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Advancing Equality in Domestic Violence Law Reform

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ADVANCING EQUALITY IN DOMESTIC VIOLENCE LAW REFORM

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INTRODUCTION

This Article addresses the tension between two themes in Elizabeth Schneider's book, *Battered Women and Feminist Lawmaking*,[1] that highlight challenges for future legal advocacy to end violence against women. Schneider reinforces the importance of advancing an equality framework as a fundamental component of domestic violence law reform.[2] Equally compelling, she reinforces the bedrock "feminist" principle that advocacy should be informed, if not driven, by the voices and experiences of the women on whose behalf the advocacy is directed.[3] Under that theory, the concerns and needs of battered women should be the foundation for legal advocacy undertaken on their behalf.

Yet, having litigated cases under the Violence Against Women Act's ("VAWA") Civil Rights Remedy[4] for over six years, including *United States v. Morrison*[5] before the United States Supreme Court, I am struck by the gap between the promise of equality the Civil Rights

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1. ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING (2000).

2. *See id.* at 192, 197-98 (discussing the link between violence against women and women's inequality).

3. *See id.* at 101-04 (discussing "feminist lawmaking" as translating women's experiences into law).

4. Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, 108 Stat. 1796 (1994), *amended by* Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended at scattered sections of 8, 18, 20, 28, and 42 U.S.C.).

5. 529 U.S. 598 (2000) (striking VAWA's civil remedy provision as an unconstitutional exercise of Congress's authority under either the Commerce Clause or the enforcement clause of the Fourteenth Amendment).

Remedy theoretically provides and the resounding requests of battered women for legal assistance in a wide range of areas other than civil rights. For example, battered women may seek assistance in negotiating criminal prosecutions in which they are involved,[6] in acquiring financial assistance and childcare,[7] and in securing government benefits.[8] The demand for direct representation in matrimonial, child custody, child support, and immigration proceedings far exceeds lawyers' availability.[9] But the number of requests for representation in civil rights lawsuits against perpetrators pales in comparison.

This gap was striking for many reasons, but mainly because the Civil Rights Remedy represented a classic "feminist" victory. As Liz discussed, it was a reform that reflected an "explicit framework of gender equality."[10] It expressly treated domestic violence and sexual assault as a form of discrimination and created a classic civil rights remedy in response.[11] Of course, the Supreme Court declared the Civil Rights Remedy unconstitutional, and thus this remedy is not

6. *See generally* Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 627-28 n.120 (2000) (describing battered women's need to balance the abuse and severity of the injury against economic concerns and possible retaliation when deciding whether to cooperate in criminal prosecutions).

7. *See, e.g.*, Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1017-18 (2000) (examining batterers' economic hold on battered women who lack sufficient financial resources); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1222 n.183 (1993) (explaining how battery compounds the difficulties of managing childcare).

8. *See generally* Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 FORDHAM URB. L.J. 1141 (1995) (describing links between poverty and violence).

9. *See* Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 991 (1991) (stating that although battered women may seek available remedies, they have no assured access to lawyers for representation); John Caher, *Pataki Proposes Higher Fees for Fund Raise in 18-B Rates*, 229 N.Y. L.J., Jan. 30, 2003, at 1 (noting shortage in assigned counsel who represent battered women in family court cases in New York); Wendy Davis, *More than Money*, 228 N.Y. L.J., June 2002, at Mag. (describing a "crisis" in the assigned counsel system leading to shortages of attorneys in family court cases affecting domestic violence victims). *Cf.* Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Services Proceedings*, 22 HARV. WOMEN'S L.J. 91 (1999) (describing custody issues battered women face as a result of domestic violence).

10. *See* SCHNEIDER, *supra* note 1, at 197.

11. *See id.* at 188-96 (recounting how the VAWA Civil Rights Remedy treated violence against women as a civil rights violation). By identifying intimate violence, sexual abuse and rape as a gendered phenomena, the Civil Rights Remedy brought to light the impact of those crimes on women's freedom and autonomy, which are fundamental to women's equality. *Id.*

available for use today.[12] But state civil rights remedies are still enforceable, and revised versions of the 1994 Civil Rights Remedy have been introduced in Congress to address the Court's constitutional concerns.[13]

Putting aside the Court's constitutional concerns, the question of what our experience with the Civil Rights Remedy tells us about the role of the equality principle in future domestic violence law reform efforts is an important one. To begin that exploration, this Paper will briefly examine how the Civil Rights Remedy was used, suggest ways to think about the limits of an equality model, and how to incorporate these lessons in future advocacy.

I. THE CIVIL RIGHTS REMEDY AS A TOOL TO ADVANCE GENDER EQUALITY

Understanding domestic violence and the legal system's treatment of domestic violence as a form of sex discrimination has been key to significant legal reform. For example, courts have recognized that police departments' failure to respond to battered women's calls for help can be a form of sex discrimination.[14] These cases have played an important role in improving police policies and practices, and have influenced the development of mandatory arrest and pro-arrest policies.[15] Similarly, sexual harassment cases framing sexual assault at

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

13. *See* Violence Against Women Civil Rights Restoration Act of 2000, H.R. 5021, 106th Cong. (2000) (restoring the federal civil remedy for gender-motivated crimes of violence with amendments addressing the *Morrison* Court's concerns); *see, e.g.*, CAL. CIV. CODE § 52(b) (1982 & Supp. 2002) (granting damages for denial of civil rights or discrimination); 720 ILL. COMP. STAT. ANN. 5/12-7.1(c) (1993 & Supp. 2002) (providing a civil remedy for gender-motivated crimes under the state's hate crime state, independent of whether there is a criminal prosecution); MICH. COMP. LAWS § 750.147b (2001) (holding a person guilty of ethnic intimidation if that person acts "maliciously and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin"); *see generally* Julie Goldscheid & Risa Kaufman, *Seeking Redress for Gender-Based Bias Crimes–Charting New Ground in Familiar Legal Territory*, 6 MICH. J. RACE & L. 265, 270-71 (2001) (discussing state gender bias crime laws).

14. *See, e.g.*, Navarro v. Block, 72 F.3d 712, 715-17 (9th Cir. 1996) (recognizing a 42 U.S.C. § 1983 claim for sex discrimination based on police department's disparate treatment of domestic violence claims); Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 700 (9th Cir. 1990) (recognizing that police policies that treat domestic violence victims differently from others can violate victims' equal protection rights); *see also, e.g.*, Hynson v. City of Chester, 864 F.2d 1026, 1032-33 (3d Cir. 1988) (articulating the standard for assessing whether a facially neutral police domestic violence policy has a discriminatory impact on women); Watson v. City of Kansas City, 857 F.2d 690, 694 (10th Cir. 1988) (confirming that police policy or custom that provides less protection for victims of domestic violence and proof that discrimination against women was a motivating factor underlying the policy could support a claim under 42 U.S.C. § 1983).

15. *See generally* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence,*

work as sex discrimination and a violation of Title VII[16] have helped change workplace policies and norms.[17] Cases brought under 42 U.S.C. Section 1983[18] to redress sexual assault by state actors, such as police or prison guards, also confirmed sexual violence as a form of sex discrimination.[19] Gender-bias studies, detailing the inferior treatment litigants receive in traditionally female fora, such as family court, have helped improve policy and procedures, although much work remains to be done.[20]

The Civil Rights Remedy codified this anti-discrimination model, linking gender-based violence to other forms of hate crime, while distinguishing it from other torts.[21] The Civil Rights Remedy has left a legacy of approximately sixty reported decisions interpreting the law.[22] Interestingly, and contrary to Liz's prediction, these cases addressed both domestic violence and sexual assault.[23] Also notably, notwithstanding much debate about how the law's requirement that plaintiffs establish "gender motivation" would be interpreted, courts readily recognized gender bias elements in both domestic violence and sexual assault cases.[24]

1970-1990, 83 J. CRIM. L. & CRIMINOLOGY 46 (1992) (describing the history of police departments' failure to respond to domestic violence cases, the advent of litigation challenging those policies, and the development of mandatory arrest policies to promote consistent police responses).

16. 42 U.S.C. §§ 2000e-2000e17 (1994 & Supp. 2002).

17. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986) (holding that sexual harassment involving sexual assault at work constitutes sex discrimination prohibited by Title VII).

18. 42 U.S.C. § 1983 (1994 & Supp. 2002) (establishing a private cause of action where state actors' violate others' statutory or constitutional rights).

19. *See, e.g.*, Women Prisoners v. District of Columbia, 93 F.3d 910, 929 (D.C. Cir. 1996) (recognizing sexual assaults on female inmates, coupled with disparaging remarks, as sex discrimination).

20. *See, e.g.*, *Violence Against Women: Victims of the System: Hearing on S. 15 Before the S. Comm. on the Judiciary*, 102d Cong. (1991) (citing studies of gender bias task forces).

21. *Cf.* Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) ("The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose— by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.").

22. *See generally* Goldscheid & Kaufman, *supra* note 13, at 266 (citing VAWA Civil Rights Remedy cases decided prior to *Morrison*).

23. *Compare* SCHNEIDER, *supra* note 1, at 193 (predicting that cases involving the Civil Rights Remedy would most likely involve sexual assualt and rape, rather than domestic violence), *with* Ziegler v. Ziegler, 28 F. Supp. 2d 601, 620 (E.D. Wash. 1998) (recognizing gender bias in claims based on domestic violence).

24. *See* Goldscheid & Kaufman, *supra* note 13, at 273-83 (describing facts used to establish gender bias in VAWA civil rights remedy cases involving sexual assault and domestic violence).

I agree with Liz that the number of claims brought may have been limited by the fact that the VAWA Civil Rights Remedy was relatively new and subject to constitutional challenge.[25] But the paucity of cases cannot be attributed to age and constitutional issues alone. Many state laws, some of which predated the Civil Rights Remedy, create or authorize civil remedies for gender-bias crimes.[26] However, like the 1994 Civil Rights Remedy, those state statutes are also infrequently used.[27] Does this mean that more work needs to be done to publicize the laws, or is there a theoretical limitation to using a civil rights-based model to redress violence against women? Of course, we need not choose one strategy to the exclusion of others, but understanding the limitations of a civil rights-based model in this context may prove useful in devising future strategies.

II. THE LIMITS OF THE CIVIL RIGHTS REMEDY APPROACH

Several points help explain why a civil rights paradigm may have limited utility in redressing violence against women. First, a civil rights remedy may contain an inherent class-based bias. Time and again, in conducting public education and outreach about the VAWA Civil Rights Remedy, I was told that battered women and sexual assault survivors would not want to avail themselves of the law because their batterer had few or no assets. Although domestic violence and sexual assault crimes are committed by perpetrators from all income groups, a civil rights remedy directed towards financial remuneration will only be useful when perpetrators have assets to recover.[28] This critique would also explain in part why domestic violence and sexual assault victims tend not to commence claims under traditional tort schemes.[29] While the number of civil damages actions to redress sexual violence could increase with more public awareness and

25. *See* SCHNEIDER, *supra* note 1, at 193.

26. *See* ANTI-DEFAMATION LEAGUE, STATE HATE CRIMES STATUTORY PROVISIONS MAP (2001) (listing twenty-one states plus the District of Columbia with gender bias crime laws, twelve of which (including the District of Columbia) incorporated civil recoveries), *available at* http://www.adl.org/learn/hate_crimes_laws/map_frameset.html.

27. *See* Goldscheid & Kaufman, *supra* note 13, at 270-71 (observing that although numerous states provide civil remedies for victims of gender-motivated crimes, no reported decisions indicate that relief was granted under those laws).

28. *See* Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 137-38 (2001) (explaining that financial recovery is not possible when a defendant does not have assets or insurance).

29. *See id.* at 135-44 (discussing factors such as lack of insurance, statutes of limitations, and procedural barriers that, when combined, lead to the dearth of domestic violence cases being brought as tort claims).

structural supports, such as insurance provisions,[30] there will always be an inherent class bias that will limit the number of women invoking their use.

Perhaps for similar reasons, other civil rights recovery schemes targeting individual perpetrators also are used less often than civil rights laws that target institutional defendants. For example, 42 U.S.C. Section 1985(3),[31] which also is directed against individuals (albeit against groups of individuals), appears to be less widely used than others from the Reconstruction era in which it was enacted.[32] This may suggest that one of the aspirations of using civil rights recovery schemes against individuals–providing an additional vehicle to hold perpetrators accountable–may not be realized through civil damages suits.

More significantly, a law providing a civil rights remedy against an individual perpetrator may be less attractive to victims of sexual violence because of the nature of the abuse. Generally, survivors of sexual violence, particularly those who faced domestic abuse, frequently go to great lengths, including obtaining protective orders and other legal interventions, to minimize their interactions with the batterer.[33] The perils of litigating against a former abusive partner are well known to those representing domestic violence victims in custody battles: batterers are renowned for entering into litigation as a means for perpetuating the abuse and attempting to exert control over the former partner.[34] Battered women face difficulty recovering

30. *See id.* at 135-37 (arguing that the current lack of third party liability insurance coverage for those accused of domestic violence contributes to the scarcity of tort claims for injuries that result from domestic violence).

31. 42 U.S.C. § 1985(3) (2000) (prohibiting conspiracies to deprive others of their civil rights).

32. *See generally* Toni Driver, Note, *Federal Law – Civil Rights – Individuals Obstructing Ingress and Egress to Abortion Facilities do not Violate a Woman's Federal Rights within 42 U.S.C. § 1985(3)*, 25 ST. MARY'S L.J. 753, 754-57 (1994) (explaining that even though members of the Forty-second Congress enacted the Civil Rights Act, codified at 42 U.S.C. § 1985(3) during the Reconstruction era to end brutality to African Americans and their supporters, the law was effectively left dormant for almost one hundred years).

33. *See* Wriggins, *supra* note 28, at 142-43 (explaining that because many battered women do not want to be continually reminded of their injury or loss, or do not want further confrontation with their batterers, they choose not to bring a civil claim against their batterers).

34. *See id.* at 143 (noting that many battered women have a "real and reasonable fear of violent retaliation for the suit"). *See generally* Joan Zorza, *Protecting the Children in Custody Disputes when One Parent Abuses the Other*, CLEARINGHOUSE REV., Apr. 1996, at 1113 (addressing batterers' use of custody battles to perpetuate abuse); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 1018 (1995) (highlighting batterers' misuse of custody battles to perpetuate abuse).

existing financial obligations, such as child support, and may not be eager to take on additional battles.[35] Also, restitution may be available through other means, such as criminal law or crime victims' compensation schemes.[36] Additional litigation, which ensures more contact and more opportunity for the batterer to use the legal system to perpetuate the abuse, may be the last thing a survivor wants to initiate.[37] In that context, it is not surprising that domestic violence victims are not eagerly seeking this form of civil rights remedy.

III. DIRECTIONS FOR THE FUTURE: INFUSING BATTERED WOMEN'S EXPERIENCES INTO A VISION OF EQUALITY

Of course, limitations associated with civil remedies for gender-based violence do not mean that they should be abandoned. Litigation adjudicating the Civil Rights Remedy's constitutionality enhanced public awareness of the problem of gender-based violence through media coverage and public debate. Although many opposed the law as an overreach of federal authority, many others expressed outrage at determinations that Congress lacked the authority to declare gender-based violence a civil rights violation.[38] By holding sexual assault and domestic violence to be gender-motivated crimes, with little reflection or analysis, these cases marked notable progress from initial cases involving sexual harassment in the workplace, in which courts dismissed sexual assault as a private matter outside the realm of workplace or legal regulation.[39]

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35. *See, e.g.*, Wriggins, *supra* note 28, at 135-44 (discussing reasons victims do not, or are not able to, seek legal remedies).

36. *See* 18 U.S.C. § 2264(a) (2000) ("Notwithstanding section[s] 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any [stalking or domestic violence] offense under this chapter.").

37. *See* Wriggins, *supra* note 28, at 143-44 (illustrating instances in which a battered woman might chose not to assert a claim against her batterer). For example, a battered woman seeking to divorce her abusive husband may rationally fear that he will employ retaliatory legal strategies in the divorce proceedings. *Id.* Also, if the battered woman has injured her abuser, she may fear that a counterclaim will be filed against her if she initiates the litigation. *Id.*

38. *Compare, e.g.*, James F. Blumstein, *Rule of Law: Football and Federalism*, WALL STREET J., Jan. 10, 2000, at A27 (urging the Court to strike the Civil Rights Remedy as an impermissible use of Congressional power), *with, e.g.*, Editorial, *Violence Against the Constitution*, N.Y. TIMES, May 16, 2000, at A22 (condemning the Supreme Court decision in *United States v. Morrison* as leaving women more vulnerable to gender-motivated violence); Melissa Klein, *Bill Will let Victims Sue for Damages; Federal Provision on Gender-Based Crimes Ruled Unconstitutional*, JOURNAL NEWS (Weschester County, N.Y.), Mar. 8, 2001, at 3B (reporting introduction of state bill to give victims of gender-based crimes civil recourse in the aftermath of *Morrison*).

39. *See, e.g.*, Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *rev'd*, 562 F.2d 55 (9th Cir. 1977) (concluding that verbal and physical sexual advances by a supervisor were based on personal urges, not sex discrimination);

But this juncture provides an opportunity to reassess the role that gender inequality plays in violence against women, and to reinvigorate the important feminist tenet that law reform initiatives should be propelled by the needs of the women we represent. The first point requires some critical self-analysis. To move forward with legal reform addressing violence against women, we must recognize the reality of our clients' lives. For example, while gender bias may exist in many, if not most, domestic violence cases, we should acknowledge that gender bias might not be operative in all domestic violence cases. Some perpetrators are women, although the percentage of female perpetrators is far lower than the percentage of men who commit violence against intimate partners. In a sense, acknowledging women's capacity for violence can advance efforts to promote gender equality by challenging stereotypes of women as passive and acknowledging women's capacity to be aggressive. While we should not reshape the public debate or deny the predominance of male violence against women, we also need not deny the existence of women's aggression to prove the general point.

To advance legal reforms, we must address the complex issues our clients present. For example, domestic violence programs often are geared to women who leave their batterers. But many women do not want to leave their batterers. They want the violence to stop and want to explore ways to safely keep their partners in their lives. While advocates must recognize and educate clients about the progressive and escalating nature of domestic violence, we do no service by excluding women who do not leave their batterers from receiving services, or by waiting until the violence escalates to more dangerous levels. Programs should welcome, rather than exclude, these women, and funding sources should facilitate and support those programmatic efforts.

Careful listening can also generate innovative reforms that promote equality. For instance, recent initiatives to prohibit discrimination against domestic and sexual assault survivors at work and in housing represent important advances that can help remove remaining barriers to economic independence and safety. Cases in which battered women are discriminated against in the workplace are beginning to be recognized as a form of sex discrimination. For example, in 1998, Maureen Valdez sued her employer for firing her

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Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D. N.J. 1976) (determining that verbal and physical sexual advances were not job-related even though they occurred at work), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

after her abusive former partner assaulted her at work.[40] Legislation has begun to address that issue directly. In 2001, New York City enacted the first law in the country to prohibit employment discrimination against battered women.[41] Similar proposals are pending in Congress, California, Hawaii, Illinois, New York and Tennessee.[42] These proposals would create a civil rights remedy for battered women who are fired or otherwise discriminated against at work because they are in an abusive relationship. In addition, these proposals can promote safety planning by assuring battered women that they will not be penalized for discussing the abuse with co-workers or supervisors. Similar proposals would prohibit sanctions against domestic violence victims in welfare-to-work training programs.[43] In related initiatives, battered women have held landlords accountable for sex discrimination when they penalize the victim for her partner's violence.[44] These efforts reframe and advance our understanding of the complex ways that discrimination impacts institutions and prevents victims of both domestic and sexual violence from successfully reaching safety.

Creative new reform may be accomplished by renewing our commitment to listening to battered women and confronting the

40. *See* Valdez v. Truss Components, Inc., No. CV98-1310-RE, slip op. at 4 (D. Or. Aug. 19, 1999) (alleging that termination constituted sex discrimination).

41. *See* N.Y.C. ADMIN. CODE § 8-107.1 (2001) ("It shall be unlawful discriminatory practice for an employer . . . to refuse to hire or employ or to bar or to discharge from employment, or to discriminate against an individual . . . because of the actual or perceived status of said individual as a victim of domestic violence.").

42. *See* Victims' Economic Security and Safety Act ("VESSA"), S. 1249, 107th Cong. (2001) (establishing, *inter alia*, an entitlement to emergency leave from work for victims of sexual and domestic violence); A.B. 2195, 2001-02 Reg. Sess. (Cal. 2002) (extending existing domestic violence leave protections to victims of sexual violence); S.B. 2438, 21st Leg. (Haw. 2002) (mirroring VESSA by establishing an entitlement to emergency leave from the workplace for victims of sexual and domestic violence); Victims of Domestic Violence Employment Leave Act, S.B. 657, 92d Gen. Assemb. (Ill. 2001) (modeling Illinois law after VESSA by establishing an emergency leave entitlement, but only for victims of domestic–and not sexual—violence); A.B. 2544, 224th Ann. Leg. Sess. (N.Y. 2001) (amending state labor law to ensure that victims of domestic violence are protected in the event they are absent from work to "attend court proceedings to assure their own or their child's safety"); Victims' Employment Rights Act of 2001, H.B. 385, 102d Gen. Assemb. (Tenn. 2001) (amending state law to prohibit employers from discriminating against actual or perceived victims of domestic violence, sexual assault, or stalking); *see also* N.Y. PENAL LAW § 215.14 (McKinney 2001) (barring termination when an employee exercises her legal right to get a restraining order); R.I. GEN. LAWS § 12-28-10 (2001) (prohibiting discharge or discrimination against employee who is a victim of domestic violence for getting a protective order).

43. *See* VESSA § 3.

44. *See, e.g.*, Robin Franzen, *Eviction Suit a Win for Violence Victims*, OREGONIAN (Portland), Nov. 3, 2001, at E01 (discussing a consent decree that would prohibit a property management company from evicting domestic violence victims on the basis of the victimization).

complex issues they face. There is a continued need to advocate support for battered women's shelters, counseling programs and rape crisis centers, including community-based rape crisis programs, job training and childcare. Civil legal assistance programs also need ongoing support. However, if we allow ourselves to take a fresh look at these issues, while embracing their inherent contradictions and complexities, we can advance legal reform addressing domestic and sexual violence into its next stage.