero, *supra* note 181.

²⁹¹ Interview with Amanda Valdovinos, *supra* note 91.

²⁹² *Id.* Judge Valdovinos admitted to using a list of sanctions in determining the appropriate sentence for a convicted defendant. See *id.* (referring to a list of sanctions passed to the author during the interview which the judge preferred be kept private in Chile but authorized for publi-

batterers and lectures them not to hit the woman again.²⁹³ She backs this policy by her beliefs that this is the best sanction in a Latin American country, that domestic violence is very rare in the middle to upper-class area of Santiago comprising her jurisdiction, and that some women, because they are so "protected" in Chilean society, "look for violent situations."²⁹⁴ Although she agrees that domestic violence is unjustifiable, she also claims to understand its existence.²⁹⁵ In so acting, the judge is using judicial discretion, built into the Chilean Penal Code, which allows for a choice of imprisonment or a small fine in "light" injury cases.²⁹⁶ Similarly, two sections of the Code of Criminal Procedure allow a judge discretion to lecture the parties²⁹⁷ and suspend any sentence.²⁹⁸ A 1989 amendment to the Code of Criminal Procedure should limit this discretion by mandating that criminal judges view protection of victims as a primary obligation and take necessary measures to this end.²⁹⁹

Many Chilean legal actors believe that there is no judicial discretion in domestic violence cases; and therefore, mistakenly conclude that every "light" injury case could only be sentenced by a small fine.³⁰⁰ With rare exceptions,³⁰¹ such a fine is levied in the eighty-two percent of domestic violence cases considered "light" injury cases.³⁰² However, the penal code allows for "light" injury cases to carry a sentence of imprisonment.³⁰³ In other words, although many Chilean legal actors mistakenly blamed the inadequate sentencing on the limitations of the penal code, the blame rightfully should be placed on the shoulders of the judiciary.³⁰⁴

cation in an English-language journal).

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* See CÓDIGO PENAL, art. 494 (Chile).

²⁹⁷ CÓDIGO PENAL, art. 494 (Chile); CÓDIGO DE PROCEDIMIENTO PENAL [C. CRIM. P.] art 561 (Chile).

²⁹⁸ CÓDIGO DE PROCEDIMIENTO PENAL [C. CRIM. P.] art. 564 (Chile) (permitting the judge to suspend sentence for up to three years, but imposing the obligation to implement the sentence upon reincidence).

²⁹⁹ CÓDIGO DE PROCEDIMIENTO PENAL [C. CRIM. P.] art. 7 (Chile).

³⁰⁰ Interview with Amanda Valdovinos, *supra* note 91. (The judge believes that although she is doing "nothing new . . . [she] doesn't want them to know everything . . . [that she is] doing[.]")

³⁰¹ See *infra* notes 305-06 and accompanying text.

³⁰² See QUIROZ, *supra* note 80 (pointing out that "light" injury cases are sanctioned with only a small fine, if sanctioned at all).

³⁰³ See CÓDIGO PENAL, art. 494 (Chile).

³⁰⁴ Interviews with Alberto Teke, *supra* note 85 (stating his belief that Penal Code does no

In the municipal district of Santiago, advocates in SERNAM's Pilot Project have had to move judges away from the penal code's "formalism" in order to procure prison sentences and a concomitant decrease in recidivism.³⁰⁵ Similarly, the Pilot Project has presented evidence to judges showing a history of violence in the cases they handle, in an effort to educate the judiciary on the gravity of domestic violence.³⁰⁶ This is simply another example of the Pilot Project's efforts to overcome the "formalism" perceived in the Code of Criminal Procedure.

Comparing the results of the cases litigated by SERNAM's Pilot Project with those in the other Santiago criminal district — that utilizes suspended sentences and lectures — demonstrates the ample judicial discretion allowed by the Chilean Penal Code in domestic violence cases. However, in contrast to the cases reviewed above, Chilean judges usually claim to be bound by codified legislation, and deny the discretion to interpret the law.³⁰⁷ As will be explained *infra*, Chilean judges at times develop *de facto* judicial norms, such as the purported limitation on discretion to impose sanctions in domestic violence cases, that have the effect of limiting the interpretation of codified law. The Chilean civil law tradition of legal formalism described *infra* differs significantly from the United States legal tradition.

When 19th century Western European rationalism was imported to Latin America from Spain, the attempt to empirically codify all legal rules and regulations resulted in a formalistic and ultimately conservative view of the role of judges in Latin America. Through the Spanish civil law system, Latin American legal systems codified norms of the existing societal order of the late 19th and early 20th centuries, including the concept of patriarchy.³⁰⁸ The Chilean Penal Code, adopted from the Spanish version, has not been substantially revised since 1873, and still incorporates patriarchal norms that influence judicial decisionmaking in domestic violence cases.³⁰⁹

Moreover, during the mid-20th century, although Chilean society was changing with the advancement of women's rights, Chilean judges

allow a "light" injury to be penalized with imprisonment).

³⁰⁵ EVALUACIÓN, *supra* note 87, at 76-77.

³⁰⁶ *Id.* Note that article 7 of the Code of Criminal Procedure also states that one of the primary obligations of criminal judges is to collect proof of the crime. CÓDIGO DE PROCEDIMIENTO PENAL [C. CRIM. P.] art. 7 (Chile). To this end, article 7 requires the judge "to practice . . . the investigative procedures that are necessary" to accomplish this obligation. *Id.*

³⁰⁷ See generally Correa, *supra* note 1.

³⁰⁸ JOHN H. MERRYMAN & DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS 119-29, 195-220 (1976).

³⁰⁹ González, *supra* note 79, at 13.

were becoming increasingly formalistic and "scientific" about the application of the law.³¹⁰ After 1945, with the onset of modernism, the Chilean legal system moved away from the belief that law should relate to family and neighborhood life, and towards a system of "abstract and technical justice."³¹¹ Legal "experts" became less concerned with the affairs of people, and more concerned with basing their "logical, semantic, and epistemological" decisions on "a matrix of rules found exclusively in the codebooks."³¹² Following this tradition, current judges have deduced that the penal code limits their ability to sanction domestic violence to only a small fine.³¹³ As was demonstrated *supra*, alternative interpretations of the penal code allow that domestic violence may be sanctioned with a prison sentence, a suspended sentence, or other measures necessary to protect the victim.³¹⁴

A recent study of Chilean judicial attitudes explains why judges refrain from stating their reasons for choosing between different interpretations of the codes.³¹⁵ As early as 1969, with the civil law system generally moving away from strict formalism, judges routinely interpreted codified laws.³¹⁶ In Chile, the codified laws at times present the possibility of diverse interpretation requiring judges to make a choice.³¹⁷ However, Chilean judges generally consider themselves to be "slaves to the law,"³¹⁸ and, therefore, present their judgements "as the only and correct interpretation of the law,"³¹⁹ and their reasoning as an "essentially logical and mechanical" application of the codified law.³²⁰ Their reasoning and sentences "must always correspond to the express text of the law."³²¹

In reality, Chilean judges, especially in domestic violence cases, have been interpreting the codes all along and have even developed judicial norms.³²² This explains the development of the *de facto* judicial norm that "light" injury domestic violence cases can only be sen-

³¹⁰ See *id.* at 6-7.

³¹¹ *Id.* at 7.

³¹² *Id.*

³¹³ See generally *id.*

³¹⁴ See *supra* notes 303-07 and accompanying text.

³¹⁵ See generally González, *supra* note 79.

³¹⁶ *Id.* at 83.

³¹⁷ Correa, *supra* note 1, at 83.

³¹⁸ *Id.* at 86.

³¹⁹ *Id.* at 93.

³²⁰ *Id.* at 83.

³²¹ *Id.*

³²² *Id.* at 91 (noting the development of case law, with no basis in legislation, that protects the rights of women in live-in relationships).

tenced with a small fine.³²³ Since the principle of *stare decisis* is not applicable in the Chilean legal system,³²⁴ the judicial application of this *de facto* norm in the great majority of domestic violence cases must be influenced by other factors.

The failure of Chilean judges to state their reasoning masks the value judgements made in nearly every decision.³²⁵ Chilean judges must choose between various interpretations of the law; however, by justifying their decisions with the formalistic assertion that they are "merely applying" codified legislation they "refuse to submit to criticism and self-criticism of their own value-judgements, interests, and options, which, undoubtedly, play a fundamental role in each of their decisions."³²⁶ This approach was particularly prevalent during periods of dictatorial rule when many Chilean judges, including members of the Supreme Court, claimed they were "merely applying" the codes dictated by the military government, even to the point of refusing to apply available constitutional principles in cases of grave human rights violations.³²⁷ This approach has carried over to the eighty-two percent of domestic violence cases that are adjudicated as "light" injury cases and punished, if at all, with only a small fine.³²⁸

³²³ The norm, which is applied in the great majority of domestic violence cases in Chile, requires a choice between a number of different interpretations of the Penal Code and Code of Criminal Procedure. See *supra* notes 298-307 and accompanying text. Furthermore, although the Penal Code states that the fine should be one to five times the batterer's monthly salary, the actual fines imposed are usually much lower than even one month's salary. Meza, *supra* note 284, at 35 (usual fine was \$6,000 pesos, even in upper- and middle-class cases); Regina Bayo, *Mujeres Golpeadas: El Facismo Masculino*, VINDICACIÓN FEMINISTA, Dec. 1979, at 50, 52 (reporting fines of 250 to 1,000 pesos).

³²⁴ MERRYMAN, *supra* note 1, at 66-72. Although many judges are influenced by previous decisions, the principle of *stare decisis* does not bind them to follow these decisions. *Id.*

³²⁵ Correa, *supra* note 1, at 93.

³²⁶ *Id.* at 94 (author's translation).

³²⁷ Informe Sobre la Situación de Derechos Humanos en Chile, Inter-Am. C.H.R. 161-90, OEA/ser. L/V/II.16, doc.17 (Sept. 27, 1985); *id.* para. 36 (criticizing the self-limitation of judicial power during Pinochet's dictatorship including the Supreme Court's failure to exercise supervision over other tribunals and the "merely formal" application of the decrees enacted by the Junta); *id.* paras. 37-52 (describing numerous examples of judicial ineffectiveness in human rights cases); *id.* para. 62 (Out of 5,400 habeas corpus petitions submitted to Court of Appeals, only 10 were addressed.); *id.* para. 63 (Ministry of Interior failed to provide information on "disappeared" persons.). See also COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, INFORME DE LA COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN 95-104 (1991) (discussing human rights violations occurring between September, 1973 and March, 1990); Jorge Correa Sutil, *Formación de Jueces para la Democracia*, 34-35 REVISTA DE CIENCIAS SOCIALES 271, 282-91 (1989-90) (describing the hierarchical, authoritarian, and formalistic nature of judicial culture, especially during the dictatorship).

³²⁸ See González, *supra* note 79 (identifying the above problems in the Penal Code, then identifying patriarchal judicial tradition as the reason that domestic violence goes unpunished).

Women's rights activists in Chile have identified that norm and the judicial reasoning behind it as patriarchy, or sexism.³²⁹ Similarly in the United States, although state penal codes allow for criminal penalties, domestic violence is routinely treated as a misdemeanor.³³⁰ In the United States, "crimes disproportionately affecting women are often treated less seriously than comparable crimes against men."³³¹

These phenomena occur despite the differences in the legal systems. Although judges in the United States are also influenced by codified laws and the principle of certainty,³³² the system in the United States tends to focus on the actions and *mens rea* of the criminal rather than the effects of the crime.³³³ The punishment of crime, therefore, is based on a theory of retribution for the criminal's wrongdoing,³³⁴ rather than on the happenstance of whether the criminal caused a certain result.³³⁵ However, this focus on criminal mindset rather than effect on the victim has been a hinderance to women's rights in the United States.³³⁶

A number of cases in the United States have concluded that a man's subjective belief that he did not intend to rape a woman excuses him from the crime, even when there was ample objective evidence of rape.³³⁷ Recently California courts have applied this argument to avoid penalizing violence against immigrant women, because men from other

See generally DANISA MALÍĆ & ELENA SERRANO, *LA MUJER CHILENA ANTE LA LEY 84* (1986); González, *supra* note 138.

³²⁹ See GONZÁLEZ, *supra* note 79; MALÍĆ & SERRANO, *supra* note 328; González, *supra* note 137.

³³⁰ Hoffman, *supra* note 20, at 25.

³³¹ VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. 43-44 n.10 (1991) (citing studies of 18 State court systems).

³³² MERRYMAN, *supra* note 1, at 27-34 (reviewing the judicial process in a civil law system, Merryman cautions against overestimating differences with respect to the common law system, using California codes and local judicial reasoning as examples).

³³³ See MODEL PENAL CODE § 2.02 (1962) (stating the general requirements for culpability).

³³⁴ KADISH & SCHULHOFER, *supra* note 141, at 217 (discussing the requirement of *mens rea*); *id.* at 136-48 (discussing the retributive theory of punishment).

³³⁵ MODEL PENAL CODE § 2.05 (1962) (noting that only a limited category of "absolute liability" crimes are exempted from the *mens rea* requirement).

³³⁶ In the Senate hearings on the Clarence Thomas nomination, Anita Hill was questioned more about her sexuality and personal life than the acts to which she was called forth to testify. In contrast, Clarence Thomas was given the opportunity to testify about his integrity. Marcus, *supra* note 197, at 1.

Similarly, the Kennedy family was allowed to testify about William Kennedy Smith's integrity and family background allowing the court to find that he did not intend rape; therefore, the court held he did not legally rape a woman who he thought wanted to have sex with him. Walter Goodman, *Sex? Viewers Are Shocked. Shocked!*, N.Y. TIMES, Dec. 22, 1991, at 1.

³³⁷ KADISH & SCHULHOFER, *supra* note 141, at 365-414.

cultures believed they had the right to abuse them, in spite of the inherent violation of the women's rights as set forth in the state's penal code. Perhaps more focus on the actions of the alleged abuser, rather than their mental state, would improve women's rights in the United States. This, however, is unlikely since study after study shows that assaults on men are treated as more serious than similar violence against women.³³⁸ In other words, the root of the problem is not the mechanics of the legal system, but sexism.

B. Defining the Crime

In contrast to the focus in the United States on *mens rea*, the Chilean Penal Code mechanically defines the crime of assault by grading the victim's injuries. Similar to the result of the approach in the United States, the Chilean Penal Code's grading system also limited women's rights. In a manner reminiscent of the "an eye for an eye, or a tooth for a tooth" doctrine, the Chilean Penal Code distinguishes the gravity of assaults, and their sanctions, by the gravity of the injuries caused, without much focus on the individual rights involved.³³⁹ "Light" injuries are punishable as misdemeanors, while injuries in the categories "less grave," "grave," "very grave," or "the most grave" are classified as felonies.³⁴⁰

In every domestic violence case in Chile, the characterization of the injury as either a felony or misdemeanor requires the exercise of judicial discretion. However, in domestic violence cases, most judges and other legal actors believe that the only differences between a "light" injury misdemeanor and a "less grave" felony is whether or not the victim lost work or required medical treatment for more than fourteen days.³⁴¹ Requisite legal-medical reports distinguish "light" injuries from "less grave" injuries by, in fact, looking to the number of days necessary for recovery.³⁴² Even in cases where there is a pattern of frequent beating lasting for years,³⁴³ unless the violence results in an extremely severe

³³⁸ See VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. (1991).

³³⁹ See *infra* notes 344-45 and accompanying text.

³⁴⁰ CÓDIGO PENAL, arts. 397, 399, 494 (Chile).

³⁴¹ Interviews with Alberto Teke, *supra* note 85.

³⁴² *Id.*

³⁴³ VIOLENCIA INTRAFAMILIAR, *supra* note 201, at 7-8. See also *Battered from the Beginning*, *supra* note 284, at 20 (Of the 110 battered women interviewed, 86% had been the victim of domestic violence for a period of time ranging from 1 to 44 years before seeking help.); Albina Sabater, *¡Mi Marido Va a Golpearme!*, EL MERCURIO, May 27, 1986, at 8 (In the case of one woman, María Luisa, beaten repeatedly by her husband, the legal system only sanctioned him

injury, criminal felony prosecution is unavailable in this system.

The Chilean Penal Code itself does not distinguish "light" from "less grave" injuries by the fourteen-day rule. The Code defines "light" injuries as "those not contemplated in Article 399."³⁴⁴ Similarly, "less grave" injuries are defined as "those injuries not contemplated in the . . . ['grave,' 'more grave,' and 'gravest' injury] article."³⁴⁵

Furthermore, the "light" injuries portion of the Code states that "[t]hese injuries are distinguished from the next highest level of injury by the conception of the Tribunal, taking into account the quality of the people and the circumstances of the act."³⁴⁶ Two Supreme Court cases on other types of assaults have ruled accordingly. In the *Segundo Aguilera Ramírez*³⁴⁷ case, the Court ruled that fifteen days of recuperation on the official medical report was "not sufficient for the qualification of the injury," and that the distinction of the level of criminality based on time for recovery only applies to the distinction between "grave" and "less grave" injuries.³⁴⁸ In the *Carlos Chamy Valencia*³⁴⁹ case, the Court stated that the distinction between "light" injury misdemeanors and "less grave" injury felonies is "entirely in the realm of judicial discretion."³⁵⁰ Therefore, the fourteen-day rule is nothing more than creative judicial discretion; therefore, the great majority of domestic violence cases could, in fact, be adjudicated as felonies and not misdemeanors.

One Chilean judge asserts her right to utilize ample judicial discretion in domestic violence cases, saying "I never feel limited [by the penal code]. If the issue is not resolved [in the code], I resolve it."³⁵¹ However, even this judge mistakenly believes that the code mandates that all cases not resulting in fourteen days of medical treatment or loss

with fines until one beating left her permanently paralyzed.); *supra* notes 111-12 and accompanying text.

³⁴⁴ CÓDIGO PENAL, art. 494 (Chile) (Article 399 defines "less grave" injuries.).

³⁴⁵ *Id.* art. 399. Additionally, the code provides that "less grave" injuries can be distinguished from "grave" injuries by looking to whether or not there was an inability to work for 30 days or more. Compare *id.* art. 399 with *id.* art. 397.

³⁴⁶ *Id.* art. 494.

³⁴⁷ See ALFREDO ETCHEBERRY, EL DERECHO PENAL Y LA JURISPRUDENCIA CHILENA, TOMO IV 344 (1991) (citing and describing *Contra Segundo Aguilera Ramírez*, LXVIII Revista de Derecho y Jurisprudencia Chilena 4-3 (Chilean S.Ct. 1971)).

³⁴⁸ *Id.* at 343-44.

³⁴⁹ See *id.* at 343 (citing and describing *Contra Carlos Chamy Valencia*, LXVII Revista de Derecho y Jurisprudencia Chilena 4-456 (Chilean S.Ct. 1970))

³⁵⁰ *Id.* at 343-44.

³⁵¹ Interview with Amanda Valdovinos, *supra* note 91.

of work must be treated as "light" injury cases.³⁵² Also, even though the code allows "less grave" injuries to be punished with either imprisonment or a fine,³⁵³ Judge Valdovinos claims that the use of judicial discretion in suspending sentences applies only to "light" injury cases.³⁵⁴ She justifies this by noting that the Code creates certain judicial "obligations" mandating imprisonment in grave injury cases, especially "when the life of the woman is in danger."³⁵⁵ Even if the battered woman wanted a suspended sentence for the batterer in such cases, this judge feels that the code obliges her to impose a prison sentence.³⁵⁶

In sum, even though the Chilean Penal Code offers sufficient judicial discretion to characterize most domestic violence cases as a felony, eighty-two percent of such cases are adjudicated as misdemeanors. Of those misdemeanors, the great majority are sentenced with only a small fine, even though the code allows the imposition of a prison sentence and other criminal remedies designed to protect the victim from further assaults. However, due to hidden judicial discretion, a norm has developed which negates a Chilean woman's fundamental human right to effective State protection from domestic violence. This is also true in the United States, where comparable crimes affecting men are treated more seriously. Domestic violence cases typically are adjudicated as misdemeanors, and victims are left without protection from continued assaults.

While judicial norms have been developed in Chile based on the changing cultural values,³⁵⁷ the lack of uniformity in judicial reasoning makes these decisions inconsistent.³⁵⁸ People cannot rely on previous decisions to enforce their rights, because the principle of *stare decisis* is not mandated.³⁵⁹ As the Chilean legal system began to address the changes prompted by the women's movement against domestic violence, erratic decisions resulted. Women within the same city faced either a mandate to suspend sentences on batterers, a fairly effective judicial protection of their rights, or more typically, the imposition of a small fine, depending on the victim's location and the values of the particular judge in their jurisdiction. This is comparable to the situation of battered women in the United States: that is, in fifteen states, mandatory arrest

³⁵² *Id.*

³⁵³ CÓDIGO PENAL, art. 399 (Chile).

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ Correa, *supra* note 1, at 88.

³⁵⁸ *Id.* at 91.

³⁵⁹ MERRYMAN, *supra* note 1, at 73-87.

laws avail better protection of women's rights; whereas, in other states and jurisdictions, such laws have not yet been adopted.³⁶⁰

In sum, judges in both Chile and the United States could utilize their respective penal codes to criminalize and sanction domestic violence as a means to protect battered women from further injuries. However, in the majority of jurisdictions in both countries, domestic violence cases are treated as insufficiently penalized misdemeanors, while battered women are exposed to further and more serious injuries, some resulting in death.³⁶¹

C. Constitutional and Human Rights Principles

One means to properly direct judicial discretion in Chile is to uncover the value judgements made in cases, and require that judges utilize constitutional principles in their decisionmaking.³⁶² The supreme law of Chile is the Chilean Constitution which, by incorporating international human rights treaties,³⁶³ requires the effective judicial investigation, prosecution, and punishment in domestic violence cases.³⁶⁴ Also, the Constitution explicitly requires judicial protection of a woman's right to life, physical and mental integrity, and freedom from discrimination.³⁶⁵

³⁶⁰ See Hoffman, *supra* note 20.

³⁶¹ See *supra* notes 116-19 and accompanying text.

³⁶² Correa, *supra* note 1, at 86.

³⁶³ CONST. POLÍTICA DE LA REPÚBLICA DE CHILE art. 5 (including the 1989 and 1991 modifications incorporating international human rights treaties). This article incorporates the provisions of the American Convention on Human Rights, *see id.*, and the provisions of the International Convention on the Elimination of All Forms of Discrimination Against Women [hereinafter Women's Convention]. Ley No. 19.023: Crea el Servicio Nacional de la Mujer, No. 33.858 Diario Oficial de la República de Chile (Jan. 3, 1991).

³⁶⁴ See *Gen. Recommendation No. 19*, *supra* note 9, at 2-3 (declaring this to be an international law norm based on the provisions of the Women's Convention, general principles found in various human rights instruments, and principles of customary international law). See also Velásquez Rodríguez Case, Case 9, Inter-Am. Ct. H.R. 123, 184, OEA/ser.C./No.4, para. 166 (1988) (Under the American Convention, States have an affirmative duty to investigate, prosecute, and punish human rights violators; this duty must be carried out by the judicial organs of the State.); Judicial Guarantees in States of Emergency, OC-9/87, Case 9, Inter-Am. Ct. H.R. (Advisory Opinion), 287, 296-300, OEA/ser.A/No.9, paras. 24, 31-32 (1987) (guaranteeing the right of every individual in every case to effective judicial recourse for human rights violations, stating that the mere existence of a statute is not sufficient, and requiring that the remedy be prompt and effective with respect to general conditions in the country and to the particular circumstances of the case); Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, Advisory Opinion, OC-4/84, Inter-Am. C.H.R., OEA/ser.A/No.4, para. 53 (1984) (stating that any form of gender discrimination is per se incompatible with the American Convention).

³⁶⁵ CONST. POLÍTICA DE LA REPÚBLICA DE CHILE art. 19, 1° (guaranteeing the right to life

The Chilean Constitution, and the values found therein, should serve as the primary instrument in interpreting other bodies of law designed to protect a woman's fundamental rights.³⁶⁶ Constitutional norms should be applied to domestic violence cases in order to arrive at more principled judicial decisionmaking in defending a woman's fundamental rights. Similarly, in the United States, the U.S. Violence Against Women Act suggests that domestic violence is a gender-based crime, violating a woman's right to equality, and would sanction such crimes under federal civil rights provisions.³⁶⁷

However, traditionally, the Chilean judicial culture has not recognized constitutional superiority, nor used constitutional principles in the interpretation of other bodies of law.³⁶⁸ Instead, Chilean judges have "a tendency to conceive each body of [C]hilean law, if not each precept, as autonomous entities and sufficient to determine the resolution of a case."³⁶⁹ Legislating principled discretion in domestic violence cases, as the supporters of the Intrafamily Violence Act advocate, makes sense in this system. Again, speaking on the issue of a woman's right to equality, the Chilean Minister of Justice has stated that "[w]ithout legal modifications, [C]hileans will not accept the change."³⁷⁰

In the United States, section 1983 of the U.S. Code³⁷¹ has recently become the tool for enforcing a municipality's duty to provide equal police protection to victims of domestic violence and victims of other forms of assault.³⁷² Domestic violence suits have been lost because of the difficulty of proving a constitutional violation: in the U.S., the equal protection clause is interpreted to require a showing of intentional discrimination in gender bias cases.³⁷³ Also, in these cases, as well as un-

and physical and mental integrity); *id.* art. 19, 2° (guaranteeing equality before the law); *id.* art. 19, 3° (guaranteeing equal protection of the law in the exercise of rights); *id.* art. 20 (establishing judicial recourse for violations of these rights).

³⁶⁶ Correa, *supra* note 1, at 85-86.

³⁶⁷ STAFF OF SENATE COMM. ON THE JUDICIARY, 102d Cong., 1st Sess., VIOLENCE AGAINST WOMEN: THE INCREASE OF RAPE IN AMERICA 1990, at 17-18 (1991). The proposed Act would create the remedy of compensatory damages for battered women in federal courts, where proving the offense is thought to be easier. *Id.* (citing REPORT ON VIOLENCE AGAINST WOMEN ACT OF 1990, S. REP. NO. 545, 101st Cong., 2d Sess. 42 (1990)).

³⁶⁸ Correa, *supra* note 1, at 86.

³⁶⁹ *Id.*

³⁷⁰ *Cumplido Interview, supra* note 193, at 16.

³⁷¹ 42 U.S.C. § 1983 (1988).

³⁷² See generally Lauren L. McFarlane, Note, *Domestic Violence Victims v. Municipalities: Who Pays When the Police Will Not Respond?*, 41 CASE W. RES. L. REV. 929 (1991).

³⁷³ Carolyne R. Hathaway, Case Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints: Thurman v. City of Torrington*, 75 GEO. L.J. 667, 685 (1986) (citing *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979) in support of this

der the U.S. Violence Against Women Act, governmental entities are liable only for monetary damages payable after the victim has been seriously injured.³⁷⁴ United States Constitutional remedies do not, as yet, provide a means to protect battered women from continued violence.

Unless and until legislation is implemented correcting the legal system's failure to effectively investigate, prosecute, and punish domestic violence cases under the current penal code, Chile will continue to be in violation of its international legal obligations.³⁷⁵ Similarly, the United States also violates applicable fundamental human rights law by failing to effectively investigate, prosecute, and punish violence against women.³⁷⁶ In particular, the United States is technically in violation of the International Covenant on Civil and Political Rights,³⁷⁷ which it ratified in 1993.³⁷⁸ The United States government has yet to formally accede to any of the Covenant's international enforcement mechanisms.³⁷⁹ Therefore, litigation against the United States in an international forum to enforce the legal obligation to effectively prosecute and punish domestic violence would be difficult, but it is possible.³⁸⁰ In contrast, a case could more easily be brought before the Inter-American Court of Human Rights against Chile to enforce its obligation to provide effective judicial protection for women's fundamental human rights.

Additionally, Chilean women's rights advocates plan further litiga-

proposition).

³⁷⁴ McFarlane, *supra* note 372.

³⁷⁵ See *supra* notes 363-64.

³⁷⁶ See *Gen. Recommendation No. 19*, *supra* note 9. This obligation is based on fundamental human rights principles and general principles of customary international law, both of which form part of United States law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (1987).

³⁷⁷ See, e.g., International Covenant on Civil and Political Rights, Mar. 23, 1976, arts. 1, 2, 6, 7, 999 U.N.T.S. 171-75 (establishing the following: the right to freedom from gender discrimination (art.1); the right to effective redress for human rights violations (art. 2); the right to equality before the law (art. 6); and the right to freedom from torture or cruel, inhuman or degrading treatment or punishment (art. 7)).

³⁷⁸ 32 I.L.M. 274 (1993).

³⁷⁹ For example, the United States has not ratified the Optional Protocol to the International Covenant on Civil and Political Rights, which is necessary for individuals alleging violations of its provisions to bring international litigation against State Parties to the Covenant. Optional Protocol to the International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 302.

³⁸⁰ A case could be brought before the Inter-American Commission on Human Rights to enforce the United States' similar international legal obligations under the American Declaration of Human Rights. Regulations, Inter-Am. C.H.R. art. 21(1)(c), OEA/ser.L/V/II.71, doc. 6 rev. 1 (1988).

tion on constitutional issues.³⁸¹ Such litigation would likely end up in the Chilean Supreme Court, which is dominated by conservative justices who remain from the military regime.³⁸² However, unlike the United States Constitution,³⁸³ the Chilean Constitution incorporates international human rights instruments.³⁸⁴

In the Chilean Court of Appeals, a promising case has recently emerged that may help develop women's fundamental human rights. In *Rebolledo vs. González*, the Chilean Court of Appeals ordered a batterer to stay away from the family home, in order to protect the woman's and children's constitutional rights to life and physical and mental integrity.³⁸⁵ In *Rebolledo*, a battered woman presented a written petition testifying that her husband persistently threatened her rights guaranteed by article 19 of the Chilean Constitution, and convinced the court to issue a protective order based on the court's obligation to enforce that article.³⁸⁶ The domestic violence in this case was particularly severe: it included sexual assaults of the woman and her daughter and repeated threats on the woman's life, especially after she had called the police.³⁸⁷ The petition also included facts showing that the violence had caused mental duress, violating the woman's right to mental integrity.³⁸⁸

Article 20 of the Chilean Constitution provides every person who suffers the deprivation, perturbation, or threat of the fundamental rights established in article 19, has the right to petition the Court of Appeals for the immediate adoption of measures necessary to ensure the protection of the affected rights.³⁸⁹ This recourse is commonly called "*amparo*" in Latin America. The Chilean Constitution includes not only the recourse of *amparo*, but article 20 additionally requires the Court of

³⁸¹ Interview with Raciela Arancibia, in Santiago, Chile (Oct. 22, 1993) (on file with the *Case W. Res. J. Int'l L.*).

³⁸² Correa Sutil, *supra* note 327, at 272.

³⁸³ *The Paquete Habana*, 175 U.S. 677, 700 (1900) (construing customary international law to apply only if no treaty or controlling constitutional provision, federal legislation, or federal executive or judicial act is in place). Since the United States Constitution has been interpreted narrowly in domestic violence cases, *see supra* notes 373-74 and accompanying text, and the pending federal Violence Against Women Act is not in compliance with customary law, *see supra* notes 76-77 and accompanying text, national litigation of human rights norms would be difficult.

³⁸⁴ *See supra* notes 363-64 and accompanying text.

³⁸⁵ Judgment of Aug. 17, 1993 (*Rebolledo v. González*), Santiago Ct. App., Case No. 1868-93 (Chile).

³⁸⁶ *See* Judgment of July 3, 1993 (Petition for Recourse of Protection of Isabel del Carmen Rebolledo Ortiz, Santiago Ct. App., Case No. 1868-93 (Chile) [hereinafter Ortiz Petition]).

³⁸⁷ *Id.* para. 1.

³⁸⁸ *Id.*

³⁸⁹ CONST. POLÍTICA DE LA REPÚBLICA DE CHILE art. 20.

Appeals to take whatever measures necessary to reestablish the superiority of constitutional law.³⁹⁰ Ms. Rebolledo's petition stated that when she looked to the police for help, they only warned her husband that he would be imprisoned if they had to return.³⁹¹ In contrast to the typical failure of the lower Chilean courts and the Supreme Court to recognize the superiority of constitutional principles,³⁹² the Court of Appeals decided to take into account the lack of protection a battered woman receives from other agencies of the legal system and formulate the constitutional recourse required under article 20.

Appellate Court Minister Carlos Cerda interviewed the parties in *Rebolledo*, and decided that the woman's testimony was very credible, while the man was lying when he claimed that he had never physically or sexually abused the woman or the children.³⁹³ Upon reporting his findings to the other two Appellate Court Ministers, Minister Cerda recommended an order protecting the woman's constitutional rights to life and physical and mental integrity.³⁹⁴ Minister Cerda was very interested in basing the order on international human rights principles, including the rights to freedom from discrimination found in the International Women's Convention.³⁹⁵ The Appellate Court issued the order that the batterer leave the family home indefinitely "to re-establish the tranquility of the home and for the mental health of his wife and children."³⁹⁶ Also, the Court ordered that the mother have custody of the children.³⁹⁷ This order injects international human rights principles into Chilean jurisprudence, and the published decision stated that a battered woman's constitutional rights to life and physical and mental integrity are protected by the Chilean Constitution.³⁹⁸ However, the Appellate Court's decision does not directly address the issue of gender discrimination.³⁹⁹

Minister Cerda has continued trying to develop the use of human rights law to defend women's rights. For example, in *Ewert v. Ojeda*, a

³⁹⁰ *Id.*

³⁹¹ Ortiz Petition, *supra* note 386, para. 1.

³⁹² See *supra* notes 368-69 and accompanying text.

³⁹³ Interview with Carlos Cerda, in Santiago, Chile (Oct. 26, 1993) (on file with the *Case W. Res. J. Int'l L.*).

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ Judgment of Aug. 17, 1983 (*Rebolledo v. González*), Santiago Ct. App., Case No. 1868-93 (Chile).

³⁹⁷ *Id.* para. 2.

³⁹⁸ See Ortiz Petition, *supra* note 386.

³⁹⁹ Judgment of Aug. 17, 1983 (*Rebolledo v. González*), Santiago Ct. App., Case No. 1868-93 (Chile).

separated woman petitioned for custody of her children under article 20 of the Constitution, stating that her husband's detention of herself and their children by his associates on the police force violated her constitutional rights to liberty and personal security.⁴⁰⁰ A Santiago Minors Tribunal judge ordered custody for the husband, based on its judgment that the woman's failure to stay married and her post-divorce "adultery" posed a threat to the moral development of the children and rendered her unfit for custody.⁴⁰¹ The Minors Tribunal issued this order despite the fact that the children, while in custody of the husband, were living with his mother, who had been separated for seven years.⁴⁰² Although another court order gave Ms. Ewert rights to take the children on trips, her ex-husband, an army lieutenant, used his influence within the police force to engineer the arrest and detention of the woman and children when they arrived at their destination, and had the children transported in a police airplane back to his residence in Santiago.⁴⁰³ Minister Cerda believes that the police detention and the Minor Tribunal's order were based on illegal and unconstitutional gender discrimination and thus, in violation of the woman's rights under the International Women's Convention, which is incorporated as part of the Chilean Constitution.⁴⁰⁴ However, he was unable to convince his fellow Minister Justices to adopt this view, and the Appeals Court decided against issuing an order of protection.⁴⁰⁵

The *Ewert* case demonstrates that even the most progressive Chilean judges have a long way to go before norms are developed to ensure women's rights to freedom from gender discrimination. In a criminal law jurisdiction in the same city, another judge used her discretion to

⁴⁰⁰ Judgment of Nov. 16, 1989 (Petition of Annelie Carolin Thiele Ewert, *Thiele v. Ojeda*), Ct. App., Case No. 54,757 (Chile) (author's translation).

⁴⁰¹ See Judgment of Jan. 11, 1990 (*Thiele v. Ojeda*), Ct. App., Case No. 54,757 (Chile); CÓDIGO CIVIL [C. CIV.], arts. 223, 225 (Chile). See also GONZÁLEZ & NORERO, *supra* note 165, at 127 (providing the legal definition of "adultery" in Chile).

⁴⁰² See Judgment of Nov. 21, 1989 (Santiago Minors Tribunal review of the Social Report submitted by the Santiago Social Services Department, *Thiele v. Ojeda*), Ct. App., Case No. 54,757 (Chile) (author's translation).

⁴⁰³ Judgment of Nov. 16, 1989 (Petition of Annelie Carolin Thiele Ewert, *Thiele v. Ojeda*), Ct. App., Case No. 54,757 (Chile) (author's translation). Interview with Carlos Cerda, *supra* note 393.

⁴⁰⁴ Judgment of Nov. 16, 1989 (Petition of Annelie Carolin Thiele Ewert, *Thiele v. Ojeda*), Ct. App., Case No. 54,757 (Chile) (author's translation). (citing article 5 of the Chilean Constitution, and the decree ratifying and incorporating the Women's Convention). The petition also states that "Minister Cerda presents that the actions of the Minors Tribunal translate[] into an arbitrary discrimination with respect to Annelie Carolin Thiele and infringes articles 5, 15, and 16 of [the Women's Convention, as decreed]." *Id.*

⁴⁰⁵ Interview with Carlos Cerda, *supra* note 393.

suspend batterers' sentences, and advised battered women to try to improve themselves through dance therapy because she believes that "sometimes women look for violent situations."⁴⁰⁶ Since *stare decisis* is not required in the Chilean legal system,⁴⁰⁷ the decisions favoring women's rights developed through SERNAM's Pilot Project do not guarantee that any similar decisions will follow.⁴⁰⁸ The influence of traditional formalism and hidden patriarchal judicial discretion in domestic violence cases will be hard to overcome by case law alone.⁴⁰⁹ The *Rebolledo* case is compelling because it is based on the constitutional rights to life and physical and mental integrity and could be used to support similar arguments in other women's rights cases. However, it does not address the right to be free from gender discrimination, and given the traditional failure of most Chilean judges to utilize constitutional norms to direct their judicial discretion,⁴¹⁰ it may not be influential on other judges.

VI. THE FEASIBILITY OF EFFECTIVE LEGISLATIVE REFORMS

In order to compel the effective protection of women's fundamental rights, new legislative mechanisms are necessary to create structural changes in the Chilean judicial system. Unless new legislation and concomitant judicial training favoring women's rights are fully implemented, judges will not prosecute or act to protect the victim in the great majority of domestic violence cases. Moreover, every other legal actor in the system is influenced by the traditional judicial approach. For example, a police official leading cooperation with SERNAM's domestic violence training program recently stated that:

Without a doubt, because it is difficult for a police officer to take a procedure [to court], because there are not always [the requisite physical injuries as set forth in the penal code]. What happens is that the police officer does not have legal elements upon which to take action. He is prepared to continue with a procedure with precise evidence, but in this case, a typified crime will not be encountered. The law is important, to give us the recourse that we lack.⁴¹¹

As was demonstrated *supra*, both the United States and Chile have

⁴⁰⁶ Interview with Amanda Valdovinos, *supra* note 91.

⁴⁰⁷ See *supra* note 359 and accompanying text.

⁴⁰⁸ See *supra* note 307 and accompanying text.

⁴⁰⁹ See *supra* notes 308-28 and accompanying text.

⁴¹⁰ See *supra* notes 368-69 and accompanying text.

⁴¹¹ *Teniente Coronel de Carabineros, Mercedes Jara: Trabajando por la Paz*, REVISTA MUJER, Sept., 1993, at 10.

structural problems in their respective legal systems resulting in the failure to effectively investigate, prosecute, and punish domestic violence, which in turn results in a failure to effectively protect battered women from further injuries.⁴¹² Therefore, both the United States and Chile currently are in violation of the international human rights norm requiring each State to provide effective judicial investigation, prosecution, and punishment of violence against women.⁴¹³ In both the United States and Chile, legislation attempts would serve to break down the barriers inherent in the legal systems by:

- (1) Specifying that domestic violence is a crime;
- (2) Making the crime subject to sentencing geared toward ending the cycle of domestic violence; and
- (3) Providing battered women with immediate protection from aggressors.⁴¹⁴

⁴¹² See *supra* note 75 and accompanying text.

⁴¹³ See *supra* note 364.

⁴¹⁴ See *infra* notes 425-28 and accompanying text (analyzing the three remedies found in each of the Chilean intrafamily violence proposals). The United States has proposed legislation that would provide for the same three remedies. S. 15, 102nd Cong., 1st Sess. § 211 (1991). The following summarizes provisions from the proposed U.S. Violence Against Women Act:

(1) *Specific codification of the crime of domestic violence by the creation of a federal crime when perpetrators cross state lines, and the provision of federal funding for "model States" that implement laws requiring mandatory arrest and prosecution of the crime of domestic violence.* Further, "model States" must "encourage the understanding of domestic violence as a serious criminal offense and not a trivial dispute." VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. § 315(b)(C) (1991). Under § 315(b),

In order to be designated as a model State [and receive federal funding], a State shall have in effect (1) a law that requires mandatory arrest of a person that police have probable cause to believe has committed an act of domestic violence or probable cause to believe has violated an outstanding civil protection order.

Id.

(2) *Specialized sanctioning, which recognizes that domestic violence is rarely an isolated incident and is likely to continue.* These sanctions are geared toward ending the cycle of domestic violence by using protective orders, *id.* § 312; federal fines and/or prison sentences when the perpetrator has crossed state lines, *id.* § 261(c); and court-mandated abuser treatment, *id.* § 308A(a)(1). A new sentence of mandatory restitution paid by the abuser to the victim in federal cases would allow the victim easier access to prosecution and a better ability to establish financial independence from the abuser. *Id.* § 264(b). However, an award of restitution shall not be a substitute for criminal penalties. *Id.* § 264(d).

(3) *The Act also provides for protection of the victim from retributive and continued violence.* Model states must adopt prosecution policies that limit the victim's exposure to the abuser and allow for prosecution without continuous ratification of the complaint by the victim, *id.* § 315; provide court advocacy for victims of domestic violence, *id.* § 315(a)(4); and make remedies as easily available as possible to victims of domestic violence by reducing delay and eliminating court fees, *id.* § 315(b)(5).

The U.S. Violence Against Women Act can only facilitate these changes by encouraging each state to adopt "model" domestic violence laws in return for increased funding for their programs.⁴¹⁵ In contrast, the Chilean Intrafamily Violence Act would mandate an immediate reform throughout the entire legal system.⁴¹⁶ SERNAM's proposed Intrafamily Violence Act was passed by the Chilean House in 1991; and in late 1993 and early 1994 another proposed Act, drafted by conservative Senator Miguel Otero, was reviewed by the Chilean Senate.⁴¹⁷ Because the resulting Chilean House and Senate versions differed, a joint commission was convened to resolve the differences.⁴¹⁸ In any case, both SERNAM's Intrafamily Violence Act and Senator Otero's proposed Act would:

- (1) enact a legislative provision codifying domestic violence as a prohibited act;⁴¹⁹
- (2) codify judicial discretion by enacting specialized, alternative sanctioning provisions geared to end the cycle of domestic violence;⁴²⁰
- (3) provide that judges may take prompt measures, such as stay-away orders, to protect the victim from continued assaults;⁴²¹ and that

Funding for "model States" is contingent upon the legal system's recognition of a victim's reasonable fear of continued violence, and the creation of new laws and policies that make the victim's involvement with the criminal justice system as easy and safe as possible. *Id.* § 315(b)(3)(a). Finally, the proposed Act provides increased funding for shelters. *Id.* §§ 310, 316-(b)(c)(3).

⁴¹⁵ See *supra* note 414.

⁴¹⁶ See SERNAM Intrafamily Violence Act, *supra* note 7; Otero's Intrafamily Violence Act, *supra* note 7.

⁴¹⁷ See SERNAM Intrafamily Violence Act, *supra* note 7; Otero's Intrafamily Violence Act, *supra* note 7. See also *infra* note 455 and accompanying text.

⁴¹⁸ Interview with Miguel Otero, *supra* note 181. See also *infra* note 457 and accompanying text.

⁴¹⁹ SERNAM Intrafamily Violence Act, *supra* note 7, art. 1; Otero's Intrafamily Violence Act, *supra* note 7, art. 1.

⁴²⁰ As provided in both Chilean pieces of legislation, the judge is required to sanction a convicted offender with one or more of the following:

1. Imprisonment;
2. A fine consisting of some portion of the offender's monthly salary;
3. Mandatory education or therapy for the offender; or
4. Ad-honorem work for the benefit of the municipality.

SERNAM Intrafamily Violence Act, *supra* note 7, art. 7; Otero's Intrafamily Violence Act, *supra* note 7, art. 4.

⁴²¹ See SERNAM Intrafamily Violence Act, *supra* note 7, art. 5(a) (requiring a judicial hearing within 5 days); *id.* art. 6 (providing that, at any time during the process, in order to ensure the full protection of this law: (a) a tribunal may order suspension of cohabitation of the alleged

judges must control and monitor the implementation of such protective measures to ensure against repeated injuries.⁴²²

In sum, both Chilean Intrafamily Violence Acts provide remedies similar in structure to those in the U.S. Violence Against Women Act, and because they mandate reforms nationwide, more effectively comply with international human rights law. Both Chilean proposals also correct limitations of the current penal code by broadly defining intrafamily violence to include acts violating the physical or mental integrity of any partner, including live-ins.⁴²³

The primary difference between the two Acts is that under SERNAM's Act the criminal courts would have jurisdiction over for both "light" and more grave injuries,⁴²⁴ whereas Senator Otero proposed the creation of special Family Tribunals governed by civil laws and procedures to handle "light" injury cases.⁴²⁵ Both Acts reinforce imprisonment as a possible sanction for domestic violence cases,⁴²⁶ even when the injuries are psychological or do not leave marks.⁴²⁷ In other words, each proposal would abolish the fourteen-day judicial norm of penalizing "light" injury cases with only a small fine.

Although Senator Otero is convinced that remedies for domestic violence, including psychological violence, should be legislatively pre-

aggressor from the family home, if necessary to protect the physical or mental integrity of any of its inhabitants; and (b) tribunal may prohibit aggressor's access to the residence and/or place of work of the petitioner).

See also Otero's Intrafamily Violence Act, *supra* note 7, art. 3(d) (requiring a judicial audience within eight days); *id.* art. 3(h) (stating that the tribunal may at any time "dictate every and any protective measure designed to guarantee the physical and mental security of the person affected," providing for the same measures as SERNAM's Act listed above "even if it is taxing," and adding that the tribunal may order financial assistance to be paid to the victim and a protective plan of care and financial support established for the children).

⁴²² SERNAM Intrafamily Violence Act, *supra* note 7, art. 9; Otero's Intrafamily Violence Act, *supra* note 7, art. 5.

⁴²³ SERNAM Intrafamily Violence Act, *supra* note 7, art. 1; Otero's Intrafamily Violence Act, *supra* note 7, art. 1.

⁴²⁴ SERNAM Intrafamily Violence Act, *supra* note 7, arts. 2, 12.

⁴²⁵ See Otero's Intrafamily Violence Act, *supra* note 7, arts. 1, 2 (establishing civil jurisdiction for "light" injury cases); Interview with Miguel Otero, *supra* note 181 (stating that Family Tribunals will be created with special competency and expertise to address all issues associated with family violence).

⁴²⁶ See *supra* note 420.

⁴²⁷ For example, SERNAM's proposal sanctions "[h]e who, even without leaving marks or scars, mistreats by act or by word [the defined relations]." SERNAM Intrafamily Violence Act, *supra* note 7, art. 1. In comparison, Senator Otero's proposal sanctions "every action that implies a mistreatment that significantly affects the physical or mental health of [the defined relations]." Otero's Intrafamily Violence Act, *supra* note 7, art. 1.

scribed, his political position on the issue actually disfavors women's rights and is distinct from SERNAM's.⁴²⁸ Senator Otero proposed his Act because SERNAM's proposal would criminalize domestic violence; however, he claims that given the similarity of the two Acts' principles and available sanctions, the difference is "a matter of words only."⁴²⁹ The Senate Act would allow for imprisonment as a sentence,⁴³⁰ as well as allow further civil sanctions for failure to comply with a protection order.⁴³¹

The Senate Act also includes a savings clause providing that cases that constitute a crime under the Chilean Penal Code provisions for "less grave" injuries are not decriminalized.⁴³² Judges would still have the discretion to determine whether or not an act of domestic violence constitutes a crime by reviewing the circumstances of the case.⁴³³ According to the savings clause, criminal judges would also gain the protective capacities, such as the ability to issue stay-away orders, found in the Intrafamily Violence legislation.⁴³⁴

Provisions of the current Chilean Code of Criminal Procedure allow ample judicial discretion to create sanctions protecting battered women from further injuries.⁴³⁵ In SERNAM's Pilot Project, the criminalization of domestic violence and threat of imprisonment have proven effective at preventing continued assaults in the great majority of cases.⁴³⁶ However, the use of Chilean civil laws and procedures, as proposed by Senator Otero,⁴³⁷ also provides advantages. First, the Chilean Code of Criminal Procedure allows for the judicial implementation of whatever measures are necessary to protect the rights affected.⁴³⁸ Second, unlike

⁴²⁸ For example, the Senator is of the opinion that slapping a spouse after a bad day at work is due to stress "not for lack of affection or love," and that women are primarily responsible for perpetuating family violence because they treat their sons and daughters differently, educating their sons in a machista way. Interview with Miguel Otero, *supra* note 181.

⁴²⁹ *Id.* See also *supra* note 425 and accompanying text.

⁴³⁰ Otero's Intrafamily Violence Act, *supra* note 7, art. 4(3).

⁴³¹ *Id.* art. 3(i).

⁴³² His proposal provides that: "[i]n the case that the facts found in the denunciation or demand constitute a crime, the civil tribunal must immediately send the process to the qualified criminal judge that is competent to be informed of this." Otero's Intrafamily Violence Act, *supra* note 7, art. 7.

⁴³³ See, e.g., *supra* notes 344-50 and accompanying text.

⁴³⁴ Otero's Intrafamily Violence Act, *supra* note 7, art. 7.

⁴³⁵ See CÓDIGO DE PROCEDIMIENTO PENAL [C. CRIM. P.] art. 7 (Chile).

⁴³⁶ See *supra* notes 87-90 and accompanying text.

⁴³⁷ Article 3 provides that every procedural issue not addressed by the provisions of the Act, will be governed by the first book of the Code of Civil Procedure. See Otero's Intrafamily Violence Act, *supra* note 7, art. 3.

⁴³⁸ CÓDIGO DE PROCEDIMIENTO PENAL [C. CRIM. P.] arts. 290, 298 (Chile). See also Inter-

SERNAM's Act which lists the available protective measures a judge may take,⁴³⁹ Senator Otero's Act lists such measures but also provides that the judge may order "every and any protective measure designed to guarantee the physical and mental security of the person affected."⁴⁴⁰ In sum, Senator Otero's proposed legislation, albeit introduced by a conservative, could provide a much more effective means of sanction and protection in domestic violence cases than the old penal system.

On the other hand, SERNAM's proposed legislation would provide a stronger message that violence against women is wrong. Supporters of SERNAM's Act believe that criminalizing domestic violence is an essential step in making the social change necessary to end the problem.⁴⁴¹ Both proposed Intrafamily Violence Acts do not exclusively address violence against women.⁴⁴² SERNAM also recognizes the need to sanction intrafamily violence against other relations, especially children.⁴⁴³ However, given the fact that Senator Otero's position is not pro-women's rights, the current challenge is to keep the issue focussed on the fact that the great majority of adult cases are of male violence against women.⁴⁴⁴ One distinct advantage of SERNAM's Intrafamily Violence Act is that it was expressly based on the international human rights principle of a woman's right to be free from intrafamily violence, which is a legal norm in accordance with the Convention on the Elimination of All Forms of Discrimination Against Women and other human rights instruments.⁴⁴⁵ In spite of the obvious benefits of both SERNAM's and Senator Otero's proposed legislation, either could be interpreted to sanction violence against women with only a small fine, or even to provide for a suspended sentence.⁴⁴⁶ Therefore, the human rights principles designed to combat gender discrimination, which are in-

view with Miguel Otero, *supra* note 181 (discussing the provisions which mandate protective measures).

⁴³⁹ See SERNAM Intrafamily Violence Act, *supra* note 7, art. 6.

⁴⁴⁰ Otero's Intrafamily Violence Act, *supra* note 7, art. 3(h).

⁴⁴¹ Interview with Nancy de la Fuente, Diego Portales Law School, in Santiago, Chile (Oct. 5, 1993) (on file with the *Case W. Res. J. Int'l L.*); Interview with María Elena Valenzuela, *supra* note 131.

⁴⁴² Both proposals protect a number of relations, including blood relatives, illegitimate or legitimate children, and adults and children under the care of others. See SERNAM Intrafamily Violence Act, *supra* note 7, art. 1; Otero's Intrafamily Violence Act, *supra* note 7, art. 1.

⁴⁴³ *Reportaje: Legislando para una Sociedad Igualitaria*, REVISTA MUJER, Sept. 1993, at 13, 14.

⁴⁴⁴ Interview with María Elena Valenzuela, *supra* note 131.

⁴⁴⁵ See Message, *supra* note 108. These principles of interpretation were not codified in the final version of the legislation enacted in May, 1994.

⁴⁴⁶ See *supra* notes 291-99 (Note that the provisions of both proposed Acts require judges to decide among a series of sanctions that include a fine.); *supra* note 420.

corporated into the Chilean constitutional scheme, should be further utilized to ensure that the resulting new law is effectively enforced.⁴⁴⁷

In the United States, the Violence Against Women Act was also clearly focussed on the gender discrimination inherent in the great majority of adult domestic violence cases.⁴⁴⁸ While it took a long time for the U.S. Violence Against Women Act to receive an appropriate place on the national political agenda;⁴⁴⁹ in Chile, there is "a generalized consciousness [among legislators] that the situation of women and the family necessitates changes in the current legislation."⁴⁵⁰ Furthermore, in Chile, as domestic violence legislation is was initiated in the context of a strong political movement for women's rights, Chilean human rights and constitutional law provide that the substance of these issues should not be lost as the law takes effect.

Any decriminalization of domestic violence cases, such as was a possible outcome of Senator Otero's legislative proposals,⁴⁵¹ would have violated international human rights principles and the dictates of the American Convention by diluting previously existing remedies for the protection of a woman's fundamental rights.⁴⁵² However, the addition of new civil remedies would not violate international norms. According to the norms of the Inter-American system for the protection of human rights, each State's legal system must provide for the effective judicial investigation, prosecution, and punishment of batterers, thereby

⁴⁴⁷ See *supra* notes 363-65.

⁴⁴⁸ See *supra* note 367 and accompanying text.

⁴⁴⁹ See generally Oppenheim, *supra* note 164.

⁴⁵⁰ *Reportaje: Legislando para una Sociedad Igualitaria*, *supra* note 443, at 14.

⁴⁵¹ Even though Senator Otero's Act contains a saving's clause directing civil judges to send all intrafamily violence cases that constitute a crime (*delito*) to the penal tribunals, article 7 "light" injury misdemeanor cases would be decriminalized under article 1, which states that all cases that previously constituted misdemeanors (*faltas*) under article 494 of the Penal Code are to be handled according to Senator Otero's legislation by civil tribunals. Otero's Intrafamily Violence Act, *supra* note 7, arts. 1, 7. *But see infra* notes 454-70 and accompanying text.

⁴⁵² The international treaties currently in force do not explicitly require that domestic violence be redressed by criminal remedies. See, e.g., the jurisprudence cited *supra* note 364. However, the norms of the American Convention, to which Chile is a State Party, prohibit the lessening or restriction of previously existing protections for individual's human rights. Advisory Opinion, Inter-Am. C.H.R. paras. 49-50, OC-3/83, OEA/ser. A/No.3 (Sept. 8, 1983) (stating that human rights treaties such as the American Convention must be interpreted to further their object and purpose, which is to protect individual's human rights). Specifically, article 29 of the American Convention prohibits restrictions that are incompatible with the full protection of human rights allowed by the norms of the American Convention. *Id.* para. 51. Article 29(b) prohibits "restricting the enjoyment of exercise of any right or freedom recognized by the laws of any state party." *Id.* Therefore, the restriction of previously existing rights, such as the right to criminal remedies in "light" injury domestic violence cases (*faltas*), violates the norms of the American Convention.

protecting a woman's fundamental rights to life, physical and mental integrity, and equality.⁴⁵³ Therefore, the ultimate test of whether Senator Otero's Act, SERNAM's Act or, for that matter, the U.S. Violence Against Women Act complies with international law is effectiveness.

After a change of government in early 1994 and much conflict between the House and Senate versions of the proposed Chilean Intrafamily Violence Act,⁴⁵⁴ the Chilean Senate, on April 20, 1994, approved a compromise version that set the final stages of enactment in motion.⁴⁵⁵ The new legislation reflects special prompting of the Senate by the Executive⁴⁵⁶ and a final political accord reached through an extraordinary series of meetings by the Chilean House and Senate Joint Committee.⁴⁵⁷ In the end, the Chilean Congress and the Executive enacted domestic violence legislation that incorporates substantial portions of SERNAM's original House version, in combination with the progressive points of the Senate version, while simultaneously rejecting the Senate provisions that could have diluted women's rights.

The adopted version creates jurisdiction in civil tribunals with full access to criminal remedies and thus should not de-penalize "light injury" domestic violence cases.⁴⁵⁸ Moreover, both criminal and civil

⁴⁵³ See *supra* note 364.

⁴⁵⁴ On January 19, 1994, the Chilean House "rejected the totality of the modifications introduced by the Senate on the project." *Proyecto de Ley Sobre Violencia Doméstica, Chilean Senate's Official Legislative History on Boletín N° 451-07* (April 15, 1994) (on file with the Case W. Res. J. Int'l L.).

⁴⁵⁵ *Senado de República de Chile, Orden del Día: Informe de la Comisión Mixta Formada en Virtud de lo Dispuesto en el Artículo 68 de la Constitución Política, Aprobado por la H. Cámara de Diputados Recaído en el Proyecto de Ley Sobre Violencia Intrafamiliar*, (Apr. 20, 1994) (on file with the Case W. Res. J. Int'l L.) [hereinafter *Orden del Día*]; *Tras Cuatro Años de Trámite: Congreso Despachó Proyecto Relativo a la Violencia Intrafamiliar*, EL MERCURIO, Apr. 21, 1994, at 1 [hereinafter *Congreso Despachó*].

⁴⁵⁶ The Intrafamily Violence Legislation was cited for Chile's 1993-94 "Extraordinary Legislative Sessions", called by the Executive to address projects still pending from the previous administration. Throughout the legislative process, the Senate was urged over five times by the Executive to take definitive action on the issue and refrain from thwarting the law's enactment. *Congreso Despachó*, *supra* note 455; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 71 (1989) (describing the Presidential power to urge action); *id.* arts. 65-68 (describing the risk of legislation being lost if an accord between both houses of the Chilean Congress is not reached within a certain time period).

⁴⁵⁷ *Congreso Despachó*, *supra* note 455; see also Marco Álvarez, *Proyecto Ingresó a Trámite en 1990 y ha Causado Discrepancias entre Ambas Cámaras: Senado Decide Hoy Aprobación*, LA NACIÓN, Mar. 22, 1994, at 2. But see *Va Proyecto de Violencia Intrafamiliar*, LA NACIÓN, Mar. 29, 1994 (An impasse between the House and Senate was resolved by Soledad Alvear, Chile's new Minister of Justice and former Minister of SERNAM, after convening a special meeting of the Joint Commission and engineering a political accord.).

⁴⁵⁸ *Orden del Día*, *supra* note 455, arts. 2 and 7. See also *Cámara de Diputados de Chile*,

courts will be empowered to order such new remedies as protective orders and financial support. The new law also incorporates the flexibility and breadth of civil remedies suggested by Senator Otero, with the option to enforce such judicial orders through the threat of imprisonment.⁴⁵⁹ These newly codified civil law remedies will be provided as an option for criminal courts in all domestic violence cases, not just the "light injury" cases treated in the new legislation.⁴⁶⁰

While the progressive points of law introduced by Senator Otero were incorporated, points in conflict with SERNAM's original version were resolved in favor of women's rights. A House provision, previously rejected by the Senate, allowing judges to order immediate protective measures upon first notice of domestic violence, rather than awaiting the more formal complaint and service of process, was incorporated into the adopted legislation.⁴⁶¹ Senator Otero's language defining the prohibited violence as acts or omissions of mistreatment "significantly" affecting the physical or mental health of the victim was deleted.⁴⁶²

In contrast to typical state laws in the United States defining legally actionable domestic violence as a physical battery between legal or blood relations,⁴⁶³ the Chilean legal system will now define and prohibit a much broader category of domestic violence. The new Chilean law provides that:

Intrafamily violence is to be understood as all mistreatment resulting from an action or omission that produces harm to the physical or mental health of: ascendants and descendants, of collateral consanguinity or up until the fourth grade [of consanguinity]; spouse or live-in partner; and minors or disabled people that are under the care or dependence of any of the members of the family group.⁴⁶⁴

Boletín No. 451-07 (0): Informe de la Comisión de Constitución, Legislación y Justicia Sobre las Observaciones Formuladas por el Presidente de la República al Proyecto de Ley Sobre Violencia Intrafamiliar, 3 (May 19, 1994) (on file with the *Case W. Res. J. Int'l L.*) (describing the accord to maintain the Senate's insistence on civil courts in the final text of the law, until special family tribunals are developed, and noting the Chilean law provides that each community must have a civil tribunal, "which assures, also, a more expedient access to justice."); *infra* note 465.

⁴⁵⁹ See *Orden del Día*, *supra* note 455, art. 7.

⁴⁶⁰ See *id.* art. 13.

⁴⁶¹ *Id.* art. 7. See also *Va Proyecto de Violencia Intrafamiliar*, *supra* note 457; *Cambios en el Texto*, LA NACIÓN, Mar. 29, 1994.

⁴⁶² *Orden del Día*, *supra* note 455, art. 1; *Cambios en el Texto*, *supra* note 461.

⁴⁶³ See VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. 24 (1991) ("Model" state laws define the prohibited violence more narrowly than Chile.); Hoffman, *supra* note 20 (Such "model" laws exist in only 15 of the 50 states.).

⁴⁶⁴ *Orden del Día*, *supra* note 455, art. 1.

During May, 1994, the compromise version described above was confirmed and enacted into law by a rare constitutional procedure, a Presidential "substitutive veto" designed to resolve conflicts not settled through the normal legislative process.⁴⁶⁵ The Chilean press described the passage of any domestic violence law as precarious, due to a long and complex political battle.⁴⁶⁶ Chilean feminists who worked directly with battered women were vehemently opposed to Senator Otero's version of the law;⁴⁶⁷ but the new Minister of SERNAM, taking a more family-oriented and traditional approach, made public statements that either version of the law would be a step forward.⁴⁶⁸ If the former Minister of SERNAM and current Minister of Justice, Soledad Alvear,⁴⁶⁹ had not boldly insisted on a political accord based on women's rights under the international human rights norms applicable in Chile today,⁴⁷⁰ the legislation may have been significantly diluted, if not completely lost.

Perhaps the controversial nature of such a progressive law on a

⁴⁶⁵ See *Formula Observaciones al Proyecto de Ley Sobre Violencia Intrafamiliar* BOLETÍN N°. 451-07 (1990); Cámara de Diputados de Chile, No. 146-328 (May 5, 1994), reprinted in *Cámara de Diputados, Veto Sustitutivo: Violencia Intrafamiliar* BOLETÍN 451-07 (May 11, 1994) (on file with the *Case W. Res. J. Int'l L.*) (presenting the text, in Spanish, of the Chilean President's Sustitutive veto); *Camara de Diputados de Chile*, BOLETÍN 451-07 (1990): *Informe de la Comisión de Constitución, Legislación y Justicia Sobre las Observaciones Formuladas por el Presidente de la República al Proyecto de Ley Sobre Violencia Intrafamiliar* 3 (May 19, 1994) (on file with the *Case W. Res. J. Int'l L.*) (presenting the Congressional Commission's analysis of the text of the law suggested by the veto, and recommending adoption by the House). See also *Orden del Día*, *supra* note 455, at 1-2 (The Senate called for the substitutive veto, citing special constitutional processes to resolve the conflict.); *Congreso Despachó*, *supra* note 455 (explaining that substitutive veto was necessary because normal legislative processes were exhausted); *En Cámara de Diputados: Aprueban Veto al Proyecto de Violencia Intrafamiliar*, EL MURCURIO, May 20, 1994 (Valparaíso edition), at B1. The final compromise version is certain to be adopted by the Senate because it incorporates the Senate's April, 1994, version. *Id.*

⁴⁶⁶ See *supra* note 457.

⁴⁶⁷ Ana Caceres et al., *Erradicar la Violencia Intrafamiliar*, LA NACIÓN, Apr. 5, 1994, at 54 ("It is clear that the actions of Senator Miguel Otero are responsible for these modifications — that could make the law inoperable — and the delay that its definitive approval has suffered.").

⁴⁶⁸ María Josefina Bilbao, *Ministra de Sernam: "Las Agresiones Estaban Ahí y No Las Veíamos"*, LA NACIÓN, Mar. 22, 1994, at 3 (Interview with María Josefina Bilbao, the new Minister of SERNAM under the 1994 Frei administration.).

⁴⁶⁹ See *Congreso Despachó*, *supra* note 455 (detailing the key role that Minister Alvear played in reaching an accord so that the project of law would not be lost completely as final procedural deadlines approached).

⁴⁷⁰ Nancy de la Fuente, *Una Ley Para Violencia Intrafamiliar*, 2 (Apr. 20, 1994) (on file with the *Case W. Res. J. Int'l L.*) (describing Chile's legal obligations to punish and eradicate violence against women, citing the Convention on the Elimination of All Forms of Discrimination Against Women and other international legal instruments incorporated into the Chilean constitutional system).

women's rights made it necessary to enact the law through such extraordinary means. In any case, it is now obvious that in this Latin American nation, great strides have been made in the advancement of women's rights through the passage of the new legislation. In terms of comparative international law, Chile's Intrafamily Violence legislation "will put . . . [the Chilean] legislation in a position of vanguard in this area."⁴⁷¹ The long work ahead is to ensure that the law is interpreted in favor of women's human rights and effectively applied and enforced.⁴⁷² However, as long as the unique social changes and cultural adaptations that made the law's enactment possible remain strong, the law can be expected to serve as an improvement in dealing with the problem of domestic violence.

VII. CONCLUSIONS AND RECOMMENDATIONS

Contrary to degrading stereotypes, the Latin American women's rights movement is the source of the strongest proposals for developing international human rights norms to defend a woman's fundamental right to be free from domestic violence.⁴⁷³ Better legal remedies are being demanded by women's rights activists throughout Latin America. However, on a local, national, and international level, policymakers in the United States who ascribe to a theory of misguided cultural relativism fail to support prosecution of cases of domestic violence involving a Hispanic or Latina woman.⁴⁷⁴ In order to examine whether "the Latino culture" is, as has been assumed by the United States government, an obstacle to the enforcement of the fundamental human rights of Latina women, this article reviewed the Chilean women's movement to end violence against women was and compared it to the situation of women in the United States.

The level of domestic violence directed against women is equally high in both the United States and Chile.⁴⁷⁵ Common structural problems in the respective legal systems created barriers to the effective judicial investigation, prosecution, and sanctioning of domestic violence, and thereby hindered efforts to protect battered women from continued assaults.⁴⁷⁶ While the incidence of domestic violence is related to the position of women in society and the national power structure;⁴⁷⁷ in

⁴⁷¹ *Id.* at 3.

⁴⁷² *Id.*

⁴⁷³ See *supra* notes 50-53, 66, 71 and accompanying text.

⁴⁷⁴ See *supra* notes 15-16, 31-34, 69-72 and accompanying text.

⁴⁷⁵ See *supra* notes 105-06 and accompanying text.

⁴⁷⁶ See *supra* note 75 and accompanying text.

⁴⁷⁷ See *supra* note 122 and accompanying text.

Chile, these issues do not present insurmountable obstacles to the development of women's legal rights. Because the Chilean women's movement is a strong and active political force, the social change necessary to achieve equality for women is occurring.⁴⁷⁸ SERNAM, the Chilean government ministry for women, is vested with the power to introduce legislation and enact changes in the national political agenda.⁴⁷⁹ Their power stems not only from a strong women's movement, but from the international human rights principles that create a legal basis for the development of women's rights in Chile.⁴⁸⁰

Participation of women in the human rights movement has expanded and changed Chilean politics to include advocacy for the fundamental right to freedom from domestic violence.⁴⁸¹ In the last decade, when the Chilean women's movement was making significant advances, the United States experienced a cultural, legal, and political backlash against expansion of women's rights.⁴⁸² Due to the strength of the Chilean women's rights movement, in some respects, the situation of women in the United States compares unfavorably to that in Chile.⁴⁸³

The myths that Latin American women are more tolerant of sexism and male violence are complex, yet clearly overdetermined by racism and other unjust stereotypes. Furthermore, in contrast to ethnocentric myths about Latin Americans, the application of legal remedies to domestic violence could be effective in the Chilean "Latino culture." Although distinct and unique cultural elements such as Catholicism,⁴⁸⁴ "machismo,"⁴⁸⁵ and poverty⁴⁸⁶ are present in Chile, they are not insurmountable obstacles in an attempt to legally protect women's rights.

During the era of the military dictatorships in the Southern Cone, women's rights were repressed by the governments espousing "Western," "Christian," and "modern" values.⁴⁸⁷ The success of women's campaigns to overthrow the dictatorships in the Southern Cone served to strengthen the Chilean women's movement.⁴⁸⁸ Today's grass roots and national movements to end violence against women in Chile, in addition

⁴⁷⁸ See *supra* note 156 and accompanying text.

⁴⁷⁹ See, e.g., *supra* note 7.

⁴⁸⁰ See *supra* note 130 and accompanying text.

⁴⁸¹ See *supra* notes 227-29 and accompanying text.

⁴⁸² See *supra* notes 196-203 and accompanying text.

⁴⁸³ See *supra* note 5.

⁴⁸⁴ See *supra* note 181 and accompanying text.

⁴⁸⁵ See *supra* notes 145-59 and accompanying text.

⁴⁸⁶ See *supra* notes 276-90 and accompanying text.

⁴⁸⁷ See *supra* notes 212-30 and accompanying text.

⁴⁸⁸ *Id.*

to the regional Latin American women's movement, are campaigning for women's rights as essential for peace and democracy.⁴⁸⁹ Even after the legal system's refusal to sanction the grave human rights abuses during the Chilean military dictatorship, distrust of the legal system has not prevented Chilean women from seeking improved legal intervention to defend their rights. Also, because Chilean society's legalistic nature, the law is a compelling element of social change with respect to women's rights.⁴⁹⁰ Due to the efforts of SERNAM, some Chilean police are now an ally in the woman's struggle against domestic violence.⁴⁹¹ At the same time, many Chilean women's rights activists are members of the ongoing human rights movement.⁴⁹² However, legal reforms, along with further social change, are necessary to end the epidemic of violence against women in Chile.

As was demonstrated *supra*, sexism is present and influential in both the United States and Chilean legal cultures. Additionally, in both countries, judicial patriarchy has been detrimental to battered women and has exposed them to further injuries, including death.⁴⁹³ This phenomena has occurred despite the differences between the United States common law and Chilean civil law systems.⁴⁹⁴ In both countries, the available judicial discretion should be used to apply constitutional and human rights principles that would ensure the effective investigation, prosecution, and punishment of domestic violence cases.⁴⁹⁵ However, given the reticence of judges in both countries, such a principled use of judicial discretion would probably not occur without the enactment of new legislation educating judges on their obligation to preserve women's fundamental rights.

In Chile, domestic violence legislation will effectuate nationwide reforms in the legal system, overturning the judicial norm that "light" injury domestic violence cases may only be sanctioned with a small fine.⁴⁹⁶ The new Chilean Intrafamily Violence law mandates: (1) investigation and prosecution of domestic violence cases; (2) sanctions geared

⁴⁸⁹ See *supra* notes 231-39 and accompanying text.

⁴⁹⁰ See *supra* notes 187-94.

⁴⁹¹ See *supra* note 83 and accompanying text (Successful training has begun and next year, a nationwide police academy training program will be implemented.). *But cf. supra* notes 385-88 and accompanying text (describing the recent *Rebolledo* case, where police failed to prosecute severe domestic violence).

⁴⁹² See *supra* note 51.

⁴⁹³ See *supra* notes 318-19, 348-50 and accompanying text.

⁴⁹⁴ See *supra* notes 295-312 and accompanying text (describing the Chilean system); *supra* notes 319-27 (describing the system in the United States).

⁴⁹⁵ See *supra* notes 364-65.

⁴⁹⁶ See *supra* note 81 and accompanying text.

towards ending the cycle of domestic violence; and (3) protective measures to prevent continued injuries.⁴⁹⁷ The Chilean legislation also punishes psychological violence.⁴⁹⁸ Although psychological violence is shown to have grave effects and lead to suicides in the United States,⁴⁹⁹ the United States legislation does not provide any such remedy.⁵⁰⁰

The U.S. Violence Against Women Act results in the same three structural changes as the Chilean legislation, but would not ensure nationwide reforms.⁵⁰¹ These structural changes are necessary for minimal compliance with human rights standards applicable in the United States. SERNAM's Intrafamily Violence Act and the U.S. Violence Against Women Act recognize the gender bias inherent in cases of domestic violence against women.⁵⁰² Chile's new Intrafamily Violence Act does not explicitly recognize such gender bias, but that issue might not be lost in future processes, especially if Chilean judges comply with the international human rights standards that are incorporated in their constitution.⁵⁰³

One difference between the legal systems in the United States and Chile is that the Chilean Constitution incorporates international human rights norms, while the system in the United States generally does not.⁵⁰⁴ However, the international norm that States have an affirmative obligation to protect a woman's fundamental human rights by providing effective judicial investigation, prosecution, and punishment of domestic violence⁵⁰⁵ is applicable in the United States.⁵⁰⁶ International human rights norms required the enactment, and now the effective application, of legislation in Chile that protects women's rights, including the right to be free from gender discrimination. These same principles require the enactment of further legal remedies to ensure more protection for women in the United States than the Violence Against Women Act.

In conclusion, the comparison of the situation of battered women in

⁴⁹⁷ See *supra* notes 414, 419-22 and accompanying text; see generally *Orden del Día*, *supra* note 455.

⁴⁹⁸ See *supra* note 252 and accompanying text. See also *supra* notes 455, 465 and accompanying text.

⁴⁹⁹ See *supra* notes 245-47 and accompanying text.

⁵⁰⁰ See generally VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. (1991).

⁵⁰¹ See *supra* note 414 and accompanying text.

⁵⁰² See *supra* notes 142, 367 and accompanying text.

⁵⁰³ See *supra* note 444 and accompanying text.

⁵⁰⁴ See *supra* notes 334, 377-79, 383 and accompanying text.

⁵⁰⁵ See *id.*; *supra* note 364 and accompanying text.

⁵⁰⁶ See *supra* notes 379-80.

the United States and Chile reveals common structural problems in the respective legal systems that demand reforms to ensure women's fundamental rights. The victorious Chilean legislation is actually more progressive than the U.S. Violence Against Women Act. Unsubstantiated stereotypes of the "Latino culture" present no real reason to refuse legal remedies for Hispanic or Latina women who are battered in the United States, even though such remedies should accommodate cultural differences. Furthermore, the national and international remedies being developed by Latin American women could improve the situation of women in the United States. The United States policy of refusing to support international treaties such as the Inter-American Convention on the Prosecution, Punishment and Elimination of Violence Against Women on the basis of misguided "cultural relativism"⁵⁰⁷ is unfounded. While respect for diversity and careful attention to political context is important in the international human rights arena, the United States should promote, not hinder, the international human rights norms being developed by Latina women. In contrast to myths about United States superiority, the United States should follow the lead of the Latin American women's rights movement and implement the national and international legal remedies that Latina women are developing.

⁵⁰⁷ See *supra* note 72 and accompanying text.