LAW AS A TROJAN HORSE:

UNINTENDED CONSEQUENCES OF RIGHTS-BASED INTERVENTIONS TO SUPPORT BATTERED WOMEN

Renée Römkens†

I. INTRODUCTION

The call to law and legal rights and their concomitant progress narratives figure centrally in late modern society. This pull is particularly characterized by an appeal to law as an instrument to bring about recognition of various social and political problems as civil rights issues. In many respects, domestic violence can be considered the premier civil rights issue in this context. After thirty years of feminist advocacy and politics, a small but historic change has taken place: domestic violence has entered mainstream international and national politics as a matter of legitimate public concern and has become the subject of various legal regulations in the United States, notably the provision of rights to support and protect victims. Domestic violence has been constructed as a respectable legal domain where, both nationally and internationally, substantial lawmaking takes place that reflects interesting political and cultural differences. In the field of

† Visiting Professor at Columbia University, Department of Sociology and Institute for Research on Women and Gender and Associate Professor at Utrecht University, the Netherlands (Dept. of General Social Sciences). Different versions of this paper have been presented at the Annual Law & Society Meeting in Miami, Florida (May 26-29, 2000) and at the Women and the Welfare State Conference at Hebrew University, Jerusalem (June 5-6, 2000). For suggestions and comments on earlier drafts of this paper, I am grateful to Martha Ertman, Katherine Franke, James Jacobs, Holly Maguigan, Martha Mahoney, Linda Mills, Julie Nice, Selma Sevenhuijsen, and Joan Tronto. While working as a Visiting Scholar at New York University's Global Law Program in 2000-2001, I have particularly benefitted from discussions with colleagues at the Center for Research in Crime and Justice at NYU Law School.

1. For the United States, the Violence Against Women Act ("VAWA") is the most recent example of federal regulation. Note that the civil rights remedy it contained has recently been declared unconstitutional in U.S. v. Morrison, 529 U.S. 598 (2000). In his recent essay on changes in the past fifty years in criminal law, Sanford Kaddish views the influence of feminism on criminal law as a "social development to be remembered." Sanford Kaddish, Fifty Years of Criminal Law: An Opinionated Review, 87 CAL. L. REV. 943, 981 (1999). He points in particular to the changes in rape law and in the law of self-defense. Id. at 975-79.

2. International regulation of domestic violence is most notably reflected in the U.N. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (1979) [hereinafter CEDAW]. See also Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. GAOR, 40th Sess., at 213, U.N. Doc. A/RES/40/34 and /36. It is important to bear in mind that there are profound international differences in the translation of this public concern into legal regulation. For example, despite the fact that various West European countries, such as Great Britain, the Netherlands and Germany, started shelters for battered women as early as the United States did and have meanwhile developed a strong shelter movement, the amount and level of civil and/or criminal legal regulation in these countries varies substantially. See Liz Kelly, Renée Römkens & Elizabeth Stanko, Guest Editors' Introduction, 7 VIOLENCE AGAINST WOMEN 727, 729 (2001). Within the European Union, efforts are being undertaken to harmonize future legislation in this area among member countries. Id.

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domestic violence against adult women, for example, the level of both criminal and civil legal regulation in most West European countries is not as widely developed as in the United States (both on the national and state levels). This seems to reflect a general cultural difference in the way law figures much less prominently in European as compared to American culture as the primary device to call upon when resolving or handling social conflicts. Further international comparative research is necessary to gain more insight into this cultural-legal aspect.\textsuperscript{3} It is interesting to note that in Dutch, the expression “American situations” (Amerikaanse toestanden) is commonly used in an unequivocally pejorative sense to indicate America’s cultural preoccupation with issues of liability and the tendency to sue, usually for excessive amounts of monetary compensation, for any form of sustained damage or suffering. From a Dutch (European) perspective, this is generally considered to be an objectionable use of law that reflects the status of (if not obsession with) law in a liberal society as one of the most powerful cultural instruments that can be called upon to serve individual interests under the guise of pursuing legal justice. However, the development toward juridification of the issue of domestic violence inevitably invokes new social and legal disputes, both in civil and criminal law. In particular, the ongoing debate focuses on the questions of whether and how the fact that violence in the home is a matter of public concern translates into an affirmative obligation of the state to protect victims of family violence.\textsuperscript{4} It is interesting to note that from a constitutional law perspective, the plight of the state is usually emphasized within feminist legal debates and the predominant negative liberties approach in the United States has been severely criticized.\textsuperscript{5} From a criminal legal perspective, however, there is a growing acknowledgment among feminist legal scholars that mandatory arrest and prosecution policies

\textsuperscript{3} See, e.g., Susan L. Miller & Rosemary Barberet, \textit{A Cross-cultural Comparison of Social Reform: The Growing Pains of the Battered Women's Movements in Washington, D.C., and Madrid, Spain}, 19 L. & Soc. INQUIRY 923 (1994) (concluding that criminal justice respondents in the United States advocated arrest in conjunction with social services, while in Spain, these respondents were more reluctant to endorse criminal sanctions).

\textsuperscript{4} According to current constitutional legal doctrine in the United States, the state—notably the police—has no affirmative duty to protect women (and children) because the source of harm of such violence is considered private. See DeShaney v. Winnebago County Dep’t of Soc. Serv., 489 U.S. 189, 195-97 (1989) (ruling that the state lacks any affirmative obligation to prevent domestic violence or to protect individuals against it, if the source of harm is private). For a recent critique of this ruling, see G. Kristian Miccio, \textit{Notes from the Underground: Battered Women, the State, and Conceptions of Accountability}, 23 HARV. WOMEN'S L.J., 133, 135 (2000) (“After DeShaney and its progeny, conceptions of state accountability for domestic violence have been eradicated from rights discourse.”). Miccio discusses the consequences of the doctrine of the “special relationship” as it relates to a 1999 California case, Benavidez v. San Jose Police Dept., 71 Cal. App. 4th 853 (1999). In this case, the court ruled that police did not owe the victim a duty of care and did not negligently perform their duties by leaving the victim in her home when injured by violence committed by her boyfriend, despite their violation of San Jose Police Department Order § L2194.40, which gives detailed instructions to provide “all forms of help” to victims of domestic violence.

\textsuperscript{5} Elizabeth Schneider, \textit{The Dialectic of Rights and Politics: Perspectives from the Women's Movement}, 61 N.Y.U. L. REV. 589 (1986). See also G. Kristian Miccio, \textit{With All Due Deliberate Care: Locating the Contours of State Responsibility for Violence Against Mothers in the Age of DeShaney}, 29 COLUM. HUM. RTS. L. REV. 164 (1998) (arguing from a human rights perspective that a state pattern of nonfeasance in domestic violence disputes makes the state as culpable as private actors and that using the public/private dichotomy to defend the absence of an obligation to protect victims creates the impression that the state is morally condoning abuse).
invoke dilemmas and problems that deserve critical attention when developing policies to help protect victims.\footnote{See Linda Mills, \textit{Killing Her Softly: Intimate Abuse and the Violence of State Intervention}, 113 \textit{Harv. L. Rev.} 550 (1999) (arguing that mandatory interventions of the criminal justice system can equally result in imposing "state violence" onto abused women). \textit{See also infra} note 66 on mandatory arrest policy, effectiveness and issues of women's agency.}

Against the background of this discourse on domestic violence and legal rights, and drawing from critical feminist and legal theory, I will focus in this article on the paradoxical, contingent and even contradictory implications of the recognition of rights.\footnote{A large volume of feminist work has documented and theorized the impact of gender, race and class biases in law, notably to the detriment of women. \textit{See generally}, e.g., Kimbrell Crenshaw, \textit{Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color}, in \textit{The Public Nature of Private Violence} 93 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994); \textit{Identities, Politics, and Rights} (Austin Sarat & Thomas R. Kearns eds., 1995); \textit{Tamar Pitch, Limited Responsibilities: Social Movements & Criminal Justice} (John Lea trans., 1995); \textit{The Public Nature of Private Violence} (Martha A. Fineman & Roxanne Mykitiuk eds., 1994); Judith Resnik, \textit{Asking About Gender in Courts}, 21 \textit{J. Women Culture & Soc'y} 952 (1996); Carol Smart, \textit{Feminism and the Power of Law} (1989).}

Once law is invoked, a powerful institution and accompanying discourses are unleashed that often stretch far beyond the instrumental and politically inspired goals that underlie this appeal to law in order to bring about social justice. In practice, legal regulation to support individuals who have suffered domestic violence is a double-edged sword. The law inevitably controls, monitors and potentially punishes, at the same time that it empowers, protects and enhances freedom. The shift of domestic violence into the legal and public policy domain creates a need to establish and define general categories that fit the bureaucratic administrative system, while working with limited budgets to answer the question, "Which victims deserve support?" The invocation of law as a categorizing mechanism to identify rights bearers—through criminal law or welfare law—engages a powerful regulatory mechanism that might be at odds with the emancipatory goals in mind when invoking the law. Contrary to what liberal legal theory suggests, rights are not only "trumps."\footnote{Ronald Dworkin, \textit{Taking Rights Seriously} xi (1977) ("Rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not sufficient justification for denying them what they wish, as individuals to have or to do."), \textit{quoted in Identities, Politics, and Rights}, supra note 7, at 2 n.8.}

In this paper I will explore the flip side of rights as trumps as exemplified by recent developments in creating rights and special provisions for battered women.

Legal rights do not operate in a vacuum where only law rules. The enactment and impact of rights are dependent upon and influenced by the wider political, cultural and social contexts. For a better understanding of the ways in which rights do or do not serve the complex and often contradictory interests of battered women, it is important to situate them in the specific social-cultural and political discursive contexts in which rights operate. Therefore, I will start by presenting two empirical examples of legal and policy regulation to support and/or protect battered women. I have chosen two cases from different countries and legal systems to illustrate empirically how the invocation of law, regardless
of the specific legal or policy regimes they represent, can have not only unintended, but also institutionally subversive consequences.

I will present in Part II an example from American policy and administrative regulation. I will argue that the provision within American welfare law to support battered women, usually referred to as the Family Violence Option, so far seems to be unsuccessful in achieving its aim of providing support to battered women. Based on a discussion of the initial rhetoric surrounding welfare reform in the mid-nineties, I will argue that the Family Violence Option, although intended to exempt battered women with dependent children from some of the severe cutbacks in welfare, was at odds with the socially and politically dominant rhetoric that underlay the general welfare reform—rhetoric that stigmatizes battered women. Not surprisingly, this underlying contradiction is revealed in a failure in the implementation of the legal-administrative provision. I will analyze data from a recent study on the use of the Family Violence Option in New York City that documents how the majority of battered mothers on welfare are excluded from support. In Part III, I will present a case from the criminal justice domain about a program developed to respond more effectively to victims of domestic violence and stalking in the Netherlands. I will show how the implementation of the program manifests a shifting of priorities from protection of the victim to prosecution of the offender. In the end, this means that the majority of victims are effectively excluded from entering the program.

In Part IV I will reflect on several questions: What is problematic about rights? What happens if we create a special category of women—in this case, battered women—based upon current or past harms? What cultural notions underlie our system of legal categorizing? Despite the fact that both examples come from very different regulatory regimes and are initial studies that deserve to be replicated and/or updated, they provide unique and valuable information on the impact and limited effectiveness of creating specific provisions for groups of women. I will reflect upon how the cases can further our theoretical understanding of how law operates as a regulatory device that evokes not only unforeseen and contradictory, but also self-defeating, consequences. These cases illustrate the regulatory work of law and the social and cultural categories it builds upon, which the law subsequently transforms and reifies into legal identities. It is not my intention to take a position for or against law as a strategic instrument. Rather, it is my goal to critically analyze whether legal regulations and legal rights work the way we want them to, and to assess how they work within different regulatory regimes that could illuminate the unintended effects of law. As I will show, legal regulation excludes many battered women from protection or support precisely at the moment when it announces its desire to support and protect them through inclusion in law.
II. THE AMERICAN CASE: FAILURE OF THE FAMILY VIOLENCE OPTION IN WELFARE REFORM

A. Welfare Reform, Domestic Violence and the Rhetoric of Responsibility

The relationship between welfare and domestic violence has only gradually become the subject of critical attention, particularly in the United States, within the context of the mid-1990s welfare reforms. Given the prevalence, nature and consequences of domestic abuse, chronic violence can substantially increase the chances that its victims—mostly women—will end up in poverty. More generally, poverty is a highly racialized and gendered problem, in that it affects Black and Latina women much more than white women. There are various links between domestic violence and welfare need. A woman may divorce and subsequently face daunting impediments to finding employment, such as a lack of childcare providers. Alternatively, a woman may go on welfare in order to be financially able to leave her abuser but may be unable to leave welfare because her abuser sabotages her attempts to pursue education, training or employment. She may experience difficulties at work, lose her job or drop out of school due to the controlling, abusive and harassing behavior of her ex-spouse.

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9. See Jody Raphael, Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency, 19 HARV. WOMEN'S L.J. 201, 208 (1996) (arguing that "[b]ecause domestic violence experts have been historically disconnected from feminist welfare policy analysts and academics, the issue of domestic violence has failed to inform the policy debates about welfare"); Peter Margulies, Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection and Voice, 63 GEO. WASH. L. REV. 1071, 1071 (1995) (noting that "traditional poverty scholars have ignored how domestic violence exacerbates poverty and causes homelessness. Rather than integrating domestic violence issues into a richer conception of poverty law, traditional scholars have marginalized domestic violence into the gendered ghetto of family law and the exotica of criminal law defenses."); see, e.g., ANNE MARIE CAMMISSA, FROM RHETORIC TO REFORM? WELFARE POLICY IN AMERICAN POLITICS (1998). While providing an excellent perspective on the general political and historical developments animating American welfare policy, Cammissa makes no mention at all of specific provisions in the welfare reform for battered women or women in general. This failure to address the gendered impact of welfare is interesting given the dearth of socio-historical research that has documented how welfare is crucial in the social support and regulation of women's lives in particular. See MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT (1996); LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935 (1994); WOMEN, THE STATE, AND WELFARE (Linda Gordon ed., 1990). For an excellent contribution on the implications of recent developments in welfare in the United States, particularly regarding issues of domestic violence in relation to welfare, see BATTERED WOMEN, CHILDREN AND WELFARE REFORM: THE TIES THAT BIND (Ruth A. Brandwein ed., 1999).


11. Susan L. Thomas, "Ending Welfare as We Know It," or Farewell to the Rights of Women on Welfare? A Constitutional and Human Rights Analysis of the Personal Responsibility Act, 78 U. DET. MERCY L. REV. 179, 183 (2001) (quoting 1997 U.S. Census Bureau data, she reiterates that poverty is a woman's problem; 95% of welfare recipients in the United States are women. Poverty is also racially skewed: Black female heads of a household have higher poverty rates than white women, 39.8% vs. 27.7% respectively).


estimates indicate that between fourteen and thirty-two percent of welfare recipients in the United States are abused by their current partners.\textsuperscript{14}

Drastic welfare reforms in 1996 in the United States—under the ominous name of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (hereinafter PRA)—instituted major cutbacks and brought “an end to welfare as we knew it.”\textsuperscript{15} Some of the major changes include the five-year limit on receiving benefit, the requirement to secure paid employment after two years (“from welfare to work”),\textsuperscript{16} and the tougher child-support requirements. These changes imply severe limits on available resources for welfare and particularly affect the most vulnerable social groups in society—notably battered and single women with children.\textsuperscript{17} To understand how this reform affects battered women, it is important to remember that the political debates justifying welfare reform were characterized by a highly moralistic rhetoric of personal responsibility for sustaining oneself and one’s children. This easily paved the way for a rhetoric of individual failure, blame and stigmatization of those in need of public support in times of increasing job-insecurity and the basic uncertainty flowing therefrom.\textsuperscript{18}

Joan Tronto has pointed out how the debates surrounding American welfare reform generally deploy the standpoint of work ethic.\textsuperscript{19} Among other things, the work ethic assumes a simple and direct relationship between effort and desert and uses a tautological account of desert and success: those who work hard earn a lot; those who are poor are lazy and do not work hard enough. In its “methodological individualism” the work ethic underlying American welfare reform reduces all complex social and political issues into simple and straightforward issues of desert with highly moral overtones: those who work will be successful and deserve good, those who do not work are the poor and lazy failures. It is this rhetoric of success (no matter how elusive that turns out to be for most of those who work hard) and failure that is a recurring theme in the

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\item\textsuperscript{14} Marcellene E. Hearn, Now Legal Def. & Educ. Fund, New York City’s Failure to Implement the Family Violence Option 12 (2000) (citing Raphael & Tolman, supra note 10); see also Raphael, supra note 9, at 205. As these figures relate to women with a partner, these percentages do not include the women who ended up on welfare due to divorce from an abusive partner.
\item\textsuperscript{15} With this wide-ranging and politically charged terminology, President Clinton in 1992 announced plans to change existing American welfare laws. Cammissa, supra note 9, at 63-93.
\item\textsuperscript{16} Note that in this political rhetoric, domestic work, care providing and/or child rearing work is not considered “work.” Only paid work is considered to be real work.
\item\textsuperscript{17} See Wendy Pollack, Twice Victimized—Domestic Violence and Welfare Reform, 30 Clearinghouse Rev. 329 (1996).
\item\textsuperscript{18} See Zygmunt Bauman, In Search of Politics 5 (1999). Bauman recently argued that “uncertainty, insecurity and unsafety” are “the most sinister and painful of contemporary troubles.” Id. In particular, he talks about economic insecurity and uncertainty as a consequence of the casualization of work and the decrease of employment that prevents an increasing number of people from gaining access to a structural and secure income to sustain themselves. Id. at 9-58. He strongly criticizes the welfare-to-work program because of the short term and generally low qualified jobs people end up in. This program “leads from lesser to greater insecurity.” Id. at 180. He makes a case for a basic income as a human rights issue: “(T)he right to stay alive which precedes and conditions all choice is the inalienable property of all human beings, not something to be earned.” Id. at 181.
\item\textsuperscript{19} See Joan Tronto, What’s Wrong With the Work Ethic? (1997) (unpublished manuscript) (on file with author). See generally Max Weber, The Protestant Ethic and the Spirit of Capitalism (1930) (pointing to the profound connection between Calvinist work ethos as a pre-condition for the explosive economic growth and the development of Western capitalism in the nineteenth and early twentieth centuries).
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welfare debate. "[It] posits welfare recipients as defective citizens, and then passing judgment on which defects are legitimate and which ones are not, we give ourselves license not to listen to welfare recipients themselves but to pass judgement on them based on whatever little information we may have." 20 Martha Fineman observed quite poignantly that we all live subsidized lives, whether the subsidy comes from government in the form of direct assistance to poor families or indirectly in the form of tax exemptions: "The question is why we stigmatize some subsidies, but not others." 21 Several critics of the PRA pointed out that welfare reform induced a rhetoric of irresponsibility and in so doing provided the narrative that allows the association between dependency on welfare with illegal behavior. Poverty was re-framed as more of a moral than an economic problem. 22

B The Family Violence Option to Support Battered Women on Welfare

In the debates leading up to the welfare reform, there was a growing awareness, fueled by emerging research, on the relationship between domestic violence and poverty. 23 It became obvious that the welfare reform as described in the aforementioned requirements would severely impact battered women with dependent children. 24 Although the PRA did provide a general "hardship exemption," a special amendment was introduced to address the special hurdles, related to income and safety issues, that battered women face in successfully moving from welfare to work. The 104th American Congress eventually unanimously adopted an amendment to the PRA called the Family Violence Option (hereinafter FVO), that allowed states to provide flexible waivers to exempt battered women from certain requirements of the bill. 25

20. Id. at 11.
22. For a recent contribution to the debate that explicitly addresses the gender and racialized dimensions of this reformulation process, see Lisa A. Crooms, The Mythical, Magical "Underclass": Constructing Poverty in Race and Gender, Making the Public Private and the Private Public. 5 J. GENDER RACE & JUST. 87, 91 (2001) (providing an analysis of how the legal welfare reform privatizes public poverty, which permits poverty to be cast as a private matter caused by individual irresponsibility and immorality).
23. The various reports from the Taylor Institute, notably from Jody Raphael, have been crucial in this respect. See Wendy Pollack & Martha F. Davis, The Family Violence Option of the Personal Responsibility and Work Opportunity Act of 1996: Interpretation and Implementation, CLEARINGHOUS Rev., 1079-1100 (1997). See also Richmond, supra note 10, at 579.
25. According to Pollack and Davis, the fact that a special provision for battered women was created is the result of successful cooperation of "women's rights, welfare and domestic violence advocates and intelligent legislators." Pollack & Davis, supra note 23, at 1080. The authors note that advocates "consider the creation of separate state-funded programs for other populations of public assistance recipients" who cannot comply with PRA requirements, such as a head of household with a disability who is not eligible for Supplemental Security Income or people who must provide care to a disabled child.
The FVO enables states to temporarily waive the work requirement, or to extend the period during which battered women can receive welfare when the requirements would unfairly penalize them or put them or their families at risk of further harm. It also enables them to waive the work requirements or other criteria if they would make it more difficult for the spouse to leave the abusive situation.\(^{26}\) The FVO has been adopted by forty-one states.\(^{27}\) In order to identify the women in need of special support through the FVO, the FVO requires that the agency administering welfare screen and provide referrals to victims of domestic violence. This creates an affirmative obligation to notify every welfare applicant of the availability of domestic violence services and the procedure for obtaining a protective order, to screen every welfare applicant or recipient for domestic violence, and to refer anyone who identifies herself in writing as a victim of domestic violence to a specialized domestic violence liaison at the welfare agency, who will subsequently handle the case to see whether a waiver is appropriate and meets the requirements for a federally recognized good cause domestic violence waiver.\(^{28}\) After referral takes place, a specialized domestic violence liaison is responsible for assessing the applicant’s credibility, before deciding about the type of appropriate waiver. In this process, the law states that, at a minimum, the liaison officer has to get a sworn statement from the victim alleging the abuse. In addition, other documentation of the abuse of a legal or social nature, such as protective orders, hospital records, and letters from social service providers, can be used to establish credibility.\(^{29}\) On paper, the law seems to support welfare recipients who are victims of domestic violence, presenting them as deserving special support.

In the spring of 2000, a research report was released analyzing the way this law has been implemented in New York City. It revealed that the City of New York failed quite dramatically to meet any of the mentioned legal requirements and in many instances violates state law. In summary:

No systematic notification of services takes place. A majority of applicants and recipients that were interviewed for the New York study were not informed at all about any domestic violence services or of the waivers available according to the FVO.

There is no systematic screening of potential victims of domestic abuse. The majority of applicants and recipients of welfare were not questioned at all about any experiences with domestic violence.

No systematic referrals take place. Of applicants and recipients who were screened and said in writing that they were experiencing domestic violence, only


\(^{27}\) See JODY RAPHAEL & SHEILA HAENNICKE, KEEPING BATTERED WOMEN SAFE THROUGH THE WELFARE TO WORK JOURNEY: HOW ARE WE DOING? A REPORT ON THE IMPLEMENTATION OF POLICIES FOR BATTERED WOMEN IN STATE TEMPORARY ASSISTANCE FOR NEEDY FAMILY PROGRAMS (1999), quoted in HEARN, supra note 14, at 4.

\(^{28}\) See HEARN, supra note 14, at 5.

\(^{29}\) N.Y. COMP. CODES R. & REGS. tit. 18, § 351.2 (1) (2001). Finally, a waiver must contain a services plan to count as "good cause waiver" that meets federal legal standards. See HEARN, supra note 14, at 8.
half were referred to a domestic violence liaison officer. Of those who orally presented themselves as victims, not one received an appropriate referral.30

In some cases where the applicant presented the caseworker with evidence of domestic violence, such as an order of protection, the applicant was actively denied a special referral. The caseworker thought there was no longer any danger since she did not live with the batterer anymore. The report clearly indicates that many caseworkers lacked any knowledge of domestic violence, and that domestic violence is not considered a serious issue to take into consideration. In New York City, between 25,000 and 57,600 welfare recipients were estimated to be eligible to meet with a domestic violence liaison officer in 1999. Only 3,023 actually did so. Of those, only about one-third (thirty-six percent) obtained any type of waiver (mostly child support waivers or a partial employment waiver). The domestic violence liaison officers attributed this low referral rate to the non-specialized caseworkers' "lack of knowledge" and lack of "proper training" regarding their legal obligation.

Addressing a conference in 1998, Jason Turner, one of the welfare agency's commissioners in charge of implementing the FVO, urged caution in its implementation. He advised "not to let domestic violence inadvertently become a designation which permits individuals to not take responsibility for their lives." Domestic violence should never become "an exemption from obligation."31 It seems from the empirical data on the administration of the FVO that this advice has been taken to heart by the welfare agencies.

C Family Violence Option: From Support to Exclusion

These data tell an old and familiar story: the impact of any law depends upon its implementation in day-to-day practice, as well as on its political support, or lack thereof.32 Various factors influence its success, including available expertise
and material support. The use of the FVO shows what some critics predicted from the very start: without training for the appropriate people within the welfare agencies, the implementation of the provision is doomed to fail.\textsuperscript{33} Furthermore, the lack of substantial supplemental funding remains one of the major obstacles.\textsuperscript{34} Given the shift toward more punitive welfare regulations in the United States, and the preexisting bureaucratic nature of welfare agencies that in the nineties became structurally understaffed, the already limited willingness and ability of these agencies to support the people receiving or applying for welfare benefits became all the more exaggerated.\textsuperscript{35}

It is interesting to note the development in recent policies regarding financial support for social and therapeutic services in the field of domestic violence. Under the Family Violence Prevention and Service Act, states are provided assistance in order to increase public awareness about family violence and to provide immediate shelter and related assistance to victims of family violence. The Act also provides for technical assistance and training related to family violence programs. This does not, however, cover training of caseworkers in welfare agencies.

A closer look reveals that there is also a gendered dynamic that illuminates why the implementation of a provision designed to support battered women became an opportunity to punish in practice. First, the work ethic underlying the welfare reform is deeply gendered and facilitates the onset of an "othering" dynamic toward welfare recipients, women, and people of color.\textsuperscript{36} In its standard of economic success, the traditional work ethic excludes all unpaid labor, including the care work that is done at home by women\textsuperscript{37} or by highly underpaid

\textsuperscript{33} See also Elizabeth Watson et al., \textit{Reports of Regional Activism}, 7 GEO. J. ON POVERTY L. & POL'Y 231, 232 (2000) (citing warnings from workers and advocates in the field of welfare reform, that the FVO becomes meaningless if caseworkers do not know of this law, or do not know how to apply it). The authors stress the importance of training caseworkers to ask their clients about domestic violence and to respond usefully to a client who is abused.

\textsuperscript{34} See Howell, supra note 24, at 149 (noting that the Welfare Act actually provides a financial disincentive because states may only grant the exception to twenty percent of families on public assistance). Given that the percentage of abused women among welfare recipients is most probably higher than 20%, this implies that the FVO excludes a substantial number of women from the promised support. See RAPHAEL & TOLMAN, supra note 10; Howell, supra note 24, at 149. Furthermore, Howell notes that many women will not come forward with their experiences of abuse out of shame and fear of retaliation. \textit{Id.}, at 143-45, 149.


\textsuperscript{35} The quality of service provided to the public by the Social Security Administration has deteriorated in recent years, according to recent reports of the Federal Social Security Advisory Board. "The number of Social Security employees has dropped 22 percent in the last 15 years, to 65,048, from 83,505 in 1985. But the number of beneficiaries in programs run by Social Security increased by 26 percent in those years, to 51.7 million, from 41.1 million." Robert Pear, \textit{Federal Panel Warns Bush of Social Security Problems}, N.Y. TIMES, Feb. 19, 2001, at A11.


\textsuperscript{37} See Fineman, supra note 21, at 305-06.
(mostly female and often minority) domestic servants. Through their unpaid or underpaid, and thus undervalued care work, with its concomitant positions of powerlessness and lack of privilege, those who perform this work easily become essentially “different.” The structural obstacles to getting or holding a paid job on top of domestic care-taking and child-rearing responsibilities are constructed as individual problems of defective citizens. This rhetoric creates a narrative within which the welfare recipient figures as the “other” who is the one to be blamed.\(^{38}\) Within American welfare reform, the divorced or single woman who lives outside heterosexual marriage and the hierarchical family, especially if she is a racial or ethnic minority, is treated as a social problem in need of regulation because she does not fit within the mythical, idealized marriage and nuclear family in our society.\(^{39}\)

Subsequently, the battered woman has become particularly vulnerable to this stigmatizing othering mechanism because the abused woman who does not leave is in the context of welfare law a defective citizen par excellence. In dealing with domestic violence, the obsession of various professional disciplines with the idea of leaving the abusive relationship, disregarding all the social-economic and psychological complexities at stake, is striking.\(^{40}\) There is abundant research illustrating how leaving a violent relationship is an outcome of a long trajectory, complicated by myriad struggles related to systemic social and economic obstacles and by psychological limitations due to the severe consequences of chronic trauma that most abused women have experienced.\(^{41}\) Furthermore, leaving the relationship is the most dangerous period in which she runs the greatest risk of being killed.\(^{42}\) All this is widely known; in fact, it formed the basis for the FVO provision to support battered women on welfare. But interestingly, this social scientific and clinical knowledge seems not to have had any substantial influence on policymakers or administrators charged with implementing the FVO. This is another example of the general and often

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38. Tronto, supra note 19, at 9.
39. Fineman, supra note 21, at 310-11 (underlining the normativity of the family ideology in welfare law); Crooms, supra note 22, at 84-89 (pointing more explicitly to the fact that the PRA imposes a strict heterosexual gender regime and and punishes those women and unmarried mothers who do not conform to that regime and do not perform gender in the correct way). Thomas argues that the PRA is inherently discriminatory in various ways because it is explicitly based on the model of the traditional, heterosexual, two-parent family. She contends that it violates several human rights provisions and several constitutional rights of women, such as the right to make their own decisions about marriage, procreation and parenting. It infringes both the spirit and the letter of women’s human rights declarations as codified in various articles in CEDAW. Supra note 2. Because the PRA will have a disparate impact on Black, Latina and other non-white communities who suffer more from poverty, Thomas believes that the PRA violates the International Convention on the Elimination of All Forms of Racial Discrimination (CEAFRD). Thomas, supra note 11, at 182-85, 200-01.
42. See Mahoney (1992), supra note 40; see also M.I. Wilson & M. Daly, Who Kills Whom in Spouse Killings? On the Exceptional Sex Ratio of Spousal Homicides CRIMINOLOGY 189-215 (1992); M.I. Wilson, & M. Daly, Spousal Homicide Risk and Estrangement, VIOLENCE AND VICTIMS 3-16 (1993).
dramatic gap between science and policy development that subverts the latter.\textsuperscript{43} The battered woman surfaces in this welfare discourse as the one who (at least potentially) is to be blamed—if not for the violence, then certainly for not “taking responsibility” for leaving. This is the new politically correct language to reframe the complex issue of exit from a violent relationship as a matter of individual (ir)responsibility.\textsuperscript{44} In the context of welfare reform, the female victim of domestic violence emerges as a threatening cultural icon of failure: failure of marriage and heterosexual romance, failure to protect her children,\textsuperscript{45} and more importantly failure to take responsibility and leave. Even after she leaves, the battered mother has failed and runs the risk of being punished. By reformulating the issue of not leaving a violent relationship as “not taking responsibility,” battered women, more than any other recipients of welfare, are constructed within the discursive context of welfare reform as undeserving welfare

\textsuperscript{43} Martha Minow, in a critical analysis of the much debated gap between policy makers and social scientists, attributes this gap to the “rejection of social action” by the social sciences and concludes in general terms that there is a loss of “commitment to action and reform.” Martha Minow, Learning from Experience: The Impact of Research about Family Support Programs on Public Policy, 143 U. PA. L. REV. 221, 251 (1994). Although I certainly agree with the author’s observation that policy development is often uninformed by social science, her attribution of the cause to the loss of commitment among the social scientists is contestable. Certainly the assertion that this loss of commitment is due to their “search for validity as an objective methodology” is far from clear—validity is a characteristic of data presented as a result of the use of a method, but can never be a methodology. Id. at 252. More importantly it simplifies the socio-economic, cultural, political, and often highly gendered power dynamics at stake that influence which scientific knowledge is taken into consideration in the decision making process that underlies policy development. The FVO case in this article is clearly an example of the minimization and ignorance of abuse of women, if not the arrogance of policy makers in the face of overwhelming data that point in the opposite direction.

\textsuperscript{44} See Crooms, supra note 22.

\textsuperscript{45} Regardless of any actions that battered mothers may have taken to protect their children, they can be found guilty of neglect or abuse under a strict liability standard, because of their “failure to protect” their children against the harm that results from exposure to domestic violence. Most recently even women who had left their abusers but had admitted to the social workers that they had been beaten while pregnant, were punished. Their newborn children were removed after birth because of the mother’s failure to protect them. See Rachel Roth, Adding Insult to Injury, at http://www.salon.com/mwt/feature/2000/09/14/battered_mothers/print.html (Sept. 14, 2000). Amy R. Melner concludes that there is a “lack of empathy” apparent in the treatment of abused mothers in the judicial system. Women may face criminal or civil liability, they may lose custody for their failure to protect newborn children were removed after birth because of the mother’s failure to protect them.

Since 1996, the New York State Legislature has attempted to afford additional protection to domestic violence victims and their children by mandating consideration of domestic violence when determining the best interests of the child in custody and visitation cases. Susser argues that this new law “is clearly meant to impose restrictions on visitation and custody for one parent who has been found to have committed violence against the other parent” and reports that in practice the legislative findings meant to help battered mothers in custody disputes, are used by courts and child protective officials against them in accusing them of neglect. Kim Susser, Weighing the Domestic Violence Factor in Custody Cases: Tipping the Scales in Favor of Protecting Victims and Their Children. FORDHAM URB. L. J., 875, 878 (2000). Schermitzki argues that the label of “failure to protect” reflects the double standard society uses for mothers and fathers in child custody cases. Schermitzki argues that the label of “failure to protect” reflects the double standard society uses for mothers and fathers in child custody cases. Schermitzki argues that the label of “failure to protect” reflects the double standard society uses for mothers and fathers in child custody cases.
recipients, precisely at the moment they have entered as a social and legal category to be specifically “protected” or “supported.”

When the FVO was enacted in 1996, it was strongly critiqued for the way it represented women. Martha Mahoney, though certainly not opposing this exception, criticized the problematic images that underlie this provision. She indicated that it might lead to a particularly unhelpful competition among women based on the violence they experienced and the status that it would give them. She feared a development in which feminists would try to emphasize battering experiences. In the end, Mahoney argued, the “battered woman” would end up as a more “worthy” recipient of special support, which would implicitly create an image that might be detrimental to the “regular” and “less worthy” welfare mother who was supposed to be able to get a job or leave the unhappy marriage since she was not battered.\footnote{Martha Mahoney, Images of Battered Women, Presentation at the Law & Society Meeting in Glasgow (July 1996); e-mail from Martha Mahoney (Oct. 11, 2000) (on file with author).}

The portrayal of abused women could lead to a divide-and-conquer strategy: abused women would become the new deserving recipients of less harmful welfare policies, and implicitly all others would be undeserving recipients for whom the punitive new directions in welfare reform are acceptable, so the argument went. This has not happened. On the contrary, creating two symbolic and paradigmatic categories of welfare recipients—the single or divorced mother as the “regular” welfare client and the battered woman who deserves an exception—has in fact amplified the marginalization of the battered woman and has undermined her entitlement to welfare until she proves that she is a responsible woman in the eyes of the law. American discourse on the right to welfare is essentially connected to a discourse on responsibilities (as the new euphemism for obligations). It is precisely this convergence of the discourse of responsibilities with the discourse on violence and exit from abusive relationships that seems to have made the battered woman into a less deserving welfare recipient.

The FVO’s failure illustrates how the granting of a legal provision through an appeal for group-based rights has not brought the kind of support that the FVO amendment to the welfare law intended. The very creation of special rights for battered women created an opportunity for the offensive rhetoric of stigmatization and inaugurated a policy that in fact led to the exclusion of the majority of battered women on welfare and in need of special assistance who were the initial target of the provision.\footnote{Maurice Goldman gives a recent example of how the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the “Welfare Reform Act”) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) particularly exclude battered immigrant women from support they were initially provided with under the Violence Against Women Act of 1994. Both the Welfare Reform Act and IIRIRA prevent immigrant women from collecting any federal aid unless they fall within specific exceptions. Because of these statutes, an abused immigrant who leaves her spouse will be homeless and without economic support. Maurice Goldman, The Violence Against Women Act: Meeting its Goal in Protecting Battered Immigrant Women, 37 FAM. & CONCIL. CTS. REV. 375 (1999).}
A. AWARE: Electronic Alarms to Protect Victims of Stalking

As an attempt to better protect battered women who are stalked by their former partners, technological developments in the private commercial domain in electronic alarm systems have found their way into the criminal justice system, both in the United States and in Europe. In this section I will focus on a project called AWARE (Abused Women’s Active Response Emergency). In this project, the home of the woman—who no longer lives with the abuser—is secured by an electronic alarm system that she can set off at home by pushing a button when her ex-partner approaches and/or threatens her. The woman also receives a remote pendant that she can carry with her, and it enables her to set off the alarm up to 300 feet around the house, in cases the abuser stalks her in the street around the victim’s house. The alarm is connected to the security company who immediately inform the police upon receiving the alarm. Once the police are informed, the policy is to immediately send a patrol car to the woman’s house in order to arrest the perpetrator. In 1991, the first AWARE project started in Winnipeg, Canada. As of 2001, AWARE has been implemented in 160 cities in the United States. So far, no empirical research has been done in the United States nor in Canada into the effectiveness of the AWARE program. In the Netherlands the first pilot project was launched in 1998 by the Rotterdam police in conjunction with various social services and a women’s health care center. During the project’s pilot stage, we conducted an exploratory in-depth study into the system’s implementation. Given that this study provides the only and most recent data available internationally, in this part I will present some core data from that study. Although generalizations must be limited, such data nonetheless can provide insights into certain problems that are indicative of wider underlying issues concerning the invocation of the criminal legal system.

48. See also DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001) (pointing out that increasing cooperation between the private sector and criminal justice system is one of the ways in which the rapidly developing culture of crime control over the past decades manifests itself).

49. See ADT, AWARE PROGRAM LOCATIONS, at http://www.adt.com/divisions/residential/in_your_community/aware_locations.cfm (last visited Nov. 13, 2001). In 1995, a comparable project started for the first time in Europe, in Great Britain (where the project is called Linkline) and two years later in the Netherlands. See RENÉE RÖMKENS & SYLVIA MASTENBROEK, DAN HOOR JE DE VIJSEEN ADEMEN: OVER BELAGING EN BEDREIGING VAN VROUWEN DOOR HUN EX-PARTNER EN DE BEVEILIGING DOOR HET AWARE-SYSTEEM [THEN YOU HEAR FISH BREATHE: ON STALKING OF WOMEN BY THEIR EX-PARTNERS AND PROTECTION THROUGH THE AWARE-SYSTEM] 10-11 (1999). These projects implement the electronic alarm system in all kinds of variations. What varies in particular are the conditions for the alarm connection, who wears the pendant, the period of connection and the degree to which the multi-disciplinary approach has been implemented in order to both support and protect the women and to criminally sanction and treat the perpetrator.

50. RÖMKENS & MASTENBROEK (1999), supra note 49. See also Renée Römken, De Paradox van Bescherming en Bestrafting [The Paradox of Punishment and Protection], NEMESIS 79 (2000).

51. The author is currently engaged in research into the implementation of the AWARE-program in the Domestic Violence Bureau of the District Attorney's Office in King's County, New York. The project is in its earliest stage of data collection. First results will be published in 2002.
to resolve social problems. Here I will focus on essential aspects of the program that are comparable to the way the system is implemented in the United States. I will indicate where the data are specifically relevant within the Dutch criminal legal system (as in the inquisitorial system, without a jury, unlike the American adversarial jury system).

The basic aim of the AWARE project is to provide protection to victims through swift intervention focused on arresting and prosecuting the perpetrators.\textsuperscript{52} In order for women to be eligible for the alarm system, the Dutch Selection Committee agreed to use what they labeled as “objective and independent criteria”: first, the woman is de facto separated from her partner and maintains no voluntary contact with him; second, she has a restraining or civil protection order; third, there is a police record available indicating earlier assaults; and fourth, the woman is willing to follow through with a criminal prosecution against her ex-partner upon his arrest.\textsuperscript{53} These four qualifications show that legal criteria or information from the police were the defining indicators for the seriousness of the violence and stalking. One of the reasons for the Committee to be very strict in selecting which women were provided with the electronic alarm system was what they considered to be the severe character of the criminal justice response (arrest and prosecution).\textsuperscript{54} It should be handled carefully to avoid the possibility that women could use the system as a means of retaliation, according to the Committee. The Committee emphasized that it was reluctant to adopt liberal criteria because it feared that women might use the alarm to have ex-partners arrested with a push of the button.

Given these concerns and what they reflect about the expected vengeful motivations attributed to the women, it is interesting to see how the system was distributed (or not) and how it was used by the women in day-to-day practice. During the first half-year of the project, 148 women inquired about the system. Eventually thirty-five women applied for the protection system, expecting that they would meet the selection criteria. All thirty-five women had a history of very severe abuse with repeated injuries that sometimes required hospital treatment.\textsuperscript{55} The selection procedure turned out to be highly exclusionary in its

\textsuperscript{52} A parallel aim is to offer counseling and social services to the victim and to provide treatment to the perpetrator.

\textsuperscript{53} In the United States the security company that installs the system (ADT) suggests similar criteria for implementing the AWARE program. Most importantly, there must be an imminent danger of attack, the woman must have obtained a restraining order, and she must be willing to prosecute and testify against the batterer. ADT, THE ADT AWARE® PROGRAM: PROTECTION FOR ABUSED WOMEN, at http://www.adt.com/divisions/residential/in_your_community/aware.cfm (March 17, 2000).

\textsuperscript{54} See ROMKENS & MASTENBROEK, supra note 49, at 29-38.

\textsuperscript{55} On average, the women in this study had been divorced for three years. The stalking behavior they were suffering from on and off during most of that time varied from following the woman in the street; violently attacking her in a public space; harassing her and her family members at home or at work with phone calls, letters, or threats to her and the children; or damaging property (car, garden, house), often at night. Two-thirds of the women had fled to a shelter at least once. One in six women moved permanently to escape the stalking, though in most cases the abuser tracked down her new address. This group of applicants without exception experienced severe, chronic traumatization, which caused numerous psychosomatic complaints and depressive symptoms. Id, at 108-116.
effect. Of the thirty-five applicants, only one in four women received the alarm system.\textsuperscript{56} Two legal criteria turned out to be the biggest obstacles.

First, obtaining the required civil protection order created a high threshold.\textsuperscript{57} One in four women withdrew their applications because they were too traumatized and were psychologically not in a condition to deal with all the efforts and paperwork it would take to start the legal procedures to get a protection or restraining order. Some of these women went into hiding while their applications were pending. Further, one in four applicants eventually did not dare to apply for a civil protection order out of fear of retaliation (given that the system would not yet be in place at the time the woman applied for a civil protection order).\textsuperscript{58} Women's reluctance to apply for civil protection orders was read as a signal that their ex-partner's behavior was not serious. The underlying notion is that if the violence is really severe, any woman would always want a legal protection order. Calling upon the law becomes then the self-evidentiary proof of seriousness, unlike the victim's own narrative and her perceptions of estimated risks.\textsuperscript{59} Of all applicants who eventually did register for protection orders, one in seven was rejected or suspended. There was a great disparity between civil judges' decisions as to when to grant civil protection orders.\textsuperscript{60} These data clearly put the assumed objectivity and neutrality of judges' decisions in a different light.\textsuperscript{61} An application for a civil protection order is not only a risky enterprise for some battered and stalked women but is an endeavor with an uncertain outcome.

Second, the requirement to show police records as objective evidence regarding the partner's previous abuse and/or stalking behavior created difficulties. Often, women had not reported to the police for fear of revenge from their ex-partners. Several women indicated that in the past the police had advised them to not report abuse or file a complaint because prosecution was not feasible due to lack of evidence, and therefore filing a complaint would be of no use. This left these women, who eventually refrained from applying for AWARE, without so-called objective legal evidence. Further, the qualification of police

\textsuperscript{56} Id. at 39-56.

\textsuperscript{57} Under Dutch civil law, it is a time-consuming and complicated process to obtain a civil order of protection in domestic violence cases. In this study we found that it usually took at least two months for women to receive a civil protection order, which delayed the connection to the AWARE system and enhanced the safety problems. As of now there are no specific legal provisions in the Netherlands, unlike in many states in the United States, that facilitate the issuance of protection orders in cases of domestic violence. Id. at 43.

\textsuperscript{58} Karla Fischer & Mary Rose, \textit{When "Enough is enough" : Battered Women's Decision-Making Around Court Orders of Protection}, 41 CRIME \& DELINQUENCY 414 (1995).

\textsuperscript{59} Id.


records as more objective than other evidence is questionable, considering the overwhelming data on bias in police records on domestic violence.  

A comparison of the nine cases of women who eventually did get the AWARE alarm system and the twenty-seven women who did not indicated that there were no significant differences in severity of abuse or how recent threats were. One must therefore conclude that the legal criteria for eligibility excluded more severely endangered women in need of protection than it included.

B. A WARE and Legal Exclusionary Dynamics

This mostly unintended exclusionary effect was a direct consequence of the enforcement of legalistic criteria, but was masked by invoking ideological notions regarding the "neutrality" and "objectivity" of these criteria. Information on the abuse provided by the applicant herself or evidenced by non-legal documents—even medical records—was explicitly considered to be more subjective and therefore not only insufficient but also less reliable. This illustrates the ease with which law can endow itself with the mantle of power and situate itself as a producer of a superior kind of knowledge, where concepts like "neutrality" and "objectivity" are taken as flowing self-evidently from the praxis of the legal system. In doing so, law turns out to be an impaired instrument with an inherently limited capacity to validate women's experiences. It comes as no surprise, then, that law excludes many women from the protection it purports to offer.

This exclusionary effect is related to the shift that took place in the implementation of the project—from protecting the victim to prosecuting the perpetrator as the central goal. We might consider this as a highly ironic example of what Reva Siegel has identified as "preservation through transformation" (i.e., the preservation and perpetuation of the privileged status of men that can be observed in several legal reforms in the United States in the area of domestic violence). This shift to prioritizing prosecution is an unintended consequence of providing support to victims within the criminal legal context that is by definition primarily oriented toward the perpetrator. If criminal law defines the conditions under which protection to the victim is offered, it will do so on its terms. For police and prosecutors, numbers of arrests and convictions count as material proof of their success. They measure their production by arrest and conviction rates, not by a victim's increased feelings of safety. So when determining a woman's eligibility for the alarm system, estimating the chances for a successful prosecution of the perpetrator seems to be a primary goal. This is

62. The records of earlier police interventions retrieved in this study most often showed clear tendencies of minimization of violence (e.g., referring to "marital quarrel" or "relational problems"). See Ruth E. Fleury et al., What Happened Depends on Whom You Ask: A Comparison of Police Records and Victim Reports Regarding Arrests for Woman Battering, 26 J. CRIM. JUST. 53 (1998).

63. Id. at 58.

paradoxical because after all, the AWARE system could serve as a deterrent, since the ex-partner might refrain from further stalking in order to avoid being arrested. Furthermore, the reason for prioritizing police documentation and civil protection orders was that they provided the “objective” data necessary to build a criminal case that might take place in the future. From the very beginning, achieving the goal of a successful prosecution overshadowed the related goal of providing protection to women. Although there is no reason to position prosecution and protection in opposition to each other since the one does not necessarily exclude the other, the question remains: Why should prosecution of the defendant count as a primary goal if it is to be achieved at the expense of the protection of many victims?\(^6\)

In a project unequivocally aimed at protecting and supporting battered and stalked women, the law does so on its own conditions. It is constructed according to the terms of a dominant legal culture that does not necessarily take into account the woman’s best interests. It is illuminating to note that the Dutch women whose houses were eventually secured with the alarm system were reluctant to use it. The women want to get protection and safety from the alarm system, yet they do everything possible to avoid a full-blown intervention of the criminal justice system which would force them to play the assigned role of testifying victims in a regime that they dislike for a variety of reasons.\(^6\)\(^6\) This illustrates that women are in fact trying to be creative in using the alarm and the criminal justice system connected to it, in their own way, which does not necessarily fit the criminal justice logic of trigger-happy law enforcement. The women prioritize protection and peace of mind for themselves and their children, and knowing they can set off the alarm if necessary meets their primary need—to get protection. Punishment or prosecution of ex-partners does not seem to be a priority for the victims. This calls into question the presumed vengefulness of battered women that caused the Selection Committee to be so strict in assigning the system. The fact that women rarely use the alarm also raised the question among the legal professionals involved in the AWARE program as to whether the system is successful.\(^6\)\(^7\) Again we see the criminal legal system defines

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\(^6\) See Jeffrey Fagan, National Institute of Justice, The Criminalization of Domestic Violence: Promises and Limits 39 (1996) (noting that the double goals of punishment of offenders and protection of victims “may be reciprocal as policy but may be in conflict at the operational level”).


\(^6\) Preliminary data from the Brooklyn DA’s Office in Kings County, New York on the experiences with the AWARE electronic alarm system confirms this picture. Since the start of the AWARE program in Brooklyn in 1995, 242 women have been in the program, 54 of whom are currently active. Only five activations of the alarm...
success within its own paradigm and exclusively on its own criminal legal terms (e.g., arrests and prosecutions) not in terms of increased safety for the victims. Based on the research findings partly presented here, the Rotterdam police have expressed a willingness to reconsider a less stringent enforcement of legal criteria for entering the program, notably the civil protection order.

IV. THEORETICAL REFLECTIONS AND DISCUSSION

There are many differences between the two projects, and the qualitative and exploratory nature as well as the limited numbers of women involved in each of the studies urges appropriate caution in drawing broad conclusions. Despite the fact that part of the problem relates to shortcomings in the implementation of regulations underlying both programs, administrative improvements would not resolve the underlying cause of the problems. These examples illustrate several more structural dynamics inherent in legal regulation and legally-based policy developments that can inform further reflection on how group-based laws work when implemented on an individual level in domestic violence cases.

Both projects show several paradoxes that law as a regulatory mechanism implies. Most notably they illustrate that the invocation of law can be more detrimental and less emancipatory than its advocates had hoped. Legal rights do not merely provide entitlements for individual subjects that stand above and outside politics. As much as rights can emancipate, they regulate and can constrain at the same time. As Michel Foucault has argued, in law’s regulatory work, its subversion is implied. Unlike what early feminist activism suggested (equating the personal as political and vice versa), there certainly can be a dilemma at stake between satisfying “personal” and “political” needs. From a political point of view, group rights—in this case rights for battered women—are grounded in legal and political recognition because they serve the primary aim of a political strategy. However, successful campaigns in the politics of recognition win on terms set not by the rights holders but by larger institutional forces. The political interests and values of these institutions do not always converge with the individual’s, and thus the demand for recognition often entails damaging “misrecognition” by others. Let me emphasize again that the question is not whether we should be for or against rights or special provisions for battered women. Instead, we should focus on the following: How emancipatory and effective are rights in terms of bringing justice to and supporting women? Where can rights go wrong? Which cultural and political contexts impact the law? How can representations of battered women help explain the unforeseen impacts of regulations that were intended to provide legal support?

resulted in an arrest. The number of alarm activations by women that did not result in an arrest is fewer than ten. Interview with Deidre Biallo-Padin, Chief, Domestic Violence Bureau, in Brooklyn, NY (Nov. 9, 2001).


70. Id.
I will reflect upon two dynamics that seem to play a crucial role in understanding the potential counterproductive effect of legal regulation: the impact of legalizing the social identity of the battered woman and the impact of legalizing a complex social and personal conflict like violence against women in intimate relationships.

A. Legalizing Social Identities and Essentializing Social Ills

Both cases exemplify a paradoxical shift in the representation of the victim of domestic violence. While there is a growing social and political awareness of the epidemic of abuse of women, that informed both initiatives, in their day-to-day practice both projects move toward a more restrictive definition of the "real" or "worthy" victim who deserves compassion, support, and protection through the criminal justice and welfare systems. Well-meaning policy has excluded many battered women from support under the FVO and from the protection of the alarm system. The legal categorization of "battered women"—or any other identity category for that matter—defines the class of rights holders in terms that are deeply normative, not just descriptive. Thus, all who seek the law's protection and legal recognition must conform their identities to that regulatory, normative frame. The paradoxical and inevitable result is that, precisely when the abuse of women shifts from a private into a public issue, many women are excluded from the benefits that are attached to that official category of battered woman. Both cases exemplify that political or legal strategies always have meanings that exceed their original purposes, and exclusion might be an unintended yet significant meaning.

The category of the battered woman is necessarily reified into a legal identity, of which women must prove themselves to be members. In both cases a profound distrust of the battered woman's own narrative operates in combination with the legal ideology of objectivity, rendering it difficult to prove membership in this category for those who appeal to law for protection against domestic violence. This paradox exemplifies the principal constraint of emancipatory politics in late modernity: subjects and practices are always at risk of being resubordinated and disciplined through the discourses naming and politicizing them. 71 While striving toward visibility and acceptance, the legal language of recognition can become the language of constraint. 72 Battered women are no exception to this power dynamic. Law making and policy development rest on the assumption of a paradigmatic victim. This is inevitably a stereotypical victim who rarely exists in everyday life. Legal rights are by definition generalized, abstract provisions and their ability to meet the concrete needs of individuals is therefore structurally constrained and certainly not guaranteed.

The legal category of the battered woman is based on past or current injury that law seeks to remedy. We might therefore look to the debate on law and

71. See FOUCAULT, supra note 68.
identity politics. In rights regimes, law creates a politicized identity as a vehicle for protection or support, and this identity is both regulatory and controlling in its unintended consequences. As Wendy Brown observed: "The emancipatory function of rights cannot be adjudicated in abstraction from the judicial apparatus through which they are negotiated . . . . Rights may subject us to intense arms of bureaucratic domination and regulatory power even at the moment that we assert them in our own defense." We could say that the welfare state produces welfare subjects through various categories of need, of which the victim of domestic violence is one. In that context, the battered woman has become "a normativized social identity that is manageable by regulatory regimes."

By creating specific categories to include victims of domestic violence and battered women in the groups that are provided rights or benefits such as welfare and protection, the law invariably invokes exclusionary mechanisms to limit the number of women to whom the rights are granted, and in doing so it tends to undermine the values that motivated inclusion. This limitation is inherent in law's individualizing nature, even when law-makers are motivated by concern for battered women and a desire to actively assume responsibility for their support. One of the discursive powers of law is that it recasts social dynamics as characteristics of individuals. In the realm of domestic violence, legal regulations seem particularly likely to have this individualizing and exclusionary effect. In both of the projects I discuss, creating the legal category "the victim of domestic violence" both reflects and reinforces ambivalence about the complex constraints on choices that battered women face. Male violence toward women in intimate heterosexual relationships touches upon deeply rooted cultural ambiguities regarding the recognition of domestic violence as a social and political harm rather than an individual's bad fate.

Several authors have noted that in the debate on the current crisis in the welfare state, there is a tendency to essentialize social ills into individual failure to provide an illusion of certainty and normalcy to the wider population in current society. Jock Young has labeled one aspect of this process "the vendetta

73. Id. at 120-21.
74. Id. at 59.
75. See id. at 128.
76. For a clear example of this cultural ambivalence regarding the social nature of family violence, see DeShaney v. Dept. of Soc. Serv., supra note 4. In the context of a discussion on the recent increase in use of shelters by women and children in New York City during the winter of 2001, Mayor Giuliani of New York City stated that "many people fabricate stories of domestic violence in order to get into a shelter." National Public Radio (March 5, 2001). This was the Mayor's response to a reporter's suggestion that the increase might have reflected the impact of a publicity campaign that ran in the winter of 2001 in the subways of NYC, urging battered women to seek help earlier. This statement reflects the profound and pervasive disbelief about wife abuse that coexists with the urge to help battered women. This cultural ambiguity leads to a classic double bind for many battered women who are urged to speak out and seek help: damned if you do, damned if you do not. For a more extensive discussion of cultural ambiguities, see Part IV.B.
77. See, e.g., JOCK YOUNG, THE EXCLUSIVE SOCIETY (1999); see also BAUMAN, supra note 18.
against the single mother.” Like the single mother, the divorced or single battered woman is often characterized as an individual who fails to take responsibility. In this way, the battered woman becomes a social and normativized identity that is managed by the current welfare regime in the United States. In both cases discussed in this paper, one’s membership in the legal category is proven through formal legal documentation; the presumed lack of credibility, reliability or responsibility of domestic abuse victims explicitly justifies the need for such proof. The category of the battered woman triggers archetypal notions about blame, revenge and responsibility—or more accurately, the lack thereof. The representation of the battered woman, and more generally of the domestic violence victim, regularly shifts from a group category of “deserving victims” during the stage of lawmaking, to a category of potentially flawed, unreliable, irresponsible, exaggerating, and undeserving individuals in its day-to-day legal implementation of laws that were originally intended to protect and support women.

B. Legalizing Social Conflicts and Cultural Ambivalences

Very specific socio-political motives informed feminist strategies from the beginning of the 1970s in the appeal to the law to legitimate domestic violence as a social and political problem and to lay a solid foundation for the state’s responsibility to ensure and protect battered women’s rights. However, the strategic focus on the problem by activists and policy makers alike as one that demands a legal solution can also be understood as reflecting a more general social trend in late modernity toward an increasing juridification—certainly in the United States through civil law—of the interaction between individual citizens. Some theorists relate this to increasing individualization and to a decrease of social cohesion and a loss or diminishment of traditional social support structures on a community level that might be helpful in creating extralegal solutions to conflicts. Social and cultural changes toward a more atomized society have increased the need for impersonal ways to effectuate our rights and resolve conflicts. At the same time we witness the increasing enforcement of criminal laws as well as the criminalization of behaviors that formerly were considered to be social ills at worst. Local and national governments, notably in the United States, have increasingly embraced the ideology of “law and order,” which sets off a rhetoric that associates poverty

78. Young, supra note 77, at 197. It is important to note that the category of “single mother” is overdetermined by race in the United States more than in the United Kingdom, where Young’s analysis is primarily situated.

79. Id. See also Robert D. Putnam, Bowling Alone: America’s Declining Social Capital, 6 J. DEMOCRACY 65 (1995). Jeffrey Rosen commented recently on the “litigation explosion” in the United States and particularly on the increasing reliance on the vocabulary of law in everyday interaction. According to Rosen this signals a social transformation due to “a breakdown of traditions of trust and manners.” “As traditional authorities find themselves under siege, citizens increasingly turn to laws and legalisms to resolve their social and political disputes.” Jeffrey Rosen, In Lieu of Manners, N.Y. TIMES MAGAZINE, Feb. 4, 2001 at 6:46.
Law as a Trojan Horse

with criminality and in effect monitors and controls people living in lower class neighborhoods. The two cases presented here illustrate the unholy marriage of the declining welfare state and an increasing reliance on the criminal justice system to monitor and regulate society.

Within a legalistic approach, domestic violence is inevitably framed in a discourse of rights and responsibilities, which is often based on an unproblematized distinction between the private and public realm. There is a clear distinction assumed between domestic violence as a private issue, and therefore predominantly a matter of individual responsibility, and domestic violence as a part of the social and public domain, and therefore the state's responsibility. Violence against women defies this conceptualization of the private-public opposition, and certainly defies a logical conceptualization of the problem in terms of a right to respect of bodily integrity. A battered woman’s ambivalence about leaving a violent relationship is experienced not as conflicting rights between her and her partner, but as conflicting responsibilities and conflicting desires to care for herself and her children on the one hand and for her partner on the other. The rhetoric and ethics of rights and legal responsibilities have severe limitations because they fail to capture the paradoxes these women face.

The problems that arise when domestic violence is defined as a social conflict that enters into the legal realm illustrate some of the limitations inherent to the politics of law. The legal context in which support for battered women is framed usually offers an inflexible and limited set of tools that is not well equipped to deal with ambivalence. And it is ambivalence that pervades all aspects of domestic violence, not only among the victims. The responses that battered women’s experiences evoked during the implementation of the legal provisions I presented revealed a deeply-ingrained ambivalence in society toward domestic violence generally, and toward the category of battered women in particular, that undermines support for battered women. In the past decades a shift has taken place toward a more principled rejection of the use of violence in intimate relationships. In the abstract we abhor domestic violence and have made it into an illegal act, a crime for which the perpetrators can be held accountable, be arrested, put in jail, or subjected to treatment programs, and for which the victims deserve our support. In spite of these political commitments, publicity

80. Zygmunt Bauman argues that in the postmodern era of globalization most nation-states have two faces. On the one hand there is the “Social State,” which guarantees minimal securities for its citizens but increasingly serves only the middle class, especially in the United States. On the other hand there is the “Charitable State,” which through the use of law and order supports and also controls the poor population, notably African-Americans. This “charitable” aspect of the state is based on a moralizing conception of poverty. ZYGMUNT BAUMAN, GLOBALIZATION: THE HUMAN CONSEQUENCES 103 (1998).
81. See also GARLAND, supra note 48.
82. See Römkens (1991), supra note 41 (arguing that an ethics of care might offer a theoretical and political framework to reflect upon the role of the state in providing care to citizens or creating the conditions under which (female) citizens are better equipped to take care of themselves and others). See also CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (distinguishing between a “voice of justice” and a “voice of care” in moral reasoning and arguing that these different ethical voices reflect attention to rights versus responsibilities, respectively); Tronto supra note 19.
campaigns, shelters, and various legal policies that express support for battered women, the attitude toward individual victims in the implementation of law and policy remains at best ambiguous. The construction discussed above of the battered woman as a moral failure reflects this clearly. From a cultural-psychological perspective the battered woman almost needs to be othered into the stereotypical lower-class and racialized (black) "helpless" victim, with no alternative but to go to a shelter. That popular representation protects the (white) middle- and upper-class self-image that rests upon the assumption so crucial to Western civilization that "we" are in control of our aggression and violence. No matter how we as a society want to recognize battering as a social problem, the othering of the battered woman persists because domestic violence is so prevalent that it is too close for comfort. The image of battered women as a typical lower class problem allows the association of domestic violence with poverty, hence with irresponsibility and lack of credibility, as we saw in both projects. This othering and moralizing approach to the battered woman is most blatantly visible in the cultural obsession with the issue of exit and the rhetorical question that is always at hand: that "we" do not understand why battered women do not leave and that "we" would most certainly leave if this would happen to us—thereby positioning the author of the question on the right side of

83. See Yael Danieli, Countertransference in the Treatment and Study of Holocaust Survivors and their Children, 5 VICTIMOLOGY: AN INT'L. J. 355 (1980) (describing how countertransference mechanisms are common in the treatment and study of Jewish Holocaust survivors and are reflected in the defensive grouping of clients into a larger social category (e.g., "passive Jews"). Doing so enables therapists to distance themselves from their individual clients' suffering when that resonates with undealt-with pain for the therapist, particularly when the therapist is Jewish. Danieli suggests that these dynamics are often also at stake among researchers vis-a-vis their research subjects.

84. See NORBERT ELIAS, UEBER DEN PROZESS DER ZIVILIZATION [THE CIVILIZING PROCESS] (1939) (analyzing the development of "etiquette" in Western Europe and arguing from a sociological and psychoanalytic perspective that controlling and ritualizing public display of violence has been crucial to Western civilization and the self-image of Western individuals).

85. A comparison of data from reliable representative surveys reveals that at least one in eleven women in Western Europe and North America has been severely and repeatedly abused by a male partner at some point in her life, and this abuse has resulted in injuries that required medical treatment. See generally Malcom Gordon, Definitional Issues in Violence Against Women, 6 VIOLENCE AGAINST WOMEN 747 (2000); Carol Hagemann-White, European Research on the Relevalence of Violence Against Women, VIOLENCE AGAINST WOMEN 732 (2001).

A Dutch national survey on domestic violence conducted in 1985 was one of the first that provided representative data indicating that abuse of women is not statistically correlated to any socio-economic class. Renée Römkens, Prevalence of Wife Abuse in the Netherlands. Combining Quantitative and Qualitative Methods. JOURNAL OF INTERPERSONAL VIOLENCE 99 (1997). See also Holly Johnson, Rethinking Survey Research on Violence Against Women, in RETHINKING VIOLENCE AGAINST WOMEN 23. (R. Emerson Dobash, R. Dobash eds., 1998). For estimates on violence in same-sex relationships see SAME-SEX DOMESTIC VIOLENCE (Beth Leventhal & Sandra Lundy eds., 1999). An unintended effect of the battered women's movement is that in the public discourse on battering a stereotype of domestic violence has been created that facilitates this othering dynamic. The public image of the battered woman is based on the representation of those few women who are visible: battered women who turn to the police or live in shelters, who are virtually always poor and with few social resources. (Incidental "celebrity cases" that catch the media's attention, such as the abuse and alleged homicide of Nicole Brown Simpson by OJ Simpson in the early nineties, hardly seem to affect the dominant image of battering as a lower-class problem). See, e.g. DONNA FERRATO, LIVING WITH THE ENEMY (1991) (portraying pictures of predominantly poor, lower-class women who experienced abuse from their husbands or boyfriends). The book contains only one story of a relatively wealthy couple in which the wife was severely abused, and one on "the wife of a top government official . . . puncturing the myth that only the poor get battered." Id. at 131.
the dividing line because s/he knows when to leave, s/he is not a victim and silencing in shame those addressed who might be a victim. The confrontation with domestic violence inevitably triggers profound, albeit mixed, feelings of discomfort, disengagement, pain, sadness, confusion or anger, all of which consciously or subconsciously fuel our judgment and our response to these situations. It requires intense training to be aware of the complexities at stake, both from the perspective of professionals and from the victims’ perspectives, in order to develop a well-informed, open-minded and supportive attitude. Without proper training the day-to-day decision making used in implementing law or policies reveals highly individual prejudices, biases and moral judgements. When dealing with violence in intimate relationships, the rush to judgment on an individual level fits neatly with the cultural ambivalence, and subsequently the limit of our tolerance and support is easily revealed. As we saw in these projects and their underlying aim, the battered woman is considered to be deserving of compassion as a victim of a violent crime, yet the violence is minimized when she does not translate it into legal actions like filing a complaint or applying for a protection order. She is held morally responsible for her victimization, at least partly, as long as she does not leave; and she can simply leave, “because every house has a front door you can walk through,” as I heard a judge once say in court to a battered woman who had killed her spouse. She bears responsibility for her victimization simply because it takes place in an intimate relationship. In the political and legal rhetoric we see the language of choice creeping in, “masking coercion as private desire.” The liberal legalistic distinction between the private and public domain has come full circle, disguising the many structural constraints battered women may face, and de facto excluding them from the very provisions intended to support them.

V. CONCLUSION

Recognition of the public nature of private violence against women has been achieved to some degree, as has the recognition of the public obligation that flows therefrom. However, the shift from abuse of women as a “private” into a “public” issue is not without ambivalence and social resistance. Too often the public obligation and/or public responsibility in the case of domestic violence is read as a need of legal regulation as if the law would provide a solid enough power basis to overcome that resistance. Within feminist legal theory there are ample reasons to keep reflecting on whether and how law operates and under

86. Immediately after the FVO was launched it was stressed that an essential element of successful implementation of the FVO was educating applicants and recipients of public assistance about domestic violence. Another key element was training for all personnel on domestic violence and its effects on victims and survivors. See Pollack and Davis, supra note 23, at 1087.
87. BROWN, supra note 72, at 123.
89. See generally ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000).
what conditions it can be an empowering tool to support or protect women's safety. The suggestion that there exists a "dialectic relationship" between politics and feminist lawmaking in the field of domestic violence, often seems to be premised upon the optimistic assumption that political struggles and the struggle for rights inform each other in a way that leads to progress or will at least bring more social justice. Without denying or minimizing that the entrance of domestic violence into the arena of law has brought about legal provisions and social changes that can support and empower women, the intervention of law also often takes its toll. Law can have a beneficial effect, but only for a limited number of women and at a considerable price. This exemplifies how law in its implementation can be violent in and of itself.

The legal interventions and projects as described in this paper give reason for skepticism given the powers that the law invokes, that are inherent in the law and that undermine the intended goal of the intervention. When calling upon the law it is important that we acknowledge the paradoxical effects and the dilemmas at stake which might not be easy or even possible to resolve, but which might protect us against naive optimism. Law can disappoint us because it is often ineffective, or even damaging, precisely because it operates within a self-proclaimed rational, and certainly dichotomous and adversarial style that is not able to deal with complex and conflicting realities that battered women confront. This raises the question of how the emancipatory goal of a law surfaces in the face of other goals the law shares, as law in its implementation is embedded and operates as part of powerful institutionalized regimes, such as the bureaucracy of a welfare regime, that impose ideologies of their own. In a culture that values law as the ultimate instrument to protect and deliver "justice," "freedom" and "liberty," and in which political problems are thought best resolved by legal solutions, it is difficult to fundamentally question law. If the law indeed can help to legitimate or even might ease human suffering, we should not forget the "juridogenic" characteristics of law that can make things worse.

If we appeal to law, we sometimes call upon a Trojan horse: when we invite law in, law re-invites itself time and again, but on its own terms and with its own agenda.

90. Id. at 6.
92. See, e.g., Naomi Cahn, Policing Women: Moral Arguments and the Dilemmas of Criminalization, 49 DEPAUL L. REV. 817, 825 (2000) (critiquing criminal law's limited ability to support victims, and pleading to make more use of civil law).
93. See CAROL SMART, supra note 7 at 12 ("Just as medicine is seen as curative rather than iatrogenic, so law is seen as extending rights rather than creating wrongs. It is perhaps useful to coin the term juridogenic to apply to law as a way of conceptualizing the harm that law may generate as a consequence of its operations.")