

2011

## Gender Violence and Work in the United States and South America: The Parallel Processes of Legal and Cultural Change

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### Recommended Citation

Goldscheid, Julie. "Gender Violence and Work in the United States and South America: The Parallel Processes of Legal and Cultural Change." *American University Journal of Gender Social Policy and Law* 19, no. 3 (2011): 921-958.

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# GENDER VIOLENCE AND WORK IN THE UNITED STATES AND SOUTH AFRICA: THE PARALLEL PROCESSES OF LEGAL AND CULTURAL CHANGE

JULIE GOLDSCHIED\*

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\* Julie Goldscheid, Professor, CUNY School of Law. Thanks to Dean Michelle Anderson and the CUNY Law School Faculty Development Program for supporting this project, to participants in the CUNY Law School faculty workshop and to Dean Michelle Anderson, Penelope Andrews, and Jenny Rivera for their comments. I am grateful to Pamela Scully and to Nancy Lemon for their helpful input. Thanks to Raquel Gabriel and the CUNY Law School library staff for their assistance. This project was supported (in part) by a grant from the City University of New York PSC-CUNY Research Award Program. Special thanks to Penelope Andrews for her assistance in developing this project, to Justice O’Regan of the South African Constitutional Court; Lisa Vetten of the Tshwaranang Legal Advocacy Centre; Beth Goldblatt and Likhapha Mabatha of CALS; Jennifer Williams of the Women’s Legal Center; Synnov Skorge, Irma Maharaj of the Saartjie Baartman Centre for Women & Children; Dee Smyth and Lily Artz of the Gender, Health & Justice Institute of the University of Capetown, David Bilchitz of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law; to Bernadette Muthien of Engender, and to the staff at many of those organizations for their generosity of time, insight and information in meeting with me. Thanks to Sally Curran, Suha Dabbouseh, Kathleen Heffron, Lisa McClurkin, Mona Moayad, Seeta Persaud, Nate Treadwell and Kate Watson for their able research assistance.

## INTRODUCTION

Social change theorists widely recognize that law reform and cultural change go hand-in-hand.<sup>1</sup> Certainly this is true of gender violence,<sup>2</sup> an issue that is deeply rooted in social and cultural norms and stereotypes.<sup>3</sup> This Article takes on the parallel processes of law reform and cultural transformation by comparing gender violence reform projects in the United States with those in South Africa. It compares these parallel processes by focusing on one strand of advocacy on behalf of domestic and sexual violence survivors: the economics of abuse. Since economic independence is central to women's<sup>4</sup> ability to navigate abuse, women's ability to work in the face of intimate partner violence is critical. This Article focuses on each country's advocacy efforts to address the ways gender violence impacts women's ability to obtain and retain their jobs.<sup>5</sup>

The contrasts between the two countries' reform efforts are in some senses stark. The potential for law reform in South Africa is rich, given employment laws that mandate procedurally and substantively fair

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1. See, e.g., JOEL J. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (2007); Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. LAW & SOC. SCI. 17, 18 (2006); see also William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 421 (2001) (urging recognition of the interaction between law and social movements); Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 2 (2001) (critiquing the divergence between legal scholarship and social movement theory).

2. This Article uses the term "gender violence" to refer to the range of violence committed predominantly by men against women, including domestic and sexual violence.

3. See Julie Goldscheid, *Elusive Equality in Domestic and Sexual Violence Law Reform*, 34 FLA. ST. U. L. REV. 731, 776-77 (2007) (arguing in support of approaches that both increase the availability of legal remedies and support transformational social change).

4. This Article primarily uses female references because the vast majority of domestic and sexual violence victims are women. See, e.g., BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., *CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2006 STATISTICAL TABLES tbl.2* (2008), [hereinafter *CRIMINAL VICTIMIZATION*], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus0601.pdf> (reporting that approximately eighty-nine percent of all rapes and sexual assaults in the United States in 2006 were committed against women); CALLIE MARIE RENNISON, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUST., *INTIMATE PARTNER VIOLENCE, 1993-2001* (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf> (concluding that eighty-five percent of all victimizations by intimate partners in 2001 were against women). For analogous data from South Africa, see, for example, ROBIN PHAROAH, INST. FOR SEC. STUD., *THE DYNAMICS OF CRIME: COMPARING THE RESULTS FROM THE 1998, 2003, AND 2007 NATIONAL CRIME AND VICTIMIZATION SURVEYS 9* (2008), available at <http://www.iss.co.za/uploads/PAPER177.pdf> (reporting that the majority of those assaulted by a spouse or partner, ninety-three and seventy percent respectively, were women).

5. See *infra* Part III.

dismissals and its constitutional and statutory structure based in substantive equality principles.<sup>6</sup> These formal protections go far beyond those afforded under United States' laws. Nevertheless, cultural, social, and political factors, including extraordinarily high rates of violence and poverty, the prevalence of home-based work, and minimal legal and social service infrastructure, create a wide gap between the potential for law reform and the realistic possibilities for meaningful change. Despite that gap, the challenges faced by advocates working to address the economic impact of gender violence in both countries are different in degree rather than in kind. Advocates in both countries grapple with similar difficulties in ensuring meaningful implementation of domestic violence law reforms. Both projects illustrate the limits of legal reform absent accompanying cultural and political change. They both reflect the particular challenges posed for those working in the informal labor sector. Moreover, both highlight the difficulties and importance of reform that broadly addresses issues of race, class, sexual orientation, and immigration status, as well as gender.

Part I lays the foundation for the comparison by describing the context in which each country addresses gender violence and work. It compares the statistics detailing the prevalence of domestic and sexual violence in both countries, as well as those describing women's participation in the formal and informal labor markets. Part II places reform relating to gender violence and work in the context of each country's broader domestic and sexual violence reform movements. It briefly reviews the countries' respective reform projects and their attendant critiques. Part III focuses on reforms addressing the impact of gender violence on work. It summarizes data on the nature and extent of the problem and the contours of efforts in both countries to address it.

Part IV focuses on practical possibilities for law reform. It analyzes potential legal strategies under South Africa's anti-discrimination and unjust dismissal laws and contrasts them with those available under the United States' employment-at-will legal framework. It also shows how, in both countries, law reform efforts directed at the traditional workplace are inherently limited in their ability to help those who work in the informal economy.

Part V offers several observations about what the comparison reveals about possibilities for achieving transformative change. First, the comparison illustrates a central and universal challenge for anti-gender violence advocates: the difficulty of effectively implementing well-meaning reform given the constraints of funding, training, and shifting political support. Second, the comparison highlights the importance of

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6. *See infra* Part IV.

centering the problem of gender violence as a problem of equality. Finally, it reinforces the importance of cross-race and cross-gender activism and of commitments from all members of society to end gender violence. Although the project of changing attitudes and cultures is formidable, only by undertaking transformative goals will we have the chance of producing more far-reaching and transformative change.<sup>7</sup>

## I. CONTEXT

A comparison of the ways the United States and South Africa respectively address the impact of gender violence on women's work must be placed in context at the outset. This introductory section summarizes the statistics describing the prevalence of abuse in both countries, as well as the nature and extent of women's participation in each country's labor markets, since both factors shape the nature of potential reforms.

### A. Prevalence of Abuse

The statistics on the prevalence of abuse in both countries reveal differences in scale, rather than in kind. In the United States, statistics consistently show that approximately one in four women will be assaulted by an intimate partner in her lifetime.<sup>8</sup> One in six women report having experienced a completed or attempted rape at some point in her life.<sup>9</sup> In South Africa, reports and commentators agree that South Africa's rates of violence generally,<sup>10</sup> and gender violence in particular, are among the highest in the world.<sup>11</sup> Statistics that directly parallel those from the United

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7. I offer these observations with a note of humility and caution. As a white lawyer whose work has focused on advocacy on behalf of domestic and sexual violence survivors in the United States as part of broader efforts to challenge gender and other forms of inequality, I have great respect for those who have been and who are engaged in South Africa's struggle for gender and racial equality. To suggest a comparison between reform efforts in both countries risks minimizing the enormity of the South African struggle to overcome apartheid and the explicit and deeply entrenched patriarchal culture that sanctions gender violence. Nevertheless, I hope the suggestions can be useful to South African advocates, and that the discussion can help those of us in the United States learn from our South African colleagues as we reconsider and retool our strategies for law reform and social change.

8. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUST., FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 26 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

9. See *id.* at 13.

10. See, e.g., *South Africa: World Crime Capital?*, 5 NEDBANK ISS CRIME INDEX (2001), available at <http://www.iss.co.za/Pubs/CrimeIndex/01Vol5No1/World.html> (comparing levels of reported crime in South Africa with other crime ridden countries and concluding that South Africa's rates are generally higher).

11. See, e.g., STAT. S. AFR., QUANTITATIVE RESEARCH FINDINGS ON RAPE IN SOUTH AFRICA 3 (2000), available at <http://www.statssa.gov.za/publications/Rape/Rape.pdf> (noting that rates of reported rape in South Africa were highest among Interpol member countries); *Woman a Day Shot and Killed by an Intimate Partner in SA*, CTR. FOR THE STUDY OF VIOLENCE AND RECONCILIATION (MAY 1, 2009),

States are not available due to differences in data collection methods.<sup>12</sup> Nevertheless, studies consistently document the magnitude of sexual assault in South Africa.<sup>13</sup> One community-based random sample of adult men found that over a quarter of the men interviewed disclosed having raped a woman or girl in the previous year.<sup>14</sup> Nearly half of the men who said they had committed rape reported that they had raped more than one woman or girl.<sup>15</sup> Reports of “corrective rape” of lesbians, purportedly to “cure” their sexuality, have increasingly been documented.<sup>16</sup> The reported rates of sexual violence in South Africa are particularly disturbing, given that sexual assault remains under-reported, that the police often appear unsympathetic and insensitive, and that low conviction rates persist.<sup>17</sup> The connections between rape and HIV transmission amplify the dangers

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[http://www.csvr.org.za/index.php?option=com\\_content&view=article&id=2161:woman-a-day-shot-and-killed-by-an-intimate-partner-in-sa-50109&catid=139:media-articles&Itemid=37](http://www.csvr.org.za/index.php?option=com_content&view=article&id=2161:woman-a-day-shot-and-killed-by-an-intimate-partner-in-sa-50109&catid=139:media-articles&Itemid=37) (reporting on the frequency of domestic violence using firearms); *Crime Statistics: Rapes*, NATIONMASTER, <http://www.nationmaster.com/graph/crime/crime-rape/crime-rape-per-capita> (last visited Feb. 6, 2011) (ranking South Africa as the highest rate of rape, 1.19538 per 1,000 people, based on the Seventh United Nations Survey of Crime Trends and Operations of Criminal Justice Systems); *see also, e.g.*, Catherine Albertyn et al., *Women's Freedom and Security of the Person*, in GENDER, LAW AND JUSTICE 300 (Elsje Bonthuys & Catherine Albertyn eds., 2007) (discussing high rates of interpersonal violence); *accord* Michelle Govender, *Domestic Violence: Is South Africa Meeting its Obligations in Terms of the Women's Convention?*, 19 S. AFR. J. ON HUM. RTS. 663, 665 (2003).

12. *See* Albertyn et al., *supra* note 11, at 299; *see also infra* note 19.

13. *See, e.g.*, S. AFR. POLICE SERV., CRIME SITUATION IN SOUTH AFRICA (2000), [http://www.saps.gov.za/saps\\_profile/strategic\\_framework/annual\\_report/2008\\_2009/2\\_crime\\_situation\\_sa.pdf](http://www.saps.gov.za/saps_profile/strategic_framework/annual_report/2008_2009/2_crime_situation_sa.pdf) (reporting police-based statistics); STAT. S. AFR., *supra* note 11, at 6-7 (collecting statistics from several studies that document domestic violence in South Africa on a national basis, as well as on a more localized scale); LISA VETTEN, ADDRESSING DOMESTIC VIOLENCE IN SOUTH AFRICA: REFLECTIONS ON STRATEGY AND PRACTICE 2 (2005) [hereinafter REFLECTIONS ON STRATEGY AND PRACTICE] (citing Rachel Jewkes & Naeema Abrahams, *The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview*, 55 SOC. SCI. & MED. 1231 (2002)), *available at* <http://www.preventgbvafrica.org/system/files/vetten.vaw.pdf> (reporting that one in nine women reported being raped); *see also, e.g.*, Albertyn et al., *supra* note 11, at 301-03, 321-22 (collecting studies of sexual assault and domestic violence).

14. Rachel Jewkes et al., *Understanding Men's Health and Use of Violence: Interface of Rape and HIV in South Africa*, MRC POL'Y BRIEF, June 2009, at 1, 1, *available at* [http://www.mrc.ac.za/gender/violence\\_hiv.pdf](http://www.mrc.ac.za/gender/violence_hiv.pdf).

15. *Id.*

16. *See, e.g.*, J.A. Nel & M. Judge, *Exploring Homophobic Victimization in Gauteng, South Africa: Issues, Impacts and Responses*, 21 ACTA CRIMINOLOGICA 19, 24 (2008), *available at* [http://www.avaaz.org/out\\_ucap\\_gauteng\\_study](http://www.avaaz.org/out_ucap_gauteng_study) (observing that black lesbians are particularly targeted for rape).

17. *See* STAT. S. AFR., *supra* note 11, at 2 (discussing difficulty in collecting statistics on sexual assault given low reporting, withdrawal of complaints, and low prosecution rates); *see also* Penelope E. Andrews, *Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law*, 8 TEMP. POL. & CIV. RTS. L. REV. 425, 445-46 (1999) [hereinafter *Role of Culture*] (citing studies).

associated with such high rates of sexual assault.<sup>18</sup>

Domestic violence in South Africa is even more difficult to measure since South African police statistics historically have not recognized “domestic violence” crimes as a separate reporting category.<sup>19</sup> The only national prevalence study on intimate partner violence found that almost half of all women murdered had been killed by their intimate partners, which purportedly is the highest rate reported anywhere in the world.<sup>20</sup> Another study reported that a woman is killed by her intimate partner in South Africa every six hours.<sup>21</sup> Other studies confirm that one in four women are physically abused by a current or former partner in their lifetimes.<sup>22</sup> Experts routinely discuss high rates of domestic abuse across all sectors of South African society.<sup>23</sup>

In both countries, domestic and sexual violence is rooted in a history of male domination, in which violence against women has been sanctioned both formally and informally through the interaction of law with cultural

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18. See, e.g., Jewkes et al., *supra* note 14, at 2 (explaining that HIV prevalence for men who had raped was 19.6 percent, and that those men were more likely to have engaged in risky sexual behavior).

19. See Lisa Vetten, *The Influence of Gender on Research: A Critique of Two Victim Surveys*, 4 DEV. UPDATE No. 2, 1998, at 1 (Ctr. for the Study of Violence & Reconciliation) [hereinafter *Influence of Gender*], available at [http://www.csvr.org.za/index.php?option=com\\_content&view=article&id=1624%3Ath-e-influence-of-gender-on-research-a-critique-of-two-victim-surveys&Itemid=2](http://www.csvr.org.za/index.php?option=com_content&view=article&id=1624%3Ath-e-influence-of-gender-on-research-a-critique-of-two-victim-surveys&Itemid=2) (detailing that domestic violence crimes are hidden among other crimes such as common assault and attempted murder). Most reports cited in this article use the definition of domestic violence adopted in the South African Domestic Violence Act, for example Domestic Violence Act 116 of 1998 § 1(viii)(a)-(j) (S. Afr.), available at [www.info.gov.za/view/DownloadFileAction?id=70651](http://www.info.gov.za/view/DownloadFileAction?id=70651) (defining domestic violence as physical abuse; sexual abuse; emotional, verbal, and psychological abuse; economic abuse; intimidation; harassment; stalking; damage to property; entry into the complainant’s residence without consent, where the parties do not share the same residence; or any other controlling or abusive behavior towards a complainant where such conduct harms, or may cause imminent harm to, the safety, health, or well-being of the complainant). See also *infra* notes 62-73.

20. ADELE KIRSTEN, UNITED NATIONS DEV. PROGRAMME, GUNS AND ROSES: GENDER AND ARMED VIOLENCE IN AFRICA 4 (2007) (citing S. MATHEWS, WORLD HEALTH ORG., WHO REPORT ON VIOLENCE AND HEALTH 93 (2008)), available at [http://www.who.int/violence\\_injury\\_prevention/violence/global\\_campaign/en/chap4.pdf](http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap4.pdf) (reporting prevalence rate of intimate partner violence in South Africa—8.8 per 100,000 of women fourteen and older—as the highest rate in the world).

21. Shanaaz Mathews et al., “Every Six Hours a Woman is Killed by Her Intimate Partner”: A National Study of Female Homicide in South Africa, MRC POL’Y BRIEF, No. 5, June 2004, at 1, 4, available at <http://www.mrc.ac.za/policybriefs/woman.pdf>.

22. See, e.g., RACHEL JEWKES ET AL., MED. RES. COUNCIL, “HE MUST GIVE ME MONEY, HE MUSTN’T BEAT ME,” VIOLENCE AGAINST WOMEN IN THREE SOUTH AFRICAN PROVINCES 10 (1999) [hereinafter MED. RES. COUNCIL], available at <http://www.mrc.ac.za/gender/violence.pdf>.

23. See, e.g., PHAROAH, *supra* note 4, at 9 tbl.6 (showing incidences of assault in nine provinces of South Africa); *Role of Culture*, *supra* note 17, at 445 (concluding that domestic violence affects women across class and color lines, while rape ostensibly affects black women the most).

norms and practices.<sup>24</sup> The commission of the crime is inextricably gendered; both domestic and sexual violence are committed overwhelmingly by men against women.<sup>25</sup> In both countries, survivors' experiences of abuse are compounded by other forms of oppression, including oppression based on race, national origin, sexual orientation, immigration status, and class.<sup>26</sup>

Reform efforts in both countries have been complicated by the limits of identity-based politics and by real and perceived tensions between challenges to systems of gender versus race-based subordination. Writing about South Africa, legal scholar Penelope Andrews has argued that domestic and sexual violence, and advocates' attendant reform projects, have been shaped by the government's violent enforcement of apartheid, the violence of the resistance movement, and the formal inscription of women's subservience in traditional cultures.<sup>27</sup> Accordingly, the predominance of the "race question," and women's associated commitment to end racial inequality, has left gender equality and related struggles to end gender violence as a "step-child" of political struggles.<sup>28</sup> In the United

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24. For sources discussing this history in the United States, see generally LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* (1988); ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO PRESENT* (1987); SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE* (1982); ELIZABETH SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 17 (2000); Reva Siegel, "*The Rule of Love*": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2197 (1996). For sources discussing the parallel history in South Africa, see, for example, Penelope Andrews, *Learning to Love After Learning to Harm: Post-Conflict Reconstruction, Gender Equality and Cultural Values*, 15 *MICH. ST. J. INT'L L.* 41 (2007) [hereinafter *Learning to Love*]; *Role of Culture*, *supra* note 17, at 425.

25. See RENNISON, *supra* note 4, at 1; see also PHAROAH, *supra* note 4, at 9.

26. For discussions of these issues from the United States' perspective, see, for example, COLOR OF VIOLENCE (Incite! Women of Color Against Violence ed., 2006); DOMESTIC VIOLENCE AT THE MARGINS (Natalie J. Sokoloff & Christina Pratt eds., 2005) (collecting articles on the role of race, class, sexual orientation, and gender in the experience of domestic violence); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1991); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 *B.C. THIRD WORLD L.J.* 231 (1994); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 *GOLDEN GATE U. L. REV.* 567 (1990). For discussions from South African commentators, see, for example, Albertyn et al., *supra* note 11, at 69-73; *Role of Culture*, *supra* note 17, at 440-42; Cheryl De La Rey, *South African Feminism, Race and Racism*, 32 *AGENDA* 6, 6-8 (1997).

27. *Learning to Love*, *supra* note 24, at 46-48. For additional discussion, see, for example, SHANAAZ MATHEWS & NAEEMA ABRAHAMS, *GENDER ADVOC. PROGRAMME & THE MED. RES. COUNCIL, COMBINING STORIES AND NUMBERS: AN ANALYSIS OF THE IMPACT OF THE DOMESTIC VIOLENCE ACT (NO. 116 OF 1998) ON WOMEN* 7 (2001), available at <http://www.mrc.ac.za/gender/domesticviolence.pdf>; accord ROMI SIGSWORTH, *CTR. FOR THE STUDY OF VIOLENCE AND RECONCILIATION, GENDER-BASED VIOLENCE IN TRANSITION* 5, 8-9 (2008), available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?lng=en&ord582=grp2&id=99629>.

28. See *Role of Culture*, *supra* note 17, at 441; accord Albertyn et al., *supra* note

States, the politics of reform movements reflect similar tensions, with advocacy initiatives aimed at ending gender violence being criticized as having the effect of increasing violence against women and men of color, and with racial justice organizing critiqued for ignoring the gendered forms of racism faced by women of color.<sup>29</sup>

Other issues inform the nature and prevalence of abuse as well. For example, South Africa's law enforcement has been critiqued for prioritizing political dissent and control over the black community, over promoting safe communities.<sup>30</sup> In both countries, perhaps to differing degrees, poverty drives and informs the experience of abuse.<sup>31</sup> In South Africa in particular, the need for basic resources, such as housing, food, water, and health care, may take precedence over efforts to live without violence.<sup>32</sup> Perceptions that combating violence may be less essential than other policy reforms thus shape the scope and reach of anti-violence initiatives.

### *B. Women's Labor Market Participation*

Advocacy concerning the impact of gender violence on work is also shaped by the nature of women's labor force participation. In the United States, nearly the same percentages of women and men participate in the workforce; however, women continue to earn substantially less than men.<sup>33</sup>

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11, at 300-01 (discussing patriarchal social and cultural roots of sexual assault in South Africa), 321-22 (discussing the same with respect to domestic violence); *see also* De La Rey, *supra* note 26, at 6-10 (1997) (discussing the challenges of implementing "anti-racist feminism").

29. *See, e.g.*, ANDREA SMITH ET AL., *COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* intro. 1-10 (2006).

30. *See generally* *Role of Culture*, *supra* note 17, at 433.

31. *See, e.g.*, PENNY PARENZEE ET. AL., INST. OF CRIMINOLOGY, U. OF CAPE TOWN, *MONITORING THE IMPLEMENTATION OF THE DOMESTIC VIOLENCE ACT: FIRST RESEARCH REPORT: 2000-2001* 103 (2001), *available at* <http://www.ghjru.uct.ac.za/osf-reports/dva-report.pdf> (referencing South Africa); JODY RAFAEL AND RICHARD M. TOLMAN, *TRAPPED BY POVERTY, TRAPPED BY ABUSE: NEW EVIDENCE DOCUMENTING THE RELATIONSHIP BETWEEN DOMESTIC VIOLENCE AND WELFARE* (1997), *available at* <http://humanservices.ucdavis.edu/resource/uploadfiles/x%20Trapped%20by%20Poverty,%20Trapped%20by%20Abuse.pdf> (referencing the United States). *See generally infra* notes 102-148.

32. PARENZEE ET. AL., *supra* note 31, at 103; *see also, e.g.*, Dee Smythe & Lillian Artz, *Money Matters: Structural Problems with Implementing the DVA*, 66 *AGENDA* 24, 26 (2005) [hereinafter *Money Matters*], *available at* <http://www.ghjru.uct.ac.za/pdf/money-matters.pdf> (explaining that the need for economic security often outweighs the need for a violence-free life).

33. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *CHARTING THE U.S. LABOR MARKET IN 2006*, chart 5-1 (2007), *available at* <http://www.bls.gov/cps/labor2006/> (reporting that sixty-one percent of women and seventy-six percent of men participated in the workforce). Nevertheless, women continue to earn eighty percent of what their male colleagues earn. *See generally* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *HIGHLIGHTS OF WOMEN'S EARNINGS IN 2008* (2009) [hereinafter *HIGHLIGHTS OF WOMEN'S EARNINGS*], *available*

Although women's unemployment rates are slightly lower than men's, recent reports reveal that the percentage of women in the workforce is decreasing for the first time since the 1960s.<sup>34</sup>

In South Africa, although women's participation in the labor market has increased in recent years, women continue to experience higher rates of unemployment than men. South Africa has a high unemployment rate overall; recent statistics show that approximately 31 percent of men and nearly 47 percent of women are unemployed.<sup>35</sup> Unemployment is highest among African (as opposed to white) women.<sup>36</sup> Within South Africa, women earn substantially less than men, with African women suffering particularly from discrimination at the hiring stage.<sup>37</sup> These trends emerge in the context of what researchers agree is increasing inequality in the distribution of income since the end of apartheid.<sup>38</sup>

The prevalence of women working in what has been called the "informal

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at <http://www.bls.gov/cps/cpswom2008.pdf> (comparing earnings for full-time wage and salaried workers); JUDY GOLDBERG DAY & CATHERINE HILL, AAUW EDUC. FOUND., *BEHIND THE PAY GAP 2* (2007), available at <http://www.aauw.org/learn/research/upload/behindPayGap.pdf> (reporting that just one year out of college, women earn eighty percent of what their male colleagues earn, while ten years later, they earn just sixty-nine percent of their colleagues' wages); *The Gender Pay Gap: State by State Pay Gap Between Women and Men Full-Time Workers*, AM. ASSOC. OF UNIV. WOMEN, <http://www.aauw.org/learn/research/statedata/> (last visited June 1, 2011) (finding continued wage gaps regardless of education level and reporting data for each state).

34. See, e.g., Press Release, U.S. Congress Jt. Econ. Comm., *Women and their Families are Being Squeezed* (Sept. 16, 2008), [http://jec.senate.gov/public/index.cfm?p=PressReleases&ContentRecord\\_id=7f440c9b-a6a7-f7b7-e48a-1276e02dc229&ContentType\\_id=66d767ed-750b-43e8-b8cf-89524ad8a29e](http://jec.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=7f440c9b-a6a7-f7b7-e48a-1276e02dc229&ContentType_id=66d767ed-750b-43e8-b8cf-89524ad8a29e) (detailing the rise in women's unemployment rate from 4.1 percent in 2001 to 5.2 percent in 2008); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *THE EMPLOYMENT SITUATION: JULY 2008* 1 (2008), [http://www.bls.gov/news.release/archives/empsit\\_08012008.pdf](http://www.bls.gov/news.release/archives/empsit_08012008.pdf) [hereinafter *EMPLOYMENT SITUATION*] (reporting unemployment rate for adult men at 5.3%, adult women at 4.6%).

35. See S. AFR. DEP'T OF LABOUR, *WOMEN IN THE SOUTH AFRICAN LABOUR MARKET 1995-2005* 6 (2006), <http://www.labour.gov.za/documents/useful-documents/labour-market-research-and-statistics/labour-market-research-women-in-the-south-african-labour-market-1995-2005> [hereinafter *S. AFR. LABOUR MARKET*] (explaining that female unemployment rates were substantially higher than male unemployment rates).

36. See *id.* at 17 (distinguishing those of African descent from those who identify as "white," "coloured," or "Indian/Asian."); see also S. AFR. GOV'T INFO., *SOUTH AFRICA'S PEOPLE* (2010), available at <http://www.info.gov.za/aboutsa/people.htm> (showing the population differences for African, white, and colored women). For further discussion of the gender gap in remuneration of South African workers, see, for example, Elsje Bonthuys, *Gender and Work*, in *GENDER, LAW AND JUSTICE*, *supra* note 11, at 267-70.

37. See Carola Grun, *Direct and Indirect Gender Discrimination in the South African Labour Market*, 25 INT'L J. OF MANPOWER 321, 340 (2004).

38. See, e.g., Kalie Pauw & Liberty Mncube, *The Impact of Growth and Redistribution on Poverty and Inequality in South Africa* 15 (Dev. Policy Research Unit, Working Paper No. 07/126, 2007), available at <http://ssrn.com/abstract=1014309>.

economy” influences the utility of legal remedies for workplace problems resulting from gender violence.<sup>39</sup> Women are generally overrepresented among those who work in the informal economy.<sup>40</sup> Large percentages of South African women who work in the informal labor sector work either out of their own or out of other peoples’ homes. For example, researchers estimate that nearly forty percent of women in 2005 worked either as domestic workers or in other parts of the informal labor sector.<sup>41</sup>

Although not as widely recognized as in South Africa, increasing numbers of workers in the United States, many of whom are undocumented immigrants, are employed in informal settings.<sup>42</sup> This includes both those whose employment falls outside of employment regulations and those whose employment is legally covered, but in which laws are often unenforced or under-enforced.<sup>43</sup> For many workers, remedies such as anti-discrimination provisions or minimum wage and hours laws simply do not apply.<sup>44</sup> For others, traditional anti-discrimination laws are of limited practical utility.<sup>45</sup> Consequently, the structural reliance on employment

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39. For definitions of the “informal economy,” see, for example, ANNETTE BERNHARDT ET AL., *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA’S LABOR MARKET* 1-7 (2008) [hereinafter *GLOVES-OFF ECONOMY*] (defining employment in the “informal economy” as employment without secure contracts or social security coverage); ANNETTE BERNHARDT ET AL., BRENNAN CTR. FOR JUST., *UNREGULATED WORK IN THE GLOBAL CITY* 6 (2007) [hereinafter *UNREGULATED WORK IN THE GLOBAL CITY*] (defining unregulated work to include both those who are covered but in which employers violate labor regulations and those who fall outside labor and employment laws); Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 *YALE L.J.* 2289, 2292-93 (1994) (defining and describing the “informal economy” as income-generating activities occurring outside the state’s regulatory framework).

40. See, e.g., INT’L LABOR ORG., *WOMEN AND MEN IN THE INFORMAL ECONOMY: A STATISTICAL PICTURE* 19-20 (2002), available at [www.ilo.org/public/english/employment/gems/download/women.pdf](http://www.ilo.org/public/english/employment/gems/download/women.pdf) (detailing statistics).

41. Pauw & Mncube, *supra* note 38, at 15. For further discussion of the relationship between gender and South Africa’s formal and informal economies, see, for example, Bonthuys, *Gender and Work*, in *GENDER, LAW & JUSTICE*, *supra* note 11, at 244-51.

42. See, e.g., *GLOVES-OFF ECONOMY*, *supra* note 39, at 19; Shirley Lung, *Developing a Course on the Rights of Low-Wage Workers*, 54 *J. LEGAL EDUC.* 380, 382-84 (2004); Kamala Sankaran, *The ILO, Women and Work: Evolving Labor Standards to Advance Women’s Status in the Informal Economy*, 3 *GEO. J. GENDER & L.* 851, 853-55 (2002).

43. *GLOVES-OFF ECONOMY*, *supra* note 39, at 4; *UNREGULATED WORK IN THE GLOBAL CITY*, *supra* note 39, at 6.

44. See, e.g., *GLOVES-OFF ECONOMY*, *supra* note 39, at 6; see also Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 *AM. U. L. REV.* 1361 (2009) (describing undocumented workers’ limited employment rights, particularly in light of recent Supreme Court case law and advocating revised approach); see generally *infra* notes 185-187.

45. See *GLOVES-OFF ECONOMY*, *supra* note 39, at 5 (highlighting employer evasion strategies); see also LAURA B. NIELSEN ET AL., *AM. BAR FOUND., CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF*

outside regulated workplaces poses challenges for legal reform and political organizing in both countries.

## II. REFORM PROJECTS AND CRITIQUES

This section situates advocacy projects to address the impact of gender violence on women's work within the context of each country's broader movements to end gender violence. It offers a snapshot of both countries' reform efforts, which reveals the similar challenges advocates in both countries face.

Not surprisingly, reform efforts in both countries run on parallel courses. In the United States, the wave of reform that began in the 1960s centered on increasing criminal penalties, improving law enforcement responses, and developing a network of shelters and associated social service resources to assist victims.<sup>46</sup> These reforms have been critiqued on a number of fronts, including over-reliance on the criminal justice system; insufficient access to counsel, particularly for family court matters; insufficient remedies and resources for immigrants and women of color; and an increasing bureaucratization of services.<sup>47</sup> Scholars and advocates increasingly recognize the centrality of economic independence in survivors' efforts to negotiate safety.<sup>48</sup> Studies document the ongoing

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FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987-2003 20 (2008) (finding that blue collar and other workers (compared to those working in sales, service, administrative, managerial and professional positions) represent nineteen percent of the plaintiffs in federal employment discrimination claims).

46. For discussion of the evolution of these reforms, see, for example, LISA A. GOODMAN & DEBORAH EPSTEIN, *LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE* (2008); SCHECHTER, *supra* note 24, at 81; Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, in *DOMESTIC VIOLENCE AT THE MARGINS* 50 (Natalie J. Sokoloff & Christina Pratt eds., 2005).

47. See, e.g., KRISTIN BUMILLER, *IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE* (2008); GOODMAN & EPSTEIN, *supra* note 46; Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 *DEPAUL L. REV.* 817 (2000); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 *BUFF. CRIM. L. REV.* 801 (2001); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 *HOUS. L. REV.* 237 (2005); Leslye Orloff, *Immigrant Women and Domestic Violence*, *VAWNET* (2009), available at [http://new.vawnet.org/category/index\\_pages.php?category\\_id=908](http://new.vawnet.org/category/index_pages.php?category_id=908); Jenny Rivera, *Puerto Rico's Domestic Violence Prevention and Intervention Law and the United States Violence Against Women Act of 1994: The Limitations of Legislative Responses*, 5 *COLUM. J. GENDER & L.* 78 (1995-1996) [hereinafter *Puerto Rico's Domestic Violence Prevention*]; Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 *B.C. THIRD WORLD L.J.* 231 (1994) [hereinafter *Domestic Violence Against Latinas*].

48. See, e.g., Nina W. Tarr, *Employment and Economic Security for Victims of Domestic Abuse*, 16 *S. CAL. REV. L. & SOC. JUST.* 371 (2007); Deborah M. Weissman, *The Personal is Political—and Economic: Rethinking Domestic Violence*, 2007 *BYU L. REV.* 387 (2007).

barriers victims face in obtaining meaningful relief, particularly in family court.<sup>49</sup> Survivors increasingly seek alternatives to newly emerged norms that effectively require them to leave their abuser.<sup>50</sup> The story of domestic and sexual violence reform in the United States, in many ways, is a story of unintended consequences and of constant adjustment and realignment. It is the story of ongoing struggles for adequate resources and against the entrenched biases of race, gender, immigration status, sexual orientation, and class.

South Africa's experience with gender violence and associated reform illustrates the possibilities of law reform and the limitations of the law absent accompanying cultural change. South Africa's reforms parallel those in the United States with a focus on improving criminal justice responses and the development of associated social services.<sup>51</sup> Nevertheless, many reforms were enacted with the benefit of the experience of years of international anti-domestic and sexual violence advocacy, and in a political context that, at least on a formal level, recognizes domestic and sexual violence as a problem of gender equality.<sup>52</sup> The extent of progress is remarkable given the relative brevity of this recent reform period.

As many commentators have discussed, South Africa's constitutional guarantees of equal protection, including sex-based equality, and of freedom from violence from public or private sources, establish a normative framework that strongly condemns violence against women and holds public and private actors accountable for preventing and remedying its harms.<sup>53</sup> The Constitutional Court has upheld the state's constitutional

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49. See, e.g., Voices of Women Organizing Project, *Justice Denied: How Family Courts in NYC Endanger Battered Women and Children*, <http://www.vowbwrc.org/pdf/justiceDeniedRep.pdf> (last visited June 8, 2011).

50. See, e.g., Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1491 (2008).

51. See, e.g., REFLECTIONS ON STRATEGY AND PRACTICE, *supra* note 13, at 4; *Money Matters*, *supra* note 32, at 28-32; see also *infra* notes 59-73 (summarizing reforms). Most of the discussion in this article addresses the domestic violence reform movement, because that is the framework in which much reform relating to the workplace has developed. For a discussion of rape law reform in South Africa, see, for example, Michelle J. Anderson, *Rape in South Africa*, 1 GEO. J. GENDER & L. 789 (2000).

52. See *infra* note 62 (citing Domestic Violence Act, which defines domestic violence as a problem of gender equality).

53. See, e.g., S. AFR. CONST., 1996 (providing in section 12(1)(c) a right to freedom from violence from public or private actors, in section 12(2) a right to bodily and psychological integrity, and in section 9 a right to equality). For discussions of this constitutional framework see, for example, Penelope Andrews, "Democracy Stops at my Front Door: Obstacles to Gender Equality in South Africa," 5 LOY. U. CHI. INT'L L. REV. 15, 25 (2007) [hereinafter *Obstacles to Gender Equality*]; *Learning to Love*, *supra* note 24, at 52-61; *Role of Culture*, *supra* note 17, at 442; Helene Combrinck, *The*

obligation to deal effectively with domestic violence,<sup>54</sup> which has been interpreted as imposing a “general norm of accountability” on state actors such as the police.<sup>55</sup> The Constitutional Court has applied these constitutional principles to hold public officials accountable for their commission of sexual violence.<sup>56</sup> Nevertheless, the enormous gap between South Africa’s normative commitment to equality and the difficulty of achieving meaningful reform is a testament to both the power of progressive law reform and the difficulty of shifting deeply entrenched cultural norms.<sup>57</sup>

Many of the legal reforms enacted over the last ten years explicitly acknowledge South Africa’s historic failure to adequately address gender violence and aim to afford a broad scope of remedies and full recourse for domestic and sexual violence victims. For example, in 1996, South Africa’s National Crime Prevention Strategy designated crimes of violence against women as a “national priority” and instituted reforms, such as mandatory minimum sentences for certain rapes and tightening bail conditions for those charged with rape.<sup>58</sup> Other responses include the development of family courts, specialized sexual offences courts, and centralized centers where survivors can obtain assistance from medical, social service, and law enforcement professionals in the aftermath of sexual assault.<sup>59</sup>

Legislation was designed to afford victims the maximum protection from domestic abuse that the law could provide.<sup>60</sup> The Prevention of Domestic Violence Act (the “Act”), originally enacted in 1993 and revised in 1998, was enacted following concerted advocacy by women’s

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*Dark Side of the Rainbow: Violence Against Women in South Africa After Ten Years of Democracy*, 2005 ACTA JURIDICA 171, 173; Valorie K. Vojdik, *Conceptualizing Intimate Violence and Gender Equality: A Comparative Approach*, 31 FORDHAM INT’L L.J. 487, 511-24 (2008); see also Catherine Albertyn, *Women and the Transition to Democracy in South Africa*, in GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER 39 (1994) (tracing the history of women’s involvement in the new South African Constitution).

54. See *S. v. Baloyi* 2000 (1) BCLR 86 (CC) at 2 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/1999/19.pdf>.

55. See *Carmichele v. Minister of Safety & Sec.* 2001 (3) SA 305 (SCA) at 39 para. 61 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2001/22.html>.

56. See *N.K. v. Minister of Safety & Sec.*, 2005 (8) BCLR 835 (CC) at 7 para. 12 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2005/8.html> (holding the Minister of Safety and Security vicariously liable for a woman’s rape by three uniformed, on-duty policemen who had offered to give her a ride home).

57. See, e.g., *Role of Culture*, *supra* note 17, at 455.

58. See REFLECTIONS ON STRATEGY AND PRACTICE, *supra* note 13, at 2 (referencing National Crime Prevention Strategy (NCPS) of 1996).

59. *Id.*

60. See PARENZEE ET AL., *supra* note 31, at 3; *Money Matters*, *supra* note 32, at 27-28.

organizations in conjunction with progressive governmental and state officials.<sup>61</sup> Its preamble explicitly recognizes domestic violence as a “serious social evil” that “takes many forms.”<sup>62</sup> It identifies domestic violence as a problem of gender equality and recognizes the State’s obligations to address it as deriving from the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Rights of the Child.<sup>63</sup>

Drafters sought to address the complexities of domestic violence through comprehensive definitions and remedies.<sup>64</sup> Accordingly, the Act defines domestic violence broadly to cover all forms of abuse, including physical, sexual, economic, and emotional, and includes a catch-all provision to cover abuse that does not otherwise fit the statutory definitions.<sup>65</sup> The Act defines domestic violence so that the law applies, for example, regardless of whether the parties are married, whether they live together, or whether they have a child in common.<sup>66</sup> The Act provides that a domestic violence victim may apply for a protective order, and it contemplates a broad range of prohibitions aimed at stopping the abuse, such as prohibiting the abuser from entering the mutual home, the victim’s residence, or the victim’s place of employment.<sup>67</sup> The Act also authorizes protection orders that evict the abuser from the home, or that force him to pay rent for and/or emergency maintenance to the victim.<sup>68</sup> Additionally, the Act attempts to address law enforcement’s historic neglect of domestic violence.<sup>69</sup> It requires police to provide victims with information about available resources, and to inform victims of available legal and social service options.<sup>70</sup>

The Domestic Violence Act explicitly recognizes the connections between abuse and women’s economic security. For example, it lists economic abuse as a form of domestic violence that can give rise to a protection order.<sup>71</sup> It acknowledges the impact of abuse on a victim’s

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61. REFLECTIONS ON STRATEGY AND PRACTICE, *supra* note 13, at 4.

62. Domestic Violence Act 116 of 1998 Preamble ¶ 1 (S. Afr.), *available at* [www.info.gov.za/view/DownloadFileAction?id=70651](http://www.info.gov.za/view/DownloadFileAction?id=70651).

63. *Id.* at Preamble ¶ 2.

64. PARENZEE ET AL., *supra* note 32, at 102.

65. *See* Domestic Violence Act 116 of 1998 § 1(viii)(j) (S. Afr.), *available at* [www.info.gov.za/view/DownloadFileAction?id=70651](http://www.info.gov.za/view/DownloadFileAction?id=70651).

66. *See id.* at § 1(vii).

67. *Id.* § 7(1).

68. *Id.* § 7(3).

69. *Id.* § 2 (stating that police officers must render assistance to victims as soon as is reasonably possible following a reporting of domestic violence).

70. *Id.*

71. *Id.* §§ 1(viii)(d), 1(ix) (defining economic abuse as “(a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under

ability to work, for example, by stating that protection orders can prohibit an abuser from entering a victim's workplace, and by defining "harassment" as a pattern of conduct that targets the victim at or near the victim's workplace.<sup>72</sup> Its relief provisions further recognize the economic impact of abuse, for example, by requiring the abuser to pay emergency monetary relief to the survivor.<sup>73</sup>

Nevertheless, implementing and realizing the aspirations underlying these legislative and constitutional mandates proves far more difficult. Many critiques of the progress of reform mirror those in the United States. Much like the United States, advocates critique reform efforts for their over-reliance on the criminal justice system, the manifold problems associated with the lack of resources—particularly for poor women and women of color—and the entrenchment of customary and biased social attitudes and norms.<sup>74</sup>

A lack of resources and infrastructure and inadequate training limit the reach of South Africa's anti-domestic violence laws. For example, despite the law's comprehensive protections, the physical location of services and

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law or which the complainant requires out of necessity . . . (b) the unreasonable disposal of household effects or other property in which the complainant has an interest.").

72. *Id.* §§ 1(xii)(a), 7(1)(f).

73. *Id.* § 7(4).

74. Several articles and studies evaluate South Africa's progress in addressing domestic and sexual violence. *See, e.g.,* Lillian Artz & Dee Smythe, *Bridges and Barriers: A Five Year Retrospective on the Domestic Violence Act*, in *ADVANCING WOMEN'S RIGHTS: THE FIRST DECADE OF DEMOCRACY* 214 (Christina Murray & Michelle O'Sullivan eds., 2005) [hereinafter *Bridges and Barriers*] (lamenting the police force's belief that the Domestic Violence Act is being abused); LILLIAN ARTZ, *INST. CRIMINOLOGY, U. CAPE TOWN: SOUTH AFRICA, MAGISTRATES AND THE DOMESTIC VIOLENCE ACT: ISSUES OF INTERPRETATION* 53 (2003), available at [www.afrimap.org/english/images/documents/file42e7975633097.pdf](http://www.afrimap.org/english/images/documents/file42e7975633097.pdf) (noting that domestic violence cases are often the lowest priority on court dockets because many magistrates still view them as a family issue); MATHEWS & ABRAHAMS, *supra* note 27, at 2 (identifying negative experiences with police as a major factor preventing women from reporting crimes); PARENZEE ET AL., *supra* note 32, at 82 (highlighting the fact that some police stations do not even have fax machines or photo copiers to help complete administrative tasks); PENNY PARENZEE & DEE SMYTHE, *DOMESTIC VIOLENCE AND DEVELOPMENT: LOOKING AT THE FARMING CONTEXT* (Inst. of Criminology, U. Cape Town 2003), available at <http://www.ghjru.uct.ac.za/osf-reports/farmworker-report.pdf> (evaluating various responses to high levels of domestic violence on farms); Kelley Mout, *Providing a Sense of Justice: Informal Mechanisms for Dealing With Domestic Violence*, S. AFR. CRIME Q. 20 (June 2005) (finding that many unemployed women abstain from using the courts because of the possibility that their abuser will be arrested, thereby eliminating key financial support); *Money Matters*, *supra* note 32 (arguing that the Domestic Violence Act must take into account economic abuse, not just physical abuse); REFLECTIONS ON STRATEGY & PRACTICE, *supra* note 13, at 5-6 (noting that the Domestic Violence Act protects wealthier and urban women far more effectively than others); *see also* Combrinck, *supra* note 53 (evaluating constitutional and legislative developments, while noting enduring implementation problems); Govender, *supra* note 11 (arguing that South Africa's responses have failed to decrease violence against women).

the lack of resource allocation render criminal and civil justice systems virtually inaccessible for many women, particularly those in poor, black communities.<sup>75</sup> Researchers charged with monitoring the Domestic Violence Act's implementation documented the "alarming" lack of infrastructure and resources, as well as "demotivated, untrained and frustrated" law enforcement personnel.<sup>76</sup> Among other deficiencies, they cited officials' inability to track cases or records, and the lack of inter-sectoral and intra-sectoral networking and supportive services, as leaving women unprotected from violence even if they beat the odds and succeed in obtaining a protection order.<sup>77</sup> The failure to adequately train and resource the staff charged with implementing the Act raise questions for some researchers about the seriousness of government's commitment to its effective implementation.<sup>78</sup> They cited the inadequacies of using protective orders as the standard solution to the complex problem of abuse, given their limited ability to deter and prevent future violence.<sup>79</sup> As a tool to advocate for adequate budgetary allocations, researchers have "costed" the implementation of the Domestic Violence Act.<sup>80</sup>

The struggle against gender violence in South Africa, like that in the United States, has been shaped by tensions between the respective struggles for racial and gender equality. As Penelope Andrews has argued: for a long time, the eradication of gender discrimination was secondary to the eradication of discrimination based on race.<sup>81</sup> As a corollary to that marginalization, domestic, and sexual violence historically were seen as "issues for white women," or as less important than the struggle against racism and apartheid.<sup>82</sup> South African feminists are grappling with the best

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75. See PARENZEE ET AL., *supra* note 32, at 110 (observing that the paperwork required by the DVA is replete with inaccessible legalese); REFLECTIONS ON STRATEGY & PRACTICE, *supra* note 13, at 5-7 (noting that as of 1994, 74% of South Africa's police stations were located in white suburbs or business areas). For a review of funding issues, see, for example, DEBBIE BUDLENDER & JULIA KUHN, CTR. FOR THE STUDY OF VIOLENCE & RECONCILIATION, WHERE IS THE MONEY TO ADDRESS GENDER-BASED VIOLENCE? (2007), available at <http://www.csvr.org.za/docs/gender/whereisthemoney.pdf>.

76. PARENZEE ET AL., *supra* note 32, at 102.

77. *Id.* at 107.

78. *Id.* at 107, 108.

79. *Id.* at 109, 110-12.

80. REFLECTIONS ON STRATEGY & PRACTICE, *supra* note 13, at 10; Lisa Vetten et al., *The Price of Protection: Costing the Implementation of the Domestic Violence Act*, CSVR GENDER PROGRAMME, POL'Y BRIEF No. 02 (Oct. 2005) [hereinafter *The Price of Protection*], available at <http://www.csvr.org.za/docs/gender/protection.pdf>.

81. *Learning to Love*, *supra* note 24, at 61; accord Malehoko Tshoedi & Hlengiwe Hlela, *The Marginalization of Women Unionists During South Africa's Democratic Transition*, in SAKHELA BUHLUNGU, TRADE UNIONS AND DEMOCRACY 111 (2006) (noting that "[f]or a long period, gender has been de-prioritised" and arguing for mainstreaming of gender issues in the trade union movement).

82. See, e.g., BINAIFER NOWROSEE & BRONWEN MANBY, HUMAN RIGHTS WATCH,

ways to address the perception that anti-gender-violence advocacy may be perceived as challenging widely held male-dominated cultural norms.<sup>83</sup> South Africa's legacy and ongoing reality of overt racism, and its relatively short history of reform, bring these tensions into sharp relief.

### III. GENDER VIOLENCE AND WORK

Studies in the United States and elsewhere have begun to document the impact and costs of abuse on women's employment.<sup>84</sup> The impact of gender violence on work is stark and often invisible. It manifests in a number of ways, including absenteeism and lateness that result when women require time off to attend to medical, legal, and other needs resulting from the abuse; lost productivity resulting from abusers who harass their partners while they are at work; and direct losses that result when abusers commit acts of domestic violence or sexual assault in the workplace.<sup>85</sup> In the United States, a patchwork of federal and state laws may provide redress for survivors who suffer adverse consequences at work because of abuse.<sup>86</sup> Rather than repeat the literature describing

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VIOLENCE AGAINST WOMEN IN SOUTH AFRICA: STATE RESPONSES TO DOMESTIC VIOLENCE AND RAPE 2 (1995), <http://www.hrw.org/legacy/reports/1995/Safricawm-02.htm>.

83. See, e.g., Mathews, *supra* note 20, at 107 (describing a reproductive health and gender program that incorporates popular sayings, wedding songs, and role-plays to address deep-rooted beliefs and attitudes about abuse). For a discussion of feminist approaches to advancing gender equality in the context of South African traditional culture and religion, see, for example, Likhapha Mbatha et al., *Culture and Religion, in GENDER, LAW AND JUSTICE*, *supra* note 11, at 167-70.

84. See, e.g., CTR. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES (2003), [http://www.cdc.gov/ncipc/pub-res/ipv\\_cost/IPVBook-Final-Feb18.pdf](http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf) [hereinafter CDC STUDY (detailing costs)]; GENERAL ACCOUNTING OFFICE, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS (1998), <http://www.gao.gov/archive/1999/he99012.pdf> (describing abusers' tactics and citing studies showing, for example, that between 35 and 56 percent of employed battered women were harassed at work by their batterers, and that 55 to 85 percent reported missing work because of the abuse); WHO, THE ECONOMIC DIMENSIONS OF INTERPERSONAL VIOLENCE (2004), <http://whqlibdoc.who.int/publications/2004/9241591609.pdf>; Elizabeth M. Ellis, Beverly M. Atkinson, & Karen S. Calhoun, *An Assessment of the Long Term Reaction to Rape*, 90 J. ABNORMAL PSYCH. 263, 264 (1981) (noting that one half of sexual assault victims studied reported losing their job in the aftermath of the assault); see also, e.g., CORPORATE ALLIANCE AGAINST DOMESTIC VIOLENCE UK, <http://www.corporateallianceuk.com/home.asp> (describing employers' responses in the United Kingdom); Mathews, *supra* note 20, at 102-03 (discussing world-wide statistics documenting economic impact of abuse). For a summary and analysis of legal responses in the United States, see, for example, Julie Goldscheid, *Gender Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 COLUM. J. GENDER & L. 61 (2009); Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 FLA. ST. U. L. REV. 669 (2008).

85. See, e.g., Goldscheid, *supra* note 84, at notes 56-86 and accompanying text.

86. See generally, e.g., Widiss, *supra* note 84; Goldscheid, *supra* note 84.

efforts in the United States, this section focuses on work by South African advocates to address the economic impact of abuse, particularly as it affects women's work.

Legislation, research, and advocacy in South Africa recognize the centrality of economics in the dynamics of abuse.<sup>87</sup> For example, the Domestic Violence Act's provisions acknowledging economic abuse, those identifying the workplace as a potential site of abuse, and those providing for economic relief as a part of protective orders, reflect advocates' understanding of the economic ramifications of abuse.<sup>88</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act, which applies where the Employment Equity Act does not,<sup>89</sup> explicitly prohibits unfair workplace discrimination based on gender and includes gender-based violence as a prohibited ground of discrimination.<sup>90</sup> In many ways, these provisions go far beyond common legislative schemes currently in effect in the United States.<sup>91</sup> On the other hand, South Africa's domestic violence legislation does not include some of the specific workplace protections increasingly included in U.S. state and, to a lesser extent, federal, law.<sup>92</sup> This difference in structural approach may result from the greater workplace protections potentially available to victims under South Africa's "just cause" approach to employment.<sup>93</sup> It may also reflect South Africa's more deeply entrenched gender divide and the greater percentage of women who either are unemployed, underemployed, or who work in the

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87. See, e.g., MED. RES. COUNCIL, *supra* note 22, at 12-13 (documenting prevalence of economic abuse); *id.* at 17 (documenting costs of abuse to employers).

88. Domestic Violence Act 116 of 1998 § 7(1), (4) (S. Afr.).

89. See Employment Equity Act 55 of 1998 (S. Afr.).

90. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 §8(a) (S. Afr.). Notably, I could find no reported decisions reflecting attempts to invoke that provision.

91. Although every state in the United States authorizes economic relief as part of its protective order legislation, no state recognizes economic abuse as the basis for obtaining a protective order. See, e.g., A.B.A. COMM'N ON DOMESTIC VIOLENCE, A.B.A., DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS BY STATE (2008), [http://www.abanet.org/domviol/docs/DV\\_CPO\\_Chart\\_8\\_2008.pdf](http://www.abanet.org/domviol/docs/DV_CPO_Chart_8_2008.pdf); see also, e.g., Adrienne E. Adams et al., *Development of the Scale of Economic Abuse*, 14 VIOLENCE AGAINST WOMEN 563 (2008) (describing the development of the Scale of Economic Abuse, designed to advance understanding and identification of the extent and impact of economic abuse by batterers).

92. For example, state and federal legislative initiatives in the United States address the workplace ramifications of abuse, *inter alia*, by requiring employers to provide leave (paid or unpaid) to survivors needing to go to court, and to authorize unemployment insurance payments to those who lose their jobs as a result of abuse. See, e.g., Widiss, *supra* note 84, at 671-73, 711-12 (evaluating state leave provisions allowing domestic violence victims time off work to legally pursue their perpetrators and noting that many state unemployment insurance systems provide wage replacement to individuals who lose their jobs through no fault of their own).

93. See *infra* Part IV.B.

informal labor sector.<sup>94</sup> These differences also may reflect the relative priority of other reforms, for example, those directly addressing economic resources, over those authorizing rights-enforcement in the formal labor sector.

In addition to differences in legal protections, a primary difference between the two countries' advocacy work on these issues is the absence of initiatives in South Africa's formal, regulated labor sector. In the United States, reform efforts addressing the impact of domestic violence on the workplace began in the 1990s and grew, in large part, out of a combination of employee-led, employer-led, and union-led initiatives.<sup>95</sup> These initiatives promote workplace awareness of the impact of gender violence on work and advance workplace policies and procedures that facilitate domestic and sexual violence victims' continued and safe employment.<sup>96</sup> Some of these initiatives have grown out of employers' work-life initiatives, and some have been spurred by safety concerns.<sup>97</sup> A few initiatives in South Africa have begun to address related workplace issues, such as the general problem of workplace violence,<sup>98</sup> and the impact of AIDS in the workplace.<sup>99</sup> Some union efforts have identified violence against women as a barrier to workplace equality.<sup>100</sup> However, no visible initiatives focusing on gender-based violence and the workplace have emerged out of South Africa's industrial, governmental, or labor sectors.<sup>101</sup>

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94. See *supra* Part I.B.

95. See generally CORNELL U. SCH. INDUS. & LAB. RELAT., *Domestic Violence as a Workplace Issue*, <http://www.ilr.cornell.edu/laborPrograms/initiatives/wkplace/dm/index.html> (last visited Jan. 31, 2011); CORPORATE ALLIANCE TO END PARTNER VIOLENCE, <http://www.caepv.org/> (last visited Jan. 31, 2011); SAFE@WORKCOALITION, <http://www.safeatworkcoalition.org/> (last visited Jan. 31, 2011).

96. For a discussion of these and other workplace policy initiatives, see, for example, Goldscheid, *supra* note 84, at notes 104-23 and accompanying text.

97. *Id.* at 77-78.

98. See generally SUSAN STEINMAN, JOINT PROGRAMME ON WORKPLACE VIOLENCE IN THE HEALTH SECTOR, WORKPLACE VIOLENCE IN THE HEALTH SECTOR: COUNTRY CASE STUDY: SOUTH AFRICA (2003), [http://www.who.int/violence\\_injury\\_prevention/violence/interpersonal/en/WVcountrystudysouthafrica.pdf](http://www.who.int/violence_injury_prevention/violence/interpersonal/en/WVcountrystudysouthafrica.pdf).

99. See generally OVERSEAS DEV. INST., *AIDS and the Private Sector: The Case of South Africa* (Dec. 2007), <http://www.odi.org.uk/resources/download/427.pdf>.

100. See generally *Campaigns – Gender Strategy*, NAT'L EDUC., HEALTH & ALLIED WORKERS UNION, [http://www.lrs.org.za/pdf/women\\_at\\_work/b1\\_14.pdf](http://www.lrs.org.za/pdf/women_at_work/b1_14.pdf) (listing violence against women as one of several "key strategic priorities").

101. For example, although the National Education, Health & Allied Workers' Union now identifies gender equality and stopping violence against women as a policy priority, the first draft of its HIV/AIDS program proposal reportedly did not include any statement recognizing that women and girls' freedom from violence and sexual coercion is essential to physical security and reducing HIV infection. See Sara Williamson, *Union Women Fighting Privatization in Southern Africa*, [http://www.psac-sjf.org/pages/index\\_e.aspx?DetailID=336](http://www.psac-sjf.org/pages/index_e.aspx?DetailID=336) (last visited Feb. 7, 2011). For a discussion of the challenges of incorporating gender issues into the South African trade union

Despite the absence of formal employer or labor driven initiatives, South African researchers and advocates have identified economics and labor as foundational issues in addressing domestic violence.<sup>102</sup> An informal, preliminary study investigated the status of employer policies. Researchers surveyed large clothing manufacturers to determine whether they had any policies or experience with the impact of domestic or sexual violence on their workplace.<sup>103</sup> Those researchers were not able to identify any employers with domestic violence policies.<sup>104</sup> As one expert speculated, the lack of workplace policies addressing domestic violence may be due to cultural perceptions that the problem is less important than others, as well as the pervasiveness of violence generally, which overshadows issues unique to domestic and sexual abuse.<sup>105</sup>

One small, exploratory study began to map some of the nuances of how abuse impacts women's work opportunities and economic independence.<sup>106</sup> Researchers interviewed women recruited from domestic violence service organizations.<sup>107</sup> They were predominantly poor urban women with limited education who were unemployed or were employed in unskilled, low-paying work.<sup>108</sup> The interviews illustrated the contribution of domestic violence to women and children's poverty.<sup>109</sup> In some cases, women described how abusers take women's money and property and deny them the opportunity to seek employment.<sup>110</sup> Other interviews described abusers' sabotaging of women's ability to work, for example, by arriving at a partner's workplace to check on her whereabouts or by phoning constantly to make sure she was not "seeing other men."<sup>111</sup> Other women recounted how being beaten and bruised on the face led to their absenteeism, and sometimes to demotion or to poor performance.<sup>112</sup> Still other women recounted how they lost their jobs because of the abuse.<sup>113</sup>

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movement, see generally, e.g., Tshoedi & Hlela, *supra* note 81, at ch. 5.

102. This is consistent with the legislative focus on the economics of abuse. See, e.g., *supra* notes 71-73, and accompanying text.

103. Interview with Dee Smythe, University of Cape Town Gender, Health & Justice Unit (Nov. 19, 2007) (notes on file with author).

104. *Id.*

105. *Id.*

106. Lisa Vetten & Rezana Hoosain, *Money, Money, Money: An Exploratory Study of the Economics of Abuse*, CSVR Gender Programme, Policy Brief No. 04, July 2006 (on file with author).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 3-5.

111. *Id.* at 6.

112. *Id.*

113. *Id.* at 7 (quoting a woman who "couldn't take . . . going to work with those problems, being absent or being smacked around like that.").

The study revealed that while having an income may protect some women from abuse, producing income can exacerbate abuse for others.<sup>114</sup> Overall, it confirmed the importance of a comprehensive social security safety net to assist those women who are not otherwise eligible for assistance, but who are subjected to abuse.<sup>115</sup>

Other studies document the centrality of economics in abuse. For example, Smythe and Artz selected economic abuse and the withdrawal of domestic violence-related legal claims as a focus for their study of the Domestic Violence Act's "myriad of implementation problems."<sup>116</sup> They selected economic abuse because of the difficult and ongoing challenges posed by economic issues.<sup>117</sup> Despite marked advances in formal legal protections and criminal justice responses, they observed that women's structural and economic dependence on men underlies many of the challenges to realizing the Domestic Violence Act's promise.<sup>118</sup> Their research indicated that "money problems" are a leading factor in provoking domestic violence.<sup>119</sup> They reported daily instances of women withdrawing criminal charges due to their fear of losing the economic support on which they and their children depend.<sup>120</sup> Other studies confirm both the prevalence of economic abuse and women's reluctance to access the criminal justice system due to the fear of losing financial support from their partner.<sup>121</sup> These dynamics mirror barriers identified by advocates for survivors in the United States, who similarly identify economic dependency as central in women's reluctance to invoke traditional legal remedies.<sup>122</sup>

A few studies directly address the impact of economic and structural dependency and gender-based abuse on women's employment opportunities and realities. For example, Parenzee, Smythe, and Artz addressed the role of economics in their study of domestic violence in the farming context.<sup>123</sup> Farming communities have high rates of domestic

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114. *Id.* at 10.

115. *Id.*

116. *Money Matters*, *supra* note 32, at 24.

117. *Id.*

118. *Id.* at 26-27.

119. *Id.* at 26.

120. *Id.* (quoting several statements from victims showing that victims financially depended on their perpetrators of domestic violence).

121. *Id.* at 27 (citing studies); *see also, e.g.*, MATHEWS & ABRAHAMS, *supra* note 27, at 7 (citing studies which recognize that poverty is a compounding factor in domestic violence cases); Kelley Moul, *Providing a Sense of Justice: Informal Mechanisms for Dealing with Domestic Violence*, 12 S.A. CRIME Q. 19, 20 (2005) (reporting that almost every interviewee attributed unemployed women's avoidance of the formal legal system to fear of losing financial support if her abusive partner was arrested).

122. *See, e.g.*, Tarr, *supra* note 48.

123. *See Money Matters*, *supra* note 32, at 26 (discussing how women's experience

violence and rape, though precise data is difficult to establish.<sup>124</sup> The agricultural work force is exploited and vulnerable to abuse because workers have limited job security, generally poor quality housing, low wages, and limited access to basic health and educational resources.<sup>125</sup> Employment relationships are often structured such that farmers contract with a male worker through contracts in which his female partner is required to work but is not independently entitled to a job or to the housing provided through her partner's contract.<sup>126</sup> As Human Rights Watch reports, despite a court ruling that a woman farmworker could not be evicted because her husband lost his job on the same farm, women farmworkers' access to housing is still dependent, in practice, on their relationship to a man who is employed on the farm.<sup>127</sup>

In the farming context, workers generally see the criminal justice system as inadequate for a variety of reasons, including physical inaccessibility, lack of resources, poorly trained staff, the general limitations of criminal justice remedies, including incarceration, and the lack of support services.<sup>128</sup> Thus, it offers a less than adequate remedy for women in farming communities who try to maintain their employment, and hence their economic security, in the face of abuse. Although development organizations aim to advance women farmworkers' economic independence, their efforts may have unintended consequences.<sup>129</sup> While those programs may improve women's independence, Parenzee and Smythe caution that they may also increase women's vulnerability to violence by shifting traditional, gender-based power relations.<sup>130</sup>

Smythe and Artz recognize that the farming context may be an extreme example, but that it nevertheless reflects the economic barriers survivors

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in the farming context is reflective of women's experiences more generally). *See generally* PARENZEE ET AL., *supra* note 31.

124. *See* ARTZ, *supra* note 74, at 17-29 (citing studies indicating that two-thirds of farmers reported that domestic violence occurred on their farms and reporting results of interview study); *see also, e.g.*, UNEQUAL PROTECTION: THE STATE RESPONSE TO VIOLENT CRIME ON SOUTH AFRICAN FARMS, HUMAN RIGHTS WATCH (2001) [hereinafter UNEQUAL PROTECTION], *available at* <http://www.hrw.org/reports/2001/safrica2/> (detailing statistics on the sexual assaults of farm workers in South Africa).

125. *See* PARENZEE & SMYTHE, *supra* note 74, at 3.

126. *See id.* at 3-4 (highlighting the relationship between economic vulnerability and vulnerability to domestic violence); *see also, e.g.*, LaShawn Jefferson, *Discrimination Against Women in Employment and Property Rights: Unexamined Factors in the Feminization of Poverty*, 24 WOMEN'S RTS. L. REP. 167, 170-71 (2003) (discussing impact of abuse on women in South Africa's agricultural sector).

127. *See* UNEQUAL PROTECTION, *supra* note 124, at n.131 and accompanying text.

128. *See* PARENZEE & SMYTHE, *supra* note 74, at 5-6; *see also* UNEQUAL PROTECTION, *supra* note 124, at n.552 and accompanying text.

129. *See* PARENZEE & SMYTHE, *supra* note 74, at 48.

130. *Id.* at 48-50.

face more generally.<sup>131</sup> They describe how the need for economic security may prevail over the need to be free from violence.<sup>132</sup> They also reference countless cases in which women withdraw from criminal prosecutions due to fears of losing all economic support for themselves and their children if they pursue criminal justice complaints.<sup>133</sup> Their study additionally documented how “money problems” remain a leading factor in precipitating intimate partner violence and other forms of domestic abuse.<sup>134</sup> The power of economics in the dynamics of abuse reinforces the importance of multi-sector responses that ensure adequate social and economic support for victims.<sup>135</sup>

From the social service perspective, at least one program in Cape Town specifically focuses on women’s economic empowerment in the face of gender violence. The Saartjie Baartman Centre is a “one-stop” centre that aims to provide a range of services to women and children who have survived gender-based violence.<sup>136</sup> It is a domestic violence shelter that offers a range of services, including counseling, support, and training in fields such as trauma, rape, substance abuse, HIV/AIDS, contraception and parenting skills, and information relating to family law.<sup>137</sup> The Centre maintains an economic empowerment program that places clients in job training programs that are coordinated with the Centre’s counseling and support programs.<sup>138</sup> The program grows out of the Centre’s recognition of the symbiotic relationship between violence and poverty, in that poverty increases women’s vulnerability to violence and violence exacerbates women’s poverty.<sup>139</sup> Although the Centre reported various difficulties with the program, including tracking participants once they left the Centre and structuring meaningful training opportunities, it reported that clients’ confidence and self-esteem increased as a result of the training, and that a significant number secured either permanent or part-time work as a result.<sup>140</sup> It highlighted that, to succeed, job skills must be addressed along with other factors that impact survivors of gender violence, such as depression and trauma.<sup>141</sup>

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131. *Money Matters*, *supra* note 32, at 26.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 32-33.

136. IRMA MAHARAJ, SAARTJIE BAARTMENT CENTRE FOR WOMEN AND CHILDREN, ECONOMIC EMPOWERMENT OF WOMEN SURVIVORS OF GENDER-BASED VIOLENCE 9 (2006) (on file with author).

137. *Id.*

138. *Id.* at 10, 12-27.

139. *Id.* at 9.

140. *Id.* at 3, 28-40.

141. *Id.* at 28.

Looking at the issue more broadly, one reported study looked at the relationship between economics and abuse by studying the impact of an economic development program on the reduction of intimate partner violence.<sup>142</sup> The study evaluated a microfinance-based poverty alleviation program that administered loans to selected women in poor South African communities.<sup>143</sup> The program included a gender-focused training component that ran training sessions covering topics such as gender roles, cultural beliefs, relationships, communication, domestic violence, and HIV infection, and that aimed to bolster the participants' leadership, critical thinking, and communication skills.<sup>144</sup> A second phase of the program encouraged wider community mobilization to engage youth and men in the project.<sup>145</sup> The study reported that the program reduced the levels of abuse among women participants by more than half.<sup>146</sup> The study also reported that the program increased women's assets, as well as self-confidence and progressive attitudes towards gender norms.<sup>147</sup> Although the study was limited by a small sample size,<sup>148</sup> it suggests that multi-pronged approaches that address the realities of both economics and abuse may make a difference in increasing independence and safety.

#### IV. OPPORTUNITIES FOR LAW REFORM

##### *A. South Africa's Constitutional and Statutory Anti-Discrimination Laws*

As many commentators have observed, South Africa's new Constitution and many of its recent legislative initiatives present a model of progressive law reform, particularly with respect to gender equality.<sup>149</sup> Various provisions could provide relief to survivors of gender violence who suffer related adverse actions at work. Constitutional decisions impose responsibility on state and private actors to take reasonable steps to prevent and redress violence.<sup>150</sup> Those decisions should support the imposition of liability on employers when acts of intimate partner violence or sexual assault take place at work, and when the employer could have, but failed, to take reasonable steps to prevent it. Other protections may derive from the

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142. Julia C. Kim et al., *Understanding the Impact of a Microfinance-Based Intervention on Women's Empowerment and the Reduction of Intimate Partner Violence in South Africa*, 97 AM. J. PUB. HEALTH 1794 (2007).

143. *Id.*

144. *Id.* at 1796.

145. *Id.*

146. *Id.* at 1797-98.

147. *Id.*

148. *Id.* at 1796.

149. *See supra* note 53.

150. *See supra* notes 53-56.

Employment Equity Act (EEA), which was enacted in 1998 to, among other things, prohibit discrimination on a broad range of grounds, authorize affirmative action programs in proscribed circumstances, and prohibit sexual harassment at work.<sup>151</sup> In 1998, the National Economic Development and Labour Council issued a code of good practice governing the handling of sexual harassment cases.<sup>152</sup> The EEA's prohibition of both direct and indirect discrimination should encompass a broader range of prohibited conduct than that recognized under the United States' intentional discrimination framework.<sup>153</sup>

Other provisions could also help ensure gender violence survivors' continued employment. The Code of Good Practice accompanying the Employment Equity Act's prohibition of discrimination provides that an employer's failure to make reasonable accommodations to an employee's needs and circumstances without undue hardship may constitute unfair discrimination.<sup>154</sup> This could have a substantial impact in requiring employers to assess whether modest workplace accommodation could facilitate a survivor's successful ongoing employment, assuming survivors will feel safe enough to self-disclose to their employer. In addition, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which applies where the EEA does not, explicitly prohibits unfair discrimination based on gender, including gender-based violence.<sup>155</sup> Accordingly, employers would be prohibited from taking adverse employment actions against survivors for reasons associated with the abuse.

Notwithstanding these provisions, the Equality Courts that have been established to address workplace discrimination are underutilized.<sup>156</sup> This

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151. Employment Equity Act 55 of 1988 (S. Afr.) (EEA). For a discussion of the EEA's sexual harassment provisions, see, for example, Deborah Zalesne, *Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms*, 25 HARV. WOMEN'S L.J. 143 (2002).

152. See South Africa's Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices, § 5.2.2. (S. Afr. 1998).

153. See *id.* Although United States statutory prohibitions recognize claims based on disparate impact (which may be regarded as "indirect" discrimination), those provisions generally have been narrowly construed. See, e.g., Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006); Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For: What Not?*, 42 BRANDEIS L. J. 597 (2004).

154. South Africa's Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices, § 5.2.2. (S. Afr. 1998).

155. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 § 8(a) (S. Afr.).

156. S. Africa Human Rights Commission, *Equality Update: "Advancing Equality for all,"* (Jan. – June 2007), [http://www.sahrc.org.za/sahrc\\_cms/downloads/Equality%20Update\\_%20Jan\\_June%202007.pdf](http://www.sahrc.org.za/sahrc_cms/downloads/Equality%20Update_%20Jan_June%202007.pdf) (on file with author).

may be due to uncertainty, misunderstanding, or a lack of knowledge and awareness about how those laws can address unfair workplace discrimination.<sup>157</sup> The costs of litigation may further limit the utility of anti-discrimination laws as a means of effecting workplace equality.<sup>158</sup>

Another aspect of South Africa's employment laws may readily assist some survivors who find recourse difficult under traditional tort and anti-discrimination frameworks. In many cases, abuse impacts survivors' abilities to get and keep their jobs in ways that may not fall neatly into traditional sex discrimination prohibitions.<sup>159</sup> As I have described elsewhere, there are at least two categories of cases in which the impact of abuse is often rendered invisible, but nevertheless negatively impacts survivors.<sup>160</sup> In the first category, the abuse may adversely affect the victim's ability to perform her job. For example, an abuser may harass her at work by calling her hundreds of times a day, or by showing up and threatening her and/or her co-workers. The harassment may cause her to experience performance problems as a result. Due to historic biases and the shame often associated with abuse, she may not disclose or explain the situation to co-workers or supervisors. Absent explanation, her performance issues may lead to disciplinary actions that could jeopardize her job. In other cases, the operation of subtle, gender biases about victims may shape employers' responses to a victim upon learning that she is the survivor of domestic or sexual violence. In both types of cases, United States' employment discrimination laws may not recognize adverse actions against domestic violence survivors as prohibited discrimination.<sup>161</sup>

### *B. Unjust Dismissal Law*

South Africa's unjust dismissal law could readily provide redress for survivors whose circumstances might not fit squarely within the United States' anti-discrimination frameworks.<sup>162</sup> Generally, South Africa's Labour Relations Act (LRA) prohibits dismissals that are either

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157. *Id.*

158. *Id.*; see also, e.g., Bonthuys, in *GENDER, LAW & JUSTICE*, *supra* note 11, at 262.

159. This is the case under United States' laws, which likely would treat domestic and sexual violence as gender-neutral experiences. See Goldscheid, *supra* note 84, at 95-104. Survivors may more readily find recourse under South Africa's anti-discrimination prohibitions, which recognize disparate impact theories, and which prohibit discrimination based on gender-based violence.

160. See Goldscheid, *supra* note 84, at 95-104.

161. See *id.* (discussing limitations of U.S. employment laws).

162. A full discussion of South Africa's unfair dismissal law is beyond the scope of this article, which will focus on its application to victims of gender violence who experience workplace difficulties resulting from the abuse. For a general discussion of South Africa's unfair dismissal law, see, for example, P.A.K. LE ROUX & ANDRE VAN NIEKERK, *THE SOUTH AFRICAN LAW OF UNFAIR DISMISSAL* (1994).

substantively or procedurally unfair.<sup>163</sup> The LRA defines substantively unfair dismissals to render automatically unfair an enumerated list of grounds for dismissal, including dismissals based on unfair discrimination on a range of protected grounds.<sup>164</sup> Dismissals based on prohibited discrimination may nevertheless be fair if the reason for dismissal is based on an inherent requirement of the particular job.<sup>165</sup> Other dismissals are substantively unfair if the employer fails to prove that it is related to the employee's conduct or capacity or based on the employer's operational requirements.<sup>166</sup> The LRA additionally prohibits procedurally unfair dismissals and provides parameters for procedural requirements in its Code of Good Practice.<sup>167</sup> Generally speaking, the Code of Good Practice requires employers to clearly communicate standards of performance, to employ progressive discipline, and to take into account the employee's circumstances, which include the length and quality of previous service, as well as the circumstances of any performance problems, before dismissal.<sup>168</sup>

This framework has important implications for victims of gender violence. By shifting the onus of establishing that a dismissal is procedurally and substantively fair to the employer, South Africa's employment framework affords survivors of gender violence the chance to explain the role of abuse in any employment-related issues and requires the employer to give her a chance, with possible reasonable workplace modifications, to address the issue. By contrast, in the United States, nothing in federal law uniformly prevents an employer from reflexively terminating the employee regardless of whether her performance issues stem from her partner's abuse, and regardless of whether an employer's security-related concerns would be addressed through her termination.<sup>169</sup> Under the unjust dismissal approach, for example, if a woman misses work because she fears that her abusive partner will come to the workplace, or if

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163. *See generally* Labour Relations Act No. 66 of 1995 §§ 185-197 (S. Afr.) [hereinafter LRA] (outlining what constitutes as an "unfair dismissal").

164. LRA § 187(1)(f) (enumerating race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility as a non-exclusive list of prohibited grounds). This anti-discrimination prohibition overlaps with the protections afforded under the later-enacted Employment Equity Act. *See supra* note 151.

165. LRA § 187(2). The statute also provides that dismissals based on age are nevertheless fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity. *Id.*

166. LRA § 188(1).

167. LRA § 188(1)(b) (requiring fair procedure); LRA § 188(2) (requiring consideration of the Code of Good Practice set forth in Schedule 8 to the LRA).

168. LRA Schedule 8.

169. *See, e.g.,* Goldscheid, *supra* note 84, at 95-107 (discussing the impact of reflexive employment decisions on survivors' abilities to keep their jobs).

she experiences performance-related problems because he stalks her at work or calls her incessantly, she would have a chance to explain the reasons for the problems and potentially salvage her job. This approach would support the best practices increasingly recognized by employers, which shows that in many, if not most, cases, safety planning and negotiation of usually modest workplace modifications can ensure both workplace safety and will lead to retention of valuable employees.<sup>170</sup>

At least one decision invoked the LRA's unfair dismissal procedures in the case of a dismissed employee who had been in an abusive relationship.<sup>171</sup> In that case, an arbitrator overturned the employee's dismissal because "she had an abusive relationship" for a number of years, which "could have affected work performance."<sup>172</sup> The arbitrator concluded that the employer:

[H]ad not established the reason for poor performance. Applicant had an abusive domestic relationship. Management of respondent [the employer] knew about this. Employees' system programmes were not used to help applicant in her situation. Applicant was only helpful after the dismissal. Is this not like closing the stable door after the horses had bolted?<sup>173</sup>

Nevertheless, the Labour Court set aside the arbitrator's award because the record did not establish how the abusive relationship affected the applicant's work situation.<sup>174</sup> The Court criticized the arbitrator's decision for failing to elaborate any details of how the abuse impacted her poor workplace performance, her absence from work on several occasions without explanation, and her frequent absence from her workstation.<sup>175</sup> Unfortunately, this brief decision does not elaborate in any more detail what type or quantum of evidence would have satisfied the court that the abuse impacted the employee's work performance.

It is impossible to determine, without further information, whether the employee's workplace performance issues were in fact related to her abusive relationship and the problems in the record were problems of poor advocacy, whether they reflected the internalized stigma survivors often experience, or whether the problems were unrelated to the abuse. Nevertheless, the case demonstrates that the LRA's procedural and substantive fairness requirements can facilitate an employer's consideration

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170. See Goldscheid, *supra* note 84, at 81-84 (discussing best practices).

171. Gov't Comm. & Info. Sys. v. CCMA 2002 All SA (S. Afr.) at 1, available at <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZALC/2002/172.html&query=2002/09/25>.

172. *Id.* at 3.

173. *Id.* at 3-4.

174. *Id.* at 4.

175. *Id.*

of the impact of abuse on otherwise-neutral performance issues.

Cases in similar contexts also show how the LRA requires employers to consider employees' circumstances before dismissal. South Africa's unjust dismissal framework requires an inquiry about whether the absence was reasonable. As one decision noted, citing a respected treatise: "[I]n assessing the fairness of a dismissal for absenteeism . . . the court will examine a number of factors, including the reason for the [employee's] failure to present himself for work, his or her past work record and the employer's treatment of this offense in the past."<sup>176</sup> That requirement could help employees coping with abuse, who may be absent from work and may not voluntarily disclose the reason for their absence due to the stigma associated with abuse.<sup>177</sup> Courts' recognition as "unfair" dismissals of employees who left work due to safety concerns also could help survivors of domestic abuse. For example, more than one court overturned dismissals when "stay-away" orders in an employee's township created a justifiable fear of harm if the employee had stayed at work.<sup>178</sup> Another case found a dismissal to be unfair when an employee's absence was due to his imprisonment, during which the employee was unable to notify the employer of the reason for his absence.<sup>179</sup> In addition, the LRA's procedural fairness requirement could assist survivors, since it bars dismissals when an employer fails to use progressive discipline before terminating the employee.<sup>180</sup>

The United States' employment laws require no similar inquiry; to the contrary, they permit dismissal unless it is based on one (or more) of the prohibited grounds enumerated in federal, state, or local antidiscrimination laws, or unless the employee is covered by a union or other contract. Under anti-discrimination frameworks, the ultimate burden is on the employee to establish that the termination, or other adverse job action, was based on her protected category, rather than on a legitimate employment reason. Although any legal framework can be narrowly interpreted, South Africa's unjust dismissal framework illustrates how a different legal

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176. Africa & Pub. Servants Assoc. 2003 (24) ILJ Juta 1153 (CCMA) at 1158 (S. Afr.) (citing GROGAN, WORKPLACE LAW, 6th ed., at 152) (finding dismissal unfair when employer knew employee failed to report to work after a business trip because he lacked sufficient funds, though upholding dismissal on other grounds); *see also* Radebe v. Keeley Forwarding (Pty.) Ltd. (1) 1988 (9) ILJ Juta 504 (IC) (S. Afr.) (finding dismissal substantively unfair when a security guard left post for approximately half an hour to go to toilet).

177. *See* Goldscheid, *supra* note 84, at 102-03.

178. *See, e.g.,* Monareng v. Midrand Motolek CC 1991 (12) ILJ Juta 1348 (IC) (S. Afr.) (deciding that even though the employer had a right to discipline the respondent, he had not acted fairly in doing so); *accord* SA Laundry, Dry Cleaning, Dyeing & Allied Workers Union v. Advance Laundries LTD 1985 (6) ILJ Juta 544 (IC) (S. Afr.).

179. Trident Steel (Pty) Ltd. v. CCMA 2004 (26) ILJ 1519 (LC) (S. Afr.).

180. *See, e.g.,* Jacobs & Trident Steel 2005 (26) ILJ JUTA 2259 (BCA) (S. Afr.).

structure could facilitate continued employment for survivors of gender violence.

### *C. Limitations in the Informal Labor Sector*

Despite the theoretical availability of legal arguments that could help gender violence survivors keep their jobs, many employment protections as well as anti-domestic violence laws remain effectively beyond the reach of many South African women.<sup>181</sup> The prevalence of work in the informal sector is one factor that limits the utility of law reform. Although some recent reforms extend legal protections to “atypical” workers, lack of knowledge about their rights and ineffective enforcement mechanisms render those protections of limited utility.<sup>182</sup> Employment in the informal economy bars legal recourse for many survivors of gender violence working in the United States as well.<sup>183</sup> For example, workers in the informal economy are excluded from legal protections through laws that apply only to employers of a certain size.<sup>184</sup> Other laws explicitly exclude domestic workers from minimum wage and maximum hour protections,<sup>185</sup> from guarantees of the right to organize,<sup>186</sup> and from occupational safety and health standards.<sup>187</sup>

Thus in both countries, the disconnect between the types of workplaces governed by labor and employment laws and the realities of many women’s work lives requires advocates to consider creative approaches and to think critically about the strategic use of law reform. In South Africa, for example, organizing initiatives focus on improving working conditions and training women for more stable and lucrative occupations.<sup>188</sup> Similarly,

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181. *See supra* notes 74-80 and accompanying text (describing implementation challenges).

182. *See, e.g.*, Basic Conditions of Employment Act 75 of 1997, as amended by Basic Conditions of Employment Amendment Act, 2002, Contract Cleaning Wage increase, and Domestic workers wage increase 1 Dec 2007 § 83A (amending definition of “employee” to include “atypical” workers).

183. *See supra* notes 43-46 and accompanying text.

184. *See, e.g.*, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq. (2006) (anti-discrimination law applying only to employers with 15 or more employees); Family and Medical Leave Act, 42 U.S.C. § 2601 (2009) (providing up to twelve work weeks of unpaid, job-protected leave for specified purposes to those who work for employers with 50 or more employees for a specified minimum number of hours over the preceding year).

185. *See* Long Island Care at Home v. Coke, 551 U.S. 158 (2007) (upholding Fair Labor Standards Act’s exemption for many domestic service workers).

186. *See* National Labor Relations Act, 29 U.S.C. § 152(3) (2010) (defining “employee” to exclude agricultural laborers or those working in domestic service).

187. *See* 29 C.F.R. § 1975.6 (2011) (exempting individuals employed for “ordinary domestic household tasks” from Occupational Safety and Health Act requirements).

188. *See, e.g.*, NAILA KABEER, MAINSTREAMING GENDER IN SOCIAL PROTECTION FOR THE INFORMAL ECONOMY 292 (2008) (describing South Africa’s Self-Employed Women’s Union); Hari Srinivas, *Organising Women in the Informal Sector – The*

advocacy strategies in the United States include traditional legal and policy-based initiatives,<sup>189</sup> as well as non-litigation-based approaches to inform workers of their rights and to enhance legal protections.<sup>190</sup> These workplace realities require legal advocates and organizers to work together to increase awareness and shift norms so that the often hidden problem of gender violence becomes more widely acknowledged and better addressed, in all types of workplaces.

## V. CENTERING EQUALITY AND TRANSFORMATION

This section offers observations for advocacy that draw on the common experiences of advocates in both countries working to make the promise of equality real.

### A. Implementation, Enforcement, and Training

Many of the implementation challenges identified by advocates in South Africa are remarkably similar to those faced by advocates in the United States. It goes without saying that enacting new laws, or achieving a law reform litigation victory, is only the first step in achieving change. As social movement theorists have observed, legal tactics may have their most limited impact in struggles to implement new laws and policies.<sup>191</sup> When it comes to policy implementation, a complex mix of law, politics, and power dynamics will determine the extent and nature of successful reform.<sup>192</sup>

Advocates in South Africa are confronting the familiar difficulties of ensuring adequate funding for programmatic initiatives and of properly

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*SEWU experience, available at* <http://www.gdrc.org/icm/wind/wind-women-is.html> (aiming to support self-employed women).

189. For recommendations for legal and policy reform, see, for example, Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for all Law-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 555, 557 (2006).

190. For examples of organizing campaigns with workers who traditionally lack legal remedies, see, for example, Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390 (2008) (discussing union organizing of home-based care workers); *Domestic Workers United: Resources*, <http://www.domesticworkersunited.org/rightsandresources.php> (last visited Jun. 26, 2011) (listing recommended practices, including standard-form contracts and employment standard guidelines).

191. See, e.g., STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* 148 (2d ed. 2004) (“Rights are most sensibly thought of as agents of political mobilization rather than as ends in themselves.”); Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. SOC. SCI. 17, 32 (2006) (observing that women’s right to abortion has not materialized even though American feminists prevailed in *Roe v. Wade*).

192. See, e.g., SCHEINGOLD, *supra* note 191, at 117; see also, e.g., CATHERINE R. ALBISTON, *INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE* (2010) (studying nuanced relationship between law reform and social policy with respect to family and medical leave).

training officials charged with law enforcement and program administration.<sup>193</sup> Examples of these challenges in the United States abound. For example, enactment and reauthorization of the federal Violence Against Women Act has increased the availability of services and the range of options for survivors of gender violence.<sup>194</sup> Yet, every year, advocates must press to ensure that funds that were authorized were actually appropriated in the federal budget.<sup>195</sup> Absent the political organization and capital to ensure appropriations, the funding promised in the enacted law would not stand a chance of reaching the individuals and communities it was intended to benefit.

Another striking similarity lies in the difficulty of addressing the unintended consequences of well-intentioned reforms that inevitably surface as laws are implemented.<sup>196</sup> In South Africa, this process is complicated by the fact that a newly enfranchised majority is charged with governing after years of disenfranchisement and state-sponsored violent repression. This formal change in power status runs counter to typical, though often criticized, dynamics of policy implementation, which tend to reinscribe, rather than facilitate, shifts in power and influence.<sup>197</sup> The process of moving from the position of outsider/activist to insider/policy administrator presents complex challenges of role and identity that further complicate the difficult role of implementing new social policy in a new political regime.

### *B. Gender Violence in a Socio-Political Context*

The United States' recent experience with domestic violence law reform illustrates the importance of maintaining a focus on the societal context in which gender violence persists while growing programs that enjoy public,

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193. See *supra* notes 75-80.

194. See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2961 (2005) (providing programmatic and financial support for range of programs). For a summary of the provisions of the VAWA 2005 reauthorization, see, for example, *Violence Against Women Act (VAWA) 2005*, NAT'L CTR. ON DOMESTIC & SEXUAL VIOLENCE, [http://www.ncdsv.org/publications\\_vawa.html](http://www.ncdsv.org/publications_vawa.html) (last visited June 1, 2011).

195. See, e.g., Family Violence Prevention Fund, *Act Now, Stop Teen Dating Violence*, <http://action.endabuse.org/fvvpf/home/> (last visited Feb. 24, 2011) (urging for funding for the teen dating violence program that was created in the Violence Against Women Act, but has yet to be funded); National Coalition Against Domestic Violence, Alerts and Updates, <http://www.ncadv.org/publicpolicy/AlertsandUpdates.php> (last visited June 8, 2011) (listing action alerts to, *inter alia*, ensure funding of programs to end violence against women and support survivors).

196. For discussions of these unintended consequences see *supra* notes 47-51.

197. See, e.g., ANNE L. SCHNEIDER & HELEN INGRAM, POLICY DESIGN FOR DEMOCRACY 102-49 (1997) (describing how the process of public policy development in the United States is determined by the relative political power of the groups that are the target of policy initiatives).

and particularly governmental, support. Advocacy efforts have dramatically increased the availability of social services and have made substantial inroads into raising awareness among policymakers, law enforcement officials, and others with whom survivors of gender violence interact as they negotiate abuse.<sup>198</sup> Increasingly, federal and state funding supports social service and other programs to assist survivors.<sup>199</sup> With that mainstreamed support has come a neutralization in the way gender violence is addressed. Instead of framing the problem as a social construct reflecting gender bias, domestic and sexual violence often is framed in terms of personal dynamics of relationship.<sup>200</sup> The de-politicization of the issue, and the shift from a political to a social service focus, comes at the cost of reducing dialogue about root causes and de-emphasizing programs advocating changes in cultural norms. This shift jeopardizes meaningful discussions about causation and, therefore, prevention, and reduces the potential for transformational change.

Directly addressing the biases that tolerate and condone gender violence is a challenging project that has no easy solution. The social context of gender violence cannot be addressed without considering race, class, sexual orientation, and immigration status, which complicate survivors' experiences of abuse. Some promising programs support challenging traditional gender roles, for example, by addressing male bullying and violence in early childhood education.<sup>201</sup> Some frame domestic violence through the lens of poverty and unemployment.<sup>202</sup> Others employ a range of empowerment, human rights, and broad anti-subordination frameworks.<sup>203</sup> These and similar innovative initiatives should receive

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198. See *supra* note 46 and accompanying text.

199. See, e.g., 119 Stat. 2961.

200. See, e.g., GOODMAN & EPSTEIN, *supra* note 46, at 2, 8-12; Martha McMahon & Ellen Pence, *Making Social Change: Reflections on Individual and Institutional Advocacy with Women Arrested for Domestic Violence*, 9 VIOLENCE AGAINST WOMEN 47, 54, 58 (2003); Miccio, *supra* note 47, at 316; see also, e.g., Richie, *supra* note 46, at 52-53 (arguing that race and gender-neutrality has limited the anti-domestic violence movement's effectiveness).

201. See Mathews, *supra* note 21, at 109 (describing the status of intervention programs). See generally CTRS. FOR DISEASE CONTROL, *Intimate Partner Violence: Prevention Strategies*, available at [http://www.cdc.gov/violenceprevention/pdf/IPV-SV\\_Program\\_Activities\\_Guide-a.pdf](http://www.cdc.gov/violenceprevention/pdf/IPV-SV_Program_Activities_Guide-a.pdf).

202. See, e.g., *Bridges and Barriers*, *supra* note 74, at 213-15.

203. See, e.g., Maria Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 189 (2003) (recommending a labor policy that provides all workers with basic human rights and benefits); Rivera, *supra* note 26, at 305 (urging full participation by Latinas and Latinos in their local and political communities); Connect: Safe Families, Peaceful Communities, available at <http://www.wconnectnyc.org/> (community organizing-based approach to prevent and end gender violence); National Latino Alliance for the Elimination of Domestic Violence, available at <http://dvalianza.org/en/about-us.html> (supporting communities of color that experience family violence).

continued visibility and support.

South Africa's newer and less entrenched legal and social service infrastructure poses challenges but also presents opportunities to insist on a continued focus on root causes and social context. Unlike the United States, South Africa's public dialog frames gender violence as a problem rooted in traditional gender norms and proscribed roles.<sup>204</sup> For example, one recent study of rape identified social tolerance and support for sexual assault as a core part of the problem.<sup>205</sup> Accordingly, it concluded that social constructions of masculinity predicated on the control of women must be changed to better respond to, and ultimately prevent, rape.<sup>206</sup> This rhetorical and substantive approach contrasts starkly with that in the United States, where popular rhetoric most often references domestic and sexual violence as gender neutral. Instead, it is so-called "fathers' rights" groups that often invoke the role of gender, taking the position that the system is biased against men.<sup>207</sup> South Africa's normative framing of the problem in terms of its social and political roots lays the groundwork for progressive programs and transformative dialogue.

### *C. Broad-Based Commitments and Difficult Conversations*

The importance of commitments from all members of society to ending the problem cannot be underestimated. Workplace policies addressing gender violence offer a useful example of the power of shared commitments. In the United States, much workplace reform has been spurred by initiatives advanced by advocates working in collaboration with business leaders who recognized that developing policies was good for employees as well as their businesses' bottom line.<sup>208</sup> Although advocates and business leaders may hold somewhat different perspectives on

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204. See, e.g., Jewkes et al., *supra* note 14, at 8-9, 20 (discussing the connection between South Africa's patriarchal culture and prevalence of violence against women).

205. LISA VETTEN ET AL., TRACKING JUSTICE: THE ATTRITION OF RAPE CASES THROUGH THE CRIMINAL JUSTICE SYSTEM IN GAUTENG 42 (2008), available at [http://www.mcr.ac.za/gender/Tracking\\_Justice\\_Web.pdf](http://www.mcr.ac.za/gender/Tracking_Justice_Web.pdf).

206. *Id.*

207. See, e.g., CHARLES E. CORRY ET AL., CONTROLLING DOMESTIC VIOLENCE AGAINST MEN (2002), available at [http://www.familytx.org/research/Control\\_DV\\_against\\_men.pdf](http://www.familytx.org/research/Control_DV_against_men.pdf) (arguing that popular rhetoric ignores the male victims in the domestic violence case); *The Fathers' Rights Network; Domestic Violence Information*, <http://www.fathersrightsnetwork.net/dvlinks> (linking to websites that refute the idea that domestic violence is primarily committed against women). For research defining different types of intimate partner violence, see, for example, Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 477 (2008); Michael S. Kimmel, 'Gender Symmetry' in *Domestic Violence: A Substantive and Methodological Research Review*, 8 VIOLENCE AGAINST WOMEN 1332 (2002).

208. See *supra* notes 84-85.

particular aspects of the problem, their shared interests have advanced workplace policies, primarily in larger organizations that have significant human resources infrastructure. In South Africa, the pressing problems of (general) violence and AIDS may eclipse the less visible issue of how gender-based abuse affects the workplace.

Looking at the problem of abuse more generally, anti-gender violence advocates are increasingly calling on men to take an active role in the anti-gender violence movement. Historically, the role of men has been controversial in the anti-domestic violence movement in the United States, out of concerns that attention and funding would be diverted from helping women to supporting men.<sup>209</sup> Yet, there is an increasing international awareness that to truly end, or significantly decrease the problem, men must join the project by challenging violence committed by their peers.<sup>210</sup> Advocates in South Africa are part of these efforts to call on male allies to challenge the acceptability of male violence against women.<sup>211</sup> Such efforts would include a renewed dedication by all stakeholders in the criminal justice system to understand the wide range of circumstances in which rape occurs, and to listen to the experiences of survivors in enforcing legal remedies.<sup>212</sup>

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209. See, e.g., SCHECHTER, *supra* note 24, at 258-67.

210. See, e.g., *Engage Men in Ending Violence Against Women*, WORLD HEALTH ORGANIZATION (Mar. 6, 2009), [http://www.who.int/mediacentre/multimedia/podcasts/2009/violence\\_against\\_women\\_20090306/en/index.html](http://www.who.int/mediacentre/multimedia/podcasts/2009/violence_against_women_20090306/en/index.html) (discussing male responsibility for gender-based violence); *Engaging Men in Ending Violence Worldwide*, FAMILY VIOLENCE PREVENTION FUND (July 19, 2009), <http://endabuse.org/content/news/detail/1294/> (violence prevention roundtable targeting men); ALIANZA: NATIONAL LATINO ALLIANCE FOR THE ELIMINATION OF DOMESTIC VIOLENCE, <http://www.dvalianza.org/en/resources.html> (last visited Feb. 24, 2011) (citing publications that highlight working with males of all ages to end domestic violence); THE MEN AGAINST VIOLENCE WEBRING, <http://www.interactivetheatre.org/mav/index.html> (last visited Feb. 24, 2011) (urging men to advocate to end sexual assault); *Progress of the World's Women 2008-09, Breaking the Walls of Silence: Accountability for Ending Violence Against Women and Girls*, UNIFEM (2007), [http://www.unifem.org/progress/2008/justiceFS\\_who\\_panel2.html](http://www.unifem.org/progress/2008/justiceFS_who_panel2.html); *Men in the Movement to End Violence Against Women: Training and Education*, VAWNET, [http://new.vawnet.org/category/Main\\_Doc.php?docid=1045](http://new.vawnet.org/category/Main_Doc.php?docid=1045) (last visited Feb. 24, 2011) (collecting United States-based resources).

211. See, e.g., Dean Peacock & Andrew Levack, *The Men as Partners Program in South Africa: Reaching Men to End Gender-Based Violence and Promote Sexual and Reproductive Health*, 3 INT'L J. MEN'S HEALTH 173 (2004); *South Africa*, ENGENDERHEALTH, <http://www.engenderhealth.org/our-countries/africa/south-africa.php> (last visited Feb. 24, 2011); Stephanie Urdang, *Men Join Campaign to End Violence Against Women*, UNITED NATIONS AFRICA RENEWAL (2010), <http://www.un.org/ecosocdev/geninfo/afrec/newrels/221-camapign-to-end-violence-against-women.html>; *Directory of Civil Society Organizations Working in Partnership with Men to End Violence Against Women in the UNESCAP Region and Beyond*, UNESCAP (2011), <http://www.unescap.org/esid/GAD/Resources/NewTableEVAWM.pdf>.

212. VETTEN, *supra* note 205, at 57.

Nevertheless, the challenges are complex. In South Africa, traditional and customary law's formal endorsement, or tolerance, of domestic and sexual violence renders anti-gender violence laws or services fundamentally controversial. Advocates have begun to address the tension between constitutional and customary law as it affects gender generally and gender violence in particular.<sup>213</sup> Advocates in the United States, particularly those working in immigrant communities, also have had to navigate a balance between respecting traditional approaches and recognizing legal requirements.<sup>214</sup> In both countries, many advocates recognize that the connections between gender and other forms of oppression, culture, and abuse are textured and complex.<sup>215</sup> As with other related issues, advocates and service providers can benefit from engaging in difficult conversations and grappling with differences in cultural norms and values to make meaningful progress.<sup>216</sup>

After approximately forty years of modern advocacy to end gender violence, advocates in the United States are recognizing the need to challenge traditional advocacy approaches. For example, some are questioning the common wisdom that advocacy should be focused on helping the woman leave, in recognition that many women do not want to leave their partners.<sup>217</sup> Others are considering advocates' longstanding positions that alternative dispute resolution processes, such as restorative justice, should never be used in cases of domestic or sexual violence.<sup>218</sup>

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213. See, e.g., *Role of Culture*, *supra* note 17, at 434-40, 442; Penelope E. Andrews, "Big Love?": *The Recognition of Customary Marriages in South Africa*, 64 WASH. & LEE L. REV. 1483, 1496 (2007); see also *infra* notes 27-28, 81.

214. See, e.g., Shamita Das Dasgupta, *Women's Realities: Defining Violence against Women by Immigration, Race, and Class*, in NATALIE J. SOKOLOFF, DOMESTIC VIOLENCE AT THE MARGINS 56 (2005).

215. See, e.g., Diana Gibson, *Rethinking Domestic Violence: Case Studies from the Western Cape, South Africa*, (ASSRI, Working Paper, 2008), available at <http://www.assr.nl/> (describing the meaning attached to domestic violence by survivors, as mediated by traditional male roles as well as cultural traditions).

216. Advocates who disagree about method or strategy may remain polarized due to the difficulty of discussing highly charged issues. For a United States' example of a recent initiative aimed at facilitating sensitive dialogue between domestic violence advocates, service providers and court personnel, see, for example, FAMILY COURT REVIEW: SPECIAL ISSUE, 46 FAM. CT. REV. 431 (2008) (compiling papers from conference convened by the Association of Family and Conciliation Courts and the Family Violence Department of the National Council of Juvenile and Family Court Judges to address tensions in family court adjudication of domestic violence cases).

217. See, e.g., Goldfarb, *supra* note 50.

218. See, e.g., Donna Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 128, 149 (Heather Strang & John Braithwaite eds., 2002); C. Quince Hopkins et al., *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 311 (2004). Other suggested approaches have been strongly critiqued by anti-domestic violence advocates. See, e.g., LINDA G. MILLS, INSULT TO INJURY 101-18 (2003) (recommending a restorative justice approach for domestic violence cases as part of a critique on the domestic violence movement). For

Others are recognizing that the traditional “feminist” frame that identifies the male as perpetrator and female as “victim” erases the prevalence of abuse in same sex relationships.<sup>219</sup> These difficult conversations are not unlike those undertaken by South African advocates balancing traditional and customary law with modern approaches to sex equality.<sup>220</sup> Though these questions provoke difficult conversations, they inevitably will be useful in moving advocacy and services forward. By looking at approaches used by advocates in South Africa and by considering the opportunities available under its progressive laws, those of us in the United States may be better equipped to consider creative and productive reform.

### CONCLUSION

Comparing the United States’ and South Africa’s efforts to address the parallel processes of law reform and cultural change in the context of gender violence and work is a study of commonalities and contrasts. The example of advocacy efforts to address the impact of gender violence on women’s work offers one example of the tensions. The United States has had the benefit of approximately forty years of recent advocacy efforts, yet rates of domestic and sexual violence remain high and economic vulnerability continues to shape survivors’ experience of abuse. Although progress has been made in terms of employers’ recognition of how the problem impacts the workplace, and although legal remedies increasingly are available to those whose jobs are jeopardized as a result of the abuse, our cramped interpretation of employment laws, as well as the increasing prevalence of work in the informal labor sector, call into question the efficacy of those legal protections.

South Africa presents a contrasting set of challenges, with alarmingly high rates of domestic and sexual violence in addition to staggering rates of other forms of violence. Yet, its constitution and statutory frameworks,

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critiques of Mills’ proposals, see, for example, Annalise Acorn, *Surviving the Battered Reader’s Syndrome, or: A Critique of Linda G. Mills’ Insult to Injury: Rethinking Our Responses to Intimate Abuse*, 13 UCLA WOMEN’S L.J. 335, 337 (2005); Donna Coker, *Race, Poverty, and the Crime-Centered Response to Domestic Violence: A Comment on Linda Mills’s Insult to Injury: Rethinking Our Responses to Intimate Abuse*, 10 VIOLENCE AGAINST WOMEN 1331, 1341 (2004).

219. See, e.g., Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582 (1996); Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming A Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325 (1999); Adele M. Morrison, *Queering Domestic Violence to “Straighten Out” Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law’s Conventional Responses to Domestic Violence*, 13 CAL. REV. L. & WOMEN’S STUD. 81 (2003); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990).

220. See, e.g., Andrews, *supra* note 213, at 1485.

particularly but not exclusively those that have been enacted since the end of apartheid, chart a range of legal remedies that have the potential for affording relief when women's employment is jeopardized as a result of abuse. Nevertheless, the prevalence of poverty, the rates of employment in the informal labor sector, and the enduring role of traditional patriarchal culture compound the challenge of using law to change conditions on the ground.

The comparison highlights the inherent similarities of law reform that seeks to transform historic biases and cultural norms. It underscores the importance of enforcement and implementation, of centering anti-subordination initiatives in the context of equality, and of maintaining the difficult and ongoing project of challenging bias in its many forms to create both legal change and cultural transformation.