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Abstract

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Abstract

This article uses the occasion of the 2012 Reauthorization of the Violence Against Women Act (VAWA) to review the circumstances by which legal theory and social movement discourse have acted to circumscribe the scope of VAWA and the dominant approach to domestic violence. It seeks to explore the relationship between domestic violence advocacy and feminist theory of the type that has functioned as “the ideological reflection of one’s own place in society” with insufficient attention to superstructures. It argues for the re-examination of the current domestic violence/criminal justice paradigm and calls for the consideration of economic uncertainty and inequality as a context for gender-based violence. It argues that as an epistemology, domestic violence scholarship has fallen behind other fields of study due to its failure to address the structural context of gender-based violence. The Article then proposes a redefinition of the parameters of domestic violence law and presents new (and provocative) ways to think about law-related interventions to ameliorate gender violence.
Introduction

The year 2012 marks nearly two decades since the enactment of the historic Violence Against Women Act (VAWA).\(^1\) The passage of VAWA in 1994 signaled Congressional recognition of the relationship between gender-based violence and women’s equality, and more: VAWA served to acknowledge that state legal structures had failed to provide adequate remedy to battered women. VAWA authorized victims of gender-based violence to bring civil rights actions in federal judicial forums, that is, to seek remedy in precisely those forums traditionally “reserved for issues where important national interests predominate.”\(^2\)

The pending reauthorization of VAWA 2012 provides an occasion to reexamine the legal premises that have shaped and subsequently continued to inform the conventional wisdom about the nature of and responses to domestic violence.\(^3\) The civil rights remedy designed to address gender-based violence as a form of discrimination and considered to be essential to eradicating domestic violence was nullified in \textit{U.S. v Morrison}.\(^4\) The provisions that subsequently remained most “usable”—and certainly most available—favored the law enforcement and prosecutorial strategies funded by the Act.\(^5\)


\(^5\) The Act created new federal crimes and enhanced penalties, including federal felonies for acts of interstate domestic violence as well as interstate violations of protective orders. 18 U.S.C. §§ 2262, 2264. The Act also increased funding for criminal justice responses and services for crime victims tied to law enforcement. 42 U.S.C. §3796gg(a). \textit{See} Margaret B. Drew, \textit{Denying Choice Of Forum: An Interference By The Massachusetts Trial Court With Domestic Violence Victims’ Rights And Safety}, 43 Suffolk U. L. Rev. 293, 323 (2010) (noting that the function of criminal courts in domestic violence cases are enhanced as a result of training and funding through VAWA). \textit{See}
VAWA 2012 proposes to extend funding for important victim service. It also includes new reforms relating to the jurisdictional complexities important for Native American victims of gender-based violence whose circumstances have been neglected as a function of historical matters of sovereignty struggles and conflicting federal and state statutes. The proposed reauthorization will no doubt, however, remain very much a product of the prevailing criminal justice paradigm from which it emerged. It is to this issue and its consequences that this Article responds.

Despite mounting evidence that points to deviant behavior—including domestic violence—as a socially-conditioned outcome, it is unlikely that Congress will reauthorize a version of VAWA that responds to structural theories of criminal behavior. On those occasions when proponents of VAWA have addressed structure, the discourse has been generally limited principally to the failure of law enforcement agencies to arrest and the courts to punish perpetrators. The underlying premise that appears to drive the legal response is consistent with Rational Choice Theory, that is, that criminals make rational choices among alternative courses of actions (i.e., “crime is a decision, not a disease”). Noticeably missing from discussions about domestic violence are social theories which focus on the macro political conditions and economic circumstances that contribute to crime, including domestic violence, and the development of social policies that focus on poverty prevention, economic assistance, and


6 U.S. Committee Senate Committee on Indian Affairs, Native VAWA draft bill, available at http://indian.senate.gov/issues/upload/Native_VAWA_draft_bill.pdf.

distribution of services as a response.\textsuperscript{8} Under current economic conditions, including chronic under- and unemployment, declining wages, and diminishing benefits, consideration of these circumstances is vital to a fuller understanding of domestic violence.

The call for continued support for criminal laws as response to domestic violence is not without an internal logic, of course. Domestic violence advocates have long recognized that criminal justice promised immediate results, both politically and in terms of the urgent need to bring about a cessation of violence. Attempts to direct legal attention to the systemic sources of violence implied a daunting long-term process. In fact, structural inequality and socio-economic problems of the type that contribute to criminal behavior are rarely remedied in the legal system.\textsuperscript{9} As Martha Mahoney has observed, “[t]he vocabulary of American law is not easily adapted to discussing class.”\textsuperscript{10} This is particularly true in the realm of legal responses to domestic violence where advocates have avoided the demonstrated relationship of poverty and domestic violence and have remained on the sidelines of legislative debates affecting social welfare policies, despite the impact of such policies on domestic violence victims.\textsuperscript{11} However understandable, the commonly-held assumption that gender-based violence is unrelated to the political economy serves to discourage efforts to pursue law-related structural reforms and thus hinders the development of legal responses to issues of economic inequality.

\textsuperscript{8} Id.

\textsuperscript{9} \textit{See} Stephen Loffredo, \textit{Poverty, Inequality, and Class In The Structural Constitutional Law Course}, 34 Fordham Urb. L.J. 1239, 1243-1244 (2007) (observing that liberal constitutional scholars posit that “poverty and class inequality--and their direct and collateral impacts--lie beyond the Constitution's cognizance or concern”).


This Article examines the ways that both legal theory and social movement discourse have acted to circumscribe the scope of VAWA and the dominant approach to domestic violence. It seeks to explore the relationship between domestic violence advocacy and feminist theory of the type that has functioned as “the ideological reflection of one’s own place in society” with insufficient attention to superstructures.\textsuperscript{12} It argues for the re-examination of the current domestic violence/criminal justice paradigm and calls for the consideration of economic uncertainty and inequality as a context for gender-based violence. It suggests new strategies with which to address the socio-economic complexities of domestic violence, without which the domestic violence movement risks failure to achieve the desired goals.

This Article is organized in three parts. Part I reviews the processes by which VAWA separated domestic violence from the context of political economy, specifically how legislative provisions and legal interpretations narrowed the scope of the remedy. It then examines the ways that the discourse of legal interventions has been shaped by the politics of what Angela Harris has called “unmodified feminism” as well as the politics of the domestic violence movement.\textsuperscript{13} It argues that feminism’s essentialist preoccupations with matters of identity together with the domestic violence movement’s inattention to poverty and economic inequality served to facilitate the ascendancy of the domestic violence/criminal justice paradigm. Part II examines the relationship between economic uncertainty and inequality, on the one hand, and

\textsuperscript{12} Sonja Buckel & Andreas Fischer-Lescano, \textit{Gramsci Reconsidered: Hegemony in Global Law} 22 Leiden J. of Int’l Law, 437, 441 (2009). Feminism is a broad term that covers a range of tendencies, branches, and different ideological strands. Here, I refer to feminism in as an “exclusionary practice and ideology” that emphasizes concern with the public-private divide and opposition to patriarchy and while tending to avoid issues pertaining to race, ethnicity, or class. See Amalia Sa’ar \textit{Postcolonial Feminism, the Politics of Identification, and The Liberal Bargain} 19 Gender and Society 680, 686 (2005) (identifying a type of feminism as “well positioned vis-à-vis the liberal order”).

\textsuperscript{13} See Angela Harris, \textit{Race Essentialism in Feminist Legal Theory}, in \textit{Critical Race Feminism}, 34, 37, 39 (Adrienne Katherine Wing, ed. 2003) (critiquing Catherine “dominance theory” of feminism which holds itself out as a “total” theory). See \textit{supra} note 12, and accompanying text for further clarification about the use of the term feminism.
domestic violence, on the other. It argues that as an epistemology, domestic violence scholarship has fallen behind other fields of study due to its failure to address the structural context of gender-based violence.

Part III proposes a redefinition of the parameters of domestic violence law and presents new ways to think about criminal justice interventions. It challenges as unduly facile the prevailing view that the most effective response to domestic violence is a criminal one. The failure to address the relationship between the political economy and domestic violence is to problematize domestic violence principally as idiosyncratic and aberrant rather than social and structural. It reviews the development of veterans’ courts that operate under the assumption that criminal behavior originates in a structural causal setting that transcends individual agency. These courts serve as an alternative example of criminal justice intervention where sociological and structural explanations of behavior are relevant to the outcome and offer the possibility for reforms in domestic violence cases. Part III also considers strategies that extend beyond the criminal justice system and commends several legal projects, including interventions such as community benefits agreements (CBAs). The prototypical CBA involves community groups summoning their collective strength to negotiate with corporations and municipalities to insure that development projects benefit local and low-income residents. These agreements are relevant for advocates seeking to address the structural determinants of violence, including domestic violence. CBAs may constrain or redistribute capital, and at the same time can address issues specifically pertaining to domestic violence. The Article concludes by


explaining that to question the current “practice” of VAWA does not imply a need to nullify existing analyses and approaches but rather suggests the benefits of offering multiple perspectives.

The relationship between individual harms and social structures is complex and requires consideration of multifaceted strategies. The framework proposed in this Article may stand as a provocative challenge to the prevailing approaches to domestic violence. This critique must also be distinguished from those who would oppose the reauthorization of VAWA because it currently proposes to provide better protection and services to victims of same-sex relationships, or because of allegations that female victims have free rein to make untested allegations against male perpetrators.16 But efforts to address domestic violence without consideration of the broader socio-economic circumstances are perforce doomed to address only consequences, not cause.

I. Law as Social Action, Social Action as Law

VAWA has evolved within a dynamic interplay of law and social discourse in which the phenomenon of gender-based violence has been decontexualized from any useful political economic theoretical framework.17 Despite its auspicious beginnings evidenced by Congressional fact-finding on the relationship between domestic violence and the national economy, the implementation of VAWA has detached domestic violence from economic


17 June Starr & Jane F. Collier, Introduction, 1, 6 in History and Power in the Study of Law: New Directions in Legal Anthropology (Starr & Collier, eds. 1989) (describing critical legal studies’ concern with the mutual construction of law and social order).
circumstances. Legal developments have influenced and been influenced by the prevailing practice of identifying domestic violence as a phenomenon unrelated political economic structures.\textsuperscript{18} These factors have facilitated the ascendency of criminal law responses to domestic violence and leave unexplained—and thus unaddressed—the complex determinants of the domestic violence, including the significant economic transformations that have occurred throughout the United States.

A. VAWA and the Law: Rendering Invisible the Economic

In 1994, Congress enacted VAWA, generally recognized as the most comprehensive federal effort to address gender-based crimes. VAWA reframed the issue of the domestic violence narrative in two important new ways: gender-based violence as a fundamental civil rights issue and domestic violence as a cause of economic impairment. In an effort to preempt the anticipated challenge to the Act’s civil rights remedy, witnesses provided ample evidence to document the failure of government to respond to violence against women and establish the nexus between violence against women and economic concerns. The civil rights remedy was inscribed in the Commerce Clause based on an understanding that domestic violence was intricately related to economic issues and that individual victims as well as the national economy suffered economic harm.\textsuperscript{19} The Act introduced significant measures toward ameliorating the


multiple consequences of domestic violence, including hotlines, shelter programs, and other important services.

VAWA’s 1994 civil rights remedy was short-lived. In 2000, the Supreme Court in *U.S. v. Morrison* declared that portion of the Act unconstitutional and beyond the reach of the Commerce Clause.\(^{20}\) The Act, considered contentious because of the civil rights remedy, was never voted on as a stand-alone bill. Instead, it was enacted as Title IV of the Violent Crime Control and Law Enforcement Act and part of an Omnibus Crime bill—the largest crime bill in U.S. history—described by some scholars as “draconian.”\(^{21}\) Once the civil rights remedy was nullified, VAWA developed into a statute primarily concerned with criminal prosecution and continued to expand a criminal justice strategy through subsequent reauthorizations. The principal purpose of the 2000 VAWA reauthorization, which added new domestic violence-related crimes, was to advance the goal of successfully prosecuting batterers.\(^{22}\) While the 2000 Act authorized an important new remedy for immigrant women victims of crime, the stated

\(^{20}\) 529 U.S. 598 (2000).


purpose of the new nonimmigrant visa classification was to strengthen the ability of law enforcement agencies to prosecute crimes. Moreover, although the 2000 reauthorization increased funding for services, legal aid organizations receiving VAWA funds were required to inform state and local law enforcement about their work as a means to expand the capacity of the criminal justice system. The reauthorization bill in 2005 provided new law enforcement tools, most notably the DNA Fingerprint Act described as a “stunning extension of government power,” and has raised concerns that poor men and especially men of color may be “catalogued” for purposes of wrongful intrusion by the state. VAWA funds—some of which came from savings accrued by reductions in the federal workforce—have been allocated primarily and increasingly to police, prosecutors, and funding for jails.

VAWA 2012, like the prior two reauthorizations, proposes to continue much needed funding for a range of services for victims of gender-based violence. Notably, the bill would grant clear jurisdictional authority over such acts of domestic violence that occur on tribal lands to tribal courts. VAWA 2012 would expand important services to youth and supports sexual assault victims who suffer delays in criminal rape investigations due to backlogs in the


inventorying of rape kits. The original version of the bill includes a non-discrimination grant conditions clause that includes sexual orientation and seeks to clarify and improve protections for battered immigrants. These are critical initiatives to reduce and ameliorate the consequences of domestic violence.

The “weight” of the Act, however, continues to favor a criminal justice response to domestic violence. Amendments to the bill would not only countermand improved protections for immigrants introduced in the original version but would add harsher penalties to the Immigration Act with regard to matters unrelated to domestic violence. The vast portion of the proposed funding is allocated to police and prosecutors to encourage arrests and prosecution. Indeed, much of the congressional testimony offered in support of the 2012 reauthorization of VAWA privileged criminal justice remedies to domestic violence. Certainly some witnesses

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29 Id. Section 3, Universal Definitions and Grant Conditions, Title VIII, Protection of Battered Immigrants. The provisions to prohibit discrimination against gays and lesbians and improved remedies for immigrants have been met with significant Senate Republican opposition. See Republicans Retreat on Domestic Violence, N.Y. Times, Feb. 9, 2012 at A26.


acknowledged the relationship between economic strain and domestic violence, and in fact confirmed that domestic violence rates increased during times of economic downturn. Nevertheless, almost all testimony prioritized the continued allocation of VAWA funds to enhance the criminal justice system.33

These circumstances demonstrate the constitutive power of law and its ability to construct and limit the categories within which we conceive of domestic violence. The VAWA discourse has been conducted largely in the context of crime and punishment, with little attention to economic matters. At the national level, the Supreme Court in Morrison pronounced that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”34 The Court continued to separate the phenomenon of domestic violence from economic concerns in Castle Rock v. Gonzales,35 where it determined that battered women lacked any property interest in the enforcement of a protection order—even as property may be defined in the “broad and majestic terms” of U.S. v. Roth.36 Economic considerations have fared no better at the local level. State courts rarely order economic relief in the form of child support and spousal maintenance in domestic violence civil protection order cases although state statutes authorize such relief.37 Tort claims by victims seeking compensatory damages for acts of domestic violence

33 See supra note 31, The Continued Importance of the Violence Against Women Act, Hearing before the Committee on the Judiciary, United States Senate, June 10, 2009, Questions and Answers to Witnesses, p 34, 40-41, 44- 48, 50-51.

34 529 U.S. at 613.


36 Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571(1972).

37 North Carolina Governor’s Crime Commission, Child Support Application Filing Rates and Domestic Violence Protection Order Cases, (2007) (noting that judges failed to order child support where requested in 80 percent of the cases) (report on file with author). Deborah Epstein, Effective Intervention in Domestic Violence Cases; Rethinking
violence are difficult to sustain because of statutes of limitations and other procedural obstacles as well as problematic insurance policies that exempt coverage for women who are abused in their homes.\textsuperscript{38}

The scant attention given to economic hardship as a consequence of domestic violence makes it all but impossible to consider economic hardship as a cause of domestic violence.\textsuperscript{39} The political economic circumstances of the perpetrator are deemed irrelevant. “Mainstream” criminal theories understand acts of deviant behavior as deeds of individual volition. Indeed, the legislative recommendations that urge increased arrests and prosecutions are based on theories that have developed fully into articles of faith and are central to prevailing criminal justice orthodoxy, that is, the proposition of criminals as rational actors, engaged in acts of rational choice after weighing the costs and benefits before deciding to engage in criminal acts.\textsuperscript{40}

Criminal justice remedies predominate, reinforced by the prevailing belief that to punish is to deter.

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\textsuperscript{38} Martha Chamallas & Jennifer B. Wriggins, \textit{The Measure of Injury: Race, Gender, and Tort Law} 3, 73(2010).

\textsuperscript{39} See Donna Coker, \textit{Enhancing Autonomy For Battered Women: Lessons From Navajo Peacemaking} 47 UCLA L. Rev. 1, 12 (1999) (setting out the need to recognize oppressive structures in the lives of batterers).

\textsuperscript{40} See supra note 7. Kathleen Ho, \textit{Structural Violence as a Human Rights Violation} 4 Essex Human Rights Rev. 1, 3(2007) (noting that structuralist theories hold that individuals do not make decisions as free agents but rather as embedded in relational structures that shape their actions).
The point here is not to oppose the reauthorization of VAWA.\textsuperscript{41} Rather it is to call attention to historic patterns that serve to sustain a default legal system that makes a solution to the structural basis of domestic violence all but impossible to obtain. These legal developments, moreover, have influenced the means—and the ends—through which social movements have acted to end domestic violence.

**B. Social Movements as Sources of Law.**

Legal developments are often constitutive of the ways in which social movements develop.\textsuperscript{42} But law also responds to and is a result of social movements.\textsuperscript{43} Efforts by feminists and the domestic violence movement to challenge prevailing power hierarchies and improve the condition of women by over-reliance on the criminal justice system have, in fact, contributed to a skewed understanding of domestic violence.\textsuperscript{44}

The debates about the politics of feminist initiatives to end gender-based violence involve a set of larger issues about feminism that must be historicized and approached by way of a political economic analysis. During the 1970s, the domestic violence advocacy movement emerged within second-wave feminism, identified with a “fundamental emancipatory promise with its expanded sense of injustice and its structural critique of society.”\textsuperscript{45} Second wave

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\textsuperscript{41} The bill has been the subject of partisan fighting and has been challenged by all Republican members in the Senate Judiciary Committee because of provisions protecting lesbians, gays, bisexuals, transgendered people, and immigrants. \textit{See} Terkel, \textit{supra} note 16. \textit{See} note 30, and accompanying text.

\textsuperscript{42} Patricia Ewick and Susan S. Silbey, \textit{The Common Place of Law: Stories from Everyday Life} 34 (1998) (observing that law functions not only “to shape social action but as social action”)

\textsuperscript{43} Menachem Mautner, 96 Cornell L. Rev. 839, \textit{Three Approaches to Law and Culture} 96 Cornell L. Rev. 839, 862 (2011).

\textsuperscript{44} \textit{See generally} Safety And Justice, \textit{supra} note 25.

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feminism promoted an intersectional understanding of oppression that focused on class, race, sexuality as well as gender. The original goal of feminist legal theory similarly has been described as an undertaking to “substantively address women’s lived inequality, as well as to perpetuate fairness and non-subordination in the world more generally.”

Political scientist Nancy Fraser has studied the development of feminism and notes that with the subsequent shift of feminism from the structural to the cultural, the politics of identity eclipsed political economic concerns. Other scholars similarly have observed that feminist theory abandoned a radical critique at a time of a shift in global economic structures, including outsourcing and globalization, when wealth concentrations grew more extreme and economic inequality increased. They attribute the rise of identity politics to the professionalization and cooptation of feminism and a failure to conceive of alternatives to capitalism. Fraser posits that as a result of these circumstances, “second-wave feminism has unwittingly provided a key ingredient of the new spirit of neoliberalism.”

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46 Fraser, supra note 45, at 103.

47 Mae C. Quinn, Feminist Legal Realism 35 Harv. J. of Law and Gender 1, 20 (2012) (describing the viewpoint of feminist legal scholars advocated that Legal Feminism should go beyond the academy and seek to transform fundamental political and social values).


49 Brown, supra note 48, at 3 (noting the relationship between the “abandonment” of such theories and the political transformations at the end of the 20th century. See also Terry Eagleton, Indomitable, London Review of Books, 13 Mar 3, 2011.

50 Bernstein supra note 48, at 52 (citing Wrong and Bell).

51 Fraser, supra note at 45, at 111. Bernstein, supra note 48, at 64 (noting that identity politics has been coopted as a result of the commodification of interests and differences).
ignored the intersection of identities.\textsuperscript{52} Identity politics served a politically important purpose as a means of insights about the condition of women, of course. But the emphasis on identity as an organizing politics has produced, if not widened, divisions among groups who are marginalized differently and have further weakened the capacity for broad political alliances. As the scholarly critiques have demonstrated, greater attention paid to “difference” has signaled feminism’s retreat from the politics of redistribution in favor of the politics of recognition.\textsuperscript{53}

Identity politics has served as the core organizing tool for feminists engaged in the domestic violence movement. Identity politics sought to create group cohesiveness based on the proposition that all women were at “universal risk” of domestic violence by virtue of being women in a male-privileged society. The very concept of women-as-victims emerged as an identity constructed vis-à-vis a male partner with little attention to economics. Advocates readily advanced the proposition that domestic violence knows no class bounds, fearing that if domestic violence were identified as an issue primarily affecting the poor, there would be scant attention paid and fewer resources allocated to the problem.\textsuperscript{54} By constructing the problem as a “classless” one, advocates ignored the relationship between domestic violence and economic circumstances, notwithstanding evidence to the contrary.\textsuperscript{55} Indeed, domestic violence advocates might be described as having entered into a “liberal bargain” whereby they sought to

\textsuperscript{52} Bernstein, \textit{supra} note 48, at 52, 57.

\textsuperscript{53} Nancy Fraser and Nancy A. Naples, \textit{To Interpret the World and to Change It: An Interview with Nancy Fraser} 29 Signs 1103, 1112 (2004).


accommodate themselves to the very ideology that sustains structural inequality.\textsuperscript{56}

The invocation of victimhood may have served as an important early means through which to forge a political identity for the domestic violence movement. But the construction of victimhood as a status linked to patriarchy without attention to socioeconomic structures preempted and precluded class solidarities.\textsuperscript{57} To put it differently, the personal displaced the political.

Feminism’s transition from a movement once concerned with structural inequality in public and private realms to the adoption of law and order strategies as a means to address domestic violence has significantly influenced legal developments. Feminist activists welcomed the efficacy of criminal justice strategies through which to reconfigure the discourse of domestic violence from a matter of private realms to an issue of the public policy. The emphasis on criminal law responses and the failure to situate gender-based violence within a broader structural framework, moreover, occurred precisely at the moment in which social problems associated with economic hardship and social dysfunction passed under the purview of the criminal justice system.\textsuperscript{58}

The domestic violence movement has thus been identified with a ““punitive, retribution-driven agenda,”” per the ethos of the culture of the criminal justice system.\textsuperscript{59} Attention to socioeconomic factors as causal factors of domestic violence is all but absent from domestic violence theory and practice. Having emphasized “the wrongs done to women, and not the socially

\textsuperscript{56} Sa’ar \textit{supra} note 12, at 681.


\textsuperscript{59} Aya Gruber, \textit{Rape, Feminism, and the War on Crime}, 84 Wash L. Rev. 581, 582 (2009).
produced capacity for women to be wronged, to be victims,” feminists have narrowed the scope for addressing structural determinants of gender-based violence.60

Feminism’s abandonment of the emancipatory project has had a profound impact on the strategies deployed to address domestic violence in ways previously under-problematized. The consequences of these developments, however, are well known. The evidence suggests that the criminal justice system often inflicts great harm to women of color, poor women, and immigrant women, and deprives women of agency.61 New reports suggest that domestic violence statutes may in fact produce over-criminalization outcomes to the detriment of both women and men.62 Mandatory arrest policies in cases of domestic violence have contributed to increasing arrest rates even outside the context of intimate partner incidents.63 Perhaps most notably, domestic violence can itself be a collateral consequence of a criminal justice system that emphasizes punishment and imprisonment and thereby further destabilizes communities.64

The domestic violence movement has evolved principally into a legal movement embedded within the criminal justice system. But the causes of violence—including gender
violence—are varied and complex and indeed are often the product of historical and structural conditions. That the domestic violence/criminal justice paradigm fails to conceptualize a social framework with which to understand violence creates potentially pernicious conditions for women. The analyses of legal remedies must consider the relevance of political economy as the context for gender-based violence.

II. Paying Attention to Class and Inequality

As the issues of gender-based violence moved from private matters to public concerns, feminist scholarship gave increasing emphasis to patriarchy as source of domestic violence. Patriarchy was identified as a system of dominance institutionalized in public realms as a matter of social practice and legal bias where men as a group dominate women as a group. An expanding scholarship on the effect of structural economic dislocation, however, suggests a far-more complicated set of factors contributing to domestic violence. It is no longer sufficient to explain domestic violence in terms of patriarchy as a system separated from the social structures that reinforce the multiple power relationships of daily life. Other areas of scholarship and advocacy have acted as a causal link between grave social harms and the political economy. This Part suggests that the field of domestic violence should be encouraged to do the same.

A. Domestic Violence: Preempting Consideration of the Consequences of the New Economy

Law-and-order proponents have embraced criminalization strategies as the most effective—and legitimate—form of government intervention. In fact, these approaches tend to

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67 *Id.* at 553, 560 (noting that men’s behavior is influenced, if not determined, by social structures and linked to pathological social arrangements).
foreclose the possibility of advancing socio-economic rights.\(^68\) As Bernard Harcourt has explained:

…the argument for more severe law and order is joined at the hip with the argument for limited government intervention elsewhere: the legitimacy and competence in the government in the field of crime and punishment goes hand in hand with government incompetence when it comes to ‘Government jobs, Government housing, Government welfare.’\(^69\)

Many advocates have remained in the thrall of criminal law strategies despite mounting evidence linking the new economy and community distress, on the one hand, and a rise in domestic violence, on the other.\(^70\) Social science research has provided persuasive evidence of linkages between economic adversity and gender-based violence.\(^71\) Ethnographic studies have chronicled the consequences of plant closings through workers' individual narratives wherein they admit to worsening relationships with spouses and committing acts of violence as a result of loss of work.\(^72\) This body of research reveals the ways that individual perceptions of declining economic well being contribute to family distress, conflict, and violence.\(^73\) Downward mobility

\(^68\) See Waldron, supra note 10, at 775 (noting that some theories of justice appear to be hostile to socioeconomic rights).


and economic inequality weakens social capital which helps to sustain community norms against domestic violence.  

Recent reports since the 2008 recession have documented the rise of domestic violence in direct proportion to economic hardship. The National Domestic Violence Hotline reported that the national increase in telephone calls in 2009 was the effect of a decline in household finances and financial strain. Since 2008, the judicial system has experienced a significant rise in the number of family violence case filings attributed to the ripple effect of the recession. New York State recorded an 18 percent increase in family violence cases, which has turned “the courts into theaters of economic crisis” that has reached deep into the lives of formerly middle-

Linking Economic Hardship to Marital Quality and Instability, 52 J. Marriage & Fam. 643, 643 (1990) (noting the experiences of the Great Depression when economic hardship was found to increase the risk of family dysfunction, including physical abuse); Gaventa, supra note 72, 49-50 (describing negative effects on family life after plant closings); Judy A. Van Wyk et al., in Detangling Individual-, Partner-, and Community-Level Correlates of Partner Violence, 49 Crime & Delinquency 412, 424-29 (2003) (observing that subjective financial satisfaction is tied to domestic violence).


Domestic Abuse On Rise, supra note 75. See also Ian Urbina, Philadelphia to Handle Abuse Calls Differently, N.Y. Times, Dec.31, 2009, at A13 (noting an increase in domestic violence calls due to the recession after a 15 year decrease). A more recent study confirmed that the unemployed are experiencing increased emotional or mental health problems and family conflict. Michael Cooper & Allison Kopicki, Facing Hardship, Jobless Say They Have Hope, N.Y. Times, Oct. 27, 2011 at A1.

Neeta Pal, Cuts Threaten Civil Legal Aid, Brennan Center for Justice, Apr. 11, 2011 http://www.brennancenter.org/content/resource/the_economy_and_civil_legal_services1/.
class families. A reduction in violent crime rates in Philadelphia in 2009 was not reflected in the number of domestic violence cases. On the contrary, domestic violence homicides increased 67 percent—all linked to deteriorating economic conditions. In the same year, domestic violence shelters reported a 75 percent increase in the number of victims seeking help, most of whom identified financial strain as cause of the violence. Several studies measuring the consequence of the recent recession found that families were “fraying at the seams” as a result of strained relationships brought about by economic uncertainty and hardship.

Market forces have the power to frustrate established patterns of daily life and may be disruptive within the intimate spaces of the household. Current conditions of chronic unemployment have subjected families to withering tensions. The economic and occupational stress produced by these events is often mediated through socially-determined norms of masculinity and produce havoc in the private domains of the household, undermining socially constructed gender-roles pertaining to work and wages that dominate most families. Economic crisis and the loss of work must be understood as a flash-point that acts to reveal the ways that gender norms are embedded in all social relationships and especially work and wage-related

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82 See Kathryn E. Gallagher & Dominic J. Parrott, What Accounts for Men’s Hostile Attitudes Toward Women? The Influence of Hegemonic Male Role Norms and Masculine Gender Role Stress, 17 VAW 568, 578 (2011) (reviewing findings that explain men’s aggression toward women as a function of social pressures to act in accordance with “hegemonic masculine gender role guidelines”). For a more in depth review of socially constructed reactions to economic uncertainty, see Weissman, supra note 11, at 428-431; Melzer, supra note 36, at 822.
circumstances. Simply put, the likelihood of partner violence increases in structurally disadvantaged households and communities.

Domestic violence scholars and advocates may have failed to pay attention to economic strain as a contributing cause of domestic violence but they have not been oblivious to the economic repercussions of domestic violence. On the contrary, the literature has long recognized that domestic violence destabilizes women’s participation in the workplace and that ensuing economic dependencies precipitate and often perpetuate abusive intimate relationships. Some domestic violence programs provide job and financial literacy counseling to enable women to gain economic independence.

But current strategies have not been contextualized within current economic conditions, where employment opportunities are limited and the responsibility for coping with economic crises has shifted from government and employers to individuals and families. The possibilities of economic independence are often beyond the reach of vast numbers of women.


who confront insurmountable obstacles gaining access to the wage-labor market. 87 Just as importantly, current approaches to financial literacy often encourage women to function “in an unfettered market dominated by individual empowerment and choice where responsibility remains within the limits of the consumer.” 88 So-called “empowerment strategies” are funded by large corporations whose purpose differs from the goals of social justice movements, and more specifically: the well-being of women. 89 Such strategies fail to address the structural underpinnings that produce financial distress and reproduce inequality. 90 Instead, they depoliticize struggles for economic equality and in fact often have limited “real-world” application. 91 They may perpetuate the myth of “the good survivor” who can persevere despite economic policies that have produced the current economic crisis—a myth that has served to legitimize these policies. 92 In fact, some victims of domestic violence have identified predatory


89 Rebecca Hall, Paper Abstract, ClassCrits IV, Criminalizing Economic Inequality, Sept. 23-24, 2011 at American University Washington College of Law (noting that large corporations like Allstate and cosmetics companies often fund “empowerment projects” for victims of domestic violence) (abstract on file with the author).

90 Saavedra supra note 88, at 9-10.

91 Dag Leonardsen, Empowerment in Social Work: An Individual vs. Relational Perspective 16 Int. J. Soc. Welfare 3, 9 (2007) (describing how a program designed to teach budgeting skills and training for job seeking produced additional stress because of the lack of funds with which to budget and the lack of available jobs).

lending as the most significant obstacle to economic independence.\textsuperscript{93} Perhaps most importantly for purposes of this article, domestic violence programs have addressed the consequences of abuse with little attention to the development of prevention strategies on the basis of a socioeconomic analysis: that is, they neglect to address the structural causes of the violence itself.\textsuperscript{94} The focus has been on the symptoms of oppression rather than sources of oppression that affect men and women.

Social problems such as domestic violence are often outcomes of both material conditions and cultural systems by which men and women are socialized into the conventions of daily life.\textsuperscript{95} Without a theoretical framework with which to construct a usable explanatory model to addresses criminal behavior as a function of social systems and economic structures, remedies are doomed to focus on consequences, not cause.

**B. The Gap in Scholarship**

That much of the literature on domestic violence continues to pay scant attention to matters of political economy suggests that this is a scholarship that lags behind other fields of critical knowledge related to human rights, public health, families, crime, and theories of justice. Renewed interest in class and inequality has placed poverty, economic change, and downward mobility at the center of recent research and advocacy trends as a way to understand and respond


to the determinants of deviant behavior. The Occupy Wall Street movement has, of course, drawn national attention to issues of economic inequality and wealth redistribution. New scholarly networks have emerged to challenge the premise of the “free market” paradigm and to offer new solutions for a wide range of social problems. Researchers representing diverse branches of study emphasize a relational approach to the interrogation of human rights violations. Others who study international law have similarly encouraged a class approach to the issue. Indeed, the very relationship between socioeconomic rights and broad principles of justice has recently developed into a subject of concern in the realm of law and philosophy. These approaches share a common commitment to the development of a methodology that contextualizes acts of deviance and social harm in a broader socioeconomic framework.

The scholarship has assumed several forms. In the field of human rights, grave social harms have been associated with structural inequality as a way to consider strategies of prevention, intervention, and repair. Experts have suggested a relationship between violence and economic vulnerability, on the one hand, and genocide on the other. Amelioration of economic inequality is seen as a minimum condition to reduce the threat of mass killings and other forms

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97 *About ClassCrits* (describing a recent network of scholars and activists who seek to engage in a critical analysis of law and the economy) [http://classcrits.wordpress.com/about/](http://classcrits.wordpress.com/about/).


of political violence.\textsuperscript{101} Other recent studies of genocide have also identified economic globalization as source of violence. These analyses have demonstrated that market-driven development strategies have exacerbated inequality and accelerated degradation, often with tragic consequences, and perhaps nowhere more tragically than the mass murders in Rwanda.\textsuperscript{102} The UN Secretary General’s Report on “Implementing the Responsibility to Protect” against genocide and other crimes against humanity warned that developed countries may themselves be vulnerable to endemic violence as an outcome of deteriorating social and economic circumstances.\textsuperscript{103}

The scholarship addressing post-conflict societies has similarly argued that the relationship between violence—male violence in particular—and economic and social insecurity must be addressed to reduce threats of continued violence.\textsuperscript{104} Studies of torture have established that acts of inhumanity cannot be addressed solely within the realms of civil and political rights, but must also attend to matters of wealth inequality and income insecurity: precisely those conditions that produce both torture victims and perpetrators.\textsuperscript{105}

\textsuperscript{101} Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, 14 par. 33, Feb. 18, (2003) A/HRC/10/30\textsuperscript{).} For example, the recent report of the UN Special Advisor on Genocide urged the need to mitigate increasing poverty and inequality in order to prevent political violence in Kenya. \textit{Id.}


\textsuperscript{103} \textit{Implementing The Responsibility To Protect--Report Of The Secretary-General, A/63/677, January 2009} par. 21 p. 13.

\textsuperscript{104} Naomi Cahn, \textit{Gender, Masculinities and Transition in Conflicted Societies} 44 N. Eng L. Rev. 1, 7 (2009) (identifying socially constructed roles of masculinity and economic and social insecurity as part of the cluster of causalities for post-conflict violence). Cahn also calls for “rehabilitation for victims and perpetrators, including programs that seek to address issues of socially-constructed hyper-masculinity associated with violence.” \textit{Id.} at 19

\textsuperscript{105} Louise Arbour, \textit{Preface} 10, 34, 39, 42 in \textit{Attacking the Root Causes of Torture, Poverty, Inequality and Violence, An Interdisciplinary Study}, (Thomas E. McCarthy, ed. 2006). The UN has emphasized the human rights cannot be protected without consideration of economic cultural and social rights. Nathalie Milvalez, \textit{Torture and Violations of}
Recent articles on child trafficking and sexual exploitation have criticized the failure to address systemic sources of the problem and challenge the usefulness of after-the-fact punitive interventions.\textsuperscript{106} These studies have noted that the prevailing response to trafficking relies on the criminal justice system to identify and punish individual bad actors with little attention to poverty alleviation and lacking a “strong commitment to social equity.”\textsuperscript{107} The recent report by the UN Special Rapporteur on Extreme Poverty and Human Rights also criticized the penalization of the poor for “deviant” behaviors related to impoverishment.\textsuperscript{108} The consensus in the recent human rights scholarship is striking: economic inequality must be addressed as a way to alleviate the conditions that produce all forms of violence.\textsuperscript{109}

A corpus of health law scholarship has similarly recognized economic hardship and inequality as factors contributing to violent and harmful behavior.\textsuperscript{110} Chronic conditions of income inequality produce stress and low morale that affect health adversely, often resulting in


\textsuperscript{107} Todres, \textit{Widening Our Lens}, supra note 106, at 63, 73.


violence. Health issues linked to income inequality cannot be resolved by medical intervention alone, but rather require attention to structural matters. Public health scholars studying the rates of HIV infection in the United States have established that the biology of transmission and infection is directly linked with socio-economic conditions. They have urged greater attention to this relationship and argue that a redistribution of resources is required as a means to reduce infection rates. Health researchers have stated plainly:

> There is persuasive evidence that the reduction of health inequalities can only be achieved by addressing their fundamental causes as opposed to the diseases through which they are expressed, or the immediate precursors of those diseases. Thus, it is widely acknowledged that structural factors, largely determined by the economic organisation of nation states and the wider global community, are unequivocally implicated in the perpetuation of inequalities in health.

Injury-prevention specialists have similarly attributed a pattern of household mishaps to income inequality. Accidents are more likely to occur in low-income households without access to products and equipment that properly meet established safety standards.

Family law scholarship, too, has increasingly addressed social tensions in households within the context of class and inequality. Family law scholars have demonstrated that family

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114 *Id.* at 425, 429.


well-being and family dysfunction must be considered within the realm of the political economy.\textsuperscript{118} They have documented the ways in which household power differentials often replicate market hierarchies, often with deleterious effects on its members.\textsuperscript{119} Cycles of family instability are themselves symptoms of cycles of the market: economic adversity often wreaks havoc upon a household, disrupting the conventions of intimacy, patterns of child-rearing, and gender-determined norms of self-esteem.\textsuperscript{120} Researchers in the field of child abuse have demonstrated the influence of economic stability on parent-child relationships. Children’s law experts are critical of the shift from child welfare to child protection and the attending emphasis on policing “the deviant parent” as a result of the depoliticization of social inequality.\textsuperscript{121} Tendencies of punitive responses have permeated child protection systems, now viewed as “adjuncts of the penal apparatus,” thereby discouraging families from availing themselves of social services.\textsuperscript{122} Researchers have urged attention to the conditions of socio-economic disadvantage.\textsuperscript{123}

Experts on sexual abuse and incest are reluctant to rely on the criminal justice system, wary of an exploitative and racist system that revealed itself incapable of providing meaningful

\textsuperscript{118} Eichner, \textit{supra} note 117, at 55-57. \textit{See Carbone, supra} 96, note 53.


\textsuperscript{120} Carbone, \textit{supra} note 96, at 549, 552, 556 (observing the “two-parent as the province of the elite”).


\textsuperscript{122} \textit{See Loïc Wacquant}, \textit{Class, Race, and Hyperincarceration in Revanchist America}, Daedalus 74, 84-85 (Summer 2010).

\textsuperscript{123} \textit{Id.}
intervention.\textsuperscript{124} They reject the tendency to characterize such acts as “personal and familial trauma” preferring instead to situate deviance in the context of economic displacement, lack of universal health care, the dismantling of the welfare state, and capitalism’s exploitation of sex as a means of power.\textsuperscript{125}

The field of social work has also examined deviance from a structural perspective. New critiques challenge the emphasis on individual capacity building so central to the social work concept of empowerment.\textsuperscript{126} Social work scholars have increasingly emphasized the study of social patterns that contribute to crisis rather than the individual consequence of crisis.\textsuperscript{127} As a methodology, researchers examine of hierarchies of power, wealth inequality, and issues of social justice as a means to fulfill their ethical responsibilities in the realm of social work.\textsuperscript{128}

The scholarship of domestic violence has fallen behind the current intellectual and theoretical advances that have arrived to a deeper understanding of the complex working of market forces in the daily life of vast numbers of men and women. Domestic violence scholarship has remained largely fixed on theories of patriarchy based on notions of a male-dominated society: arguments that cannot be gainsaid, of course, but also arguments that have tended to neglect the structural conditions from which patriarchy emerged as a cultural


\textsuperscript{126} Leonardsen, supra note 91, at 4.

\textsuperscript{127} Id. at 7.

arrangement. Missing too are the explanations of ways that hierarchies of power and authority other than patriarchy contribute to patriarchal structures.

Few indeed are manifestations of social dysfunction in which factors of structural inequality are not relevant. Notable feminist scholars Nancy Fraser and Wendy Brown have urged feminists to revive their relationship with political economic justice: “to integrate the best of recent feminist theorizing with the best of recent critical theorizing about capitalism” and to “cultivate the memory— and …ignite that memory – of the utopian imaginary of the revolutionary paradigm.” Inequality in the United States has increased dramatically. The crisis of the political economics of neoliberalism has reached grave proportions. Chronic economic crises have withering, and often permanent effects on families and households. The line between political economic structures and domestic violence is direct, and thus invites an obvious question: why not expand beyond paradigmatic criminal laws as a means to end gender-based violence?

III. Redefining the boundaries of domestic violence law

In October 2011, the Topeka city council voted to repeal a local law that criminalized domestic violence as a budget-saving measure. This well-publicized event suggests the ways

129 For a helpful critique of current feminist theories about patriarchy, see Hunnicutt, supra note 66, at 553.

130 Fraser, supra note 45, at 98.

131 Wendy Brown, supra note 45 at 15.


133 Benjamin Kunkel, How Much Is Too Much?, 33 LRB 9 ( Feb.3, 2011) (described by David Harvey as a “surplus capital and surplus labour existing side by side with seemingly no way to put them back together”).

134 A. G. Sulzberger, Facing Cuts, a City Repeals Its Domestic Violence Law, N.Y. Times, Oct. 12, 2011 at A11. For further discussion of the deficiencies of the criminal justice system to carry out its paradigmatic functions of
that criminalization strategies are often subject to political expedience and market forces. The action by Topeka is not the first to expose a criminal justice system uninterested in carrying out its paradigmatic law enforcement functions in cases of domestic violence on those occasions when such strategies are deemed disadvantageous for law enforcement agencies. In the Town of Castle Rock v. Gonzales the U.S. Supreme Court ruled that the police were not required to enforce domestic violence restraining orders, notwithstanding a state law that required enforcement. In the realm of domestic violence, criminal law often functions in an arbitrary manner and undermine its very stated purpose.135

Notwithstanding such lapses, the remedies to domestic violence will always be associated with criminal law. The task before scholars and advocates is the development of radically different criminal law approaches to domestic violence. As criminal law scholars have noted: “[t]he criminal justice system needs more than reform. It requires reimagining.”136

This Part offers alternative strategies to address domestic violence in three settings: two are examples of criminalization models that are embedded in formal criminal justice institutions but function outside of the prosecution-to-prison paradigm, the first ex ante and the second ex post. The third model addresses crime and accountability outside of the formal criminal justice system entirely. This Part then moves beyond the realm of criminal law to law-related initiatives that seek to constrain market forces as a way to strengthen domestic violence advocacy.

A. Criminal justice strategies re-imagined.

1. Law Enforcement Investment in the Political Economy.

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A deeper understanding of the relationship between economic strain and domestic violence suggests new criminal justice models to address structural concerns, including unemployment, poverty, and neighborhood infrastructure. Law-enforcement strategies that shift from post hoc responses to preventative initiatives with a focus on community problem-solving provide one alternative to arrest and prosecution. These models are designed to prevent the commission of a criminal act that would otherwise necessitate conventional law enforcement responses.

Several existing progressive criminal justice initiatives offer promising possibilities and serve as models for novel approaches to domestic violence. Police and prosecutors in Kalamazoo, Michigan have claimed legal authority to oblige “slum landlords” to comply with housing codes and improve their housing stock. In Brooklyn, New York, the District Attorney’s office has developed expertise in matters beyond prosecutorial trial skills in order to work with communities to mobilize local assets, address housing issues, and reclaim public space. Kansas state correctional officials inaugurated the Justice Reinvestment program designed to reduce funding of prisons and reallocate the savings to infrastructure and civic

137 Gruber, supra note 12, at 655-656 (noting that under different circumstances, criminal justice might be part of a feminist agenda). See Wacquant, supra note 122, at 85 (arguing the need for deep and broad reforms). For a review of a progressive analysis of and description of alternative approaches to crime, see generally Center for Community Alternatives, http://www.communityalternatives.org.

138 Klingele, supra note 136, at 979.


Institutions in high-risk neighborhoods.\textsuperscript{142} In Wichita, as part of the Justice Reinvestment program, law enforcement officials developed a plan to purchase abandoned property and redevelop housing in blighted neighborhoods.\textsuperscript{143} In an effort to reduce recidivism and re-incarceration, probation and parole officers in Arizona have joined with social workers to assess factors such as poverty, unemployment, substance abuse, and mental illness and facilitate access to health care, job training, unemployment or disability benefits, and food stamps.\textsuperscript{144} Addressing the socio-economic factors that contribute to crime must be a fundamental premise to any crime prevention strategy.\textsuperscript{145}

These measures do not respond directly to crimes of domestic violence, of course, but they do suggest solutions relevant to gender-based violence. They formulate models upon which to base reforms needed within the criminal justice system and embody solutions advocated by progressive criminal law scholars who discern in “massive investment in schools, social services, health care, and unfettered access to drug and alcohol rehabilitation” a means to reduce the crime and the criminal justice system’s overreliance on punishment.\textsuperscript{146} Moreover, they respond to domestic violence scholars who urge police and prosecutors to adopt strategies are responsive to the circumstances of marginalized communities.\textsuperscript{147}

\begin{itemize}
\item \textsuperscript{142} Judith Greene & Marc Mauer, \textit{Downscaling Prisons: Lessons from Four States}, 53-54 (2010).
\item \textsuperscript{144} Id. at 29.
\item \textsuperscript{146} Wacquant \textit{supra} note 122, at 85.
\end{itemize}
Little attention has been given to the ways that these reforms could be applied to domestic violence. Indeed, the domestic violence movement has not advocated new approaches to reverse the trend of over-criminalization and hyperincarceration—an oversight not without irony for a movement that developed out of the civil rights project. Whether such reforms can influence criminal justice procedures depends entirely on the will of the political leaders as well as the efforts of advocates. Indeed, the call to reform the criminal justice system has been a priority demand for the U.S. civil rights/human rights movement for decades. As Loïc Wacquant has observed, class is “the first filter of selection for incarceration;” while “race comes second” along with the “rapid ‘blackening’ of the prison population even as serious crime ‘whitened.’” Domestic violence advocates would do well to consider how the values associated with the civil rights struggles ought to inform criminal justice responses to gender violence.

2. Veterans’ Courts: Theorizing Human Behavior

A second and more recent model—one that is fully situated within the formal criminal justice system—interest special court programs for veterans. Unlike the first model which is designed to affect ex ante the circumstances that contribute to domestic violence, veterans’ courts intervene in circumstances after a crime has been committed.

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149 See Nicola Lacey, American Incarceration in Comparative Perspective, Daedalus 102, 105 (Summer 2010) (observing that reforms to the criminal justice system are dependent on certain political systems that are either more or less conducive to support economic and social policies aimed at reducing exclusionary criminal justice policies).

150 Wacquant, supra note 122 at 78, 79 (noting “inmates are first and foremost poor people”).

The first veterans’ court was established in 2008 in response to patterns of rising crime among returning veterans, behavior that was attributed to post-traumatic stress disorder or other deployment-related emotional problems. The courts have increased in numbers and currently approximately 80 such programs are in operation nationwide. These courts have determined that the effect of military service ought to mitigate the consequences for criminal acts and endeavor to provide assistance with a wide range of services. Veterans’ courts operate with the premise that military service has relevance to criminal conduct and endeavor to provide assistance with a range of services.

Specialized courts are not a new approach. They fall within the tradition of “problem-solving courts” designed to devise alternatives to incarceration strategies. They often share a common desire to improve outcomes and reduce court inefficiencies. Indeed, “specialized” domestic violence courts often take the form of an integrated civil and criminal court for the purpose of administrative streamlining while alleviating the burdens of the process for victims.

Domestic violence courts are associated with efficient case management and a focus on

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152 Goode, supra note 151.


155 Id.


157 Leon, supra note 156, at 100.

enhancing prosecutorial functions.\textsuperscript{159} Indeed, court bureaucracies and victims of domestic violence are the primary beneficiaries of these specialized courts.\textsuperscript{160}

Veterans’ courts represent in intent and outcome a paradigmatic shift, for they lend credence to the proposition that criminal behavior often has its origins in structural conditions beyond the scope of individual volition.\textsuperscript{161} These courts “focus on the offender rather than the crime” and seek “to understand and address the causes of the criminal behavior.”\textsuperscript{162} Unlike mitigation strategies introduced by the defendant at the sentencing phase in a criminal trial, veterans’ courts offer a venue in which to contextualize—sympathetically—criminal conduct as a function of structural circumstances. Veterans’ courts intervene after violence has occurred, but they function as a forum where the “causes” of crime may be considered, thereby promoting the theorization of human behavior that serves to enlighten \textit{ex ante} policies related to domestic violence crime and intervention.\textsuperscript{163}

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\textsuperscript{159} Allison Cleveland, \textit{Specialization Has the Potential to Lead to Uneven Justice: Domestic Violence Cases in the Juvenile & Domestic Violence Courts}, 6 Mod Am. 17, 18 (2010) (noting that at least in one jurisdiction, domestic violence courts were harder on perpetrators than other courts).
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\textsuperscript{160} \textit{Id.} at 18 (recounting concerns that “judicial education about family abuse and extended tenure on a calendar devoted to such cases creates a pro-victim, antidefense bias”). \textit{See also} Anat Maytal, \textit{Specialized Domestic Violence Courts: Are They worth the Trouble in Massachusetts?}, 18 B.U. Pub. Int. L.J. 197, 226 (2008). \textit{See generally} MacDowell, \textit{supra} note 158 (analyzing the benefits and drawbacks that these courts present to victims of domestic violence).
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\textsuperscript{161} Shein, \textit{supra} note 151, at 50. One critique of these courts is that they create a privileged class of defendants. \textit{See} Dahlia Lithwick, \textit{A Separate Peace}, Newsweek, Feb. 22, 2010 (recounting the objections raised by the American Civil Liberties Union). These courts may likely serve as a model for most, if not all crimes but for purposes of this article, it references feasibility for gender-based crimes. Lynne Marek, \textit{Courts For Veterans Spreading Across U.S. Wave Of Vets In Courts Trips Alarm}, 31 The National Law Journal 1, (2008) (noting necessity of addressing the underlying issues of criminal behavior).
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\textsuperscript{162} Hon. Wendy S. Lindley, \textit{The Promise of Veterans Court} 51 Nov. Orange Co. Lawyer 29 (2009) (asserting that for a defendant suffering from PTSD who commits a crime, “effective treatment won't be obtained through traffic school, or through a traditional batterers intervention program, or through prison”). \textit{See also} Schwartz, \textit{supra} note 154(reporting sympathetic comments by one federal district court judge toward veterans in criminal court and showing leniency)
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\textsuperscript{163} \textit{See} Morrill, \textit{et al.}, \textit{supra} note 100, at 297 (describing a particular type of sociological inquiry to the study of crime).
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Increasing numbers of law enforcement experts and criminal justice officials support veterans’ courts as a far more usable alternative to traditional criminal justice strategies. These authorities have recognized that social forces often contribute to criminal behavior. In a statement before the House of Representative Committee on Veterans Affairs, the Director of the New York Veterans Service Agency testified that veterans who found themselves in the criminal justice system “are not bad people; they just got caught up with the wrong people, places and things.” These views have often prevailed even where the defendant has committed serious offenses. Indeed, the U.S. Supreme Court has ratified the theories upon which veterans courts are based. In Porter v. McCollum, a domestic violence case involving the murder of the defendant’s former girlfriend and her current boyfriend, the Supreme Court acknowledged the legal relevance of stress and emotional trauma caused by conditions of combat over which the defendant had no control.

The decision in Porter suggests a sympathetic willingness to consider the consequences of combat and the difficulties faced in re-adjusting to civilian life as factors relevant to criminal

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164 Goode, supra note 151.

165 Id (noting that law enforcement officials agree that “the society that trained them and sent them into harm’s way… bears some responsibility).


liability. Veterans’ courts consider high unemployment, chronic financial instability, and mental health problems as factors contributing to substance abuse and increased anger and sexual aggression, all attributed to the trauma of combat. Many veterans who suffer post-traumatic stress often do not seek mental health care. These symptoms, and the failure to obtain treatment, help explain why veterans commit a statistically significant number of crimes, including rape and assault.

Veterans are deemed more worthy of public sympathy than the un- and underemployed who commit acts of domestic violence, thus making comparisons between soldiers and workers politically problematical. In fact, the repercussions of combat are similar to the effects of chronic economic instability and loss of livelihood. Mental health problems among unemployed men who face few prospects of finding work have been described as “staggering” and include anxiety disorders, insomnia, headaches, and stomach ailments; an increase in alcoholism and drug abuse; and increased mental hospital admissions. Displaced workers often experience a sense of alienation and disenfranchisement; suicide and attempted suicide rates increase, as do incidents of crime and homicide rates. All in all, the very factors that contribute to acts of domestic violence.

169 Lithwick, supra note 161. Katel, supra note 151.


171 Lithwick, supra note 161.

172 Id. (reporting figures from the Department of Veterans Affairs that veterans account for 10 percent of those with criminal records).

173 See Weissman, supra note 11, at 418.

174 Id. at 419-420.
Veteran courts offer a promising way to address structural circumstances of violence within the criminal justice system. These courts provide a successful model to consider the ways in which broader socio-psychological concerns contribute to criminal behaviors, and indeed suggest ways for the criminal justice system to consider the context of crime as condition of remedy.\textsuperscript{175} Although these courts address the criminal behavior of a population for which there is already public sympathy and support, they may still serve to “insulat[e] judicial and correctional professionals from the converging pressures of the media and politicians, and rehabilitat[e] rehabilitation through a public campaign debunking the neoconservative myth that “nothing works” when it comes to reforming offenders.”\textsuperscript{176}

The point here is not that these courts serve merely as forums to aid perpetrators with exculpatory strategies. But it is also true that efforts to “get at” the sources of gender violence must—at some point—address the material circumstances of domestic violence, not as a defense strategy but as a remedy to the structural sources of deviant behavior. These courts work in concert with a network of service providers to coordinate benefits for veterans and locate housing and employment for them.\textsuperscript{177} Veterans’ courts act to foster a “broader solidarity project,” that is, a social agenda that addresses poverty and homeless prevention, economic assistance, and distribution of services.\textsuperscript{178}

\textsuperscript{175} See Dickey & McGarry, \textit{supra} note 140, at 338 (suggesting that justice requires this).

\textsuperscript{176} Wacquant, \textit{supra} note 122, at 85, 85 n 56 (noting that studies have demonstrated that rehabilitation is more effective than retribution in changing the behaviors of criminals).


\textsuperscript{178} Garland, \textit{supra} note 7, at 199.
Certainly, caution is warranted when promoting any type of problem-solving court and the diversionary programs they foster.\textsuperscript{179} Such reforms often contribute to a net-widening phenomenon whereby the supervision and surveillance associated with special courts have increased technical violations that result in over-criminalization and even greater punishment of those defendants who do not complete their alternative treatment programs.\textsuperscript{180} It further bears emphasis that veterans’ courts are not designed to serve as strategies to aid perpetrators in judicial proceedings at which they are defesa setting where courts are “authorized” to explore the social factors of crime, however, veterans’ courts offer the possibility of meaningful reform. They may help to foster a consensus about the possibilities of courts attending to the structural sources of criminal conduct. These courts may inform and influence \textit{ex ante} interventions as a matter of public policy and advocacy strategies—and thus serve as a model aptly suited for criminal intervention in domestic violence. Their demonstrated success rate provides greater motivation to consider this approach as a way for domestic violence cases as well.\textsuperscript{181}

3. Intervening in Criminal Behavior Outside the Formal Criminal Justice System

The third model that more closely addresses issues relating to the phenomenon of domestic violence offers equally promising possibilities. The transformative justice approach focuses on criminal conduct and perpetrator accountability and seeks to untether the response from criminal justice institutions. Transformative justice, Angela Harris explains, addresses violence both at the institutional and interpersonal levels.\textsuperscript{182} It acknowledges the role of the

\textsuperscript{179} Weissman, \textit{supra} note 156, at 245- 246.

\textsuperscript{180} \textit{Id}.

\textsuperscript{181} See Zuber, \textit{supra} note 167.

state, communities, and families in creating systems of power and subordination particularly in regard to gender-based violence.\textsuperscript{183} Advocates of transformative justice strategies challenge socially-constructed gendered norms that prevail in families and communities—norms that directly or indirectly sanction male violence while at the same time addressing structural conditions and state violence.\textsuperscript{184}

Harris introduces her readers to Generation Five, an organization that seeks to prevent and respond to child sexual abuse and whose goals include “transformation of the social conditions that perpetuate violence - systems of oppression and exploitation, domination, and state violence.”\textsuperscript{185} Generation Five supports survivors and holds abusers accountable “without relying on punishment, State violence, incarceration or policing” and addresses the problem within larger social movements focused on economic, racial, and gender injustice.\textsuperscript{186}

Scholars who study criminal justice institutions have recognized that the system “is long due for an overhaul.”\textsuperscript{187} The above models differ from the prevailing criminal justice response to domestic violence, for they seek to affect the structural circumstances that produce crime. All three approaches call for increased community-oriented interventions and contribute to an understanding that an effective criminal justice strategy can take place in formal as well as

\footnote{183}{\textit{Id.}}

\footnote{184}{\textit{Id.} at 221, 224.}

\footnote{185}{\textit{Id.} at 212. \textit{See} Generation Five, Transformative Justice, \url{http://www.generationfive.org/tj.php}. Generation Five characterizing sexual abuse as a social and political issue. \textit{Kershnar, supra} note 124, at 67.}

\footnote{186}{\textit{Kershnar, supra} note 124, at 5. The organization is also committed to protecting the rights of the accused, whether rightfully or wrongfully accused. \textit{Id.} at 20.}

\footnote{187}{Roger A. Fairfax, Jr. \textit{From “Overcriminalization” to “Smart on Crime”: American Criminal Justice Reform—Legacy and Prospects}, 7 J. L. Econ. & Pol’y 597 (2011).}
informal settings. They counteract institutional proclivities to over-criminalize and over-incarcerate, and mitigate the cumulative effects of inequality widely experienced in the criminal justice system.  

B. Domestic Violence Law and the Political Economy

However re-organized and re-imagined, criminal approaches that focus on the behavior of individual perpetrators have limited impact on the socioeconomic conditions that contribute to domestic violence. To embrace legal strategies that seek both to remedy domestic violence and address economic justice requires a leap of faith. Courts have been hostile to claims based on poverty and class, categories that are relegated to the lowest level of judicial review. Scholars and advocates, discouraged by the difficulty in pressing successful legal claims to address the practices of private capital, have tended to abandon efforts to focus on class issues within the law. Moreover, domestic violence advocates may consider matters of economic justice too distant and abstract; they are more concerned with remedies that are immediate and individual, and thus less likely to depart from conventional approaches to mitigate gender-based crimes.

To approach the complexities of domestic violence through remedies that address socioeconomic conditions is not without challenges, of course; but such strategies are worthy of consideration for they offer far more comprehensive and certainly far more nuanced remedies to domestic violence that the existing template of “punishment-as-deterrence” that has failed to

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188 These approaches also differ from restorative justice models which only function after a crime has been committed and deal with the aftermath of criminal behavior. See John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?* 46 U.C.L.A L. Rev. 1727, 1743 (1999).

189 Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, Daedalus 8, 12 (Summer 2010) (observing that carceral inequalities affect not only those incarcerated by their families and children).

190 See Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-transformation Cases*, 76 S. Cal. L. Rev. 799, 844 (2003) (warning that the failure to develop a successful legal strategy to regulate deindustrialization further discourages consideration of these issues).
reduce gender-based violence.\footnote{See Weissman, supra note 11, at 439-442 for a discussion of how Trade Adjustment Assistance and Workforce Investment programs for dislocated workers offer counseling services that could include screening of potential perpetrators and victims to identify the ways that economic instability contribute to domestic violence. See Waldron, supra note 10, at 801 (observing that theories of justice do not seem to be designed for the real world as compared with socioeconomic rights).} The law can and does—however infrequently—regulate the political economy, and domestic violence scholars should explore these possibilities. The Supreme Court has ratified the authority of municipalities to seize private property in the name of community welfare and economic development.\footnote{Kelo v. City of New London, 545 U.S. 469 (2005); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006).} City planning and community development strategies also possess legal tools worth considering. Richard Schragger has described three strategies designed to constrain and redistribute capital at the local level: placing conditions on development subsidies through contracts, including community benefit agreements (CBAs); labor friendly legislation such as minimum wage ordinances; and efforts to exclude capital deemed harmful to communities, such as anti-big box campaigns.\footnote{Richard C. Schragger, Mobile Capital, Local Economic Regulation, And The Democratic City, 123 Harv. L. Rev. 482, 508-513 (2009).}

Of these strategies, CBAs offer a promising way to address structural concerns and at the same time attend to issues pertaining to domestic violence. CBAs are generally private enforceable contracts negotiated between a prospective developer and community coalitions that include conditions relating to social justice issues.\footnote{The Staples Center expansion in Los Angeles is widely recognized as the leading example of a CBA whereby community groups negotiated for “an “unprecedented package of concessions” and benefits in favor of a coalition of groups. See David A. Marcello, Community Benefit Agreements: New Vehicle for Investment in America’s Neighborhoods, 39 Urban Lawyer 657, 658 (2007); Patricia Salkin & Amy Lavine, Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements, 17 J. Affordable Hous. & Cmty. Dev. L. 113, 114 (2007) (noting that the negotiation may also include local government officials).} These agreements also involve the relevant governmental entity which ultimately approves the development proposal.\footnote{Cummings (noting the way in which governmental regulations are implicated in CBAs).}
entering into CBAs originates from the specific impact of a proposed new development project or market initiatives that will affect the character of the community. Public subsidies or public approvals for private development projects provide community groups with the leverage needed to commence CBA negotiations.\footnote{Marcello, \textit{supra} note 194, at 659.}

CBAs are not limited to the immediate physical or operational consequences of the development plan at issue, that is, they do not function as “single-issue commitments.”\footnote{Julian Gross, \textit{Community Benefits Agreements: Definitions, Values, and Legal Enforceability}\textit{ 17 J. of Affordable Housing \& Community Development Law 35, 40 (2007); Marcello, \textit{supra} note 194, at 662.} They address a broad array of socio-economic conditions and often bring together diverse community groups.\footnote{See Susan L. Giles \& Edward J. Blakely, \textit{Fundamental of Economic Development Finance,} ix-x (2001)(describing an array of services and benefits that a developer might offer as a means of contributing toward the community good). See Madeline Janis-Aparicio \& Roxana Tynan, \textit{Power in Numbers: Community Benefits Agreements and the Power of Coalition Building,} 144 Shelterforce Online, Issue #144 (2005) available at \url{http://www.nhi.org/online/issues/144/powerinnumbers.html}.} Thus, as instruments of social justice, CBAs have direct and practical relevance to the movement to end domestic violence movement.

CBAs work through a negotiation process that begins with the coalition members themselves. David Marcello has described “Operating Principles” of a CBA coalition in New Orleans and demonstrates the ways in which coalition processes promote group debate, transparency, and accountability for the development of the goals of the group.\footnote{Marcello, \textit{supra} note 194, at663-664.} These processes provide the opportunity for domestic violence advocates to demonstrate the relationship between economic development issues and domestic violence.\footnote{See \textit{supra} notes 71-83 and accompanying text.} CBA coalition membership provides the domestic violence movement with possibilities of developing new alliances with groups outside of the domestic violence advocacy movement who, in turn, may...
pay greater attention to concerns related to gender-based violence.

Through the CBA negotiation process, community groups gain assurances that economic development initiatives will benefit their constituents. CBAs have obtained living wage agreements, the development of local hiring and training programs, minority hiring programs, affordable housing developments, and day care centers: that is, services that address structural concerns relevant to both perpetrator and victim. CBAs could include provisions related to domestic violence more specifically by addressing immediate concerns for safety and support along with redistributive goals. For example, such agreements could readily include funding for domestic violence program, transitional housing, job training, education scholarships, counseling for victims, as well as abuser treatment programs.

Unlike public-private partnerships in which a private developer negotiates exclusively with government, CBAs place community coalitions at the center of the negotiation process. CBAs enable social justice coalitions to leverage bargaining power in economic development processes and affect structural economic conditions. In addition to the specific terms of the agreements, CBAs generally include monitoring and enforcement mechanisms to assure that developers abide by the negotiated terms. CBAs thus are a democratizing force in government

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201 Salkin & Levine, supra note 194, at 114; Schragger, supra note 193, at 509.

202 Marcello, supra note 194, at 660-661.


204 Scott L. Cummings, Mobilization Lawyering: Community Economic Development in the Figueroa Corridor 17 J. Affordable Housing & Community Dev. L. 59, 72 (Fall 2007/Winter 2008).
decision-making processes, monitoring, and enforcement.²⁰⁵ Domestic violence advocates who are party to these agreements help to constrain local governments who can no longer bypass community groups in effecting economic development in their localities. As participants in the process, they contribute to ameliorating some of the circumstances that produce domestic violence.

In sum, a CBA strategy would accomplish important goals: expand domestic violence advocacy into broader social justice networks, obtain support from coalition members to include contract conditions calling for specific resources to prevent and ameliorate the consequences of domestic violence, and address structural economic concerns. Such a strategy could also contribute to the untethering of solutions to gender-based violence tied to a failed criminal justice system.

IV. Conclusion

This article has addressed the complexities of domestic violence with attention to expanding both the discursive framework and legal context beyond the existing paradigmatic criminal justice response. Such a shift does not discard other analyses nor does it suggest abandoning the particular objectives of the domestic violence movement in favor the objectives of socio-economic justice. Rather, these arguments posit that the relationship between individual harms and social structures requires multifaceted approaches. Harm is perpetrated and experienced under circumstances that must be addressed individually and immediately, of course. Similarly, victims are entitled to immediate remedy and should not be expected to delay justice while better systems of amelioration develop. The point is not to exculpate perpetrators of

²⁰⁵ Id. Marcello, supra note 194, at 665 (noting that CBAs “restore democratizing legitimacy by affording community groups a voice”).
gender violence but rather to construct interventions that include context to preclude consequences.

Strategies based on the causal connection between economic structures and domestic violence promise to be as difficult to develop as they will be demanding to implement. Immediate pragmatic solutions to crimes of domestic violence do not exist. But efforts seeking to end domestic violence that do not consider the broader socio-economic circumstances are likely to be ineffective. This viewpoint has been articulated by scholars who study related human rights violations and egregious suffering. In the context of torture, the World Organization Against Torture:

Sustainable protection against torture and other forms of violence cannot be conceived without conditions ensuring the respect of human rights, including economic, social and cultural rights of each individual.206

Similar concerns have been expressed by public health scholars who have recognized the futility of focusing on individuals who make poor and costly behavioral choices regarding health:

It is uninformative to conceptually isolate the behaviours and psychosocial orientations which are associated with poor health outcomes from their SES roots. If the desire for economic efficiency is to be a central theme of the processes which shape late industrial societies, then it is entirely possible that the most efficient way to reduce the disease burden associated with poor health behaviours and psychosocial characteristics is to improve the socioeconomic conditions which generate them (citations omitted).207

Domestic violence scholars and advocates should join theorists and activists to develop political economic approaches to social harms. Compelling social and economic changes often...
act to change behaviors, and often act to change behaviors profoundly. These circumstances call for the harnessing of creative and collective efforts, for the sake of the particular struggle against domestic violence, and for all forms of gender-based harms. Indeed, addressing the structural determinants of domestic violence will not only improve outcomes for victims of such crime, but will enhance theories of justice generally to the benefit of the larger goals of social justice.

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208 See Julie Goldsheid, Advancing Equality In Domestic Violence Law Reform 11 Am. U. J. Gender Soc. Pol’y & L. 417, 424 (2003) (calling for a “reinvigorate[ion] [of] the important feminist tenet that law reform initiatives should be propelled by the needs of the women we represent”).

209 Waldron supra note 10, at 22 (suggesting that socioeconomic rights are best developed within the context of theories of justice).