

THE FAILURE AND PROMISE OF COMMON LAW EQUITY IN DOMESTIC ABUSE CASES

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I. INTRODUCTION

In the last sixty years, American law has seen dramatic reforms in response to domestic abuse.¹ Feminist efforts to illuminate “wife beating” as a public and social phenomenon of gender bias have led to significant legal innovations, such as the federal Violence Against Women Act and a proliferation of civil protection statutes in the states.² These legislative movements have generally improved the response to domestic abuse in the United States.³ Virtually all of these reforms afforded specific

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

2. *See infra*, note 93.

3. Since 1993, intimate partner violence has declined, especially among male victims. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, INTIMATE PARTNER VIOLENCE RATES IN THE UNITED STATES (2007), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipvus.pdf>. Women are more likely to experience nonfatal intimate partner violence than men. *See id.* The National Coalition Against Domestic Violence, citing Department of Justice data from 2003, reports that 85% of domestic violence victims are women. *See* NAT'L COALITION AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE FACTS (2007), *available at* <http://www.ncadv.org/files/DomesticViolenceFactSheet%28National%29.pdf>.

According to the Center for Disease Control, in a given year, approximately 7 million American women and 6 million American men will experience rape, physical violence, or stalking by an intimate partner. Over their lifetimes, approximately 42 million American women and 32 million American men will experience such abuse by an intimate partner. This accounts for about one-third of all American women during their lives and about one-tenth of all men. *Id.* at 39. Approximately one-quarter of all American women and one-seventh of American men have experienced severe physical violence by an intimate partner in their lives. *Id.* at 43. Nearly half of all Americans have experienced “psychological aggression” by an intimate partner. For example, “their partner acted angry in a way that seemed dangerous, told them they were a loser or a failure, insulted or humiliated them,” or other “coercive

processes and remedies to victims of domestic abuse by building upon existing legal structures.

This raises the question, If existing legal structures could have intervened in situations of intimate violence through their own extant authority, were these legislative innovations actually necessary to confront the problem? Historically, common law equity had the potential to effectively intervene upon violence in homes, to provide injunctive relief to protect women and children, and to allow an examination of the dynamics of family violence.⁴

Despite this potential, equity has largely failed as a means of protecting victims of abuse in families. Equity turns on a court's discretion; courts may consider cases within their discretion, weighing conscience and equity, and then issue coercive *in personam* relief, either provisional or permanent, subject to contempt sanctions. Courts may enter relief to avoid irreparable harm when legal remedies are inadequate, and courts may also fashion reparative, preventative, or structural injunctions to work justice for the aggrieved. However, it is this very discretion that has undermined equity's capacity to intervene in cases of domestic abuse.⁵ A judge sitting in equity is naturally subject to

control." See NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, 2010 SUMMARY REPORT (Michele C. Black et al. eds., 2011) available at http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

4. In 1980, Professor Nadine Taub identified and examined the potential for equity responses to domestic violence, and her work is integral to this article. See Nadine Taub, *Ex Parte Proceedings in Domestic Violence Situations: Alternative Frameworks for Constitutional Scrutiny*, 9 HOFSTRA L. REV. 95, 96-97 (1980) [hereinafter Taub, *Ex Parte Proceedings*]; Nadine Taub, *Equitable Relief in Cases of Adult Domestic Violence*, 6 WOMEN'S RTS. L. REP. 241 (1979-80) [hereinafter Taub, *Equitable Relief*]. In this Article, I build upon the observations that Professor Taub made at the virtual dawn of the domestic violence movement and seek to determine how thirty years of reform in law and society may have affected equity's potential as a response to domestic violence. See also James R. Robinson, Comment, *Untangling the "Loose Threads": Equitable Adoption, Equitable Legitimation, and Inheritance in Extralegal Family Arrangements*, 48 EMORY L.J. 943, 945-46 (1999) (advancing equity as a means of just treatment of children born from non-marital relationships, in light of dramatic changes in family structures in the last quarter of the twentieth century).

5. See Taub, *Equitable Relief*, *supra* note 4 (discussing the potential role of equity in the early days of the feminist movement to address domestic violence with distinct, focused legal reforms, considered in more detail throughout this article); see also Lynn A. Sacco, Comment, *Wife Abuse: The Failure of Legal Remedies*, 11 J. MARSHALL J. PRAC. & PROC. 549 (1977-78) (discussing in 1977 the abject failure of legal regimes to address domestic violence within existing structures, before the wide

his or her own view of justice and the role of the law. Most judges before the 1960s simply would have lacked the vocabulary and cultural competence to recognize or understand domestic abuse, except for in the most egregious cases of physical violence. For these reasons, competing legal theories of privacy and coverture often shielded abusive perpetrators.⁶ Thus, despite equity's potential to address the problem of intimate violence, courts in equity could not achieve adequate equitable relief in family matters, and equity fell short of its potential to advance the cause of gender justice and peace in homes.⁷

Today, equity may still find good application in the cause of justice and peace. Modern society is far better informed about matters of gender justice and the dynamics of intimate violence. Feminist reforms have taken root and flourished, and the law now empowers courts to intervene regularly in family matters.⁸ Contemporary legislative responses to domestic abuse necessarily rely on broad definitions and standards to promote stable, predictable, and common responses; these responses, however valuable and useful, often fail to provide tailored and wise remedies to address unique types of abusive relationships and empower individuals in their struggles. Although equity should not supplant the legislative reforms that have reshaped the law's response to domestic abuse, it can expand the tools available to courts to achieve justice for victims, especially victims who are

advent of civil protection orders and other specific policies).

6. Justice Daniel explained the deeply rooted doctrine of coverture in his dissent in *Barber v. Barber*:

By Coke and Blackstone it is said:

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

Barber v. Barber, 62 U.S. 582, 600-01 (1858).

7. Lenore Walker argues this more aggressively:

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

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

8. The topic is explained more fully in subsequent sections addressing legal responses to domestic abuse. See *infra* notes 79-94 and accompanying text.

not subject to physical violence. Equity can be an interstitial supplement to inform and advance judicial responses to intimate partner abuse and domestic violence.

In Part II of this Article, I offer a brief, comparative history of equity and the law of domestic abuse. In Part III, I consider the form and substance of contemporary equity and personal interests, as well as equity's capacity to confront domestic abuse. In Part IV, I argue that equity still has a place in the law's response to domestic abuse and that courts can and should employ equitable remedies to bring customized relief to intractable family violence.

II. A BRIEF, INTERSECTING HISTORY OF EQUITY AND PERSONAL INTERESTS AND THE SLOW DEVELOPMENT OF DOMESTIC ABUSE LAW

In the Anglo-American tradition, equitable justice arose in the fourteenth and fifteenth centuries in response to the decline of feudalism in England.⁹ The king's courts and medieval chancery struggled to grasp the changing, conflicting rules of real property alienation and interests, and equity gave courts recourse when the law could not accommodate a breach of trust or unjust encumbrance of land.¹⁰

The rise of equity was rooted in the Middle Age ideology that natural law was a means to achieve ideal justice and fairness in society.¹¹ In this pursuit of ideal justice, equity became a "supplementary or residuary jurisdiction" to permit the law to bend and expand to ensure the higher ideals.¹² Many systems of law, from Rome onward, permitted the modification of law on moral grounds, but it was not until the English and American

9. See BRYCE LYON, A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND 457-61 (1960); see also W.H. BRYSON, THE EQUITY SIDE OF THE EXCHEQUER 9, 31-33 (1975); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 675-76 (1956). Long before the English constitution evolved, Greek and Roman philosophers and orators considered the place of equity in the law for the same reasons. See H.F. JOLOWICZ AND BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW, 410, 507 (1972). Aristotle believed equity was necessary to correct the law when the law's generality failed to consider the particularities of a specific case. See FRITZ SCHULZ, HISTORY OF ROMAN LEGAL SCIENCE 74 (1946).

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

11. See CARLETON KEMP ALLEN, LAW IN THE MAKING 383 (1964).

12. *Id.* at 384.

legal systems arose that law and equity were divided into separate tribunals.¹³ This distinction between law and equity explains the persistent, sharp divisions at play until the twentieth century.¹⁴

Domestic violence, like equitable justice, is an ancient, historic phenomenon.¹⁵ Roman law constrained family violence, and English common law gave rise to the famous “Rule of Thumb.”¹⁶ From the beginning of the American Republic, American law ignored, and arguably condoned, family violence until the mid-1800s, when a few jurisdictions began to eliminate virtual immunity for perpetrators.¹⁷ Well into the twentieth century, courts and legislatures were reluctant to intervene in “family matters,” leaving violence behind drawn curtains and denying useful legal remedies to victims.¹⁸

By the sixteenth century, great Enlightenment upheavals were at work in Britain and on the European Continent, where “[t]he political and legal fabric of feudalism, the authority of the medieval Church, and the comprehensive system of scholastic philosophy, were found equally wanting, and modern thought made its way into all spheres of life.”¹⁹ Vinogradoff describes the

13. See 12 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 446 (1938).

14. *Id.*

15. See Judith Armatta, *Getting Beyond the Law’s Complicity in Intimate Violence Against Women*, 33 WILLAMETTE L. REV. 773, 783-86 (Fall 1997); see also ELIZABETH SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 13-20 (2000) (providing a concise history of the law of domestic violence and wife battery).

16. See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657 (2004); see also James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY’S L.J. 1149, 1157-60 (1994-95). Truss provides a useful history of common law tolerance and gradual objection to domestic violence.

[The Rule of Thumb] permitted men to beat their wives with a rod or stick “no larger than a man’s thumb” or small enough to “pass through a wedding band” . . . as a natural and necessary right of control, incident to the man’s role as head of the family.

Id. at 1157 (internal citations omitted).

17. See, e.g., Jeffrey R. Baker, *Trifling Violence: The U.S. Supreme Court, Domestic Violence and a Theory of Love*, 42 CUMB. L. REV. 65 (2011-2012).

18. See *infra* notes 67-69.

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

work of prominent sixteenth century jurists to illuminate the jurisdictional power struggle between the English Chancery and Ecclesiastical courts, against the King's Common Law courts.²⁰ At the source of equity decisions in the sixteenth century was a rigorous application of conscience informed by Christian philosophy.²¹ Conscience in equity is "discerning between good and evil and . . . inclining towards the good, apart from conscience proper, which deals with the subsumption of individual cases under the general rules laid down by *Sinderisis* and developed by reason."²² Conscience may be the great general, organizing principle of equity.²³

In 1523, English legal philosopher Christopher St. Germain wrote of the English law in the famous Doctor and Student dialogues.²⁴ St. Germain mentions the concept of *epieikeia* ("reasonableness" or "equity"), which is in essence "a doctrine of authority capable of preventing the hardship which otherwise would ensue either from the literal extension of positive rules to extreme cases and also by strictly literal construction of cases that fall within the true intention of the rule."²⁵ St. Germain's conscientious equity was a "righteousness which considers all the particular circumstances of the deed, tempering justice with mercy [I]t is an implied reservation in every law that it is not to operate against the law of God and the law of reason."²⁶

In chancery or ecclesiastical courts, equity served as an exception to the law, generating results not from direct laws or

20. See Vinogradoff, *supra* note 19, at 377.

21. See *id.* at 378.

22. *Id.* Allen cites Vinogradoff and explains that "sinderesis" is a "crude anglicization" of the Greek root connoting reason and conscience. ALLEN, *supra* note 11, at 407.

23. See ALLEN, *supra* note 11, at 406 (noting the rise of equity from Medieval English opinions sounding results in "conscience," 'good faith,' 'reason,' 'conscience and law,' 'the law of conscience,' 'law and right,' 'right and reason,' 'law, right, and good conscience,' 'right and reason,' 'reason and good faith.'").

24. See PLUCKNETT, *supra* note 9, at 685. See also Zofia Rueger, *Gerson's Concept of Equity and Christopher St. Germain*, 3 HIST. OF POL. THOUGHT 1 (1982) (noting that St. Germain's seminal articulation actually reached farther back to Gerson's *Regulae Morales* from the fourteenth century, which pled its sources from Aristotle and Christ). See *id.* at 5, 28-31.

25. Rueger, *supra* note 24, at 1-2.

26. ALLEN, *supra* note 11, at 407-08. From Aristotle to St. Germain, "equity comprise[d] the guiding principles for the adaptation of general rules to specific cases, and especially to cases which transcend the rules in one way or another." *Id.*

strict precedents but from general theories.²⁷ The exceptional cases that were diverted from the common law rested on the courts' reason and conscience, as well as three principal doctrines: the idea that equitable remedies had to be provided for those who did not understand how to avail themselves of the law; the idea that transactions based on confidence and trust had to be protected; and the idea that promises in contracts had to be enforced, even if formalities were lacking.²⁸ In these dawning years, equity was available only in disputes between creditors and debtors, in cases of breach of trust and confidence, and in controversies over parol agreements or formless contracts.²⁹

In the eighteenth century, equity made some headway in family law as English chancellors developed the law of trusts.³⁰ These cases primarily structured rules of property law to decide issues arising from estates, trusts, marital property, separate women's property, alimony interests, and bankruptcy.³¹ It was in trust law that English law first took up these questions of gender and family structure.³²

In this era, Blackstone reflected on English constitutional history, women, and paternalism, and he explained that the English common laws "[were] for the most part intended for her protection and benefit."³³ However, for women to be protected under the doctrine of coverture, they had to merge themselves into men's legal identity or else be left exposed to legal incapacity.³⁴ This is consistent with the common law's structure

27. ALLEN, *supra* note 11, at 378-79.

28. *See id.* at 379.

29. *See id.* at 380-81.

30. 12 HOLDSWORTH, *supra* note 13, at 273.

31. *See id.* at 273-85.

32. *See id.*

33. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 341-42 (Wayne Morrison ed., 2001). *See* Walker v. Walker's Executor, 76 U.S. 743 (1869). *Contra* Frontiero v. Richardson, 411 U.S. 677 (1973) (Justice Brennan famously wrote in 1973 that the "attitude of 'romantic paternalism' . . . put women, not on a pedestal, but in a cage.").

34. *See* 12 HOLDSWORTH, *supra* note 13, at 310-11 (noting that in the sixteenth and seventeenth centuries, chancery courts continued to hold

that there could be no contract between husband and wife, that neither could sue the other, and that after marriage no variation of any settlement made before marriage could be effected by agreement. Similarly, it was doubted in some cases whether a contract made before marriage could give the wife any active disposing power during marriage.).

for two centuries:

At common law the husband had untrammelled right to his wife's services whether rendered to him in his home or business or whether rendered to third persons [N]o case has been found where at common law the husband by a consensual act could emancipate his wife in manner similar to a parent's gift to a child of his rights to its services. The equitable reforms of the eighteenth century gave little aid to the working woman as against her husband³⁵

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

The "unity of husband and wife" and the "sanctity of home" limited abused spouses' remedies to divorce or criminal actions. The "unity of spouses" fiction ratified the husband's domination and control of his wife and expressly precluded any possible tort recovery for injuries he had inflicted. Treating husband and wife as one within the context of a male-dominated society rendered women invisible from the eyes of the law. Moreover, emphasis on the sanctity of the home allowed courts to ignore domestic violence against, and domination of, women as "private matters."³⁶

This persistent element of the common law shaped American courts for generations. In 1868, the North Carolina Supreme Court considered a case of wife beating and declared, "We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."³⁷ In 1872, the United States Supreme Court denied Myra Bradwell a license to practice law in Illinois because she was a woman, and Justice Bradley concurred:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine

35. See, e.g., Joseph Warren, *Husband's Right to Wife's Services*, 38 HARV. L. REV. 421, 421-22 (1925).

36. Truss, *supra* note 16, at 1158-59 (citations omitted).

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

ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of womanhood So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modification of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States.³⁸

In 1904, the United States Supreme Court recognized that “the husband has, so to speak, a property in the body and right to the personal enjoyment of his wife.”³⁹ The Court effectively held that such a property right required legal protection to ensure use and enjoyment.⁴⁰

In the traditional English view, equity was limited to property issues and not available in issues of personal or domestic relations.⁴¹ Thus, equity possibly could have intervened to protect a woman’s right in her own body, as well as the husband’s property right in his wife’s body, in cases of coercion and violence; however, this interpretation did not materialize, despite the husband’s perceived right in his wife’s body. Common law equity, in search for a pretext in property law to protect personal interests, might have availed itself of coverture to find jurisdiction in domestic violence cases, but chancellors did not pursue any such socially progressive, enlightened view of women or marriage in the nineteenth century.

In 1916, Epaphroditus Peck undertook an examination of a

38. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872).

39. *Tinker v. Colwell*, 193 U.S. 473, 483 (1904).

40. *See id.*

41. *See* Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916). *See also* Joseph R. Long, *Equitable Jurisdiction to Protect Personal Rights*, 33 YALE L.J. 115 (1923), which states:

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

claim by suffragists that women needed the vote to correct legal injustices.⁴² Peck considered legal reforms such as the “married women’s statutes” in Connecticut, which he described as the most conservative state in the Union at that time.⁴³ Peck explained that suffrage had not yet come to a legislative vote in Connecticut before Connecticut enacted many progressive law reforms to protect the personal and property rights of wives.⁴⁴ He explained that Connecticut law, based on the common law of England, “denied to the wife even the meager property rights which she had by the English common law, and left her without any legal right, either in the property of her husband, or in that which had been hers or came to her by gift or by inheritance.”⁴⁵ This extreme denial of rights did not continue; Peck listed a litany of reforms related to testimonial capacity, dower, and other encumbrances, and also discussed an 1877 Connecticut statute:

[T]he revolution in the property rights of husband and wife was completed by an act which began with the broad declaration that “neither husband or wife shall acquire by force of the marriage any right to or interest in any property held by the other before the marriage or acquired after the marriage,” gave the wife the right to make contracts with, or conveyances to, third persons “in the same manner as if she were unmarried,” and gave to the surviving wife exactly the same rights in her deceased husband’s estate that the husband, if surviving, takes in his wife’s estate.⁴⁶

Peck explained that in addition to this property rights reform, Connecticut provided even greater personal rights to wives:

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

42. See Epaphroditus Peck, *Women’s Rights in a Male-Suffrage State*, 25 YALE L.J. 459 (1916).

43. See *id.* at 460.

44. See *id.*

45. *Id.* at 462.

46. *Id.* at 463 (citing 1877 Conn. Pub. Acts, Ch. 114).

Chief Justice Swift wrote in 1795: “It is with much regret that I mention it as a part of the common law that the husband possesses the barbarous power of chastising the wife In this state, I have never known the question agitated If such a question should ever be brought before a court, I hope they will discard the savage doctrine of the common law and decide that a husband is punishable for the unmanly act of chastising his wife.”⁴⁷

Peck thus appears to have found women’s suffrage unnecessary because Puritan culture would inoculate wives from violence by their husbands. Peck’s observations on domestic violence are evidence of the ethos of the time, in which the law did not much contemplate violence against women or consider it worthy of disrupting common law views of gender and family. Peck concluded that Connecticut’s reforms, delivered by an all-male legislature, elected by all-male voters, rendered husbands and wives “absolutely independent of each other” and “exactly equal to each other in property rights,” except that women had a superior right to demand support from their husbands.⁴⁸

Although Peck credited the law with impressive reforms, he also considered that women might not be equal and independent after all:

If the wife continues to be at any economic disadvantage, it is due not to the laws of the state, but to the laws of nature and to the general usages of society, which give to the husband a more lucrative portion of the family activities than that which falls to the wife.⁴⁹

Peck’s casual claim to nature and the “general uses of society” illustrates that early legal reforms could not adequately protect women from abusive subordination. Because there was a strong preference for privacy and sovereignty in the home, “the general usages of society” strongly favored men in the home, and the doctrine of coverture left a strong residue; authorities such as judges, prosecutors, and police could not have been expected to intervene powerfully to aid abused women. If equity rested in a judge’s discretion and conscience, then a victim of domestic abuse

47. Peck, *supra* note 42, at 462 (quoting ZEPHANIAH SWIFT, SWIFT’S SYSTEM OF THE LAWS OF CONNECTICUT 202 (1795)).

48. *See id.* at 463, 466.

49. *Id.* at 463-64.

seeking to avail herself of equity surely would be fighting uphill.⁵⁰

As woman's suffrage succeeded and wives emerged from coverture, equity eventually began to accommodate personal interests without a property bootstrap. In the early twentieth century, Roscoe Pound articulated the rising trend toward protecting personal interests and condemned the rule limiting equity to property interests as arbitrary and unjustified by anything but its history.⁵¹ In his classic article on the question, Pound offers several cases to show that equity in fact has protected personal interests, even when courts denied that they were using equity, and he argued that the rule against protecting personal interests through equity should pass away.⁵² Pound observed contemporary American cases that expressly extended equity to the protection of personal interests, finding that money damages were inadequate, and correctly foreseeing that American equity would extend to personal interests, such as humiliation, defamation, privacy, and nuisance.⁵³ In 1916, however, Pound found only a hesitant extension of equity into domestic relations, and those courts that used equity often contrived property rights to justify ordering injunctions.⁵⁴

Throughout the twentieth century, Pound's view prevailed, and courts increasingly extended equity over personal interests, although many continued to tie the desired personal interests to pretextual property rights.⁵⁵ By the 1960s, it had become the

50. Chastisement, rooted deeply in the elements of coverture, persisted into the twentieth century, at least in England, as a persistent cultural artifact of women's subordination. Freeman mentions some twentieth century cases in the United Kingdom where trial courts and police countenanced violence to enforce a husband's orders and instructions on his wife, and he notes reports from wives confessing that they "asked for it" with nagging and insubordination. See Michael D.A. Freeman, *La Vice Anglaise? – Wife Battering in English and American Law*, 11 FAM. L.Q. 199, 211-12 (1977).

51. See *id.*

52. See *id.* at 670-72.

53. See *id.* at 673.

54. See Freeman, *supra* note 50, at 673-77. In 1923, Professor Long took up the issue as well and observed that equity was not available for assault and battery, defamation, and invasion of privacy because the rights were not property rights or were otherwise adequately protected in law. See Long, *supra* note 41, at 117-25. Citing the same cases as Pound, Long agreed that although equity had found uses in family matters, it was constrained by the pretext of property rights and certain limitations of parentage. See *id.* at 126-27.

55. See Robert Allen Sedler, *Injunctive Relief and Personal Integrity*, 9 ST. LOUIS U. L.J. 147, 148 (1965). The leading early case on this evolution of equity in family

“modern view” that equity could reach personal interests, and the only remaining questions were which interests to protect in equity and how to protect them.⁵⁶ In fact, as Sedler discussed, the United States Supreme Court sanctioned this evolution as early as the 1930s:

We believe the true rule to be that equity will protect personal rights by injunction upon the same conditions upon which it will protect property rights by injunction. In general, these conditions are, that unless relief is granted a substantial right of the plaintiff will be impaired to a material degree; that the remedy at law is inadequate; and that injunctive relief can be applied with practical success and without imposing an impossible burden on the court or bringing its process into disrepute.⁵⁷

Sedler identified five categories of personal rights that courts had protected in equity by the 1960s: (1) the right to reputation, (2) the right to be let alone, (3) the right to family relations, (4) the right to associational relations, and (5) civil rights.⁵⁸ Although he did not contemplate domestic abuse specifically, in his taxonomy, it likely would fall into “the right to be let alone.” In Sedler’s survey of twentieth century cases, cases of gross assault and battery did not receive equitable injunctive relief because there were “adequate legal remedies,” namely, criminal

law was *Vanderbilt v. Mitchell*, 67 A. 97 (N.J. 1904), discussed by Roy Moreland, *Injunctive Control of Family Relations*, 18 KY. L.J. 207 (1930), which observed the tendency of courts to find property rights as pretexts for protecting personal interests, but which found a sound property ground in its own decision. See also Moses H. Thompson, *The Equitable Theory of Injunction in Domestic Relations*, 1 CLEV.-MARSHALL L. REV. 45 (1952); Robert A. Oberfell, Note, *Jurisdiction of Equity to Protect Personal Rights*, 20 NOTRE DAME L. REV. 51, 56 (1945), noting the general trend through the 1940s of courts to extend equity to protect personal interests through “metaphysical” concepts of property.

56. See Sedler, *supra* note 55, at 148-49. See, e.g., *Webber v. Gray*, 307 S.W.2d 80 (Ark. 1957) (affirming an equitable injunction and its enforcement in contempt against a rabid and aggressive mistress by the man with whom she had an affair, despite finding that her actions were non-criminal and not set against a property right, but finding that her “incessant harassment” and “protracted molestations” could be enjoined).

57. See Sedler, *supra* note 55; see also *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939). Sedler also quoted a Texas appellate court decision from 1924, which held: “The personal rights of citizens are infinitely more sacred and are of more value than things that are measured by dollars and cents.” *Hawks v. Yancey*, 265 S.W. 233, 237 (Tex. Civ. App. 1924); Sedler, *supra* note 55, at 149.

58. See Sedler, *supra* note 55, at 151.

prosecution.⁵⁹ Sedler also cautioned against extending equity to enjoin parties with “strong feelings” at stake, unless, somewhat contradictorily, the feelings are so precious as to be subject to irreparable harm.⁶⁰ He staked out the limits of equity in interpersonal relationships:

The real point is that the law cannot be bothered with such matters; it cannot regulate through the injunctive process the day to day relationships of people. Neighbors will quarrel and harass one another. If any regulation is to take place, it should be through criminal prosecutions for breach of the peace. Otherwise, the parties must work things out themselves.⁶¹

However, several cases within these parameters intervened in intimate relationships, and Sedler identified a class of cases in which courts entered injunctions to preserve marriages from alienated affections and to protect the reputations of spouses from harassment and interference by scorned lovers.⁶² In 1965, Sedler did not, or could not, identify any case of judicial interference between an abusive husband and his wife, but he noted plenty of cases where courts enjoined threatening mistresses, third parties, or indiscrete and profligate paramours from threatening the sanctity of a marriage.⁶³ Despite that, Sedler summarized the judicial approach under the burgeoning modern approach of equity: “The law can formulize the marriage relationships or terminate it, but it cannot preserve it, since such preservation depends on too many intangibles and intimacies

59. Sedler, *supra* note 55, at 166.

60. Sedler, if not entirely contradicting himself, at least provided a significant nuance to his observation that an injunction is wasted on cases that invoke strong personal emotions:

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

Id. at 210.

61. *Id.* at 169.

62. *See id.* at 169-71.

63. *See* Sedler, *supra* note 55; *see also* Moreland, *supra* note 55 (listing and observing contemporary cases consistent with Sedler’s trends and taxonomy).

2012] **Equity in Domestic Abuse Cases** 573

beyond judicial control.”⁶⁴

Sedler may have spoken too strongly because courts routinely forced failed marriages to continue by the mechanics of equitable maxims.⁶⁵ In the days of coverture, as well as in the period of strict divorce rules, courts were routinely faced with contradictory insights into marriage: on one hand, that marriage is too intimate and sacred to touch, and on the other, that the law could not permit liberal dissolution of marriage by the spouses themselves.⁶⁶

Although equity may have abhorred physical violence, defamation, and constant harassment, at least two maxims prevented courts from enjoining domestic violence by injunction. First, courts believed that divorce and criminal sanctions were completely adequate remedies at law.⁶⁷ Second, with any hint of unclean hands, a court would force a warring couple to remain married, consistent with narrow, strict application of the maxims in equity.⁶⁸ Thus, as John Stuart Mill observed in nineteenth century England, the law virtually trapped the victimized wife:

In no other case (except that of a child) is the person who has been proved judicially to have suffered an injury, replaced under the physical power of the culprit who inflicted it. Accordingly wives, even in the most extreme and protracted cases of bodily ill-usage, hardly ever dare avail themselves of the laws made for their protection: and if, in a moment of irrepressible indignation, or by the interference of neighbours, they are induced to do so, their whole effort afterwards is to disclose as little as they can, and to beg off their tyrant from his merited chastisement.⁶⁹

Mill’s critique began to erode and evolve the traditional

64. See Sedler, *supra* note 55, at 193; see also Moreland, *supra* note 55, at 224. Moreland argued in 1930 that equity should be available for the personal interests of family relationships but that enjoining intimate relationships was not wise policy, because “[i]t can well be argued that attempts to govern too closely the morals of people by injunction will only result in making the courts which grant such decrees ridiculous and so injure the structure of the whole legal system.” Moreland, *supra* note 55, at 219.

65. See ZECHARIAH CHAFFEE, JR., SOME PROBLEMS IN EQUITY 73-75 (1950).

66. See *infra* note 113.

67. See, e.g., *Thompson v. Thompson*, 218 U.S. 611, 617-19 (1910).

68. See CHAFFEE, *supra* note 65.

69. JOHN STUART MILL, *The Subjection of Women*, in ON LIBERTY AND THE SUBJECTION OF WOMEN 147-48 (Alan Ryan ed., 2006) (1869).

common law of marriage in the early twentieth century with women's suffrage and attendant law reforms.⁷⁰ Mill would have felt well-vindicated by the end of the twentieth century. In 1971, the United States Supreme Court unanimously held that the Fourteenth Amendment Equal Protection Clause prohibits discrimination based on gender or sex.⁷¹ In 1992, the Supreme Court finally repudiated the old common law rule of wifely subjugation, without dissent:

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed Only one generation has passed since this Court observed that "woman is still regarded as the center of home and family life," with attendant "special responsibilities" that precluded full and independent legal status under the Constitution These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution Women do not lose their constitutionally protected liberty when they marry.⁷²

As early as 1910, some jurisdictions had begun to recognize tort actions between spouses, although the Supreme Court was initially reluctant to recognize such a "revolution" in the fixed form of marriage.⁷³ With a new understanding of women and family, Americans began to examine and address the problem more forthrightly as a matter of criminal law and public health.⁷⁴ Initially, reformers promoted the "battered women's movement," but soon thereafter, lawyers, activists, and courts began to advocate for recognition of domestic violence as a problem of gender inequity and to propose legal innovations to overcome cultural reticence.⁷⁵

70. Freeman, *supra* note 50, at 200.

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

72. *Planned Parenthood v. Casey*, 505 U.S. 833, 896-97 (1992) (quoting *Hoyt v. Florida*, 368 U.S. 57 (1961)).

73. See *Thompson v. Thompson*, 218 U.S. 611, 615 (1910) (considering a D.C. statute giving independent standing to wives to sue in tort. "Their obvious purpose is, in some respects, to treat the wife as a *femme sole*, and to a large extent to alter the common-law theory of the unity of husband and wife . . .").

74. *Developments in the Law—Legal Responses to Domestic Violence: I. Introduction*, 106 HARV. L. REV. 1501, 1502 (1993) (discussing the tension between reformed legal remedies and continuing cultural biases against state interference in such intimate relationships). See Sack, *supra* note 16, at 1666.

75. See Jane C. Murphy, *Engaging With the State: The Growing Reliance on*

In the 1970s, domestic violence became a subject of legitimate study and scientific examination.⁷⁶ At the beginning of this movement, several theories sought to explain the causes of domestic violence: perpetrator pathology, stress by social structure, male inadequacy and perceived failure in industrial contexts, feminist ideas of oppression, and liberation ideology.⁷⁷ Feminism largely prevailed, and most contemporary theories, which are backed by consistent empirical research, explain domestic abuse as an exertion of power, control, and coercion framed by traditional gender norms and male domination of women.⁷⁸

By the mid-twentieth century, American law essentially merged equity and law, to be deployed by unified courts of law and equity as appropriate.⁷⁹ Correlated with this merger was the

Lawyers and Judges to Protect Battered Women, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 500-03 (2002-03) (noting that by the 1980s, "[t]he movement became dominated by lawyers, elected officials and courts. The work shifted from establishing shelters, safe houses, and hotlines, to drafting legislation, lobbying elected officials, and litigating cases to create and expand legal protections for battered women.").

76. At least by 1978, however, Michael Freeman noted that, "there has hardly been any worthwhile research." Freeman, *supra* note 50, at 201; see also Susan Maidment, *The Law's Response to Marital Violence in England and the U.S.A.*, 26 INT'L & COMP. L.Q. 403, 404 (1977).

77. See Freeman, *supra* note 50, at 204-08.

78. See *id.*; see also LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* (2011); SCHNEIDER, *supra* note 15, at 5, 21-28; EVAN STARK, *COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE* 198-210 (2007).

79. The United States Constitution merged law and equity into the jurisdiction of a single Supreme Court. See U.S. CONST. art. III, § 2; Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (current version at 28 U.S.C. § 41(1) (2000)). This was a departure from the English common law with its slowly evolving mix of courts and crossing jurisdiction. The English fused jurisdiction over law and equity into one High Court of Judicature with the Judicature Acts of 1873 and 1875, but a disputed question remains if a fusion of jurisdiction actually resulted in a merger of law and equity themselves. See HARBURY AND MARTIN, *MODERN EQUITY* 14, 20 (Jill E. Martin ed.) (2005). In America, with some exceptions in the states, courts either sit as courts of law or courts of equity, as the case requires, or as courts of combined jurisdiction with equity available as necessary to the court. In 1937, the Federal Rules of Civil Procedure affirmed that in Article III courts, all cases in law or equity are only "civil cases," and the court can extend the "extraordinary" power of equity as it finds necessary. See Richard H.W. Maloy, *Expansive Equity Jurisprudence: A Court Divided*, 40 SUFFOLK U. L. REV. 641, 641-42, 680-81 (2007) (citing *Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 306 U.S. 563, 568 (1939)) (noting perpetuation of the Judiciary Act of 1789). See also FED. R. CIV. P. 1; FED. R. CIV. P. 2 (stating that "[t]here is one form of action – the civil action.").

dissolution of equity's fixation on property rights, affording courts more flexible remedy options and jurisdiction to intervene in cases involving purely personal interests.⁸⁰ It is equity's native, pragmatic flexibility that has ensured its survival and that may give renewed vigor to courts' rulings in domestic abuse cases.

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

It must not be forgotten that the rules of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time – altered, improved, and refined from time to time The doctrines are progressive, refined and improved; and if we want to know what the rules of equity are, we must look, of course, rather to the more modern than the more ancient cases.⁸¹

Likewise, in 1933, during a moment when “[j]udicial opinion as to what constitutes a marriage [underwent] a change,” a scholar noted the potential for equity to effectively respond to the demands for justice in marriages.⁸² Because equity is susceptible to cultural norms, the evolution of societal needs, and demands on families:

[Equity] embraces situations where real and genuine consent is lacking because of fraud, duress, and other similarly effective causes. Considerations of public policy and communal morality have received special regard and have had much to do with shaping the accepted tenets of the field. They arose in part from the needs and conditions of an era, the social and economic characteristics of which are no longer with us. By a sort of metamorphosis begun two or more generations in the past, we have grown into a different form – different not only in degree but in kind. We see all about us a much altered way of life of great complexity. It is marked by the creation of new, and the enlargement of existing demands on human relationships. Legislative and judicial extensions of individual rights and duties add their weight.⁸³

80. See *supra* notes 51-57.

81. 12 HOLDSWORTH, *supra* note 13, at 465-66 (quoting Jessel, M.R. in *In re Hallett's Case*, 13 C.D. 696, 710 (1879)).

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

83. Emmerglick, *supra* note 82, at 47-48; see, e.g., Recent Cases, *Equity – Fraud*

In fact, since the 1960s, American family law has continued to experience a metamorphosis into a “much altered way of life of great complexity.”⁸⁴ Advocates for law reform followed the shelter movement in the 1970s with greater activism to shape existing laws and to generate new responses to domestic violence.⁸⁵ Among these reforms, state legislatures have considered mandatory arrest policies in which police are bound to arrest someone on a domestic violence scene, and prosecutors have promoted “no drop” prosecutions in attempts to prevent victim-witnesses from coercion by their abusers in court.⁸⁶ In the twentieth century, states abolished marital rape exemptions, enhanced stalking crimes, and crafted counseling diversion programs.⁸⁷ In 1994, the federal government enacted the Violence Against Women Act of 1994 (VAWA), which federalized some interstate domestic violence crimes and established federal grants and policy preferences for states to address legal and community responses to domestic abuse.⁸⁸

The civil protection order may be the most common legal innovation to arise in response to domestic abuse.⁸⁹ Civil protection schemes require courts to do the work of equity, even if they are not strictly equitable remedies.⁹⁰ Civil protection order schemes are formal, with rules and strict procedures that provide a mechanism for injunctions, but without true consideration of equity outside the statutory structure.⁹¹ In 1970, Congress

As Ground for Equity's Jurisdiction to Annul Marriages (Virginia), 3 WASH. & LEE L. REV. 129 (1941).

84. Emmerglick, *supra* note 82, at 48.

85. *See infra* note 180.

86. Thomas L. Hafemeister, *If All You Have is a Hammer: Society's Ineffective Response to Intimate Partner Violence*, 60 CATH. U. L. REV. 919, 978-86 (2011) (describing and critiquing mandatory arrest and prosecution policies).

87. *See Developments in the Law – Legal Responses to Domestic Violence: II. Traditional Mechanisms of Response to Domestic Violence*, 106 HARV. L. REV. 1505, 1515-18 (providing the details of these innovations in state law).

88. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1902 (1994).

89. Civil Protection Orders are statutory devices to provide emergency, expedited relief, including physical restraint, for a victim of domestic violence. *See* discussion *infra* Section III.B.4.

90. *See* Taub, *Ex Parte Proceedings*, *supra* note 4, at 99; *see also* Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J. L. & Fam. Stud. 35, 38-42 (2008).

91. *See generally* Baker, *supra* note 90 (discussing adequacy of civil protection orders).

passed the Intrafamily Offenses Act for the District of Columbia, which included the first form of civil protection orders.⁹² By 1992, every state had established civil protection schemes to provide civil remedies for people vulnerable to domestic abuse.⁹³

If conscience, discretion, and justice drive the progression of equity, perhaps courts can revive equity's utility in cases of domestic abuse. Equity's structure and flexibility may bend to protect the personal interests and safety of domestic abuse victims, problems that stricter legal standards cannot adequately remedy. Courts today are better versed in the phenomenon of domestic abuse, better prepared to consider the dynamics of coercion in individual relationships, and better equipped with guidance in the law. Therefore, today's courts should alter, refine, and improve the use of equity to promote the cause of justice in domestic abuse cases.⁹⁴

92. D.C. CODE § 16-1001, *et seq.* (2009); *see also* Tamara L. Kuennen, "No-Drop" Civil Protection Orders: Exploring Bounds of Judicial Intervention in the Lives of Domestic Violence Victims, 16 UCLA WOMEN'S L.J. 39, 47 n.26 (2007).

93. Every state and the District of Columbia provide for civil protection orders for victims of domestic violence. *See, e.g.*, ALA. CODE §§ 30-5-1, (1998); ALASKA STAT. §18.66.100 (2006); ARIZ. REV. STAT. ANN. § 13-3601 (2001); ARK. CODE ANN. § 9-15-201 (2007); CAL. FAM. CODE §§ 6320, 6340 (2008); COLO. REV. STAT. §§ 13-14-101, 18-6-800 (2008); CONN. GEN. STAT. § 46b-16 (2008); DEL. CODE ANN. tit. 10, § 1042 (2006); D.C. CODE § 16-1003 (2005); FLA. STAT. ANN. §§ 741.30 (West 2008); GA. CODE ANN. §19-13-4 (2004); HAW. REV. STAT. § 586-3 (2005); IDAHO CODE ANN. § 39-6304 (2008); 750 ILL. COMP. STAT. 60/201 (West 1999); IND. CODE ANN. § 34-26-5-2 (LexisNexis 2007); IOWA CODE § 236.1 (West 2008); KAN. STAT. ANN. § 60-3101-3112 (2005); KY. REV. STAT. ANN. § 403.715-785 (LexisNexis 1999); LA. REV. STAT. ANN. § 46:2131 (2008); ME. REV. STAT. ANN. tit. 19-A, § 4001 (2008); MD. CODE ANN., FAM. LAW § 4-501 (2006); MASS. GEN. LAWS ANN. ch. 209, § 3 (2008); MICH. COMP. LAWS §§ 600.2950, 600.2950(a) (2008); MINN. STAT. ANN. § 518B.01 (2008); MISS. CODE ANN. § 93-21-1 (2007); MO. REV. STAT. §455.010 (2004); MONT. CODE ANN. § 40-15-101 (1995); NEB. REV. STAT. § 42-901 (2005); NEV. REV. STAT. § 33.017, .020 (2006); N.H. REV. STAT. ANN. § 173-B:1 (LexisNexis 2007); N.J. STAT. ANN. § 2C:25-17 (West 2008); N.M. STAT. ANN. § 40-13-2 (LexisNexis 2008); N.Y. FAM. LAW §530.11; N.C. GEN. STAT. § 50B-2 (2005); N.D. CENT. CODE § 14-07.1-02 (2004); OHIO REV. CODE ANN. § 3113.31 (LexisNexis 2008); OKLA. STAT. ANN. tit. 22, § 60.2 (2006); OR. REV. STAT. §107.718 (2007); 23 PA. CONS. STAT. § 6108 (2006); R.I. GEN. LAWS § 15-15-3 (2003); S.C. CODE ANN. § 20-4-40 (2006); S.D. CODIFIED LAWS § 25-10-3 (2002); TENN. CODE ANN. § 36-3-602 (2006); TEX. FAM. CODE ANN. § 81.001 (1997); UTAH CODE ANN. § 77-36-1 (2008); VT. STAT. ANN. tit. 15, § 1103 (2006); VA. CODE ANN. § 16.1-279.1 (2008); WASH. REV. CODE ANN. § 26.50.030 (2005); W. VA. CODE § 48-27-501 (2001); WIS. STAT. § 813.123 (2006); WYO. STAT. ANN. § 35-21-105 (2000).

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

III. CONTEMPORARY EQUITY AND DOMESTIC ABUSE

Equity exists today, but is dissolved into the law, and while available to courts, it is largely preempted or codified by the proliferation of statutes. The principles of equity arise in other sectors of the law, but those principles remain available to courts, at least as rubrics for making close calls.⁹⁵ Examining the vestiges of equity in contemporary practice reveals some potential utility in response to persistent domestic abuse.⁹⁶

A. THE ELEMENTS OF MODERN EQUITY

The availability of equitable relief turns on a court's discretion, measuring the appropriateness of the remedy, determined by comparing several factors derived from common law.⁹⁷ To obtain injunctive relief at equity in a tort action, a court should evaluate seven factors:

- (1) The nature of the interest to be protected,
- (2) The relative adequacy to the plaintiff of injunction and other remedies,

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

Freeman, *supra* note 50, at 250-51. Perhaps, after nearly forty years of law reform and cultural change, equity can capitalize on the resulting education and socialization to give better responses to victims of domestic violence.

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

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

97. See RESTATEMENT (SECOND) OF TORTS § 933 (2011).

- (3) Any unreasonable delay by the plaintiff in bringing suit,
- (4) Any related misconduct on the part of the plaintiff,
- (5) The relative hardship likely to result to defendant if injunction is granted and to plaintiff if denied,
- (6) The interests of third persons and the public,
- (7) The practicality of framing and enforcing the order of judgment.⁹⁸

These factors track many of the traditional maxims of equity, but they may be manifest in various formulations across jurisdictions and courts.⁹⁹

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

- (1) The extent of the threat of irreparable harm to the plaintiff if the interlocutory injunction is not granted,
- (2) The consequences that the interlocutory relief may have on the defendant,
- (3) The probability that the plaintiff will succeed on the merits, and
- (4) The public interest.¹⁰⁰

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

In analyzing the appropriateness of an injunction, it is helpful to distinguish ends from means. The ends are the specific results sought, such as freedom from trespass or nuisance, or the removal of an encroaching wall. The means are the coercive orders and judgments of the court and their administration. Ends must be envisaged before means are examined, but the available means must then be appraised When considered from the point of view of the court's

98. RESTATEMENT (SECOND) OF TORTS § 936 (1) (1979); *see also* Taub, *Equitable Relief*, *supra* note 4, at 243, identifying four elements differently stated: (1) a threatened or existing harm to the plaintiff, (2) with no adequate remedy at law, (3) for which a balance of hardships favors injunctive relief, and (4) that public interest will be served by the injunction.

99. *See* Taub, *Equitable Relief*, *supra* note 4, at 243.

100. RESTATEMENT (SECOND) OF TORTS § 936 (2) (1979).

convenience of administration, the injunctive remedy may often appear to be difficult, complex and burdensome. Moreover, it may often seem likely to result in hardship upon the defendant or to conflict with various interests of the public. Care must be taken, however, that these fears do not too easily overbalance the plaintiff's needs and the importance of the ends to be accomplished After all, by hypothesis, the defendant is the wrongdoer. The public interest is seldom found to be on the side of the unrestrained commission of tort.¹⁰¹

This is consistent with Schoenbrod's observations that modern equity struggles fundamentally between giving a plaintiff too little or too much protection with injunctive relief.¹⁰² This balance turns on tailoring a specific remedy for the plaintiff and weighing the equities to avoid judicial overreaching and undue harm to the defendant.¹⁰³

Historically, courts have often favored the "equities" of sovereign husbands and social constructs over injunctive relief tailored to protect victims of domestic abuse.¹⁰⁴ To avoid tampering with traditional tenets of family life and common law gender roles, courts were wont to favor legal remedies over intrusive injunctions.¹⁰⁵ Before the late twentieth century, courts widely favored divorce and criminal proceedings as the more "adequate remedies," but these remedies are often not adequate at all for victims of domestic abuse. If the legal and statutory remedies are not adequate to address a specific relationship,

101. RESTATEMENT (SECOND) OF TORTS § 936 cmt. c (1979).

102. See David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedies*, 72 MINN. L. REV. 627, 633 (1987-88).

103. See *id.*

104. See discussion, *supra* Section I.

105. This presupposes that a victim of domestic abuse could get a hearing and hale her abuser into court in the first place. See, e.g., *Thompson v. Thompson*, 218 U.S. 611 (1910), in which the Supreme Court considered a D.C. statute giving a married woman standing to sue in tort. The Court truncated that standing to prevent wives from suing their husbands for battery for fear of "revolutionizing" the institution of marriage. The *Thompson* court held that "perpetration of such atrocious wrongs [of domestic violence] affords adequate grounds for relief under the statutes of divorce and alimony," and the wife "may resort to the criminal courts, which it is to be presumed, will inflict punishment commensurate with the offense committed." *Id.* at 617, 619. For more on the historic reticence of courts to intervene in family violence, see Jeffrey R. Baker, *Trifling Violence: The U.S. Supreme Court, Domestic Violence and a Theory of Love*, 42 CUMB. L. REV. 65 (2012).

equity may fulfill its great purpose of achieving justice where the traditional legal remedies cannot.

B. ADEQUATE AND INADEQUATE REMEDIES AT LAW

Central to equity's jurisdiction is a judicial determination that there is no legal remedy adequate to the issue at hand.¹⁰⁶ This is critical to the thesis of this Article because the proliferation of legal reforms responding to domestic abuse often remains inadequate, especially when fixated on physical violence.¹⁰⁷

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

In assessing the place of equity practice in the overall legal system, it is critical to realize the extent to which the common law system operated as a brake. One could not turn to equity if there was an adequate remedy at law. Equity grew interstitially, to fill in the gaps of substantive common law (such as the absence of law relating to trusts) and to provide a broader array of remedies—specific performance, injunctions, and accountings. Equity thus provided a “gloss” or “appendix” to the more structured common law. An expansive equity practice developed as a necessary companion to common law.¹⁰⁸

Courts historically have looked to divorce or criminal sanctions to remedy domestic abuse, and modern policies and statutory regimes such as civil protection orders arose to fill the gaps left by the common law.¹⁰⁹ Today, these mechanisms still

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

107. For a full examination of the inadequacy of civil protection orders to accommodate abuse that is not physically violent, see generally Baker, *supra* note 90.

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

109. Taub authored a 1981 study surveying early statutory instruments designed to provide relief for domestic violence victims, as well as the potential and challenges of equitable responses. See TAUB and BOYLAN, *supra* note 96. The author of this

may function as seemingly adequate legal remedies that might foreclose independent claims in equity.¹¹⁰ Courts and lawyers should reclaim equity when the law fails to recognize the plight of a victim or to provide a just remedy for a victim's escape and recovery.¹¹¹ When the law has not imagined the form of a victim's coercive abuse, or where the available remedy would perpetuate or revictimize the victim, equity offers courts a conservative, erstwhile means of reaching practical, tailored justice.

1. DIVORCE AS AN ADEQUATE LEGAL REMEDY FOR DOMESTIC ABUSE

The evolution of divorce law in the twentieth century is a wending illustration of the tug-of-war among cultural shifts, statutory reforms, appellate reluctance, and judicial practicality.¹¹² Throughout the nineteenth century, divorce

Article shares a thesis with Taub that equity could provide a coherent regime for effective judicial intervention in cases of domestic abuse. Implicit in Taub's work on this question is a recognition that this is aspirational, and that, for centuries, equity did not live up to its potential for justice for victims. See TAUB and BOYLAN, *supra* note 96 at 1.

110. Arkansas provides a clear example. When Arkansas first enacted its structure for civil protection orders, it vested the jurisdiction with the power to issue injunctions in its equity courts, having maintained the distinction between law courts and equity courts through the 1990s. See Mark R. Killenbeck, *And Then They Did . . . ? Abusing Equity in the Name of Justice*, 44 ARK. L. REV. 235 (1991). Soon after the law's passage, the Arkansas Supreme Court invalidated the law as impermissibly expanding equity jurisdiction by vesting chancery courts with the power to issue the orders, primarily because the existing criminal laws against domestic violence were the adequate legal remedy. See *id.* at 239-40 (citing *Bates v. Bates*, 793 S.W.2d 788 (Ark. 1990)); see also Shayne D. Smith, Note, *Constitutional Law – The Domestic Abuse Act of 1989 – An Impermissible Expansion of Chancery Jurisdiction.*, 13 U. ARK. LITTLE ROCK L. REV. 537, 549-51 (1990). Because the legislature rooted the initial version of the civil protection order structure in the courts of equity, and because the state high court found that victims could find relief in criminal prosecution of their abusers, the court found that the statute violated the state constitution. See *id.*

111. Taub hinged her hope on equity overcoming the perceived adequacy of these remedies on tactical showings of "special circumstances" that could render the available legal remedies inadequate to the situation, and she suggested that this showing typically must involve repeated, continuing wrong-doing. See TAUB and BOYLAN, *supra* note 96, at 34. This Article hangs its hope not on artful pleading, but on a changed cultural and social awareness of domestic abuse and gender justice that will inform and influence judicial discretion and conscience.

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

remained restricted to precise formalism, with exacting standards of fault and clean hands, and courts acted to protect the institution of marriage in all cases absent real violations of marital commitments.¹¹³ As economic empowerment and independence for wives increased, the culture and practice of divorce changed forever because women found themselves unwilling to submit to the yokes of coverture.¹¹⁴

Divorce rates increased, and cultural acceptance of divorce widened to accommodate new and expansive ideas of “incompatibility” with married women’s law, suffrage, and standing.¹¹⁵ Still, formalism in the law remained steadfast.¹¹⁶ When married couples sought divorce for temperament or incompatibility, they were forced to manufacture formal grounds for divorce, such as violence or adultery, and one party would bear such an accusation to ensure that the other had clean hands.¹¹⁷ These rules reflect the theory that divorce is punishment for violating the bonds of marriage, but the popular psychology of the twentieth century favored individualism over

113. DiFonzo, *supra* note 112, at 5:

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

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

114. DiFonzo, *supra* note 112, at 4. *See, e.g.,* Smith v. Smith, 72 Pa. Super. 96 (1918); Pennington v. Pennington, 169 N.W. 327, 328 (Iowa 1918) (affirming divorce for a wife who alleged no physical violence but where the court made this finding:

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

115. *See* DiFonzo, *supra* note 112, at 3-4.

116. DiFonzo, *supra* note 112, at 4-8. *See, e.g.,* Hockerston v. Hockerston, 182 P. 325 (Cal. Dist. Ct. App. 1919) (affirming an order denying divorce to a wife who charged an instance of severe physical violence “that by reason thereof grievous mental suffering, anguish, and distress, and grievous physical suffering and pain, resulted to the plaintiff,” even where the husband did not appear to participate in the trial for divorce).

117. DiFonzo, *supra* note 112, at 4-8.

2012]

Equity in Domestic Abuse Cases

585

institutionalism and erased the notion of divorce as a sanction.¹¹⁸

In the early twentieth century, divorce began to become a means of liberty, and moral arguments rose in favor of releasing people from mutually intolerable marriages.¹¹⁹ As the struggle rose between prevailing formalism and the rising demand for no-fault divorce, incompatibility, without clear definition, became a category within formalism to permit increasingly available dissolution.¹²⁰ Litigants and practically minded judges corralled the demand for mutual, temperamental divorce within a rubric much faster than appellate courts and legislatures could stomach.¹²¹

In response to the undeniable swell of demanding divorce customers, legislatures and appellate courts began to expand the categories of formal grounds for divorce, expanding “cruelty” to include emotional abuse, not merely physical violence.¹²² By the middle of the twentieth century, “cruelty” might have extended to include basic nagging and admonishment, serving as an effective proxy for incompatibility.¹²³

Liberalized divorce laws can provide relief and escape from violent relationships and abuse that is not physically violent, and they can capture remedies beyond mere restraint.¹²⁴ However, divorce will often not be an adequate remedy for domestic abuse. Historically, courts viewed the availability of divorce as a pretext to deny women under coverture standing and relief in tort

118. See CHAFFEE, *supra* note 65. A complaining party could not receive a divorce against the other unless she was faultless because of the ubiquitous maxim of clean hands. If both parties had committed wrongs, they were sentenced to remain together perpetually, in equity. See DiFonzo, *supra* note 112, at 9.

119. DiFonzo, *supra* note 112, at 4-8. See also Mill, *supra* note 69; CHAFFEE, *supra* note 65.

120. DiFonzo, *supra* note 112, at 8.

121. *Id.* at 8, 12-13. Very few of these divorces were appealed, because both the husbands and the wives wanted divorces. For this reason, more conservative appellate courts, removed from the reality of the lived-relationships, had few chances to tamp down the practice. See *id.*

122. *Id.* at 11-12 (quoting Krauss v. Krauss, 111 So. 683, 685 (La. 1927)).

123. *Id.* at 14-16.

124. See Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1159-60 (2009). See also Keller v. Keller, 158 N.W.2d 694, 698 (N.D. 1968) (recognizing a trial court’s inherent power in divorce actions to issue injunctions, and affirming a temporary restraining and exclusion order against a husband upon a “showing of specific prior acts or conduct on the part of the defendant to justify such order”).

actions.¹²⁵ Today, divorce may be a more accessible means for relief for married couples, and equity is inherently available to divorce courts.¹²⁶ Even so, divorce remains costly and time-consuming, and divorce is not available to victims of domestic violence who are not married to their abusers.¹²⁷ Divorce also may provoke economic and financial consequences that are untenable for a wife and mother who is dependent on her abusive husband's monetary provision.¹²⁸ Not only may divorce be expensive and time-consuming for a victim seeking to escape from violence, but she may find herself homeless, impoverished, unemployed, and unable to provide for her children.¹²⁹

Divorce is not an adequate legal remedy for spouses who want to save their marriages or do not desire stark separation from their partners.¹³⁰ Victims may also eschew divorce as a remedy for domestic abuse and violence because there are delays in procedure and because exclusion, separation, and alimony may not always prevent future violence or coercion.¹³¹

2. CRIMINAL PROSECUTION AS AN ADEQUATE LEGAL REMEDY

Historically, courts have deferred to the criminal proscriptions against assault and battery to provide a remedy for domestic violence.¹³² The theory prevailed that victims need only call the police to receive relief from violence, but this theory failed because of recalcitrant practices by police and prosecutors, steeped in a persistent culture of indulgence and willful ignorance.¹³³ In England and in a few early American states,

125. See, e.g., *Thompson v. Thompson*, 218 U.S. 611, 617-19 (Taney, J., dissenting).

126. See, e.g., *Kantaris v. Kantaris*, 169 N.W.2d 824 (Iowa 1969).

127. See *Johnson*, *supra* note 124, at 1159-60.

128. See *Sacco*, *supra* note 5 (observing this danger and inadequacy of divorce law before common reforms in domestic violence policy and practice); see also *Freeman*, *supra* note 50, at 244-45.

129. See *Freeman*, *supra* note 50 at 244-45; see also Shirley Darby Howell, *Domestic Violence, Flawed Interpretations of 42 U.S.C. §1437(D)(L)(6), Sexual Harassment in Public Housing, and Municipal Violations of the Eighth Amendment: Making Women Homeless and Keeping Them Homeless*, 13 JONES L. REV. 1 (2008).

130. See *Moreland*, *supra* note 55, at 214.

131. See *infra* Section III.B.2.

132. See *Thompson v. Thompson*, 218 U.S. 611 (1910).

133. See *Freeman*, *supra* note 50, at 219. But see *Fulgham v. State*, 46 Ala. 143 (1871). *Fulgham* is a positive example of a court denouncing wife battery in the nineteenth century. In *Fulgham*, the Alabama Supreme Court addressed a violent episode between two married, emancipated slaves. The Court took pains to note that chastisement was never the law in Alabama and affirmed the criminal conviction of

whipping a perpetrator arose as a criminal sanction for wife beating, but this provoked practical criticism that flogging culprits hurt women because their abusers return “more brutalized and infuriated than ever, and again have their wives at their mercy.”¹³⁴

As recently as the 1970s, in the midst of the second major American feminist movement, many police agencies remained reluctant to intervene aggressively in violent homes, often preferring merely to calm a situation, separate the parties, and then divert cases from prosecution and ignore victims unwilling to prosecute.¹³⁵ Even well-meaning police officers will encounter difficult choices in the field when they have imperfect information.¹³⁶ Short-term peace may require temporary, immediate separation that does not affect underlying causes, but field “mediation” may get at the heart of the “dispute.”¹³⁷ The feminist response may focus neither on community peace nor dispute-resolution, but rather on protecting the victim and deterring further oppression.¹³⁸ Although a victim of abuse may well find relief through the police and criminal intervention, she retains little agency in the transaction and must depend on the blunt response of officers who arrive with little context or

the husband who had beaten his wife with a board when she intervened in his excessive punishment of their children, despite the husband’s affirmative defense of chastisement. The court tracked Blackstone’s explanation of chastisement and the ancient tradition but found a progressive element in the law:

Since then, however, learning, with its humanizing influences, has made great progress, and morals and religion have made some progress with it. Therefore, a rod which may be drawn through the wedding ring is not now deemed necessary to teach the wife her duty and subjection to the husband. The husband is therefore not justified or allowed by law to use such a weapon, or any other, for her moderate correction. The wife is not to be considered as the husband’s slave. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law.

Fulgham v. State, 46 Ala. 143, 146-47 (1871). Calling the newly freed slave a “citizen of the state,” among the “rank of the highest in the commonwealth,” the court implicitly observes the humanizing trend of the law to treat women “upon the same footing before the law,” yet she still would have had no standing to sue him on her own. The court also notes that the privilege to abuse a wife is “not *now* acknowledged by our law.” *Id.* at 147 (emphasis added).

134. See Freeman, *supra* note 50, at 200 (citations omitted).

135. See Sacco, *supra* note 5, at 560-63.

136. See LAWRENCE W. SHERMAN AND RICHARD A. BERK, *The Specific Deterrent Effects of Arrest for Domestic Assault*, in DOMESTIC VIOLENCE 355-56 (Mangai Natarajan ed.) (2007); 49 AM. SOC. REV. 261, 262 (1984).

137. See *id.* at 263.

138. See *id.* at 262.

understanding of the nuances of the abusive relationship.¹³⁹ Further, if the coercive abuse does not readily satisfy the elements of violent crime, the police may not intervene at all.¹⁴⁰

Likewise, prosecutors often have been reluctant to prosecute cases that fall short of homicide and have been more likely to divert cases to non-judicial settings or to avoid prosecution at all, especially with a reluctant victim-witness.¹⁴¹ In any event, even with the most enlightened and sensitive prosecutor, the victim remains a witness, not a client, and her case depends on prosecutorial discretion, not her own.¹⁴² The victim has little or no agency in the prosecution of criminal charges, and she has only the option to proceed or to refuse to prosecute, leaving her open to potential coercion from the court, the prosecutors, and her abuser.¹⁴³

Thus, although criminal law remedies are available, police officers and prosecutors have vast discretion, so victims remain at their mercy for support and relief.¹⁴⁴ Without access to quick, equitable injunctions, victims have had to rely on police and prosecutors to deliver them or else wait out a divorce. Theoretically, the criminal justice system could be available to these victims, but practically, they have no adequate remedy at law.

3. TORT LIABILITY AS AN ADEQUATE LEGAL REMEDY

Tort law plainly provides remedial damages for intentional torts like assault, battery, intentional infliction of emotional distress, and the like, and courts have rendered equitable relief in such tort cases.¹⁴⁵ Victims of domestic violence would struggle to achieve useful, quick relief to escape a violent relationship through a tort action, and would instead encounter the expensive and long path toward resolution of a civil action.¹⁴⁶ If the need for

139. See SHERMAN AND BERK, *supra* note 136, at 262.

140. See SHERMAN AND BERK, *supra* notes 136-139 and accompanying text.

141. See Sacco, *supra* note 5, at 563-65, 567-68.

142. See Taub, *Equitable Relief*, *supra* note 4, at 254.

143. See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 17 (1999).

144. See Maidment, *supra* note 76, at 406-09.

145. See Johnson, *supra* note 124, at 1158 (citing TAUB and BOYLAN, *supra* note 96, at 2, 5).

146. See *id.* at 1159.

relief is immediate, urgent, and not monetarily quantifiable, tort actions are inadequate legal remedies; tort liability does not answer the victim's needs.

Domestic abuse is not merely about cuts and bruises and other injuries to be made whole by money damages. Victims of domestic abuse suffer significant increases in physical health problems, even beyond the immediate effect of a punch or shove.¹⁴⁷ Reliable studies have reported varied chronic symptoms associated with the abuse suffered by domestic violence victims: headaches, back pain, gastrointestinal problems, chest pain, pelvic pain, insomnia, fatigue, nightmares, and choking sensations.¹⁴⁸ A 2004 study found significantly increased physiological stress among abuse victims and concluded that this likely shows that women who are battered may have increased susceptibility to future illness.¹⁴⁹ Another study observes immediate and long term physical and psychological distress resulting from domestic violence including bruises and lacerations, chronic pain, eating disturbances, anxiety, low self-esteem, depression, sleep deprivation, and memory loss.¹⁵⁰ Also, “[40%] to 60% of battered women are abused during pregnancy and 8% of pregnant battered women experience obstetrical complications as a direct result of their abuse.”¹⁵¹ Women who are victims of domestic abuse are more likely to have been

147. Kimberly K. Eby, *Exploring the Stressors of Low-Income Women with Abusive Partners: Understanding Their Needs and Developing Effective Community Responses*, 19 J. FAM. VIOLENCE 221, 222 (2004). The author discusses this study and those referenced in the next seven footnotes in a previous article. See Jeffrey R. Baker, *Necessary Third Parties: Multidisciplinary Collaboration and Inadequate Professional Privileges in Domestic Violence Practice*, 21 COLUM. J. GENDER & L. 283, 290-94 (2011).

148. See Eby, *supra* note 147 (citing Kimberly K. Eby et al., *Health Effects of Experiences of Sexual Violence for Women with Abusive Partners*, 16 HEALTH CARE WOMEN INT'L 563 (1995)); see also Diane R. Follingstad et al., *Factors Moderating Physical and Psychological Symptoms of Battered Women*, 6 J. FAM. VIOLENCE 81 (1991); Elaine Hilberman & Kit Munson, *Sixty Battered Women*, 2 VICTIMOLOGY INT. J. 460 (1977); Suzanne K rouac et al., *Dimensions of Health in Violent Families*, 7 HEALTH CARE FOR WOMEN 413 (1986); Rachel Rodriguez, *Perception of Health Needs by Battered Women*, 12 RESPONSE: TO THE VICTIMIZATION OF WOMEN & CHILDREN, No. 4, 22 (1989); Evan Stark & Ann Flitcraft, *Medical Therapy as Repression: The Case of the Battered Woman*, HEALTH & MED. 29 (1982); Murray Straus & Richard J. Gelles, *The Costs of Family Violence*, 102 PUB. HEALTH REPORTS 638 (1987).

149. See Eby, *supra* note 147 at 225, 229.

150. Janice Humphreys, et al., *Psychological and Physical Distress of Sheltered Battered Women*, 22 HEALTH CARE FOR WOMEN INT'L 401 (2001) (citations omitted).

151. *Id.*

hospitalized because of self-injury, poisoning, gastrointestinal disorders, assault injuries, psychiatric disorders, or attempted suicide in the year before obtaining a protection order.¹⁵²

Victims of emotional abuse have increased chances of diverse mental health complications, including depression, anxiety, post-traumatic stress disorder, and suicidal ideation.¹⁵³ Women exposed to domestic abuse report higher incidents of intrusive thoughts, ruminations and avoidance, and symptoms of post-traumatic stress disorder.¹⁵⁴ More intense trauma symptoms occur in those who have survived more severe violence.¹⁵⁵ Domestic abuse has an “enormous impact” on victims’ feelings of depression.¹⁵⁶

Moreover, before the mid-twentieth century, a wife had no

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

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

154. See Eby, *supra* note 147.

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

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

standing to sue her husband in tort, even for assault or battery.¹⁵⁷ Coverture prevented a wife from suing her husband, except by a next friend for divorce, and spousal immunity kept her from civil remedies against her abuser altogether.¹⁵⁸ Even when a wife did sue her abusive husband, she might encounter suspicious judges.¹⁵⁹ Freeman quotes judges and scholars who wrote that, even in the twentieth century, a wife's suit against her husband would be "unseemly, distressing, and embittering," and that "[i]f a husband 'beats up' his wife, she cannot sue him, because to sue him would be unwifely."¹⁶⁰

Tort remedies fell short then, and continue to fall short now in three important ways.¹⁶¹ First, as explained above, courts traditionally and historically have considered divorce and criminal penalties as adequate and appropriate remedies for domestic violence, not equitable or legal damages.¹⁶² Second, tort damages necessarily come after the escape from abuse and provide no immediate relief from injury, and tort damages do little to compensate for emotional trauma and familial disruption.¹⁶³ Third, civil tort remedies compensate retroactively; they do not protect immediately or into the future.¹⁶⁴

In *Dickson*, an instructive case from Washington, the divorce itself was the provocation for years of harassment and defamation.¹⁶⁵ The wife in *Dickson* sued for injunctive relief against her ex-husband who had spent the years after their divorce mounting a campaign to make divorce illegal and invoking his wife in his literature and communications; he accused her of being insane and claimed still to be married to her in the sight of God.¹⁶⁶ He trespassed on her property, cursed her in public and in front of their children, told others that they were still married, told their children that she was not sane, and wrote

157. See, e.g., *Barber v. Barber*, 62 U.S. 582, 588-90 (1858).

158. See *id.*; but see Sacco, *supra* note 5, at 569-73 (discussing the rise of married women's statutes and the expansion of standing to sue, typically only after divorce and prosecution).

159. See Freeman, *supra* note 50.

160. *Id.* at 228.

161. See Taub, *Equitable Relief*, *supra* note 4, at 255.

162. See *supra* Section III.B.1 and Section III.B.2.

163. See generally *supra* Section III.B.3.

164. See TAUB and BOYLAN, *supra* note 96, at 44.

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

166. See *id.* at 477.

her voluminous letters featuring similar statements.¹⁶⁷ The trial court issued an injunction, claiming that it had jurisdiction over the divorce and the minor children:

(I)t is ORDERED, ADJUDGED AND DECREED that the defendant be and he is hereby temporarily restrained from harassing the plaintiff in any way whatsoever, from writing her letters, from going upon the premises that she may occupy wherever that might be, from cursing plaintiff in public or private, from accusing her of being insane, from taking delivery of mail in her name at his address or anywhere else, from representing that plaintiff is defendant's wife, or from any way harassing, contacting, speaking to or communicating with the plaintiff or otherwise interfering with her freedom and personal enjoyment¹⁶⁸

The defendant husband argued that defamation had an adequate legal remedy in tort law and that the injunction violated his constitutional free speech rights.¹⁶⁹ The court found that defamation is not protected speech and that money damages in tort would not be sufficient because of the "recurrent nature of plaintiff's invasions of defendant's rights; the need for a multiplicity of damage actions to assert defendant's rights; the imminent threat of continued emotional and physical trauma; and the difficulty of evaluating the injuries in this case in monetary terms."¹⁷⁰

The *Dickson* court yet remarked that the "thrust of the injunction" was not to protect the wife and mother but to protect the minor children from their father's behavior.¹⁷¹

There was sufficient evidence that Mr. Dickson's conduct interfered with the welfare of his minor children At one time, he was receiving mail in Mrs. Dickson's name at his office He has told several persons that she is insane and sick More than once he has come to her house, and when she went inside, he shouted loud enough for the neighbors to hear that she was insane and needed him. In a letter he sent to her, he said that he had written to her

167. *Dickson v. Dickson*, 529 P.2d 476, 477 (Wash. 1974).

168. *Id.* at 477-78.

169. *See id.* at 478.

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

171. *See id.* at 488-89.

employer. One of the most harassing acts has been his insistence to several persons that Mrs. Dickson is still his wife It would be naive to assume that Mrs. Dickson's unhappiness did not have a harmful effect upon [the children] and on Mrs. Dickson's ability to raise them. The effect upon their mother could not help but embitter the children toward their father Moreover, much of Mr. Dickson's conduct directly threatened their welfare. He has stated to several persons that the children, as well as Mrs. Dickson, need help and that if she would marry him again, he could help them. On one occasion he passed out literature at their church, at which several persons laughed. This occurrence was related to a couple of Mrs. Dickson's older children. These incidents could not have escaped the younger children's attention. The disparaging remarks about or reflecting on them could very well make them think badly of themselves and their family. They have undoubtedly heard of Mr. Dickson's statements that Mrs. Dickson is still his wife. In [the children's minds], remarks about [their] mother's health and relationship with her ex-husband, at the least, would create much confusion. More likely, it may lead to questioning of [their] mother's judgment and [their] mother's conduct, such as seeing other men.¹⁷²

The *Dickson* court enjoined Mr. Dickson from harassing Mrs. Dickson, and thus offers a rare example of a court turning to equity to intervene in family matters. The court found the defendant's actions to be defamatory, harassing, and harmful to the minor children. To the court's credit, it employed equity to enjoin the ex-husband from his behavior toward his ex-wife. The case demonstrates the utility and potential of equity that this Article promotes.

By contrast, the *Dickson* decision also demonstrates a deficiency in language and tools to describe Mr. Dickson's coercive abuse. The court was bound to frame its opinion in tort and free speech structures. It does not seem to appreciate that Mr. Dickson was attempting to coerce his ex-wife to return to him, to exercise power and control over her, and to drive her back into his domain. The court stated that its central thrust was to protect the children, not Mrs. Dickson, who was the actual target of Mr. Dickson's actions. The court might well have found that Mrs.

172. *Dickson v. Dickson*, 529 P.2d 476, 479-80 (Wash. 1974).

Dickson had a personal interest to be free of Mr. Dickson's coercion and that Mr. Dickson's tactics were abusive and violated his ex-wife's interests, even if his actions did not satisfy the elements of a particular tort or crime.¹⁷³ The court might have found that Mrs. Dickson has an interest in being free from her ex-husband's harassment and in achieving stability and peace in her home. The court found that the consequences of interlocutory relief on Mr. Dickson were outweighed by Mrs. Dickson's need for protection from the harm he caused her, but the court could have framed its findings in terms of dignity, autonomy, stability, peace, and freedom from fear.

Dickson is a rare, positive result of equity in domestic abuse cases, but it illustrates a lack of language and understanding of family and gender dynamics as late as 1970. Courts and culture simply had not yet articulated a clearer vision of domestic abuse beyond physical wife battery. In spite of this, *Dickson* demonstrates the potential that equity has to help courts achieve desirable results within existing structures.

4. THE CIVIL PROTECTION ORDER AS AN ADEQUATE LEGAL REMEDY

Civil protection orders are a statutory species of injunctive relief for victims of domestic violence, arising in the late 1970s and now available in every state.¹⁷⁴ In quick order, states seized on civil protection orders as an efficient means to afford quick, emergency, and usually temporary injunctive relief to victims of domestic violence.¹⁷⁵ This can include simple restraint, residential exclusion, temporary child custody, financial support, transportation, and the surrender of firearms.¹⁷⁶

Civil protection order regimes, however useful, sound in the law, not in equity. These statutes all include standards of evidence and statutory elements, and virtually all of them define

173. See, e.g., *Webber v. Gray*, 307 S.W.2d 80 at 296 (affirming an injunction for non-criminal actions that would have been "trivial" had they been "sporadic or of short duration," but which were subject to an injunction where the defendant's actions were "incessant" and "protracted").

174. See *supra* note 93.

175. See Kuennen, *supra* note 92 at 47-48 n.26, 34; Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 53 (2000).

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

“abuse” by referencing criminal codes and other statutes.¹⁷⁷ Virtually all of these antecedent crimes and statutory definitions of domestic abuse presuppose physical violence.¹⁷⁸ In the early days of civil protection schemes, some concern arose that they might totally supplant equitable remedies because they might stand as complete and universally adequate legal remedies.¹⁷⁹

On the contrary, civil protection statutes’ inflexibility and fixation on physical violence makes civil protection orders inadequate remedies at law for victims of abuse.¹⁸⁰ Civil protection orders create a regime of accessible legal remedies, but by focusing almost exclusively on physical violence and crimes, the statutes do not reach other forms of coercion and subjugation.¹⁸¹ This fixation limits the availability of civil protection orders and can dramatically affect the results of related legal actions if victims cannot immediately prove significant physical violence.¹⁸²

These other forms of non-violent abuse and coercion can include interference with a victim’s work and workplace. A perpetrator can exert financial pressure and dependence with financial threats, by alienating joint bank accounts, or by forcing a partner to endorse paychecks under duress.¹⁸³ An abuser may threaten to remove a partner or her children from his medical insurance or to intercept her governmental benefits. He may threaten to expose intimate details of her life through social media or isolate her from friends and family by monitoring her cell phone and text messages. These are not far-fetched ideas,

177. See, e.g., ALA. CODE § 30-5-2(1) (2010).

178. See Baker, *supra* note 90.

179. See Taub, *Equitable Relief*, *supra* note 4, at 246.

180. See Leigh Goodmark, *Law is the Answer? Do We Know for Sure? Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 29-30 (2004):

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

181. See Johnson, *supra* note 124, at 1112.

182. See *id.* at 1152-53.

183. See, e.g., LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 29-30 (2011).

and they are not illegal. Because they are not illegal, a victim cannot get a civil protection order to enjoin them under statutory schemes. Thus, civil protection orders cannot provide adequate relief to victims of abuse that is neither physical nor illegal on its face, however harmful it may be to the victims.

C. JUDICIAL DISCRETION

Equitable decisions rest in the discretion of the court, a hallmark of the practice of modifying the law to accommodate justice in individual cases.¹⁸⁴ Despite gradual hardening into normalized rules, equity's purpose and effect lie in the conscience of individual judges:

Equity is a roguish thing. For law we have a measure . . . equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a Chancellor's foot.¹⁸⁵

If a judge does not have a clear, thorough understanding of domestic violence and family dynamics, from a generalized philosophical level to the intricate dynamics of individual families, the judge cannot render effective relief.¹⁸⁶

A judge's discretion is not without guidance, and that guidance comes from the vaunted maxims of equity, which

184. See Schoenbrod, *supra* note 102. Schoenbrod notes this tenet but argues that equity has devolved into formalized compartments that prevent it from rendering appropriate remedies, without constant precedent or predictable results. See *id.* at 632. He laments the absence of "transsubstantive principles to guide judges in fashioning injunctive relief." *Id.* He is concerned about injunctions that give less protection than the plaintiff is due, by "balancing the equities," and about injunctions that give more than the plaintiff needs, by "tailoring the remedy," and he proposes a principle to thread the needle. See *id.* at 633-34. Under his principle:

Judges must honor the decisions that the law has made as to both the ends—the goals of the law of liability—and the means—the modes designated by the law of liability to achieve its ends. Equitable discretion should kick in only when the case presents issues as to the means that the law has left undecided, and even then it should remain controlled by the law's decisions as to ends. If so, the law truly is honored in the breach.

Id. at 694-95.

185. 12 HOLDSWORTH, *supra* note 13, at 467-68 (referencing "Selden's well-known aphorism.").

186. See Freeman, *supra* note 50, at 200: "[s]olutions presuppose an understanding of the problem. Legal responses cannot operate *in vacuo*. Successful solvents require more than a willingness to act. What is required is a thorough cognizance of the aetiology of wife battering."

evolved to guide a judge's discretion despite the existence of inadequate legal remedies. A judge may use the maxims of equity once a plaintiff has met the burden to access equity, articulating a claim without an adequate remedy at law, threatening irreparable harm, favoring her in justice, and consistent with public policy. The maxims are not necessarily authoritative but are informative and subjective. Disputed for centuries, the actual number, content, meaning, and utility of equitable maxims are uncertain, and their historical use and application seems certainly geared toward pragmatic resolution of courts' consciences.¹⁸⁷

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

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

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

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

Id. at 177.

Professor Brill identifies and discusses 12 maxims:

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

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

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

It was an evil day when the first American judge to speak of clean hands had the bright idea of injecting the maxim into the very place where it would work its greatest mischief. In dealing with a marriage, judges have an especially strong duty to look at the total situation, and not let result turn on the ethical behavior of a single individual. Marriage does not involve just one person. Indeed, most of the difficulties as well as its delights come from the basic fact that it takes two to make marriage. And besides the other spouse, whose appearance as defendant rather than plaintiff may be somewhat fortuitous, many more persons are interested in the formation, continuance and termination of the relationship. Most obvious are the children (born and unborn) whether of this couple or from the union of one

(12) Equity Abhors Forfeitures.

Howard W. Brill, *The Maxims of Equity*, 1993 ARK. L. NOTES 29 (1993). Contemporary English scholar Jill E. Martin also identifies twelve maxims, but two of them have different angles: (1) Where the equities are equal the law prevails, and (2) Equity looks to the intent rather than the form. She also would substitute two maxims: (1) Equity imputes an intention to fulfill an obligation, and (2) Delay defeats equities. See HANBURY AND MARTIN, MODERN EQUITY 27-32 (Jill E. Martin ed.) (2005). In 1882, Walter E. Sparks identified six maxims arising from the English traditions:

- (1) Equity, having once had jurisdiction, does not lose the jurisdiction even if the courts of law afterwards grant the same or a similar relief.
- (2) Equity follows the law.
- (3) Where there is equal equity, the law must prevail.
- (4) Equality is equity.
- (5) He who seeks equity must do equity.
- (6) Equity considers that done with ought to have been done.

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

spouse with a fresh mate. In addition, the question of whether [the couple is] lawfully married may seriously concern creditors, federal tax collectors, school authorities, neighbors, and potential fiancés of either Over and above this host of citizens, the community has all sorts of vital interests, which are not altogether consistent. For instance, as against the policy preferring a permanent family to barnyard matings, there are practical advantages in replacing one hopelessly unhappy childless marriage by two happy and fruitful marriages, as sometimes happens, rather than condemning each spouse to celibacy or sin. And if the discordant couple [has] children, statistics cannot demonstrate whether they will suffer more from a broken home or from a nominal home full of hatred and contempt. When society cannot make up its mind how to reconcile all these competing interests and policies, we ought not blame judges for being bewildered The clean hands maxim is an impertinent intrusion on this very difficult and important judicial job.¹⁸⁸

Among the prominent maxims of equity, equity is a doctrine of conscience that will tolerate no wrongdoing.¹⁸⁹ This is consistent with a judge's fundamental discretion in equity, to do what the judge thinks ought to be done. Inevitably, judges are products of their time, environment, and culture, and individual conscience is shaped by innumerable insights and experience.¹⁹⁰ In theory, the maxims of equity and case precedent should guide judicial discretion.

Today, American law essentially has merged equity into courts of law, but the maxims and principles of equity remain manifest in judicial decision-making.¹⁹¹ This functional residue of equity is available for adjudication of personal interests,

188. CHAFFEE, *supra* note 65, at 73-75.

189. *See supra* note 187.

190. Judges drive equity in their particular circumstances, as evident in the evolution from feudalism to private property rights and from private property rights to personal interests, as described above in Section II. Equity is progressive and apt to be altered and refined by modern cases, social context, changing cultural mores, and judges' milieu. *See* 12 HOLDSWORTH, *supra* note 13; *see also* Emmerglick, *supra* note 82. This is especially true for matters of family structure and gender roles. *See, e.g.,* State v. Rhodes, 61 N.C. 453, 459 (1868) (*per curiam*) (observing that the issue of judicial intrusion into violent marriages is "at sea" and will be driven by community values and direction).

191. *See supra* Section III.A (discussing the contemporary state of equity).

unmoored from courts' traditional reticence from interfering in intimate relationships without a pretext of property rights.¹⁹² Equitable remedies remain but are increasingly diluted or dissolved with the expansion of statutory and regulatory authorities.¹⁹³ Equity, in the form of injunctive relief, should still be available for plaintiffs in domestic matters.¹⁹⁴

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

For centuries, however, equity has not manifested itself in cases of domestic abuse. Before the gender movements of the 1970s, judges were not well-equipped culturally, socially, or politically to exercise discretion and conscience in equity to intervene in family violence, and, because equity must "follow the law," judges had little latitude before the law attempted to tackle domestic violence.¹⁹⁵ Thus, judges were apt to be reluctant to interfere in intra-family violence.¹⁹⁶ Into the twentieth century, as laws began to respond to feminist movements and heightened awareness during the social revolutions of the 1960s, courts and

192. See Laycock, *supra* note 95, at 709. Despite being largely focused on property cases, in his expansive survey of irreparable harm cases, Laycock observes that the most common personal injury cases involve family violence. See *id.* at n.116.

193. See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 933-51 (1979). The Restatement observes that the claims most likely to receive injunctive relief include: impairment or loss of the support of land, pollution or diversion of water, nuisance, wrongful dealings in chattel, wrongful interference with business, interference in domestic relations, and injuries in personalty. The Restatement also notes that assault and battery, among other torts, are less frequently subject to injunctive relief. See *id.*

194. See *id.*; see also Taub, *Equitable Relief*, *supra* note 4.

195. See Freeman, *supra* note 50, at 201. Freeman observes that injunctive relief only gained traction with modern domestic violence statutes in the 1960s and 1970s. By the end of the 1970s, "[t]he injunction [was] the battered wife's best legal weapon. It [was] also the most popular remedy." *Id.* at 235.

196. Note, *Duties and Enforcement Mechanisms for the Rights of Battered Women*, 16 SUFFOLK U. L. REV. 937, 939-47 (1982) (tracking early developments in domestic violence responses and observing the historic reticence of police, prosecutors, and judges to intervene and render relief in cases of spousal violence).

legislatures remained largely devoted to maintaining and rehabilitating traditional family units, even at the expense of protection and relief for battered wives.¹⁹⁷

In her early article on the intersection of equity and domestic violence, Professor Taub noted a few cases in which judges issued injunctions to relieve victims of abuse by domestic partners, but she also recognized that equity might have been available much more broadly in domestic cases.¹⁹⁸ She then raises and attempts to answer the question that is at the heart of this Article: “Although equitable relief theoretically should be available where a tort is threatened and legal remedies are inadequate, in practice *something special appears necessary* to convince a court that the prospect of prosecution or damages will not suffice to deter this type of tortious conduct.”¹⁹⁹ What is the “something special” necessary to convince judges to intervene in domestic relationships with equity?²⁰⁰

Taub suggested that the defendants’ obsession, motivation, and long duration of abuse played significant roles in swaying judges to intervene, and, more theoretically, she points to the persistent notion of spousal immunity as a source of reticence.²⁰¹ In 1980, however, she considered that courts may seek cover for avoiding domestic violence cases in equity: “Moreover, the concern for marital harmony to which the encyclopediae, and at

197. See Freeman, *supra* note 50, at 243.

198. See Taub, *Equitable Relief*, *supra* note 4, at 244.

199. *Id.* (emphasis added).

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

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

Keller v. Keller, 158 N.W.2d 694, 698 (N.D. 1968); see also TAUB and BOYLAN, *supra* note 96, at 19.

201. See TAUB and BOYLAN, *supra* note 96, at 245: “Though no longer the prevalent rule, the doctrine where applicable bars tort action based on personal interests. The rule is usually justified in the interest of domestic tranquility, the fear of collusive or frivolous suits, and the availability of the alternative remedies of divorce and criminal prosecution.” *Id.* (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS §122 (4th ed. 1971), noting the doctrine’s roots in coverture).

times the cases, refer may not actually amount to a protectable interest, but may merely reflect the way courts avoid resolving actual disputes over allegations of violence.”²⁰²

While Taub considers the procedural and doctrinal obstacles to equity in domestic violence, this “something special” is greater social awareness surrounding domestic life and violence, far beyond artful pleading. Inasmuch as equity permits courts to rely on their own discretion and judgment, with precious little guidance from statute or precedent, courts must reckon with their impulse to “avoid resolving actual disputes over allegations of violence.”²⁰³ If coverture, chastisement, and domestic privacy justified and sheltered violence within homes, perhaps judges simply were not offended by domestic violence. If culture, society, and the law accommodated “trifling violence” in the interest of domestic harmony, then it can be no surprise that courts were reluctant to deploy equity in the case of victims. Had courts used the tools at their disposal before the modern era, then perhaps legal reforms, such as civil protection orders, would not have been necessary.

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

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

Moreover, because equity is to “follow the law,” equity could

202. TAUB and BOYLAN, *supra* note 96, at 246.

203. *Id.*

offer little recourse against intimate abuse when the common law itself provided centuries of insulation for abusers in the form of chastisement, privacy and coverture, and spousal immunity.²⁰⁴ Permitting a woman to sue her husband for battery was “revolutionary” in 1910, and the United States Supreme Court did not abrogate the common law of marriage until 1992, despite a century’s worth of statutory, political, and social upheaval.²⁰⁵ As society gained greater awareness of domestic violence in the 1960s, however, equity was slow to evolve, if it evolved at all. The traditional maxims of equity and the turn from a fixation on property rights should have and could have accommodated firm judicial intervention on behalf of victims.

Since the 1960s, the law and society have experienced dramatic changes regarding domestic violence. The women’s movement of the 1960s and 1970s captured a new message of intimate partner violence, and began to articulate wife-beating as a matter of gender justice.²⁰⁶ After the social shifts of the late twentieth century, domestic violence emerged from the privacy of the home and the residue of coverture. Legal reforms and policies reflected a growing intolerance with domestic violence, and new criminal and civil statutes sought to provide quicker access to stronger remedies for victims of domestic violence.²⁰⁷ As Justice O’Connor observed in 1992:

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In *Bradwell v. State* [1873] . . . three Members of this Court reaffirmed the common-law principle that

a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most

204. See TAUB and BOYLAN, *supra* note 96, at 10 (calling interspousal immunity the “clearest obstacle to equitable relief against battering in marital, as opposed to quasi-marital, situations,” even as the rule was fading quickly by the end of the twentieth century).

205. *Contra* Thompson v. Thompson, 218 U.S. 611 (1910); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

206. See WALKER, *supra* note 7; SCHNEIDER, *supra* note 15; Stark, *supra* note 148; GOODMARK, *supra* note 183.

207. See *supra* notes 86-94.

states. . . .

Only one generation has passed since this Court observed that “woman is still regarded as the center of home and family life,” with attendant “special responsibilities,” that precluded full and independent legal status under the Constitution These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.²⁰⁸

Society moves and culture changes with halting ambivalence, but increased awareness and general condemnation of domestic abuse among American lawmakers and judges. The national government and the states all have enacted laws to confront domestic abuse, and in a multitude of public and private institutions, communities work to prevent and intercept domestic abuse.²⁰⁹ This is a legitimate, demonstrable sea-change in the ways that law and policy react to family violence.²¹⁰

As equity remains available and viable for courts to use in cases of domestic violence, conscience, culture, and community necessarily will inform judicial discretion.²¹¹ With a

208. *Planned Parenthood v. Casey*, 505 U.S. 833, 897 (1992) (quoting *Bradwell v. Illinois*, 83 U.S. 130 (1873); *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)). The dissent was vigorous but did not rise to defend the common law version of marriage or the subordination of wives. In 1992, the Supreme Court abrogated the common law of marriage that subordinated women to men, and no justice objected.

209. *See supra* notes 86-94.

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

Now, thirty years after feminist advocates first started the fight against domestic violence, many changes have come to pass. In 2008, if a woman is hit by her husband and calls 911, the police arrive promptly and take the incident seriously. The officer doesn’t suggest that his time is being wasted, and he doesn’t suggest the man step outside to cool off. Instead, he handcuffs the perpetrator and takes him to the police station, where he will be booked and jailed, while another officer escorts the wife and her children to a shelter. Violence against a woman in her home is now defined as a crime by our society, and the criminal justice system treats it as such.

Id. at xi.

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

The problem of adequacy of remedy and injunctive relief in domestic relations can be handled with a social consciousness and in a humanitarian spirit An

2012]

Equity in Domestic Abuse Cases

605

humanitarian spirit and a heightened consciousness of abuse in domestic and intimate relationships, courts can and should leverage extant equity to reach victims and intervene against perpetrators, especially in those intimate cases where coercive abuse does not meet particular legal standards fixated on physical violence. Equity is available, and courts should avail themselves of the standard tools to suffer no wrong and to seek justice.

IV. EQUITY'S NEW POTENTIAL TO ADDRESS DOMESTIC VIOLENCE

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

In 1938, quoting from an 1879 case, Holdsworth observed that equity is “progressive” and best when altered, refined, and improved in light of the more modern cases.²¹² At the very ancient roots of equity, in Greece, Rome, and medieval England, equity served as a moral balancing in the law, “God’s justice” to render fair results when formalized law could not accommodate justice in a given case.²¹³ The call of this Article is to refine, alter, and improve equity in light of an illuminated, modern understanding of domestic abuse and gender justice, while claiming the old moral demands of good conscience suffering no wrong against victims of domestic abuse without rendering adequate, preventative, and moral relief.

As demonstrated here, the law never has been without the means and methods to intervene in abusive relationships and to

adequate remedy at law, preventing relief by injunction should be as plain, complete, practical and efficient to the ends of justice in its prompt administration as the remedy of injunction itself.

Thompson, *supra* note 55, at 50, 54.

212. See 12 HOLDSWORTH, *supra* note 13.

213. See Vinogradoff, *supra* note 19.

render relief for injustice. The first fundamental question is why the law has not responded, either by measured reticence, by deference to cultural norms, or by implicit imprimatur of prevailing gender roles. The second fundamental question then must be how the law can or should intervene in interpersonal relationships to prevent abuse, to restore peace, or to favor one partner over another.

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

In her book, *A Troubled Marriage: Domestic Violence and the Legal System*, Goodmark describes the “spectacular” rise of laws to confront domestic abuse over the past forty years.²¹⁴ She documents efforts of feminists and lawmakers to craft responses to domestic abuse that intervened on behalf of victims of physical violence, but she critiques these efforts with their roots in “dominance feminism.” She argues that these reforms, both civil and criminal, are

excessively focused on physical violence rather than the totality of a woman’s experience of abuse, concerned primarily with separating women from their partners, regardless of the effectiveness of such policies or the desires of the individual women, and bound to stereotypes of women subjected to abuse that take power from individual women and validate intrusions on women’s autonomy.²¹⁵

In a word, the legal remedies are inadequate. Goodmark argues for a counterpoint to dominance feminism, anti-essentialist feminism that does not see women merely as victims or shaped

214. GOODMARK, *supra* note 183, at 16-22.

215. *Id.* at 4.

2012]

Equity in Domestic Abuse Cases

607

essentially by the dominance of men in patriarchy.²¹⁶

[W]omen stand at the intersection of various identities that construct them: race, sexual orientation, socioeconomic class, disability, and other defining characteristics. Laws and policies must be attentive to this intersectionality . . . All of these facets of identity shape their relationships (and the abuse that happens in those relationships), their goals, their options and their decisions about how to handle the abuse in their lives²¹⁷

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

[B]ecause of its singular emphasis on physical violence, the prevailing model minimizes both the extent of women's entrapment by male partners in personal life and its consequences Viewing woman abuse through the prism of the incident-specific and injury-based definition of violence has concealed its major components, dynamics, and effects, including the fact that it is neither "domestic" nor primarily about "violence." Failure to appreciate the multidimensionality of oppression in personal life has been disastrous for abuse victims.²¹⁸

Thus, although the modern era offers long-awaited legal responses to domestic abuse, even these responses do not afford adequate legal remedies for many victims. They are wholesale remedies for retail crimes.

Goodmark proposes an entirely "reconstructed" legal system that would accommodate individuals more effectively through restorative, therapeutic, and collaborative theories and policies.²¹⁹ Doubtless, reform and improvement is constantly necessary, and the movement for legal responses to domestic abuse remains in its relative historic infancy. Short of a revolution, however, extant legal theories, namely common law equity, remain available for creative, wise, tailored, and useful responses to domestic abuse. Equity has the roots and the flexibility to recognize unique forms of coercive, non-violent abuse and to empower victims in all their multitude identities, goals, and

216. GOODMARK, *supra* note 183, at 4-5, 138-41.

217. *Id.* at 5, 139.

218. Stark, *supra* note 148, at 10.

219. GOODMARK, *supra* note 183, at 170-77.

desires.

Increasingly from the late 1800s, American courts have been able to use equity in cases of personal interests without a pretextual property right.²²⁰ As the property pretext fell away, courts have had much more freedom to craft customized remedies to protect plaintiffs who can show that they face irreparable harm with no adequate remedy available at law.²²¹ Courts retain inherent power and discretion to fashion preemptive orders to protect personal interests.²²² In the tradition of equity, courts should seek to maximize justice by balancing the need for tailored remedies to protect plaintiffs and weighing equities to avoid excessive intrusion on defendants.²²³ The historic maxims of equity are to inform and guide courts' discretion.²²⁴ This is the ancient formulation of equity, and it remains the law, notwithstanding the modern merger and dilution of the common law.²²⁵

The maxims of equity promote the court's role as arbiter of conscience and justice. Equity will suffer no harm.²²⁶ Equity is equality.²²⁷ Equity regards that as done which ought to have been done.²²⁸ Equity aids the vigilant and the diligent, and equity values substance over form.²²⁹ This high-minded, aspirational, moral language is capable of reaching cases of domestic abuse, where a court should suffer no wrong without providing a legal remedy.

As illustrated in several of the cases cited here, courts have employed equity in divorce cases involving physical violence, but there are precious rare examples of courts using equity in free-standing actions for injunctive relief from domestic abuse. This is not surprising because women have only had independent standing to request the use of equity to protect their personal interests since the beginning of the twentieth century, and

220. *See supra* note 51 and accompanying text.

221. *See supra* notes 52-58.

222. *See id.*

223. *See supra* notes 93-94.

224. *See supra* note 173.

225. *See supra* notes 88-89.

226. *See supra* note 186.

227. *See id.*

228. *See id.*

229. *See id.*

because equity is to “follow the law” as it exists.²³⁰ Because the law has only begun to recognize domestic abuse and intimate partner violence as a discrete phenomenon for one generation, equity has had little law to follow. Inasmuch as equity is to stand in the gap where legal remedies are inadequate, the legal reforms attendant to the domestic violence movement might lull courts into an idea that new statutory mechanisms are adequate.

Three questions follow these observations. First, can cases of domestic abuse invoke the need for equity; that is, does domestic abuse, either physical or coercive, cause irreparable harm to victims? Second, if extant legal remedies are indeed inadequate, can equity do better? Third, if equity can do better, are courts sufficiently capable of rendering appropriate relief through judicial discretion and conscience?

First, without doubt, domestic abuse can generate irreparable harm, to mind, body, and fortune. As described above, victims of domestic abuse suffer far more than fleeting bruises, cuts, or fractures.²³¹ The injuries are psychological, spiritual, emotional, both economic and non-economic, and lasting.²³² The assaults are rarely ever only physical battery; abusers target victims’ will, independence, identity, spirit, dignity, and capacity to fend for themselves. Domestic abuse imposes subjugation, dependence, and doubt. These are not compensable injuries.

Second, equity may well be able to render better results for victims of domestic abuse, especially coercive abuse that is not physically violent.²³³ As illustrated above, domestic abuse often transcends legal definitions; abuse that is not violent, yet coercive, may not be illegal *per se*. Financial, emotional, and psychological coercion may not be criminal or even cognizable torts, but they may nonetheless inflict irreparable harm. The law should not suffer these wrongs without legal remedy, yet criminal codes, divorce regimes, and civil protection orders cannot adequately remedy these harms. Indeed, an abuser may use these very tactics to coerce a victim from availing herself of available legal remedies.²³⁴

230. *See supra* note 186.

231. *See supra* notes 117, 133-41.

232. *See id.*

233. *See supra* notes 96-97, 115, 138-141.

234. *See* Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic*

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

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

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

The tide has turned from the long era of judicial reticence to intervene in domestic abuse cases. In 1868, the North Carolina

Supreme Court demonstrated the prevailing idea of the age when it upheld the interest of familial privacy and the internal government of a home, however violent or patriarchal, against judicial inquiry: “We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.”²³⁵ The court explained its rationale:

Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive; and each member will find excuse for the other in his own frailties. But when trifles are taken hold of by the public, and the parties exposed and disgraced, and each endeavors to justify himself or herself by criminating the other, that which ought to be forgotten in a day, will be remembered for life.²³⁶

With prescience, however, the court foreshadowed the changes to come within a century and acknowledged that community and cultural mores drove that court and would drive later courts to come: “From what has been said it will be seen how much the subject is at sea. And, probably, it ever will be so: for it will always be influenced by the habits, manners and conditions of every community.”²³⁷

In 1910, as discussed above, the United States Supreme Court considered a new D.C. statute granting independent standing to women to sue in tort, not only through their husbands or next-friends.²³⁸ The statute itself was a remarkable moment in the march to women’s enfranchisement, but the Court suspected that “[t]heir obvious purpose is . . . to a large extent to alter the common-law theory of the unity of husband and wife.”²³⁹ The Court truncated the statute’s effect to find that a woman did not have standing to sue her husband for battery, although she could sue anyone else for any tort because to allow this would revolutionize the institution of marriage.²⁴⁰

By 1992, after universal suffrage, World War II, and the second women’s liberation movement, the Supreme Court agreed without dissent that “[t]hese views, of course, are no longer

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

236. *Id.* at 458.

237. *Id.* at 456.

238. *See Thompson v. Thompson*, 218 U.S. 611, 615 (1910).

239. *Id.*

240. *See id.*

consistent with our understanding of the family, the individual, or the Constitution.”²⁴¹ In 1994, Congress passed the Violence Against Women Act, acknowledging the scourge of domestic violence with national legislation, which declared: “All persons within the United States shall have the right to be free from crimes of violence motivated by gender,” and “A person . . . who commits a crime of violence motivated by gender and thus deprives another of [this] right . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.”²⁴² By the 1990s, every state had enacted provisions for civil protection orders and other legal reforms to combat domestic abuse.²⁴³ These reforms joined innovative police practices, specialized court dockets, proliferation of shelters and justice centers, and concentrated attention from non-profits and scholars.²⁴⁴

Although the movement may be relatively young, the American legal landscape is remarkably different for victims of domestic abuse in the second decade of the new century than it was at the close of the last century. The tide has turned in constructive, positive, and substantial ways. To be sure, incidents of domestic abuse remain epidemic and can seem intractable even before these policy and legal reforms and public consensus against domestic abuse.²⁴⁵ Considerable debate remains, and the subject remains “at sea” as to the proper and prudential role of the law in intimate, personal relationships.

If the law has a role to play, and if victims will continue to seek relief in courts, courts ought to avail themselves of every good tool to render sound justice. Domestic abuse is

241. *Planned Parenthood v. Casey*, 505 U.S. 833, 896-97 (1992).

242. 42 U.S.C. § 13981 (b), (c) (1994). The statute was held unconstitutional by the Supreme Court. *See United States v. Morrison*, 120 U.S. 598 (2000) (finding that Congress exceeded its authority under the Commerce Clause and Remedial Power Clause of the Fourteenth Amendment). Despite the constitutional disposition, VAWA signaled that the national government recognized domestic abuse and was ready to act against it. Leigh Goodmark, while making other criticisms against the legislation and its effects, observes, “[t]he passage of VAWA is attributable in part to the success of the battered women’s movement in persuading policymakers of the universality – whiteness – of domestic violence.” GOODMARK, *supra* note 183, at 24.

243. *See supra* note 92 for a list of state civil protection order statutes.

244. *See Hafemeister, supra* note 86 (surveying various legal responses to domestic abuse since the 1970s).

245. *See supra* note 2.

fundamentally a strategic assault on a victim's will, power, agency, and capacity to act independently and is manifested by myriad personal tactics. These tactics may be physically violent and criminal, or they may be subtle, private, and customized to a unique relationship between abuser and victim. While domestic abuse may be a gender issue invoking broad themes of feminism and women's rights, a victim is always an individual person by herself in a relationship, subject to the creative methods of a dominant partner.

The persistent problem is how to shape broad, predictable, responsive law and policy to deeply personal and unique crises.²⁴⁶ This is the very role of equity. Equity exists to fashion remedies for people facing irreparable injury for which the law does not provide a ready, adequate remedy. Historically, equity rarely touched personal interests, much less the personal abuse of intimate partners, but the time is right to revive the tools of equity for justice in homes and families. For a century, American equity has reached personal interests without the pretext of property rights, and during that century, lawmakers, law enforcement officials, lawyers, and courts of law have grown increasingly more responsive to domestic abuse. The ground is more fertile for judges who would exercise discretion in conscience, in keeping with the law, to suffer no wrong without a just remedy.

Traditional, common law equity equips courts to fashion tailored injunctions to give relief from subtle, non-criminal, abusive coercion that is not physically violent. In equity, courts can inquire into discrete, personal circumstances, can balance equities, and can disarm abusers of tactics that the law cannot define but which can be immensely powerful in their homes. Through equity, courts can respond to a victim's narrative and can shape injunctive relief to empower her agency and her ability to direct her own path to peace, sufficiency, and provision.

246. See GOODMARK, *supra* note 183, at 4; see also Hafemeister, *supra* note 86, at 1000, stating that:

[T]oo great a focus on so few cases has resulted in what tends to be a one-size-fits-all approach This societal response can be counterproductive if it fails to adequately distinguish among various types of IPV or does not provide sufficient latitude, flexibility, and nuance for responding to the different needs, desires, and circumstances of the victims.

V. CONCLUSION

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

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