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

Abstract

This article takes on the parallel processes of law reform and cultural transformation by comparing gender violence reform projects in the United States with those in South Africa. It does so by focusing on one strand of advocacy, the economics of abuse. Economic independence is central to women’s ability to navigate abuse. Consequently, women’s ability to work in its aftermath is critical. This article compares each country’s current and potential reform projects to address the ways gender violence impacts survivors’ ability to get and keep their jobs.

Despite stark contrasts between the countries’ respective legal and
economic contexts, the challenges faced by advocates in each country are different in degree rather than in kind. This article reviews the prevalence of gender violence in each country and the extent and nature of women’s workplace participation. It places reforms addressing the impact of abuse on employment in the broader context of each country’s domestic and sexual violence reform movements and describes employment-related projects, with a focus on those in South Africa.

The similarities and differences in economics, culture and law underscore several lessons about the possibility of achieving transformational change. The article identifies several theories under which South Africa’s progressive legal frameworks could afford recourse to survivors whose employment is adversely affected as a result of abuse. It also highlights the common challenges faced by law reform projects that seek to transform historic biases and cultural norms. It underscores the importance of complementing law reform with social and political change, of centering anti-subordination initiatives in the context of equality, and of maintaining the difficult and ongoing project of challenging bias in its many forms, in order to create both legal change and cultural transformation.

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INTRODUCTION

Social change theorists widely recognize that law reform and cultural change go hand in hand.\(^1\) Certainly this is true of gender violence,\(^2\) an issue that is deeply rooted in social and cultural norms and stereotypes.\(^3\) This article takes on the parallel processes of law reform and cultural transformation by comparing gender violence reform projects in the United States with those in South Africa. It compares these parallel processes by focusing on one strand of advocacy on behalf of domestic and sexual violence survivors: the economics of abuse. Since economic independence is central to women’s\(^4\) ability to navigate abuse, women’s


\(^2\) This Article uses the term “gender violence” to refer to the range of violence committed predominantly by men against women, including domestic and sexual violence.

\(^3\) See Julie Goldscheid, Elusive Equality in Domestic and Sexual Violence Law Reform, 34 Fla. St. U. L. Rev. 731, 768-77 (2007) (arguing in support of approaches that both increase the availability of legal remedies and support transformational social change).

\(^4\) This Article primarily uses female references as a generalization because the vast majority of domestic and sexual violence victims are women. See, e.g., Callie Marie Rennison, Intimate Partner Violence, 1993-2001, Crime Data Brief (U.S. Dep’t of Just., Wash., D.C.) Feb. 2003, available at http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf; (concluding that eighty-five percent of all victimizations by intimate partners in 2001 were against women); Bureau of Justice Statistics, U.S. Dept of Justice, Criminal Victimization in the United States, 2006 Statistical Tables 15 tbl.2 (2008), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus0601.pdf [hereinafter Criminal Victimization] (reporting that approximately eighty-nine percent of all rapes and sexual assaults in the United States in 2006 were committed against women). For analogous data from South Africa, see, e.g., Robin Pharoah, Institute for Security Studies, The Dynamics
ability to work in the face of intimate partner violence is critical. This article will focus on each country’s advocacy efforts to address the ways gender violence impacts women’s ability to get and keep their jobs.\footnote{\textit{See infra} Part 3.}

The contrasts between both countries’ reform efforts are in some senses stark. The potential for law reform in South Africa is rich, given employment laws that mandate procedurally and substantively fair dismissals, and a constitutional and statutory structure based in substantive equality principles.\footnote{\textit{See infra} Part 4.} Nevertheless, cultural, social and political factors including extraordinarily high rates of violence and poverty, the prevalence of home-based work, and minimal legal and social service infrastructure create a wide gap between the potential for law reform and the realistic possibilities for meaningful change. Despite that gap, the challenges faced by advocates working to address the economic impact of gender violence in both countries are different in degree rather than in kind. Both grapple with similar difficulties in ensuring meaningful implementation of domestic violence law reforms. Both exemplify the limits of legal reform absent accompanying cultural and political change. Both illustrate the particular challenges posed for those working in the informal labor sector. And both highlight the difficulties, and importance, of reform that broadly addresses issues of race, class, sexual orientation and immigration status.

Part 1 lays the foundation for the comparison by describing the context in which each country addresses gender violence and work. It compares the statistics detailing the prevalence of domestic and sexual violence in both countries, as well as those describing women’s participation in the formal and informal labor markets. Part 2 places reform relating to gender violence and work in the context of each country’s broader domestic and sexual violence reform movements.\footnote{This discussion will focus on efforts in South Africa, since other articles address the workplace ramifications of gender violence in the United States. \textit{See infra} notes 83-Error! Bookmark not defined..} It will briefly review the respective approaches taken to reform, and the attendant critiques.

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Part 3 discusses both countries’ approaches to the impact of gender violence on work. It summarizes data on the nature and extent of the problem and the contours of efforts in both countries to address it.

Part 4 focuses on practical possibilities for law reform. It analyzes potential legal strategies under South Africa’s anti-discrimination and unjust dismissal laws and contrasts them with those available under the United States’ employment-at-will legal framework. It also shows how, in both countries, law reform efforts directed at the traditional workplace are inherently limited in their ability to help those who work in the informal economy.

Part 5 offers several observations about what the comparison reveals about possibilities for achieving transformative change. First, the comparison illustrates a central and universal challenge for anti-gender violence advocates -- the difficulty of effectively implementing well-meaning reform given the constraints of funding, training and shifting political support. Second, the comparison highlights the importance of centering the problem of gender violence as a problem of equality. Finally, it reinforces the importance of cross-race and cross-gender activism and of commitments from all members of society to end gender violence. Although the project of changing attitudes and cultures is formidable, only by undertaking transformative goals will we have the chance of producing more far-reaching, and transformative, change.  

I. CONTEXT

A comparison of the ways the United States and South Africa respectively address the impact of gender violence on women’s work must be placed in context at the outset. This introductory section summarizes the statistics describing the prevalence of abuse in both

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8 I offer these observations with a note of humility and caution. As a white lawyer whose work has focused on advocacy on behalf of domestic and sexual violence survivors in the United States as part of broader efforts to advance gender equality, I approach the opportunity to learn about parallel efforts in South Africa with great respect for those who have been and who are engaged in that country’s struggle for gender and racial equality. To suggest a comparison between reform efforts in both countries risks minimizing the enormity of the South African struggle to overcome apartheid and the explicit and deeply entrenched patriarchal culture that sanctions gender violence. Nevertheless, I hope the suggestions can be useful to South African advocates, and that the discussion can help those of us in the United States learn from our South African colleagues as we reconsider and retool our strategies for law reform and social change.
countries, as well as the nature and extent of women’s participation in each country’s labor markets, since both of those factors shape the nature of potential reforms.

A. Prevalence of Abuse

The statistics on the prevalence of abuse in both countries reveals differences in scale, rather than in kind. In the United States, statistics consistently show that over one in five women will be assaulted by an intimate partner in their lifetime. One in six women report having experienced a completed or attempted rape at some point in their lifetime. In South Africa, reports and commentators agree that South Africa’s rates of violence generally, and gender violence in particular, are among the highest in the world. Statistics that directly parallel those from the United States are not available, due to differences in the ways that data is collected. Nevertheless, for example, studies consistently document the

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10 Id. at 13.


13 In addition, data on the prevalence and nature of sexual assault in South Africa only recently has begun to be collected. See Albertyn, supra note 12, at 299.
magnitude of sexual assault in South Africa. One community-based random sample of adult men found that over a quarter of the men interviewed disclosed having raped a woman or girl in the previous year. Nearly half of the men who said they had committed rape reported that they had raped more than one woman or girl. Reports of “corrective rape” of lesbians, purportedly to “cure” their sexuality, have been increasingly documented. The reported rates of sexual violence in South Africa are particularly disturbing given that sexual assault remains underreported, that the police often appear unsympathetic and insensitive and that low conviction rates persist. The connections between rape and HIV transmission amplify the dangers associated with such high rates of sexual assault.

Domestic violence in South Africa is even more difficult to measure since South African police statistics historically have not recognized “domestic violence” crimes as a separate reporting category. The only


16 Id. (46.3 percent of men who had committed rape said they had raped more than one woman or girl).


19 See, e.g., Jewkes, supra note 15, at 2 (discussing the correlation).

national prevalence study on intimate partner violence found that almost half of all women murdered were killed by their intimate partners, which purportedly is the highest rate reported anywhere in the world. Another study reported that a woman is killed by her intimate partner in South Africa every six hours. Other studies report that over a quarter of women studied had been physically abused by a current or former partner. Experts routinely discuss high rates of domestic abuse across all sectors of South African society.

Domestic and sexual violence in both countries is rooted in a history of male domination, in which violence by men against women has been sanctioned both formally and informally, through the interaction of law with cultural norms and practices. In both countries, the commission of

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the crime is inextricably gendered: both domestic and sexual violence are committed overwhelmingly by men against women.\textsuperscript{26} In both countries, survivors’ experiences of abuse are compounded by other forms of oppression, including those based on race, national origin, sexual orientation, immigration status and class.\textsuperscript{27}

Reform efforts in both countries have been complicated by the limits of identity-based politics and by real and perceived tensions between challenges to systems of gender versus race-based subordination. Writing about South Africa, legal scholar Penelope Andrews has argued that domestic and sexual violence, and attendant reform efforts, have been shaped by the government’s violent enforcement of apartheid, the violence of the resistance movement, as well as the formal inscription of women’s subservience in traditional cultures.\textsuperscript{28} Accordingly, the predominance of the “race question,” and women’s associated commitment to end racial inequality, has left gender equality and related struggles to end gender violence as a “step-child” of political struggles.\textsuperscript{29}

Andrews, \textit{The Role of Culture}, supra note 18, at 425 (describing the role of culture in perpetuating violence against women in South Africa).

\textsuperscript{26} See supra note 4.


\textsuperscript{29} Andrews, \textit{Role of Culture}, supra note 18, at 441; accord Catherine Albertyn, et al., \textit{Women’s Freedom and Security of the Person}, in \textit{GENDER, LAW AND JUSTICE}, supra
In the United States, the politics of reform movements reflect similar tensions, with advocacy initiatives aimed at ending gender violence being criticized as having the effect of increasing violence against women and men of color, and with racial justice organizing critiqued for ignoring the gendered forms of racism faced by women of color.\textsuperscript{30}

In addition to those political factors, the severity and pervasiveness of crime in general complicates both analyses of the problem and prescriptions for reform.\textsuperscript{31} For example, the extent to which violence permeates daily life in South Africa, and to a lesser extent, the United States, raises questions about how domestic and sexual violence is understood and mediated by survivors. Issues include how best to distinguish domestic and sexual violence from other forms of violence, and of when and how to separate services and other interventions addressing crimes typically considered “gender-based” from those responding to other types of crimes. In both countries, perhaps to differing degrees, poverty also drives and informs the experience of abuse. In many cases, the need for basic resources such as housing, food, water and health care take precedence over efforts to live without violence.\textsuperscript{32} Perceptions that combating violence may be less essential than other forms of advocacy shape the scope and reach of anti-violence initiatives.

\textbf{B. Women’s Labor Market Participation}

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

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\textsuperscript{32} See generally, Cheryl De La Rey, South African feminism, race and racism, 32 AGENDA 6 – 10 (1997) (discussing the challenges of implementing “anti-racist feminism”).
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men.\textsuperscript{33} Although women’s unemployment rates overall are slightly lower than men’s, recent reports reveal that for the first time since the 1960’s, the percent of women in the workforce is decreasing, not increasing.\textsuperscript{34}

In South Africa, although women’s participation in the labor market has increased in recent years, women continue to experience higher rates of unemployment than men. South Africa has a high unemployment rate overall,\textsuperscript{35} with recent statistics reporting approximately 31 percent of men, and nearly 47 percent of women, to be unemployed.\textsuperscript{36} Unemployment is highest among African (as opposed to white) women.\textsuperscript{37} Within South

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\item\textsuperscript{37} WOMEN IN THE S. AFRICAN LABOUR Mkt, supra note 35, at 17. The category African” distinguishes those of African descent from those who identify as “white”, “coloured” or “Indian/Asian.” See, e.g., id. (reporting statistics using those designations); South African Government Information, \textit{The Land and its People}, (same), http://www.info.gov.za/aboutsa/people.htm. For further discussion of the gender gap in
Africa, women earn substantially less than men, with African women suffering particularly from discrimination at the hiring stage. These trends emerge in the context of what researchers agree is increasing inequality in the distribution of income since the end of apartheid.

The prevalence of work in what has been called the “informal economy” informs the utility of legal remedies for workplace problems resulting from gender violence. Women generally are overrepresented among those who work in the informal economy. Large percentages of South African women work in the informal labor sector, which often means that they work either at their own or other peoples’ homes. For example, researchers estimate that nearly forty percent of women in 2005 worked either as domestic workers or in other parts of the informal labor sector.

Although not as widely-recognized as in South Africa, increasing numbers of workers in the United States, many of whom are undocumented immigrants, are employed in informal settings. This remuneration of South African workers, see, e.g., Elsje Bonthuys, Gender and work, in GENDER, LAW & JUSTICE, supra note 12, at 267-70.


40 For definitions of the “informal economy” see, e.g., ANNETTE BERNHARDT, ET AL., THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA’ S LABOR MARKET 1-7 (2008); ANNETTE BERNHARDT ET AL., BRENNA CTR. FOR JUSTICE, UNREGULATED WORK IN THE GLOBAL CITY 6 (2007) (defining unregulated work to include both those who are covered but in which employers violate labor regulations and those who fall outside labor and employment laws); Saskia Sassen, The Informal Economy: Between New Developments and Old Regulations, 103 YALE L. J. 2289, 2292-93 (1994) (defining and describing the “informal economy” as income-generating activities occurring outside the state’s regulatory framework).


42 Pauw & Mncube, supra note 39, at 15. For further discussion of the relationship between gender and South Africa’s formal and informal economies, see, e.g., Bonthuys, Gender and Work, in GENDER, LAW & JUSTICE, supra note 12, at 244-51.

43 See, e.g., BERNHARDT, GLOVES-OFF ECONOMY, supra note 40, at 13-21; Shirley Lung, Developing a Course on the Rights of Low-Wage Workers, 54 J. LEGAL EDUC. 380, 382-84 (discussing increasing number of work arrangements that are not governed
includes both those whose employment falls outside of employment regulations and those whose employment is legally covered, but in which laws are often un- or under-enforced. For many workers, remedies such as anti-discrimination provisions or minimum wage and hours laws simply do not apply. For others, traditional anti-discrimination laws are of limited practical utility. In both countries, then, the structural reliance on employment outside regulated workplaces pose challenges for legal reform and political organizing.

II. REFORM PROJECTS AND CRITIQUES

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

Not surprisingly, reform efforts in both countries run on parallel courses. In the United States, the wave of reform that began in the 1960’s centered on increasing criminal penalties and improving law enforcement responses, and on developing a network of shelters and associated social service resources to assist victims. As many have


44 See, e.g., BERNHARDT, GLOVES-OFF ECONOMY, supra note 40, at 4; BERNHARDT, UNREGULATED WORK IN THE GLOBAL CITY, supra note 40, at 6; see also, e.g., Pascale Joassart-Marcelli & Daniel Flaming, Economic Roundtable Briefing Paper, Workers Without Rights: The Informal Economy in Los Angeles (2002).

45 See, e.g., BERNHARDT, GLOVES-OFF ECONOMY, supra note 40, at 6; Keith Cunningham-Parmeter, Redefining the Rights of Undocumented Workers, (describing undocumented workers’ limited employment rights, particularly in light of recent Supreme Court caselaw and advocating revised approach), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1398525&CFID=16383391&CFTOKEN=73539724. See also infra notes 178-180

46 BERNHARDT, GLOVES-OFF ECONOMY, supra note 40, at 5-13; see also, e.g., LAURA B. NIelsen, ET AL., AMERICAN Bar Fnd., Contesting Workplace Discrimination in Court: Characteristics and Outcomes of Federal Employment Discrimination Litigation 1987-2003 (2008), at 20 (blue collar and other workers represent 19% of plaintiffs in federal employment discrimination claims).

47 For discussion of the evolution of these reforms, see, e.g., LISA A GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH
PARALLEL PROCESSES

documented, these reforms have been critiqued on a number of fronts, including over-reliance on the criminal justice system; insufficient access to counsel, particularly for family court matters; insufficient remedies and resources for immigrants and women of color; and an increasing bureaucratization of services.\textsuperscript{48} Scholars and advocates increasingly recognize the centrality of economic independence in survivors’ efforts to negotiate safety.\textsuperscript{49} Studies document the ongoing barriers victims face in obtaining meaningful relief, particularly in family court.\textsuperscript{50} Survivors increasingly seek alternatives to the newly emerged norms that effectively require them to leave the abuser.\textsuperscript{51} The story of domestic and sexual violence reform in the United States, in many ways, is a story of unintended consequences and of constant adjustment and realignment. It is the story of ongoing struggles for adequate resources, and against the entrenched biases of race, gender, immigration status, sexual orientation, and class.


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

As many commentators have discussed, South Africa’s constitutional guarantees of equal protection, including sex-based equality, and of freedom from violence from public or private sources, establish a normative framework that strongly condemns violence against women and holds public and private actors accountable for preventing and remedying its harms. The Constitutional Court has upheld the state’s constitutional obligation to deal effectively with domestic violence, which has been interpreted as imposing a “general norm of accountability” on state actors.

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such as the police.\textsuperscript{55} The Constitutional Court has applied those constitutional principles to hold public officials accountable for their commission of sexual violence.\textsuperscript{56} Nevertheless, the enormous gap between South Africa’s normative commitment to equality and the difficulty of achieving meaningful reform is a testament both to the power of progressive law reform, and the difficulty of shifting deeply entrenched cultural norms.\textsuperscript{57}

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

The Prevention of Domestic Violence Act, (the “Act”), originally enacted in 1993 and revised in 1998, sought to afford domestic violence victims the maximum protection from domestic abuse that the law can provide.\textsuperscript{60} The Act was enacted following concerted advocacy by women’s organizations, in conjunction with progressive governmental and state officials.\textsuperscript{61} Its preamble explicitly recognizes domestic violence

\textsuperscript{56} K. v. Minister of Safety & Security, 2005(8) BCLR 835 (CC), http://www.saflii.org/za/cases/ZACC/2005/8.html (holding the Minister of Safety and Security vicariously liable for a woman’s rape by three uniformed, on-duty policemen who had offered to give her a ride home).
\textsuperscript{57} See, e.g., Andrews, supra note 18.
\textsuperscript{58} Vetten, supra note 52, at 2.
\textsuperscript{59} Vetten, supra note 52, at 2.
\textsuperscript{61} Vetten, supra note 52, at 4.
as a “serious social evil” that “takes many forms.” It identifies domestic violence as a problem of gender equality and recognizes the State’s obligations to address it as deriving from the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Rights of the Child.

Drafters sought to address the complexities of domestic violence through comprehensive definitions and remedies. Accordingly, the Act defines domestic violence widely to cover all forms of abuse, including physical, sexual, economic, and emotional, and includes a catch-all category that would cover abuse that does not otherwise fit statutory definitions. It broadly defines domestic violence so that the law would apply, for example, regardless of whether the parties had married, whether they live together, or whether they had a child in common. It provides that a domestic violence victim may apply for a protective order, and it contemplates a broad range of prohibitions aimed at stopping the abuse, such as prohibiting the abuser from entering the mutual home, the victim’s residence, or the victim’s place of employment. It authorizes protection orders that evict the abuser from the home, or that force him to pay rent for and/or emergence maintenance to the victim. The Act also attempts to address law enforcement’s historic neglect of domestic violence, and requires police to provide victims with information about available resources, and to inform victims of the ability to apply for a protective order, and/or to file criminal charges.

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

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62 Domestic Violence Act, at Preamble ¶ 1.
63 Domestic Violence Act, at Preamble ¶ 2.
64 Parenzee, supra note 32, at 102.
65 Domestic Violence Act, at 1(viii).
66 Domestic Violence Act, at 1(vii).
67 Domestic Violence Act, at 7(1).
68 Vetten, supra note 52, at 5.
69 Domestic Violence Act, at 2.
70 Domestic Violence Act, at 1(viii)(d), and 1(ix) (prohibiting economic abuse and defining it as “(a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, . . . ; (b) the unreasonable disposal of household effects or other property in which the complainant has an interest”).
ability to work, for example, by stating that protection orders can prohibit an abuser from entering a victim’s workplace, and by defining “harassment” as a pattern of conduct that targets the victim at or near the victim’s workplace. Its relief provisions further recognize the economic impact of abuse, for example, by requiring the abuser to pay emergency monetary relief to the survivor.

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

A lack of resources and infrastructure and inadequate training limit the reach of South Africa’s anti-domestic violence laws. For example, despite the law’s comprehensive protections, the physical location of services and the lack of resource allocation render criminal and civil justice systems virtually inaccessible for many women, particularly those in poor, black communities. Researchers charged with monitoring the

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71 Domestic Violence Act, at 1(xii).
72 Domestic Violence Act, at 7(4)
74 Vetten, supra note 52, at 5-7; Parenzee, supra note 32, at 110. For a review of
Domestic Violence Act’s implementation documented the “alarming” lack of infrastructure and resources, as well as “demotivated, untrained and frustrated” law enforcement personnel. Among other deficiencies, they cited officials’ inability to track cases or records, and the lack of inter-sectoral and intra-sectoral networking and supportive services, as leaving women unprotected from violence even if they beat the odds and succeed in obtaining a protection order. The failure to adequately train and resource the staff charged with implementing the Act raise questions for some researchers about the seriousness of government’s commitment to its effective implementation. They cited the limitations of protective orders as the standard solution to the complex problem of abuse, given their limited ability to deter and prevent future violence. As a tool to advocate for adequate budgetary allocations, researchers have “costed” the implementation of the Domestic Violence Act.

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

funding issues, see, e.g., Debbie Budlender and Julia Kuhn, Ctr. For the Study of Violence & Reconciliation, Where is the Money to Address Gender-based Violence? (Nov. 2007), http://www.csvr.org.za/docs/gender/whereisthemoney.pdf.
75 Parenzee, supra note 32, at 102.
76 Parenzee, supra note 32, at 107.
77 Parenzee, supra note 32, at 107, 108.
78 Parenzee, supra note 32, at 109, 110-12.
80 Andrews, Learning to Love, supra note 25, at 61; accord Malehoko Tshoaeedi & Hlengiwe Hlala, The marginalization of women unionists during South Africa’s democratic transition, in SAKHELA BUHLUNGU, TRADE UNIONS AND DEMOCRACY, at 111 (2006) (noting that “[f]or a long period, gender has been de-prioritised” and arguing for mainstreaming of gender issues in the trade union movement).
against gender violence may be perceived as challenging widely held male-dominated cultural norms. South Africa’s legacy and ongoing reality of overt racism, and its relatively short history of reform, bring these tensions into sharp relief.

III. GENDER VIOLENCE AND WORK

Studies in the United States and elsewhere have begun to document the impact and the costs of abuse on women’s employment. The impact of gender violence on work is stark but often invisible. It manifests in a number of ways, including absenteeism and lateness that result when women require time off to attend to medical, legal, and other needs resulting from the abuse; lost productivity resulting from abusers who harass their partners while they are at work; and direct losses that result when abusers commit acts of domestic violence or sexual assault in the

See, e.g., Mathews, supra note 21, at 107 (describing reproductive health and gender program that incorporates popular sayings, wedding songs and role-plays to address deep-rooted beliefs and attitudes about abuse). For a discussion of feminist approaches to advancing gender equality in the context of South African traditional culture and religion, see, e.g., Likhampha Mbatha et al., Culture and religion, in GENDER, LAW & JUSTICE, supra note 12, at 167-170.

workplace. Rather than repeat the literature describing efforts in the United States, this section focuses on work by South African advocates to address the economic impact of abuse, particularly as it affects women’s work.

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

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84 See, e.g., Goldscheid, supra note 83, at notes 56-86, and accompanying text.
85 See, e.g., Jewkes, et al., supra note 23, at 12-13 (documenting prevalence of economic abuse); id. at 17 (documenting costs of abuse to employers).
86 See supra notes 70 - 72.
87 See infra note 145.
88 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 §8(a). Notably, I could find no reported decisions reflecting attempts to invoke that provision.
89 Although every state authorizes economic relief as part of its protective order legislation, no state recognizes economic abuse as the basis for obtaining a protective order. See, e.g., http://www.abanet.org/domviol/docs/DV_CPO_Chart_8_2008.pdf; see also, e.g., Adrienne E. Adams et al., Development of the Scale of Economic Abuse, 14 VIOLENCE AGAINST WOMEN 563 (2008) (describing development of the Scale of Economic Abuse, designed to advance understanding and identification of the extent and impact of economic abuse by batterers).
90 For example, state and federal legislative initiatives in the United States address the workplace ramifications of abuse, inter alia, by requiring employers to provide leave (paid or unpaid) to survivors needing to go to court, and to authorize unemployment insurance payments to those who lose their jobs as a result of abuse. See, e.g., Widiss, supra note 83, at 711-12 (unemployment); 671-73 (leave).
91 See Part 4, infra.
are unemployed, underemployed, or who work in the informal labor sector. These differences also may reflect the relative priority of other reforms, for example, those directly addressing economic resources, over those authorizing rights-enforcement in the formal labor sector.

In addition to differences in legal protections, a primary difference between the two countries’ work in this area is the absence of initiatives in South Africa’s formal, regulated labor sector. In the United States, reform efforts addressing the impact of domestic violence on the workplace began in the 1990’s and grew, in large part, out of a combination of employee-led, employer-led and union-led initiatives. Those initiatives promote workplace awareness of the impact of gender violence on work and advance workplace policies and procedures that facilitate domestic and sexual violence victims’ continued and safe employment. Some of these initiatives have grown out of employers’ work-life initiatives, and some have been spurred by safety concerns. Although South Africa has begun to study related workplace issues, such as the general problem of workplace violence, and the impact of AIDS on the workplace, and some union efforts identify violence against women as a barrier to workplace equality, no visible initiatives focusing on gender-based violence and work have emerged out of South Africa’s industrial, governmental, or labor sectors.

92 See Part 1B, supra.
94 For a discussion of these and other workplace policy initiatives, see, e.g., Goldscheid, supra note 83, at notes 104-123 and accompanying text.
95 Id. at 77-78.
99 For example, although the National Education, Health & Allied Workers’ Union now identifies gender equality and stopping violence against women as a policy priority, the first draft of its HIV/AIDS program proposal reportedly did not include any statement recognizing that women and girls’ freedom from violence and sexual coercion is essential to physical security and reducing HIV infection. Sara Williamson, Union Women fighting privatization in Southern Africa (July 7, 2009), http://www.psac-sijf.org/en/focus/project.cfm?projectid=50. For a discussion of the challenges of incorporating gender issues into the South African trade union movement, see generally,
Despite the absence of formal employer or labor driven initiatives, South African researchers and advocates have identified economics and work as a foundational issue. An informal, preliminary study investigated the status of employer policies. Researchers surveyed large clothing manufacturers to determine whether they had any policies or experience with the impact of domestic or sexual violence on their workplace. Those researchers were not able to identify any employers with domestic violence policies. As one expert speculated, the lack of workplace policies addressing domestic violence may be due to cultural perceptions that the problem is less important than others, as well as the pervasiveness of violence generally, which overshadows issues unique to domestic and sexual abuse.

One small, exploratory study began to map some of the nuances of how abuse impacts women’s work opportunities and economic independence. Researchers interviewed women recruited from domestic violence service organizations. They were predominantly poor urban women with limited educations who were unemployed or who were employed in unskilled, low-paying work. The interviews illustrated the contribution of domestic violence to women and children’s poverty. Women described how, in some cases, abusers take women’s money and property and deny them the opportunity to seek employment. Other interviews described abusers’ sabotaging of women’s ability to work, for example, by arriving at the workplace to check on her whereabouts, or by phoning constantly to make sure she wasn’t “seeing other men.” Other women recounted how being beaten and bruised on the face led to their absenteeism, and sometimes to demotion or to poor performance. Still other women recounted how they...


100 This is consistent with the legislative focus on the economics of abuse. See, e.g., *supra* notes 69-71.

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

102 *Id.*

103 *Id.*


105 *Id.* at 3-5.

106 *Id.* at 6.

107 *Id.*
lost their jobs as a result of the abuse. The study revealed how having an income may protect some women from abuse, but also that an income can exacerbate abuse for others. Overall, it confirmed the importance of a comprehensive social security safety net to assist those women who are not otherwise eligible for assistance, but who nevertheless are subjected to abuse.

Other studies document the centrality of economics in abuse. For example, Smythe and Artz selected economic abuse and the withdrawal of domestic violence-related legal claims for study out of the “myriad of implementation problems” with the Domestic Violence Act. They did so due to the intractability and ongoing challenge economic issues pose. Despite marked advances in formal legal protections and criminal justice responses, they observed that women’s structural and economic dependence on men underlies many of the challenges to realizing the Domestic Violence Act’s promise. Their research indicated that “money problems” are a leading factor in precipitating intimate partner violence and other forms of domestic abuse. They reported daily instances of women withdrawing criminal charges due to their fear of losing the economic support on which they and their children depend. Other studies confirm both the prevalence of economic abuse, and women’s reluctance to access the criminal justice system because of fear of losing financial support from their partner. These dynamics mirror barriers identified by advocates for survivors in the United States, who similarly identify economic dependency as central in women’s reluctance to invoke traditional criminal justice remedies.

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108 Id. at 7 (quoting a woman who “couldn’t take . . . going to work with those problems, being absent or being smacked around like that.”).
109 Id. at 10.
110 Id.
112 Id.
113 Id. at 25.
114 Id. at 26.
115 Id.
116 Id. at 27 (citing Parenzee, et al (2001)); see also, e.g., Mathews & Abrahams, supra, note 28, at 7 (citing studies recognizing that poverty is a compounding factor in domestic violence cases); Kelley Moul, Providing a Sense of Justice: Informal mechanisms for dealing with domestic violence, 12 S.A. CRIME Q. 19, 20 (2005) (reporting that almost every interviewee described unemployed women’s avoidance of the formal legal system due to fear of losing financial support if her abusive partner was arrested).
117 See supra, note 49 (addressing economics generally). See also, e.g., supra note
A few studies directly address the interaction of economic and structural dependency and gender-based abuse on women’s employment opportunities and realities. For example, Parenzee and Smythe addressed the role of economics in their study of domestic violence in the farming context.\textsuperscript{118} Farming communities have high rates of domestic violence and rape, though precise data is difficult to establish.\textsuperscript{119} The agricultural work force is exploited and vulnerable to abuse, as workers have limited job security, generally poor quality housing, low wages, and limited access to basic health and educational resources.\textsuperscript{120} Employment relationships often are structured such that farmers contract with a male worker, through contracts in which his female partner is required to work but is not independently entitled to a job or to the housing provided through her partner’s contract.\textsuperscript{121} As Human Rights Watch reports, despite a court ruling that a woman farmworker could not be evicted because her husband lost his job on the same farm, women farmworkers’ access to housing is still dependent, in practice, on their relationship to a man who is employed on the farm.\textsuperscript{122}

In the farming context, workers generally see the criminal justice system as inadequate for a variety of reasons, including physical inaccessibility, lack of resources, poorly trained staff, the general limitations of criminal justice remedies, including incarceration, and the lack of support services.\textsuperscript{123} Thus, it offers a less than adequate remedy for women in

\textsuperscript{118} Parenzee & Smythe, \textit{supra} note 73. See note 126-130 and accompanying text for a brief discussion of how women’s experience in the farming context is reflective of women’s experiences more generally.

\textsuperscript{119} \textit{Id.} at 1, 4 (citing studies indicating that two-thirds of farmers reported that domestic violence occurred on their farms), 17-29 (reporting results of interview study); \textit{see also}, e.g., \textsc{Human Rights Watch}, \textsc{Unequal Protection: The State Response to Violence Crime on South African Farms} (2001), \url{http://www.hrw.org/reports/2001/safrica2/}.

\textsuperscript{120} Parenzee & Smythe, \textit{supra} note 73, at 3.


\textsuperscript{122} \textsc{Human Rights Watch}, \textit{supra} note 119.

\textsuperscript{123} Parenzee & Smythe, \textit{supra} note 73, at 5-6; \textsc{Human Rights Watch}, \textit{supra} note
farming communities who try to maintain their employment, and hence their economic security, in the face of abuse. Although development organizations aim to advance women farmworkers’ economic independence, their efforts may have unintended consequences. At the same time that those programs may improve women’s independence, Parenzee and Smythe caution that they may also increase women’s vulnerability to violence by shifting traditional, gender-based power relations.

Smythe and Artz recognize that the farming context may be an extreme example, but that it nevertheless reflects the economic barriers survivors face more generally. They describe how the need for economic security may prevail over the need to be free from violence. They also referenced countless cases in which women withdraw from criminal prosecutions due to fears of losing all economic support for themselves and their children if they pursue criminal justice complaints. The study additionally documented how “money problems” remain a leading factor in precipitating intimate partner violence and other forms of domestic abuse. The power of economics in the dynamics of abuse reinforces the importance of multi-sector responses that ensure adequate social and economic supports for victims.

From the social service perspective, at least one program in Cape Town specifically focuses on women’s economic empowerment in the face of gender violence. The Saartjie Baartman Centre is a “one-stop” centre that aims to provide a range of services to women and children who have survived gender-based violence. It is a domestic violence shelter that offers a range of services, including counseling, support, and training in fields such as trauma, rape, substance abuse, HIV/AIDS, contraception and parenting skills, and information relating to family law.

119. at n. 552 and accompanying text; Artz, supra note 73; Parenzee, et al., supra note 73.
124 Parenzee & Smythe, supra note 73, at 47.
125 Id. at 48-50.
126 Smythe & Artz, supra note 60, at 26.
127 Id.
128 Id.
129 Id.
130 Id. at 32-33.
132 Id.
maintains an economic empowerment program in which it partners with training organizations and businesses and places clients in job training programs that are coordinated with the Centre’s counseling and support programs. The program grows out of the Centre’s recognition of the symbiotic relationship between violence and poverty, in that poverty increases women’s vulnerability to violence and violence exacerbates women’s poverty. Although the Centre reported various difficulties with the program, including tracking participants once they left the Centre and difficulties in structuring meaningful training opportunities, it reported that clients’ confidence and self-esteem increased as a result of the training, and that a significant number secured either permanent or part-time work as a result. It highlighted that, to succeed, job skills must be addressed along with other factors that impact on survivors of gender violence, such as depression and trauma.

Looking at the issue more broadly, one reported study looked at the relationship between economics and abuse by studying the impact of an economic development program on the reduction of intimate partner violence. The study evaluated a microfinance-based poverty alleviation program that administered loans to selected women in poor South African communities. The program included a gender-focused training component that ran training sessions covering topics such as gender roles, cultural beliefs, relationships, communication, domestic violence, and HIV infection, and that aimed to strengthen communications skills, critical thinking and leadership. A second phase of the program encouraged wider community mobilization to engage youth and men in the project. The study reported that the program reduced the levels of abuse among women participants by more than half. The study also reported that that the program increased women’s assets, as well as self-confidence and progressive attitudes towards gender norms. Although the study was limited by a small sample size and other factors, it suggests that multi-

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133 Id. at 10, 12-27.
134 Id. at 9.
135 Id. at 3, 28-40.
136 Id. at 28.
138 Id. at 1796.
139 Id.
140 Id. at 1797-98.
141 Id.
142 Id. at 1799.
pronged approaches that address the realities of both economics and abuse may make a difference in increasing independence and safety.

IV. OPPORTUNITIES FOR LAW REFORM

A. South Africa’s constitutional and statutory anti-discrimination laws

As many commentators have observed, South Africa’s new Constitution and many of its recent legislative initiatives present a model of progressive law reform, particularly with respect to gender equality. Various provisions could provide relief to survivors of gender violence who suffer related adverse actions at work. Constitutional decisions impose responsibility on state and private actors to take reasonable steps to prevent and redress violence. Those decisions should support the imposition of liability on employers when acts of intimate partner violence or sexual assault take place at work, and when the employer could have, but failed, to take reasonable steps to prevent it. Other protections may derive from the Employment Equity Act (“EEA”), which was enacted in 1998 and which, among other things, prohibits discrimination on a broad range of grounds, authorizes affirmative action programs in proscribed circumstances, and prohibits sexual harassment at work. In 1998, the National Economic Development and Labour Council issued a code of good practice governing the handling of sexual harassment cases. The EEA’s prohibition of both direct and indirect discrimination should encompass a broader range of prohibited conduct than that recognized under the United States’ intentional discrimination framework.

143 See, e.g., supra note 54 (citing sources).
144 See supra notes 53 - 56.
146 www.saweb.co.za/labour/sexual.html.
Other provisions also could help ensure gender violence survivors’ continued employment. The Code of Good Practice accompanying the Employment Equity Act’s prohibition of discrimination provides that an employer’s failure to make reasonable accommodations to an employee’s needs and circumstances without undue hardship may constitute unfair discrimination. This could have substantial impact in requiring employers to assess whether modest workplace accommodation could facilitate a survivor’s successful ongoing employment, assuming survivors will feel safe enough to self-disclose to their employer. In addition, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which applies where the EEA does not, explicitly prohibits unfair discrimination based on gender, including gender-based violence. Notwithstanding these provisions, the Equality Courts that have been established to address workplace discrimination are underutilized. This may be due to uncertainty, misunderstanding, or a lack of knowledge and awareness about how those laws can address unfair workplace discrimination. The costs of litigation may further limit the utility of anti-discrimination laws as a means of effecting workplace equality.

Another aspect of South Africa’s employment laws may readily assist some survivors who may find recourse difficult under traditional tort and anti-discrimination frameworks. In many cases, abuse impacts survivors’ abilities to get and keep their jobs in ways that are less readily apparent and that may not fall neatly into sex discrimination prohibitions. As I have

What Not?, 42 BRANDEIS L. J. 597 (2004); see also, e.g., Ricci v. DeStafano, 2009 U.S. LEXIS 4945 (June 29, 2009) (requiring proof of a “strong basis in evidence” that civil service examination had impermissible disparate impact based on race to justify discarding examination due to its racial impact).

148 Code of Good Practice into Integration of EE into HR Policies & Practices, § 5.2.2.
151 Id.
152 Bonthuys, in GENDER, LAW & JUSTICE, supra note 12, at 262.
153 This is the case under United States’ laws, which would treat domestic and sexual violence as gender-neutral experiences. See Goldscheid, Gender Violence and Work, supra note 83, at 95-104. Survivors may more readily find recourse under South Africa’s anti-discrimination prohibitions, which may interpret gender more broadly, which more broadly recognize disparate impact theories, and which, in some cases,
described elsewhere, there are at least two categories of cases in which the impact of abuse often is rendered invisible, but that nevertheless negatively impacts survivors. In the first category, the abuse may impact a woman in ways that adversely affect her ability to perform her job. For example, an abuser may harass her at work by calling her hundreds of times a day, or by showing up and lurking in ways that are threatening. Yet, due to historic biases and the shame often associated with abuse, she may not disclose or explain the situation to co-workers or supervisors. She may experience performance problems as a result. Absent explanation, her performance issues may lead to disciplinary actions that could jeopardize her job. In other cases, the operation of subtle, gender biases about victims may shape employers’ responses to a victim upon learning that she is the survivor of domestic or sexual violence. In both types of cases, United States’ employment discrimination laws may not recognize adverse actions against domestic violence survivors as prohibited discrimination.

B. Unjust dismissal law

South Africa’s unjust dismissal law readily could provide redress for survivors whose circumstances might not fit squarely within antidiscrimination laws. Generally, South Africa’s Labour Relations Act (LRA) prohibits dismissals that are either substantively or procedurally unfair. The LRA defines substantively unfair dismissals through an enumerated list of grounds that render dismissals automatically unfair, including dismissals based on unfair discrimination on a range of protected grounds. Dismissals based on prohibited discrimination may nevertheless be fair if the reason for dismissal is based on an inherent requirement of the particular job. Other dismissals are substantively

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154 Id. at 74-76.
155 Id. at 94-104 (discussing limitations of U.S. employment laws]
156 A full discussion of South Africa’s unfair dismissal law is beyond the scope of this article, which will focus on its application to victims of gender violence who experience workplace difficulties resulting from the abuse. For a general discussion of South Africa’s unfair dismissal law, see, e.g., P A K LE ROUX & ANDRE VAN NIEKERK, THE SOUTH AFRICAN LAW OF UNFAIR DISMISSAL (1994).
158 LRA § 187; LRA § 187(1)(f) enumerating race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility as a non-exclusive list of prohibited grounds). This anti-discrimination prohibition overlaps with the protections afforded under the later-enacted Employment Equity Act. See supra note 145.
159 LRA § 187(2). The statute also provides that dismissals based on age are
unfair if the employer fails to prove that it is related to the employee’s conduct or capacity or based on the employer’s operational requirements. The LRA additionally prohibits procedurally unfair dismissals, and it provides parameters for procedural requirements in its Code of Good Practice. Generally speaking, the Code of Good Practice requires employers to clearly communicate standards of performance, to employ progressive discipline, and to take into account the employee’s circumstances, which include the length and quality of previous service, as well as the circumstances of any performance problems, before dismissing an employee.

This framework has important implications for victims of gender violence. By shifting the onus of establishing that a dismissal is procedurally and substantively fair to the employer, South Africa’s employment framework affords survivors of gender violence the chance to explain the role of abuse in any employment-related issues and requires the employer to give her a chance, with possible reasonable workplace modifications, to address the issue. By contrast, in the United States, nothing in federal law uniformly prevents an employer from reflexively terminating the employee regardless whether her performance issues stem from her partner’s abuse, and regardless whether an employer’s security-related concerns would be addressed through her termination. Under the unjust dismissal approach, for example, if a woman misses work because she fears that her abusive partner will come to the workplace, or if she experiences performance-related problems because he stalks her at work, or calls her incessantly, she would have the chance to explain the reasons for the problems and potentially could salvage her job. This approach would support the best practices increasingly recognized by employers, which shows that in many if not most cases, safety planning and negotiation of usually modest workplace modifications can both ensure workplace safety and will lead to retention of valuable employees.

nevertheless fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity. Id.

160 LRA § 188(1).
161 LRA § 188(1)(b) (requiring fair procedure); LRA § 188(2) (requiring consideration of the Code of Good Practice set forth in Schedule 8 to the LRA).
162 LRA Schedule 8.
163 See, e.g., Goldscheid, supra note 83, at 95-107 (discussing impact of reflexive employment decisions on survivors’ abilities to keep their jobs).
164 See, e.g., Goldscheid, supra note 83, at 81-84.
At least one decision invoked the LRA’s unfair dismissal procedures in the case of a dismissed employee who had been in an abusive relationship. In that case, an arbitrator overturned the employee’s dismissal because “she had an abusive relationship” for a number of years, which “could have affected work performance.” The arbitrator concluded that the employer:

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

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

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


166 Id. at 3.

167 Id. at 3-4.

168 Id. at 4.

169 Id.
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Cases in similar contexts reveal courts’ insistence that employers take employee’s circumstances into account in determining whether a dismissal was unfair. For example, in some cases employees coping with abuse may be absent from work, and may not disclose the reason for their absence due to the stigma associated with abuse. South Africa’s unjust dismissal framework requires an inquiry about whether the absence was reasonable. As one decision noted, citing a respected treatise: “in assessing the fairness of a dismissal for absenteeism, . . . the court will examine a number of factors, including the reason for the [employee’s] failure to present himself for work, his or her past work record and the employer’s treatment of this offense in the past.”170 Courts have found dismissals to be unfair when an employee left work due to safety concerns in other contexts. For example, courts have overturned dismissals when “stay-away” orders in an employee’s township created a justifiable fear of harm if she stayed at work.171 Other cases found dismissals unfair when an employee’s absence was due to his imprisonment, during which the employee was unable to notify the employer of the reason for his absence.172 The LRA’s procedural fairness requirements will bar dismissals when the employer failed to use progressive discipline before terminating the employee.173

The United States’ employment laws require no similar inquiry; to the contrary, they permit dismissal unless it is based on one (or more) of the prohibited grounds enumerated in federal, state or local antidiscrimination laws or unless the employee is covered by a union or other contract.

170 Africa and Public Servants Assoc., 24 INDUS. L. J. (JUTA) 1153 (CCMA, KN12853-02) (March 24, 2003) (citing GROGAN, WORKPLACE LAW, 6th ed., at 152) (finding dismissal unfair when employer knew employee failed to report after a business trip because he lacked sufficient funds, though upholding dismissal on other grounds); see also, e.g., Radebe v. Keeley Forwarding (Pty.) Ltd, 9 INDUS. L. J. (JUTA) 504 (Indus. Ct. Dec. 4, 1987) (finding dismissal substantively unfair when security guard left post for approximately half an hour to go to toilet).


172 See, e.g., Trident Steel (Pty) Ltd., v. CCMA, 26 INDUS. L. J. (JUTA) 1519 (Labour Ct., (JR845/01) (Dec. 3, 2004); Nyangaza and Germiston Powder Coates, 26 INDUS. L. J. (JUTA) 200 (BCA SEPT. 7, 2004); Magadla and AMT Svcs. (Pty.) Ltd., 24 INDUS. L. J. (JUTA) 1769 (BCA JUNE 27, 2003).

173 See, e.g., Jacobs & Trident Steel, 26 INDUS. L. J. (JUTA) 2259 (BCA (MEWC 1207) AUG. 10, 2005).
Under anti-discrimination frameworks, the ultimate burden is on the employee to establish that the termination, or other adverse job action, was based on her protected category, rather than on a legitimate employment reason. Although any legal framework can be narrowly interpreted, South Africa’s unjust dismissal framework exemplifies how a different legal structure different from that used in the United States leaves the door open to facilitate continued employment for survivors of gender violence.

C. Limitations in the informal labor sector

Despite the theoretical availability of legal arguments that could help gender violence survivors keep their jobs, many employment protections as well as anti-domestic violence laws remain effectively beyond the reach of many South African women. The prevalence of work in the informal sector is one factor that limits the utility of law reform. Although some recent reforms extend legal protections to “atypical” workers, lack of knowledge about their rights and ineffective enforcement mechanisms render those protections of limited utility.

Employment in the informal economy bars legal recourse for many survivors of gender violence working in the United States as well. For example, workers in the informal economy are excluded from legal protections through laws that apply only to employers of a certain size. Other laws explicitly exclude domestic workers from minimum wage and maximum hour protections, from guarantees of the right to organize, and for occupational safety and health standards.

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174 See supra notes 73-79 and accompanying text (describing implementation challenges).
175 Id. at 255.
176 See supra notes 42-45 and accompanying text.
177 See, e.g., Title VII of the 1964 Civil Rights Act, 42 U.S.C. sec. 2000e et seq. (2009) (anti-discrimination law applying only to employers with 15 or more employers); Family and Medical Leave Act, 42 U.S.C. sec. 2601 (2009) (providing up to twelve work weeks of unpaid, job-protected leave for specified purposes to those who work for employers with 50 or more employees for a specified minimum number of hours over the preceding year).
180 See U.S. Dep’t of Labor Standard 1975.6 (2001) exempting individuals employed for “ordinary domestic household tasks” from Occupational Safety and Health
Thus in both countries, the disconnect between the types of workplaces governed by labor and employment laws and the realities of many women’s work lives requires advocates to consider creative approaches and to think critically about the strategic use of law reform. In South Africa, for example, organizing initiatives focus on improving working conditions and training women for more stable and lucrative occupations.\footnote{See, e.g., NAILA KABEER, MAINSTREAMING GENDER IN SOCIAL PROTECTION FOR THE INFORMAL ECONOMY 292 (2008) (describing South Africa’s Self-Employed Women’s Union); Organizing Women in the Informal Sector – The SEWU experience, http://www.gdrc.org/icm/wind/wind-women-is.html.} Similarly, advocacy strategies in the United States include traditional legal and policy-based initiatives,\footnote{For recommendations of legal and policy reforms, see, e.g., Rebecca Smith & Catherine Ruckelshaus, Solutions, Not Scapegoals: Abating Sweatshop Conditions for all Law-Wage Workers as a Centerpiece of Immigration Reform, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 555 (2006).} as well as non-litigation-based approaches to inform workers of their rights and to enhance legal protections.\footnote{For examples of organizing campaigns with workers who traditionally lack legal remedies, see, e.g., Peggie R. Smith, The Publicization of Home-Based Care Work in State Labor Law, 92 MINN. L. REV. 1390 (2008) (discussing union organizing of home-based care workers); Domestic Workers United, http://www.domesticworkersunited.org/resources.php, (listing, e.g., recommended standard-form contracts and recommended employment standard guidelines).} These workplace realities require legal advocates and organizers to work together to increase awareness and shift norms so that the often hidden problem of gender violence becomes more widely acknowledged and better addressed, in all types of workplaces.

V. CENTERING EQUALITY AND TRANSFORMATION

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

A. Implementation, enforcement and training

Many of the implementation challenges identified by advocates in South Africa are remarkably similar to those faced by advocates in the United...
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States. It goes without saying that enacting new laws, or achieving a law reform litigation victory, is but the first step in achieving change. As social movement theorists have observed, legal tactics may have their most limited impact in struggles to implement new laws and policies.184 When it comes to policy implementation, a complex mix of law, politics, and power dynamics will determine the extent and nature of successful reform.185

Advocates in South Africa are confronting the familiar difficulties of ensuring adequate funding for programmatic initiatives and of properly training officials charged with law enforcement and program administration.186 Examples of these challenges in the United States abound. For example, enactment and reauthorization of the federal Violence Against Women Act has increased the availability of services and the range of options for survivors of gender violence.187 Yet every year, advocates must press to ensure that funds that were authorized were actually appropriated in the federal budget.188 Absent the political organization and capital to ensure appropriations, the funding promised in the enacted law would not stand a chance of reaching the communities that need it.

Another striking similarity lies in the difficulty of addressing the unintended consequences of well-intentioned reforms that inevitably surface as laws are implemented.189 In South Africa, this process is complicated by the fact that a newly-enfranchised majority is charged with governing after

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185 See, e.g., Scheingold, supra note 184, at 117.
186 See infra notes 73-79.
189 See supra, note 47.
years of disenfranchisement and state-sponsored violent repression. This formal change in power status runs counter to typical, though often criticized, dynamics of policy implementation, which tend to reinscribe, rather than facilitate, shifts in power and influence.\footnote{190} The process of moving from the position of outsider/ activist to insider/ policy administrator presents complex challenges of role and identity that additionally complicate the difficult role of implementing new social policy in a new political regime.

b. Gender violence in a socio-political context

The United States’ recent experience with domestic violence law reform illustrates the importance of maintaining a focus on the societal context in which gender violence persists while growing programs that enjoy public, and particularly governmental, support. Advocacy efforts have dramatically increased the availability of social services and have made substantial inroads into raising awareness among policymakers, law enforcement officials, and others with whom survivors of gender violence interact as they negotiate abuse.\footnote{191} Increasingly, federal and state funding supports social service and other programs to assist survivors.\footnote{192} With that mainstreamed support has come a neutralization in the way gender violence is addressed. Instead of framing the problem as a social construct reflecting gender bias, domestic and sexual violence often is framed in terms of personal dynamics of relationship.\footnote{193} The depoliticization of the issue, and the shift from a political to a social service focus, comes at the cost of reducing dialogue about root causes, and de-emphasizing programs advocating changes in cultural norms. This shift jeopardizes meaningful discussions about causation and therefore prevention, and reduces the potential for transformational change.

\footnote{190} See, e.g., ANNE L. SCHNEIDER & HELEN INGRAM, POLICY DESIGN FOR DEMOCRACY, 102-149 (1997) (describing how the process of public policy development in the United States is determined by the relative political power of the groups that are the target of policy initiatives).
\footnote{191} See supra, note 47.
\footnote{192} See, e.g., Violence Against Women and Department of Justice Reauthorization Act of 2005, supra note 187.
\footnote{193} See, e.g., GOODMAN & EPSTEIN, supra note 47, at 2, 8-12; Miccio, supra note 48, at 293; Martha McMahon & Ellen Pence, Making Social Change: Reflections on Individual and Institutional Advocacy with Women Arrested for Domestic Violence, 9 VIOLENCE AGAINST WOMEN 47, 54, 58 (2003); see also, e.g., Ritchie, supra note 48, at 52-53 (arguing that race and gender-neutrality has limited the anti-domestic violence movement’s effectiveness).
Directly addressing the biases that tolerate and condone gender violence is a challenging project that has no easy solution. The social context of gender violence cannot be addressed without considering the impact of race, class, sexual orientation and immigration status, which complicate survivors’ experiences of abuse. Some promising programs support challenging traditional gender roles, for example, by addressing male bullying and violence in early childhood education. Some frame domestic violence through the lens of poverty and unemployment. Others employ a range of empowerment, human rights and broad anti-subordination frameworks. These and similar innovative initiatives should receive continued visibility and support.

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

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195 See, e.g., Artz & Smythe, *Bridges & Barriers*, *supra* note 73, at 225.


199 *Id.*

the problem in terms of its social and political roots lays the groundwork for progressive programs and transformative discourse.

c. Broad-based commitments and difficult conversations.

The importance of commitments from all members of society to ending the problem cannot be underestimated. Workplace policies addressing gender violence offer a useful example of the power of shared commitments. In the United States, much workplace reform has been spurred by initiatives advanced by advocates working in collaboration with business leaders who recognized that developing policies was good for employees as well as their businesses’ bottom line. Although advocates and business leaders may hold somewhat different perspectives on particular aspects of the problem, their shared interests have advanced workplace policies, primarily in the larger organizations that have significant human resources infrastructure. In South Africa, the pressing problems of (general) violence and AIDS may eclipse the less visible issue of how gender-based abuse affects the workplace.

Looking at the problem of abuse more generally, anti-gender violence advocates increasingly are calling on men to take an active role in the anti-gender violence movement. The role of men historically has been controversial in the anti-domestic violence movement in the United States, out of concerns that attention and funding would be diverted from helping women to supporting men. Yet there is an increasing international awareness that to truly end, or significantly decrease the problem, men must join the project by challenging violence committed by their peers.


201 See supra notes 93 - 94.


Advocates in South Africa are part of these efforts to call on male allies to challenge the acceptability of male violence against women. Such efforts would include a renewed dedication by all stakeholders in the criminal justice system to understanding the wide range of circumstances in which rape occurs, and to listening to the experiences of survivors in enforcing legal remedies.

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

After approximately forty years of modern advocacy to end gender violence, advocates in the United States are recognizing the need to challenge traditional advocacy approaches. For example, some are questioning the common wisdom that advocacy should be focused on helping the woman leave, in recognition that many women do not want to leave their partners. Others are considering advocates’ longstanding positions that alternative dispute resolution processes, such as restorative justice, should never be used in cases of domestic or sexual violence. Others are recognizing that the traditional “feminist” frame that identifies the male as perpetrator and female as “victim” erases the prevalence of abuse in same sex relationships. These difficult conversations are not meaning attached to domestic violence by survivors, as mediated by traditional male roles as well as cultural traditions).

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


See, e.g., Phyllis Goldfarb, Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence, 64 GEO. WASH. L. REV. 582 (1996); Nancy J. Knauer, Same-Sex Domestic Violence: Claiming A Domestic
unlike those undertaken by South African advocates balancing traditional and customary law with modern approaches to sex equality. Though these questions provoke difficult conversations, they inevitably will be useful in moving advocacy and services forward. By looking at approaches used by advocates in South Africa and by considering the opportunities available under its progressive laws, those of us in the United States may be better equipped to consider creative and productive reform.

CONCLUSION

Comparing the United States’ and South Africa’s efforts to address the parallel processes of law reform and cultural change in the context of gender violence and work is a study of commonalities and contrasts. The example of advocacy efforts to address the impact of gender violence on women’s work offers one example of the tensions. The United States has had the benefit of approximately 40 years of recent advocacy efforts, yet the rates of domestic and sexual remain high. Although progress has been made in terms of employers’ recognition of how the problem impacts the workplace, and although legal remedies increasingly are available to those whose jobs are jeopardized as a result of the abuse, our cramped interpretation of employment laws, as well as the increasing prevalence of the informal labor sector, call into question the impact of those legal protections.

South Africa presents a contrasting set of challenges, with alarmingly high rates of domestic and sexual violence in addition to staggering rates of other forms of violence. Yet, its Constitution and statutory frameworks, particularly but not exclusively those that have been enacted since the end of apartheid, chart a range of legal remedies that hold substantial potential for affording relief when women’s employment is jeopardized as a result of abuse. Nevertheless, the prevalence of poverty, the rates of employment in the informal labor sector, and the enduring role of traditional patriarchal culture, compound the challenge of using law to change conditions on the ground.


See, e.g., supra note 82, 206.
The comparison highlights the inherent similarities of law reform that seeks to transform historic biases and cultural norms. It underscores the importance of enforcement and implementation, of centering anti-subordination initiatives in the context of equality, and of maintaining the difficult and ongoing project of challenging bias in its many forms, in order to create both legal change and cultural transformation.

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