
REFORMING BY RE-NORMING: HOW THE LEGAL SYSTEM HAS THE POTENTIAL TO CHANGE A TOXIC CULTURE OF DOMESTIC VIOLENCE

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Regressive societal norms and gender-based biases, both explicit and implicit, have compounded over time to form a cultural realm of tolerance toward domestic violence. This Article examines how the law has contributed to the development of this culture, and more importantly, how the law can be utilized to transform a toxic culture of intimate partner violence. The law can be a positive agent of change, and its powers should be marshaled to effectuate change in attitudes and norms towards domestic violence. By importing the social norms theory of psychology and theories of re-norming and implicit biases, we may work to detoxify society's treatment and tolerance of intimate partner violence.

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INTRODUCTION

The home setting is often the first place many of us have formed our views of larger society.¹ If one grows up in a heteronormative family with a maternal figure and a paternal figure, one learns that the mother has her role—and then that quietly becomes the prototype of the role of a woman. Likewise, the father figure has his role—and this then becomes implicitly the role of a man.² Assuming an intimate partner relationship exists between the parents, how they interact with each other establishes the stencil for what intimate relationships look like in a child’s mind. The child grows up with these images, seeing males and females through those young, impressionable eyes. These gendered notions then become embedded in the child’s mind and establish the norms that shape the child’s views of society as a whole.

If intimate partner violence is part of the child’s family dynamic, then violent relationships as the norm become rooted in the child’s worldview.³ In fact, even if intimate partner violence is not a part of a child’s particular family dynamic, the child only needs to look to television, social media, the arts, or other public domains to observe intimate partner violence being tolerated and “normalized.”⁴

Regardless of whether those norms originate from inside the family or from outside of the home in the larger society, children may presume some level of intimate partner violence exists in many typical relationships. This pervasiveness of domestic violence then shapes norms and expectations of how the child interacts in society as an adult.

Scholars have studied domestic violence and the social construct of gender and masculinities for decades, and only recently has the concept been explored of a nexus between intimate partner violence and “toxic masculinity.”⁵ Toxic social norms embodied by modern society tend to generate themes of masculine oppression, patriarchal power, and control over women and children, which are then replicated

1 SUSAN MULLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 170 (1989).

2 For ease in addressing masculinity versus femininity, this Article is operating from the presumption of a heteronormative family, even though clearly this is not the only prototype of a family.

3 Throughout this Article, I am using the terms “domestic violence” and “intimate partner violence” interchangeably, even though there has been a shift toward the term intimate partner violence (“IPV”). That said, I am talking about the history of the law and citing to cases where the term domestic violence has traditionally been used.

4 Francine Banner, *Honest Victim Scripting in the Twitterverse*, 22 WM. & MARY J. WOMEN & L. 495, 496–97 (2016) (describing recent examples of mainstream domestic violence).

5 Terry A. Kupers, *Toxic Masculinity as a Barrier to Mental Health Treatment in Prison*, 61 J. CLIN. PSYCHOL. 713, 714 (2005).

from generation to generation. Collectively, negative gendered messages about femininity and masculinity may play a role in the tolerance of intimate partner violence.

When we look at norms and themes in larger societal culture, we often see the legal system mirroring such norms. In other words, how a legal system operates often reveals the roots of a societal culture. Yet, the legal system, as a whole, is itself a pillar of structure and foundation in our society. If such a legal system is sewn from threads interwoven with toxic masculinity and tolerance of domestic violence, then such threads permeate the daily lives of its citizens. Thus, if we operate from the presumption that toxic masculinity is embedded within the legal system, we then should be asking, “How might the legal system help detoxify it?” In other words, if the underlying legal system has contributed to or tolerated a toxic culture, we need to explore how that legal system might begin to transform the culture in a positive way.

One way to truly change a culture, legal or otherwise, is to focus upon re-establishing what is acceptable in society and what is unacceptable. This Article will address how we might explore such a process in the arena of intimate partner violence. Through the practice of “re-norming,”⁶ which will be discussed later, a society may reconfigure attitudes. Specifically, a society may alter attitudes towards men and women in a way that decreases tolerance of intimate partner violence. Ultimately, the law can be a powerful tool to influence, frame, initiate, and effectuate that change. This Article will explore the law’s role and potential to reshape and re-norm attitudes, tolerance, and a society that has too readily accepted intimate partner violence.

In Part I, I will address the concept of culture, norms, and how such terms are being utilized in forming what I term a “toxic culture of intimate partner violence.” I employ this phrase as a frame of reference to describe the pernicious effects of intimate partner violence that have become prevalent. I then explore psychological theories about social norms and theories of re-norming to consider ways to temper such a toxic culture. In Part II, I address the centrality of the legal system in any given society or culture. I note how the legal system and a patriarchal history have tolerated and contributed to a toxic culture of domestic violence. In Part III, I address how the legal system and underlying legal education may be employed to transform and re-norm such a culture through legislation and educated enforcement of the law. I borrow from social norms theories, as well as concepts of implicit biases and re-norming. In Part III, I also note some state and federal examples in case law and legislation, as well as some research on an international level. I conclude by emphasizing that the law and broader education can be used as tools to ultimately re-norm societal perceptions of intimate partner violence.

6 The term “re-norming” has been used in various contexts, including group therapy sessions, special education testing, physics, and test taking. It is only recently being used in the context of intimate partner violence, and that is how I am re-imagining the term here.

I. A TOXIC CULTURE OF INTIMATE PARTNER VIOLENCE

Society is influenced by what I am terming “a toxic culture of intimate partner violence.” We need to detoxify this culture. What does this mean? How can we do so? How has the law hurt and helped? These questions are explored below.

I posit that tolerance of domestic violence forms “a toxic culture of intimate partner violence,” which sows its seeds in early childhood—influenced by family and larger society—and is then later reinforced by rules of law and legal structures. As Dr. James Gilligan notes, “the microcosm of any one family’s violence can only be understood fully when it is seen as part of the macrocosm, the culture and history of violence, in which it occurs.”⁷

A. What Is Culture? What Are Norms?

The notion of culture is multi-faceted and multi-layered.⁸ As I have noted in earlier scholarship, “culture is pervasive and omnipresent, yet quite amorphous And yet culture so informs our world and our daily behavior.”⁹ For purposes of this Article, culture is defined as a set of informal norms and rules of behavior in society. A set of norms is what is deemed customary and acceptable behavior within a larger culture. If a society’s set of norms does not deem certain behavior acceptable, that behavior tends to decrease.

Norms have been defined as “rules or expectations of behavior within a specific [culture]. Often unspoken, these norms offer social standards of appropriate and inappropriate behavior, governing what is (and, is not) acceptable.”¹⁰ Professor Cass Sunstein defines social norms as “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done.”¹¹ Norms are replicated in society because there is a human urge to conform, especially when it is expected that all others in the particular society will be conforming.¹²

The term “re-norming” has been routinely used in various contexts, including team building, group counselling, test taking, and physics.¹³ It is only beginning

7 JAMES GILLIGAN, *VIOLENCE: REFLECTIONS ON A NATIONAL EPIDEMIC* 15 (1997).

8 Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory*, 34 L. & PSYCHOL. REV. 55, 63 (2010) (citing Professor Naomi Mezey that “[t]he notion of culture is everywhere invoked and virtually nowhere explained.”).

9 See Melissa L. Breger, *Transforming Cultural Norms of Sexual Violence Against Women*, 4 J. RES. GENDER STUD. 39, 40 (2014); Naomi Mezey, *Law as Culture*, 13 YALE J. L. & HUMAN. 35 (2001).

10 WORLD HEALTH ORG., *VIOLENCE PREVENTION THE EVIDENCE: CHANGING CULTURAL AND SOCIAL NORMS THAT SUPPORT VIOLENCE* 4 (2009), http://www.who.int/violence_injury_prevention/violence/norms.pdf. As the World Health Organization notes, “Rules and expectations of behaviour—norms—within a cultural or social group can encourage violence.” *Id.* at 1.

11 Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996).

12 WORLD HEALTH ORG., *supra* note 10, at 4.

13 See, e.g., BRIAN COLE MILLER, *NICE TEAMS FINISH LAST* 4 (2010) (team building); Tomoe Kanaya, *Measures Taken to Compensate for Rising IQ Scores Affect Who Is Diagnosed with Mental Retardation Regardless of Actual Cognitive Ability, Study Finds*, AM. PSYCHOL. ASS’N (Oct. 19, 2003), <http://www.apa.org/news/press/releases/2003/10/flynn-effect.aspx> (test taking); Carlos A. Hernandez Linares

to be utilized by scholars in the intimate partner violence context that I am using it in for this Article,¹⁴ and related theories have been used in some literature and research about decreasing negative behavior such as domestic violence. I am re-imagining this persuasive concept and theory in a different context: re-norming a legal system that breaks from existing gendered norms to create healthier gendered norms, which then in turn may decrease intimate partner violence. I am also envisioning re-norming as connected to the psychological analysis embodied in the social norms theory.¹⁵ Essentially, the social norms approach states that individuals model their own behavior based upon how they perceive others in society acting. One seeking to diminish negative behavior would frame the behavior in less acceptable terms, thereby decreasing the behavior.¹⁶ In this Article, I am drawing both from the existing social norms theory and from the concepts of re-norming and implicit biases to advocate for ways that the law can reduce a “toxic culture of intimate partner violence.”

B. Defining a “Toxic Culture of Intimate Partner Violence”

Modern-day culture is imbued with gendered norms relating to domination, over-sexualization, power, and control over women and children.¹⁷ I argue that, in essence, this culture then serves to normalize intimate partner violence. The prevalence of domestic violence in every single country on this globe demonstrates that we are not just addressing these issues in a small part of the globe, but instead are facing a worldwide tolerance of domestic violence.¹⁸

Domestic violence is about power and coercive control of one person over another. It can involve any number of methods, including physical, sexual, emotional, economic, or psychological abuse.¹⁹ Data demonstrates a large number of women worldwide (at least one in four) have reported physical or sexual violence at the hands of a husband or intimate partner.²⁰ I suspect the numbers are much higher, but just unreported. Based upon the data we have, those most at risk for

& Maria A. Japon, *A Renorming in Some Banach Spaces with Applications to Fixed Point Theory*, 258 J. FUNCTIONAL ANALYSIS 3452 (2010) (physics).

14 Professor Andrew King-Ries used the terminology in the same way I will be using it here in a persuasive article about teens, dating, and violence. See Andrew King-Ries, *Teens, Technology, and Cyberstalking: The Domestic Violence Wave of the Future?* 20 TEX. J. WOMEN & L. 131, 160 (2011).

15 See Alan D. Berkowitz, *An Overview of the Social Norms Approach*, in LINDA C. LEDERMAN & LEA P. STEWART, *CHANGING THE CULTURE OF COLLEGE DRINKING: A SOCIALLY SITUATED HEALTH COMMUNICATION CAMPAIGN* 193 (2005).

16 WORLD HEALTH ORG., *supra* note 10, at 6–7.

17 See, e.g., JACKSON KATZ, *THE MACHO PARADOX* (2006); Breger, *supra* note 9, at 42.

18 See *infra* pp. 4144.

19 MELISSA L. BREGER ET AL., *NEW YORK LAW OF DOMESTIC VIOLENCE* 12 (3d ed. 2013); *Domestic Violence*, DEP’T OF JUSTICE, <https://www.justice.gov/ovw/domestic-violence#dv> (last visited Mar. 12, 2018).

20 *Facts and Figures: Ending Violence Against Women*, U.N. WOMEN, <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> (last visited Mar. 12, 2018); Nurith Aizenman, *Alarming Number of Women Think Spousal Abuse Is Sometimes OK*, NPR (Mar. 18, 2015, 12:16 PM), <https://www.npr.org/sections/goatsandsoda/2015/03/18/392860281/alarming-number-of-women-think-spousal-abuse-is-sometimes-ok>.

becoming victims of domestic violence are young women between the ages of sixteen and twenty-four years old.²¹

Intimate partner violence has been situated in an Integrated, Ecological Model, which theorist Lori Heise and others have expounded upon in subsequent research.²² This model identifies intimate partner violence as rooted not just in one part of a person's life, but rather in the "delicate equilibrium of interacting social, institutional, cultural, and political contexts of people's lives."²³ The various parts of an abuser's life include intersecting risk factors, which play a role in the likelihood the abuser will offend; such factors are mapped out in an elliptical diagram (See Figure 1).²⁴ When looking at a particular abuser, there are five elliptical circles that can make intimate partner violence more likely. The "Overall Larger Society" is the outermost portion of the ellipse, which includes factors such as gender inequality, the legal system, laws, and sanctions. The next portion is "Society," which includes factors such as rigid gender roles, social norms granting control to men over women, tolerance of men violating women, and overly aggressive masculinity. The next three sections are "Community" (i.e., isolation, negative associations, and socio-economic challenges), "Relationship" (i.e., marital conflict, structure of family, and male control of decision-making), and "Individual" (e.g., early exposure to domestic violence in family of origin, education, and employment). I will be focusing upon the outermost rings of layers: Overall Larger Society and Society. These layers are where issues of the legal system, laws, social norms, and rigid gender roles intersect most often with intimate partner violence. It is essential that we try to reach all of the layers; in other words, the more we infuse each elliptical circle with healthier, non-violent norms, the more promise we have at achieving healthy non-violent norms at the outermost levels of Overall Larger Society and Society.²⁵

This Article will focus upon male violence against females. In no way does this piece intend to undervalue or overlook other patterns of intimate partner violence. The principles in this Article could technically apply to any violence by one person who tries to exert power and control over another. Yet, this piece traces patriarchal roots of society and the law, where we see early and deeply embedded gender

21 *Dating Abuse Statistics*, LOVEISRESPECT, <http://www.loveisrespect.org/resources/dating-violence-statistics/> (last visited Mar. 12, 2018) (citing DEP'T OF JUSTICE, BUREAU OF JUSTICE & STATISTICS, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES, 1993–2004 (2006)); see also Kathryn E. Moracco et al., *Women's Experiences with Violence: A National Study*, 17 WOMEN'S HEALTH ISSUES 3 (2007), available at <https://www.ncbi.nlm.nih.gov/pubmed/17321942>.

22 See Lori L. Heise, *Violence Against Women: An Integrated, Ecological Framework*, 4 VIOLENCE AGAINST WOMEN 262 (1998), available at <http://gbvaor.net/wp-content/uploads/2012/10/Violence-Against-Women-An-Integrated-Ecological-Framework-Heise-1998.pdf>. My sincerest thanks to Dr. Peter Jaffe, Western University, of London, Ontario, for suggesting that I incorporate this model into my current piece.

23 Lori Michau et al., *Prevention of Violence Against Women and Girls: Lessons from Practice*, 385 LANCET 1672, 1672 (2014).

24 See APPENDIX FIG. 1, *infra*; Rachel Jewkes et al., *From Work with Men and Boys to Changes of Social Norms and Reduction of Inequities in Gender Relations: A Conceptual Shift in Prevention of Violence Against Women and Girls*, 385 LANCET 1580 (2015).

25 Researchers have also termed these layers as ontogenic factors, microsystems, exosystems, and macrosystems. Heise, *supra* note 22, at 26465.

norms.²⁶ As has been noted by the Chief of State of Sweden, “gender roles [are] the deepest cause of violence on earth because they normalize[] dominance and submission[.]”²⁷ Author and activist Gloria Steinem asserts that we cannot “ignore or consider *inevitable* the fact that females are the objects of most violence around the globe.”²⁸ Author and activist Jackson Katz urges us to look introspectively at a culture that has produced such high levels of men’s violence against women, even claiming that the challenge to decrease men’s violence against women is an even more daunting task than the war against terrorism.²⁹

Violence against women is so pervasive that some scholars note our society has a “culture of victimization of women, domination and rape.”³⁰ As stated, I posit that society also has what I term a “toxic culture of intimate partner violence.” I propose we draw from scholarly interdisciplinary research to assess whether the legal system can help re-norm societal views which have for too long tolerated intimate partner violence.

1. What Can We Learn from the Movement to End Rape Culture?

Those of us desiring to change cultural norms can borrow lessons from many areas, such as the movement to eliminate rape culture, and even from the recent #metoo movement. “Rape culture” is defined as “the casual debasement [of women] . . . that has become such a part of our lives that it is often invisible.”³¹ A rape culture is one in which we presume that sexual violence against women is not

26 In the United States, for example, approximately eighty-five percent of all reported domestic violence incidents are perpetrated by males against females. See, e.g., *Domestic Violence*, N.Y. ST. OFF. PREVENTION OF DOMESTIC VIOLENCE, <http://www.opdv.ny.gov/professionals/abusers/genderandipv.html> (last visited Mar. 18, 2018); MICHELE C. BLACK ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 24 (2010), available at https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf (reporting that 92.5% of perpetrators of sexual violence are men); SHANNAN CATALANO ET AL., FEMALE VICTIMS OF VIOLENCE 5 (2009), available at <https://www.bjs.gov/content/pub/pdf/fvv.pdf> (reporting that 86% of abusers were men and 86% of victims were women).

27 Gloria Steinem, *Comments on Taking Stock: A Symposium Celebrating the New York State Judicial Committee on Women in the Courts*, 36 N.Y.U. REV. L. & SOC. CHANGE 525, 526 (2012); see also Breger, *supra* note 9, at 42.

28 Steinem also states that “gender domination tends to be the first way we learn it’s okay for one group to eat even though they don’t cook or clean; [for one group] to be paid for working outside the home even though the other group does the important work of raising children that is mysteriously called ‘not working’” Steinem, *supra* note 27, at 526.

29 KATZ, *supra* note 17, at 33.

30 LETITIA ANNE PEPLAU ET AL., GENDER, CULTURE, AND ETHNICITY: CURRENT RESEARCH ABOUT WOMEN AND MEN 269 (1999) (citing A. Ayres Boswell & Joan Z. Spade, *Fraternalities and Collegiate Rape Culture: Why Are Some Fraternities More Dangerous Places for Women?*, 10 GENDER & SOC’Y 133 (1996)).

31 Terry O’Neill, *Sexist, Racist Attitudes Entrenched in Society Erode Women’s Dignity, Humanity and Safety*, NAT’L ORG. FOR WOMEN (Mar. 14, 2013), <http://now.org/resource/sexist-racist-attitudes-entrenched-in-society-erode-womens-dignity-humanity-and-safety/>; see also Joyce Williams, *Rape Culture* in BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY (George Ritzer ed., 2007). Margaret Lazarus, in her film entitled *Rape Culture* (1975), takes credit for first defining the concept. See *Margaret Lazarus, OUR BODIES OURSELVES*, <http://www.ourbodiesourselves.org/about/contributors/margaret-lazarus/> (last visited Mar. 12, 2018).

only a fact of life, but one as inevitable as death or taxes.³² Some researchers assert that the United States has more rapes than any other industrialized country.³³

The term “rape culture” has been used not only to describe larger societal culture, but also to explain subcultures of sexual violence in places such as college campuses, sports, fraternities, or the military.³⁴ In describing rape culture, scholars have noted that societal forces have interacted to create an “ecosystem” where rape thrives.³⁵ “This ecosystem exists as a place where significant numbers of people are sexually assaulted, victims often feel silenced, and when they do speak, their voices frequently fall on deaf ears.”³⁶ Those working to reform rape culture have focused on a variety of re-norming strategies, including increasing education and awareness of the dangers of rape, and rewording legal statutes to include affirmative consent.³⁷ Furthermore, some might argue that the #metoo movement is bringing to light “rape culture” and workplace sexual harassment through re-norming and changing social perceptions and norms in a way never seen before.³⁸ We can apply some of these same re-norming lessons to try to curb intimate partner violence.³⁹

2. What Can We Learn from the Literature and Research on Toxic Masculinity?

A society that is embedded with a subculture of toxic masculinity—along with its core of dominance, control, and violence over women and children—fosters an unhealthy environment. Toxic masculinity has been described as a particular kind of exaggerated masculinity. Scholars have defined toxic masculinity as that which “refers to the socially-constructed attitudes that describe the masculine gender role as violent, unemotional, sexually aggressive, and so forth.”⁴⁰ Others have noted more specifically that toxic masculinity is “the constellation of socially regressive male traits that serve to foster domination, the devaluation of women, homophobia, and

32 Dianne Herman, *The Rape Culture in* CHANGING OUR POWER: AN INTRODUCTION TO WOMEN STUDIES 260 (1988).

33 Sarah K. Murnen, Carrie Wright, & Gretchen Kaluzny, *If “Boys Will Be Boys,” Then Girls Will Be Victims? A Meta-Analytic Review of the Research That Relates Masculine Ideology to Sexual Aggression*, 46 SEX ROLES 359, 360 (2002).

34 Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L. J. 1, 1 (2015). *See also* THE INVISIBLE WAR (Chain Camera Pictures 2012); THE HUNTING GROUND (CNN 2015).

35 Mary Graw Leary, *Affirmatively Replacing Rape Culture with Consent Culture*, 49 TEX. TECH. L. REV. 1, 2 (2016).

36 *Id.* Certainly the #metoo movement is radically changing the culture, or at least raising awareness thereto.

37 *Id.*

38 *See, e.g.*, Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> (arguing that “[t]he #MeToo movement is accomplishing what sexual harassment law . . . has not.”).

39 *See* Jonathan Cohn, *Five Things We Can Do to Address Domestic Violence*, NEW REPUBLIC (Sept. 14, 2014), <https://newrepublic.com/article/119436/how-stop-domestic-violence-experts-offer-5-steps-policy-makers>.

40 *Toxic Masculinity*, GEEK FEMINISM WIKI, http://geekfeminism.wikia.com/wiki/Toxic_masculinity (last visited Mar. 12, 2018). *See also* Kupers, *supra* note 5, at 716–18; Caitlyn Martin, *Another Reason Why We Should Ditch Toxic Masculinity*, URGE (May 5, 2016), <http://urge.org/toxic-masculinity-the-toxic-sludge-weve-got-to-get-rid-of/>.

wanton violence”⁴¹ and is characterized by traits of “misogyny, homophobia, greed, and violent domination.”⁴² When a culture tolerates toxic masculinity, the natural consequences flowing from the toxicity include gender-based sexual assault and domestic violence.

The term toxic masculinity has been closely connected to the concept of hyper-masculinity,⁴³ where stereotypical male behavior, such as physical strength, aggression, and sexuality are exaggerated.⁴⁴ With toxic masculinity, however, these characteristics are no longer just exaggerated, but injurious.⁴⁵ Toxic masculinity has been described as the need to aggressively compete with and dominate others.⁴⁶ When toxic masculinity becomes embedded within a society or social construct, the institutionalized encouragement of “male” characteristics and masculinity stigmatize and demean those things that are seen as culturally “female” or feminine.

There is also a connection to the concept of hegemonic masculinity, a term which encompasses the traits that describe the dominant paradigm of “real men” in modern culture.⁴⁷ There are two prongs that make up hegemonic masculinity: (1) domination over women, and (2) the hierarchy of dominance between men in society.⁴⁸ “Today’s hegemonic masculinity in the United States of America and Europe includes a high degree of ruthless competition; an inability to express emotions other than anger; an unwillingness to admit weakness or dependency; a devaluation of women and all feminine attributes in men, homophobia, and so forth.”⁴⁹ “These values are in no way inherent to being a man, but they are completely integral to how we raise and socialize our boys [as a whole].”⁵⁰

41 Kupers, *supra* note 5, at 714.

42 *Id.* at 716.

43 *Id.* at 716–18. See also Donald L. Mosher & Mark Sirkin, *Measuring a Macho Personality Constellation*, 18 J. RES. PERSON. 150 (1984); Charlene L. Muehlenhard & Leigh Ann Kimes, *The Social Construction of Violence: The Case of Sexual and Domestic Violence*, 3 PERSON. & SOC. PSYCHOL. REV. 234 (1999); David Tager et al., “Walking Over ‘Em: An Exploration of Relations Between Emotion Dysregulation, Masculine Norms, and Intimate Partner Abuse in a Clinical Sample of Men,” 11 PSYCHOL. MEN & MASCULINITY 233 (2010).

44 *Id.*

45 For example, one researcher addresses toxic masculinity through the concept of respect, or a perceived lack thereof, by noting “[w]hat can lead to toxicity is the repeated frustration of a man’s need to be respected. Thus, there is the well-known caricature of domestic violence or toxic masculinity . . . where the man feels chronically disrespected at work and in the community, drinks alcohol to numb the pain, and proceeds to beat or otherwise abuse the woman he is closest to while screaming, ‘All I ask for is to be shown a little respect!’” *Id.*

46 Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630, 1640–42 (2012); Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J. L. GENDER & SOC’Y 201, 216 (2008) (explaining that males often experience a “disidentification” with their mothers to become autonomous and assert their “masculine” traits).

47 Kupers, *supra* note 5, at 716.

48 *Id.*

49 *Id.*

50 Britta Love, *Why Does Our Society Celebrate Sociopathic, Narcissistic and Toxic Masculine Traits?* ALTERNET, (Oct. 2, 2016, 6:34 AM), <http://www.alternet.org/election-2016/donald-trump-gives-america-good-look-mirror>.

Notably, hegemonic masculinity may reveal itself in positive contexts, as well—i.e., a healthy competition in sports, or the drive to succeed at work and provide for a family.⁵¹ In contrast

toxic masculinity is constructed of those aspects of hegemonic masculinity that foster domination of others and are, thus, socially destructive. Unfortunate male proclivities associated with toxic masculinity include extreme competition and greed, insensitivity to or lack of consideration of the experiences and feelings of others, a strong need to dominate and control others, an incapacity to nurture, a dread of dependency, a readiness to resort to violence, and the stigmatization and subjugation of [those] who exhibit feminine characteristics.⁵²

Those engaged in the study of masculine culture have focused on the existence of toxic masculinity in subcultures, such as in prisons,⁵³ fraternities,⁵⁴ or politics.⁵⁵ Some scholars have argued that often the most suspect institutions for promoting intimate partner violence are simultaneously our most revered: the military and the family.⁵⁶ It is often contended for both establishments that men take the rigid gender roles of defenders, protectors, and rulers.⁵⁷

⁵¹ Kupers, *supra* note 5, at 716.

⁵² *Id.* at 717.

⁵³ *Id.* at 718 (“Whether by ‘pulling a heist,’ ‘joyriding’ in a stolen car, doing a ‘drive-by’ to prove one is enough of a ‘man’s man’ to be in the gang, bragging to other males about a sexual conquest or a date rape, or participating in a college fraternity gang rape, young males turn to crime and violence to prove their manhood.”).

⁵⁴ See, e.g., Sheryl Gay Stolberg, *18 Penn State Students Charged in Fraternity Death*, N.Y. TIMES (May 5, 2017), https://www.nytimes.com/2017/05/05/us/penn-state-fraternity-death-timothy-piazza.html?_r=0; Lanetra Bennett, *Florida State’s ZBT Fraternity Suspended 6 Years for Hazing*, WCTV (June 14, 2017, 4:27 AM), <http://www.wctv.tv/content/news/FSU-fraternity-ZBT-investigated-for-hazing-424444834.html>.

⁵⁵ For example, U.S. Congresswoman Gwen Moore of Wisconsin presented testimony in support of the reauthorization of the Violence Against Women Act during the meeting of the 2012 House of Representatives. She noted that members of the Senate Judiciary Committee who voted no on the legislation all happened to be male. She expressed dismay at this outcome and indicated that it instilled in her a similar fear of being victimized by men as a young woman. By Congresswoman Moore’s account, the prevalence of a “toxic culture of masculinity” has become injected into the decision-making process of the leaders of this country. *Reauthorization of the Violence Against Women Act of 1994: Debates and Proceedings on H.R. 4271 Before Congress*, 112nd Cong. H1658 (2012). (statement of Rep. Gwen Moore).

⁵⁶ See, e.g., U.S. COMM’N ON HUMAN RIGHTS, 2013 STATUTORY ENFORCEMENT REPORT: SEXUAL ASSAULT IN THE MILITARY (2013), available at http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf; see also Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN’S L.J. 25, 26 (1989). (“[M]ilitarism’ . . . [is] the pervasive cluster of forces that keep history insane: hierarchy, conformity, waste, false glory, force as the resolution of all issues, death as the meaning of life, and a claim to the necessity of all of that. Ultimately, force and gender are parts of the same death-seeking process. For these same forces account in turn for the oppression of women in whatever patriarchal institution—religion, state, family, academy—and by whatever method—rape, battering, economic exploitation, rendering invisible.”).

⁵⁷ A man’s ability to successfully triumph by force over a combatant in the military or his ability to provide for his family are often viewed to thus define his so-called masculinity. Jamie R. Abrams, *The Collateral Consequences of Masculinizing Violence*, 16 WM. & MARY J. WOMEN & L. 703, 717 (2010); Dowd, *supra* note 46, at 208–09 (“Masculinities theory sees masculinity, in any form, as a social construction, not as a biological given.”).

Yet, in the same way that men cannot and should not be essentialized and categorized as monolithic, with only one way to express masculinity, the same is true for women. For example, when one conjures up in the mind exaggerated notions of femininity, such stereotypical female traits typically include delicate souls, who are fragile or passive. In some cases, stereotypes of women, particularly as victims, portray women as hysterical and overly dramatic. Hence, when we explore what this means in an intimate partner violence setting, we see female victims of intimate partner violence often vilified and painted as weak, or exaggerating, or histrionic.⁵⁸

It is convenient as a culture to resort to gendered stereotypes as a way to define the role of men and women in society. Gloria Steinem notes that “[w]hen it comes to the cult of gender, ideas are hard to challenge or even to see as open to challenge, because they are exaggerated versions of the earliest ways we may have been taught to see people as groups rather than as unique individuals.”⁵⁹

Stereotypes about intimate partner violence range from whether a victim should have left the abuser, to whether a victim is credible because she returned to her abuser.⁶⁰ While these tend to be misconceptions, they often permeate societal views of why domestic violence continues in the home.

Stereotypes are so often resistant to change “because our perceptions become impervious to new information. People interpret ambiguous information to confirm stereotypes and are often unaffected by information that a stereotype is invalid.”⁶¹ The image of an overexaggerated desire to achieve respect and control and status in the community as a “real man”—as if there were such a monolithic way to be male—further contributes to this culture of violence.⁶²

Although researchers do not have a clear-cut profile of the “typical” batterer, they do have some clues that link back to one’s family or beliefs about gender, as well as other risk factors in an abuser’s life, as explained earlier by the Ecological Model. Children who have grown up in homes of domestic violence are more likely to become future batterers and future victims themselves, demonstrating the learned behavior aspect of intimate partner violence.⁶³ Furthermore, men who demonstrate traditional and toxic forms of masculinity tend to foster views tolerating intimate partner violence.

In examining the way in which society as a whole views domestic violence, it has been noted that

58 It should be noted that describing victims as hysterical is often used as a tool to minimize domestic violence.

59 Steinem, *supra* note 27, at 526.

60 Melissa L. Breger, *Introducing the Construct of the Jury into Family Violence Proceedings and Family Court Jurisprudence*, 13 MICH. J. GENDER & L. 1, 34–35 (2006).

61 Nicole E. Negowetti, *Implicit Bias and the Legal Profession’s “Diversity Crisis”: A Call for Self-Reflection*, 15 NEV. L. J. 930, 943 (2015) (explaining confirmation bias).

62 In early 2017, a billboard in North Carolina read: “Real men provide; Real women appreciate it.” See Bethany Chafin, *Billboard About Gender Roles Sparks Debate, Protest in North Carolina*, NPR (Feb. 28, 2017, 4:32 PM), <http://www.npr.org/2017/02/28/517720434/billboard-about-gender-roles-sparks-debate-protest-in-north-carolina>.

63 EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 48 (3d ed. 2003); LORI L. HEISE, WHAT WORKS TO PREVENT PARTNER VIOLENCE? AN EVIDENCE OVERVIEW 37 (2011).

[e]ven if a woman thinks the abuse from her husband is wrong, friends and family around her will be less likely to offer her support if society accepts the abuse as acceptable and mothers will be less likely to teach their sons to resolve differences with their partners using words instead of their fists. Social norms and the attitudes that underpin them really are the root cause of violence against women⁶⁴

Again, one of the most significant sources of violence stems from “[o]bserving violence in one’s family of origin . . . [that] creates ideas and norms about how, when, and towards whom aggression is appropriate.”⁶⁵ Adolescent males who have witnessed domestic violence are twice as likely to abuse an intimate partner later in life.⁶⁶

As discussed in the next section, borrowing from social norms theory might be a helpful tool in debunking stereotypes about blaming victims and decreasing intimate partner violence. Outsiders often ask, “Why didn’t she just leave?”⁶⁷ Inherent in such a question is the implication that it is possible to leave,⁶⁸ or that the violence is not as bad as it seems (i.e., the victim must not be telling the truth or is not credible). The questions that society and judges and legislators *should* be asking should not be based on why she stayed; the question we should be asking is, “Why did he abuse her?” In the same way, women are taught to avoid situations where they could more likely be victimized or raped. Why are we teaching young women “don’t get raped” instead of teaching men “don’t rape?”⁶⁹

C. How Does This Toxic Culture of Domestic Violence Interplay with Gender Bias?

Gendered norms and implicit biases play a role in creating a culture that condones violence against women. It is these gendered norms that form the nexus between a society and its underlying themes of power and control over women and girls.⁷⁰ Coercive control and intimate partner violence can only thrive in a society that accepts such violence, or at least silently tolerates it. A toxic culture of

⁶⁴ Aizenman, *supra* note 20 (referring to statements of Clinton Foundation policy adviser Rachel Tulchin).

⁶⁵ Kenneth Corvo et al., *Toward Evidence-Based Practice with Domestic Violence Perpetrators*, 16 J. AGGRESSION, MALTREATMENT & TRAUMA 111, 116–17 (2008).

⁶⁶ Jane K. Stoeber, *Teach Your Children Well: Preventing Domestic Violence*, 13 SEATTLE J. SOC. JUST. 515, 527 (2016).

⁶⁷ Jane K. Stoeber, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L. J. 303, 333 (2011) (“Studies show that, on average, women who experience intimate partner violence leave the violent partner five to seven times before fully ending the relationship . . .”).

⁶⁸ The term “separation assault” was coined by Professor Martha Mahoney in her Michigan Law review article. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 6 (1991).

⁶⁹ See generally Cheryl Hanna, *Sometimes Sex Matters: Reflections on Biology, Sexual Aggression, and Its Implications for the Law*, 39 JURIMETRICS 261 (1999), (pinpointing the lessons that most—if not all—women have practiced to “not get raped.”)

⁷⁰ CATHARINE MACKINNON, SEX EQUALITY 761–62 (2d ed. 2007).

condoning domestic violence against women trickles down and manifests as gender bias. Or, as in the old chicken and the egg adage, perhaps the gender bias is what leads to the toxic culture. Regardless of whether the culture morphs into bias, or the bias morphs into culture, the interconnectedness is apparent.

1. What is Implicit Bias and How Does It Contribute to Culture and Norms?

Unlike explicit biases, implicit biases do not necessarily take the shape of outward animosity or hatred towards a particular group.⁷¹ Implicit bias encompasses the idea “that people can possess attitudes, stereotypes, and prejudices in the absence of intention, awareness, deliberation, or effort.”⁷² All people harbor implicit biases,⁷³ though these biases are not typically conscious or maliciously-based. Because of this, implicit biases are harder to identify and eradicate than are explicit biases. “Implicit bias is not merely ‘a cognitive glitch,’ but a reflection of cultural issues that have a real-world impact.”⁷⁴ Research has shown that implicit biases can begin to form as young as three years old, and then deepen over the years, becoming part of a child’s concrete set of beliefs as an adult.⁷⁵ Such biases then shade how one ultimately views the world.⁷⁶

Even if a society argues explicitly that women are equal and that violence against women is fundamentally wrong, that society may implicitly tolerate misogyny and intimate partner violence.⁷⁷ This normalization of sexism and gendered violence then confirms and reinforces deeply embedded constructs of gender emanating from

71 Breger, *supra* note 9, at 41; Erik J. Girvan, *When Our Reach Exceeds Our Grasp: Remedial Realism in Antidiscrimination Law*, 94 OR. L. REV. 359, 371 (2016) (“Regular repetition of surveys on nationally representative samples of U.S. adults show that, at least as assessed in self-reported measures, explicit bias has declined substantially since the mid-1900s.”).

72 See John T. Jost et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORG’L BEHAV. 39, 42–43 (2009); Melissa L. Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. L. & SOC. CHANGE 555, 560–63 (2012); Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613, 617–18 (2007); David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L. J. 1389 (2008).

73 Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 849 (2012). (“Over six million [Implicit Association Tests] have been taken, with the results being used by the developers to refine the test. . . . Jerry Kang describes the results as ‘clear and overwhelming.’ Participants ‘systematically preferred socially privileged groups’”).

74 Negowetti, *supra* note 61, at 940.

75 Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J. 345, 363 (2007).

76 See, e.g., Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 983–85 (1999); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 949–51 (2006). See generally Patricia G. Devine, *Implicit Prejudice and Stereotyping: How Automatic Are They? Introduction to the Special Section*, 81 J. PERSON. & SOC. PSYCHOL. 757 (2001); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989).

77 See, e.g., Christine Sgarlata Chung, *From Lily Bart to the Boom Boom Room: How Wall Street’s Social and Cultural Response to Women Has Shaped Securities Regulation*, 33 HARV. J. L. & GENDER 175 (2010) (describing the effects of sexism on Wall Street).

childhood.⁷⁸ To chisel away at this destructive culture, society must reshape and reform its norms.

2. How Does Society Further Fuel, Normalize, and Minimize This Toxic Culture of Domestic Violence?

*Who can take two jumper cables?
Clip them to her tits?
Turn on the battery and
Watch the bitch twitch.
-Sung to the tune of The Candyman*

The above lyrics were reportedly recited by cadets at the Citadel during daily runs, coming to light in the early 1990s when the first female cadet, Shannon Faulkner, fought for admission.⁷⁹ Despite the vitriol, the lyrics could have easily been written in recent years and hit the top forty American Billboard list of songs. While current music is saturated with misogynistic lyrics,⁸⁰ lyrics glorifying violence and unhealthy relationships are certainly nothing new.⁸¹ Gender violence-based lyrics in the music industry are just one of the myriad examples of violence against women glorified and tolerated in the wider popular culture arena, including platforms like cinema, television, and video games.

Even if those who create such lyrics argue the speech itself is protected or the words are intended to raise social awareness,⁸² one needs to be cognizant that there is an impact on society as a whole when toxic, raw, and explicit messages are

78 See Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 5–6 (2010); Rhode, *supra* note 72, at 617–18.

79 Professor Val Vodjik uncovered these lyrics when studying the incident. See Symposium, *Women and War: A Critical Discourse*, 20 BERKELEY J. GENDER L. & JUST. 321, 345 (2005).

80 See, e.g., Nolan Feeney, *Does Lana Del Rey's New Song Glorify Domestic Violence?*, TIME (June 4, 2014), <http://time.com/2823016/lanadelrey-ultraviolence-title-track/> (last visited July 31, 2017) (in which Del Rey compares getting hit to a kiss and asks her lover to “give me all of that ultraviolence; quoting the Crystals’ controversial 1962 song “He Hit Me (And It Felt Like a Kiss),” including the lyrics “he hurt me, but it felt like true love”; see also, *Katy Perry Lyrics-“ET”*, AZ LYRICS, <http://www.azlyrics.com/lyrics/katyperry/et152121.html> (last visited June 19, 2017) (lyrics include “[t]ake me, [I] wanna be your victim, [I’m] ready for abduction”).

81 Topping the Billboard charts for the year 1983, the Police sang, “Oh can’t you see, you belong to me? Every breath you take, Every move you make, Every bond you break, Every step you take, I’ll be watching you.” *The Police Lyrics – “Every Breath You Take”*, AZ LYRICS, <https://www.azlyrics.com/lyrics/police/everybreathyouake.html> (last visited Apr. 17, 2018); see also, Rochell Thomas, *Eminem’s ‘Love the Way You Lie’ Warns of the Cycle of Abuse*, MTV NEWS (Aug. 6, 2010), <http://www.mtv.com/news/1645285/eminems-love-the-way-you-lie-warns-of-the-cycle-of-abuse/>.

82 See KATZ, *supra* note 17, for a thoughtful, nuanced discussion of rap music, race, and in particular Eminem. The First Amendment defense also arises when batterers utter violent epithets to their victims as a form of abuse, naming it art or freedom of expression. Such a case was heard by the Supreme Court when, under the guise of lyrics, one batterer wrote vile, violent words and posted them online, where he knew his wife would see them. The U.S. Supreme Court agreed with the defendant in *Elonis v. United States* that the ex-husband’s speech was protected even when such words were, “[t]here’s one way to love you but a thousand ways to kill you. I’m not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. . . . [f]old up your [protection from abuse order] and put it in your pocket[.] Is it thick enough to stop a bullet?” *Elonis v. United States*, 135 S.Ct. 2001, 201617 (2015).

repeatedly dispersed. Young persons (often the chief consumers of top music hits) absorb these messages subconsciously in their inner thought processes and may internalize them. The lyrics are heard and sung at alarmingly young ages. Many of these distorted societal ideas of femininity and masculinity are further cemented into our children's brains by other forms of media.

As addressed earlier, society routinely normalizes or minimizes intimate partner violence—treating it as an inevitable part of relationships. Despite the fact that studies have shown that young women experience the highest rate of intimate partner violence in the United States,⁸³ for example, it is not uncommon to hear American young women “jokingly” measuring their partner's love for them by the intensity and duration of their stalking.⁸⁴

Those deeply embedded social and gendered norms play into a narrative about how people are “supposed” to act, and how intimate relationships are “supposed” to look.⁸⁵ We, as a society, need to change the idea that exercising power and control by one human being over another is acceptable. The more we see society, the laws, and the legal system condoning intimate partner violence, the more these distorted norms form implicit biases in our minds, leading to a tolerance of domestic violence.

It is with this societal tolerance of a toxic culture of intimate partner violence that social norms theory and the legal system might be of some help. Just for a brief overview, which will be expanded upon later in this Article,⁸⁶ Professor Cass Sunstein and other theorists posit that studying and applying social norms theory can foster positive results, such as increasing safety and decreasing various forms of inequality.⁸⁷ More specifically, because people like to conform,⁸⁸ if people do not abide by social norms, they feel shame, and therefore they are less likely to engage in behavior in which society does not approve. In the context of intimate partner violence, social norms research has revealed that men often overestimate other men's acceptance of abusive behavior towards women, and underestimate other men's willingness to intervene in an abusive relationship.⁸⁹ As a result, when men and boys believe that their peers will accept sexist and abusive behavior, they are themselves much less likely to intervene.⁹⁰ That, in turn, can lead abusers to think their actions are acceptable and tolerated—which then perpetuates more violence.⁹¹

83 Ages 16–24 experience almost triple that of the national average. See LOVEISRESPECT, *supra* note 21.

84 King-Ries, *supra* note 14, at 132, 139.

85 See Breger, *supra* note 72, at 55759 (discussing the implicit bias present in family courts dealing primarily with female litigants and the idealistic standard of what a “good mother” is supposed to look like).

86 See *infra* pp. 3541.

87 Sunstein, *supra* note 10. See also RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, & HAPPINESS 67, 182 (2008).

88 THALER & SUNSTEIN, *supra* note 87, at 55.

89 ALAN D. BERKOWITZ, FOSTERING HEALTHY NORMS TO PREVENT VIOLENCE AND ABUSE: THE SOCIAL NORMS APPROACH (May 2010), <http://www.alanberkowitz.com/articles/Preventing%20Sexual%20Violence%20Chapter%20-%20Revision.pdf>; see also THALER & SUNSTEIN, *supra* note 87, at 66.

90 Jackson Katz, *It Takes a Campus to Stop Assaults*, CHRON. HIGHER EDUC. (July 10, 2014), <http://www.chronicle.com/blogs/conversation/2014/07/10/how-to-prevent-sexual-assault/>.

91 *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1049 (1996); see also Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 COLUM. J.L. & SOC. PROBS. 167, 170 (1998).

II. HOW HAS THE LEGAL SYSTEM CONTRIBUTED TO THIS CULTURE OF DOMESTIC VIOLENCE?

Law builds on what society has established, and vice versa. Thus, when the legal system mirrors societal biases about gender, it perpetuates gender-biased laws and a culture and tolerance of intimate partner violence. As Professor Sherilyn Ifill writes about the nexus between gender and the legal system:

The law . . . contains deeply embedded gender narratives. . . . Stories about the physical strength, emotionalism, vulnerability, virtuousness or wantonness of women can influence how legal decision-makers evaluate cases involving women litigants, witnesses, lawyers, and judges. Feminist scholars have described how women's narratives can affect legal decision-making. These scholars have explored the unique role that gender perspectives play in the development of legal theory and interpretation. In so doing, they have identified the male-centered narratives that undergird legal norms and doctrine.⁹²

To explore how the legal system has traditionally helped condone a culture of domestic violence, we look to the history of the law. Researchers Buzawa and Buzawa ask, "Why do we care about historical attitudes and precedents toward women? This helps us to understand the structural violence considered endemic against women in Western society Socially sanctioned violence against women has been persistent since ancient times."⁹³

The law serves as a normalizing force in society, delineating what society will tolerate and what is permissible under the law. In this sense, the law informs and reflects society's culture. To that end, an overview of the most significant ways in which the laws have reinforced a toxic culture of domestic violence throughout history will provide insight into its current existence.

Only 100 years have passed since men were denied the legal right to beat their wives in England and the United States.⁹⁴ Laws condoning violence against women have been on the books since 753 B.C., over 2,700 years ago.⁹⁵ Under the reign of

92 Sherilyn Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 447 (2000) (citing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1988); DEBORAH L. RHODE, *JUSTICE & GENDER: SEX DISCRIMINATION AND THE LAW* (1989); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988)). The work of scholars in the critical legal studies movement has influenced much of the work of critical feminist writers and critical race scholars. For an overview of critical legal studies, see ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986) (citing work of Catharine MacKinnon, Deborah Rhode, and Robin West). See, e.g., MACKINNON, *supra* note 70, at 3839 & n.29; see generally West, *supra* note 92.

93 BUZAWA & BUZAWA, *supra* note 63, at 57.

94 R. Emerson Dobash & Russell P. Dobash, *Wives: The Appropriate Victims of Marital Violence*, 2 VICTIMOLOGY 426, 426 (1978).

95 Cheryl Ward Smith, "The Rule of Thumb": A Historic Perspective?, reprinted in DOMESTIC VIOLENCE LAW 12 (Nancy K.D. Lemon ed., 2d ed. 2001).

Romulus of Rome, “the husband had an absolute right to discipline his wife physically for various unspecified offenses.”⁹⁶ Men were deemed the heads of their households and women merely a possession within that home. Because the law did not recognize women as people, but instead as property or chattel, men could not be held liable for their actions against such chattel in a court of law. Thus, these laws allowed husbands to beat their wives as an appropriate punishment to prevent exposing the husband to criminal and civil liability. From there the Law of Chastisement was born.

The Rule of Thumb embodied the Law of Chastisement and permitted “a man to beat his wife with a rod or switch *so long as* its circumference was no greater than the girth of the base of the man’s right thumb.”⁹⁷ This tolerance of violence against women continued throughout the development of the world. In the fourteenth century, the Catholic Church adopted in the Rules of Marriage that a husband may “take up a stick and beat [his wife] soundly” should she disobey him.⁹⁸

In the sixth century, English law established the “Chattel Theory” under which a woman was the property of her father and eventually her husband. Women were considered untrustworthy and were “inferior, childlike and mindless . . . suitable only for conjugal duties.”⁹⁹ Laws against bride capture emerged, which protected fathers’ property interests in their daughters.

Thereafter, the eleventh through the sixteenth centuries brought the Doctrine of Coverture. “Women lost their legal identity upon marriage. At that time, the husband and wife became one—the husband. . . . Under this theory, the woman could not own personal property, make a will, nor be a party to a contract.” So the husband could never be in trouble for assaulting his wife—he was merely assaulting himself . . . or, at best, his chattel.¹⁰⁰

Finally, the nineteenth century brought a wave of change, beginning with women in England lobbying Parliament to enact laws ending chastisement. The success of this movement, however, was short-lived. In the United States, husbands who could prove that their violent behavior was “provoked” could then defeat their wives’ petitions for divorce.¹⁰¹ Further, women seeking the assistance of the courts were often denied recourse. “[F]or a century after courts repudiated the right of chastisement, the American legal system continued to treat wife beating differently from other cases of assault and battery.”¹⁰² In *State v. Rhodes*, the North Carolina Supreme Court rejected the law of chastisement, yet declined to enforce criminal

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Virginia H. Murray, *A Comparative Survey of the Historic Civil, Common and American Indian Tribal Law Responses to Domestic Violence Law*, 23 OKLA. CITY U. L. REV. 433, 436 (1998).

⁹⁹ Ratna R. Bharamgoudar, *A Critical Study of Protection of Women Against Domestic Violence in India*, (Feb. 28, 2006) (Dissertation, Karnatak Univ. Dep’t of L.), <http://shodhganga.inflibnet.ac.in/handle/10603/96505>.

¹⁰⁰ NANCY D. LEMON, *DOMESTIC VIOLENCE LAW* (4th ed. 2015). The law in early years did its part in contributing to a culture of domestic violence. For example, domestic violence was not treated or even identified until the late 20th century.

¹⁰¹ Murray, *supra* note 98.

¹⁰² Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117, 211820 (1996).

charges against a man who assaulted his wife.¹⁰³ The case, heard in 1868, involved a husband who had whipped his wife “three licks, with a switch about the size of one of his fingers (but not as large as a man’s thumb).”¹⁰⁴ Although the court acknowledged that this attack would constitute assault if perpetrated outside the marital relationship, the court noted that “the evil of publicity would be greater than the evil involved in the trifles complained of.”¹⁰⁵ Furthermore, the marital rape exception and the law of primogeniture (limiting women’s property rights) continued throughout most of the twentieth century.¹⁰⁶

Even with this robust history of domination and violence by men over women in the written laws, domestic violence was believed to be “an exceedingly rare phenomenon.”¹⁰⁷

Today, the question remains whether the effects of millennia of patriarchal society can be reversed. Law mimics society—and, arguably, society mimics law. Even absent explicit patriarchal laws, legal systems can be implicitly biased by silently condoning gender violence, or by not providing remedies to victims of violence.¹⁰⁸ There have also been examples where the law has remained stagnant for so long on issues regarding gender violence that legal remedies are non-existent or limited.¹⁰⁹ The legal system—judges, lawyers, and legislators—must be educated about the dynamics of domestic violence and be proactive in decreasing gender violence through utilization of the law.

III. HOW DOES RE-NORMING WITHIN SOCIETY AND THE LEGAL SYSTEM HAVE THE POTENTIAL TO CHANGE THIS CULTURE OF DOMESTIC VIOLENCE?

If we operate from the belief that the legal system and its laws arguably form the pillars of any community, we next must determine how we might alter that legal

¹⁰³ *State v. Rhodes*, 61 N.C. 453 (1868).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 454.

¹⁰⁶ *Murray*, *supra* note 98; *see also* *People v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984) (“We find that there is no rational basis for distinguishing between marital rape and nonmarital rape.”).

¹⁰⁷ *Siegel*, *supra* note 102, at 211820. Indeed, in 1972, only five social science papers were written on the topic—papers based on major misconceptions about spousal abuse that have continued to confuse people’s thinking about the subject up to the present.

¹⁰⁸ One case that sheds light on the law tolerating and silently condoning gender violence is *United States v. Morrison*, 529 U.S. 598 (2000). In the *Morrison* case, a college freshman was raped by two college football players at Virginia Polytechnic Institute in September of 1994. The Violence against Women Act had created a federal tort remedy which the victim (whether male or female) had to prove that the violence was motivated by animus toward gender. Because the football players had earlier issued misogynistic taunts about women that were openly heard in the campus cafeteria, the plaintiff used this behavior to demonstrate a culture of gender bias and gendered violence as tolerated—and as such, used this as a basis for animus towards gender. The Supreme Court not only failed to provide the plaintiff with the relief requested, but then subsequently struck down the relevant part of VAWA (violence motivated by gender animus) as unconstitutional.

¹⁰⁹ For example, it was not until 2014 that the Board of Immigration Appeals announced that an individual citing a history of abuse from domestic violence could successfully claim asylum status in the United States in *Matter of A-R-C-G*. *See* Amy Grenier, *Landmark Decision on Asylum Claims Recognizes Domestic Violence Victims*, IMMIGRATION IMPACT (Sept. 2, 2014), <http://immigrationimpact.com/2014/09/02/landmark-decision-on-asylum-claims-recognizes-domestic-violence-victims/>. The BIA held that “‘married women in Guatemala who are unable to leave their relationship’ can constitute a . . . particular social group that forms the basis of a claim for asylum.” *Id.*

system and those laws in such a way as to be a positive contribution to culture and society. This is where we can look at psychological concepts such as re-norming and social norms.

A. Re-Norming in General: Social Norms Theory and Re-Norming

As addressed briefly above, the concepts of re-norming and social norms theories are somewhat related, but nonetheless distinct. The concept of re-norming dates back to 1965 and has been applied in many contexts, such as group counselling dynamics and team building. Dr. Bruce Tuckman studied the phases experienced by individuals engaged in group therapy and how those phases influenced different behavior based upon the norms of the group.¹¹⁰ The five phases identified by Tuckman included the stages of: forming, storming, norming, performing, and adjourning.¹¹¹ Building upon this model, another researcher, Timothy Biggs, recommended the addition of a phase to Tuckman's research: re-norming.¹¹² Re-norming is the stage after norming and before performing. The re-norming stage is seen as the part where a group transforms, and in doing so "it is necessary to understand and review the dysfunctional phases or negative forces . . . so that appropriate corrective actions can be taken."¹¹³ Another way re-norming has been described is that "[as] new ideas are implemented, individual members adjust and develop [to these new ideas]."¹¹⁴ These ways of describing re-norming can be loosely applied here, but the term fits more precisely as this author first saw it used in the context of intimate partner violence by Professor King-Ries.¹¹⁵ I am using the term as Professor King-Ries applies it to changing behavior and norms in the context of dating violence, while also incorporating long-standing social norms theories, which have been applied in recent times as a potential way to reduce domestic violence and sexual assault.¹¹⁶

Specifically, I borrow the concept of re-norming to address transforming the dysfunctional and negative forces that modern society passively tolerates with regard to gendered violence. The law is but one instrument for achieving this transformation, and we can learn by drawing from other disciplines. Appropriate corrective actions would be those that use the law or legal system to re-norm a toxic culture of intimate partner violence.¹¹⁷ For example, we can look to the context of

110 Bruce W. Tuckman, *Developmental Sequence in Small Groups*, 63 PSYCHOL. BULL. 384 (1965).

111 *Id.* at 39697; Bruce W. Tuckman & Mary Ann C. Jensen, *Stages of Small-Group Development Revisited*, 4 GROUP & ORG'L MGMT. 419 (1977).

112 MILLER, *supra* note 14, at 4.

113 Tom Edison, *The Team Development Life Cycle: A New Look*, 2008 DEF. AT&L 14 (2008); Tudor Rickards & Susan Moger, *Creative Leadership Processes in Project Team Development: An Alternative to Tuckman's Stage Model*, 11 BRIT. J. MGMT 273 (2000).

114 Matt Grant, *Organisational Change: Thinking It Through* (2014), <https://www.slideshare.net/humansnotrobots/organisational-change-thinking-it-through>.

115 See King-Ries, *supra* note 14.

116 BERKOWITZ, *supra* note 89.

117 In an earlier article, I tied the underlying theory of groupthink to family court. In this Article, I again borrow from psychology and group dynamics and tie the idea of re-norming to a way of rethinking gendered norms. See Breger, *supra* note 9.

social norms psychological research when thinking about re-norming. When we look at the literature on social norms research, the theory examines individuals and their perceptions of how others in society behave.¹¹⁸ Oftentimes the theory is utilized in the context of reducing negative behavior, like drunk driving, sexual assault, or narcotics use.¹¹⁹ If individuals have distorted perceptions that others are largely behaving in risky or negative behavior, they are then more likely to engage in such behavior. Ultimately, one seeking to diminish this negative behavior would reset appropriate social norms to frame the behavior in less acceptable terms, thereby decreasing the behavior.¹²⁰

Yale Professor Daniel Kahan describes “gentle nudges” as sometimes more efficacious than “hard shoves”—particularly in areas where we want to decrease harmful behavior, such as smoking tobacco, drinking alcohol, date rape, and domestic violence.¹²¹ Kahan argues that completely outlawing or increasing stringent penalties for such behaviors may not always be the best approach to eliminating such behaviors.¹²² Strict penalties may even end in backlash and unintended consequences, especially when the law does not coincide with societal norms. Incremental changes over time can often be more effective than categorically outlawing behavior.¹²³ The social norms theory has been successful in many areas, such as in increasing community safety, decreasing drunk driving, and stigmatizing domestic violence.¹²⁴ Data demonstrates that both implicit biases and tendencies towards intimate partner violence can be traced back to early childhood.¹²⁵ Thus, it seems decreasing toxic norms is most effective when introduced in early childhood, which can then be reinforced later with law and education. In conjunction with legal remedies, broader education in society on multiple levels can be particularly effective in increasing the social stigma of intimate partner violence, and thus potentially reducing its occurrence.¹²⁶ Educational programs have been developed to alter perceptions about gender stereotypes and gendered violence in order to decrease the occurrence of domestic violence.¹²⁷ Some such programs focus particularly on male peer groups or a bystander approach in order to change the norms from within the

118 See generally Daniel M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

119 *Id.*; see also THALER & SUNSTEIN, *supra* note 87.

120 WORLD HEALTH ORG., *supra* note 10.

121 Kahan, *supra* note 118.

122 *Id.*

123 *Id.* at 633.

124 *Id.* For example, the lessons from re-norming have been particularly successful in combatting drunk driving. When there was a marked decrease of drunk driving fatalities, research indicated that it was not due to increased penalties, but rather changes in the social stigma associated with drunk driving. Groups such as Mothers Against Drunk Driving enlisted not only the law as their ally but society as a whole to re-norm behavior in order to reform behavior. By changing societal acceptance of driving while inebriated, through media and education, friends and family members everywhere became the key deterrent by re-norming safe and acceptable behavior.

125 BLACK, *supra* note 26.

126 Sally F. Goldfarb, *A Clash of Cultures: Women, Domestic Violence, and the Law in the United States*, reprinted in GENDER AND CULTURE AT THE LIMIT OF RIGHTS 74 (Dorothy L. Hodgson ed., 2011) (citing Rivera 1998 study and Yoshioka and Choi 2005 study).

127 WORLD HEALTH ORG., *supra* note 10.

male community.¹²⁸ Working with the law and the legal system, these re-norming models can be replicated as early as elementary school, with refreshers in college, law school, and then even at a judicial or legislative level.¹²⁹

For example, the United States Department of Justice has relied upon social norms data to launch a domestic violence re-norming program,¹³⁰ focusing upon multi-faceted strategies to engage men as influencers of other men.¹³¹ As noted above, Professor King-Ries outlines a number of innovative and successful campaigns aimed specifically at re-norming negative teenage behavior online,¹³² utilizing technology and teen-friendly language to change norms about what is acceptable behavior in intimate relationships.¹³³

Professor Daniel Kahan persuasively argues that domestic violence reform again can borrow lessons from the theory of social norms. For example, Kahan cites to Neil Websdale, who while studying a domestic violence epidemic in Kentucky advocated “‘enlist[ing] the support of rural men who eschew battering’ to participate in publicity campaigns that reinforce the connotation of ‘violence against women [as] cowardly or unmanly.’”¹³⁴ This shaming by one’s peers relies on existing social bonds to effectuate change. Re-norming has become the underlying goal as organizations work together to change what behavior is acceptable in intimate relationships.¹³⁵ Author Alan Berkowitz similarly points to fostering healthy non-abusive relationships through the social norms approach.¹³⁶ In the United States, Jackson Katz has been a true pioneer in the field, creating programs and writing literature about drastically changing unhealthy norms of domestic violence.¹³⁷ Enlightened programs and education in Canada and Australia, for example, have made real progress in re-norming against domestic violence through educational

128 *Id.* (discussing Men of Strength Clubs, Men Against Violence, Mentors in Violence Prevention).

129 One promising early education program, Choose Respect, engages pre-teens, teachers and caregivers. Research has shown that children are particularly vulnerable to abusive intimate relationships: a recent survey of female victims has revealed that 70% of those experiencing physical or sexual violence were first exposed between the ages of 11 and 24. BLACK, *supra* note 26. Jackson Katz notes that 29% of sexual assault survivors are attacked before age 11. KATZ, *supra* note 17, at 26.

130 See OFF. VIOLENCE AGAINST WOMEN, ENGAGING MEN IN PREVENTING SEXUAL ASSAULT, DOMESTIC VIOLENCE, DATING VIOLENCE, AND STALKING GRANT PROGRAM (2010), <https://www.justice.gov/archive/ovw/docs/engaging-men-youth-solicitation.pdf>; see also Lynn Rosenthal, *Engaging Men to Stop Violence Against Women*, THE WHITE HOUSE PRESIDENT BARACK OBAMA (Apr. 27, 2011), <https://obamawhitehouse.archives.gov/blog/2011/04/27/engaging-men-stop-violence-against-women> (last visited July 31, 2017); see, e.g., *Engaging Men & Youth Program*, FUTURES WITHOUT VIOLENCE, <https://www.futureswithoutviolence.org/engaging-men/engaging-men-youth-program/> (last visited July 29, 2017).

131 King-Ries, *supra* note 14.

132 *Id.* at 16163. These campaigns include loveisrespect.org, ThatIsNotCool.com, and MTV’s “A Thin Line” project.

133 *Id.*

134 Kahan, *supra* note 118, at 630.

135 Leary, *supra* note 35, at 3.

136 BERKOWITZ, *supra* note 89.

137 See generally KATZ, *supra* note 17.

programs and strong re-messaging campaigns.¹³⁸ Such education can be reinforced moreso when coupled with changing laws and legislation.

I am drawing both from social norms theory and from re-norming concepts to advocate for a way that law can help reduce a “toxic culture of intimate partner violence” through broad education, legislation, and enlightened implementation. Thus, lawyers, legislators, and judges understanding social norms research while also maintaining a sophisticated understanding of the dynamics of domestic violence is a first step towards re-norming the laws. Following are examples globally, nationally, and statewide.

B. Re-Norming in the Law: International Efforts Using Law and Legislation to Re-Norm

Globally, the World Bank conducted longitudinal studies of 100 countries and their attitudes about intimate partner violence.¹³⁹ The World Bank data found that as countries enacted laws outlawing domestic violence, citizens in those countries saw it as less acceptable.¹⁴⁰ Generally speaking, if laws or legislation in a particular country prohibit certain behavior, data demonstrates that the citizens of that country will view that behavior as less acceptable. In other words, if laws are clear that domestic violence is indeed a crime, the perspective of citizens—both male and female—regarding its acceptability in society then declines. The data bore out support for the notion that enacting anti-domestic violence laws may change the perception that gendered violence is acceptable. This data supports the principle that we may similarly decrease intimate partner violence using law as a positive change agent to re-norm behavior and beliefs.

For example, in some countries like Rwanda, which does not have laws prohibiting intimate partner violence, ninety-six percent of Rwandan women believe that the practice of domestic violence can be justified.¹⁴¹ About two-thirds of women in India and South Africa feel similarly.¹⁴² The attitude is also held by large swaths of women in countries across the religious and cultural spectra, according to the World Bank study. “[I]n 29 countries around the world, one-third or more of men say it can be acceptable for a husband to ‘beat his wife.’”¹⁴³ In some countries, the number of men believing it be acceptable to assault their wives is over half of the men in the country.¹⁴⁴ In nineteen countries, one-third or more of *women* agree that

138 PETER JAFFE, PRIMARY PREVENTION OF VIOLENCE AGAINST WOMEN: CURRENT KNOWLEDGE ABOUT PROGRAM EFFECTIVENESS AND PRIORITIES FOR FUTURE RESEARCH (2016); OUR WATCH, CHANGE THE STORY: A SHARED FRAMEWORK FOR THE PRIMARY PREVENTION OF VIOLENCE AGAINST WOMEN AND THEIR CHILDREN IN AUSTRALIA (2015).

139 See *Resource Guide*, VIOLENCE AGAINST WOMEN & GIRLS, <http://www.vawgresourceguide.org/> (last visited Apr. 10, 2018).

140 *Id.*

141 See *World Values Survey Wave 6: 2010–2014*, WORLD VALUES SURVEY, <http://www.worldvaluessurvey.org/WVSONline.jsp> (last visited Apr. 10, 2018).

142 *Id.*

143 Aizenman, *supra* note 20; <http://www.worldvaluessurvey.org/WVSONline.jsp>.

144 CLINTON FOUND. & BILL AND MELINDA GATES FOUND., THE FULL PARTICIPATION PROJECT: NO CEILINGS 20 (2015), available at <http://www.noceilings.org/report/report.pdf>.

a husband who beats his wife may be justified, at least “some of the time.”¹⁴⁵ In the United States, one in ten *women* find domestic violence to be acceptable; and in Germany—one in five *women*.¹⁴⁶ The data is similar when we view attitudes toward a particular type of intimate violence, marital rape.¹⁴⁷ Intimate partner violence has become expected and normalized in a society such as the South Pacific island nation of Papua New Guinea, where nearly every woman on the island has experienced some form of domestic abuse.¹⁴⁸

Yet, these numbers change significantly when the countries pass laws and legislation condemning domestic violence. When countries re-norm what conduct is acceptable and tolerated, its citizens reshape their acceptance of such negative conduct. Thus, one lesson we can learn from this 100-country longitudinal data is how powerful the law and legislation can be in effectuating change in societal norms and perceptions of violence.

Illustratively, in 1995, only thirteen of 100 countries surveyed by the World Bank had laws outlawing domestic violence.¹⁴⁹ By 2013, that number had increased to seventy-six out of 100 countries.¹⁵⁰ A World Bank report found that in countries that had enacted anti-domestic violence legislation, women’s acceptance of spousal abuse became lower than in other countries where domestic violence was still permitted by law.¹⁵¹ As a whole, in countries that outlawed domestic violence, only forty percent of women citizens condoned domestic violence.¹⁵² For countries without anti-domestic violence laws, fifty-seven percent of women approved of domestic violence.¹⁵³

In 2013, after anti-domestic violence legislation was passed in the country of Nigeria, the number of Nigerian women who found it acceptable for a husband to beat his wife fell from forty-four percent (in 2003) to twenty-one percent. In the country of Benin, the drop was from thirty-nine percent to ten percent over a similar period of time.¹⁵⁴ In twelve years, women in Haiti’s acceptance of spousal violence dropped from eleven percent to three percent.¹⁵⁵

¹⁴⁵ Aizenman, *supra* note 20.

¹⁴⁶ *Id.*

¹⁴⁷ CLINTON FOUND., *supra* note 144, at 20. In at least one country, “62 percent of women and 48 percent of men agreed or partially agreed that a man has a right to sex even if a woman refuses.”

¹⁴⁸ Carey Wagner, *Papua New Guinea, Where Violence Can Seem Like the Norm for Women*, N.Y. TIMES (Jan. 17, 2014), <https://www.nytimes.com/2014/01/18/world/asia/papua-new-guinea-where-violence-can-seem-like-the-norm-for-women.html>.

¹⁴⁹ CLINTON FOUND., *supra* note 144, at 19.

¹⁵⁰ *Id.*

¹⁵¹ Aizenman, *supra* note 20.

¹⁵² *Voice and Agency: Empowering Women and Girls for Shared Prosperity*, WORLD BANK (Oct. 10, 2014), <http://www.worldbank.org/en/topic/gender/publication/voice-and-agency-empowering-women-and-girls-for-shared-prosperity>.

¹⁵³ *Id.*

¹⁵⁴ Aizenman, *supra* note 20.

¹⁵⁵ *Id.*; CLINTON FOUND., *supra* note 144, at 19. However, there is still work to be done. “For example, nine of the 26 countries studied in Sub-Saharan Africa lack any legal protection from violence against women. In some countries, laws remain weak: The World Bank found that 62 of 100 countries surveyed do not explicitly criminalize marital rape or sexual assault within marriage.” *See also* Fatimah El-Jamil & Nabi Abi-Hashem, *Family Maltreatment and Domestic Violence Among Arab Middle Easterners: A Psychological, Cultural,*

This is powerful data showing how the law can transform cultural attitudes. Once the law is the rule of the society, individuals convert their thinking of what is acceptable and what is not acceptable. When domestic violence in a marriage is no longer legal, fewer citizens see such violence as the norm. The data from this research can be coupled with implementing legislation and laws and applying them in a nuanced and educated way to move society forward in re-norming negative attitudes.

In the international examples above, countries saw the benefit of outlawing domestic violence outright—what Kahan might call a “hard shove.” But as he notes, there are some times when it is better to use “gentle nudges” instead of “hard shoves” to effectuate change in behavior through law.¹⁵⁶ Sometimes stricter penalties should give way to other ways for the law to re-norm more subtly by increasing positive legislation that re-shapes norms about what is socially acceptable or not. This may be more appropriate when we look to laws in the United States, where domestic violence is already largely criminalized, and thus the “hard shoves” have been implemented. Examples follow of more “gentle nudges.”

C. Re-Norming in the Law: United States Efforts Using State and Federal Law and Legislation to Re-Norm

The New York Legislature created the Office for the Prevention of Domestic Violence (“OPDV”)—the first and only free-standing state agency in the nation dedicated to domestic violence—to operate as a thinktank to promote sound and intelligent domestic violence legislation.¹⁵⁷

In 1994, the New York Legislature also passed the Family Protection and Domestic Violence Intervention Act.¹⁵⁸ The Act allowed survivors to choose between Family Court and Criminal Court—or to choose both, and then have dual court orders of protection.¹⁵⁹ So, here, domestic violence survivors already had the benefit of the legal system to issue orders of protection, but often the challenge was that police officers or court personnel were the ones “choosing” for the survivors whether the orders be civil or criminal. After the groundbreaking case of *Bruno v. Codd*,¹⁶⁰ legislation was passed to allow survivors their own autonomy and flexibility in how they wished the law to assist. Here the law reset the norms: it was not for

Religious, and Legal Examination, in UNDERSTANDING DOMESTIC VIOLENCE: THEORIES, CHALLENGES, AND REMEDIES (Rafael Art Javier & William G. Harron eds., forthcoming July 2018). “Virtually, the attitudes of the younger generation are shifting in regards to marital violence (Middle East Program, 2016). Examining a group of 206 students in Lebanon, Obeid, Chang, and Ginges (2010) found more than half strongly opposed any justification for wife beating. They also found that both male and female students, who held more traditional gender role values, were more likely to endorse beliefs that overlook or condone wife beating. Such findings attest to the challenges being faced in Arab societies, where certain socio-cultural-religious-ideological, and civil-legal factors maintain traditional norms towards the family, where gender roles are still fostering inequality and ultimately compromise the stand against domestic maltreatment and brutality.”

¹⁵⁶ See generally Kahan, *supra* note 118.

¹⁵⁷ OFF. PREVENTION OF DOMESTIC VIOLENCE, <http://www.opdv.ny.gov/> (last visited Apr. 10, 2018).

¹⁵⁸ The Family Protection and Domestic Violence Intervention Act of 1994, 1994 N.Y. LAWS 8642.

¹⁵⁹ Jonathan Lippman, *Ensuring Victim Safety and Abuser Accountability: Reforms and Revisions in New York Courts' Response to Domestic Violence*, 76 ALB. L. REV. 1417, 1424 (2013).

¹⁶⁰ *Bruno v. Codd*, 396 N.Y.S.2d 974 (1977).

governmental personnel to choose the forum; the norm should be that the survivor chooses. The law re-normed.

As another example, the Family Court Act in New York has been repeatedly expanded to include what would constitute a crime of domestic violence under the law, reflecting a broad understanding of the complexities of power and control and domestic violence dynamics. In amending the statute to include identity theft, larceny, and coercion, for example, the New York Legislature re-normed how the law viewed intimate partner violence outside of just physical abuse, by stating:

We know that in addition to physical and psychological tactics, abusers employ economic means to control and otherwise abuse their victim, making it harder for victims to secure their safety. There is broad recognition among mental health service providers, domestic violence prevention advocates and legal practitioners that in fact, economic abuse is a form of domestic abuse. Economic abuse is a tactic commonly used by abusers to control their victim's finances and prevent them from leaving an abusive relationship. The types of conduct encompassing economic abuse range from identity theft and stealing money and documents, to engaging in other conduct that prevents a victim from being self-sufficient, including hampering a victim's ability to secure or retain a job. Such conduct has severe and long lasting consequences on the safety of a domestic abuse survivor.¹⁶¹

In New Jersey in 1991, the Legislature declared domestic violence a serious crime against society when it found that thousands of persons in New Jersey State were regularly beaten, tortured, and in some cases killed by their spouses or cohabitants, and that there is a further positive correlation between spousal abuse and child abuse, with children suffering deep and lasting emotional effects from exposure to domestic violence. The New Jersey Legislature recognized that societal attitudes concerning domestic violence could affect the responses of law enforcement and judicial systems; although many of the existing statutes were applicable to acts of domestic violence, these societal attitudes could nonetheless result in acts of domestic violence receiving different treatment from similar crimes. The New Jersey Legislature tried to shine a light on this discrepancy in an effort to change.¹⁶²

Other states have similarly attempted to counter intimate partner violence and attitudes about it by changing laws, changing culture, or both.¹⁶³ For example, in recent years, many states have passed legislation to expand the definition of stalking beyond physically following someone to now include “misuse of telephone facilities

¹⁶¹ *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

¹⁶² See, e.g., *New Jersey Judiciary Domestic Violence*, N.J. CTS., <https://www.judiciary.state.nj.us/courts/family/dv.html#prevention> (last visited Apr. 10, 2018).

¹⁶³ Former South Carolina Governor Nikki Haley specifically noted how transforming a culture can change behavior when she created a domestic violence task force that aimed to “change a culture in South Carolina that has enabled abusers and led to the deaths of hundreds of women.” Harrison Cahill, *Gov. Haley Creates Task Force to Address State's Domestic Violence Issues*, THE STATE, <http://www.thestate.com/news/local/article13943999.html> (last visited Apr. 10, 2018).

and equipment, misuse of electronic communication or interactive computer service, revenge porn, and visual surveillance.”¹⁶⁴ It is this deeper and more modern understanding of intimate violence by legislators—specifically, that domestic violence is often used as a method of power and control by abusers and that technology is often a tool in this control—that can assist lawmakers in creating and implementing future appropriate and fitting laws.

On a federal level, through the various iterations of the Violence Against Women Act (“VAWA”), legislators have tried to confront intimate partner violence explicitly. Even the very existence of this federal legislation sends a powerful message to society that intimate partner violence is being taken seriously by the United States government and cannot be overlooked. Author Jackson Katz calls VAWA “the most far-reaching piece of legislation ever on the subject,” and commends how it has allowed federal funds to be applied toward “prevention efforts that target men and boys” as well as women and girls.¹⁶⁵ As Professor Sally Goldfarb notes, “[T]he enactment of the statute as a whole triggered a change in norms within the legal system. VAWA was the first major federal legislation addressing violence against women. As such, it signaled a new level of governmental commitment to combatting violence against women.”¹⁶⁶

D. Re-Norming in the Law: New York Efforts Using Case Law and Precedent to Re-Norm

Beyond just adding or changing laws to re-norm, we need to have an enlightened judiciary and legislatures to create, implement, and enforce such laws in ways that will be effective. For example, educated jurists should pen decisions which do not presume a tolerance of intimate partner violence or preconceived notions of gendered roles. This precedent then can demonstrate the law as an effective tool to educate society about the harms of domestic violence, while still remaining sensitive to the complexities of domestic violence dynamics in real lives. Some examples from New York case law follow.

¹⁶⁴ Justina Coronel, *New Maryland Stalking and Domestic Violence Laws Effective October 1, 2016*, 47 ABC (Nov. 1, 2016), http://www.wmdt.com/top-stories/new-maryland-stalking-and-domestic-violence-laws-effective-october-1-2016_20161101100451355/138746495.

¹⁶⁵ KATZ, *supra* note 17, at 11.

¹⁶⁶ Goldfarb, *supra* note 126. Office of the Press Secretary, Fact Sheet: The “It’s On Us” Campaign Launches new PSA, Marks One-Year Since Launch of “It’s On Us” Campaign to End Campus Sexual Assault (Sept. 1, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/09/01/fact-sheet-its-us-campaign-launches-new-psa-marks-one-year-launch>. Press Release, Sen. Brown Applauds Senate Passage of Violence Against Women Act Reauthorization, Sherrod Brown Senator for Ohio (Apr. 26, 2012), <https://www.brown.senate.gov/newsroom/press/release/sen-brown-applauds-senate-passage-of-violence-against-women-act-reauthorization> (VAWA “provide[s] essential resources to state and local law enforcement to investigate and prosecute domestic and dating violence, sexual assault, and stalking. It also give[s] support to critical non-profit organizations that supply essential services for victims and survivors.”). Press Release, Sen. Brown: With More Than 38,000 Reported Incidences of Domestic Violence in Ohio Last Year, We Must Pass Tough Legislation to Combat Abuse, Sherrod Brown Senator for Ohio (Mar. 21, 2012), <https://www.brown.senate.gov/newsroom/press/release/sen-brown-with-more-than-38-000-reported-incidences-of-domestic-violence-in-ohio-last-year-we-must-pass-tough-legislation-to-combat-abuse>; Grant Programs, U.S. DEP’T OF JUST., <https://www.justice.gov/ovw/grant-programs> (last visited Aug. 6, 2017).

A prime example of how law can re-norm perceptions of domestic violence is the enlightened and groundbreaking decision by the Second Circuit and the New York Court of Appeals in the *Nicholson* case.¹⁶⁷ The case is an example of how we can use nuanced mechanisms in the law as a way to drill down into the complexities of intimate partner violence and reshape societal norms about what it means to be a victim of domestic violence, and what it means to be a good parent.¹⁶⁸ Rather than vilifying and criminalizing mothers who were survivors of domestic violence, the courts approached the case with care, skill, training, and nuanced judgment, and did not subscribe to pre-existing societal norms about intimate partner violence and gendered norms about parenting.¹⁶⁹ In other words, perhaps the Court used “gentle nudges” instead of “hard shoves.”

Nicholson was a class action case involving battered mothers who had their children removed from their homes because they were victims of domestic violence. The mothers were suing in federal court, *inter alia*, state governmental child welfare agencies that would remove children from the homes merely due to the mother being abused, placing the children into foster care. The case started in the federal courts, where an enlightened Judge Weinstein made multiple findings by clear and convincing evidence in favor of the battered mothers.¹⁷⁰ On appeal, the Second Circuit certified three questions of state law for the New York Court of Appeals to answer. In answering these three questions, the high court of New York unanimously responded and gave context to the plight of the abused parent. The Court explained that the New York standard under its child neglect statutes is the “minimum degree of care.” The Court ultimately addressed multiple factors that trial courts need to consider when determining whether the non-violent parent has exercised the minimum degree of care.¹⁷¹ In other words, trial courts must recognize the complexities and nuances of intimate partner violence dynamics and judge parenting in context. Poignant questions were raised by this case: Aren’t there other ways to protect mother and child(ren) without removing children from the home? By removing children from their non-abusive mothers, aren’t we having the legal and child welfare systems blame and re-traumatize these mothers and children? These questions force society and the legal system to consider how we can break away from victim-blaming or intimate partner violence-minimizing norms when applying the law.

167 *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

168 *Id.*

169 Breger, *supra* note 72, at 560–63; LINDA FENTIMAN, *BLAMING MOTHERS: AMERICAN LAW AND THE RISK TO CHILDREN’S HEALTH* (2017).

170 The findings were that the agency regularly alleges and indicates child neglect against battered mothers; rarely holds abusers accountable; fails to offer adequate services to women before removal; regularly separates battered mothers and children unnecessarily; fails to adequately train its employees re: domestic violence; and its written policies provide insufficient and inappropriate guidance to its employees. *Nicholson*, 203 F. Supp. 2d at 19497.

171 *Nicholson v. Scopetta*, 820 N.E.2d 840, 846 (N.Y. Ct. App. 2004). (“1. The victim’s risks to leaving; 2. Risks to staying; 3. Risks to seeking assistance through government channels welfare shelters; 4. Risks attendant to criminal prosecution against the abuser; 5. Risks attendant to relocation; 6. The frequency and severity of the violence, and 7. The resources and options available to the survivor.”)

In another particularly strongly-worded New York State appellate opinion, *Wissink v. Wissink*,¹⁷² the appellate court utilized decades of psychological research to drive home the point that domestic violence cannot be tolerated in the home. The appellate court used strong, persuasive language about the toxicity of intimate partner violence when it described the “polluted environment” that the child grew up with in her home, as she witnessed her father terrorize her mother. This highlights the notion of domestic violence in the home as a toxic culture.¹⁷³

Specifically, in *Wissink*, the trial court had just heard credible testimony about severe domestic violence perpetrated by the father against the mother in front of, or sometimes involving, the daughter. Yet, after hearing the details of the abuse, the daughter, at that time a teenager, denied the very existence of violence was being perpetuated in her home and insisted upon living with her father. The trial court allowed her to reside with her father, yet the Appellate Court reversed this ruling and concluded:

Were it not for the documented history of domestic violence confirmed by the court after a hearing, we would have unanimously affirmed the Family Court’s award of custody to the father in accordance with Andrea’s expressed preference and the evidence documenting their positive relationship. However, the fact of domestic violence should have been considered more than superficially, particularly in this case where Andrea expressed her unequivocal preference for the abuser, while denying the very existence of the domestic violence that the court found she witnessed. The record is replete with incidents of domestic violence reported by the mother, and by evidence supporting her testimony. . . . [To hold otherwise, the] child learns a dangerous and morally depraved lesson that abusive behavior is not only acceptable, but may even be rewarded.¹⁷⁴

In another New York case, *Nussbaum v. Steinberg*,¹⁷⁵ Hedda Nussbaum was brutally beaten by attorney Joel Steinberg, who then also murdered his six-year-old stepdaughter, Lisa. In the subsequent torts case, plaintiff Hedda requested the statute of limitations be tolled, as she had been institutionalized for ten years. The Court acknowledged that

172 *Wissink v. Wissink*, 749 N.Y.S.2d 550 (N.Y. App. Div. 2d Dep’t 2002).

173 Stoeve, *supra* note 66, at 518.

174 *Wissink*, 749 N.Y.S.2d at 551. “In this case the Family Court did not entirely ignore the legislative mandate, and specifically noted that it had considered the effect of domestic violence in rendering its custody determination. However, the ‘consideration’ afforded the effect of domestic violence in this case was, in our view, sorely inadequate. In a case such as this, where the record reveals years of domestic violence, which is denied by the child who witnessed it, and the child has expressed her preference to live with the abuser, the court should have ordered a comprehensive psychological evaluation. The forensic evaluator would be concerned with such issues as the nature of the psychopathology of the abuser and of the victim; whether the child might be in danger of becoming a future victim, or a witness to the abuse of some other victim; the child’s developmental needs given the fact that she has lived in *the polluted environment* of domestic violence all of her life—and the remedial efforts that should be undertaken in regard to all parties concerned.” (emphasis added)

175 *Nussbaum v. Steinberg*, 703 N.Y.S.2d 32 (N.Y. App. Div. 1st Dep’t 2000).

[i]t must be recognized that domestic violence, by its very nature, is much more insidious and complex than even other intentional torts or crimes involving assault, or other abuse, in that the abuser and the victim are generally found to be in a close or intimate relationship. The destructive impact of violence in such an intimate relationship may be so complete that the victim is rendered incapable of independent judgment even to save one's own life.¹⁷⁶

The appellate court affirmed the trial court,¹⁷⁷ signifying the critical importance of courts understanding the complexities and harms of intimate partner violence, and creating laws to decrease its tolerance. It is another example of the courts pushing the conversation forward in terms of how society and the legal system perceive intimate partner violence.

As the selected New York cases stated above demonstrate, the bar and the bench viewing intimate partner violence in an educated way—pushing past old norms about victim-blaming and passive tolerance of violence—can be incredibly impactful upon its litigants. Not only do we need intelligent laws in place through legislation to combat domestic violence, but we then need to ensure that courts are effectively applying such laws in the courtroom to continue to work against unhealthy norms. In other words, in order to ultimately re-norm societal views, we need to utilize the law and the legal system on several levels to help nudge society.

IV. CONCLUSION: HOW DO WE CONTINUE TO USE THE LAW AND RE-NORMING AS POSITIVE CHANGE AGENTS TO DETOXYIFY?

Importing the lessons and research discussed above, we should employ strategies to alter a toxic culture of intimate partner violence by: (a) infusing all phases in the Integrated, Ecological model with healthy norms, through the law and education, and (b) utilizing the legal system and the laws as positive change agents to re-norm societal attitudes.

Likewise, players in the legal, legislative, and judicial systems need to understand deeply the context and the interdisciplinary research pertaining to intimate partner violence in order to perpetuate positive norms and laws. We need nuanced decision-making and appropriate laws and social norms in order to re-norm societal attitudes about intimate partner violence.

It is essential to examine how deeply this toxic culture has been engrained throughout legal history. Early laws played a role in the normalization of spousal abuse, and the future laws should likewise have a role of re-normalization. To truly change this culture, we must have the support of the laws and the courts to re-establish what is acceptable behavior within intimate relationships. We must re-norm

¹⁷⁶ *Id.* at 33.

¹⁷⁷ Appellate court held: “The evidence adduced at the hearing and credited by the Special Referee amply demonstrated that, during the ten-year period preceding the commencement of this action, plaintiff was unable to protect her legal rights because of an overall inability to function in society, which tolled the one-year Statute of Limitations for intentional torts.” *Id.*

laws and society in order to combat the systemic effects of a tolerant culture of domestic violence.¹⁷⁸

Ultimately, society needs to unlink the various stereotypes that become imbedded in early brains regarding female and male “roles.” We need to educate society and all the players in the legal, judicial, and legislative systems about the complex dynamics of how domestic violence and gender roles are interrelated. Effective programs that focus upon peer training should be combined with legal education and a legal system that understands the complexities of coercive power and control.¹⁷⁹

One may ask: if gendered violence is so embedded in our culture, is it possible to transform our culture? Psychological studies show that culture can be malleable when there is a cognizance and a desire by members of a group to change.¹⁸⁰ Similarly, data shows that recognizing implicit biases helps decrease such biases.¹⁸¹ Thus, by increasing awareness across the board, and in all parts of the legal system, we can begin the process of re-norming standards in the legal system, and then subsequently in our culture as a whole. In order to truly detoxify our culture, we need to unearth and unhook embedded implicit biases about unhealthy intimate relationships. Far earlier than when kids are forming intimate relationships, we need to disconnect linkages in their young minds that masculinity is about being powerful and controlling, or that femininity is the opposite. We need masculinity to be envisioned outside of toxic masculinity.

We must ensure a legal system with lawyers, legislators, and courts that understand the incredible complexity of intimate partner violence and the profound impact it has upon lives. That legal system then must enforce and reinforce positive norms about gender and intimate partnerships. Ultimately, we need the next generation’s lawyers, legislators, and judges to use the law as a vehicle to re-norm ideas of gender to eliminate a toxic culture condoning or tolerating intimate partner violence.

178 Jennifer Manganello, *Teens, Dating Violence, and Media Use: A Review of the Literature and Conceptual Model for Future Research*, 9 TRAUMA, VIOLENCE, & ABUSE 3, 11, 13 (2008).

179 Stoeber, *supra* note 66, at 531.

180 Breger, *supra* note 9, at 89 (citing MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* (2008)).

181 Breger, *supra* note 72, at 564–65; see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 331 (1987) (“[W]e must take cognizance of psychological theory in order to frame a legal theory that can address that affliction.”).

APPENDIX

Figure 1

