

7-1-2015

Rethinking a New Domestic Violence Pedagogy

Deborah M. Weissman

Follow this and additional works at: <http://repository.law.miami.edu/umrsjlr>



Part of the [Civil Rights and Discrimination Commons](#), and the [Women Commons](#)

Recommended Citation

Deborah M. Weissman, *Rethinking a New Domestic Violence Pedagogy*, 5 U. Miami Race & Soc. Just. L. Rev. 635 (2015)
Available at: <http://repository.law.miami.edu/umrsjlr/vol5/iss2/33>

This Part III: Reimagining Mobilization, Action, and Pedagogy is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Race & Social Justice Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

Rethinking a New Domestic Violence Pedagogy

Deborah M. Weissman*

I.	INTRODUCTION	636
II.	ANTI-RACIAL PROFILING LITIGATION AND CAMPAIGNS	639
	A. <i>Domestic Violence, Racial Profiling, Genetic Privacy, and the DNA Fingerprint Act</i>	640
	B. <i>Domestic Violence Advocacy, Racial Profiling, and “Stop and Frisk”</i>	646
	1. Litigation	647
	2. Stop and Frisk Legislative Initiatives.....	649
	a. S. 1038, The Federal End Racial Profiling Act.....	649
	b. The Community Safety Act.....	651
III.	DISCRIMINATORY DOMESTIC VIOLENCE PROGRAM PRACTICES ..	652
	A. <i>Exclusionary Practices; Discriminatory Impact</i>	652
IV.	NEED TO REVISE DOMESTIC VIOLENCE CURRICULUM AND EXPAND LEGAL SKILLS	654
	A. <i>Racism, the Criminal Justice System and the Domestic Violence Curriculum</i>	654
	B. <i>Domestic Violence Law: Including the Legal Tools to Address Discrimination in Services.</i>	656
V.	CONCLUSION.....	658

* Reef C. Ivey II Distinguished Research Professor of Law, University of North Carolina School of Law. The author wishes to express gratitude to Donna Coker for her insights and dedication to organizing the CONVERGE! Reimagining the Movement to End Gender Violence conference, to the Miami Workers Center Sisterhood of Survivors, and to the Center of Applied Feminism at the University of Baltimore. The author gratefully acknowledges Louis Pérez, Jr. for his support and comments, as well as Etiony Aldarondo, Rosa Gonzalez-Guarda, Ivon Mesa, Natalia Villegas and other participants at the panel on Social Justice Pedagogy & Academy/Community Collaboration. Professor Weissman also participated as a speaker at CONVERGE! Reimagining the Movement to End Gender Violence Conference that took place at the University of Miami School of Law on February 7-8, 2014. See Rosa M. Gonzalez-Guarda et al., *Panel on Social Justice Pedagogy and Academy/Community Collaboration*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 631 (2015).

Recommended citation: Deborah M. Weissman, *Rethinking a New Domestic Violence Pedagogy*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 635 (2015).

I. INTRODUCTION

It has been several decades since a cohort of academics and advocates have articulated their concerns about the emerging patterns of response to gender-based violence that failed to serve adequately the needs of communities of color, the poor, immigrants, the disabled, and LGBTQ persons. The question of why the criminal justice system fails to work for many victims of domestic violence has been raised by many thoughtful scholars.¹ Most commonly, Blacks, Latino/as, and poor people from communities with a history of abusive encounters with the criminal justice system are often loathe to seek criminal remedies.² Undocumented immigrants who are victims of domestic violence are likewise disinclined to expose their immigration status by contacting the

¹ See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991) (noting that women of color choose not to call the police for fear of suffering the reaction of a hostile police force); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 852 (2001) (noting that African-American women, Latinas, and poor women have difficulty in obtaining an adequate police response due to unequal treatment by the police); Angela Davis, *The Color of Violence Against Women*, COLORLINES NEWS FOR ACTION (Oct. 10, 2000, 12:00 AM) http://colorlines.com/archives/2000/10/the_color_of_violence_against_women.html (observing that criminalization process identified with domestic violence responses “further bolsters the racism of the courts and prisons”); Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women’s Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 287 (1997) (describing the process of essentializing battered women across race and class lines); Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 23 (2004); Adele M. Morrison, *Changing The Domestic Violence (Dis)Course: Moving From White Victim to Multicultural Survivor*, 39 U.C. DAVIS L. REV. 1063, 1090–91 (2006) (noting the ways in which “strained relationships between the law and communities of color” disadvantages battered women of color); 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 S. CAL. REV. L. & WOMEN’S STUD. 81, 138 (2003) (noting that the criminal justice system “impose[s] heteronormative sexist demands on lesbians”); Doug Jones, *Domestic Violence Against Women With Disabilities: A Feminist Legal Theory Analysis*, 2 FLA. A & M U. L. REV. 207, 224 (2007) (describing challenges that domestic violence victims who are disabled face when dealing with law enforcement); see also ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 185–86 (2000); BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE AND AMERICA’S PRISON NATION 2 (2013) (critiquing the “white feminist anti-violence movement . . . that argued gender inequality was the main factor that motivated violence against women—almost to the exclusion of other factors.”).

² Crenshaw, *supra* note 1, at 1257.

police.³ Lesbians, gay men, and transgendered victims of battery may similarly fear discriminatory treatment by police, prosecutors, and the courts, and hence are disinclined to endure the harsh treatment and sensationalism frequently visited on same-sex couples.⁴ Much ink has been spilled acknowledging the intersectionality of oppressions that battered persons experience.⁵

Social justice advocates have observed that domestic violence law reform has resulted in an expanded oppressive police presence that “decimate[s] poor communities and communities of color,” increased the rate of incarceration, and further impaired the ability of communities to develop internal means of social control.⁶ Recently, advocates for trafficking victims have assailed the routinely circulated and unsubstantiated claims made by law enforcement warning of a surge in sex trafficking during the Super Bowl as fear-mongering and justification for increased policing to the detriment of victims.⁷ The resort to arrests, prosecution, and punishment as a means to respond to domestic violence has largely ignored the problem of racism and abusive practices emblematic of the criminal justice system.

In fact, many anti-gender violence activists have distanced themselves from the criminal justice system, if not the legal system generally.⁸ They have questioned the efficacy of domestic violence programs, many of which have developed into apolitical service delivery

³ See Leslye E. Orloff et al., *Battered Immigrant Women’s Willingness to Call for Help and Police Response*, 13 UCLA WOMEN’S L.J. 43, 68, 77–79 (2005) (noting that this is particularly true if they are dependent on the abuser for their lawful residency or if she likely willing to risk deportation of the abuser if he is similarly undocumented and they have children together).

⁴ See generally Lisi Lord et al., *Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence*, 29 FORDHAM URB. L.J. 121 (2001).

⁵ Crenshaw, *supra* note 1, at 1257.

⁶ *Safety and Justice for All: Examining the Relationship Between the Women’s Anti-Violence Movement and the Criminal Legal System*, MS. FOUNDATION FOR WOMEN, 1, 15 (2003), available at http://files.praxisinternational.org/safety_justice.pdf [hereinafter *Safety and Justice*].

⁷ Kate Mogulescu, Op-Ed., *The Super Bowl and Sex Trafficking*, N.Y. TIMES, Feb. 1, 2014, at A23 (including the fact that such hyped up policing actually harms victims of sex trafficking).

⁸ There is a rich debate among scholars and activists about whether to “divest” from or “dismantle” the criminal justice system, that is to say, whether the anti-domestic violence movement should abandon advocacy within or about the criminal justice system. This essay does not address that debate, except to note that the likelihood is that the phenomenon of domestic violence will be associated with criminal law for the foreseeable future. See Goodmark, *supra* note 1, at 23 (observing the dangers of the legal system for women); *Safety and Justice*, *supra* note 6.

models unmoored from social justice movements.⁹ At the same time, some have sought to encourage new models of prevention, remedy, and relief in order to counter over (or any) reliance on the state. New genres of justice—restorative, transformative, and therapeutic—have made their way into the realms of advocacy as alternative methods to end the epidemic of intimate partner violence. Some activists have established domestic violence programs to serve the needs of communities marginalized by difference and who may not readily fit the “prototype” beneficiary of shelter and other domestic violence-related services.¹⁰

This essay seeks to contribute to the rethinking of paradigms of responses to domestic violence. It argues for the need to reconsider the pedagogy of domestic violence and expand the curricular content and advocacy skills as a matter of domestic violence law, that is, to reconsider what legal skills and knowledge are required of the “domestic violence bar.” The obligation to restructure domestic violence law curricula serves to address the failure of domestic violence lawyers to join with civil rights groups who have engaged in legal challenges to some of the most onerous practices related to the criminal justice system—practices that diminish the usefulness of such system for victims of gender-based violence.

In keeping with social justice principles that were and ought to remain the core of domestic violence work, advocates must contest the oppressive nature of the criminal justice system, most notably to challenge biased and punitive police and prosecutorial practices. They must develop expertise in those civil rights laws that provide protections to battered persons who are denied access to domestic violence-related programs and services because of discriminatory practices.

Law teachers and lawyers must go beyond identifying barriers that prevent recourse to legal remedies for victims of gender-based violence. They must commit to new forms of legal advocacy beyond domestic law “per se” but are nonetheless inextricably related to making such laws meaningful and useful. In other words, domestic violence advocates must act to dismantle identified barriers that prevent victims of domestic

⁹ *Safety and Justice*, *supra* note 6; see *Transformative Justice*, GENERATION FIVE, <http://www.generationfive.org/the-issue/transformative-justice/> (last visited May 22, 2015).

¹⁰ See, e.g., Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Domestic Violence Against Marginalized Women in Diverse Communities*, 11 VIOLENCE AGAINST WOMEN 38, 49–50 (2005) (describing the emergence of South Asian women’s organizations that can comfortably address the intersecting oppressions experienced by South Asian victims of domestic violence).

violence from seeking remedies and services in ways that shift the paradigm of what it means to “do” domestic violence law.

This essay focuses on particular strategies by which to redirect domestic violence law practice, without which the now well-developed critique about the barriers to legal remedies will be rendered ineffectual. It argues that domestic violence law must incorporate challenges to racist and exclusionary practices that occur both within and beyond the context of specific incidents of gender-based violence. Lawyers concerned with mitigating domestic violence are obligated to contest such rights violations regardless of whether they are committed by the state or nonprofit organizations. Domestic violence lawyers should include in their arsenal of legal tools, legal strategies to end racial profiling and challenge the failure of the courts as well as domestic violence programs to comply with the Americans with Disability Act, Title VI, and other civil rights laws. When victims of domestic violence are excluded from or otherwise treated discriminatorily at shelter programs because of practices that violate their civil rights, domestic violence lawyers must be disposed to redress such grievances.¹¹ Law students and lawyers planning to practice domestic violence law must become experts in these fields, in addition to developing a thorough foundation in the basic field of domestic violence law.

II. ANTI-RACIAL PROFILING LITIGATION AND CAMPAIGNS

Civil rights activists have often condemned law enforcement and criminal justice practices illegal and the ensuring consequences on communities of color and poor people. This section focuses on recent developments related to racial profiling and argues that attention to these issues is appropriate for domestic violence courses.¹² It contends, further, that domestic violence lawyers should develop familiarity with such subjects and develop the skills necessary to litigate or support litigation to end racist law enforcement practices. Domestic violence advocates have long observed that discriminatory policing practices act to discourage minority victims from seeking remedy from the criminal

¹¹ Lisa M. Martinson, *An Analysis Of Racism And Resources for African-American Female Victims of Domestic Violence in Wisconsin*, 16 WIS. WOMEN’S L.J. 259, 269–70 (2001); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 54 (1998).

¹² Patrice A. Fulcher, *Hustle And Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589, 596 n.59 (2012) (racial profiling refers to the discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual’s race, ethnicity, religion, or national origin).

justice system.¹³ Yet commenting on racist practices and their consequences, without acting to dismantle them may be insufficient. Domestic violence advocates are needed to contribute to this task.

In recent years, there have been noteworthy efforts to challenge racial profiling. These initiatives include litigation as well as legislative initiatives. An examination of these developments serves to illuminate critical themes that underscore the need to expand the scope of domestic violence law. Examples of current legal challenges to racial profiling demonstrate the failure of domestic violence advocates to join in coalition efforts to contest “the racially disparate exercise of police discretion in the decision to stop, investigate and arrest individuals.”¹⁴ Domestic violence groups have been absent from these coalitions and have failed to participate in legal challenges notwithstanding the barriers they present to the client community they assist. Legal instruction in order to “skill up” on these issues is needed and should be introduced in law school domestic violence courses as the ensemble of lawyering skills domestic violence attorneys must develop.

A. Domestic Violence, Racial Profiling, Genetic Privacy, and the DNA Fingerprint Act

The 1994 Violence Against Women’s Act (VAWA), a landmark piece of legislation has been recognized as the most comprehensive federal effort to address gender-based crimes. It is, however, possessed of a history that has linked it to the “crime-and- punishment” paradigm. VAWA was originally enacted as Title IV of the Violent Crime Control and Law Enforcement Act and part of an Omnibus Crime bill,¹⁵ the largest crime bill in United States history,¹⁶ described by some scholars as “draconian.”¹⁷ The purpose of the 2000 VAWA reauthorization was to strengthen prosecutorial tools and add new domestic violence-related crimes even while including important new remedies for immigrant

¹³ Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 CARDOZO WOMEN’S L.J. 303, 323 (2005).

¹⁴ Trevor Gardner II & Aarti Kohli, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program* (2009), available at www.law.berkeley.edu/files/policybrief_irving_FINA_L.pdf (defining domestic violence).

¹⁵ Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (1994).

¹⁶ Mayte Santacruz Benavidez, *Learning from the Recent Interpretation of INA Section 245(a): Factors to Consider When Interpreting Immigration LAW*, 96 CAL. L. REV. 1603, 1605 (2008).

¹⁷ Marie Gottschalk, *Dismantling the Carceral State: The Future Of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1721 (2006).

victims.¹⁸ The 2005 Violence Against Women Act reauthorization bill once again introduced additional law enforcement tools, including the DNA Fingerprint Act (the Act), described as a “stunning extension of government power.”¹⁹ Scholars observed that the Act would have particular implications for poor men and especially men of color who are likely to be disproportionately “catalogued” as a result of wrongful intrusion by the state.²⁰

In 2008, as the federal government sought to promulgate regulations for the implementation of the Act, civil rights groups mobilized in opposition. The Center on Constitutional Rights (CCR), concerned that implementation of this law would “have a dramatic impact on communities of color and further the assault on the rights of immigrants” called for Congressional hearings on the law which had been added to the VAWA reauthorization without prior legislative deliberations.²¹ The CCR also argued that the DNA collected private and sensitive information well beyond the scope of fingerprints, and that the collection of such materials, including from persons determined to be innocent, would allow for abuse of genetic privacy and exacerbate existing racial disparities in the system.²²

Advocates had the opportunity to litigate these issues in a case that ultimately went before the U.S Supreme Court. In *Maryland v. King* the Court was asked to consider whether the states could require individuals in police custody who were not yet convicted to give DNA samples to law enforcement without violating their Fourth Amendment rights to be free from unreasonable search and seizure.²³ Maryland law enforcement took a DNA sample from the defendant, Alonzo J. King, Jr. upon his arrested for felony assault although they did not require DNA to connect

¹⁸ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, § 1513(a), 114 Stat. 1464, 1533 (2000); 42 U.S.C. § 3796gg-7 (2013) (identifying funding for training, technical assistance, data collection and other equipment for the more widespread apprehension, prosecution, and adjudication of persons committing violent crimes against women).

¹⁹ Dorothy Roberts, *Collateral Consequences, Genetic Surveillance, and the New Biopolitics of Race*, 54 How. L.J. 567, 571–72 (2011).

²⁰ See *Safety and Justice*, *supra* note 6, at 13.

²¹ Press Release, Center for Constitutional Rights, New Database Threatens Privacy, Targets Immigrants, People of Color and Peaceful Demonstrators (May 19, 2008); *Oppose a Sweeping New Federal DNA Database! Say NO to the DNA Fingerprint Act!*, CNTR. FOR CONST. RIGHTS, <http://ccrjustice.org/get-involved/action/oppose-sweeping-new-federal-dna-database!-say-no-dna-fingerprint-act!> (last visited May 22, 2015) [hereinafter *Oppose a Sweeping New Federal DNA Database!*].

²² See *Oppose a Sweeping New Federal DNA Database!*, *supra* note 21.

²³ *Maryland v. King*, 133 S. Ct. 1958 (2012).

him to the assault charge.²⁴ The sample was then matched to an unsolved 2003 rape for which King was then charged and convicted.²⁵ The case garnered widespread national attention and implicated more than half of the states' statutory schemes as well as the federal DNA act.²⁶ In fact, during oral arguments, Justice Alito observed that the Court would be deciding "perhaps the most important criminal procedure case that [the] Court has heard in decades."²⁷

Amicus briefs were filed by a score of civil rights groups, public defenders, electronic privacy and technical experts, geneticists, and a veteran's organization, all of which challenged the constitutionality of the law.²⁸ These groups identified compelling concerns regarding the DNA fingerprint statute on its face and as applied. The consortium of amici argued that the capture and analysis of DNA materials from an individual who has been arrested, but not convicted, including cases where a district attorney determined there were insufficient grounds to proceed with a prosecution, violated the Fourth Amendment.²⁹ They further argued that these sorts of identification policies that appear to be neutral on their face have been used disproportionately as investigatory tools against minority populations and are otherwise implemented in racially biased manner.³⁰ They cited to studies demonstrating the depth of information contained in DNA samples that endanger the privacy of

²⁴ Brandon L. Garrett & Erin Murphy, *Too Much Information*, THE SLATE GROUP, (Feb. 12, 2013, 8:22 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/02/dna_collection_at_the_supreme_court_maryland_v_king.html.

²⁵ *King*, 133 S. Ct. at 1966.

²⁶ Keagan D. Buchanan, *The Twenty-First Century Fingerprint*, *Previewing Maryland v. King*, 4 CALIF. L. REV. 38, 39 (Apr. 2013) (observing that *Maryland v. King* has gained widespread national media attention).

²⁷ Martinson, *supra* note 11, at 39.

²⁸ The following amici curiae briefs were filed in *Maryland v. King*, 133 S. Ct. 1958 (2013). Brief of Amici Curiae Am. Civil Liberties Union et al. Supporting Respondent, 2013 WL 476702; Brief for the Howard Univ. Sch. of Law Civil Rights Clinic as Amicus Curiae in Support of Respondent, 2013 WL 417725; Brief of Amicus Curiae Pub. Defender Serv. For D.C. in Support of Respondent, 2013 WL 417726; Brief for the Nat'l Ass'n of Fed. Defenders as Amicus Curiae Supporting Respondent, 2013 WL 417727; Brief for Veterans for Common Sense as Amicus Curiae Supporting Respondent, 2013 WL 432944; Brief of Amici Curiae Elec. Privacy Info. Ctr. And Twenty-Six Technical Experts and Legal Scholars in Support of Respondent, 2013 WL 432946; Brief of Council for Responsible Genetics as Amicus Curiae in Support of Respondent, 2013 WL 432947; Brief for the Nat'l Ass'n of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent, 2013 WL 432948; Brief of 14 Scholars of Forensic Evidence as Amici Curiae Supporting Respondent, 2013 WL 476046; Brief of Amicus Curiae Elec. Frontier Foundation in Support of Respondent, 2013 WL 476047.

²⁹ See e.g., Brief of Amici Curiae Am. Civil Liberties Union et al. Supporting Respondent, *supra* note 28, at 3.

³⁰ See Brief for the Howard Univ. Sch. of Law Civil Rights Clinic as Amicus Curiae in Support of Respondent, *supra* note 28, at 3-4, 18-26.

individuals beyond those who are arrested, the misuse of DNA samples for non-law enforcement purposes, and especially studies that reveal racial disparities in DNA data banks.³¹ Concerns were expressed also that the statute could provide an incentive for pretextual and race-based stops, arrests for the purpose of DNA sampling, and would otherwise infringe on civil liberties.³² In sum, opposition to the DNA fingerprint statute served to identify many of the very concerns that marginalized victims of domestic violence have expressed as to why they refuse to avail themselves of criminal justice-related remedies.

Domestic violence and sexual assault organizations did in fact participate in the Supreme Court litigation as *amicus*.³³ Their appearance in the case, however, was to argue for upholding the statute. The roster of amicus agencies are limited to state-based organizations and “federally recognized state sexual assault coalitions” but do not include domestic violence programs that focus on serving particular racial or ethnic identity-based groups.³⁴ These agencies aligned with amici representing law enforcement agencies, district attorneys’ offices, and a host of crime victim-related organizations.³⁵ The amicus brief submitted by domestic violence and sexual assault groups offers alarming data about rape

³¹ The following amici curiae briefs were filed in support of the respondent in *Maryland v. King*: Brief of Amici Curiae Am. Civil Liberties Union et al. Supporting Respondent, American Civil Liberties Union, ACLU of Maryland, and ACLU of Northern California, Brief of Amici Curiae, *supra* note 28; Electronic Privacy Information Center and Twenty-Six Technical Experts and Legal Scholars in Support of Respondent; Brief of 14 Scholars of Forensic Evidence as Amici Curiae Supporting Respondent, *supra* note 28, at 9. Other concerns relate to the fact that the DNA samples will be kept indefinitely, and not related to the profiles developed by law enforcement; see Valerie Ross, *Forget Fingerprints, Law Enforcement DNA Databases Poised To Expand*, PBS (Jan. 2, 2014) <http://www.pbs.org/wgbh/nova/next/body/dna-databases/>.

³² Brief of Amici Curiae Elec. Privacy Info. Ctr. and Twenty-Six Technical Experts and Legal Scholars in Support of Respondent, *supra* note 28, at 10.

³³ Brief for Amici Curiae Md. Coal. Against Sexual Assault in Support of Petitioner, *supra* note 28.

³⁴ *Id.*

³⁵ The following amici curiae briefs were filed in *Maryland v. King*, 133 S. Ct. 1958 (2013) [hereinafter *Amici Curiae Briefs*]: Brief Of Md. Chiefs Of Police Ass’n, Inc. et al. as Amici Curiae in Support Of Petitioner, 2013 WL 179942; Brief for the United States As Amicus Curiae Supporting Petitioner, 2013 WL 50686; Brief for the Md. Crime Victims’ Res. Ctr. Inc. et al. in Support of Petitioner, 2013 WL 51933; Amicus Curiae Brief in Support of Petitioner, the State of Md., By the L.A. Cnty. Dist. Attorney on Behalf of L.A. Cnty., 2013 WL 51935; Brief for Amici Curiae DNA Saves, Bring BRI Justice Found., Keep Ga. Safe, The Rape, Abuse & Incest Nat’l Network, and The Surviving Parent Coal. in Support of Petitioner, 2013 WL 51936; Brief of the Nat’l Governors Ass’n et al. as Amici Curiae in Support of Petitioner, 2013 WL 51937; Brief of Susana Martinez, Governor of the State of N.M., as Amicus Curiae in Support of Petitioner, 2013 WL 98696; Brief of Amicus Curiae Nat’l Dist. Attorneys Ass’n in Support of Petitioner, 2013 WL 6762584.

statistics and sexual assault sequelae and note that “[r]ape victim/survivors are in a singular position to provide critical evidence (the DNA of their attackers) to assist the State in solving crime, prosecuting rapists, and preventing the rape of other citizens.”³⁶ They argued that the State’s interest in solving crimes outweighed privacy concerns, and that the accumulation of DNA data would not only solve crimes but would help prevent them.³⁷ More particularly, they observed that “solving crimes ‘helps bring closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large,’” and reminded the court that rape victims bear excruciating invasions of privacy by virtue of sexual assault exams alone.³⁸

There is, to be sure, no gainsaying that domestic violence and sexual assault amici have a compelling argument that DNA evidence facilitates rape prosecutions. The anecdotal information provided details the horrendous acts of perpetrators and the permanent scars borne by victims, their families, and communities and serves to demonstrate the particular difficulties with rape prosecutions, not the least of which may be related to gender-bias.³⁹ Indeed, four years of legislative hearings in support of the enactment of the now defunct 1994 Domestic Violence Civil Rights Act demonstrated the revictimization of rape victims during rape prosecutions.⁴⁰ Nor would there be much of a basis to challenge their position if King’s DNA sample was taken after his conviction for the felony assault charge.⁴¹ However, domestic violence and sexual assault amici failed to address, as experts have noted, that “[p]utting DNA from arrestees into databanks also exposes more innocent people to the risk of false accusation or conviction” and further, that “cross-contamination and accidental sample switches have occurred in labs across the country.”⁴² Perhaps more significantly, nowhere in their brief, did the domestic violence and sexual assault agencies address the “as applied aspect” of the statute. They did not express any concerns about

³⁶ *Amici Curiae Briefs*, *supra* note 35.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*; see also Deborah M. Weissman, *Gender-Based Violence As Judicial Anomaly: Between “The Truly National and the Truly Local*, 42 B.C. L. REV. 1081, 1091–93 (2001) (reviewing the 1994 VAWA legislative history documenting abusive criminal justice practices visited upon women who were victims of gender-based crime).

⁴⁰ *Amici Curiae Briefs*, *supra* note 35; see also Weissman, *supra* note 39.

⁴¹ Brandon L. Garrett & Erin Murphy, *Too Much Information*, THE SLATE GROUP, (Feb. 12, 2013, 8:22 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/02/dna_collection_at_the_supreme_court_maryland_v_king.html (observing that courts have all upheld the collection of DNA from felons on the ground that convicts forfeit some of their privacy rights).

⁴² *Id.*

the well-documented problem of racial profiling practices or advocate for the law to be implemented in a racially neutral way, although they could have done so without weakening their position in support of upholding the statute.⁴³

Ultimately, the Court upheld the Maryland statute, notwithstanding the widespread opposition of a broad cross-section of interests and entities that raised issues about the “vast genetic treasure map” embedded in a DNA swab and the fact that DNA samples would be disproportionately wrested from poor people of color. The Court’s dissent warned that the decision violated Fourth Amendment rights: “[m]ake no mistake about it: As an entirely predictable consequence of today’s decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason.”⁴⁴ Moreover, as observed by Professor Alan Michaels, the decision in *Maryland v. King* was issued the very same day as the release of a report that found that “all else equal African-Americans are four times as likely as whites to be arrested for marijuana,” an irony that can only contribute to concerns relating to the racist impact of the Court’s decision.⁴⁵

As a result of the Court’s decision, more and more states have enacted DNA capture statutes and along with the federal DNA statute, the volume of samples sent to DNA data bases has expanded so dramatically that law enforcement are unable to make timely use of the information.⁴⁶ As one researcher put it, “[i]f you’re arrested for having a dog off a leash in a federal park, you have to give a sample,”⁴⁷ suggesting that as a result of the increasing promulgation of DNA statutes, the number of collected samples is likely to increase, further complicating the claims of DNA capture proponents that the statute will help solve crimes. Beyond the questionable efficacy of their claims, the domestic violence and sexual assault groups that failed to address the racist application of the DNA statute have undermined their very goal, that is, to assist *all* victims in making use of the criminal justice system

⁴³ With regard to the usefulness of DNA in determining guilt or innocence, a recent report found that DNA results were diminishing as a source of exonerations suggesting the need to reconsider how useful a tool it may be. See Timothy Williams, *Study Puts Exonerations at Record Level in U.S.*, N.Y. TIMES, Feb. 4, 2014, at A12.

⁴⁴ *Maryland v. King*, 133 S. Ct. 1958 (2013) (Scalia, J. dissenting).

⁴⁵ See Douglas A. Berman, *Some More Thoughtful Thoughts About DNA Collection and Maryland v. King*, SENTENCING LAW AND POLICY (June 6, 2013, 9:53 AM) http://sentencing.typepad.com/sentencing_law_and_policy/2013/06/some-more-thoughts-on-dna-collection-and-maryland-v-king.html.

⁴⁶ Ross, *supra* note 31; Garrett & Murphy, *supra* note 41.

⁴⁷ *Id.* (observing that courts have all upheld the collection of DNA from felons on the ground that convicts forfeit some of their privacy rights).

as a means for preventing and remedying gender-based violence. Just as importantly, the divide between civil rights groups on the one side of this case, and mainstream domestic violence and sexual assault programs on the other is emblematic of a larger crisis facing the anti-domestic violence movement.⁴⁸

B. Domestic Violence Advocacy, Racial Profiling, and “Stop and Frisk”

Studies have demonstrated the adverse consequences attending racial profiling, particularly on communities of color.⁴⁹ The Center on Constitutional Rights examined the ever expanding and aggressive stop-and-frisk police practices, and through a series of interviews documented “widespread civil and human rights abuses, including illegal profiling, improper arrests, inappropriate touching, sexual harassment, humiliation and violence at the hands of police officers.”⁵⁰ The report concluded that “[t]he effects of these abuses can be devastating and often leave behind lasting emotional, psychological, social, and economic harm.”⁵¹

Individuals and communities targeted by stop and frisk practices report that they are “living under siege” in neighborhoods where “police have borrowed from military tactics” as a mode to patrol the streets.⁵² Rather than benefit from police protection, many residents contend that they require protection from the police.⁵³

The nature of police abuse is also often gendered. Women, especially transgender women and sex workers are frequent targets of stop and frisk practices, and often suffer sexual and physical assault by police deploying these tactics.⁵⁴ Notwithstanding the fact that as a result of stop and frisk practices, domestic violence victims within the targeted communities are unable or unwilling to call the police for assistance when they are being battered by an intimate partner, the domestic

⁴⁸ See e.g., Evan Stark, *Insults, Injury, and Injustice: Rethinking State Intervention in Domestic Violence Cases*, 10 VIOLENCE AGAINST WOMEN 1302, 1305 (2004) (noting that domestic violence advocates have been alienated from “potential allies in other facets of the justice struggle”).

⁴⁹ N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK REPORT 2011, 2 (2012) available at http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf; CNTR. FOR CONST. RIGHTS, STOP AND FRISK: THE HUMAN IMPACT (2012) available at <http://stopandfrisk.org/the-human-impact-report.pdf>.

⁵⁰ STOP AND FRISK: THE HUMAN IMPACT, *supra* note 49, at 1.

⁵¹ *Id.*

⁵² *Id.* at 19–20.

⁵³ *Id.* at 20.

⁵⁴ *Id.* at 12; see Hope Lewis, “Culturing” Survival: Afro-Caribbean Migrant Culture and the Human Rights of Women Under Globalization, 93 AM. SOC’Y INT’L L. PROC. 374 (1999).

violence community has yet to fully engage with other civil rights groups to put an end to these unlawful police tactics.

1. Litigation

In March 2012, New York residents and organizations concerned with ongoing abusive police practices filed a class action entitled *Ligon v. City of New York* against New York City.⁵⁵ The suit challenged “Operation Clean Halls” a program that authorized the New York City police department (NYPD) to patrol thousands of private apartment buildings across the city.⁵⁶ Plaintiffs argued that the NYPD engaged in unconstitutional stops, abusive and pretextual questioning, searches, wrongful citations, and unlawful arrest policies.

Operation Clean Halls was implemented in New York buildings where residents were disproportionately Black and Latino. Tenants and their visitors were regularly stopped, interrogated, frisked or fully searched, detained, and arrested upon entering or exiting a building, while checking their mail, or taking out garbage, notwithstanding the lack of any individualized suspicion pertaining to their behavior or presence. The complaint alleged that the New York “stop and frisk” program had “significant disparate impact on Blacks and Latinos in their enjoyment of housing and in their receipt of municipal services connected with housing as compared to whites.”⁵⁷ These policies, the plaintiffs argued, violated the United States and New York Constitutions, the Fair Housing Act, and New York common law.⁵⁸ The suit was successful. A federal court enjoined the city from further implementation of the program, finding, among other points, that the police were “deliberately indifferent to the discriminatory application of stop and frisk.”⁵⁹

Ligon was one of three cases together with *Floyd v. City of New York* and *Davis v. City of New York* that challenged NYPD’s stop and frisk policies and alleged racial profiling through federal court litigation.⁶⁰ The three lawsuits had the support of Communities United for Police Reform (CUPR), a coalition organization that, as observed by the *New York Times*, has “strong ties in communities throughout the city” and

⁵⁵ Complaint at 6, *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013) (No. 12 Civ. 2274).

⁵⁶ *Id.*

⁵⁷ *Id.* at 4.

⁵⁸ *Id.*

⁵⁹ *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013) (No. 12 Civ. 2274).

⁶⁰ See *Floyd v. City of New York*, 283 F.R.D. 153, 159 (S.D.N.Y. 2012); *Davis v. City of New York*, 902 F. Supp.2d 405 (S.D.N.Y.2012).

“successfully reframed the debate over stop-and-frisk policy.”⁶¹ At least twenty-four civil rights organizations comprised CUPR and along with thirty-nine additional organizational supporters, CUPR represented the broad and intersecting concerns of Blacks, Asians, Latino/as, Muslims, LGBTQs, working families fighting for social and economic justice, youth activists, immigrant rights groups, and health workers.⁶² With the exception of an organization called the Turning Point, a community based organization addressing the needs of Muslim women and children, no domestic violence or sexual assault organization had joined CUPR in the litigation effort to end racial profiling practices in the city of New York.

The *Ligon* and *Floyd* cases resulted in a favorable ruling by a federal court judge who found the New York defendants guilty of violating plaintiffs’ Fourth and Fourteenth Amendment rights.⁶³ The judge entered a permanent injunction and appointed an independent monitor to oversee implementation of the ordered reforms to police practices. Notably the court stated that the monitor was required to serve the interests of the stakeholders to the litigation, to work in consultation with the parties to effect the ruling, and to obtain community input, including holding “town hall” type meetings:

community input is perhaps an even more vital part of a sustainable remedy in this case. The communities most affected by the NYPD’s use of “stop and frisk” have a distinct perspective that is highly relevant to crafting effective reforms. No amount of legal or policing expertise can replace a community’s understanding of the likely practical consequences of reforms in terms of both liberty and safety.⁶⁴

In January 2014, New York City’s mayor Bill de Blasio announced that agreement had been reached with plaintiffs’ lawyers and further agreed to forego appeal and stated that the city would implement the court’s ruling in *Ligon* and *Floyd*.⁶⁵

Vincent Warren, executive director of the Center for Constitutional Rights, and lawyer for the plaintiffs in *Floyd* stated, “[t]his is where the

⁶¹ J. David Goodman, *As Critics United, Stalled Battle Against Frisking Tactic Took Off*, N.Y. TIMES, Aug. 13, 2013, at A1.

⁶² *Campaign Members*, COMMUNITIES UNITED FOR POLICE REFORM, <http://changethenypd.org/campaign/intro-members> (last visited May 22, 2015).

⁶³ *Floyd*, 959 F. Supp. 2d at 671; *Ligon*, 925 F. Supp. 2d at 478.

⁶⁴ *Id.* at 686.

⁶⁵ Benjamin Weisner & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES, Jan. 30, 2014, at A1.

real work begins.”⁶⁶ These developments have created an important opportunity for coalition members to influence criminal justice reforms. Civil and human rights associations, community groups, labor organizations, and other allies who have appeared as amici and otherwise demonstrated their support for the challenges to the NYPD’s stop and frisk program the reform process will have the opportunity to shape the reforms and monitor their implementation.⁶⁷ At present, with the exception of Turning Point and its constituents, there is no indication that domestic violence and sexual assault advocates will participate in these important reform efforts. They will stand outside of collective action and thus undermine their own ability to be “catalysts of social change.”⁶⁸

2. Stop and Frisk Legislative Initiatives

In addition to litigation to challenge racist police practices, civil rights groups have engaged in other campaigns designed to combat discriminatory policing. At the federal and municipal level, legislative initiatives have been introduced to prohibit racial profiling and hold the police accountable for constitutional violations.⁶⁹ These proposals are designed to prohibit the use of profiling on the basis of race, ethnicity, national origin or religion by law enforcement agencies.⁷⁰ Such legislative initiatives benefit women in targeted communities who are victimized by racial profiling police practices in general. More specifically they benefit victims of domestic violence who are often unable or unwilling to seek law enforcement protection from agencies that racially profile, even when they are being assaulted by an intimate partner.

a. S. 1038, The Federal End Racial Profiling Act

The End Racial Profiling Act (ERPA) of 2013 seeks to prohibit law enforcement agents from employing racial profiling tools, and would

⁶⁶ *Id.*

⁶⁷ *Timeline: Floyd v. City of New York, Stop and Frisk: The Human Impact*, CNTR. FOR CONST. RIGHTS (July 2012) http://www.ccrjustice.org/files/Floyd_Timeline-20150204.pdf.

⁶⁸ Alan Greig, *Political Connections: Men, Gender, and Violence*, UNITED NATIONS INTERNATIONAL RESEARCH AND TRAINING INSTITUTE FOR THE ADVANCEMENT OF WOMEN (2002) <http://www.menstoppingviolence.org/docs/PartnersInChangepp1-37.pdf> (critiquing the failure of anti-domestic violence programs to contribute to meaningful change).

⁶⁹ *See The Community Safety Act: Legislation to Combat Discriminatory Policing and Hold the NYPD Accountable*, COMMUNITIES UNITED FOR POLICE REFORM, <http://change.thenypd.org/about-community-safety-act> (last visited May 22, 2015) (information on New York City’s Community Safety Act).

⁷⁰ End Racial Profiling Act, S. Res. 1038, 113th Cong. (2013) (enacted).

further authorize both the United States and individuals subjected to racial profiling the right to seek declaratory or injunctive relief.⁷¹ Federal law enforcement agencies would be required to develop appropriate policies and procedures to eliminate such practices.⁷² Governmental entities and law enforcement agencies seeking certain federal grants would be required to certify that they have adopted policies and procedures to eliminate racial profiling.⁷³ ERPA would also authorize the Department of Justice to support the collection of data relating to racial profiling and to issue regulations regarding data compilation for purposes of implementation of the Act.⁷⁴

Civil rights groups have uniformly supported the bill. The Leadership Conference on Civil and Human Rights was one of several groups to organize a campaign to support the federal End Racial Profiling Act of 2011 and served as an umbrella organization for community interests. An estimated sixty civil and human rights organizations signed in support of the Act in 2011, none of which included domestic violence or sexual assault groups.⁷⁵ In 2012, the campaign expanded to more than 120 national, state, and local organizations and included only one sexual assault group: the National Organization of Sisters of Color Ending Sexual Assault (SCESA). Notably, SCESA was formed to “address the multiple layers of discrimination that are faced by Women of Color and Communities of Color.”⁷⁶

In 2013, in the wake of the travesty of the Trayvon Martin murder, the ERPA was once again introduced; the campaign was reinvigorated and included approximately 140 organizations and in addition to SCESA, one additional group focused on youth dating violence joined in support.⁷⁷ No state domestic violence or sexual assault coalitions or other domestic violence program signed on to the campaign in support for ERPA.

⁷¹ Grieg, *supra* note 68.

⁷² End Racial Profiling Act, *supra* note 70.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Letter from The Leadership Conference on Civil and Human Rights, to the United States House of Representatives (Dec. 13, 2011) (Cosponsor the End Racial Profiling Act of 2011 H.R. 3618).

⁷⁶ *Who We Are*, THE NATIONAL ORGANIZATION OF SISTERS OF COLOR ENDING SEXUAL ASSAULT (SCESA), <http://sisterslead.org/who-are-we-oct-2014/> (last visited May 22, 2015) (the stated intention of the organization is to “reclaim our leadership and ensure inclusion of our experiences in systems-wide responses and social change initiatives related to sexual assault”).

⁷⁷ The Leadership Conference, *supra* note 75.

b. The Community Safety Act

In New York City, the CUPR has organized a campaign to support a “landmark police reform legislative package” known as the Community Safety Act (CSA) to prohibit racial profiling and other discriminatory police practices.⁷⁸ The campaign was a success; the law expanded the categories of persons protected from racial profiling to include, notably among other characteristics, gender, gender expression, gender identity, or sexual orientation.⁷⁹ It also established independent oversight of the NYPD.⁸⁰ Community organizing has continued to assure the successful implementation of the legislation.⁸¹

Like the federal ERPA Act, the CSA was unvaryingly supported by civil rights and community groups. At least 120 organizations have endorsed and promoted the legislation. The interests represented are broad by any description and include anti-racist organizations, religious groups, economic justice activists, immigrant support groups, health advocacy organizations, labor entities, housing and homelessness advocates, public defenders, legal aid, and more. Of these organizations, only three are involved with domestic violence-related issues: the Turning Point (focusing on Muslim women and girls), A CALL TO MEN, (focusing on domestic violence related education for men, boys) and Day One (focused on teen violence).⁸² No mainstream domestic violence or sexual assault coalitions added their names to support the legislation.

As others have noted, “[t]he centerpiece of the CSA [was] the creation of an Inspector General to monitor the NYPD, a proposal that shows not only the dire need for independent oversight and police accountability, but also, implicitly, the lack of public faith in the criminal court’s ability and willingness to fulfill that role.”⁸³ These concerns, of course, are relevant to victims of domestic violence who suffer police abuses, including racial profiling, as individuals harmed by intimate partner violence and as members of their community.⁸⁴ Yet, as with the

⁷⁸ *Support the Community Safety Act*, COMMUNITIES UNITED FOR POLICE REFORM, <http://changethenypd.org/sites/default/files/docs/Community%20Safety%20Act%20BASICS%209-2-2013.pdf> (last visited May 22, 2015).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Take Action: The Community Safety Act*, COMMUNITIES UNITED FOR POLICE REFORM, <http://changethenypd.org/take-action-community-safety-act> (last visited May 22, 2015).

⁸² *About the Community Safety Act*, COMMUNITIES UNITED FOR POLICE REFORM, <http://changethenypd.org/about-community-safety-act> (last visited Sep. 7, 2014).

⁸³ Steven Zeidman, *Whither the Criminal Court: Confronting Stops-and-Frisks*, 76 ALB. L. REV. 1182, 1208, n.127 (2013).

⁸⁴ See Alexandra Grant, *Intersectional Discrimination in U Visa Certification Denials: An Irremediable Violation of Equal Protection?* 3 COLUM. J. RACE & L. 253, 262 (2013).

consortium of amici, mainstream domestic violence programs and coalitions appear to have abdicated their obligation to oppose racist criminal justice practices and have foregone the opportunity to participate qua domestic violence entities to reform criminal justice mechanisms.⁸⁵ By leaving the task of eliminating racial profiling to others, they have failed to engage to stop racial profiling under the banner of anti-domestic violence and thereby improve domestic violence outcomes.

III. DISCRIMINATORY DOMESTIC VIOLENCE PROGRAM PRACTICES

A. *Exclusionary Practices; Discriminatory Impact*

Just as law enforcement practices have rendered the criminal justice system unavailable to many victims of domestic violence, so too have domestic violence programs excluded certain individuals from securing access to their services.⁸⁶ Not all victims of domestic violence are

(noting how immigrant women suffer a number of abusive police practices, from racial profiling to refusal to treat domestic violence seriously in the first place); *see also* Radha Vishnuvajjala, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent*, 32 B.C. J.L. & SOC. JUST. 185, 209 (2012) (noting concerns that immigrant victims of domestic violence may be subjected to racial profiling and as a consequence placed in removal proceedings).

⁸⁵ It can be assumed that individuals associated with civil rights groups that are involved in the ERPA campaign do anti-domestic violence work; however, no organizations identified with domestic violence other than as noted above have joined the coalition or campaign.

⁸⁶ Coker, *supra* note 1, at 848–49 (observing that some battered women’s organizations fail to assist women of color, ethnic minorities, and other marginalized women, and often fail to employ diverse staff); SUSAN SCHECTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN’S MOVEMENT, 271–81 (1982) (quoting a White woman who described the racism within the battered women’s movements: “Our idea of including women of color was to send out notices. We never came to the business table as equals. Women of color join us on our terms”); Martinson, *supra* note 11, at 269 (noting the discomfort that many African-American women experience due to the perception that “shelters and institutions established to help battered women are only for the needs of white women.”); Valerie B. et al., *Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence*, 29 FORDHAM URB. L.J. 121, 147 (2001) (describing the inability of many gay, lesbian, and transgender victims to access domestic violence shelters); Dena Hassounah & Nancy Glass, *The Influence of Gender Role Stereotyping on Women’s Experience of Female Same-Sex Intimate Partner Violence*, 14 VIOLENCE AGAINST WOMEN, 310, 318 (2008) (noting the discomfort and alienation experienced by LGBTQ victims in shelters); *Domestic Violence Programs and Women with Disabilities*, FPG CHILD DEVELOPMENT INSTITUTE, May 1, 2004, <http://projects.fpg.unc.edu/~images/pdfs/snapshots/snap15.pdf> (noting that programs failed to sufficiently accommodate the needs of persons with disabilities, choosing, instead to prioritize funding for “more general services”).

afforded equal access to program assistance.⁸⁷ Certainly, resource-starved programs continue to this condition; staff is underpaid and program stability often suffers from the uncertainty of philanthropy-driven budgets. Recent funding cuts, moreover, have resulted in a reduction of services.⁸⁸ But the issues of inadequate services involves more than resources. Discriminatory attitudes within some organizations have made it impossible for many victims to obtain services. Scholars have noted that African-American women face difficulties in obtaining domestic violence resources as a function of racism within the domestic violence movement.⁸⁹ As one scholar has observed, “[m]any domestic violence shelters in this country state that they are ‘colorblind.’ However, the codes of most shelters have been set by and for white women. Therefore, the statement, ‘we treat everyone the same’ in actuality can only mean ‘we treat everyone as though she or he is white.’⁹⁰

Researchers have found that homophobia “has permeated the atmosphere in domestic violence services such as battered women’s shelters to such a degree that some women felt the need to keep their sexual orientation a secret.”⁹¹ LGBTQ victims often report that they feel vulnerable while in domestic violence shelters.⁹² They may be denied access to services on the basis that their presence will be “disruptive.”⁹³ Transgendered victims often have no access to shelters and have expressed concerns that they would be revictimized not only by residents but by staff as well.⁹⁴ Women with disabilities are similarly disinclined to use shelter services because of “the low level of access and awareness of disabled women’s needs within these communities.”⁹⁵ Domestic violence shelters often are not readily accessible to those with physical disabilities and lack the interests and/or the means to accommodate the needs of deaf or speech-impaired individuals.⁹⁶ In one survey in North Carolina, the shelter staff admitted that it prioritized services that would

⁸⁷ Child Development Institute, *supra* note 86.

⁸⁸ MARY KAY, MARY KAY TRUTH ABOUT ABUSE SURVEY REPORT (2012) available at <http://content2.marykayintouch.com/Public/MKACF/Documents/2012survey.pdf>.

⁸⁹ Martinson, *supra* note 11, at 2.

⁹⁰ Shamita Das Dasgupta, *A Framework for Understanding Women’s Use of Nonlethal Violence in Intimate Heterosexual Relationships*, 8 VIOLENCE AGAINST WOMEN 1364, 1379 (2002).

⁹¹ Hassounh & Glass, *supra* note 86, at 318.

⁹² *Id.*

⁹³ Shannon Little, *Challenging Changing Legal Definitions of Family in Same-Sex Domestic Violence*, 19 HASTINGS WOMEN’S L.J. 259 (2008).

⁹⁴ Valerie B. et al., *supra* note 4.

⁹⁵ Marsha Saxton et al., “Bring My Scooter So I Can Leave You”: A Study of Disabled Women Handling Abuse by Personal Assistance Providers, 7 VIOLENCE AGAINST WOMEN 393, 408 (2001).

⁹⁶ Jones, *supra* note 1, at 208.

not be available to women with disabilities because ‘they did not constitute a large proportion of their clients.’⁹⁷ In some circumstances, they may lack access to transportation by which to reach a shelter.⁹⁸

Non-English speakers are frequently disadvantaged and have criticized domestic violence programs for failing to provide linguistic adequate access to services and for the staff’s discriminatory and disrespectful attitudes.⁹⁹ Non-English speakers have been refused services in favor of English-speaking victims based on the belief of shelter staff that “English-speaking women will make better use of their services.”¹⁰⁰ Certain religious groups cannot avail themselves of shelter programs because food purchases and other rules do not provide accommodation for minority groups.¹⁰¹ Others have observed that some shelters invoke cultural differences to justify discriminatory practices, a claim that serves to “erase the racism of agencies and entities that fail to provide appropriate services to battered women by hiring diverse staff who speak relevant languages or translate materials.”¹⁰²

IV. NEED TO REVISE DOMESTIC VIOLENCE CURRICULUM AND EXPAND LEGAL SKILLS

A. *Racism, the Criminal Justice System and the Domestic Violence Curriculum*

The issues addressed above are of significant legal concern and bear directly on the ability of victims of gender-based violence to use the criminal justice system. Short of completely turning away from state remedies, domestic violence advocates must gain more than passing familiarity with the legal issues that bear on unconstitutional criminal justice practices so that they might offer support to civil rights groups addressing these matters.

⁹⁷ Child Development Institute, *supra* note 86.

⁹⁸ See e.g., Vicki Smith, *New State Transportation Plan Fails to Help People With Disabilities*, NC POL’Y WATCH, Feb. 5, 2014, <http://www.ncpolicywatch.com/2014/02/05/new-state-transportation-plan-fails-to-include-people-with-disabilities/>.

⁹⁹ Gina Szeto, *The Asian American Domestic Violence Movement*, in DOMESTIC VIOLENCE LAW 115, 117 (4th ed. 2013) (noting that non-English speaking victims have been assumed to be liars simply because they are misunderstood or unable to communicate with shelter staff).

¹⁰⁰ *Id.*; see also Michelle Decasas, *Protecting Hispanic Women: The Inadequacy Of Domestic Violence Policy*, 24 CHICANO–LATINO L. REV. 56 (2003).

¹⁰¹ Nooria Faizi, *Domestic Violence in the Muslim Community*, 10 TEX. J. OF WOMEN & L. 209 (2001); Stacey A. Guthartz, *Domestic Violence and the Jewish Community* 11 MICH. J. OF GENDER & L. 27 (2004).

¹⁰² Leti Volpp, *On Culture, Difference, and Domestic Violence*, 11 AM. U. J. GENDER SOC. POL’Y & L. 393, 398 (2003).

For teachers of domestic violence law, this implies the need to include readings and transition-to-practice exercises that fall within the realm of Fourth Amendment doctrine and Supreme Court jurisprudence, including search and seizure and privacy concerns, and related civil rights statutes. In order to teach these issues within context, a law teacher might assign as readings the Supreme Court briefs of the parties filed in cases that address the issues of concern to domestic violence victims. Students could select one brief and review those issues that fall outside of the realm of traditional domestic violence law, engage in moot court-style discussions, and tie the constitutional and criminal justice issues to domestic violence concerns.

Domestic violence professors might supplement their own assignments and lectures with guest speakers with expertise in constitutional and civil rights law. Students could be introduced to practicing law sources and other practice guides, which provide regularly updated treatises and forms on civil rights matters. Teachers could stream podcasts of oral arguments before the Supreme Court.

Similarly lawyers practicing domestic violence should incorporate continuing legal education programs that would enable them to engage in or otherwise support litigation or legislative campaigns of the sort described above. They can observe, second-chair, and co-counsel in civil rights matters as a means to developing the skill set necessary to represent the interests of victims of gender-based violence. These skills will also help them to counsel clients who are desirous of engaging the legal system to obtain relief from domestic violence but are unable to make use of legal remedies because of the oppressive nature of the criminal justice system.

These suggestions are offered as a way to consider how best to close the gap between critique and action. They must be further developed through dialogue and debate about how to reframe our understanding of domestic violence law. These recommendations do not imply the supplanting of traditional domestic violence law curricula or the body of domestic violence law as it is presently understood. However, without supplementing students' and lawyer's knowledge about matters that will allow them to participate with other civil rights organizations to challenge discriminatory practices, domestic violence law will be constrained and relegated to a politics that has strayed far from its origins.¹⁰³ To state it otherwise, by expanding the type of legal claims and issues associated with domestic violence law, advocates can reconstruct a socio-legal reality and integrate domestic violence law

¹⁰³ See Deborah M. Weissman, *The Personal Is Political-And Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387, 393 (2007).

within the broader themes of social justice. By redefining the contours of domestic violence law, teachers may also shift from the dominant of domestic violence as one of perpetrator and victim to include a fuller understanding of its structural circumstances.¹⁰⁴ Perhaps most importantly, this approach allows for the possibility that domestic violence clients have meaningful options to make use of the criminal justice system.

B. Domestic Violence Law: Including the Legal Tools to Address Discrimination in Services.

Education and non-legal advocacy would best serve the domestic violence community as a means to obtain compliance with non-discrimination laws applicable to domestic violence programs. Most programs receive federal funding, and as public accommodations are subject to the requirements of federal statutes and regulations that prohibit discrimination based race, national origin, religion, disability, and most recently, sexual orientation.¹⁰⁵ These entities thus have an affirmative obligation to assure equal access to services.

Domestic violence law courses could provide the legal foundation about these legal obligations to enable domestic violence lawyers to advise domestic violence programs and to bring suit as may be necessary to ensure non-discrimination. The curriculum should include class instruction on Title VI of the Civil Rights Act of 1964, including statutory provisions, regulations, relevant Executive Orders¹⁰⁶ the Americans with Disability Act,¹⁰⁷ and their state counterparts. The Department of Justice hosts legal materials related to Title VI obligations¹⁰⁸ and videos that provide a basic overview with examples of

¹⁰⁴ *Id.* at 411–24.

¹⁰⁵ The Civil Rights Act of 1964, 28 C.F.R. § 42.104(b); *see also* Deborah A. Morgan, *Access Denied: Barriers to Remedies Under the Violence Against Women Act for Limited English Proficient Battered Immigrant Women* 54 AM. U. L. REV. 485, 500(2004) (observing that victims denied a challenge to a domestic violence shelter that received federal funding for failing to provide linguistic access and translated materials); Act to Reauthorize the Violence Against Women Act of 1994, Pub. L. No. 113-4 (2013) (The 2013 reauthorization of the Violence Against Women Act recently prohibited discrimination based on sexual orientation).

¹⁰⁶ 42 U.S.C. §§ 2000d-2000d-7 (2006) (The Act authorizes federal agencies to implement Title VI by issuing their own rules and regulations); *see also* Exec. Order No. 13,166, 3 C.F.R. §13166 (2000).

¹⁰⁷ 42 U.S.C. §§ 12101-12213 (2006).

¹⁰⁸ *See Overview of Title VI of the Civil Rights Act of 1964*, U.S. DEP'T OF JUSTICE, July 30, 2014, <http://www.justice.gov/crt/about/cor/coord/titlevi.php>.

compliance concerns.¹⁰⁹ Similarly, the Department of Justice hosts website information and materials on the Americans with Disabilities Act with links to the statute and regulations.¹¹⁰ Other materials set forth ADA applicability and obligations of public and private attorneys.¹¹¹ Students should develop familiarity with federal and state standards regarding linguistic access, and gain practical skills with regard to working with foreign language interpreters.¹¹² They should be cognizant of issues in their localities that deny disabled people access to transportation.¹¹³ Concerns with regard to litigating these issues, notwithstanding, domestic violence advocates are obliged to consider such strategies when shelter programs and other service providers refuse to change their discriminatory practices.¹¹⁴ Litigation practice should be included in the overview of instruction.

The aforementioned course materials are clearly not a complete list of resources with regard to the nondiscrimination obligations of domestic violence programs. They are not meant to subsume the traditional domestic violence curriculum nor will they alone provide sufficient training to produce legal experts in particular civil rights matters. But such a shift begins the process of informing civil rights strategies on behalf of victims of gender-based violence and creates the possibility to end discriminatory practices that deny victims access to publicly funded and otherwise necessary services. Domestic violence lawyers have some obligation to eradicate the obstacles to meaningful legal assistance that have been repeatedly described in the literature, if not in their own lawyer-client meetings. Without efforts to engage in strategies to accomplish those goals, the concern that victims are unable to access services and legal intervention will remain empty rhetoric.

¹⁰⁹ See *Understanding and Abiding by Title VI of the Civil Rights Act of 1964*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/pressroom/videos.php?group=1> (last visited May 22, 2015).

¹¹⁰ See *Technical Assistance on the Americans with Disabilities Act*, ADA.GOV, http://www.ada.gov/2010_regs.htm (last visited May 22, 2015).

¹¹¹ See *Lawyers and Legal Services*, NAT'L ASS'N FOR THE DEAF, <http://www.nad.org/issues/justice/lawyers-and-legal-services> (last visited May 22, 2015).

¹¹² See, e.g., *Language Access Services*, THE NORTH CAROLINA COURT SYSTEM, <http://www.nccourts.org/LanguageAccess/Default.asp> (last visited May 22, 2015).

¹¹³ *Id.*

¹¹⁴ See, e.g., Press Release, Gay & Lesbian Advocates & Defenders, *Gay Domestic Violence Survivor, Denied Reconstructive Surgery, Charges R.O.S.E. Fund with Discrimination* (Oct. 8, 2013); Smith, *supra* note 98 (describing a suit filed against an organization established to help survivors for discrimination in regard to services for a gay man).

V. CONCLUSION

A recent United States Supreme Court case demonstrates the multiple challenges facing the domestic violence movement and the intersecting complexities at issue in the realm of domestic violence law. In *United States v. Castleman*, the Court was asked to interpret a federal law that makes it a crime for people convicted of domestic violence to possess guns.¹¹⁵ At issue in the case was a broad reading of the term “misdemeanor crime of domestic violence.”¹¹⁶ A group of domestic violence advocates filed amicus briefs supporting such a broad reading in an effort to assure that “anybody who has been convicted of a misdemeanor crime of ‘domestic violence’ would be prohibited from possessing a firearm.”¹¹⁷ They noted the abundance of evidence that demonstrates “the extreme—and extremely dangerous—role that firearms play in domestic violence matters.”¹¹⁸ They did not, however, acknowledge the impact such a broad ruling would have on immigrants, including immigrant survivors of domestic violence who are often, albeit wrongfully, convicted of misdemeanor domestic violence crimes and who would face an increased risk of deportation as a result of the recharacterization of misdemeanor domestic violence offenses. Organizations representing immigrant victims of gender-based violence, however, did raise such concerns in their amicus brief.¹¹⁹ These groups argued that such a broad definition “could have profound effects on immigration law” and would “hurt immigrant domestic violence survivors who get swept into the criminal justice system, as well as their family members, and stifle the vital reporting of domestic abuse.”¹²⁰

In a decision described as a “sweeping ruling on domestic violence”¹²¹ the Court concluded that domestic violence encompassed acts “that one might not characterize as ‘violent’ in a nondomestic context, and included ‘seemingly minor acts.’”¹²² However, the Court, in a footnote, expressly declared that such convictions *should not* qualify as domestic violence convictions for immigration purposes.¹²³ Experts following the case attribute the Court’s attention to the immigration

¹¹⁵ *United States v. Castleman*, 134 S. Ct. 1405 (2014).

¹¹⁶ *Id.* at 1406.

¹¹⁷ Brief for the National Network to End Domestic Violence et al., as Amici Curiae Supporting Petitioner at 3, *United States v. Castleman*, 134 S. Ct. 1405 (2014).

¹¹⁸ *Id.* at 1.

¹¹⁹ Brief for ASISTA Immigration Assistance et al., as Amici Curiae Supporting Respondent at 6, *United States v. Castleman*, 134 S. Ct. 1405 (2014).

¹²⁰ *Id.* at 5.

¹²¹ Adam Liptak, *Sweeping Ruling on Domestic Violence*, N.Y. TIMES, Mar. 27, 2014 at A19.

¹²² *Castleman*, 134 S. Ct. at 1405.

¹²³ *Id.* at 1411, n.4.

consequences to the arguments offered by the immigrant rights organizations.¹²⁴

Castleman reveals the anomalies confronting domestic violence advocates who sought to prohibit gun possession by convicted domestic violence perpetrators. Yet without considering the unintended consequences affecting immigrant women, they risked furthering legal developments that would have prevented such women from seeking legal remedy. Domestic violence advocates must take under consideration these challenges as circumstances will so frequently warrant. That is to say, they must endeavor to contribute to a movement that does not deny the needs and interests of disadvantaged and marginalized women.

Gender violence, and especially violence against women, will not obtain ready mitigation within the context of a criminal justice system where the poor, racial, ethnic, and national minorities are disproportionately targeted as suspected criminals. As Beth Richie has observed, “[m]ost successful movements for social change have relied in part on legal and legislative initiatives, through which laws are changed and public policies are reformed with the goal of bringing the legislative power of the state to force change,” and use these strategies “side-by-side with activist-oriented activities designed to radically change the society and its institutions.”¹²⁵ Much of the domestic violence movement, however, has evolved into a conservative “law-and-order” approaches, principally demands that for expanded law enforcement strategies, increased punishment, and emphasis on individual offenders rather than structural sources of violence.¹²⁶ Attention to remedying institutional inequality, racism, and other disparate government practices have been absent from anti-domestic violence litigation and legislative campaigns.

The consequences of the domestic violence movement’s “reform” strategies has resulted in the isolation of domestic violence groups from grander efforts to transform the carceral state, and discriminatory program services that function as a form of “cultural violence” leaving those excluded “disproportionately vulnerable to abuse.”¹²⁷ The imperative to expand domestic violence law to include legal interventions that challenge discriminatory practices thus should be self-evident. Without a broader understanding and enhanced legal skills by

¹²⁴ National Immigration Project correspondence on file with author.

¹²⁵ RICHIE, *supra* note 1, at 77.

¹²⁶ *Id.* at 88, 97.

¹²⁷ *Id.* at 95–96 (explaining how the failure to attend to the issues affecting marginalized women have contributed to their worsening circumstances); Janette Taylor, *No Resting Place: African American Women at the Crossroads of Violence*, 11 VIOLENCE AGAINST WOMEN 1473, 1480–81 (2005) (describing racist treatment of African-American women by domestic violence service programs).

which to address the abuses of the criminal justice system and discriminatory service providers, poor and marginalized women will continue to be unwilling or unable to seek state-sponsored interventions.