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The Failure and Promise of Equity in Domestic Abuse Cases

By Jeffrey R. Baker¹

I. Introduction

In the last 60 years, American law has experienced dramatic reforms in response to domestic abuse.² Feminist efforts to illuminate “wife beating” as a public and social phenomenon of gender bias have led to significant legal innovations, like the national Violence Against Women Act and a proliferation of civil protection statutes in the States. This movement and these laws have rendered generally positive improvements on domestic violence rates in the United States.³ Virtually all of these reforms built upon existing structures to afford specific process and remedies to victims of domestic abuse, but were these innovations necessary to confront intimate violence?

Rather, why were innovations necessary if existing legal structures could have intervened on their own extant authority? Customary, common law equity might have intervened effectively to interrupt violence in homes, to render injunctive relief for the protection of women and children, and to examine the dynamics of family violence.⁴

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² Here, “domestic abuse” means any form of physical, emotional or coercive abuse in marriages, families or other intimate relationships.

³ Since 1993, intimate partner violence has declined, especially among male victims. See Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Intimate Partner Violence Rates in the United States* (2007)(at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipvus.pdf>, downloaded Dec. 28, 2011). Women are more likely to experience nonfatal intimate partner violence than men. See *id.* The National Coalition Against Domestic Violence, citing Department of Justice data from 2003, reports that 85% of domestic violence victims are women. See NAT’L COALITION AGAINST DOMESTIC VIOLENCE, *Domestic Violence Facts* (2007)(at <http://www.ncadv.org/files/DomesticViolenceFactSheet%28National%29.pdf>, downloaded Dec. 28, 2011). According to the CDC, in a given year, approximately 6.9 million American women and 5.6 million American men will experience rape, physical violence or stalking by an intimate partner. Over their lifetimes, approximately 42 million American women and 32 million American men will experience such abuse by an intimate partner. This accounts for about one-third of all American women during their lives and about one-tenth of all men. Approximately one-quarter of all American women and one-seventh of American men have experienced severe physical violence by an intimate partner in their lives. Nearly half of all Americans have experienced “psychological aggression” by an intimate partner, “e.g., their partner acted angry in a way that seemed dangerous, told them they were a loser or a failure, insulted or humiliated them,” or other “coercive control.” See NAT’L CTR. FOR INJURY PREVENTION AND CONTROL, CENTERS FOR DISEASE CONTROL AND PREVENTION, *The National Intimate Partner and Sexual Violence Survey, 2010 Summary Report* (eds. Michele C. Black, Kathleen C. Basile, Matthew J. Breiding, Sharon G. Smith, Mikel L. Walters, Melissa T. Merrick, Jieru Chen and Mark R. Stevens), Tables 4.1 and 4.2 at 38, and at 39, 43, 45 (2011).

⁴ In 1980, Professor Nadine Taub identified and examined the potential for equity responses to domestic violence, and her work is integral to this article. See Nadine Taub, *Ex Parte Proceedings in Domestic Violence Situations: Alternative Frameworks for Constitutional Scrutiny*, 9 HOFSTRA L.R. 95, 96-97 (1980); Nadine Taub, *Equitable Relief in Cases of Adult Domestic Violence*, 6 WOMEN’S RIGHTS LAW REPORTER 241 (1980). Here, I build upon her observations made at the virtual dawn of the domestic violence movement and seek to determine how thirty

Despite this promise, by and large, equity failed as a means to protect victims of abuse in families. Equity turns on a court's discretion, and discretion itself undermined equity's capacity to intervene in cases of domestic abuse. Equity permitted courts to consider cases within their discretion, weighing conscience and equity, then to issue coercive *in personam* relief, either provisional or permanent, subject to contempt sanctions. A court in its discretion could enter relief to avoid irreparable harm when there was inadequate legal remedy, then could fashion reparative, preventative or structural injunctions to work justice for the aggrieved.

Although the framework existed to permit judicial projection into matters of family abuse, equity historically has not been useful or adequate to respond to abuse.⁵ A judge sitting in equity is naturally subject to the judge's own view of justice and the role of the law, and historic, competing legal theories of privacy and coverture shielded abusive perpetrators.⁶ Most judges before the 1960s simply would have lacked the vocabulary and cultural competence to recognize or understand domestic abuse, except for the most egregious cases of physical violence. Thus, despite the available tools, courts in equity could not have deployed good equitable relief in family matters.⁷

Now, however, society and culture are far better illuminated on matters of gender justice and the dynamics of intimate violence. Feminist reforms have taken root and flourished, and the law now empowers courts to intervene regularly in family matters. Equity should not supplant the reforms that have reshaped the law's response to domestic abuse, but it can expand the tools available to courts to render justice for victims, especially victims who are not subject to physical violence. Equity can be an interstitial supplement when general law cannot accommodate unique, specific relationships that are abusive and violent.

years of reform in law and society may have affected the potential of equity as a response to domestic violence. *See also* James R. Robinson, Comment, *Untangling the "Loose Threads": Equitable Adoption, Equitable Legitimation, and Inheritance in Extralegal Family Arrangements*, 48 EMORY L. J. 943, 945-946 (1999) (advancing equity as a means of just treatment of children born from non-marital relationships, in light of dramatic changes in family structures in the last quarter of the twentieth century).

⁵ *See* Taub, *Equitable Relief*, *supra* note 4 (discussing the potential role of equity in the early days of the feminist movement to address domestic violence with distinct, focused legal reforms, considered in more detail throughout this article); *see also* Lynn A. Sacco, Comment, *Wife Abuse: The Failure of Legal Remedies*, 11 J. MARSHALL J. PRAC. & PROC. 549 (1977) (discussing in 1977 the abject failure of legal regimes to address domestic violence within existing structures, before the wide advent of civil protection orders and other specific policies).

⁶ In his dissent in *Barber v. Barber*, 62 U.S. 582, 600-601 (1858), Justice Daniel explained the deeply rooted doctrine of coverture:

By Coke and Blackstone it is said: "That by marriage, the husband and wife become one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband, under whose wing and protection she performs everything. . . . [H]er legal existence and authority in a degree lost and suspended during the existence of the matrimonial union. . . ."

⁷ Lenore Walker argues this more aggressively:

[T]rial judges have a great deal of discretion in determining the conduct and outcome of courtroom legal procedure. Yet how many judges in our male-identified, male-dominated courts are sensitized to women's issues? Very few, indeed, have ever taken the time to think about the prevailing male norms and their own adaptations to them. It is extremely difficult for any judge, whose job is to uphold a particular social order, to rule against the prevailing norms of the system.

LENORE WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 255 (1989).

Over time, equity could have advanced the cause of gender justice and peace in homes but missed its opportunity for centuries. Now, equity still may find good application in the cause of justice and peace. Contemporary legal responses to domestic abuse necessarily rely on broad definitions and standards to promote stable, predictable and common responses, so these responses, however valuable and useful, often fail to offer tailored, wise remedies to accommodate unique relationships and to empower individuals in their struggle. Equity may still supplement, inform and advance judicial responses to intimate partner abuse and domestic violence.

Here, I offer a brief, comparative history of equity and the law of domestic abuse. Next, I consider the form and substance of contemporary equity and personal interests, and its capacity to confront domestic abuse. Last, I argue that equity still has a place in the law's response to domestic abuse and that courts can and should deploy equitable remedies to bring customized relief to intractable family violence.

I. A Brief, Intersecting History of Equity and Personal Interests and the Slow Development of Domestic Abuse Law

In the Anglo-American tradition, equitable justice arose in the 14th and 15th centuries in response to the decline of feudalism in England.⁸ The king's courts and medieval chancery struggled to reckon with the changing, conflicting rules of real property alienation and interests, and equity gave courts recourse when the law could not accommodate a breach of trust or unjust encumbrance of land.⁹

The rise of equity was rooted in the Middle Age's impression of law as a means to achieve ideal justice in society and in its focus on natural law as means of promoting a fair society.¹⁰ In this pursuit of ideal justice, equity became a "supplementary or residuary jurisdiction" to permit the law to bend and expand to ensure the higher ideals.¹¹ Many systems of law, from Rome onward, permitted the modification of law on moral grounds, but the distinction in English, then American, law is the division of law and equity into the jurisdiction

⁸ See BRYCE LYON, *A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND* 457 - 461 (1960), see also W.H. BRYSON, *THE EQUITY SIDE OF THE EXCHEQUER* at 9, 31-33 (1975); THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 675 - 676 (1956). Greek and Roman philosophers and orators considered the place of equity long before the English constitution evolved, and for the same reasons. See H.F. JOLOWICZ AND BARRY NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW*, 410, 507 (1972). Aristotle believed equity was necessary to correct the law when its generality failed to consider the particularities of a specific case. See FRITZ SCHULTZ, *HISTORY OF ROMAN LEGAL SCIENCE* at 74 (1953).

⁹ See LYON, *supra* note 8; see also David W. Raack, *A History of Injunctions in England before 1700*, 61 *IND. L. J.* 539, 542 (1985 - 1986).

¹⁰ See CARLTON KEMP ALLEN, *LAW IN THE MAKING* at 383 (1964).

¹¹ *Id.* at 384.

of separate tribunals.¹² This distinction explains the persistent, sharp divisions between law and equity at play until the 20th century.¹³

Likewise, domestic violence, by many names, is an ancient, historic phenomenon.¹⁴ Roman law constrained family violence, and English common-law gave rise to the famous “Rule of Thumb.”¹⁵ From the beginning of the Republic, American law condoned or ignored family violence until the mid-1800s, when a few jurisdictions began to eliminate virtual immunity for perpetrators. Well into the 20th century, courts and legislatures were reluctant to intervene in “family matters,” leaving violence behind drawn curtains and denying useful legal remedies to victims.¹⁶

By the 16th century, great Enlightenment upheavals were at work in Britain and on the Continent. “The political and legal fabric of feudalism, the authority of the medieval Church, the comprehensive system of scholastic philosophy, were found equally wanting and modern thought made its way into all spheres of life.”¹⁷ Vinogradoff describes the work of prominent

¹² See WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW*, Vol. I, at 446 (1938).

¹³ See *id.*

¹⁴ See Judith Armatta, *Getting Beyond the Law’s Complicity in Intimate Violence Against Women*, 33 WILLAMETTE L. REV. 773, 783-786 (1997); see also ELIZABETH SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 13 – 20 (2000) (a concise history of the law of domestic violence and wife battery).

¹⁵ See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wisc. L. Rev. 1657 (2004); *Developments in the Law*, *supra* note 3, at 1502. See also James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY’S L.J. 1149, 1157-1160 (1994-1995). Truss provides a useful history of common law tolerance and gradual objection to domestic violence. “[The Rule of Thumb] permitted men to beat their wives with a rod or stick ‘no larger than a man’s thumb’ or small enough to ‘pass through a wedding band’ . . . as a natural and necessary right of control, incident to the man’s role as head of the family.” *Id.* at 1157 (citations omitted). Truss observes the cultural dynamic of gender subjugation from which the “Rule of Thumb” sprang:

Compounding this tacit approval of violence against women were popular myths that obscured domestic abuse. The “unity of husband and wife” and the “sanctity of home” limited abused spouses’ remedies to divorce or criminal actions. The “unity of spouses” fiction ratified the husband’s domination and control of his wife and expressly precluded any possible tort recovery for injuries he had inflicted. Treating husband and wife as one within the context of a male-dominated society rendered women invisible from the eyes of the law. Moreover, emphasis on the sanctity of the home allowed courts to ignore domestic violence, and domination of, women as “private matters.” This traditional justification for non-action in private family matters – to avoid disturbing domestic harmony or tranquility – is all the more suspect within the context of domestic violence.

Id. at 1159-1160 (citations omitted).

¹⁶ See *Developments in the Law*, *supra* note 3, at 1502-1503.

¹⁷ Paul Vinogradoff, *Reason and Conscience in Sixteenth Century Jurisprudence*, 24 L. Q. REV. 373 (1908)(considering St. Germain’s Dialogues Between Doctor and Student and explicating the role of conscience and reason in early Enlightenment English equity, from Aristotle to Roman Law through the English constitutional evolution).

16th jurists to illuminate the jurisdictional power struggle between the English Chancery and Ecclesiastical courts against the King's Common Law courts.¹⁸ At the source of equity decisions in the 16th century was a rigorous application of conscience informed by Christian philosophy.¹⁹ Conscience in equity is "'discerning between good and evil and of inclining towards the good, apart from conscience proper, which deals with the subsumption of individual cases under the general rules laid down by *Sinderisis* and developed by reason."²⁰ Conscience may be the great general, organizing principle of equity.²¹

In 1523, English legal philosopher Christopher St. Germain wrote of the English law in the famous Doctor and Student dialogues.²² St. Germain mentions in Latin the concept of *epiekeia* or "reasonableness" or "equity," in essence "a doctrine of authority capable of preventing the hardship which otherwise would ensue either from the literal extension of positive rules to extreme cases or from the extension, also by strictly literal construction of cases that fall within the true intention of the rule."²³ St. Germain's conscientious equity was a "righteousness which considers all the particular circumstances of the deed, tempering justice with mercy. . . . [I]t is an implied reservation in every law that it is not to operate against the law of God and the law of reason."²⁴

In chancery or ecclesiastical courts, equity served as an exception to the law, generating results not from direct laws or strict precedents but from general theories; from Aristotle to St. Germain, "equity comprises the guiding principles for the adaptation of general rules to specific cases, and especially to cases which transcend the rules in one way or another."²⁵ The exceptional cases that were diverted from the common law rested on the courts' reason and conscience, and principally rested on three doctrines: that equitable remedies had to be provided for those who did not understand how to avail themselves of the law, that transactions based on confidence and trust had to be protected, and that promises in contracts had to be enforced, even if the formalities were lacking.²⁶ In these dawning years, equity was available only in disputes

¹⁸ See *id.* at 377.

¹⁹ See *id.* at 378.

²⁰ *Id.* Allen cites Vinogradoff and explains that "sinderesis" is a "crude anglicization" of the Greek root connoting reason and conscience. ALLEN, *supra* 10 at 407.

²¹ See *id.* at 406 (noting the rise of equity from Medieval English opinions sounding results in "'conscience,' 'good faith,' 'reason,' 'conscience and law,' 'the law of conscience,' 'law and right,' 'right and reason,' 'law, right, and good conscience,' 'right and reason,' 'reason and good faith.'").

²² See THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW at 685 (1956), see also Zofia Rueger, *Gerson's Concept of Equity and Christopher St. Germain*, 3 HISTORY OF POLITICAL THOUGHT 1 (1982), noting that St. Germain's seminal articulation actually reached farther back to Gerson's *Regulae Morales* from the 14th century, which pled its sources from Aristotle and Christ. See *id.* at 5, 28-31.

²³ *Id.*

²⁴ ALLEN, *supra* note 10, at 407 - 408.

²⁵ *Id.* at 378-379.

²⁶ See *id.* at 379. This first doctrine was made manifest in a case tried in 1467 in which the chancellor articulated a customary maxim: "God acts as attorney to foolish people." *Id.* at 380.

between creditors and debtors, in cases of breach of trust and confidence, and in controversies over parol agreements or formless contracts.²⁷

In the 18th century, equity made some headway in family law as English chancellors developed the law of trusts.²⁸ These cases primarily structured rules of property law to decide issues arising from estates, trusts, marital property, separate woman's property, alimony interests and bankruptcy.²⁹ It was in trust law that English law first took up these questions of gender and family structure.

In this era, reflecting on English constitutional history, women and paternalism, Blackstone explained that the English common laws "are for the most part intended for her protection and benefit."³⁰ The protection of women, however, occurred in coverture and required immersion into a man's legal identity; otherwise she would be left exposed to the wilds of legal incapacity.³¹ This is consistent with the common law's advance for two centuries:

At common law the husband had untrammelled right to his wife's services whether rendered to him in his home or business or whether rendered to third persons. . . . [N]o case has been found where at common law the husband by a consensual act could emancipate his wife in manner similar to a parent's gift to a child of his rights to its services. The equitable reforms of the eighteenth century gave little aid to the working woman as against her husband. . . .³²

Professor James Truss described the inevitable consequence of giving a husband the power of chastisement over his wife:

The "unity of husband and wife" and the "sanctity of home" limited abused spouses' remedies to divorce or criminal actions. The "unity of spouses" fiction ratified the husband's domination and control of his wife and expressly precluded any possible tort recovery for injuries he had inflicted. Treating husband and wife as one within the context of a male-dominated society rendered women invisible from the eyes of the law. Moreover, emphasis on the sanctity of the home

²⁷ See *id.* at 380-381.

²⁸ HOLDSWORTH, *supra* note 10 at 273.

²⁹ See *id.* at 273- 285.

³⁰ BLACKSTONE'S COMMENTARIES ON THE LAW OF ENGLAND, Vol. 1 341-342 (Wayne Morrison, ed. 2001); see *Walker v. Walker's Executor*, 76 U.S. 743 (1869). *Contra* Blackstone, Justice Brennan famously wrote in 1973 that the "attitude of 'romantic paternalism' . . . put women, not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677 (1973).

³¹ See HOLDSWORTH, *supra* note 10, *in* Vol. V, at 310 -311, noting that in the 16th and 17th centuries, Chancery continued to hold "that there could be no contract between husband and wife, that neither could sue the other, and that after marriage no variation of any settlement made before marriage could be effected by agreement. Similarly, it was doubted in some cases whether a contract made before marriage could give the wife any active disposing power during marriage."

³² See, e.g., Joseph Warren, *Husband's Right to Wife's Services*, 38 HARV. L. REV. 421, 421-422 (1925).

allowed courts to ignore domestic violence, and domination of, women as “private matters.”³³

This persistent element of the common law shaped American courts for generations. In 1868, the North Carolina Supreme Court considered a case of wife beating and declared, “We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.”³⁴ In 1872, the U.S. Supreme Court denied Myra Bradwell a license to practice law in Illinois, because she was a woman, and Justice Bradley concurred:

[T]he civil law, as well as nature herself, has always recognized as wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of womanhood. . . . So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modification of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states.³⁵

In 1904, the U.S. Supreme Court recognized that “the husband has, so to speak, a property in the body and right to the personal enjoyment of his wife.”³⁶ Such a property right requires legal protection to ensure use and enjoyment.

Traditionally, from the English view, equity was limited to property issues and not available at all in issues of personalty or domestic relations.³⁷ Thus, it might have been that equity could have intervened to protect a woman’s right in her own body, as well as the

³³ *Id.* at 1159-1160 (citations omitted).

³⁴ *State v. Rhodes*, 61 N.C. 453, 459 (1868)(*per curiam*).

³⁵ *Bradwell v. Illinois*, 83 U.S. 130, 141-142 (1872).

³⁶ *Tinker v. Colwell*, 193 U.S. 473, 483-484 (1904).

³⁷ See Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personalty*, 29 HARVARD L.R. 640 (1916); see also Joseph R. Long, *Equitable Jurisdiction to Protect Personal Rights*, 33 YALE L.J. 115 (1923):

The unreasonableness of so arbitrary and unjust a doctrine that a court of equity will protect one in his rights of contract and property, but deny protection to his far more sacred and vital rights of person, has often been commented upon, but the unsubstantial character of the foundation upon which this doctrine rests has not been so generally recognized. . . . But the jurisdiction of equity does not properly depend upon the nature of the right involved, whether a right of person or of property; the true test of equity jurisdiction is the existence of a justiciable right for which there is not a full, adequate, and complete remedy at law.

husband's property right in his wife's body, in cases of coercion and violence, but this reading did not materialize, despite the husband's perceived right in his wife's body. Common law equity, in search for a pretext in property law to protect personal interests might have availed itself of coverture to find jurisdiction in domestic violence cases, but chancellors did not pursue any such socially progressive, enlightened view of women or marriage in the 19th century.

In 1916, Epaphroditus Peck undertook an examination of the claim by suffragists that women needed the vote to correct legal injustices.³⁸ Peck considered legal reforms, the "married women's statutes," in Connecticut, which he described as the most conservative state in the Union at that moment.³⁹ Connecticut had not let suffrage come to a legislative vote, Peck explains, before it enacted many progressive law reforms to protect the personal and property rights of wives.⁴⁰ He explains that Connecticut law, based in the common law of England, "denied to the wife even the meager property rights which she had by the English common law, and left her without any legal right, either in the property of her husband, or in that which had been hers or came to her by gift or by inheritance."⁴¹ This extreme denial of rights did not continue, though, and Peck provides a litany of reforms, related to testimonial capacity, dower, and other encumbrances, until 1877 when:

[T]he revolution in the property rights of husband and wife was completed by an act which began with the broad declaration that "neither husband or wife shall acquire by force of the marriage any right to or interest in any property held by the other before the marriage or acquired after the marriage," gave the wife the right to make contracts with, or conveyances to, third persons "in the same manner as if she were unmarried," and gave to the surviving wife exactly the same rights in her deceased husband's estate that the husband, if surviving, takes in his wife's estate.⁴²

Despite this good news, Peck explains that in matters of personal rights, wives were even better off than in their property rights under Connecticut's liberal laws:

As to her personal rights, her situation was more favorable. Wife-beating was not a feature of the Puritan character; and the claim of "the lower rank of people, who were always fond of the common law," which Blackstone remarked upon was never recognized in Connecticut, nor indeed in any American state, except by early decisions in North Carolina and Mississippi, which were afterward overruled in those states.

³⁸ See Epaphroditus Peck, *Women's Rights in a Male-Suffrage State*, 25 Yale L. J. 459 (1916).

³⁹ See *id.* at 460.

⁴⁰ See *id.*

⁴¹ *Id.* at 462.

⁴² *Id.* at 463 (citing Public Acts of 1877, ch. 114.)

Chief Justice Swift wrote in 1795: “It is with much regret that I mention it as a part of the common law that the husband possesses the barbarous power of chastising the wife. ... In this state, I have never known the question agitated. ... If such a question should ever be brought before a court, I hope they will discard the savage doctrine of the common law and decide that a husband is punishable for the unmanly act of chastising his wife.”⁴³

Thus, Peck appears to have been quite comfortable to trust Puritan culture and wishful thinking to inoculate wives from violence by their husband, and counts these passages as arguments against the necessity of suffrage. His observations on domestic violence are evidence of the ethos of the time, in which the law did not much contemplate violence against women or consider it worthy of undoing common law structures of gender and family.

Peck concluded that Connecticut’s reforms, delivered by an all-male legislature, elected by all-male voters, rendered husbands and wives “absolutely independent of each other” and “exactly equal to each other in property rights,” except that women had a superior right to demand support from her husband.⁴⁴ He credits the law with impressive reforms, then considers that women might not be equal and independent after all: “If the wife continues to be at any economic disadvantage, it is due not to the laws of the state, but to the laws of nature and to the general usages of society, which give to the husband a more lucrative portion of the family activities than that which falls to the wife.”⁴⁵

Peck’s casual claim to nature and the “general uses of society” illustrates the inadequacy of early law reforms to protect women from abusive subordination. Inasmuch as the law reached over generations to correct injustice for women, “the general uses of society” strongly favored men in the home. Joined together with the strong preference for privacy in the home, the residue of coverture and home sovereignty, judges, prosecutors and police could not have been expected to extend the discretion at their disposal to intervene powerfully to aid abused women. If equity rested in a judge’s discretion and conscience, then a victim of domestic abuse seeking to avail herself of equity surely would be fighting uphill.⁴⁶

Whether correlation or causation, as woman’s suffrage succeeded and as wives began to emerge from coverture, equity eventually began to accommodate personal interests without a property bootstrap. In the early 20th century, Pound articulated the rising trend and condemned the rule limiting equity to property as arbitrary and unjustified by anything but its age.⁴⁷ In his classic article on the question, he offers several cases to show that equity in fact has protected personal interests, even when courts denied that they were doing it, and he argues that the rule

⁴³ *Id.* at 462 (quoting Swift’s *System* at 202 (1795)).

⁴⁴ *See id.* at 463, 466.

⁴⁵ *Id.* at 463-464.

⁴⁶ Chastisement, rooted deeply in the elements of coverture, persisted into the 20th century, at least in England, as a persistent cultural artifact of women’s sublimation. Freeman notes some 20th century cases in the U.K. where trial courts and police countenanced violence to enforce a husband’s orders and instructions on his wife, and he notes reports from wives confessing that they “asked for it” with nagging and insubordination. *See* Michael D.A. Freeman, *La Vice Anglais? – Wife Battering in English and American Law*, 11 *FAM. L.Q.* 199, 211-212 (1978).

⁴⁷ *See id.*

should pass away.⁴⁸ He observes contemporary American cases that expressly extended equity to the protection of personal interests, finding that the money damages were inadequate, and correctly foreseeing that American equity would reach to personal interests, like humiliation, defamation, privacy and nuisance.⁴⁹ In 1916, however, he found only halting extension of equity into domestic relations, and those courts that did often contrived property rights to justify the injunctions.⁵⁰

Throughout the 20th century, Pound's view prevailed, and courts increasingly extended equity over personal interests, although many continued to tie the desired personal interests to a pretextual property right.⁵¹ By the 1960's the "modern view" dominated that equity could reach personal interests, and the only remaining questions were which interests to protect in equity and how to protect them.⁵² In fact, as Sedler discusses, the Supreme Court sanctioned this evolution as early as the 1930's:

We believe the true rule to be that equity will protect personal rights by injunction upon the same conditions upon which it will protect property rights by injunction. In general, these conditions are, that unless relief is granted a substantial right of the plaintiff will be impaired to a material degree; that the remedy at law is inadequate; and that injunctive relief can be applied with practical success and without imposing an impossible burden on the court or bringing its process into disrepute.⁵³

⁴⁸ See *id.* at 670-672.

⁴⁹ See *id.* at 673.

⁵⁰ See *id.* at 673 – 677. In 1923, Professor Long took up the issue as well and observed that equity was not available for assault and battery, defamation, and invasion of privacy because the rights were not property rights or were adequately protected in law. See Long, *supra* note 37 at 117-125. Citing the same cases as Pound, he agreed that although equity had found uses in family matters, it was constrained by the pretext of property rights and certain limitation of parentage. See *id.* at 126-127.

⁵¹ See Robert Allen Sedler, *Injunctive Relief and Personal Integrity*, 9 ST. LOUIS U. L.J. 147, 148 (1965). The leading early case on this evolution of equity in family law was *Vanderbilt v. Mitchell*, 67 Atl. 97 (1904), discussed by Roy Moreland, *Injunctive Control of Family Relations*, 18 KY. L. J. 207 (1930), which discussed the tendency of courts to find property rights as pretexts for protecting personal interests but which found a sound property ground in its own decision. See also Moses H. Thompson, *The Equitable Theory of Injunction in Domestic Relations*, 1 CLEV.-MARSHALL L. REV. 45 (1952); and Note, Robert A. Oberfell, *Jurisdiction of Equity to Protect Personal Rights*, 20 NOTRE DAME L. 51, 56 (1945), noting the general trend through the 1940s of courts to extend equity to protect personal interests through "metaphysical" concepts of property.

⁵² See Sedler, *supra* note 51, at 148-149. See, e.g., *Webber v. Gray*, 307 S.W.2d 80 (Ark. 1957) (affirming an equitable injunction and its enforcement in contempt against a rabid and aggressive mistress against the man with whom she had had an affair, despite finding that her actions were non-criminal and not set against a property right, but finding that her "incessant harassment" and "protracted molestations" could be enjoined).

⁵³ *Hague v. C.I.O.*, 307 U.S. 496 (1939), discussed and quoted by Robert Allen Sedler, *Injunctive Relief and Personal Integrity*, 9 ST. LOUIS U. L.J. 147, 149 (1965). Sedler also quote a Texas appellate decision from 1924 holding, "The personal rights of citizens are infinitely more sacred and are of more value than things that are measured by dollars and cents." *Hawks v. Yancey*, 265 S.W. 233, 237 (Tex. Civ. App. 1924), quoted and discussed by Sedler, *supra* note 51, at 149.

Sedler identifies five categories of personal rights that courts had protected in equity by the 1960s: the right to reputation, the right to be let alone, the right to family relations, the right to associational relations, and civil rights.⁵⁴ In his taxonomy, domestic abuse would fall into “the right to be let alone.” Through his survey of 20th century cases, cases of gross assault and battery do not receive equitable injunctive relief because of “adequate legal remedies,” namely, criminal prosecution.⁵⁵ Sedler also cautions against extending equity to enjoin parties with “strong feelings” at stake, unless, somewhat contradictorily, the feelings are so precious as to be subject to irreparable harm.⁵⁶ He stakes out the limits of equity in interpersonal relationships:

The real point is that the law cannot be bothered with such matters; it cannot regulate through the injunctive process the day to day relationships of people. Neighbors will quarrel and harass one another. If any regulation is to take place, it should be through criminal prosecutions for breach of the peace. Otherwise, the parties must work things out themselves.⁵⁷

Within these parameters, however, fell several cases intervening in intimate relationships, and Sedler identifies a class of cases in which courts entered injunctions to preserve marriages from alienated affections and to protect the reputation of spouses from the harassment and interference of scorned lovers.⁵⁸ In 1965, Sedler did not, or could not, identify any case of judicial interference between an abusive husband and his wife, but he notes plenty of cases where courts enjoined threatening mistresses, third parties, or indiscrete and profligate paramours from threatening the sanctity of a marriage.⁵⁹ Despite that, Sedler summarizes the judicial approach under the burgeoning modern approach of equity: “The law can formulize the marriage relationships or terminate it, but it cannot preserve it, since such preservation depends on too many intangibles and intimacies beyond judicial control.”⁶⁰

⁵⁴ *See id.* at 151.

⁵⁵ *See Sedler, supra* note 51, at 166.

⁵⁶ If he does not contradict himself, he at least provides a significant nuance to this observation that an injunction is wasted on a case invoking strong personal emotions:

Because of the intensity of feeling generated by personal rights, damages usually will not be adequate. The issue then becomes one of practicality . . . There are limits on the power of courts to regulate the intimate personal relationships between human beings. . . . However, when the interest of the plaintiff is found to be substantial, when the conduct of the defendant is found to be wrongful, and when no public interest or question of practicality militates against the granting of relief, the process of injunction should be employed to give full protection to those rights which in the final analysis, are often those that make life worth living.

Id. at 210.

⁵⁷ *Id.* at 169.

⁵⁸ *See id.* at 169-171.

⁵⁹ *See id.*; *see also* Moreland, *supra* note 51 (listing and observing contemporary cases consistent with Sedler’s trends and taxonomy).

⁶⁰ *Id.* at 193; *see also* Moreland, *supra* note 51, at 224. Moreland argued in 1930 that equity should be available for the personal interests of family relationships but that enjoining intimate relationships was not wise policy, because “[i]t can well be argued that attempts to govern too closely the morals of people by injunction will only result in

He may well have overreached his diagnosis, though, because courts routinely forced failed marriages to continue by the mechanics of equitable maxims.⁶¹ In the days of coverture and into waning days of strict divorce rules, courts routinely were faced with the contradictory insights into marriage, first that marriage is too intimate and sacred to touch, and second, that the law could not permit liberal dissolution by the spouse's themselves.⁶² Although equity may have abhorred physical violence, defamation and constant harassment, at least two maxims would prevent a court from enjoining domestic violence by injunction. First, courts believed divorce and criminal sanctions to be completely adequate remedies at law.⁶³ Second, with any hint of unclean hands, a court would force a warring couple to remain married.⁶⁴ Thus, as John Stuart Mill observed in 19th century England, the law virtually trapped the victimized wife:

In no other case (except that of a child) is the person who has been proved judicially to have suffered an injury, replaced under the physical power of the culprit who inflicted it. Accordingly wives, even in the most extreme and protracted cases of bodily ill usage, hardly ever avail themselves of the law made for their protection: and if, in a moment of irrepressible indignation, or by the interference of neighbours, they are induced to do so, their whole effort afterwards is to disclose as little as they can, and to beg off their tyrant from his merited chastisement.⁶⁵

Mill's critique and the traditional common law of marriage began to erode and evolve in the early 20th century with women's suffrage and attendant law reforms.⁶⁶ Mill would have felt fully vindicated by the end of the 20th century. In 1971, the U.S. Supreme Court held, unanimously, that the 14th Amendment prohibited discrimination based on gender or sex on equal protection grounds.⁶⁷ In 1992, the U.S. Supreme finally repudiated the old common law of wifely subjugation:

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. . . . Only one generation has passed since this Court observed that "woman is still regarded as the center of home and family life," with attendant "special responsibilities" that precluded full and independent legal status under the Constitution. . . . These views, of course, are no longer consistent with our understanding of the family, the individual, or the

making the courts which grant such decrees ridiculous and so injure the structure of the whole legal system." *Id.* at 219.

⁶¹ See ZECHARIAH CHAFFEE, JR., SOME PROBLEMS IN EQUITY 73-75 (1950)(quoted and discussed, *infra* note 174).

⁶² See notes 107-108, *infra*.

⁶³ See, e.g., Thompson v. Thompson, 218 U.S. 611, 617-619 (1910).

⁶⁴ See CHAFFEE, *supra* note 61.

⁶⁵ John Stuart Mill, *The Subjection of Women* at 147-148. See also n.--, *supra*, in which the Supreme Court in 1910 said that wives could have no private causes of action but must rely on police and prosecutors to protect and vindicate her against domestic violence.

⁶⁶ Freeman, *supra* note 46, at 200.

⁶⁷ See Reed v. Reed, 404 U.S. 71, 76-77 (1971)(making gender a "protected class" under the 14th Amendment's Equal Protection Clause).

Constitution. . . . Women do not lose their constitutionally protected liberty when they marry.⁶⁸

As early as 1910, some jurisdictions had begun to recognize tort actions between spouses, although the Supreme Court was initially reluctant to recognize such a “revolution” in the fixed form of marriage.⁶⁹ With a new understanding of women and family, Americans began to examine and address the problem more forthrightly as a matter of criminal law and public health.⁷⁰ Initially, reformers promoted the “battered women’s movement,” but soon lawyers, activists and courts began to advocate for recognition of the domestic violence as a problem of gender inequity and to propose legal innovations to overcome cultural reticence.⁷¹

In the 1970s, domestic violence began to receive legitimate study and scientific examination.⁷² At the beginning of the movement, several theories sought to explain the causes of domestic violence: perpetrator pathology, stress by social structure, male inadequacy and perceived failure in industrial contexts, feminist ideas of oppression, and liberation ideology.⁷³ Largely, feminism prevailed, and most contemporary theories, backed by consistent empirical research, explain domestic abuse as exertions of power, control and coercion framed by traditional gender norms and male-domination of women.⁷⁴

By the mid-20th century, American law essentially merged equity and law, to be deployed by unified courts as appropriate.⁷⁵ Correlated with this merger is the dissolution of

⁶⁸ *Planned Parenthood v. Casey*, 505 U.S. 833, 896 - 897 (1992) (quoting *Bradwell v. State*, 16 Wall. 130, 21 L.Ed. 442 (1873); *Hoyt v. Florida*, 368 U.S. 57 (1961)).

⁶⁹ *See* *Thompson*, 218 U.S. at 615 (considering a D.C. statute giving independent standing to wives to sue in tort, “Their obvious purpose is, in some respects, to treat the wife as a *femme sole*, and to a large extent to alter the common-law theory of the unity of husband and wife. . . .”).

⁷⁰ *Id.* at 1502 (discussing the tension between reformed legal remedies and continuing cultural biases against state interference in these intimate relationships). *See* Sack, *supra* note 15 at 1666.

⁷¹ *See* Jane C. Murphy, *Engaging With the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL’Y & L. 499, 500-503 (2002-2003) (By the 1980s, “[t]he movement became dominated by lawyers, elected officials and courts. The work shifted from establishing shelters, safe houses, and hotlines, to drafting legislation, lobbying elected officials, and litigating cases to create and expand legal protections for battered women.”)

⁷² At least by 1978, however, Michael Freeman noted that, “there has hardly been any worthwhile research.” Freeman, *supra* note 46, at 201; *see also* Susan Maidment, *The Law’s Response to Marital Violence in England and the U.S.A.*, 26 INT’L & COMP. L.Q. 403, 404 (1977).

⁷³ *See* Freeman, *supra* note 46 at 204-208.

⁷⁴ *See id.* and *see* LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* (2011); ELIZABETH SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 5, 21-28 (2000); EVAN STARK *COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE* 198 – 210 (2007).

⁷⁵ The Constitution merged law and equity into the jurisdiction of a single Supreme Court. *See* U.S. CONST. Art. II, Sec. 2. *See also* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73; 28 U.S.C. § 41(1) (2000). This was a departure from the English common law with its slowly evolving mix of courts and crossing jurisdiction. The English fused jurisdiction over law and equity into one High Court of Judicature with the Judicature Acts of 1873 and 1875, but a disputed question remains if a fusion of jurisdiction had resulted in a merger of law and equity themselves. *See* HARBURY AND MARTIN, *MODERN EQUITY* (ed. Jill E. Martin) at 14, 20 (2005). In America, with some exceptions in the states, courts either sit as courts of law or courts of equity, as the case requires, or as courts of combined

equity's fixation on property rights, affording courts more flexible forms of remedy and jurisdiction to intervene in cases of purely personal interests. It is equity's native, pragmatic flexibility that has ensured its survival and that may give renewed vigor to court's interaction with domestic abuse cases.

This evolution and the theoretical progression are historical features of equity, as Holdsworth notes in his famous history:

It must not be forgotten that the rules of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time – altered, improved, and refined from time to time. . . . The doctrine are progressive, refined and improved; and if we want to know what the rules of equity are, we must look, of course, rather to the more modern than the more ancient cases.⁷⁶

Likewise, in 1933, during a moment when “[j]udicial opinion as to what constitutes a marriage has been undergoing a change,” a scholar noted the nature of equity to respond with effective felicity to the demands for justice in a marriage.⁷⁷ Equity is susceptible to cultural norms and the evolution of societal needs and demands on families:

This jurisdiction embraces situations where real and genuine consent is lacking because of fraud, duress, and other similarly effective causes. Considerations of public policy and communal morality have received special regard and have had much to do with shaping the accepted tenets of the field. They arose in part from the needs and conditions of an era, the social and economic characteristics of which are no longer with us. By a sort of metamorphosis begun two or more generations in the past, we have grown into a different form – different not only in degree but in kind. We see all about us a much altered way of life of great complexity. It is marked by the creation of new, and the enlargement of existing

jurisdiction with equity available as necessary to the court. In 1937, the Federal Rules of Civil Procedure affirmed that in Article III courts, all cases in law or equity are only “civil cases,” and the court can extend the “extraordinary” power of equity as it needs. See Richard H.W. Maloy, *Expansive Equity Jurisprudence: A Court Divided*, 40 SUFFOLK U. L. REV. 641, 641-642, 680-681 (2007), citing *Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 306 U.S. 563, 568 (1939) (noting perpetuation of the Judiciary Act of 1789). See also Fed. R. Civ. P. 1, cmt. 3, and FED. R. CIV. P. 2: “There is one form of action – the civil action.”

⁷⁶ HOLDSWORTH, *supra* note 12, in Vol. I, at 465 – 466 (1938), quoting Jessel, M.R. in *In re Hallett's Case*, 13 C.D. at 710 (1879).

⁷⁷ Leonard J. Emmerglick, *The Inherent Jurisdiction of Equity to Nullify Marriage*, 2 MERCER BEASLEY L.R. 47, 52 (1933).

demands on human relationships. Legislative and judicial extensions of individual rights and duties add their weight.⁷⁸

In fact, since the 1960s, American family law has continued to experience a metamorphosis into a “much altered way of life of great complexity.” Advocates for law reform followed the shelter movement in the 1970s with greater activism to shape existing laws and to generate new responses to domestic violence. Among these reforms, state legislatures have considered mandatory arrest policies in which police are bound to arrest someone on a domestic violence scene, and prosecutors have promoted “no drop” prosecutions in attempts to prevent victim-witnesses from coercion by their abusers in court.⁷⁹ In the 20th century, states abolished marital rape exemptions, enhanced stalking crimes and crafted counseling diversion programs.⁸⁰ In 1994, the national government enacted the Violence Against Women Act of 1994 (“VAWA”) which federalized some interstate domestic violence crimes and established federal grants and policy preferences for states to address legal and community responses to domestic abuse.⁸¹

Civil protections orders may be the most common legal innovations to arise in response to domestic abuse. Before the advent of civil protection orders, abuse victims could obtain injunctive relief or restraining orders only within the context of a larger action. In 1970, Congress passed the Intrafamily Offenses Act for the District of Columbia, which included the first form of civil protection orders.⁸² By 1992, every state had established civil protection schemes to provide civil remedies for people vulnerable to domestic abuse.⁸³ Civil protection

⁷⁸ *Id.* at 47 -48; *see also, e.g.,* Recent Cases, *Equity – Fraud As Ground for Equity’s Jurisdiction to Annul Marriages (Virginia)*, 3 WASH. & LEE L. REV. 129 (1941).

⁷⁹ Thomas L. Hafemeister, *If All You Have is a Hammer: Society’s Ineffective Response to Intimate Partner Violence*, 60 CATH. L.R. 919, 978 - 986 (2011)(describing and critiquing mandatory arrest and prosecution policies).

⁸⁰ *See Developments in the Law – Legal Responses to Domestic Violence*, 106 Harv. L. Rev. 1498, 1530-1543 (detailed review of these innovations in state law).

⁸¹ Pub. L. No. 103-322, 108 Stat. 1796, 1902 (1994).

⁸² D.C. CODE ANN. § 16-1001, *et seq.*; *see also* Tamara L. Kuennen, “No-Drop” Civil Protection Orders: *Exploring Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN’S L.J. 39, 47, note 26 (2007).

⁸³ Every state and the District of Columbia provide for civil protection orders for victims of domestic violence: ALA. CODE §§ 30-5-1, (1998); ALASKA STAT. §18.66.100, (2006); ARIZ. REV. STAT. ANN. § 13-3601, (2001); ARK. CODE ANN. § 9-15-201 (2007); CAL. FAM. CODE §§ 6320, 6340 (2008); COLO. REV. STAT. §§ 13-14-101, 18-6-800 (2008); CONN.GEN. STAT. § 46b-16 (2004 & Supp. 2008); DEL. CODE ANN. tit. 10 § 1042 (1999 & Supp. 2006); D.C. CODE ANN. § 16-1003 (2005); FLA. STAT. ANN. §§ 741.30 (2008), 741.30; GA. CODE ANN. §19-13-4 (2004); HAW. REV. STAT. § 586-3 (2005); IDAHO CODE ANN. § 39-6304 (2008); IOWA CODE § 236.1(West 2008); KAN. STAT. ANN. § 60-3101-3112 (2005); KY. REV. STAT. ANN. § 403.715-785 (LexisNexis 1999); LA. REV. STAT. ANN. § 46:2131, (1999 & Supp. 2008); ME. REV. STAT. ANN.tit.19-A, § 4001 (1998 & Supp. 2008); MD. CODE ANN., FAM. LAW, § 4-501 (2006); MASS. GEN.LAWS ANN. ch. 209 § 3 (Supp. 2008); MICH. COMP. LAWS §§ 600.2950, 600.2950(a) (Supp. 2008); MINN. STAT. ANN. § 518B.01 (Supp. 2008); MISS. CODE ANN. § 93-21-1 (2007); MO. REV. STAT. §455.010 (2004); MONT. CODE ANN. § 40-15-101 (1995); NEB. REV. STAT. § 42-901 (2005); NEV.REV. STAT. § 33.017, .020 (2006); N.H. REV. STAT. ANN. § 173-B:1 (LexisNexis 2007) ; N.J. STAT.ANN. § 2C:25-17 (West 2008); N.M. STAT. ANN. § 40-13-2 (LexisNexis 2008); N.Y. FAM. LAW §530.11; N.C. GEN. STAT. § 50B-2 (2005); N.D. CENT. CODE § 14-07.1-02 (2004); OHIO REV. CODE ANN. § 3113.31 (LexisNexis 2008); OKLA. STAT. ANN. tit. 22 § 60.2 (2006); OR. REV. STAT. §107.718 (2007); 23 PA. CONS. STAT. § 6108 (2006); R.I. GEN. LAWS § 15-15-3

schemes require courts to do the work of equity, even if they are not strictly equitable remedies.⁸⁴ Civil protection order schemes are formal, with rules and strict procedures that provide a mechanism for injunctions, but without true consideration of equity outside the statutory structure.

If conscience, discretion and justice drive the progression of equity, then perhaps courts can revive its utility in cases of domestic abuse. Equity's structure and flexibility may bend to protect the personal interests and safety of domestic abuse victims that stricter legal standards cannot remedy. Courts today, better versed in the phenomenon of domestic abuse, better equipped to consider the dynamics of coercion in individual relationships, better equipped with guidance in the law, should alter, refine and improve the use of equity in the cause of justice in these cases.⁸⁵

II. Contemporary Equity and Domestic Abuse

Today, equity exists but is dissolved into the law, available to courts but largely preempted or codified by proliferation of statutes. The principles of equity arise in other sectors of the law, but they remain available to courts, at least as rubrics for making close calls.⁸⁶

(2003); S.C. CODE ANN. § 20-4-40 (2006); S.D. CODIFIED LAWS 25-10-3 (2002); TENN. CODE ANN. § 36-3-602 (2006); TEX. FAM. CODE ANN. § 81.001 (1997); UTAH CODE ANN. § 77-36-1 (2008); VT. STAT. ANN. tit. 15 § 1103 (2006); VA. CODE ANN. § 16.1-279.1 (2008); WASH. REV. CODE ANN. § 26.50.030 (2005); W. VA. CODE § 48-27-501 (2001); WIS. STAT. § 813.123 (2006); WYO. STAT. ANN. § 35-21-105 (2000).

⁸⁴ See Taub, *supra* note 4, at 117.

⁸⁵ In his 1978 article, Freeman gave a thorough survey of English legal responses to wife battery, and at the dawn of the modern domestic violence movement, after considering reforms in criminal, civil, family law and equity, he concluded:

What is required is nothing less than a complete redefinition of the status of women in society. So long as women are perceived as inferior, so long as preservation of existing family units is seen as the overriding consideration, force will be used to control women. So long as force and control are acceptable, violence will also occur. At root, the problem, like so much else, is one of education and socialization.

Freeman, *supra* note 46 at 250. Perhaps, in forty years of law reform and cultural change, equity can capitalize on the resulting education and socialization to give better responses to victims of domestic violence.

⁸⁶ See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 Harv. L. Rev. 687 (1989-1990). Laycock argues that equity, particularly the irreparable injury rule, has ceased to exist in its historic forms at all, and he argues that courts deploy the language of equity to justify results without sure footing in real precedent. See *id.* at 692. "Law, equity and similar conceptual categories are historical rather than functional. . . . The courts have generally manipulated such rules to achieve just and functional results, but the vocabulary, and the conceptual categories have become dysfunctional." *Id.* at 693. Laycock's thesis is that the fundamental choice is between substitutionary and specific remedies, not law and equity. See *id.* at 696. While not disagreeing with Laycock's observations, equity remains present in language, form and taxonomy, so it or its vestiges in the law remain available to courts "to achieve just and functional results" as they have since the Middle Ages.

Examining the vestiges of equity in contemporary practice reveals some potential utility in response to persistent domestic abuse.⁸⁷

A. The Elements of Modern Equity

In its purer theory, the availability of equitable relief turns on a court's discretion, measuring the appropriateness of the remedy, determined by comparing several factors derived from common law.⁸⁸ To obtain injunctive relief at equity against a tort, a plaintiff bears the burden of showing eight factors:

- (1) The nature of the interest to be protected,
- (2) The relative adequacy to the plaintiff of injunction and other remedies,
- (3) Any unreasonable delay by the plaintiff in bringing suit,
- (4) Any related misconduct on the part of the plaintiff,
- (5) The relative hardship likely to result to defendant if injunction is granted and to plaintiff if denied,
- (6) The interests of third persons and the public,
- (7) The practicality of framing and enforcing the order of judgment.⁸⁹

These track many of the traditional maxims of equity but may be manifest in various formulations across jurisdictions and courts.

In most modern courts, to obtain temporary or emergency injunctions, a plaintiff must show additional elements:

- (1) The extent of the threat of irreparable harm to the plaintiff if the interlocutory injunction is not granted,
- (2) The consequences that the interlocutory relief may have on the defendant,
- (3) The probability that the plaintiff will succeed on the merits, and
- (4) The public interest.⁹⁰

The Restatement (Second) of Torts includes this guidance on the balancing of these comparative factors and the ends and means of injunctive relief:

In analyzing the appropriateness of an injunction, it is helpful to distinguish ends from means. The ends are the specific results sought, such as freedom from trespass or nuisance, or the removal of an

⁸⁷ As noted, Taub recognized and explored the potential of equitable practice and rules to address domestic violence early in the contemporary law reform movement. See NADINE TAUB AND ANN MARIE BOYLAN, *ADULT DOMESTIC VIOLENCE: CONSTITUTIONAL, LEGISLATIVE AND EQUITABLE ISSUES, PART II* (1981).

⁸⁸ See Restatement (Second) of Tort, §933 (2011).

⁸⁹ Restatement (Second) of Torts, §936 (1); see also Taub, *supra* note 4, at 243, identifying four elements differently stated: (1) a threatened or existing harm to the plaintiff, (2) with no adequate remedy at law, (3) for which a balance of hardships favors injunctive relief, and (4) that public interest will be served by the injunction.

⁹⁰ Restatement (Second) of Torts, §936 (2).

encroaching wall. The means are the coercive orders and judgments of the court and their administration. Ends must be envisaged before means are examined, but the available means must then be appraised. . . . When considered from the point of view of the court's convenience of administration, the injunctive remedy may often appear to be difficult, complex and burdensome. Moreover, it may often seem likely to result in hardship upon the defendant or to conflict with various interests of the public. Care must be taken, however, that these fears do not too easily overbalance the plaintiff's needs and the importance of the ends to be accomplished. . . . After all, by hypothesis, the defendant is the wrongdoer. The public interest is seldom found to be on the side of the unrestrained commission of tort.⁹¹

This is consistent with Schoenbrod's observations that modern equity struggles fundamentally between giving a plaintiff too little or too much protection with injunctive relief.⁹² This balance turns on tailoring a specific remedy for the plaintiff and weighing the equities to avoid undue harm to the defendant or to avoid judicial overreach.⁹³

Historically, as demonstrated earlier, courts very often have favored the "equities" of sovereign husbands and social constructs over injunctive relief tailored to protect victims of domestic abuse. To avoid overreaching traditional tenets of family life and to resist tampering with common law gender roles, courts were wont to favor legal remedies over intrusive injunctions.⁹⁴ Before the late 20th century, courts widely favored divorce and criminal proceedings as the more "adequate remedies," but as shown next, these often are not adequate at all for a victim of domestic abuse in her full context. If the legal and statutory remedies are not adequate to a specific relationship, equity may full its great purpose of achieving justice where the law cannot.

B. Adequate Remedies

⁹¹ Restatement (Second) of Torts, §936, cmt.

⁹² See David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedies*, 72 Minn. L.R. 627, 633 (1987-1988).

⁹³ See *id.*

⁹⁴ This presupposes that a victim of domestic abuse could get a hearing and hale her abuser into court in the first place. See, e.g., *Thompson*, 218 U.S. 611, in which the Supreme Court considered a D.C. statute giving a married woman standing to sue on their own in tort, then truncated that standing to prevent her from suing husband for battery, for fear of "revolutionizing" the institution of marriage. The *Thompson* court held that "perpetration of such atrocious wrongs [of domestic violence] affords adequate grounds for relief under the statutes of divorce and alimony," and the wife "may resort to the criminal courts, which it is to be presumed, will inflict punishment commensurate with the offense committed." *Id.* at 617, 619. For more on the historic reticence of courts to intervene in family violence, see my article, Jeffrey R. Baker, *Trifling Violence: The U.S. Supreme Court, Domestic Violence and the Golden Rule*, 43 CUMB. L. R. – (2012).

Central to equity's jurisdiction is a judicial determination that there is no legal remedy adequate to the issue at hand.⁹⁵ This is critical to the thesis here, because the proliferation of legal reforms responding to domestic abuse often remains inadequate, especially when fixated on physical violence.⁹⁶

Throughout history, equity has been the available corrective for shortcomings in the common or statutory law. Equity stands in the gaps for judges to accommodate difficult cases where a strict application of law would render an injustice:

In assessing the place of equity practice in the overall legal system, it is critical to realize the extent to which the common law system operated as a brake. One could not turn to equity if there was an adequate remedy at law. Equity grew interstitially, to fill in the gaps of substantive common law (such as the absence of law relating to trusts) and to provide a broader array of remedies--specific performance, injunctions, and accountings. Equity thus provided a "gloss" or "appendix" to the more structured common law. An expansive equity practice developed as a necessary companion to common law.⁹⁷

Courts historically have looked to divorce or criminal sanctions to react to domestic abuse, and modern policies and statutory regimes, like civil protections orders, arose to fill the gaps left by the common law.⁹⁸ In the contemporary moment, these mechanisms still may function as seemingly adequate legal remedies that might foreclose independent claims in equity.⁹⁹ The hope of this article is to reclaim equity when the law fails to recognize the plight of

⁹⁵ See Douglas Laycock, *supra* note 86, at 700 Laycock observes that courts often conflate a remedy's adequacy with the reparability of a plaintiff's harm.

⁹⁶ See Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders Against the Reality of Domestic Abuse*, 11 J. L. & FAM. STUD. 35 (2008), for a full examination of the inadequacy of civil protection orders to accommodate abuse that is not physically violent.

⁹⁷ Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 920 (1987); Richard H.W. Maloy, *Expansive Equity Jurisprudence: A Court Divided*, 40 SUFFOLK U. L. REV. 641, 642 (2007). Maloy surveys the competing ideas of expansive and expanding equity within the combined jurisdiction of federal courts, from progressive expansion to conservative originalism.

⁹⁸ Taub authored a 1981 study surveying early statutory instruments designed to provide relief for domestic violence victims and the potential and challenges of equitable responses. See ANN MARIE BOYLAN AND NADINE TAUB, *ADULT DOMESTIC VIOLENCE: CONSTITUTIONAL, LEGISLATIVE AND EQUITABLE ISSUES* (1981). Taub and I share a thesis that equity could provide a coherent regime for effective judicial intervention in cases of domestic abuse, and implicit in her earlier work on this question is a recognition that this is aspirational and that for centuries equity did not live up to its potential for justice for victims. See *id.* at 1.

⁹⁹ Arkansas provides a clear example. When Arkansas first enacted its structure for civil protection orders, it vested the jurisdiction to issue injunctions in its equity courts, having maintained the distinction through the 1990s. See Mark R. Killenbeck, *And Then They Did. . . ? Abusing Equity in the Name of Justice*, 44 Ark. L.R. 235 (1991). Soon after its passage, the Arkansas Supreme Court invalidated the law as impermissibly expanding equity jurisdiction by vesting chancery courts with the power to issue the orders, primarily because the existing criminal laws against domestic violence were the adequate legal remedy. See *id.* at 239 - 240 (citing *Bates v. Bates*, 793 S.W.2d 788 (Ark. 1990)); see also Note, *Constitutional Law – The Domestic Abuse Act of 1989 – An Impermissible Expansion of Chancery Jurisdiction.*, 13 UALR L.J. 537, 549 - 551 (1990). Because the legislature rooted the initial version of the civil protection order structure in the courts of equity, and because the state high court found that

a victim or when it fails to provide a just remedy for her escape and recovery.¹⁰⁰ When the law has not imagined the form of her coercive abuse, or where the available remedy would perpetuate or revictimize her in the process, equity offers courts a conservative, erstwhile means of reaching practical, tailored justice.

1. Divorce as an Adequate Legal Remedy to Domestic Abuse.

The evolution of divorce laws in the twentieth century is a wending illustration of the tortuous tug-of-war among cultural shifts, statutory reforms, appellate reluctance and judicial practicality.¹⁰¹ Through the nineteenth century, divorce remained restricted to precise formalism, with exacting standards of fault and clean hands, and courts acted to protect the institution of marriage in all cases absent real violations of marital commitments.¹⁰² With economic empowerment and independence for wives, the culture and practice of divorce changed forever as women found themselves unwilling to submit to the yokes of coverture.¹⁰³

Divorce rates increased, and cultural acceptance of divorce widened to accommodate new and expansive ideas of “incompatibility” with married women’s law, suffrage and standing, yet

victims could find relief in the prosecution criminal prosecution of their abusers, the court found the statute to violate the state constitution. *See id.*

¹⁰⁰ Taub hinged her hope on equity overcoming the perceived adequacy of these remedies on tactical showings of “special circumstances” that could render the available legal remedies inadequate to the situation, and she suggests that this showing typically must involve repeated, continuing wrong-doing. *See* NADINE TAUB AND ANN MARIE BOYLAN, ADULT DOMESTIC VIOLENCE: CONSTITUTIONAL, LEGISLATIVE AND EQUITABLE ISSUES, PART II at 34 (1981). I hang my hope, not on artful pleading, but on a changed cultural and social awareness of domestic abuse and gender justice that will inform and influence judicial discretion and conscience.

¹⁰¹ *See* J. Herbie DiFonzo, *Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change*, 34 IDAHO L. REV. 1, 3 -4 (1997), quoting Arthur Garfield Hays, *New Morals for Old: Modern Marriage and Ancient Laws*, 119 NATION 187, 189 (1924): “Revolutionary changes occur unnoticed while our delusions persist and our sense of conservatism is gratified.”

¹⁰² DiFonzo, *supra* note 101, at 5:

Indeed, nineteenth-century divorce doctrine provided a classic example of legal formalism. A marriage was deemed indissoluble, save when the complainant established a fault ground. At that point, formal dismemberment of the union was mandatory. The underlying reality of the marriage was never the focus of the judicial inquiry. Technical grounds served as the un rebuttable barometer of the health of the marriage, and their presence meant its absence, with no occasion provided for the court to inquire behind the mask of the formal law.

Id. at 7. The prevailing sins to be punished by divorce were cruelty, adultery and desertion. *See id.* at 9, 13 – 16. *See, e.g.,* Matthews v. Matthews, 107 A. 480 (N.J. Ch. 1919)(dismissing divorce petition, even amid euphemistic suggestions of marital rape); *see also, e.g.,* Chapman v. Chapman, 165 N.W. 96 (Iowa 1917).

¹⁰³ DiFonzo, *supra* note 101, at 4.; *see also, e.g.,* Smith v. Smith, 72 Pa.Super. 96 (Pa. Super. 1918). *See, e.g.,* Pennington v. Pennington, 169 N.W. 327 (Iowa 1918)(affirming divorce for a wife who alleged no physical violence but where the court made this finding:

[T]he defendant was guilty of cruelty which had not even the mitigation of hastiness and heat of blood. It was cold and continuous. Indeed, the very pettiness of the subject-matter of some of the controversies only made them more intolerable. They were calculated to stir a spirit of resistance and to disturb greatly the composure of a self-respecting wife. That the plaintiff suffered greatly therefrom is not fairly open to doubt, and that the impairment of health is the natural sequence of such suffering is quite evident.

formalism in the law remained steadfast.¹⁰⁴ As a couple would seek divorce for temperament or incompatibility, they would need to manufacture a formal ground, violence or adultery, and one would bear the accusation to ensure that the other would have clean hands.¹⁰⁵ This follows the theory of divorce as punishment, a sentence against an innocent party for violating the bonds of marriage, but the popular psychology of the twentieth century favored individualism over institutionalism and erased the notion of divorce as sanction.¹⁰⁶

In the early twentieth century, divorce began to become a means of liberty, and moral arguments rose in favor of releasing people from mutually intolerable lifetimes.¹⁰⁷ As the struggle rose between prevailing formalism and rising demand for no-fault divorce, incompatibility, without clear definition, became a category within formalism to permit increasingly available dissolution.¹⁰⁸ Litigants and practically minded judges corralled the demand for mutual, temperamental divorce within a rubric much faster than appellate courts and legislatures could stomach.¹⁰⁹

In response to the undeniable swell of demanding divorce customers, legislatures and appellate courts began to expand the categories, opening “cruelty” to emotional violations, not merely physical violence.¹¹⁰ By the middle of the twentieth century cruelty might have extended to include basic nagging and admonishment, serving as an effective proxy for incompatibility.¹¹¹

Liberalized divorce laws can provide relief and escape from a violent relationship and can even provide escape from abuse that is not physically violent, and they can capture remedies beyond mere restraint.¹¹² Divorce often will not be an adequate remedy to domestic abuse. Historically, courts viewed the availability of divorce as pretext to deny standing and relief from

¹⁰⁴ DiFonzo, *supra* note 101, at 4-8. *See, e.g.,* Hockerson v. Hockerston, 182 P. 325 (Cal. App. 1919)(affirming ordering denying divorce to a wife who charged an instance of severe physical violence “that by reason thereof grievous mental suffering, anguish, and distress, and grievous physical suffering and pain, resulted to the plaintiff,” even where the husband did not appear to participate in the trial for divorce).

¹⁰⁵ DiFonzo, *supra* note 101, at 4-8.

¹⁰⁶ *See* CHAFFEE, *supra* note 61. A complaining party could not receive a divorce against the other unless she was faultless because of the ubiquitous maxim of clean hands. If both parties had committed a wrong, they were sentenced to remain together perpetually, in equity. *See* DiFonzo, *supra* note 101, at 9.

¹⁰⁷ DiFonzo, *supra* note 101, at 4-8. *see also* MILL, *supra* n. ---, CHAFFEE, *infra* n. ---.

¹⁰⁸ DiFonzo, *supra* note 101, at 8.

¹⁰⁹ *Id.* at 12-13. Very few of these divorces were appealed, because they all wanted divorce, so more conservative appellate courts, attenuated from the reality of the lived-relationships, had few chances to tamp down the practice. *See id.*

¹¹⁰ *Id.* at 11 – 12, quoting Krauss v. Krauss, 111 So. 683, 685 (La. 1927) and Tschida v. Tschida, 212 N.W. 193, 194 (Minn. 1927).

¹¹¹ *Id.* at 14-16.

¹¹² *See* Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1159-1160 (2008). *See also*, Keller v. Keller, 158 N.W.2d 694, 696 (N.D. 1968)(recognizing a trial court’s inherent power in a divorce action to issue injunctions and affirming a temporary restraining and exclusion order against a husband upon a “showing of specific prior acts or conduct on the part of the defendant to justify such order”).

torts for women under coverture.¹¹³ Now, divorce may be a more accessible means for relief for married couples, and equity is inherently available to divorce courts.¹¹⁴ Even so, divorce remains costly and time-consuming, and, obviously, divorce is not available to victims of domestic violence who are not married to their abusers.¹¹⁵

Divorce also may provoke economic and financial consequences that are untenable for a wife and mother who is dependent on her abusive husband's monetary provision.¹¹⁶ Not only may divorce be expensive and time-consuming for a victim seeking to escape from violence, but she may find herself homeless, impoverished, unemployed and unable to provide well for her children.¹¹⁷

Divorce is not an adequate legal remedy for spouses who want to save the marriage or who do not want stark separation from a partner.¹¹⁸ Victims may also eschew divorce as a remedy for domestic abuse and violence because of the delay in the procedure, the natural limitations of exclusion, separation and alimony to prevent future violence or coercion. Also, technical application of equitable maxims or procedures that might serve the cause of coercion and harassment, not deliverance, by handing leverage to a well-financed abuser.¹¹⁹

2. Criminal Sanctions as an Adequate Legal Remedies.

Historically, courts have deferred to the criminal proscriptions against assault and battery to provide remedy for domestic violence.¹²⁰ The theory prevailed that victims need only call the police to receive the relief they needed from violence, but this theory failed on the recalcitrant practice of police and prosecutors, steeped in a persistent culture of indulgence and willful ignorance.¹²¹ In England and in a few states early in America, whipping a perpetrator arose as a

¹¹³ See, e.g. Thompson, 218 U.S. at 617-619 (J. Taney, *dissenting*).

¹¹⁴ See, e.g., Kantaris v. Kantaris, 169 N.W.2d 824 (Iowa 1969)(cited by NADINE TAUB AND ANN MARIE BOYLAN, ADULT DOMESTIC VIOLENCE: CONSTITUTIONAL, LEGISLATIVE AND EQUITABLE ISSUES, PART II at 15 (1981).

¹¹⁵ See Johnson, *supra* note 112, at 1159-1160.

¹¹⁶ See Sacco, *supra* note 5 (observing this danger and inadequacy of divorce law before common reforms in domestic violence policy and practice); see also Freeman, *supra* note 5, at 244-245.

¹¹⁷ See *id.*, see also Shirley Darby Howell, *Domestic Violence, Flawed Interpretations of 42 U.S.C. §1437(D)(L)(6), Sexual Harassment in Public Housing, and Municipal Violations of the Eighth Amendment: Making Women Homeless and Keeping Them Homeless*, 13 JONES L. R. 1 (2008).

¹¹⁸ See Moreland, *supra* note 59, at 214.

¹¹⁹ Susan Maidment, *The Law's Response to Marital Violence in England and the U.S.A.*, 26 INT'L & COMP. L.Q. 403, 413 - 414 (1977).

¹²⁰ See, Thompson, 218 U.S. 611.

¹²¹ See Freeman, *supra* note 46, at 219. *But see* Fulgham v. State, 46 Ala. 143 (Ala. 1871). *Fulgham* is a positive example of a court denouncing wife battery in the 19th century, as the Alabama Supreme Court addressed a violent episode between two married, emancipated slaves. The Court took pains to note that chastisement never was the law in Alabama and affirmed the criminal conviction of the husband who had beaten his wife with a board when she intervened in his excessive punishment of their children, despite his affirmative defense of chastisement. The Court tracks Blackstone's explanation of chastisement and the ancient tradition but found a progressive element in the law:

Since then, however, learning, with its humanizing influences, has made great progress, and morals and religion have made some progress with it. Therefore, a rod which may be drawn through the wedding ring is not now deemed necessary to teach the wife her duty and subjection to

criminal sanction for wife beating, but this provoked practical criticism that flogging culprits hurt women because their abusers returns “more brutalized and infuriated than ever, and again have their wives at their mercy.”¹²²

As recently as the 1970s, in the midst of the second women’s movement, many police agencies remained reluctant to deploy authority intervene aggressively in violent homes, often preferring merely to calm a situation, to separate parties, to divert cases from prosecution and to ignore victims unwilling to prosecute.¹²³ Even well-meaning police officers will encounter intractable choices in the field with imperfect information.¹²⁴ Short-term peace may require temporary, immediate separation that does not affect underlying causes, but field “mediation” may get at the heart of the “dispute.”¹²⁵ The feminist response may be neither community peace nor dispute-resolution but will be to protect the victim and to deter further oppression.¹²⁶ Although a victim of abuse may well find relief through the police and criminal intervention, she retains little agency in the transaction and must depend on the blunt response of officers who arrive with little context or understanding of the nuance in the relationship.¹²⁷ Further, if the coercive abuse does not readily satisfy the elements of violent crime, then the police may not intervene at all.

Likewise, prosecutors often have been reluctant to prosecute cases that fell short of homicide and have been more likely to divert cases to non-judicial settings or to avoid prosecution at all, especially with a reluctant victim-witness.¹²⁸ In any event, even with the most enlightened and sensitive prosecutor, the victim remains a witness, not a client, and her case depends on prosecutorial discretion, not her own.¹²⁹ The victim has little or no agency in the prosecution of criminal charges, and she has only the options to proceed or to refuse to

the husband. The husband is therefore not justified or allowed by law to use such a weapon, or any other, for her moderate correction. The wife is not to be considered as the husband's slave. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law.

Id. Even as the Court deploys enlightened language, even calling the newly freed slave a “citizen of the state,” among the “rank of the highest in the commonwealth,” it implicitly observes the humanizing trend of the law to treat women “upon the same footing before the law,” and she still would have had no standing to sue him on her own. The Court also notes that the privilege to abuse a wife is “not *now* acknowledged by our law.” *Id.* (emphasis added).

¹²² See Freeman, *supra* note 46, at 200.

¹²³ See Sacco, *supra* note 5, at 560-563.

¹²⁴ See Lawrence W. Sherman and Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, in DOMESTIC VIOLENCE (ed. Mangai Natarajan) at 355, 356 (2007).

¹²⁵ See *id.* at 357.

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See Sacco, *supra* note 5, at 563 – 565, 567-568.

¹²⁹ See Taub, *supra* note 4, 254.

prosecute, leaving her open to potential coercion from the court, the prosecutors and her abuser.¹³⁰

Despite the availability of criminal law, because of the discretion inherent in the police officers' and prosecutors' positions, a victim remains at their mercy for support and relief.¹³¹ Without access to a quick, equitable injunction, victims have had to rely on police and prosecutors to deliver her or to wait out a divorce. Theoretically, the criminal justice system could be available to her, but practically, she has no adequate remedy at law with which to redeem herself.

3. Torts as Adequate Legal Remedies.

Tort law plainly provides remedies damages for intentional torts like assault, battery, infliction of emotional distress and the like, and courts have rendered equitable relief in tort cases.¹³² A victim of domestic violence would be hard pressed to receive useful, quick relief to escape a violent relationship through a tort action, as she would encounter the expensive and long path toward resolution of a civil action.¹³³ If the need for relief is immediate, urgent and not monetarily quantifiable, then tort actions are inadequate legal remedies; tort does not answer the victim's needs.

Domestic abuse is not merely about cuts and bruises or injuries to be made whole by money damages. Victims of domestic abuse suffer significant increases in physical health problems, even beyond the immediate effect of a punch or shove.¹³⁴ Reliable studies have reported varied chronic symptoms associated with the abuse suffered by domestic violence victims: headaches, back pain, gastrointestinal problems, chest pain, pelvic pain, insomnia, fatigue, nightmares and choking sensations.¹³⁵ A 2004 study found significantly increased

¹³⁰ See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3 (1999) (citing ANGELA BROWN, WHEN BATTERED WOMEN KILL 68 (1987), and LENORE WALKER, THE BATTERED WOMAN, 43-44 (1979)).

¹³¹ See Maidment, *supra* note 119, at 406-409.

¹³² See Johnson, *supra* note 112, at 1158 (citing ANN MARIE BOYLAN & NADINE TAUB, ADULT DOMESTIC VIOLENCE: CONSTITUTIONAL, LEGISLATIVE AND EQUITABLE ISSUES, 2, at 5 (Wash., D.C., Legal Servs. Corp. Research Inst. Sept. 1981)).

¹³³ See *id.*

¹³⁴ Kimberly K. Eby, *Exploring the Stressors of Low-Income Women with Abusive Partners: Understanding Their Needs and Developing Effective Community Responses*, 19 J. FAM. VIOLENCE 221, 222 (2004). I discuss this study and those I reference in the next seven notes in a previous article, *Necessary Third Parties: Multidisciplinary Collaboration and Inadequate Professional Privileges in Domestic Violence Practice*, 21 COLUM. J. GENDER & L. 283, 290-294 (2011).

¹³⁵ *Id.* (citing Kimberly K. Eby et al., *Health Effects of Experiences of Sexual Violence for Women with Abusive Partners*, 16 HEALTH CARE WOMEN INT'L 563 (1995)); see also Diane R. Follingstad et al., *Factors Moderating Physical and Psychological Symptoms of Battered Women*, 6 J. FAM. VIOLENCE 81 (1991); Elaine Hilberman & Kit Munson, *Sixty Battered Women*, 2 VICTIMOLOGY INT. J. 460 (1977); Suzanne Kerouac et al., *Dimensions of Health in Violent Families*, 7 HEALTH CARE FOR WOMEN 413 (1986); Rachel Rodriguez, *Perception of Health Needs by Battered Women*, 12 RESPONSES: VICTIM WOMEN & CHILD. No. 4, 1989, at 22; Evan Stark & Ann Flitcraft, *Medical*

physiological stress among abusive victims and concluded that this likely shows that women who are battered may have increased susceptibility to future illness.¹³⁶ Another study observes immediate and long term physical and psychological distress resulting from domestic violence including bruises and lacerations, chronic pain, eating disturbances, anxiety, low self-esteem, depression, sleep deprivation and memory loss.¹³⁷ Also, “[40%] to 60% of battered women are abused during pregnancy and 8% of pregnant battered women experience obstetrical complications as a direct result of their abuse.”¹³⁸ Women who are victims of domestic abuse are more likely to have been hospitalized because of self-injury, poisoning, gastrointestinal disorders, assault injuries, psychiatric disorders or attempted suicide in the year before obtaining a protection order.¹³⁹

Victims of emotional abuse have increased chances of diverse mental health complications, including depression, anxiety, post-traumatic stress disorder and suicidal ideation.¹⁴⁰ Women exposed to domestic abuse report higher incidents of intrusive thoughts, ruminations and avoidance, symptoms of post-traumatic stress disorder. More intense trauma symptoms occur in those who have survived more severe violence.¹⁴¹ Domestic abuse has “enormous impact” on victims’ feelings of depression.¹⁴²

Therapy as Repression: The Case of Battered Women, HEALTH MED. 29 (1982); Murray Straus & Richard J. Gelles, *The Costs of Family Violence*, 102 PUB. HEALTH REP. 638 (1987).

¹³⁶ *Id.* at 225, 229.

¹³⁷ Humphreys et al., *supra* note 5, at 402 (citations omitted).

¹³⁸ *Id.*

¹³⁹ See Rose Constantino et al., *Effects of Social Support Intervention on Health Outcomes in Residents of Domestic Violence Shelter: A Pilot Study*, 26 ISSUES IN MENTAL HEALTH NURSING 575, 576 (2005) (citing Mary A. Kernic et al., *Rates and Relative Risk of Hospital Admission Among Women in Violent Intimate Partner Relationships*, 90 AM. J. OF PUB. HEALTH 1416 (2000)); see also Jennifer Cole et al., *Intimate Sexual Victimization Among Women with Protective Orders: Types and Associations of Physical and Mental Health Problems*, 20 VIOLENCE & VICTIMS 695, 696 (2005) (noting that women sexually assaulted by their spouses experience associated symptoms like bladder infections, urinary tract infections, vaginal and anal bleeding, dysmenorrhea, miscarriages and sexually transmitted diseases).

¹⁴⁰ See Ann Coker et al., *Social Support Protects Against the Negative Effects of Partner Violence on Mental Health*, 11 J. WOMEN’S HEALTH & GENDER-BASED MED. 465, 466 (2002) (citing Jacqueline C. Campbell & Linda A. Lewandowski, *Mental and Physical Effects of Intimate Partner Violence on Women and Children*, 20 PSYCHIATRIC CLINICS. OF N. AM. 353 (1997); Mary P. Koss & Lynette Hesle, *Somatic Consequences of Violence Against Women*, 1 ARCHIVES OF FAM. MED. 53 (1992); B. Bergman et al., *Utilisation of Medical Care By Abused Women*, 305 BRIT. MED. J. 27 (1992); S.B. Plichta & C. Abraham, *Violence and Gynecologic Health in Women Over 50 Years Old*, 174 AM. J. OBSTETRICS & GYNECOLOGY 903 (1996); see also Kelly L. Jarvis et al., *Psychological Distress of Children and Mothers in Domestic Violence Shelters*, 20 J. OF FAM. VIOLENCE 389, 400 (2005) (noting that victims with higher levels of depression, anxiety and anger plausibly are experiencing posttraumatic stress disorder).

¹⁴¹ See Kathleen A. Ham-Rowbottom et al., *Life Constraints and Psychological Well-Being of Domestic Violence Shelter Graduates*, 20 J. FAM. VIOLENCE 109, 111 (2005) (citing B.M. Houskamp & D.W. Foy, *The Assessment of Posttraumatic Stress Disorder in Battered Women*, 6 J. INTERPERSONAL VIOLENCE 367 (1991); A. Kemp et al., *Incidence and Correlates of Posttraumatic Stress Disorder in Battered Women: Shelter and Community Samples*, 10 J. INTERPERSONAL VIOLENCE 43 (1995)).

¹⁴² See Tammy A. Orava et al., *Perceptions of Control, Depressive Symptomatology, and Self-Esteem of Women in Transition from Abusive Relationships*, 11 J. FAM. VIOLENCE 167, 181 (1996).

Even more, before the mid-twentieth century, a wife could have had no standing to sue her husband in tort, even for assault or battery.¹⁴³ Coverture prevented a wife from suing her husband, except by a next friend for divorce, and spousal immunity kept her from civil remedies against her abuser altogether.¹⁴⁴ Even when she might sue her abusive husband, she might encounter prickly, suspicious judges. Freeman quotes judges and scholars who wrote that, even in the 20th century, a wife's suit against her husband would be "unseemly, distressing and embittering, and that "[i]f a husband 'beats up' his wife, she cannot sue him, because to sue him would be unwifely."¹⁴⁵

Tort remedies fell and fall short for domestic violence intervention in three important ways.¹⁴⁶ First, as explained above, courts traditionally and historically have considered divorce and criminal penalties as the adequate and appropriate remedy for domestic violence, not equitable or legal damages.¹⁴⁷ Second, tort damages necessarily come after the escape from abuse and provide no immediate relief from injury, and tort damages do little to compensate for emotional trauma and familial disruption.¹⁴⁸ Third, civil tort remedies compensate retroactively; they do not protect immediately or into the future.¹⁴⁹

In an instructive case from Washington, the divorce itself was the provocation for years of harassment and defamation.¹⁵⁰ In *Dickson*, a wife sued for injunctive relief against her ex-husband who had spent the years after their divorce mounting a campaign to make divorce illegal and invoking his wife in his literature and communications; he accused her to being insane and claimed still to be married to her in the sight of God.¹⁵¹ He trespassed on her property, cursed her in public and in front their children, told others that they were still married, told their children that she was not sane and wrote her voluminous letters to these effects.¹⁵² The trial court issued an injunction, claiming its jurisdiction over the divorce and the minor children still under its orders:

(I)t is ORDERED, ADJUDGED AND DECREED that the defendant be and he is hereby temporarily restrained from harassing the plaintiff in any way whatsoever, from writing her letters, from going upon the premises that she may occupy wherever that might be, from cursing plaintiff in public or private, from accusing her of being insane, from taking delivery of mail in her name at his address or anywhere else, from representing that plaintiff is defendant's wife, or from any

¹⁴³ See, e.g., *Barber*, 62 U.S. at 548, 589-590.

¹⁴⁴ See *id.*; see also Sacco, *supra* note 5 at 569-573 (discussing the rise of married women's statutes and the expansion of standing to sue, typically only after divorce and prosecution).

¹⁴⁵ See Freeman, *supra* note 46 at 228.

¹⁴⁶ See Taub, *supra* note 4, at 255.

¹⁴⁷ See note 98, *supra*.

¹⁴⁸ See notes 117, 140-143, *supra*.

¹⁴⁹ See TAUB AND MARIE BOYLAN, *supra* note 100, at 44.

¹⁵⁰ *Dickson v. Dickson*, 529 P.2d 476 (Wash. 1974).

¹⁵¹ See *id.* at 477.

¹⁵² See *id.*

way harassing, contacting, speaking to or communicating with the plaintiff or otherwise interfering with her freedom and personal enjoyment, . . .¹⁵³

The defendant husband argued that defamation had an adequate legal remedy in tort law and that the injunction violates his constitutional free speech rights.¹⁵⁴ The court found that defamation is not protected speech and found that money damages in tort would not be sufficient because of the “recurrent nature of plaintiff's invasions of defendant's rights; the need for a multiplicity of damage actions to assert defendant's rights; the imminent threat of continued emotional and physical trauma; and the difficulty of evaluating the injuries in this case in monetary terms.”¹⁵⁵

The Washington court, however, said that the “thrust of the injunction” was not to protect the wife and mother but to protect the minor children from their father’s behavior.¹⁵⁶

There was sufficient evidence that Mr. Dickson's conduct interfered with the welfare of his minor children, Michelle and Philip. At one time, he was receiving mail in Mrs. Dickson's name at his office. . . . He has told several persons that she is insane and sick More than once he has come to her house, and when she went inside, he shouted loud enough for the neighbors to hear that she was insane and needed him. In a letter he sent to her, he said that he had written to her employer. One of the most harassing acts has been his insistence to several persons that Mrs. Dickson is still his wife. . . . It would be naive to assume that Mrs. Dickson's unhappiness did not have a harmful effect upon Michelle and Philip and on Mrs. Dickson's ability to raise them. The effect upon their mother could not help but embitter the children toward their father Moreover, much of Mr. Dickson's conduct directly threatened their welfare. He has stated to several persons that the children, as well as Mrs. Dickson, need help and that if she would marry him again, he could help them. On one occasion he passed out literature at their church, at which several persons laughed. This occurrence was related to a couple of Mrs. Dickson's older children. These incidents could not have escaped the younger children's attention. The disparaging remarks about or reflecting on them could very well make them think badly of themselves and their family. They have undoubtedly heard of Mr. Dickson's statements that Mrs. Dickson is still his wife. In Michelle's mind especially, remarks about her mother's health and relationship with her ex-husband, at the least, would create much confusion. More likely, it may lead to questioning of her mother's judgment and her mother's conduct, such as seeing other men. The statements could easily discourage possible suitors for Mrs. Dickson. Moreover, by saying that she is still

¹⁵³ *Id.* at 477-478.

¹⁵⁴ *See id.* at 478.

¹⁵⁵ *Id.* at 479 (citing *Galella v. Onassis*, 353 F. Supp. 196, 235 (1972)).

¹⁵⁶ *See id.* at 188-189.

his wife, Mr. Dickson is falsely implying that he still has some right to custody and control of the minor children other than visitation rights.¹⁵⁷

The court enjoined him from “harassing the plaintiff in any way whatsoever, from writing her letters, from going upon the premises that she may occupy where ever that might be, from accusing her of being insane, from representing that plaintiff is defendant's wife or from in any way harassing, contacting, speaking to or communicating with the plaintiff or otherwise interfering with her freedom and personal enjoyment.”¹⁵⁸

Dickson is a rare case of a court turning to equity to intervene in family matters. The court found the defendant’s actions to be defamatory, harassing and harmful to the minor children, and to its credit, deployed equity to enjoin the ex-husband from his behavior toward his ex-wife. The case demonstrates the utility and potential of equity promoted in this Article.

By contrast, it demonstrates a deficiency in its language and tools to describe his coercive abuse. The court was bound to frame its opinion in tort and free speech structures. It does not seem to appreciate that these were his attempts to coerce her return to him, to exercise power and control and to drive her back into his domain. The court says that its central thrust was to protect the children, not the actual target of his actions. It might well have found that Mrs. Dickson had a personal interest to be free of Mr. Dickson’s coercion and that Mr. Dickson’s tactics were abusive and violated her interests, even if his actions did not satisfy elements of a discrete tort or crime.¹⁵⁹ The court might have found that she has an interest to be free of her ex-husband’s hounding to make her return to him, for stability and for peace in her home. The court found that the consequences of interlocutory relief on the defendant were outweighed by the wife’s needs for protection from the harm he caused her, but it could have framed these in terms of dignity, autonomy, stability, peace and freedom from fear.

Dickson is a rare, positive result of equity in domestic abuse cases, but it illustrates a lack of language and understanding of family and gender dynamics as late as 1970. Courts and culture simply had not yet articulated a clearer vision of domestic abuse beyond physical wife battery, yet it demonstrates capacity of equity to reach right results within existing structures.

4. Civil Protection Orders as Adequate Legal Remedies.

Civil protection orders are a statutory species of injunctive relief for victims of domestic violence, arising in the late 1970s and now available in every state.¹⁶⁰ In quick order, states seized on civil protection orders as an efficient means to afford quick, emergency, usually

¹⁵⁷ *Id.* at 479 – 480.

¹⁵⁸ *Id.* at 478, n. 1.

¹⁵⁹ *See, e.g.,* Webber, Webber, 307 S.W.2d at 296 (affirming an injunction for non-criminal actions that would have been “trivial” had they been “sporadic or of short duration,” but which were subject to an injunction where the defendant’s actions were “incessant” and “protracted”).

¹⁶⁰ *See* note 83, *supra*.

temporary injunctive relief to victims of domestic violence.¹⁶¹ This can include simple restraint, residential exclusion, temporary child custody, financial support, transportation and the surrender of firearms.¹⁶²

Civil protection order regimes, however useful, sound in the law, not equity. These statutes all include standards of evidence and statutory elements, and virtually all of them define “abuse” by referencing criminal codes and other statutes.¹⁶³ Virtually all of these antecedent crimes and statutory definitions of domestic abuse presuppose physical violence.¹⁶⁴ In the early days of civil protection schemes, some concern arose that they might completely supplant equitable remedies because they might stand as completely, universally adequate legal remedies.¹⁶⁵

On the contrary, it is the statutory inflexibility and the fixation on physical violence that leaves civil protection orders often inadequate remedies at law for victims of abuse.¹⁶⁶ Civil protection orders create a regime of accessible legal remedies, but by focusing almost exclusively on physical violence and crimes, the statutes do not reach other forms of coercion and subjugation.¹⁶⁷ This fixation limits the availability of civil protection orders, and can affect the results of related legal actions dramatically, if a victim cannot immediately prove significant physical violence.¹⁶⁸

These other forms of abuse and coercion that are not violent can include interference with a victim’s work and workplace. A perpetrator can exert financial pressure and dependence with financial threats, by alienating joint bank accounts or forcing a partner to endorse pay checks under duress.¹⁶⁹ An abuser may threaten to remove a partner or her children from his medical insurance or to intercept her governmental benefits. He may threaten to expose intimate details

¹⁶¹ See Tamara L. Kuennen, “No-Drop” Civil Protection Orders: Exploring Bounds of Judicial Intervention in the Lives of Domestic Violence Victims, 16 UCLAWOMEN’S L.J. 39, 47 n.26 (2007); Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL’Y REV. 51, 53 (2000).

¹⁶² See, e.g., IND. CODE § 34-26-5-9 (LexisNexis 2007).

¹⁶³ See, e.g., Ala. Code §30-5-2(1) (2010).

¹⁶⁴ This is the central thesis of my earlier work, Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J. L. & FAM. STUD. 35 (2008).

¹⁶⁵ See Taub, *supra* note 4, at 246.

¹⁶⁶ See Leigh Goodmark, *Law is the Answer? Do We Know for Sure?*, 23 ST. LOUIS U. PUB. L. REV. 7, 28–30 (2004):

By focusing so intently on physical violence, the legal system refuses to recognize how the other types of violence experienced by battered women affect their ability to function as parents and as people Moreover, by elevating physical violence over the other facets of a battered woman’s experience, the legal system sets the standard by which the stories of battered women are judged. If there is no assault, she is not a victim, regardless of how debilitating her experience has been, how complete her isolation, or how horrific the emotional abuse she has suffered.

¹⁶⁷ See Johnson, *supra* note 112, at 1112.

¹⁶⁸ See *id.* 1152-1153.

¹⁶⁹ See, e.g., GOODMARK, *supra* note 46, 29 – 30.

of her life through social media or isolate her from friends and family by monitoring her cell phone and text messages. These are not far-fetched ideas, and they are not illegal. Because they are not illegal, she cannot get a civil protection order to enjoin them under statutory schemes. Thus, civil protection orders cannot provide adequate relief to victims of abuse that is not physical or is not illegal on its face, however harmful it may be to the victim.

C. Judicial Discretion

Equitable decisions rest in the discretion of the court, a hallmark of the practice of modifying the law to accommodate justice in individual cases.¹⁷⁰ Despite gradual hardening into normalized rules, equity's purpose and effect lie in the conscience of individual judges:

Equity is a roguish thing. For law we have a measure . . . equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a Chancellor's foot.¹⁷¹

If a judge does not have a clear, thorough understanding of domestic violence and family dynamics, from a generalized philosophical level to the intricate dynamics of individual families, the judge cannot render effective relief.¹⁷²

A judge's discretion is not without guidance, and the guidance comes from the vaunted maxims of equity. The maxims evolved to guide a judge's discretion when once unmoored from the inadequate law. Once a plaintiff has met the burden to access equity, articulating a claim without an adequate remedy at law, threatening irreparable harm, favoring her in justice and consistent with public policy, the maxims of equity are to guide a court's decisions. The maxims are not necessarily authoritative but are informative and subjective. Disputed for centuries, the actual number, content, meaning and utility of equitable maxims are uncertain, and

¹⁷⁰ See Schoenbrod, *supra* note 92. Schoenbrod notes this tenet but argues that equity has devolved into formalized compartments that prevent it from rendering appropriate remedies, without constant precedent or predictable results. *See id.* at 632. He laments the absence of "transsubstantive principles to guide judges in fashioning injunctive relief." *Id.* He is concerned about injunctions that give less protection than the plaintiff is due, by "balancing the equities," and about injunctions that give more than the plaintiff needs, by "tailoring the remedy," and he proposes a principle to thread the needle. *See id.* at 633 – 634. Under his principle, "judges must honor the decisions that the law has made as to both the ends—the goals of the law of liability and the means—the modes designated by the law of liability to achieve its ends. Equitable discretion should kick in only when the case presents issues as to the means that the law has left undecided, and even then it should remain controlled by the law's decisions as to ends. If so, the law truly is honored in the breach." *Id.* at 694 – 695.

¹⁷¹ HOLDSWORTH, *supra* note 12, in Vol. I, at 467 – 468, quoting "Selden's well-known aphorism."

¹⁷² See Freeman, *supra* note 46, at 200:

Solutions presuppose an understanding of the problem. Legal responses cannot operate *in vacuous*. Successful solvents require more than a willingness to act. What is required is a thorough cognizance of the aetiology of wife battering.

their historical use and application seems certainly geared toward pragmatic resolution of courts' consciences.¹⁷³

¹⁷³ See Howard W. Brill, *The Maxims of Equity*, 1993 ARK. L. NOTES 29 (1993):

Unlike the maxims of Solomon, the maxims of equity do not span millenia, are not traceable to a single author or Author, and do not promise eternal rewards. Unlike statutes, they lack the precision and clarity necessary to resolve specific issues, do not specify any sanctions, and are not invalid for vagueness. Some maxims are merely pretext or justification for the decisions of chancery; some are inconsistent or contradictory; some are consumed by their exceptions. One treatise suggests their only role is to provide "some utility as memory aids." On the other hand, equally extreme is the statement that the maxims are "the fruitful germs" and the "judicial principles of morality which thus constitute the ultimate sources of equitable doctrines. . . ." If nothing else, the maxims, developed over the centuries, offer an insight into equitable discretion and provide the opportunity for creative lawyering.

Id.; see also Roger Young and Stephen Spitz, *SEUM – Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Lose*, 55 S.C. L. REV. 175, 176 (2003) (despite the title, a conscientious effort to identify a unifying theme within equity cases, proposing the "ultimate maxim" to "double check" the results of a decision in equity). Judge Young and Prof. Spitz identify the nine maxims that occur in South Carolina common law:

1. Equity follows the law.
2. Equity will not suffer a wrong to be without a remedy.
3. Equity acts in personam, not in rem.
4. Equity is equality.
5. Equity regards as done that which ought to be done.
6. Equity regards substance rather than form.
7. She who seeks equity must do equity.
8. He who comes into equity must come with clean hands.
9. Equity aids the vigilant and diligent.

Id. at 177. Professor Brill identifies and discusses 12 maxims:

1. Equity Will Not Suffer a Wrong To Be Without a Remedy.
2. Equity Acts In Personam, Not In Rem.
3. Equity Delights in Doing Justice and Not Just by Halves.
4. Equity Follows the Law.
5. Equality is Equity.
6. Equity Regards That As Done Which Ought To Be Done.
7. Equity Looks to the Substance and Not Merely the Form.
8. He Who Comes into Equity Must Come with Clean Hands.
9. Equity Favors the Vigilant, Not Those Who Slumber on Their Rights.
10. He Who Seeks Equity Must Do Equity.
11. Where Equities Are Equal, the First in Time Will Prevail.
12. Equity Abhors Forfeitures.

Contemporary English scholar Jill E. Martin also identifies twelve maxims, but two have different angles: (1) Where the equities are equal the law prevails, and (2) Equity looks to the intent rather than the form. She also would substitute two: (1) Equity imputes an intention to fulfill an obligation, and (2) Delay defeats equities. See HANBURY AND MARTIN, *MODERN EQUITY* (ed. Jill E. Martin) at 27 -32 (2005). In 1882, Walter E. Sparks identified six maxims arising from the English traditions:

First - Equity, having once had jurisdiction, does not lose the jurisdiction even if the courts of law afterwards grant the same or a similar relief.

With roots tangled deep into the fog of antiquity, the maxims will be as the judges will use them, but a few have found traction in family cases that might inform a contemporary equitable exercise in domestic abuse cases. Antique cases likely will not sound in the modern moment of increased awareness and condemnation of domestic abuse, but the texts of the maxims themselves surely would be useful advocates of injunctive relief for abuse victims.

Demonstrating the effect of community mores on judicial exercise of equity, Zechariah Chafee, in his famous 1940s lectures, bemoaned the plight of judges evaluating families in equity:

It was an evil day when the first American judge to speak of clean hands had the bright idea of injecting the maxim into the very place where it would work its greatest mischief. In dealing with a marriage, judges have an especially strong duty to look at the total situation, and not let result turn on the ethical behavior of a single individual. Marriage does not involve just one person. Indeed, most of the difficulties as well as its delights come from the basic fact that it takes two to make marriage. And besides the other spouse, whose appearance as defendant rather than plaintiff may be somewhat fortuitous, many more persons are interested in the formation, continuance and termination of the relationship. Most obvious are the children (born and unborn) whether of this couple or from the union of one spouse with a fresh mate. In addition, the question of whether [the couple] are lawfully married may seriously concern creditors, federal tax collectors, school authorities, neighbors, and potential fiancés of either. . . . Over and above this host of citizens, the community has all sorts of vital interests, which are not altogether consistent. For instance, as against the policy preferring a permanent family to barnyard matings, there are practical advantages in replacing one hopelessly unhappy childless marriage by two happy and fruitful marriages, as sometimes happens, rather than condemning each spouse to celibacy or sin. And if the discordant couple have children, statistics cannot demonstrate whether they will suffer more from a broken home or from a nominal home full of hatred and contempt. When society cannot make up its mind how to reconcile all these competing interests and policies, we ought not blame judges for being bewildered. . . . He is asked to reorganize the family, and not to try an offender. If an equity judge is engaged in reorganizing a corporation which is proved to be in dire straits, he does not devote his main attention to the moral conduct of

Second - Equity follows the law.

Third - Where there is equal equity, the law must prevail.

Fourth - Equality is equity.

Fifth - He who seeks equity must do equity.

Sixth - Equity considers that done with ought to have been done.

Walter E. Sparks, *The Origin, Growth, and Present Scope of Equity Jurisprudence in England and The United States*, 16 *The Western Jurist* 473, 476 (1882).

particular creditors who have put the enterprise under his charge. Instead, he endeavors to keep it going on new terms, or else distribute the assets so that they can be used in different enterprises with hopes for better fortune. The judge's task is much the same when the failure of a family is before him. The clean hands maxim is an impertinent intrusion on this very difficult and important judicial job.¹⁷⁴

Among the prominent maxims of equity, equity is a court of conscience that will suffer no wrong.¹⁷⁵ This is consistent with a judge's fundamental discretion in equity, to do what the judge thinks ought to be done. Inevitably, judges are products of their time, environment and culture, and individual conscience is shaped by innumerable insights and experience.¹⁷⁶ In theory, the maxims of equity and case precedent should guide judicial discretion.

Now, American law essentially has merged equity into courts of law, but the maxims and principles remain manifest in judicial decision making, particularly in family law. This functional residue of equity is available for adjudication of personal interests, unmoored from the traditional reticence from interfering in intimate relationships without a pretext of property rights.¹⁷⁷ Equitable remedies remain but are increasingly diluted or dissolved with the expansion of statutory and regulatory authorities.¹⁷⁸ Equity, in the form of injunctive relief still should be available for plaintiffs in domestic matters.¹⁷⁹

To achieve effective utility in cases of domestic abuse, however, traditional equity must accommodate advancing understanding of gender, domestic relationships, family governance and the phenomenon of domestic violence. While equity may not need to change fundamentally and while domestic abuse is not new, contemporary understanding of domestic abuse and the rapidly developed legal responses to domestic law should prompt expanded use of equity to bring justice to dangerous relationships.

¹⁷⁴ CHAFEE, *supra* note 61, at 73-75.

¹⁷⁵ *See*, note 173, *supra*.

¹⁷⁶ Judges drive equity in their particular circumstances, as evident in the evolution from feudalism to private property rights, from private property rights to personal interests, as described above in Section II. Equity is progressive and apt to be altered and refined by modern cases, by social context, changing cultural mores and the judge's milieu. *See* HOLDSWORTH, *supra* note 76; *see also* Emmerglick, *supra* note 77. This is especially true for matters of family structure and gender roles. *See, e.g.*, *State v. Rhodes*, 61 N.C. 453, 459 (1868)(*per curium*)(observing that the issue of judicial intrusion into violent marriages is "at sea" and will be driven by community values and direction).

¹⁷⁷ *See* Laycock, *supra* note 86 at 709. Despite being largely focused on property cases, in his expansive survey of irreparable harm cases, Laycock observes that the most common personal injury cases involve family violence. *See id.* at n. 116.

¹⁷⁸ *See, e.g.*, Restatement (Second) of Tort, ch. 48, Scope Note. The Restatement observes the claims that are most likely to receive injunctive relief: impairment or loss of the support of land, pollution or diversion of water, nuisance, wrongful dealings in chattel, wrongful interference with business, interference in domestic relations, and injuries in personality. The Restatement also notes that assault and battery, among others, are less frequently subject to injunctive relief. *See id.*

¹⁷⁹ *See id.*, *see also* Taub, *supra* note 4.

For centuries, however, equity has not manifested itself in cases of domestic abuse. Before the 1970s gender movements, judges probably were not well equipped culturally, socially or politically to exercise discretion and conscience in equity to intervene in family violence, and as equity must “follow the law,” it had little latitude before the law tackled domestic violence.¹⁸⁰ Thus, judges were apt to be reluctant to interfere in intra-family violence.¹⁸¹ Into the 20th century, as laws began to respond to feminist movements and heightened awareness during the social revolutions of the 1960s, courts and law makers largely remained devoted to maintaining and rehabilitating traditional family units, even at the expense of protection and relief of battered wives.¹⁸²

In her early article on the intersection of equity and domestic violence, Taub noted a few cases in which judges issued injunctions to relieve a victim of abuse by a domestic partner, but she also recognizes that equity might have been available much more broadly in domestic cases.¹⁸³ She then raises and attempts to answer the question at the heart of this article: “Although equitable relief theoretically should be available where a tort is threatened and legal remedies are inadequate, in practice *something special appears necessary* to convince a court that the prospect of prosecution or damages will not suffice to deter this type of tortious conduct.”¹⁸⁴ What is the “something special” necessary to convince judges to intervene in domestic relationships with equity?¹⁸⁵

Taub suggested that the defendants’ obsession, motivation and long duration of abuse played significant roles in swaying judges to intervene, and more theoretically she points to the persistent notion of spousal immunity as a source of reticence.¹⁸⁶ She considered in 1980, however, that courts may seek cover for avoiding domestic violence cases in equity: “Moreover,

¹⁸⁰ See Freeman, *supra* note 46, at 201. Freeman observes that injunctive relief only gained traction with modern domestic violence statutes in the 1960s and 1970s. By the end of the 1970s, “The injunction is the battered wife’s best legal weapon. It is also the most popular remedy.” *Id.* at 235.

¹⁸¹ Note, *Duties and Enforcement Mechanisms for the Rights of Battered Women*, 16 SUFFOLK U. L. REV. 937, 939 - 947 (1982) (tracking early developments in domestic violence responses and observing the historic reticence of police, prosecutors and judges to intervene and render relief in cases of spousal violence).

¹⁸² See Freeman, *supra* note 46 at 243.

¹⁸³ See Taub, *supra* note 4, at 244.

¹⁸⁴ *Id.* (emphasis added).

¹⁸⁵ For an example of the struggle to define the “something special,” Taub notes a North Dakota opinion working to determine the proper standard for an equitable injunction with a stringent standard:

The trial court should not issue a temporary restraining order requiring the defendant to remove himself from the home of the parties on the unfounded fears or assertions of the petitioner. The court should require a showing of specific prior acts on the part of the defendant to justify such an order. However, while the showing in this case [which consisted of affidavits as to threats of bodily harm, the defendant’s violent temper and his having struck her on one occasion] is not as strong as it might be, we cannot say the trial court abused its discretion in issuing the order.

Keller v. Keller, 158 N.W.2d 694, 698 (N.D. 1968), cited at TAUB AND BOYLAN, *supra* note 100, at 19.

¹⁸⁶ See *id.* at 244-245: “Though no longer the prevalent rule, the doctrine where applicable bars tort action based on personal interests. The rule is usually justified in the interest of domestic tranquility, the fear of collusive or frivolous suits, and the availability of the alternative remedies of divorce and criminal prosecution.” *Id.* (citing W. Prosser, *Handbook of the Law of Torts* §122 (4th ed. 1971), noting the doctrine’s roots in coverture).

the concern for marital harmony to which the encyclopaediae, and at times the cases, refer may not actually amount to a protectable interest, but may merely reflect the way courts avoid resolving actual disputes over allegations of violence.”¹⁸⁷

While Taub considers the procedural and doctrinal obstacles to equity in domestic violence, this “something special” very likely is greater social awareness around domestic life and violence, far beyond artful pleading. Inasmuch as equity permits courts to rely on their own discretion and judgment, with precious little guidance from statute or precedent, courts then must reckon with their desire to “avoid resolving actual disputes over allegations of violence.” If coverture, chastisement and domestic privacy justified and sheltered violence within homes, then perhaps judges simply were not offended by domestic violence. If culture, society and the law accommodated “trifling violence” in the interest of domestic harmony, then it can be no surprise that courts were reluctant to deploy equity in the case of victims. Had courts used the tools at their disposal before the modern era, then perhaps legal reforms like civil protection orders, would not have been necessary.

In thirty years of law reform, statutes creating civil protection orders have demonstrated popular will to intervene in violent intimate relationships where the common law and courts in equity would not tread. In 1980, when Professor Taub first considered the role of equity in arresting domestic violence, courts remained reluctant or even willful to intervene with native powers in equity. She placed hope in the skill of attorneys to plead “special circumstances” to provoke just responses from judges in equity, but, a generation later, hope may better lie in evolving, responsive judicial conscience.

Despite the essential framework, equity courts could not have imagined intervening in domestic violence cases for its first five centuries. Equity is intrinsically conservative, steeped in ancient maxims and reliant on courts reticent to issue injunctions to govern interpersonal relationships. Courts have found these to be difficult to enforce and have feared that diving into household matters would make courts look ridiculous.

Moreover, since equity is to “follow the law,” it had little recourse against intimate abuse when the common law itself provided centuries of insulation for abusers in the form of chastisement, privacy and coverture, and spousal immunity.¹⁸⁸ Permitting a woman to sue her husband for battery was “revolutionary” in 1910, and the Supreme Court did not abrogate the common law of marriage until 1992, despite a century’s worth of statutory, political and social upheaval.¹⁸⁹ As domestic violence came to greater awareness in the 1960s, however, equity was slow to evolve, if at all. The traditional maxims of equity and the turn from a fixation on

¹⁸⁷ *Id.* at 246.

¹⁸⁸ See TAUB AND BOYLAN, *supra* note 100, at 10, calling interspousal immunity the “clearest obstacle to equitable relief against battering in marital, as opposed to quasi-marital, situations,” even as the rule was fading quickly by the end of the 20th century.

¹⁸⁹ *Compare* Thompson, 218 U.S. 611; Casey, 505 U.S. 833.

property rights should have and could have accommodated firm judicial intervention on behalf of victims.

Since the 1960s, the law and society have experienced dramatic changes regarding domestic violence. The women's movement of the 1960s and 1970s captured a new message of intimate partner violence, and wife beating developed into a gender issue.¹⁹⁰ After the social shifts of the late 20th century, domestic violence emerged from the privacy of home and the residue of coverture. Law reforms and policies reflected a growing intolerance with domestic violence, and new criminal and civil statutes sought to provide quicker access to stronger remedies for victims of domestic violence. As Justice O'Connor observed in 1992:

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In *Bradwell v. State* [1873]. . . three Members of this Court reaffirmed the common-law principle that "a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states." . . . Only one generation has passed since this Court observed that "woman is still regarded as the center of home and family life," with attendant "special responsibilities," that precluded full and independent legal status under the Constitution. . . . These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.¹⁹¹

Society moves and culture changes with halting ambivalence, but increased awareness and general condemnation of domestic abuse among American lawmakers and judges are certain. The national government and the states all have enacted laws to confront domestic abuse, and in a multitude public and private institutions, communities work to prevent and intercept domestic abuse. This is a legitimate, demonstrable sea-change in the ways that law and policy react to family violence.¹⁹²

¹⁹⁰ See WALKER, *supra* note 130; SCHNEIDER, *supra* note 74; STARK, *supra* note 74; GOODMARK, *supra* note 74.

¹⁹¹ *Id.* at 897 (quoting *Bradwell*, 83 U.S. 130; *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)). See *Bradwell*, *supra* note 12. The dissent was vigorous but did not rise to defend the common law version of marriage or the subordination of wives. In 1992, the Supreme Court abrogated the common law of marriage that subordinated women to men, and no justice objected.

¹⁹² See, e.g., *Marquette v. Marquette*, 686 P.2d 990, 993 (Okla. App. 1984)(observing that "[d]omestic violence has wide-ranging ramification and can certainly be characterized as an issue of broad public interest," and citing Taub, *Ex Parte Proceeding*, *supra* note 4; Note, *The Battered Wife's Dilemma: To Kill or Be Killed*, 32 HASTINGS L.J. 895 (1980)). See also, i.e., LINDA G. MILLS, *VIOLENCE PARTNERS: A BREAKTHROUGH PLAN FOR ENDING THE CYCLE OF ABUSE* (2008):

Now, thirty years after feminist advocates first started the fight against domestic violence, many changes have come to pass. In 2008, if a woman is hit by her husband and calls 911, the police arrive promptly and take the incident seriously. The officer doesn't suggest that his time is being wasted, and he doesn't suggest the man step outside to cool off. Instead, he handcuffs the perpetrator and takes him to the police station, where he will be booked and jailed, while another

As equity remains available and viable for courts to use in cases of domestic violence, conscience, culture and community necessarily will inform judicial discretion.¹⁹³ With a humanitarian spirit and a heightened consciousness of abuse in domestic and intimate relationships, courts can and should leverage extant equity to reach victims and intervene against perpetrators, especially in those intimate cases where coercive abuse does not meet discrete legal standards fixated on physical violence. Equity is available, and courts should avail themselves of the standard tools to suffer no wrong and to seek justice.

III. Equity's New Potential for Domestic Violence

To be sure, very few people ever have advocated for violence in homes or have found wife beating to be morally upright or useful. This Article, the mass of literature and a generation of law reforms bear witness to the general notion that domestic abuse is bad, immoral and no longer social acceptable. The rub comes as communities turn to address it, and particularly whether and how to address it in the law. The law, however, has never been neutral, and its presence is clear and undeniable, as a complicit enabler of patriarchal abusers or as a stalwart, if blunt and ham-handed, advocate for victims.

In 1938, quoting from an 1879 case, Holdsworth observed that equity is “progressive” and best when altered, refined and improved in light of the more modern cases.¹⁹⁴ At the very ancient roots of equity, in Greece, Rome and medieval England, equity served as a moral balancing in the law, “God’s justice,” to render fair results when formalized law could not accommodate justice in a given case.¹⁹⁵ The call of this Article is to refine, alter and improve equity in light of an illuminated, modern understanding of domestic abuse and gender justice, while claiming the old moral demands of good conscience, suffering no wrong against a victim of domestic abuse without rendering adequate, preventative and moral relief.

As demonstrated here, the law never has been without the means and methods to intervene in abusive relationships and to render relief to injustice. The first fundamental question is how and why the law has not responded, either by measured reticence, by deference

officer escorts the wife and her children to a shelter. Violence against a woman in her home is now defined as a crime by our society, and the criminal justice system treats it as such.

Id. at xi.

¹⁹³ In 1952, arguing for an expansion of equity to personal interests in domestic relations cases, Moses Thompson sounded a similar argument, consistent with Dean Pound’s earlier in the century:

The problem of adequacy of remedy and injunctive relief in domestic relations can be handled with a social consciousness and in a humanitarian spirit. . . . An adequate remedy at law, preventing relief by injunction should be as plain, complete, practical and efficient to the ends of justice in its prompt administration as the remedy of injunction itself.

Thompson, *supra* note 51, at 50, 54.

¹⁹⁴ See Holdsworth, *supra* note 76.

¹⁹⁵ See Vinogradoff, *supra* note 19.

to cultural norms, or by implicit imprimatur of prevailing gender roles. The second fundamental question then must be whether and how the law can or should intervene in interpersonal relationships to prevent abuse, to restore peace or to favor a partner over another.

If the law is to be deployed against domestic abuse at all, as it has been since the 1970s, lawmakers, law enforcement and lawyers must grapple with the need for standards, rules and definitions to give order and predictability, and this necessarily relies on prevailing and common understanding of the phenomenon. The process is fraught that would work to craft a general law to accommodate the dynamics of unique relationships while promoting common standards in the law, without haling into court every pedestrian instance of human discord. This very struggle lies at the root of equity in antiquity, and it signals the need for equity again in cases of domestic abuse.

In her book, *A Troubled Marriage: Domestic Violence and the Legal System*, Goodmark observes and describes the “spectacular” rise of laws to confront domestic abuse over the past 40 years.¹⁹⁶ She documents efforts of feminists and law makers to craft responses to domestic abuse that intervened on behalf of victims of physical violence, but she critiques these efforts with their roots in “dominance feminism.” She argues that these reforms, civil and criminal, are “excessively focused on physical violence rather than the totality of a woman’s experience of abuse, concerned primarily with separating women from their partners, regardless of the effectiveness of such policies or the desires of the individual women, and bound to stereotypes of women subjected to abuse that take power from individual women and validate intrusions on women’s autonomy.”¹⁹⁷ In a word, the legal remedies are inadequate.

Goodmark argues for a counterpoint to dominance feminism, anti-essentialist feminism that does not see women merely as victims or shaped essentially by the dominance of men in patriarchy.¹⁹⁸

[W]omen stand at the intersection of various identities that construct them: race, sexual orientation, socioeconomic class, disability, and other defining characteristics. Laws and policies must be attentive to this intersectionality. . . All of these facets of identity shape their relationships (and the abuse that happens in those relationships), their goals, their options and their decisions about how to handle the abuse in their lives. . . .¹⁹⁹

This is consistent with Evan Stark’s criticism of violence-focused responses to domestic abuse:

¹⁹⁶ GOODMARK, *supra* note 54, AT 16-22.

¹⁹⁷ *Id.* at 4.

¹⁹⁸ *Id.* at 5, 138-141.

¹⁹⁹ *Id.* at 5, 139.

[B]ecause of its singular emphasis on physical violence, the prevailing model minimizes both the extent of women's entrapment by male partners in personal life and its consequences. . . . Viewing woman abuse through the prism of the incident-specific and injury-based definition of violence has concealed its major components, dynamics and effects, including the fact that it is neither "domestic" nor primarily about "violence." Failure to appreciate the multidimensionality of oppression in personal life has been disastrous for abuse victims.²⁰⁰

Thus, although the modern era has wrought legal responses long wanting for domestic abuse, even these responses do not afford adequate legal remedies for many victims. They are wholesale remedies for retail crimes.

Goodmark proposes an entirely "reconstructed" legal system that would accommodate individuals more effectively through restorative, therapeutic and collaborative theories and policies.²⁰¹ Doubtless, reform and improvement is constantly necessary, and the movement for legal responses to domestic abuse remains in its relative, historic infancy. Short of a revolution, however, extant legal theories, namely common law equity, remain available for creative, wise, tailored and useful responses to domestic abuse. Equity has the roots and the flexibility to recognize unique forms of coercive, non-violent abuse and to empower victims in all their multitude identities, goals and desires.

Increasingly from the late 1800s, American courts have had use of equity in cases of personal interests without a pretextual property right.²⁰² As the property pretext fell away, courts have had much more freedom to craft customized remedies to protect plaintiffs who can show that they face irreparable harm with no adequate remedy available at law.²⁰³ Courts retain inherent power and discretion to fashion preemptive orders to protect personal interests.²⁰⁴ In the tradition of equity, courts should seek to maximize justice by balancing the need for tailored remedies to protect the plaintiff by weighing equities to avoid excessive intrusion on the defendant.²⁰⁵ The historic maxims of equity are to inform and guide a court's discretion.²⁰⁶ This is the ancient formulation of equity, and it remains the law, notwithstanding the modern merger and dilution of the common law.²⁰⁷

The maxims of equity promote the court's role as arbiter of conscience and justice. Equity will suffer no harm.²⁰⁸ Equity is equality.²⁰⁹ Equity regards that as done which ought to

²⁰⁰ STARK, *supra* note 74, at 10.

²⁰¹ GOODMARK, *supra* note 74 at 170-177.

²⁰² *See* note 51, *supra*.

²⁰³ *See* notes 52-58, *supra*.

²⁰⁴ *See id.*

²⁰⁵ *See* notes 92-93, *supra*.

²⁰⁶ *See* note 173, *supra*.

²⁰⁷ *See* note 89-90, *supra*.

²⁰⁸ *See* note 173.

²⁰⁹ *See id.*

have been done.²¹⁰ Equity aids the vigilant and the diligent, and equity regards substance rather than form.²¹¹ This high-minded, aspirational, moral language is capable of reaching cases of domestic abuse, where a court should suffer no wrong without a legal remedy.

As illustrated in several of the cases cited here, courts have deployed equity in divorce cases involving physical violence, but there are precious rare examples, if any, of courts using equity in free-standing actions for injunctive relief from domestic abuse. This is not a surprise, because equity for personal interests has been available only during 20th century, because women have had independent standing for only barely that long, and because equity is to “follow the law” as it exists.²¹² Since the law has only begun to recognize domestic abuse and intimate partner violence as a discrete phenomenon for a generation, equity has had little law to follow. Inasmuch as equity is to stand in the gap where legal remedies are inadequate, the legal reforms attendant to the domestic violence movement might lull courts into an idea that new statutory mechanisms are adequate.

Three questions follow these observations. First, can cases of domestic abuse invoke the need for equity; that is, do cases of domestic abuse, physical or coercive, cause irreparable harm to its victims? Second, if extant legal remedies are indeed inadequate, can equity do better? Third, even if so, are courts sufficiently cultivated to render appropriate relief within a judge’s discretion and conscience?

First, without doubt, domestic abuse can generate irreparable harm, to mind, body and fortune. As describe above, victims of domestic abuse suffer far more than fleeting bruises, cuts or fractures.²¹³ The injuries are psychological, spiritual, emotional, non-economic and lasting.²¹⁴ The assaults are rarely ever only physical battery, but abusers target a victim’s will, independence, identity, spirit, dignity and capacity to fend for oneself. Domestic abuse imposes subjugation, dependence and doubt. These are not compensable injuries.

Second, equity may well be able to render better results for victims of domestic abuse, especially coercive abuse that is not physically violent.²¹⁵ As illustrated above, domestic abuse often transcends legal definitions; abuse that is not violent, yet coercive, may not be illegal *per se*. Financial, emotional and psychological coercion may not be criminal or even cognizable torts, but they may nonetheless inflict irreparable harm. The law should not suffer these wrongs without legal remedy, yet criminal codes, divorce regimes and civil protection orders cannot

²¹⁰ *See id.*

²¹¹ *See id.*

²¹² *See id.*

²¹³ *See* notes 117, 134 – 142, *supra*.

²¹⁴ *See id.*

²¹⁵ *See* notes 96, 166-167, *supra*.

reach these tactics. Indeed, an abuser may use these tactics to coerce a victim from availing herself of available legal remedies.²¹⁶

Equity provides fertile possibilities for tailored recourse in these cases of non-criminal, non-physical abuse. A court in equity could enjoin an abuser from dropping his partner-victim from his health insurance for a period of time to ensure her coverage and freedom to change her circumstances. A court in equity could ensure a victim had equitable access to joint bank accounts and could enjoin an abuser from encumbering and alienating jointly held property. A court in equity could enjoin an abuser from publishing intimate, embarrassing material about his partner whom he wishes to intimate into submission. A court in equity could order an abuser to maintain power and water utilities for those who are financially dependent on him. A court in equity could ensure that a partner is free from intrusion and interference at her work or school so that she does not remain financially dependent on her abuser. A court in equity could ensure that an abuser cannot track his victim's smart phone, monitor her text messages, access her email or audit her telephone records, even if he shares an account with her. Equity provides the flexibility to render wise, customized and balanced remedies where formal legal standards cannot.

Third, courts do not require dramatic legal reforms or innovative statutes to render such orders. The authority exists inherently in equitable jurisdiction, and the mechanism is available to issue tailored, just orders to ensure safety and to promote freedom from coercive abuse. The final barrier is the courts themselves, the conscience and understanding of the judges who claim their equitable jurisdiction and who would exercise their discretion to adjudicate cases of domestic abuse.

This is admittedly a hopeful and optimistic view, that contemporary judges should be much better equipped in conscience and discretion to understand, to appreciate and to evaluate domestic abuse. With thoughtful lawyering, judicial education and continued public advocacy, it is not unrealistic or unreachable. After a generation of effective work, the feminist, domestic violence movement has had remarkable progress in raising awareness and promoting reforms.

The tide has turned from the long era of judicial reticence to intervene in domestic abuse cases. In 1868, the North Carolina demonstrated the prevailing idea of the age, when it upheld the interest of familial privacy and the internal government of a home, however violent or patriarchal, against judicial inquiry: "We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."²¹⁷ The Court explained its rationale:

²¹⁶ See Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much?*, 22 BERKELEY J. GENDER L. & JUST. 2 (2007).

²¹⁷ Rhodes, 61 N.C. at 459.

Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive; and each member will find excuse for the other in his own frailties. But when trifles are taken hold of by the public, and the parties exposed and disgraced, and each endeavors to justify himself or herself by criminating the other, that which ought to be forgotten in a day, will be remembered for life.²¹⁸

With prescience, however, the Court foreshadowed the changes to come in a century and acknowledged that community and cultural mores drove the Court and would drive courts to come: “From what has been said it will be seen how much the subject is at sea. And, probably, it ever will be so: for it will always be influenced by the habits, manners and conditions of every community.”²¹⁹

In 1910, as discussed above, the U.S. Supreme Court considered a new D.C. statute granting independent standing to women to sue in tort, not only through their husbands or next-friends.²²⁰ The statute itself was a remarkable moment in the march to woman enfranchisement, but the Court suspected that “[t]heir obvious purpose is . . . to a large extent to alter the common-law theory of the unity of husband and wife.”²²¹ The Court truncated the statute’s effect to find that a woman did not have standing to sue her husband for battery, although she could sue anyone else for anything else, because it would revolutionize the institution of marriage.²²²

By 1992, after universal suffrage, World War II and the second women’s liberation movement, at least, the U.S. Supreme Court agreed without dissent that “[t]hese views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.”²²³ In 1994, Congress passed the Violence Against Women Act, acknowledging the scourge of domestic violence with national legislation, declaring, “All persons within the United States shall have the right to be free from crimes of violence motivated by gender,” and “A person . . . who commits a crime of violence motivated by gender and thus deprives another of [this] right . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.”²²⁴ By the 1990s, every state had enacted provisions for civil

²¹⁸ *Id.* at 458.

²¹⁹ *Id.* at 456.

²²⁰ *See* Thompson, 218 U.S. at 615.

²²¹ *Id.*

²²² *See id.*

²²³ Casey, 505 U.S. at 896 – 897.

²²⁴ 42 U.S.C. § 13981 (b),(c) (1994) (held unconstitutional by *United States v. Morrison*, 120 U.S. 598 (2000)(finding that Congress exceeded its authority under the commerce clause and remedial power clause of the Fourteenth Amendment). Despite the constitutional disposition, VAWA signals that the national government recognized domestic abuse and was ready to act against it. Leigh Goodmark, while making other criticism against the legislation and its effects, observes, “The passage of VAWA is attributable in part to the success of the battered women’s movement in persuading policymakers of the universality - whiteness – of domestic violence.” GOODMARK, *supra* note 74, at 24.

protection orders and other law reforms to combat domestic abuse.²²⁵ These reforms join innovative police practices, specialized court dockets, proliferation of shelters and justice centers and concentrated non-profit and scholarly attention.²²⁶

Although the moment and movement may be relatively young, the American legal landscape is remarkably different for victims of domestic abuse in the second decade of the new century than it was at the close of the last. The tide has turned in constructive, positive and substantial ways. To be sure, incidents of domestic abuse remain epidemic and can seem intractable even before these policy and law reforms and public consensus against domestic abuse.²²⁷ Considerable debate remains, and the subject remains “at sea” as to the proper and prudential role of the law in intimate, personal relationships.

If the law has a role to play, and if victims will continue to seek relief and redress in courts, the courts ought to avail themselves of every good tool to render sound justice. Domestic abuse is fundamentally a strategic assault on a victim’s will, power, agency and capacity to act independently, manifest by myriad, personal tactics. These tactics may be physically violent and criminal, or they may be subtle, private and customized to a unique relationship between abuser and victim. While domestic abuse may be a gendered issue invoking broad themes of feminism and women, a victim is always a single woman by herself in a relationship, subject to the creative methods of a dominant partner.

The persistent problem is how to shape broad, predictable, responsive law and policy to deeply personal and unique crises.²²⁸ This is the very role of equity. Equity exists to fashion remedies for people facing irreparable injury for which the law does not provide a ready, adequate remedy. Historically, equity rarely touched personal interests, much less the personal abuse of intimate partners, but the time is right to revive the tools of equity for justice in homes and families. For a century, American equity has reached personal interests without the pretext of property rights, and for a century, lawmakers, law enforcement, lawyers and courts of law have grown increasingly more responsive to domestic abuse. The ground is more fertile for judges who would exercise discretion in conscience, in keeping with the law, to suffer no wrong without a just remedy.

Traditional, common law equity equips courts to fashion tailored injunctions to give relief from subtle, non-criminal, abusive coercion that is not physically violent. In equity, courts can inquire into discrete, personal circumstances, can balance equities, and can disarm abusers of

²²⁵ See note 83, *supra*.

²²⁶ See Hafemeister, *supra* note 79 (surveying various legal responses to domestic abuse since the 1970s).

²²⁷ See note 3, *supra*.

²²⁸ See GOODMARK, *supra* note 74, at 4, *see also* Hafemeister, *supra* note 79, at 1000 (“[T]oo great a focus on so few cases has resulted in what tends to be a one-size-fits-all approach . . . This societal response can be counterproductive if it fails to adequately distinguish among various types of IPV or does not provide sufficient latitude, flexibility, and nuance for responding to the different needs, desires, and circumstances of the victims.”)

tactics that the law cannot define but which can be immensely powerful in their homes. Through equity, courts can respond to a victim's narrative and can shape injunctive relief to empower her agency and her ability to direct her own path to peace, sufficiency and provision.

IV. Conclusion

Equity and its maxims might have generated justice for generations of women and families wounded by domestic abuse. The framework existed for centuries to permit courts to intervene and render relief for victims of abuse, yet judges, bound within their cultural reticence, rarely exercised the natural authority of equity. Rather than working with extant laws, the feminist movements of the 20th century leveraged social and political capital to drive legal reforms and innovations. Society, culture and the law have shifted dramatically to recognize and address domestic abuse, violence and coercion.

Now, on the brink of new eras of thought, a divided feminist movement, polarized politics and entrenched patriarchy, equity may be a refreshing means of seeking justice for vulnerable families. Judges now are much more enlightened and attuned to issues of domestic violence and are much more comfortable intervening in intimate relationships. Equity affords a customary, restrained, ancient vehicle for delivering relief to victims of domestic abuse, without having to wait for revolutionary reforms. Equity can be a method of achieving progressive ends within an ancient, conservative structure.