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## Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners

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## GROUNDING ACCESS TO JUSTICE THEORY AND PRACTICE IN THE EXPERIENCES OF WOMEN ABUSED BY THEIR INTIMATE PARTNERS

Janet E. Mosher\*

*For women seeking to extricate themselves from the web of entrapment woven together by the multiple threads that make up the coercive control repertoire of their abusive intimate partners, it is often difficult to avoid engagement with legal systems. Yet, the legal systems they encounter—criminal, family, child welfare, immigration among them—are frequently unwelcoming (if not hostile), controlling, demeaning, fragmented and contradictory. While there has been a recent explosion of interest in “access to justice,” little attention has been paid to how we might conceptualize access to justice in a manner that speaks meaningfully to the circumstances of women who experience abuse in their intimate relationships. For such women, access to justice is curtailed not only by lack of representation, delays, costs, and procedural complexities—the obstacles commonly associated with access to justice failings—but by three inter-related phenomena: the enduring hold of an incident-based understanding of domestic violence; the failure of legal actors to curb men’s strategic use of legal systems to further their power; and the host of complications—contradictory expectations, inconsistent orders, repetitious proceedings, sweeping surveillance—that arise when women are compelled to navigate multiple intersecting legal systems. What is required, I argue, is a conceptualization of access to justice that places women’s safety and well-being at its core.*

*Dans la plupart des cas, les femmes qui veulent se sortir de l’enfer de la violence conjugale et échapper au contrôle de leur conjoint abusif n’ont d’autre choix que de se tourner vers les systèmes judiciaires. Pourtant, ceux qui s’offrent à elles, que ce soit en matière criminelle ou familiale, ou encore en matière d’immigration ou de protection de l’enfance, sont souvent peu accueillants (sinon hostiles), en plus d’être contrôlants, rabaisants, fragmentés et contradictoires. Malgré le très grand intérêt que suscite depuis quelque temps l’accès à la justice, une attention dérisoire a été accordée à la façon de conceptualiser cet accès afin de vraiment aider les femmes aux prises avec la violence conjugale. Pour ces femmes, l’accès à la justice est entravé non seulement par des services de représentation inadéquats ainsi que par les délais, les coûts et les complexités liés à la procédure, soit les obstacles habituellement associés aux failles de l’accès à la justice, mais également par trois phénomènes interdépendants : une perception tenace de la violence familiale axée sur l’incident; l’incapacité des intervenants juridiques de freiner les hommes qui se servent astucieusement des systèmes*

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*judiciaires pour accroître leur domination et la myriade de complications – attentes contradictoires, ordonnances incompatibles, procédures répétitives, surveillance envahissante – qui surviennent lorsque les femmes doivent naviguer dans les méandres de plusieurs systèmes judiciaires qui s’entrecroisent. À mon avis, il est impératif de parvenir à une conceptualisation de l’accès à la justice qui est axée d’abord et avant tout sur la sécurité et le bien-être des femmes.*

## I. INTRODUCTION

There has been an explosion of interest in access to justice over the past half dozen years or so, accompanied by a commonly heard refrain that a “crisis” exists.<sup>1</sup> Yet, among the many recent reports and interventions, a gendered analysis has been largely absent.<sup>2</sup> In the article that follows, I seek to offer some insights into a conceptualization of access to justice from the perspective of women abused in their intimate relationships.<sup>3</sup> While women encounter many of the “obstacles”

<sup>1</sup> The cause has been taken up by senior members of the bar and bench, including Chief Justice McLachlin and Governor General Johnston, see Hon Beverley McLachlin, PC, “The Challenges We Face” (remarks delivered at the Empire Club of Canada, 8 March 2007), Supreme Court of Canada <[www.scc-csc.gc.ca/court-court/judges-juges/spe-dis/bm-2007-03-08-eng.aspx](http://www.scc-csc.gc.ca/court-court/judges-juges/spe-dis/bm-2007-03-08-eng.aspx)>; Hon David Johnston (remarks delivered at the Canadian Bar Association’s Canadian Legal Conference, *The Legal Profession in a Smart and Caring Nation: A Vision for 2017*, 14 August 2011), online: Governor General <[www.gg.ca/document.aspx?id=14195](http://www.gg.ca/document.aspx?id=14195)>. Among the many recent reports on access to justice are those of the Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (October 2013), online: Canadian Forum on Civil Justice <[www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)> [*Roadmap for Change*]; the Law Commission of Ontario (LCO), *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity* (Toronto: February 2013), online: <[www.lco-cdo.org/family-law-reform-final-report.pdf](http://www.lco-cdo.org/family-law-reform-final-report.pdf)> [*Increasing Access*]; BC Legal Services Society, *Making Justice Work: Improving Access and Outcomes for British Columbians* (July 2012), online: Legal Services Society <[www.lss.bc.ca/assets/about-us/reports/submissions/makingJusticeWork.pdf](http://www.lss.bc.ca/assets/about-us/reports/submissions/makingJusticeWork.pdf)> [*Making Justice Work*]; Canadian Bar Association’s (CBA) Access to Justice Committee, *Reaching Equal Justice: An Invitation to Envision and Act* (CBA, November 2013), online: Canadian Bar Association <[www.cba.org/CBA/equaljustice/secure\\_pdf/EqualJusticeFinalReport-eng.pdf](http://www.cba.org/CBA/equaljustice/secure_pdf/EqualJusticeFinalReport-eng.pdf)> [*Reaching Equal Justice*].

<sup>2</sup> Among recent reports on access to justice, the report of the LCO, *Increasing Access*, *supra* note 1, provides the most sustained attention to gender, identifies some of the particular challenges faced by survivors of domestic violence, and underscores the importance of developing the family law system’s capacity to respond to the existence of domestic violence.

<sup>3</sup> *Reaching Equal Justice*, *supra* note 1. In this report, the CBA urges a shift in perspective from justice system insiders to “users,” a shift that flows from embracing a “truly equal justice system” as its animating principle, and from its vision of a justice system that “provides meaningful and effective access to all, taking into account the diverse lives that people live.” The CBA describes its initiative as focused “on human justice, on people law – legal issues, problems and disputes experienced by people (including small businesses), especially those that involve essential legal needs. We understand essential legal needs to be those arising from legal problems or situations that put into jeopardy the security of a person or that person’s family’s security – including liberty, personal security, health, employment, housing or ability to meet the basic necessities of life and extending to other urgent legal needs” (at 9). A shift in focus upon users has also spawned empirical work to ascertain legal needs and a literature that has served to highlight their often cascading nature and their human cost. See e.g. Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice, 2009), online: Department of Justice

routinely identified in the literature – lack of representation, delays, costs, and procedural complexities – much more is going on that impedes their access to justice. Women’s access to justice is additionally curtailed by three inter-related phenomena: the enduring hold of an incident-based understanding of domestic violence; the failure of legal actors to curb men’s strategic use of legal systems to further their power; and the host of complications that arise when women must navigate multiple intersecting legal systems.<sup>4</sup>

Most fundamentally, access to justice requires that all legal system actors – lawyers, judges, administrative decision makers and adjudicators, assessors, and mediators – have a nuanced understanding of the phenomenon of domestic violence.<sup>5</sup> Significantly, this requirement necessitates moving beyond the reductive, incident-based understanding of domestic violence that continues to dominate in the legal realm, an approach that all too frequently silences women’s narratives of abuse, minimizes the harms perpetrated against them, and renders accessing legal systems as anything but a positive, justice-enhancing experience. Rather, a deep appreciation of domestic violence – and of how it is deployed by individual men and enabled by social structures and institutions, law included – is critical. These structures include the overlapping systems of oppression that operate not only to render some women more vulnerable to violence and with fewer resources to exit relationships, but also to construct only some women as “victims” deserving of legal redress.

Meaningful access to justice for women – “justice for all” – will remain elusive unless and until a nuanced understanding of domestic violence is widely shared among system actors.<sup>6</sup> The Honourable Donna Martinson, a retired judge of the British Columbia Supreme Court, has put it this way:

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<[www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07\\_la1-rr07\\_aj1/rr07\\_la1.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf)>; Ab Currie, “A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns” (Ottawa: Department of Justice, 2005), online: Canadian Forum on Civil Justice <[www.cfcj-fcjc.org/sites/default/files/docs/2006/currie-en.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2006/currie-en.pdf)>; R Roy McMurtry et al, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Ontario Civil Needs Project Steering Committee, 2010), online: Law Society of Upper Canada <[www.lsuc.on.ca/media/may3110\\_oclnreport\\_final.pdf](http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf)>.

<sup>4</sup> I use the term “legal systems” to refer to various domains of substantive and procedural law: the criminal justice system, the child welfare system, the family law system, and so on. I am interested not only in the adjudicative or other dispute resolution processes within these various systems but also in their substantive legal content.

<sup>5</sup> There is much debate about the terminology to capture experiences of abuse in intimate relationships, and, of course, the language we use matters as it serves to organize and construct meaning. For a detailed discussion, see Gillian Walker, *Family Violence and the Women’s Movement* (Toronto: University of Toronto Press, 1990). While some object to the term “domestic violence” because it fails to signal that women are its primary victims and men its perpetrators, others take the opposite view, arguing that domestic violence is widely understood as code for the violence perpetrated by men in intimate heterosexual relationships, and, as such, obscures the abuse in same sex relationships. Although imperfect, I use the term “domestic violence” here; my discussion is focused largely on the coercive control enacted by men in the context of intimate heterosexual relationships and enabled by, among other things, gender inequality. I consider “domestic violence” as a form of “gender violence” in the sense conveyed by Sally Merry – that is, where “violence” (another contested term and discussed more fully *infra*) is used to police/enforce particular performances of gender. See Sally Engle Merry, *Gender Violence: A Cultural Perspective* (Chicester, UK: Wiley-Blackwell, 2008).

<sup>6</sup> Stephanie Sweetnam, “Where Do You Think Domestic Abuse Hurts Most?” (2013) 19:1 Violence Against Women 133 at 136.

Meaningful access to justice requires more than just providing women and children with access to any lawyer, or any judge. The justice part of access to justice requires that those lawyers and judges dealing with family law cases and criminal law cases have the interest in, aptitude for, and the professional experience and expertise required to deal with the complexities of, and multifaceted nature of, IPV [intimate partner violence] cases.<sup>7</sup>

Moreover, without this understanding, it is difficult for legal system actors to see when and how abusive (ex)partners use and manipulate legal processes and systems to work harm. Often masquerading as steps taken to access justice, abusive partners initiate and pursue private law litigation – family law litigation, in particular – to further their power and control. Also important to appreciate is that, beyond litigation, coercive controllers strategically engage the power of various legal systems to extend their own power. They threaten (and some individuals act on these threats) to call the police to have their partners charged, to revoke immigration sponsorships, to make anonymous tips to social assistance authorities to prompt fraud investigations, or to complain to child welfare authorities about their partners' neglect or abuse of the children. The engagement of any one of these systems will trigger not only an investigation but also often the involvement of other legal systems. For example, a call to the police will usually prompt a report to child protection services and, for women without permanent residence status, to Citizenship and Immigration Canada [CIC]. In these circumstances, women's engagement with these multiple legal systems is not a vindication of access to justice; rather, based on spurious allegations women are drawn in and compelled to participate. Women may have access to a legal forum or process, but not access to justice.<sup>8</sup>

As noted, particular access to justice concerns arise from the complex interplay between any number of combinations possible between, for example, the criminal, family, child welfare, immigration, and social assistance legal systems. These concerns are many and varied: multiple and repetitive court attendances; conflicting court orders; contradictory system expectations; and compromised safety when legal system actors fail to share information. The limited literature elucidating the access to justice issues at the intersections of these multiple legal systems consistently calls for greater communication and collaboration within and across systems. I

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<sup>7</sup> Hon Donna J Martinson, "Multiple Court Proceedings and Intimate Partner Violence: A Dangerous Disconnect" (keynote address delivered at the Canadian Observatory on the Justice System's Responses to Intimate Partner Violence National Conference, University of New Brunswick, 21 October 2014) at 3, online: University of New Brunswick <[www.unb.ca/conferences/mmfc2014/\\_resources/presentations/donna-martinson-keynote.pdf](http://www.unb.ca/conferences/mmfc2014/_resources/presentations/donna-martinson-keynote.pdf)>.

<sup>8</sup> Access to justice is often equated with access to the mechanisms of institutionalized dispute resolution, such as courts and tribunals. Broader conceptualizations place emphasis on "justice," casting a critical lens on the content of the substantive law, the ability of decision makers to genuinely understand the experiences of others, and distributions of power that create unequal access not only to legal literacy but to credibility, autonomy, and respect. It is this latter conceptualization that informs my analysis. See Janet Mosher "Lessons in Access to Justice: Racialized Youths in Ontario's Safe Schools" (2008) 46:4 Osgoode Hall L Rev 807; Janice Gross-Stein & Adam Cook, "Speaking the Language of Access to Justice: A New Legal Vernacular" in Julia Bass, WA Bogart & Frederick Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005).

suggest that caution is needed here; enhanced system collaboration and communication do not work invariably to enhance women's access to justice.

As many proponents suggest, this approach may well serve to avoid conflicting orders, reduce the number of court hearings, facilitate better risk assessments, and even minimize the abuse of court processes. However, we need to attend to the reality that many of these systems, in fact, do routinely communicate with each other, but they do so with a view to cutting women off and turning them out, rather than to enhancing their safety or meeting their needs. Indeed, this cross-system communication is precisely why many women – particularly those who are the most socially vulnerable and marginalized – assiduously avoid these legal systems. And, no doubt, this has significant implications for women's access to substantive justice. What is required, I suggest, is a conceptualization of access to justice that places women's safety and well-being at its core.

## II. IMPEDIMENTS TO ABUSED WOMEN'S ACCESS TO JUSTICE

### A. The Limitations of an Incident-Based Approach

The limitations of an incident-based approach to domestic violence within the legal system have been raised by many academics and activists over a substantial period of time.<sup>9</sup> The nub of this concern is that within the legal system legal actors focus their attention on discrete incidents of physical violence. As Evan Stark has observed, significant numbers of these incidents are assessed by legal actors (across a range of legal domains) as being relatively minor because seriousness is often calibrated to the extent of the injury inflicted.<sup>10</sup> Moreover, "injury" is reduced to that which is plainly observable; the bruises, broken bones, and scars. The context in which these incidents occur is stripped out, and the often more lasting forms of harm – the broken spirits, psyches, and hearts – rendered invisible.

Early work by feminists in creating the "Power and Control Wheel" sought to illustrate the multiplicity of tactics used by abusers to maintain their domination – among them, isolation, put downs and shaming, economic deprivation, intimidation, and the use of the children as pawns.<sup>11</sup> Building upon these early insights, Stark has articulated a theory of coercive control, which he describes as

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<sup>9</sup> Linda Neilson, "Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice" (2000) 18 Windsor YB Access Just 115 at 125. Neilson's observation was derived from a review of the case law and specifically focused on judicial understandings of abuse.

<sup>10</sup> Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (New York: Oxford University Press, 2007). See also the special volume devoted to engagements with Stark's theory of coercive control (2009) 15:12 Violence Against Women.

<sup>11</sup> Duluth Power and Control Wheel, online: Home of the Duluth Model <[www.theduluthmodel.org/pdf/power-andcontrol.pdf](http://www.theduluthmodel.org/pdf/power-andcontrol.pdf)>. The wheel has also been adapted by women in various social locations. See eg Sharifa Alkahteb, "Muslim Power and Control Wheel", online: London Family Court Clinic <[www.lf-cc.on.ca/muslim\\_wheel\\_of\\_domestic\\_violence.html](http://www.lf-cc.on.ca/muslim_wheel_of_domestic_violence.html)>; Roe & Jagodinsky, "Power and Control Wheel for Lesbian, Gay, Bisexual and Trans Relationships", online: Texas Council on Family Violence <[www.tcfv.org/pdf/Updated\\_wheels/LGBT.pdf](http://www.tcfv.org/pdf/Updated_wheels/LGBT.pdf)>.

an ongoing pattern of domination by which male abusive partners primarily interweave repeated physical and sexual violence with intimidation, sexual degradation, isolation and control. The primary outcome of coercive control is a condition of entrapment that can be hostage-like in the harms it inflicts on dignity, liberty, autonomy and personhood as well as to physical and psychological integrity.<sup>12</sup>

However, he is also clear that coercive control can exist without the presence of physical and sexual violence (and, indeed, this was the thrust of his expert evidence in the 2011 Ontario case of *R. v Craig*).<sup>13</sup> His work – and that of others – emphasizes the micro-regulation of women’s everyday lives: of gendered performances surrounding food preparation, childcare, and relationships with friends and family. Emma Williamson’s imagery is evocative here in imploring us “not [to focus] on the incidents of abuse ... but to understand the nature of domination, to focus on the ‘cage.’”<sup>14</sup> Also important in Stark’s conceptualization of coercive control is how state institutions and structures – among them, inadequate welfare rates, limited housing options, precarious immigration status, a gender- and race-stratified labour market, and pervasive gender discrimination – facilitate men’s entrapment of women.

In the fields of psychology and sociology, significant literature has emerged over the past decade that seeks to differentiate between forms of abuse or violence and various topologies have been generated.<sup>15</sup> Michael Johnson’s work has been perhaps the most influential. While Johnson now employs five categories of abuse, the three central categories in his work are: “coercive controlling violence” (Johnson originally termed this “intimate terrorism”), “situational couple violence,” and “violent resistance.” Johnson’s first category aligns with Starks’ model of coercive control. His second category, “situational couple violence,” seeks to capture relationships where there are incidents of violence (that may vary markedly in their severity) but are not embedded within a larger pattern of control. The third category, “violent resistance,” is used primarily by women to defend themselves or to resist coercive controlling

<sup>12</sup> Evan Stark, “Re-presenting Battered Women: Coercive Control and the Defense of Liberty” (paper prepared for Violence Against Women: Complex Realities and New Issues in a Changing World Conference, Montreal, 2012), online: The Advocates for Human Rights <[www.stopvaw.org/uploads/evan\\_stark\\_article\\_final\\_1008-12.pdf](http://www.stopvaw.org/uploads/evan_stark_article_final_1008-12.pdf)> at 7 [unpublished].

<sup>13</sup> *R v Craig*, 2011 ONCA 142.

<sup>14</sup> Emma Williamson, “Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control” (2010) 16:12 Violence Against Women 1412. Coercive control differs from the representation of violence in the Power and Control Wheel in that acts of physical and sexual violence are less central. In addition, more attention is paid in theories of coercive control to the micro-regulation of everyday life and to how men’s power, and women’s corresponding entrapment, is enabled by social structures.

<sup>15</sup> Michael Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance and Situational Couple Violence* (Boston, MA: Northeastern Press, 2008); Michael Johnson, Janel Leone & Yili Xu, “Intimate Terrorism and Situational Couple Violence in General Surveys: Ex-Spouses Required” (2014) 20:2 Violence Against Women 186; Jane Wangmann, “Different Types of Intimate Partner Violence-An Exploration of the Literature” (Australian Domestic & Family Violence Clearinghouse, October 2011), online: Gendered Violence Research Network <[www.adfvc.unsw.edu.au/PDF%20files/IssuesPaper\\_22.pdf](http://www.adfvc.unsw.edu.au/PDF%20files/IssuesPaper_22.pdf)>.

violence.<sup>16</sup> Johnson, Stark, and many others posit that coercive control is highly gendered, with men overwhelmingly in the category of coercive controllers.<sup>17</sup>

A sizeable literature has also emerged in a number of disciplines that challenges the early feminist explanation of violence as being rooted exclusively in a single structure of oppression, that of patriarchy. Building on critical race theory and particular strains of feminist scholarship, this work theorizes intersecting identities and structures of oppression and places at the centre the experiences and voices of racialized, queer, transgendered, Indigenous, newcomer, and other marginalized women. In other words, current understandings of domestic violence are much more complicated than the unitary picture painted by early feminist work. As Donna Coker argues, these insights are important for our understanding not only of the roots of domestic violence but also of the structures that limit women's escape routes.<sup>18</sup>

Deborah Weissman, writing in 2013, echoes concerns raised by many feminist scholars and activists in her observation that the law and legal actors have failed to keep pace with these changing understandings of domestic violence, continuing to operate on a reductive, incident-based understanding.<sup>19</sup> The failure to situate incidents of physical and sexual abuse within the frame of coercive control means that we often under-estimate the risks and severity of harm to women and children.<sup>20</sup> This failure also produces an extraordinarily limited conception of "safety," wherein safety is equated with a single act – that of separation – a conception that also obscures the realities of post-separation violence.<sup>21</sup>

<sup>16</sup> In the area of family law, increased attention is being paid to topologies of violence and their relevance to decision making, screening, and the choice of dispute resolution process. While there is much agreement that these topologies are relevant and useful, there is a concern that decision makers may too readily categorize the violence as "situational couple violence" and that knowledge is not sufficiently advanced for categorizations to be confidently made. See Wangmann, *supra* note 15; Nancy Ver Steegh, "Differentiating Types of Domestic Violence: Implications for Child Custody" (2005) 65 La L Rev 179; Linda Neilson, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, Family, Child Protection): A Family Law, Domestic Violence Perspective*, 2nd ed (Ottawa: Department of Justice, 2013) at 28, online: Department of Justice <[www.justice.gc.ca/eng/rp-pr/fl-lf/famil/enhan-renfo/neilson\\_web.pdf](http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/enhan-renfo/neilson_web.pdf)>.

<sup>17</sup> There are deep and acrimonious debates on this point. See eg Michael Johnson, "Gender and Types of Intimate Partner Violence: A Response to an Anti-Feminist Literature Review" (2011) 16 *Aggression & Violent Behavior* 289; Joanne Minaker & Lauren Snider, "Husband Abuse: Equality with a Vengeance?" (2006) *Can J Corr* 753; Kristin Anderson, "Gendering Coercive Control" (2009) 15:12 *Violence Against Women* 444; Donald Dutton et al, "The Gender Paradigm in Domestic Violence Research and Practice Part II: The Information Website of the American Bar Association" (2009) 14 *Aggression & Violent Behavior* 30.

<sup>18</sup> Donna Coker, "Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence" in Heather Strange & John Braithwaite, eds, *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press, 2002). Coker describes domestic violence as a "social practice maintained by multiple systems that operate in the lives of battering men and battered women" (at 128).

<sup>19</sup> Deborah M Weissman, "Law, Social Movements, and the Political Economy of Domestic Violence" (2013) 20 *Duke J Gender L & Pol'y* 221.

<sup>20</sup> Stark, *supra* note 12.

<sup>21</sup> Stark argues that "there is mounting evidence that the level of 'control' in abusive relationships is a better predictor than prior assaults of future sexual assault and of severe and fatal violence." See Stark, *supra* note 12 at 4. For a review of the literature on post-separation violence, see Molly Dragiewicz & Walter DeKeseredy, *Study on the Experiences of Abused Women in the Family Courts in Eight Regions in Ontario* (Oshawa, ON: Luke's Place Support & Resource Centre for Women & Children, 2008) at 11.



Leigh Goodmark highlights, as do a number of scholars, the equally narrow and problematic construction of the “victim” within much legal discourse: passive, meek, and helpless, white and middle class.<sup>22</sup> The failure to problematize the reigning construction of victimhood also works together with the de-contextualization of women’s use of violence, which results in the inappropriate charging and conviction of women. While there is limited Canadian research on women charged with domestic violence offences, front-line advocates report that the overwhelming majority of these women are using “violent resistance,” yet in the incident-based focus of the criminal justice system, this context is rarely addressed (often with significant consequences for the outcomes in other parts of the legal system).<sup>23</sup>

Across a range of legal domains, while some women report positive experiences, many recount how legal system actors have minimized the harms they have experienced, often dismissing their accounts as irrelevant, not credible, or as vindictive ploys.<sup>24</sup> It is not only that the context of coercive control is elided but also that even the acts of physical and sexual violence are routinely disregarded. Judith Herman reports that for the women in her study who had turned to the criminal justice system the “single greatest shock was the discovery of just how

<sup>22</sup> Leigh Goodmark, “Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal” (2009) 31 Wash UJL & Pol’y. See also Adele M Morrison, “Queering Domestic Violence to ‘Straighten Out’ Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law’s Conventional Responses to Domestic Violence” (2003) 13 S Cal Rev L & Women’s Stud 8; Kae Greenberg, “Still Hidden in the Closet: Trans Women and Domestic Violence” (2012) 27 Berkeley J Gender L & Just 198; Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43 Stan L Rev 1241; Natalie J Sokoloff & Ida Dupont, “Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities” (2005) 11 Violence Against Women 38; Angela Davis, “The Color of Violence Against Women” (keynote address delivered at the Color of Violence Conference, 28 April 2000), online: Colorlines <[www.colorlines.com/archives/2000/10/the\\_color\\_of\\_violence\\_against\\_women.html](http://www.colorlines.com/archives/2000/10/the_color_of_violence_against_women.html)>.

<sup>23</sup> In the Canadian context, see Cheryl Fraehlich & Jane Ursel, “Arresting Women: Pro-arrest Policies Debates and Developments” (2014) 29 J Family Violence 507; Julie Poon, Myrna Dawson & Mavis Morton, “Factors Increasing the Likelihood of Dual and Sole Charging of Women for Intimate Partner Violence” (2012) 20:12 Violence Against Women 1447; Pamela Cross, *It Shouldn’t Be This Hard: A Gender-Based Analysis of Family Law, Family Court and Violence Against Women* (Oshawa, ON: Luke’s Place Support & Resource Centre for Women & Children, 2012); Dragiewicz & DeKeseredy, *supra* note 21; Shoshana Pollack et al, *Women Charged with Domestic Violence in Toronto: The Unintended Consequences of Mandatory Charge Policies* (Toronto: Woman Abuse Council of Toronto, March 2005) online: <[www.womanabuse.ca](http://www.womanabuse.ca)>. In the American context, see Melissa Dichter, “‘They Arrested Me – And I Was the Victim’: Women’s Experiences With Getting Arrested in the Context of Domestic Violence” (2013) 23:2 Women & Criminal Justice 81; Alesha Durfee, “Situational Ambiguity and Gendered Patterns of Arrest for Intimate Partner Violence” (2012) 18:1 Violence Against Women 64; Susan L Miller & Michelle L Meloy, “Women’s Use of Force: Voices of Women Arrested for Domestic Violence” (2006) 12:1 Violence Against Women 89.

<sup>24</sup> Neilson registers a concern where women’s allegations are treated with skepticism, as motivated by malice, and as designed to alienate a child’s father. Neilson, *supra* note 16. See also Holly Johnson & Jennifer Fraser, *Specialized Domestic Violence Courts: Do They Make Women Safer? Community Report: Phase I* (Ottawa: University of Ottawa, 2011) online: Ontario Association of Interval and Transition Houses <[www.oaith.ca/assets/files/Publications/Criminal%20Law/DVC-Do-theyMake-Women-Safer.pdf](http://www.oaith.ca/assets/files/Publications/Criminal%20Law/DVC-Do-theyMake-Women-Safer.pdf)>.

little they mattered.”<sup>25</sup> This marginal role within the justice system, she observes, was a “humiliation only too reminiscent of the original crime.”<sup>26</sup> In a moving personal account of her own experiences as a Black middle-class woman abused by a White working-class man, Stephanie Sweetnam writes this of her experience of Canada’s legal system:

I was subjected to the racist and sexist nature of our flawed legal system. I came to believe, and remain convinced, that the legal system is a form of violence in itself that abuses society’s most vulnerable and oppressed populations. Had I not been as strong-willed and educated, I would have given up a long time ago and succumbed to prevailing ideas associated with abused women, and women of color. One wonders about the women who are not as privileged as me. How do they cope with a biased and inconsistent legal system, and a society that perpetuates hegemonic masculinity, excuses violence against women, and blames the victim rather than the perpetrator of abuse? ... Simply put, redemption must be found within oneself because the legal system does not venture to ensure “justice for all.”<sup>27</sup>

### **B. The Strategic Use of Legal Processes and Systems by Coercive Controllers**

In the words of Chief Justice Beverley McLachlin, “[u]nfortunately, many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system.”<sup>28</sup> The image here, which is a common one, is of men and women who desire access but who encounter a host of often insurmountable barriers. Yet for many women who experience abuse in their intimate relationship, the access to justice problem is often of an entirely different sort. They are not seeking entry to the justice system but, rather, are unwillingly drawn in by their abusive partners (and, in some instances, by the state), despite their best efforts to avoid it.

Extensive research documents that a common tactic among coercive controllers is, as noted in the introduction, the use of threats (sometimes acted upon) to invoke various legal systems: to report a woman to child welfare authorities for abusing or neglecting her children; to initiate family law proceedings seeking sole or joint custody; to call the police to report her as having abused him; to report her for welfare fraud if she or they are in receipt of social assistance; and to engage immigration processes to facilitate her deportation if she is not a Canadian citizen.<sup>29</sup> In many instances, once one of these legal systems is engaged, others are notified, and, as detailed more fully in the third part of this article, women are then subject to surveillance by various state actors with the power to apprehend their children, terminate social assistance benefits, pursue criminal charges, and remove them from the country. Significantly, the coercive controller turns

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<sup>25</sup> Judith Lewis Herman, “Justice From the Victim’s Perspective” (2005) 11:5 *Violence Against Women* 571 at 581.

<sup>26</sup> *Ibid* at 682.

<sup>27</sup> Sweetnam, *supra* note 6 at 136.

<sup>28</sup> McLachlin, *supra* note 1.

<sup>29</sup> Andrea Vollum, *Court-Related Abuse and Harassment: Leaving an abuser can be harder than staying* (Vancouver: Young Women’s Christian Association (YWCA), 2010), online: YWCA Metro Vancouver <[www.ywcavan.org/sites/default/files/resources/downloads/Litigation%20Abuse%20FINAL.pdf](http://www.ywcavan.org/sites/default/files/resources/downloads/Litigation%20Abuse%20FINAL.pdf)>. See discussion later in this article; Neilson, *supra* note 16 at 28; Herman, *supra* note 25 at 575.

to these legal systems, not to resolve disputes or to enforce rights, but, rather, to maintain control, to punish, and to harm his partner. Here, we can see that the failure to fully appreciate coercive control impedes our ability to adequately differentiate sincere attempts to access justice from the use of legal systems to enlarge an abusive partner's power and control.

In legal proceedings to which the coercive controller is a party, research – particularly in the family law context – documents a range of ways in which he uses litigation to continue to abuse, intimate, control, and harass.<sup>30</sup> Various referred to as procedural abuses, legal bullying, paper stalking, paper abuse, and post-separation violence, his repertoire includes self-representing by choice in order to cross-examine his former partner, bringing multiple and frequent motions, dragging out support and custody proceedings in order to maintain control over his partner or sometimes solely for the purpose of depleting her financial resources so that, if represented, she will no longer be able to afford counsel, refusing to pay support, and withholding assets.<sup>31</sup> As the women in Herman's study noted, the "strategies of domination and control" to which they had been subjected by the perpetrators of violence against them "seemed well suited to the legal system."<sup>32</sup>

Susan Miller and Nicole Smolter's description of how civil protection orders (intended to protect women)<sup>33</sup> have become "tools in the abuser's arsenal calculated to wear them down, whittle away their self-esteem, and create hardships as they work to negotiate their lives absent of men's violence, power, and control" could apply equally to a range of legal processes.<sup>34</sup> The analogy they draw to stalking is a compelling one, and, as they point out, the confounding difference here is that the stalker is exercising legal options rather than performing criminal acts against a former intimate partner. Indeed, his conduct is often overlooked or justified as a legitimate attempt to exercise his legal rights – to access justice – rather than the continuation of coercive control. Sociologist Jane Gordon writes this of her own experience:

The psychological effect of this took its toll; the whole experience was devastating. Requests for appropriate restraints within the legal system were denied. I felt that

<sup>30</sup> Martinson, *supra* note 7 at 6; see also Federal-Provincial-Territorial Ad Hoc Working Group on Family Violence, *Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems*, vol 1 (Ottawa: Department of Justice, 2013) at 91 [Working Group].

<sup>31</sup> See Susan L Miller & Nicole L Smolter, "'Paper Abuse': When All Else Fails, Batterers Use Procedural Stalking" (2011) 17:5 *Violence Against Women* 637; Vollum, *supra* note 29; Cross, *supra* note 23 at 35, 37, 57, 63, 71; Neilson, *supra* note 16 at 28, 31.

<sup>32</sup> Herman, *supra* note 25, recounts that many women in her study provided examples of when they believed the perpetrator had successfully manipulated the system. Herman notes that by comparison to the criminal context, women in the civil context felt they had more control yet, at the same time, experienced feeling "powerless and marginalized in face of complex rules and procedures of the legal system, which they often perceived as a cynical game" (at 584).

<sup>33</sup> Civil protection orders exist in most of Canada's provinces and territories. In Ontario, legislation creating civil protection orders, the *Domestic Violence Protection Act*, was passed in 2000 but never proclaimed. In 2009, this legislation was repealed when reforms to the *Children's Law Reform Act*, RSO 1990, c C12, s 39 [CLRA], which included new restraining order provisions (the breach of which now constitutes a criminal offence), were introduced.

<sup>34</sup> Miller & Smolter, *supra* note 31 at 640.

there was no protection anywhere in the system for my interests or for those of my children; instead, judges informed me again and again that they would not interfere with my former husband's access to the judicial system.<sup>35</sup>

Kathryn Wellman describes one of the “unintended consequences” of a number of feminist reforms in the area of domestic violence – civil domestic violence legislation, a more rigorous criminal justice response, and expanded child welfare mandates to include children witnessing domestic violence – has been the expansion of “the opportunity [for batterers] to use the legal system as an additional avenue to harass their victims. Batterers can now file their own civil protection orders, fight for custody of their children, and, once in the legal system, attempt to re-victimize battered women by repeatedly dragging them into court.”<sup>36</sup>

While the doctrine of abuse of process recognizes inherent powers in the courts to control their processes to prevent abuse – be it through collateral attacks, the attempt to re-litigate matters already decided, frivolous actions, or vexatious litigation – relatively little attention has been given to the use of legal processes to further the abuse of women. The doctrine does recognize the use of legal processes to harass or oppress as a form of abuse, and case law indicating that one need consider the “whole history” of the matter might be usefully extended – it is not only the whole history of the litigation that needs to be considered but, rather, the history of coercive control.<sup>37</sup> Bringing a nuanced, contextualized understanding of coercive control to the abuse-of-process doctrine would help differentiate men's genuine efforts to access justice and their strategic manipulation of legal processes to control and punish their former partners.

### C. Navigating Intersecting Legal Systems

As noted above, multiple legal systems will frequently be engaged, simultaneously and/or sequentially. The existence of domestic violence will be relevant to a range of legal and administrative determinations: whether a child is in need of protection; whether the accused is guilty of a criminal offence; to whom custody should be awarded and access granted; whether welfare authorities will exempt a woman from the obligation to pursue child support (including through legal proceedings); and whether immigration authorities will revoke a woman's conditional permanent resident status, grant permanent resident status on a humanitarian and compassionate basis, or find her claim to be a refugee well founded.<sup>38</sup> Recognition of the relevance of domestic violence to many of these legal issues has been quite recent, and more

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<sup>35</sup> Jane Gordon “Multiple Meanings of Equality: A Case Study in Custody Litigation” (1989) 3 CJWL 256 at 263.

<sup>36</sup> Kathryn Gillespie Wellman, “Taking the Next Step in the Legal Response to Domestic Violence: The Need to Reexamine Specialized Domestic Violence Courts from a Victim Perspective” (2013) 24:3 Colum J Gender & L 444 at 453. Wellman's argument is focused in particular on specialized domestic violence courts, but, more broadly, she examines the history of legal responses to domestic violence and a host of unanticipated consequences of reform efforts.

<sup>37</sup> *Dale Streiman & Kurz LLP v De Teresi*, 2007 CanLii 1902 (ONSC), citing Henry J in *Lang Michener v Fabian* 1987 CanLII 172 (ONSC).

<sup>38</sup> See Jennifer Koshan, “Investigating Integrated Domestic Violence Courts: Lessons from New York” (2014) 51:3 Osgoode Hall LJ 989 at 1007–1009, observing that many problems arise as a result of need to navigate multiple forums to address all of these issues.

recent still has been the attention to the particular problems created by multiple system engagement. The literature that does exist focuses primarily on the interactions of criminal and family law (and, in particular, on evaluations of integrated domestic violence courts),<sup>39</sup> occasionally drawing in child welfare, as does the recent 2013 report of the Federal-Provincial-Territorial Ad Hoc Working Group on Family Violence [Working Group].<sup>40</sup>

To my knowledge, there is no Canadian data that captures the full extent of multiple legal systems engagement, and, indeed, even the data on parallel legal proceedings are limited. The Working Group provides a helpful overview of some of the existing studies: a file review of Toronto family law court files revealed that in 10.7 percent of such files there was also a criminal proceeding in relation to domestic violence; 38 percent of family law lawyers surveyed in 2010 reported that in their cases involving family violence their clients were often or always also before the criminal courts; and a survey of child welfare cases in which domestic violence was the grounds for investigation revealed a considerable overlap with criminal proceedings (36 percent) and, of these cases, also with a child custody dispute (28 percent).<sup>41</sup> In Molly Dragiewicz and Walter DeKeseredy's review of family courts in eight regions in Ontario, approximately 80 percent of the women they interviewed who were involved in family law proceedings had had contact with the police. Of these, 45 percent reported that criminal charges had been laid. In their interviews with community advocates, many reported that their clients were dealing with concurrent family and criminal law proceedings and that a very significant percentage was also dealing with child protection services.<sup>42</sup> Front-line service providers have also recently noted that it is becoming increasingly common for women to be interacting with more than one legal system, including engagement with parallel family and immigration proceedings. Consequently, those working in the sector are seeing women with increasingly complex legal problems.<sup>43</sup> Beyond the instances in which multiple proceedings are commenced are a host of other system interactions that may occur in relation to investigations, administration decision making, and alternative dispute resolution processes.

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<sup>39</sup> See Koshan, *supra* note 38, for an extensive review of this literature. See also Margaret B Drew & Marilu E Gresens, "Denying Choice of Forum: An Interference by the Massachusetts Trial Court with Domestic Violence Victims' Rights and Safety" (2010) 43:2 Suffolk UL Rev 293; Robyn Mazur & Liberty Aldrich, "What Makes a Domestic Violence Court Work? Lessons from New York" (2003) 42:2 Judges' J 5.

<sup>40</sup> Working Group, *supra* note 30. The Working Group makes clear that immigration proceedings, non-family civil, and the division of matrimonial property are beyond the scope of its work, as are "non-justice sector responses" (at 15).

<sup>41</sup> *Ibid* at 26–27.

<sup>42</sup> Dragiewicz & DeKeseredy, *supra* note 21 at 23, 43–44.

<sup>43</sup> See Barbra Schlifer Commemorative Clinic, *Justice Done: Crafting Opportunity from Adversity* (Toronto: Barbra Schlifer Commemorative Clinic, 2011); Joan Riggs, *The Impacts of Recent Law Reforms on Abused Women Involved in The Family Court Process in Ontario: An Environmental Scan of Violence Against Women Service Providers* (Oshawa, ON: Luke's Place Support and Resource Centre for Women and Children, 12 October 2011), online: Luke's Place <[www.lukesplace.ca/pdf/Impacts\\_LP\\_Final\\_Report.pdf](http://www.lukesplace.ca/pdf/Impacts_LP_Final_Report.pdf)>. The latter report concludes that "[i]mmigration law and its impact on women as they go through the family law system are currently the least understood and addressed in the system" (at 7). Websites offering information and advice to women advise of the increasingly complex inter-relationship of family law and immigration law and counsel women to get legal representation.

These various systems differ in many fundamental respects. They have varied, and in some instances conflicting, mandates; they differ in the “verification” required to establish domestic violence and, indeed, in their conceptualizations of that violence (variously framed as abuse, family violence, and intimate partner violence); and should legal proceedings be invoked, they differ in party structure, the rules of evidence, the burden of proof, and the length of time to come to a decision.<sup>44</sup> To illustrate – but by no means to exhaustively review the complex and often fraught nature of these system interactions – a case study may assist.<sup>45</sup> Assume a woman enters Canada on a visitor’s permit to spend time with her boyfriend. While in Canada, they decide to marry. He promises to initiate a family class sponsorship. A year later, a child is born. While prior to the birth, her husband was verbally abusive and intensely regulated her dress, her contact with friends and family, and her spending, after the birth he becomes physically and sexually abusive. He repeatedly tells her that he has filed the papers to initiate a family class sponsorship so that she will gain permanent resident status, yet he regularly threatens to withdraw his sponsorship and that she will be deported if she does not comply with his demands.

His use of threats and promises regarding family class sponsorship – in reality, his control over her immigration status – reflects a practice repeatedly documented in the research.<sup>46</sup> The West Coast Legal Education and Action Fund’s [LEAF] position paper on violence against women without immigration status captures this vividly: “[A]busive sponsors prey upon the precarious immigration status of their partners to control their behaviour and stop them from reporting the violence or leaving the relationship.”<sup>47</sup> Should the woman in this hypothetical

<sup>44</sup> Working Group, *supra* note 30 at 5, 14.

<sup>45</sup> While this “case study” is a hypothetical, it closely tracks the experiences of many of the mothers without status interviewed by the Vancouver YWCA. See Sheryl Burns, *Single Mothers without Legal Status in Canada: Caught in the Intersection Between Immigration Law and Family Law* (Vancouver: YWCA, March 2010), online: YWCA Metro Vancouver <[www.ywcavan.org/sites/default/files/resources/downloads/YWCA-%20Mothers%20Without%20Legal%20Status%20Report\\_2010\\_web.pdf](http://www.ywcavan.org/sites/default/files/resources/downloads/YWCA-%20Mothers%20Without%20Legal%20Status%20Report_2010_web.pdf)>. A total of twenty-three mothers and thirty front-line workers and lawyers were interviewed for the project. The author notes that women’s fear about speaking extended to participation in the project, with women understandably uncertain as to whether the interviewer could be trusted or might make a report to Citizenship and Immigration Canada or to child protection services. The report includes incidents where, for example, a woman seeking emergency hospital services was reported to Citizenship and Immigration Canada (CIC). See also Rupaleem Bhuyan et al, *Unprotected, Unrecognized: Canadian Immigration Policy and Violence Against Women, 2008–2013* (Toronto: University of Toronto, 14 November 2014), online: Migrant Mother’s Project <[www.migrantmothers-project.com/wp-content/uploads/2012/10/MMP-Policy-Report-Final-Nov-14-2014.pdf](http://www.migrantmothers-project.com/wp-content/uploads/2012/10/MMP-Policy-Report-Final-Nov-14-2014.pdf)>.

<sup>46</sup> See eg Andrée Côté, Michèle Kérisit & Marie-Louise Côté, *Sponsorship – For Better or For Worse: The Impact of Sponsorship on the Equality Rights of Immigrant Women* (Ottawa: Status of Women Canada, March 2001), online: CERIU <[www.cerium.ca/IMG/pdf/SW21-54-2000E.pdf](http://www.cerium.ca/IMG/pdf/SW21-54-2000E.pdf)>; *Safety of Immigrant, Refugee and Non-Status Women* online: Ending Violence Association British Columbia <[www.endingviolence.org/files/uploads/IWP\\_Resource\\_Guide\\_FINAL.pdf](http://www.endingviolence.org/files/uploads/IWP_Resource_Guide_FINAL.pdf)> [EVA BC]; Janet Mosher, “The Complicity of the State in the Intimate Abuse of Immigrant Women” in Vijay Agnew, ed, *Racialized Migrant Women in Canada: Essays on Health, Violence and Equity* (Toronto: University of Toronto Press, 2009) 41.

<sup>47</sup> West Coast Legal Education and Action Fund (LEAF), “Position Paper on Violence against Women without Immigration Status” (May 2012), online: West Coast Leaf <[www.westcoastleaf.org/wp-content/uploads/2014/10/2012-POSITION-STATEMENT-Women-without-Status-in-Canada.pdf](http://www.westcoastleaf.org/wp-content/uploads/2014/10/2012-POSITION-STATEMENT-Women-without-Status-in-Canada.pdf)> at 2. The Migrant Mothers Project based in Ontario characterizes immigration status as a “pivotal factor that increases vulnerability to abuse and neglect.” Bhuyan et al, *supra* note 45.

situation decide to leave the relationship and apply for social assistance in Ontario, assuming the application for family class sponsorship has indeed been filed (her immigration status will be confirmed by contacting the CIC), she will be eligible to receive benefits.<sup>48</sup> Unless she discloses the violence (and there is considerable evidence that abused women are very reluctant to disclose violence to front-line welfare workers),<sup>49</sup> both the CIC and Ontario Works will contact her husband to seek enforcement of his financial sponsorship. And absent a disclosure and verification of violence, she will be required to make reasonable efforts to enforce the sponsorship agreement and may well be required to pursue a child support application in family court.<sup>50</sup> Her entry into the immigration and family law systems, and potentially into legal proceedings, is not her choice; she is drawn in unwillingly and at best reluctantly. This is not an experience of access to justice.

In the event that her husband decides to revoke his sponsorship (and, not uncommonly, the act of leaving is what prompts this action) and she has no other form of application for status pending, she will be denied social assistance benefits. And because an application for benefits will result in contact with the CIC, it may well be what triggers immigration removal proceedings (and possibly immigration detention). She will also not have a work permit. She will be without status in Canada. Supporting herself and her child will be extraordinarily difficult. The worry that her child may be removed from her care by child welfare authorities (or custody awarded to her husband) if she is unable to provide the necessities of life and that she may be deported will be constant.<sup>51</sup>

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<sup>48</sup> Ontario Ministry of Community and Social Services, Ontario Works Policy Directive 3.11 Sponsored Immigrants (February 2013); Ontario Works will verify her status with CIC and will also verify whether there exists a valid undertaking and sponsorship. In circumstances of the sponsorship of a family class member who is a spouse, the length of the financial undertaking to provide for the essential needs of the sponsored person is three years. In British Columbia, amendments introduced in 2012 render a parent with a dependent Canadian citizen child and who has separated from an abusive spouse, has applied for permanent resident status, and who cannot leave British Columbia with the child due to a court order, agreement, or ongoing claim to custody or access by a person resident in BC, eligible for assistance. See BC Reg198/2012.

<sup>49</sup> Taryn Lindhorst, Marcia Meyers & Erin Casey, "Screening for Domestic Violence in Public Welfare Offices: An Analysis of Case Manager and Client Interactions" (2008) 14:1 Violence Against Women 5.

<sup>50</sup> Policy Directive 3.11, *supra* note 48. CIC will send a warning letter to the sponsor and Ontario Works will also contact the sponsor in relation to recovery of the sponsorship debt, unless an allegation of "abuse and/or family violence" (undefined in the directive) is made. In these circumstances, Ontario Works requests that CIC not send a warning letter. While in the ordinary course, a woman will be required to make reasonable efforts to secure the financial support under the sponsorship agreement, this can be temporarily waived for three to twelve months if "there is a breakdown in the sponsorship relationship because of abuse and/or family violence." The circumstances warranting a waiver must be clearly documented, and reasonable third party verification from "police, a lawyer, a community or health care professional" provided. The obligation to pursue financial support can be permanently waived if there is "evidence of abuse or family violence over a prolonged period of time and the Administrator is satisfied that it is not in the best interest of the sponsored immigrant to pursue support." Similar provisions apply in relation to the obligation to pursue child and spousal support. See Ontario Ministry of Community and Social Services, Ontario Works Policy Directive 5.5 Family Support (February 2013). A waiver is also possible here if "evidence of domestic violence or a restraining order is in effect against the other parent" is provided.

<sup>51</sup> Burns, *supra* note 45; Dragiewicz & DeKeseredy, *supra* note 21 at 51.

Without his family class sponsorship, her only option to regularize her status in most instances is to initiate a “humanitarian and compassionate” (H & C) application. The H & C application often takes two years (if not more) to process. It involves the exercise of ministerial discretion to decide whether to permit the application to be made from within Canada and whether to grant permanent resident status.<sup>52</sup> Governed by an internal policy guide (IP5), officers are to consider a range of factors, among them, evidence of her “establishment” in Canada (often difficult for an abused woman who has been socially isolated and unable to secure employment), her ties to Canada, “family violence considerations” (officers are directed to consider “police incident reports, charges or convictions, reports from shelters for abused women, medical reports, etc.”<sup>53</sup>), the best interests of any children affected by the application (officers are clearly instructed that this “*does not* mean that the best interest of the child outweighs all other factors”),<sup>54</sup> and the consequences of the separation of relatives.<sup>55</sup> Moreover, at the end of the day, after all other processing has concluded, her application is likely to be unsuccessful if she continues to be in receipt of social assistance.<sup>56</sup>

The H & C application also does not prevent her removal from the country, and, in some circumstances, she will be removed without her child. A family law order will have an important bearing here. If there exists an order for joint custody or for access in favour of the child’s father, she cannot leave the country with her child. However, particularly if the order was made prior to the commencement of removal proceedings, it may serve to delay her removal. The courts have also been clear that non-removal orders under child custody legislation cannot be granted for the purposes of frustrating removal orders in immigration proceedings.<sup>57</sup> Similarly, in the family law realm, the woman’s “lack of status may disadvantage her during a child custody hearing if her former spouse suggests she has the capacity to abduct their children.”<sup>58</sup> Notwithstanding these important system interactions, she cannot count on accessing decision makers who will fully understand and consider these interactions. In the worst case scenario, she will be removed without her child prior to the determination of her H & C application, her application will ultimately be unsuccessful, and the child will remain in the sole custody of the abusive father (or,

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<sup>52</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, s 25 [IRPA].

<sup>53</sup> CIC, *IP5 Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (Ottawa: CIC, 2011) at 50.

<sup>54</sup> *Ibid* at 14 (emphasis in original).

<sup>55</sup> *Ibid* at 13.

<sup>56</sup> *Ibid* at 61. See Heather Neufeld, “Inadequacies of the Humanitarian and Compassionate Procedure for Abused Immigrant Spouses” (2009) 22 *JL & Soc Pol’y* 177; Mosher, *supra* note 46; Nicole Simes, “The Impact of Spousal Sponsorship Laws on Intimate Partner Violence: A Canadian-American Comparison” (2010) 7:1 *JL & Equality* 91.

<sup>57</sup> See eg *JH v FA*, 2009 ONCA 17. See also *NEC v AAA*, 2010 ONCJ 54, wherein the court fashioned an order for custody and access that was very much alive to the unfolding deportation proceedings against the mother.

<sup>58</sup> West Coast LEAF, *supra* note 47 at 3. Martinson, *supra* note 7 at 8, drawing upon her experience in working to facilitate judicial communication in child abduction cases, notes that “both in Canada and world-wide, most of the parents who take children without the legal authority to do so (1) are women who have moved from their homes to another place, met someone, have children; (2) say that they and their children are experiencing IPV; (3) feel they are unsafe; (4) don’t think they will be protected in the place they are living; and (5) take the children and go back home.”



potentially, the child welfare authorities).<sup>59</sup> While both the immigration and family law systems do consider the “best interests of the child” – this being the determinative factor in family law – it is only one of a number of factors considered in relation to an H & C application.

Invoking the criminal justice system through a call to police adds yet another layer of complexity. As noted earlier, a call to police will prompt contact with child protection authorities and very likely with immigration.<sup>60</sup> There is a risk that her spouse will blame her and that she may be charged.<sup>61</sup> The charge alone, and almost certainly a conviction, will impact her immigration status. Indeed, changes to the *Immigration and Refugee Reform Act* in relation to “criminality” and “serious criminality” have rendered this more likely.<sup>62</sup> Should she be charged, and a routine no-contact order issued as a condition of her release, this may establish a status quo in relation to custody that will bear heavily on the outcome of any contested custody matter. The terms of a bail order may also preclude participation in any counselling mandated by the child protection authorities.<sup>63</sup>

While an endless array of possible cross-system impacts exists, particularly concerning is the rippling effect of engagement (or lack thereof) with the criminal justice system. A conviction will often constitute the “proof” or “verification” required as women navigate other systems. In the context of family law proceedings, the conviction will be treated as *prima facie* evidence of the underlying conduct, and while not determinative of the outcome regarding custody and access, it will play an important role. A conviction will also be important in providing the verification of abuse required, as noted above, in an H & C application and for a waiver of her obligation to pursue child support or an immigration undertaking, if she is in receipt of social assistance.<sup>64</sup> While neither regime restricts acceptable verification to a conviction, a conviction is often treated as the gold standard. An acquittal (or, indeed, the absence of a criminal proceeding)

<sup>59</sup> Colleen Varcoe & Lori Irwin, “‘If I Killed You, I’d Get the Kids’: Women’s Survival and Protection Work with Child Custody and Access in the Context of Woman Abuse” (2004) 27:1 *Qualitative Sociology* 77.

<sup>60</sup> Burns, *supra* note 45. Women in the YWCA study reported not calling the police for fear of not being believed and of being deported. In instances where police had been called and a charge laid, abusers threatened to cancel sponsorships unless women recanted. Throughout North America, the Don’t Ask Don’t Tell movement has sought to facilitate the ability of those with precarious status to access critical social services – including policing – without risk of immigration and border control involvement. Toronto City Council voted on 21 February 2013 to become a “sanctuary city” wherein access would be assured. The position of the Toronto Police Services is that “victims and witnesses of crime shall not be asked their immigration status, unless there are bona fide reasons to do so,” however if status is disclosed, this must be reported to CIC. Toronto Police Services, “Victims and Witnesses without Legal Status” online: Toronto Police Service <[www.torontopolice.on.ca/publications/files/victims\\_and\\_witnesses\\_wthout\\_legal\\_status.pdf](http://www.torontopolice.on.ca/publications/files/victims_and_witnesses_wthout_legal_status.pdf)>. See also Abigail Deshman, “To Serve Some and Protect Fewer: The Toronto Police Services’ Policy on Non-Status Victims and Witnesses of Crime,” (2009) 22 *JL & Soc Pol’y* 20.

<sup>61</sup> Pollack et al, *supra* note 23.

<sup>62</sup> *IRPA*, *supra* note 52, s 36(1)–(2). Most troubling is the combined effect of sections 36(2) and 36(3)(a); the latter deems all hybrid offences to be indictable offences and the former provides that a foreign national is inadmissible if convicted in Canada of an offence punishable by way of indictment. Common assault (section 266 of the *Criminal Code*) is a hybrid offence and, as a result, even a conviction for common assault will render a foreign national inadmissible to Canada.

<sup>63</sup> Working Group, *supra* note 30 at 58.

<sup>64</sup> See the discussion of waivers and verification in note 50 in this article.

will not be determinative of the outcome in other contexts, but it is also likely to be highly impactful.

The heavy reliance often placed on the outcome in the criminal justice system is especially troubling in light of the reality that for a host of reasons – contact with child welfare authorities, fear of retaliation, loss of income support and potentially of housing, shame, love, fear of a racist response, community ties, distrust, and immigration consequences – most women never report the abuse to police.<sup>65</sup> As such, a concern arises regarding the weight that actors situated within multiple legal domains place on the criminal justice system to provide verification and proof of the violence.<sup>66</sup> As Linda Neilson concludes, “[i]f family lawyers and courts ignore or discount patterns and incidents of domestic violence that do not result in a criminal charge, the vast majority of the criminal acts of domestic violence will not be considered in family and child protection litigation.”<sup>67</sup> Moreover, the focus on the criminal charge and conviction reinforces the incident-based approach to domestic violence, obscuring the tactics deployed by coercive controllers, including their use of law and legal processes, to isolate, entrap, and control women. As Veronica Thronson illustrates by reference to threats to revoke immigration sponsorships, it is not merely a matter of family court judges understanding immigration relief but also understanding “how abusers can use the immigration status of their partners and their partner’s children to control and prolong abusive relationships ... Family courts must be aware that abusers may use the courts to continue to perpetuate abuse on their partners and must prevent exploitation of family proceedings to perpetuate abuse.”<sup>68</sup>

Another possibility is that the woman in this hypothetical may be faced with conflicting legal orders. In its 2013 report, the Working Group observed that it is “not uncommon in many parts of Canada for a criminal court to issue a peace bond or make an order with respect to bail or sentencing, without knowledge that there are simultaneous family law proceedings between the parties, or that a family law order has already been issued.”<sup>69</sup> Similarly, family court judges may order a settlement conference or make an access ruling that conflicts with pre-existing bail or probation conditions precluding the accused’s contact with his intimate partner and children. As the Honourable Donna Martinson explains, “criminal courts order no contact, child protection authorities say the children will be apprehended if there is contact and the family court focuses on the view that contact is in the best interests of the child and grants unsupervised access.”<sup>70</sup>

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<sup>65</sup> Statistics Canada, *Family Violence in Canada: A Statistical Profile*, Catalogue no 85-224-X (Ottawa: Statistics Canada, 2011) at 5, reporting on data from the General Social Survey where in 2009, 22 percent of victims of spousal violence stated that the incident came to the attention of the police. Working Group, *supra* note 30 at 59; Johnson & Fraser, *supra* note 24; Aya Gruber, “The Feminist War on Crime” (2007) 92 Iowa L Rev 741; Dianne Martin & Janet Mosher, “Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse” (1995) 8 CJWL 3.

<sup>66</sup> Neilson, *supra* note 16 at 13–16; Working Group, *supra* note 30 at 30–33.

<sup>67</sup> Neilson, *supra* note 16 at 15.

<sup>68</sup> Veronica T Thronson, “Domestic Violence and Immigrants in Family Courts” (2012) 63:1 Juvenile & Family Crt J 63 at 74.

<sup>69</sup> Working Group, *supra* note 30 at 12.

<sup>70</sup> Martinson, *supra* note 7 (slide presentation), online: University of New Brunswick <[www.unb.ca/conferences/mmfc2014/\\_resources/presentations/donna-martinson-keynote-slides.pdf](http://www.unb.ca/conferences/mmfc2014/_resources/presentations/donna-martinson-keynote-slides.pdf)>.

A background report for the Working Group prepared by criminal defence lawyers notes that having access to information about family law and child welfare proceedings at the bail hearing – where no contact orders are routinely issued – is vital, yet very difficult, to obtain, especially given that the bail hearing occurs quickly.<sup>71</sup> Indeed, the Working Group concludes that “[c]urrently in Canada, there is no jurisdiction with the technological capacity to implement systemic matching on an ongoing basis.”<sup>72</sup> The challenge of accessing this information directly from the parties is heightened when parties are self-represented, as is commonly the case.<sup>73</sup> In the event of conflicting orders, while the criminal court order will technically trump that issued by the family court, the result for families without explicit legal advice is likely to be confusion, and for women and children, potentially compromised safety.<sup>74</sup>

In other circumstances, orders may not conflict, but they will be inconsistent. As Justice Harvey Brownstone explains, it is possible for a family court judge to make a factual determination that violence did not exist, yet for a criminal conviction to be subsequently secured, notwithstanding the higher burden of proof in the latter case. As he explains, this could arise where a woman is unrepresented in family court (a very common occurrence) yet has expert legal counsel in the form of a Crown attorney able to adduce a solid evidentiary foundation to support a conviction in the criminal proceeding.<sup>75</sup> While the result is not the existence of conflicting orders, the inconsistent factual determinations and the conviction in the criminal proceeding raise concerns regarding whether the custody and access arrangements ordered in the family law context adequately account for the risk of future harm. Equally concerning are inconsistent outcomes between family courts and immigration determinations: a family court may determine that the best interest of the child rests in an award of joint custody, but a mother without status is ordered removed from Canada.

A number of lawyers and judges understand these various legal systems to interact in yet another manner – that is, as strategically deployed by disingenuous victims. For example, in a background report for the Working Group, lawyers were advised to take the time to explain to their clients the consequences of invoking the criminal justice system since it may “give a client pause where he or she is contemplating making a complaint to police out of frustration rather

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<sup>71</sup> Joseph Di Luca, Erin Dann & Breese Davies, *Best Practices where there is Family Violence (Criminal Law Perspective)* (Ottawa: Department of Justice Canada, 2012).

<sup>72</sup> Working Group, *supra* note at 30 at 76. Recent changes in Ontario may go a small distance in addressing this. Reforms to the *CLRA*, *supra* note 33, require a parenting affidavit be filed in support of an application for custody. Required elements of the affidavit include information regarding involvement in a child protection court case, criminal convictions, current charges, and any criminal offences. In addition, the deponent is asked, in relation to section 24(4) of the Act which requires the court to consider whether the person has at any time committed violence or abuse against a spouse, child or member of the housing, to “describe incident(s) or episode(s) and provide information about the nature of the violence or abuse, who committed the violence and who the victim(s) was/were.” See *Family Law Rules*, O Reg 114/99, Form 35.1: Affidavit in Support of Claim for Custody or Access.

<sup>73</sup> Working Group, *supra* note 30 at 75.

<sup>74</sup> *Ibid* at 64. The relationship between child welfare and family law orders is addressed in *Child and Family Services Act*, RSO 1990, c C.11, ss 57, 57.1, 57.2 [CFSA].

<sup>75</sup> Working Group, *supra* note 30 at 110, citing Harvey Brownstone, *Tug of War: A Judge’s Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court* (Toronto: ECW Press, 2009).

than fear or for the purpose of gaining an advantage in the family law proceedings.”<sup>76</sup> And while noting concerns for women’s safety, the report’s authors suggest that “[b]alanced against these concerns, however, must be a recognition that in the often emotional context of a family breakdown, allegations of violence made by one spouse against another can be exaggerated or even fabricated.”<sup>77</sup>

A counter-argument draws our attention to the empirical literature showing that the much more common situation is for no evidence at all to be adduced in relation to the abuse in the relationship or for that evidence, if presented, to be discounted.<sup>78</sup> This may occur because a woman has not disclosed the abuse – it is not only the police to whom women are reluctant to disclose – and, if represented, because her counsel has not screened for abuse. The Working Group has reviewed evidence that suggests few lawyers screen for domestic violence: 83 percent of lawyers attending a national family law program in 2010 indicated that they never or rarely used a screening tool.<sup>79</sup> In some instances, the abuse is disclosed but not adduced because of an assessment by counsel that the disclosure may be considered as evidence that her client is an “unfriendly parent” or that she is fabricating allegations as a ploy to secure custody.<sup>80</sup> Disturbingly, research undertaken by the Vancouver Young Women’s Christian Association [YWCA] found that even where a child has been directly abused lawyers and advocates often advise mothers without status “not to disclose such abuse [in family law proceedings] unless they can prove it through physical or third-party evidence because such allegations may be considered false and therefore harm the mother’s case for custody.”<sup>81</sup> In addition, significant problems will arise, no doubt, when, as Martinson and others have observed, family law judges (or lawyers)

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<sup>76</sup> Di Luca, Dann & Davies, *supra* note 71 at 6.

<sup>77</sup> *Ibid* at 9.

<sup>78</sup> Neilson, *supra* note 16 at 13–14. Neilson underscores the point that the failure to present evidence of domestic violence occurs at all stages of the family law process and that this failing is repeatedly found in empirical studies. This occurs, Neilson and others maintain, for a variety of reasons: settlement pressure (including from professionals); judicial resistance; and the lack of understanding among professionals. See also Elizabeth L MacDowell, “When Courts Collide: Integrated DV Courts and Court Pluralism” (2010–2011) 20 *Texas J Women & L* 95 at 114, who points out that many domestic violence cases are never identified by courts as domestic violence cases, even when the violence is relevant to the issues before the court.

<sup>79</sup> Working Group, *supra* note 30 at 130. Recent legislative changes in British Columbia require all family dispute resolution professionals to screen for family violence to assess whether dispute resolution processes are safe and appropriate. See *Family Law Act*, SBC 2011, c 25. An early assessment suggests, however, that there has not been an appreciable increase in the information provided to judges, in either the family or criminal law settings, about family violence and the risk of future harm. As the authors conclude, “[t]hese results raise the potential that the aims of the FLA to ensure the safety, security and well-being of victims of family violence, and in particular children, are not, at least in the early days, being met. If this is true, this presents a significant justice concern.” See Donna Martinson & Margaret Jackson, “Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts” (final report by the Canadian Observatory on the Justice System’s Response to Intimate Partner Violence, 14 January 2016) online: The FREDA Centre for Research on Violence Against Women <[www.fredacentre.com/wp-content/uploads/2016/01/Observatory-Martinson-Jackson-Risk-Report-FINAL-January-14-2016.pdf](http://www.fredacentre.com/wp-content/uploads/2016/01/Observatory-Martinson-Jackson-Risk-Report-FINAL-January-14-2016.pdf)> at 3.

<sup>80</sup> Christine Harrison, “Implacably Hostile or Appropriately Protective? Women Managing Child Contact in the Context of Domestic Violence” (2008) 14:4 *Violence Against Women* 381.

<sup>81</sup> Burns, *supra* note 45 at 23.

are, for example, unaware of the immigration consequences of their orders.<sup>82</sup> The absence of screening, together with the views expressed regarding the strategic use of allegations of domestic violence, reveal something even more troubling than a narrow incident-based conceptualization of domestic violence: the lingering hold of myths regarding women's fabrications of violence.<sup>83</sup> Significantly, far less attention has been paid to the strategic engagement of the legal systems by coercive controllers.

Finally, as will be clear, the engagement with multiple legal systems often necessitates the retelling of one's story and, no doubt, seemingly endless court appearances with attendant costs, delays, the expanded potential for contact with the abuser, and increased levels of stress.<sup>84</sup> Importantly, the Working Group has drawn attention to the conclusions of various death review committees and inquests that the failure to share information has impeded fully informed risk assessments and has been a contributing factor in tragic family homicides.<sup>85</sup> Similarly, the lack of information sharing has been identified as undermining the assessment of risk to women and children in the context of various immigration and refugee determinations, including those facing a Canadian citizen child if the mother is to be removed.<sup>86</sup>

Not surprisingly, websites designed to provide information to women urge them to secure legal advice. The woman in my hypothetical, if searching for guidance on the Internet might learn that "[i]f you are dealing with family law issues get legal advice as soon as possible to protect your rights"<sup>87</sup> and that "timely immigration legal advice is extremely important."<sup>88</sup> Yet women's access to counsel is often extraordinarily limited, both because they rarely have the

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<sup>82</sup> Martinson, *supra* note 7 at 6. A similar observation is repeatedly made in the American literature; see eg David B Thronson, "Thinking Globally, Acting Locally: The Problematically Peripheral Role of Immigration Law in the Globalization of Family Law" (2013) 22 *Transnational L & Contemporary Problems* 655, noting that in their struggle with the complexities at the intersections of family law and criminal law some judges ignore immigration issues entirely, while others attach undue weight (at 656). For a state-by-state review, see Soraya Fata et al, "Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings" (2013) 47:2 *Fam LQ* 230.

<sup>83</sup> See Cross, *supra* note 23 for a discussion of this issue, and Elaine Craig more generally on the enduring nature of these myths. Elaine Craig, "Examining the Websites of Canada's 'Top Sex Crime Lawyers': The Ethical Parameters of Online Commercial Expression by the Criminal Defence Bar" (2015) 48:2 *UBC L Rev* 257.

<sup>84</sup> Koshan, *supra* note 38 at 1011; Working Group, *supra* note 30 at 85–87.

<sup>85</sup> Mary Ellen Turpel-Lafond, *Honouring Christian Lee: No Private Matter: Protecting Children Living with Domestic Violence* (Victoria: Office of the Representative for Children and Youth, September 2009), online: Representative for Children and Youth <[www.rcybc.ca/sites/default/files/documents/pdf/reports\\_publications/honouring\\_christian\\_lee.pdf](http://www.rcybc.ca/sites/default/files/documents/pdf/reports_publications/honouring_christian_lee.pdf)>; Mary Ellen Turpel-Lafond, *Honouring Kaitlynnne, Max and Cordon: Make Their Voices Heard Now* (Victoria: Office of the Representative for Children and Youth, March 2012), online: Representative for Children and Youth <[www.rcybc.ca/sites/default/files/documents/pdf/reports\\_publications/honouring\\_kaitlynnne.pdf](http://www.rcybc.ca/sites/default/files/documents/pdf/reports_publications/honouring_kaitlynnne.pdf)>.

<sup>86</sup> EVA BC, *supra* note 46 at 158–162.

<sup>87</sup> "Finding Help with your Family Law Problem," online: Family Law Education for Women <[www.onefamilylaw.ca/en/legalhelp/](http://www.onefamilylaw.ca/en/legalhelp/)>.

<sup>88</sup> Kristin Marshall, "Can a woman be deported without her child?," online: Luke's Place <[lukesplace.ca/resources/can-a-woman-be-deported-without-her-child/](http://lukesplace.ca/resources/can-a-woman-be-deported-without-her-child/)>.

income to privately retain counsel and because legal aid plans provide limited or no coverage.<sup>89</sup> As the Vancouver YWCA report concludes, women are often left to deal with the immigration and family law systems entirely on their own.<sup>90</sup> However, it is clear that a woman requires not simply access to a lawyer but also to one who understands these complex system interactions.<sup>91</sup>

The common response to these issues identified at the intersections of multiple legal systems is to urge greater collaboration, communication, and information sharing across systems. The Working Group concludes, for example, that “[e]nsuring adequate access to justice for families simultaneously navigating these various branches of the justice system requires a concerted effort on the part of justice system professionals and those working within these systems to provide a more cohesive and coordinated response to these important social issues,” and it reviews several promising practices in this regard.<sup>92</sup> Martinson echoes this conclusion, adding that “meaningful access to justice in these cases requires using innovative approaches to such coordination that lead to not just consistent solutions, but the most effective solutions possible within the legal frameworks that apply.”<sup>93</sup> Similarly, researchers and front-line advocates who have focused their attention on the intersections between immigration, family, and child welfare systems have called for increased coordination and information sharing.<sup>94</sup> The Ending Violence

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<sup>89</sup> Among the many difficulties women report when self-representing are dealing with the paperwork, understanding court procedures, knowing how to act, ongoing abuse, and dealing with a former partner or his lawyer; see Dragiewicz & DeKeseredy, *supra* note 21 at 33.

<sup>90</sup> Burns, *supra* note 45 at; Law Commission of Ontario, *supra* note 1; Dragiewicz & DeKeseredy, *supra* note 21; Peter Jaffe, Claire Crooks & Nicolas Bala, “A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes” (2009) 6:3-4 *Journal of Child Custody – Special Issue: Domestic Violence Issues in Child Custody* 169; Pamela Cross, *Through the Looking Glass: The Experiences of Unrepresented Abused Women in Family Court* (Oshawa, ON: Luke’s Place Support and Resource Centre, March 2008), online: Ontario Association of Interval and Transitions Houses <[www.oaith.ca/assets/files/Publications/Family%20Law/Through-the-looking-glass.pdf](http://www.oaith.ca/assets/files/Publications/Family%20Law/Through-the-looking-glass.pdf)>.

<sup>91</sup> Cross, *supra* note 23. See *R v Pham*, 2013 SCC 15, where the court found that a sentencing judge may exercise a discretion to take into consideration the collateral consequences of a sentence – in this instance, that the imposition of a sentence of two years resulted in the accused losing the right to appeal a removal order against him. Neither party raised this at the time of sentencing. Indeed, it appears neither was aware of the consequences. The court reduced the sentence to two years less a day, remarking that it was wrong for the Court of Appeal to have refused to do so based on its belief that the accused had abused Canada’s hospitality.

<sup>92</sup> Working Group, *supra* note 30 at 17. The Working Group further describes access to justice as a “critical driver” of initiatives to improve system coordination and cohesion (at 14). While not addressing the specific interface of criminal, family, and child welfare proceedings, the *Roadmap for Change* report, *supra* note 1 at 7, comes to a similar conclusion. There is a need to “improve collaboration and coordination not only across and within jurisdictions, but also across and within all sectors and aspects of the justice system (civil, family, early dispute resolution, courts, tribunals, the Bar, the Bench, court administration, the academy, the public, etc.)” The British Columbia Justice Reform initiative, *Making Justice Work*, *supra* note 1 at 7, also emphasizes the need to break down silos in the justice system and to develop systems thinking.

<sup>93</sup> Martinson, *supra* note 7 at 1; see also Dragiewicz & DeKeseredy, *supra* note 21, who found overwhelming support among both women and community advocates in their study for increased communication between courts, automatic sharing of court orders, and the sharing of information related to risk assessment (at 24).

<sup>94</sup> See eg, EVA BC, *Provincial Briefing Document 5: Executive Summary, Protection of Children of Abused Immigrant, Refugee and Non-Status Women* (May 2010), online: Ending Violence Association of BC <[www.endingviolence.org/wp-content/uploads/2010/07/BC\\_BN\\_5\\_Child\\_Protection.pdf](http://www.endingviolence.org/wp-content/uploads/2010/07/BC_BN_5_Child_Protection.pdf)>.

Association, a women's advocacy organization in British Columbia, recommends a yet more expansive web of connectivity, drawing in not only criminal, family, child welfare, immigration, and social assistance systems but also settlement and other community-based agencies, health services, the education system, housing services, and the private bar.<sup>95</sup>

Greater system coordination and information sharing is held out as offering the potential for improved decision making, reductions in costs and delays, better coordination of services, stricter controls to limit procedural stalking and abuse, and the enhanced safety of women and children.<sup>96</sup> While enhanced systems collaboration and coordination seems self-evidently sound, let me offer a few cautions – cautions that suggest we need to define more precisely to what ends collaboration, coordination, and information sharing are directed – and a call to consider women's safety as an integral component of access to justice.<sup>97</sup>

Consider, for example, the possibility that particular kinds of court fragmentation may be in women's interests – for example, that separate criminal and family law courts may be preferable to the integrated court model where one judge hears family and criminal law matters, separately, which is a model that is often proposed as a partial solution.<sup>98</sup> While integrated courts may prevent conflicting orders and enhance judicial efficiency, they may create a new problem for women. Elizabeth McDowell calls this the “all your eggs in one basket” problem that results because “assignment to a single judicial officer only helps the limited number of victims with multiple cases whose first case proceeds favorably and where the hearing officer is provided with complete information.”<sup>99</sup> One can imagine that, especially where the first case is framed narrowly, focused on a single incident of physical abuse, and where important evidence is missing, concerns might arise regarding the same judicial officer hearing the second or third cases (which are likely to involve child welfare and family law). A related point, which is also highlighted by McDowell, questions whether the proliferation of specialized domestic violence courts may operate to render domestic violence even less visible to legal actors working in domains outside of these courts, especially when the necessary expertise is concentrated among a few system actors rather than being broadly dispersed.<sup>100</sup>

The current rules governing information exchange between these legal systems and between various legal proceedings is enormously complex (and it is unfathomable how parties can self-represent in any of these proceedings). This complexity, reviewed in considerable detail by the Working Group, arises because of the range of competing interests and values at stake: the

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<sup>95</sup> EVA BC, *supra* note 46 at 221.

<sup>96</sup> See also Wellman, *supra* note 36, who argues that fully integrated courts may mitigate the manipulation of the legal system by coercive controllers to inflict re-victimization; Koshan, *supra* note 38. The Working Group, *supra* note 30 at 91, concludes that a “lack of consistency can also encourage a proliferation of motions as litigants have little to lose making the same arguments before a different judge with the hope of getting a different result. Further, without a judge monitoring the overall number of applications, their frequency, or necessity, vexatious litigation can result in perpetrators using the legal system to continue abuse of the victim.”

<sup>97</sup> Wellman, *supra* note 36.

<sup>98</sup> An integrated court was established in Toronto in June 2011. A number have existed in the United States for quite some time; see Koshan, *supra* note 38 for a review of the literature evaluating these courts.

<sup>99</sup> MacDowell, *supra* note 78 at 112.

<sup>100</sup> *Ibid* at 114–115.

accuracy of decision making; fair trial rights; the fostering of beneficial therapeutic relationships; the protection of confidentiality; and respect for privacy, among them. As the Working Group has queried, if counselling records will be disclosed in criminal proceedings, what is the effect on an accused or a victim's participation in child welfare- or family law-related counselling? What is the effect of the production of child protection records to an accused on the ability to meaningfully assist children in need of protection if confidentiality is not assured? In the balancing of multiple interests, it is not at all clear that more information exchange across legal systems and proceedings is in women's interests (indeed, women have asserted their privacy and equality interests in a number of criminal and civil cases to resist the sharing of records/information).<sup>101</sup> These, and other, considerations no doubt also have important implications, as the Working Group suggests, for the full disclosure of information necessary for adequate risk assessments.

Additional challenges arise not through a failure to communicate but, rather, from conflicting system mandates and assumptions. This incompatibility has been raised, for example, by family law judges in relation to the impact of standard bail conditions – no contact orders – on the adjudication of family law matters such as custody, access, and exclusive possession of the matrimonial home.<sup>102</sup> The no-contact order is intended to prevent harm by prohibiting contact (forced relationship exit) and is issued as a matter of course, often over the clear objections of women. In this instance, harm is understood in a narrow sense, as arising from contact; prevent contact, and women are assumed to be safe. The family court works from an entirely different framework in which a child's contact with both parents is presumptively to be facilitated and contact will be prohibited only in exceptional circumstances where a judge is persuaded that it would not be in the child's best interest.<sup>103</sup> Fiona Kelly illustrates, through a discussion of the case of *H.H. v H.C.*, the markedly different assessments and outcomes across these domains. The father, who had been convicted of serious offences against his wife and his in-laws, was granted supervised access in the family law realm, while child protection authorities arranged for the mother and child to move to another province based on an assessment of risk, and the police considered the case a "homicide" prevention file.<sup>104</sup>

A criminal law order takes precedence based on federal paramountcy and not as a result of principles designed to best ensure the safety and security of women and children. Justice Bruce Pugsley, in his characterization of the standard no-contact order as "rote treatment" devoid of

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<sup>101</sup> See *R v O'Connor*, [1995] 4 SCR 411; *R v Mills* [1999] 3 SCR 668; *M (A) v Ryan*, [1997] 1 SCR 157. The Working Group report addresses a number of these complex questions. Working Group, *supra* note 30 at 47ff.

<sup>102</sup> Di Luca, Dann & Davies, *supra* note 71, advise criminal defence counsel that in order to protect the accused's relationship with his children and to prevent the creation of a "status quo" in respect of custody and possession of the matrimonial home, the accused may wish to secure reports from an access supervisor (if favorable to the accused) and seek an emergency order for specified access if there is supervised access, an order for non-removal from the jurisdiction, and/or a preservation order (at 21–22).

<sup>103</sup> For a discussion of this expectation, including in cases of violence, see Fiona Kelly, "Enforcing a Parent/Child Relationship at All Costs?: Supervised Access Orders in the Canadian Courts" (2011) 49:2 Osgoode Hall LJ 277. Kelly notes that contact with the father is often characterized as a child's right, even in circumstances where the child opposes contact (at 294 and 305–307).

<sup>104</sup> *Ibid* at 300–303.



professional discretion that “wreaks family law havoc,” would not be the first person to question whether this practice is actually in women’s interests.<sup>105</sup> It is thus not clear that the routine issuance of no-contact orders, or their precedence over family law orders, necessarily makes women safer (notwithstanding ongoing concerns that family court judges often pay insufficient attention to women’s safety).

Indeed, we could identify multiple conflicting mandates among the various legal systems in which women may be required to participate: “promote the best interests, protection and well-being of children”;<sup>106</sup> ensure that the stigma of a criminal conviction attaches only when the state has met its high burden of proof; promote the “equitable sharing by parents of responsibility for their children”;<sup>107</sup> recognize “individual responsibility and [promote] self-reliance through employment”;<sup>108</sup> and “permit Canada to pursue the maximum social, cultural and economic benefits of immigration, to see that families are reunited in Canada, and to protect public health and safety and to maintain the security of Canadian society.”<sup>109</sup> Although the safety of women has been the stated rationale for a raft of reforms in some number of these systems over the past two decades – the creation of specialized domestic violence courts, the introduction of mandatory charging and pro-prosecution policies and routine no-contact orders, the development of family law reforms in some provinces directing judges to consider domestic violence, and the creation of domestic violence exceptions to the application of harsh social assistance and immigration policies – none of these regimes is expressly focused on women’s safety.<sup>110</sup> And, certainly, many women’s experiences of these systems and their interactions are not ones of enhanced safety but, rather, quite the opposite. Indeed, the power these systems wield to unravel women’s lives has increased significantly in the past decade with changes in their respective legal frameworks and the increasing confluences between them – between immigration and criminal law (crimmigration), criminal law and social assistance delivery, social assistance and immigration, and child welfare and immigration.<sup>111</sup>

<sup>105</sup> *Shaw v Shaw*, 2008 ONCJ 130. In *Shaw*, the mother was charged after allegedly hitting her husband and based on a phone call with a friend that had been intercepted by her husband during which she joked about solving her matrimonial problem with a gun if she could access one. The husband/father went to the police a month later to request that she be charged. See also the unpublished Masters’ thesis of Laurence Dominique Lustman, a former domestic violence special prosecutor. Laurence Dominique Lustman, “Hearing the Voices of Victims of Domestic Violence: Agency, No-Contact Orders, and No-Drop Prosecution” (LLM thesis, Osgoode Hall Law School, York University, 2008) [unpublished]; Jeannie Suk, *At Home in the Law: How the Domestic Violence Revolution Is Transforming Privacy* (New Haven, CT: Yale University Press, 2009).

<sup>106</sup> *CFSA*, *supra* note 74, s 1(1) (paramount purpose).

<sup>107</sup> *Family Law Act*, RSO 1990, c F.3, preamble.

<sup>108</sup> *Ontario Works Act, 1997*, SO 1997, c 25, Schedule A, s 1.

<sup>109</sup> *IRPA*, *supra* note 52, ss 3(1), (a), (d), (h), in particular.

<sup>110</sup> Even in relation to criminal justice intervention, there is little evidence that women’s safety is enhanced, and, indeed, there is evidence to suggest that for some women the result is an escalation in violence. For a review of much of the empirical literature, see Andrew R Klein, “Practical Implications of Current Domestic Violence Literature” (research report submitted to the US Department of Justice, 2008), online: National Criminal Justice Reference Service <[www.ncjrs.gov/pdffiles1/nij/grants/222320.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/222320.pdf)>.

<sup>111</sup> Koshan, *supra* note 38, concluded in her review of integrated domestic violence courts that while there seems to be a broad consensus that safety for women has been one of the central goals in their creation, it is often “unclear how these goals are defined, to be achieved and measured” and how safety is conceptualized (at 1004).

Changes in immigration law – the introduction of conditional permanent resident status,<sup>112</sup> new criminality and serious criminality provisions, an erosion of family class access to Canada,<sup>113</sup> the emphasis on enforcement and speedy removal, and the increased use of detention – have rendered the ability to remain in Canada more precarious for many women, profoundly impacting their safety and security.<sup>114</sup> A growing US scholarship documents the dramatic impact of immigration reforms that have lowered the threshold for detention and deportation, creating what David Thronson has called “involuntary transnational families.”<sup>115</sup> A recent report, entitled “Shattered Families,” suggests a conservative estimate puts the number of US citizen children in foster care at any given time as a result of immigration detention and removal at 5,100.<sup>116</sup> Veronica Thronson’s assessment of US immigration law is equally applicable to the Canadian context:

Immigration law itself contributes to the perpetuation of domestic violence ... women and children are at greater risk for domestic violence not only because of their immigration status, but because of way US immigration law is structured ... [it]

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<sup>112</sup> Changes to the regulations in October 2012 created a new category of “conditional permanent residence” status for sponsored spouses and cohabiting partners. For those married or in a conjugal relationship for less than two years and without children, “permanent residence” was made conditional on the continued cohabitation in a conjugal relationship for a two-year period. While an exception was created for abuse and neglect by the sponsor, given the challenges of fitting within the exception and the risks should one be found not to fit the exception, few applications for the exception have been made. Many women’s advocates have expressed concern that this reform has served to more fully entrap women in abusive relationships. See eg the brief of the Migrant Mothers Project, “Spousal Sponsorship and Conditional Permanent Residence” (14 January 2016), online: Migrant Mothers Project <[www.migrantmothersproject.com/wp-content/uploads/2015/12/MMP-Conditional-PR-Policy-Brief-Jan-14-2016.pdf](http://www.migrantmothersproject.com/wp-content/uploads/2015/12/MMP-Conditional-PR-Policy-Brief-Jan-14-2016.pdf)>; CIC, “Operational Bulletin 480 (Modified)” (11 June 2014); Pam Hrick, “A Dangerous Step Backwards: The Implications of Conditional Permanent Resident Status for Sponsored Immigrant Women in Abusive Relationships” (2012) 21 Dal J Leg Stud 1. The Liberal government announced in February 2016 that it will introduce changes to grant permanent resident status on the arrival of the sponsored spouse to Canada. See Abbas Rana, “Spouses of Canadians to get permanent residency immediately: McCallum,” *The Hill Times* (29 February 2016), online: The Hill Times <[www.hilltimes.com/2016/02/29/spouses-of-canadians-to-get-permanent-residency-immediately-mccallum/52239/52239](http://www.hilltimes.com/2016/02/29/spouses-of-canadians-to-get-permanent-residency-immediately-mccallum/52239/52239)>.

<sup>113</sup> While, historically, Canadian immigration policy has embraced family reunification as a central plank, in recent years a shift away from family class applicants and towards economic migrants has occurred, with the number of family class immigrants dropping from 39 percent of new immigrants in 1994 to 22 percent in 2012. See Ethno-Cultural Council of Calgary, *Families Together/Families Apart: in Canada* (February 2014) at 3; Jacklyn Neborak, *Family Reunification? A Critical Analysis of Citizenship and Immigration Canada’s 2013 Reforms to the Family Class*, Working Paper no 2013/8 (Toronto: Ryerson Centre for Immigration & Settlement, November 2013).

<sup>114</sup> See Bhuyan et al, *supra* note 45, report of the Migrant Mothers project. The report systematically reviews immigration reforms from 2008 to 2013 and their implications for women’s safety and security.

<sup>115</sup> D Thronson, *supra* note 82; see also Sarah Rogerson, “Lack of Detained Parents’ Access to the Family Justice System and the Unjust Severance of the Parent-Child Relationship” (2013) Fam LQ 141.

<sup>116</sup> Seth Freed Wessler, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* (New York: Applied Research Centre, 2011).

puts great power and control in the hands of sponsoring relatives, including abusive spouses and parents ... [creating] dangerous power dynamics.<sup>117</sup>

Similarly, reductions in benefit levels, an emphasis on employment, the definition of spouse, and a fraud detection regime that encourages anonymous snitching in the social assistance context have also served to shore up the power of abusive men.<sup>118</sup> Within the child welfare regime, a shift from “child welfare” to “child protection” has been critiqued for its focus on the policing of “deviant” parents and the blaming of women for “failing” to protect children from exposure to domestic violence.<sup>119</sup> Legislative changes to the definition of a “child in need of protection” to specifically include witnessing domestic violence or that expand the concept of emotional harm (as in Ontario) have resulted in massive increases in reports to, and investigations by, child welfare authorities on domestic violence grounds.<sup>120</sup> Importantly, these changes in definition have similarly expanded reporting requirements for police officers, shelter workers, settlement agencies, and others working with women experience abuse. They are, in effect, all part of an elaborate network of surveillance.

Indeed, surveillance has emerged as a significant feature of modern regulation. Surveillance practices began to proliferate with the emergence of the “risk” society, as a means to both identify and contain risk. Within the context of neo-liberalism, “risk” is manifest in particular ways and by particular bodies. Given neo-liberalism’s emphasis upon “self-reliance” and its retreat from social provision, among the riskiest bodies are those that are unattached to the labour market or unattached to a male breadwinner. As recipients of Ontario Works benefits, women are scrutinized for compliance with a political project to produce self-reliance and family

<sup>117</sup> V. Thronson, *supra* note 68 at 63–64; see also Cross, *supra* note 23 at 45.

<sup>118</sup> Janet Mosher, “Intimate Intrusions: Welfare Regulation and Women’s Personal Lives” in Dorothy Chunn & Shelley Gavigan, eds, *The Legal Tender of Gender*, Onati Law & Society Series (Oxford: Hart Publishing, 2010) 165; Janet Mosher & Pat Evans, “Welfare Policy: A Critical Site of Struggle for Women’s Safety” in Angela Miles, ed, *Women in a Globalizing World: Transforming Equality, Development, Diversity and Peace* (Toronto: Inanna Publications, 2013) 138; Janet Mosher, Pat Evans & Margaret Little, *Walking on Eggshells: Abused Women’s Experiences of Ontario’s Welfare System* (5 April 2004) online: York University <[www.yorku.ca/yorkweb/special/Welfare\\_Report\\_walking\\_on\\_eggshells\\_final\\_report.pdf](http://www.yorku.ca/yorkweb/special/Welfare_Report_walking_on_eggshells_final_report.pdf)>; Gwen Brodsky et al, “Human Rights Denied: Single Mothers on Social Assistance in British Columbia”, online: Poverty and Human Rights Centre <[www.povertyandhumanrights.org/docs/denied.pdf](http://www.povertyandhumanrights.org/docs/denied.pdf)>; Priya Kandaswamy, “‘You Trade in a Man for the Man’: Domestic Violence and the US Welfare State” (2010) 62:2 *American Quarterly* 253.

<sup>119</sup> See Weissman, *supra* note 19; Karen J Swift & Marilyn Callahan, *At Risk: Social Justice in Child Welfare and Other Human Services* (Toronto: University of Toronto Press, 2009).

<sup>120</sup> Nico Trocmé et al, “What Is Driving Increasing Child Welfare Caseloads in Canada? Analysis of the 1993 and 1998 Ontario Incidence Studies of Reported Child Abuse and Neglect” (2005) 84:3 *Child Welfare* 341; Ramona Alaggia et al, “In Whose Best Interest: A Canadian Case Study of the Impact of Child Welfare Policies in Cases of Domestic Violence” (2007) 7:4 *Brief Treatment & Crisis Intervention* 275, where the authors also note concerns raised about the implementation of the legislative changes, among them the reluctance to report and the increase in surveillance. See Cross, *supra* note 23 for a discussion of the impact of these changes, particularly upon the relationship between the violence against women sector and child welfare authorities (at 29–30).

responsibility.<sup>121</sup> In the child protection context, mothering is scrutinized for the risks that “deficient” mothering poses to children, and in the immigration context, those seeking membership are scrutinized for the risk of state dependence and of criminality. While within the criminal justice system some women are recognized as genuine victims, as social assistance recipients, as mothers involved with child protection agencies, and as persons without status they are not victims, but, rather, caricatured and stereotyped as welfare queens, delinquent mothers, and bogus claimants abusing Canada’s “generosity.” These caricatures and stereotypes are deeply embedded in the systems with which they must often engage, and, thus perhaps not surprisingly, women have often drawn explicit parallels between these systems and their abusive relationships: the constant monitoring, the fear, the lack of access to information, the unpredictability, the derision, the lack of autonomy, and the threats of harm for non-compliance.<sup>122</sup>

Moreover, these political projects are not always compatible, and women have to answer to many masters, who often demand contradictory forms of behaviour: leave the relationship to ensure the children do not witness the violence;<sup>123</sup> maximize the children’s contact with their father; secure employment; remain in the relationship; and stay home to care for the children.<sup>124</sup> And this is why cross-system communication can be a justice-denying experience for many women. Not only is the web of surveillance amplified, creating a “surveillant assemblage” that is capable of gathering and potentially sharing vast amounts of information, but they confront the impossibility of compliance with these incompatible expectations.<sup>125</sup> Faced with the prospect of information sharing between systems, the surveillance of their performance as mothers, wives, workers, and potential citizens by systems with the power to remove their children from their care, revoke their status, and remove them from the country, and deny them access to the income supports needed to survive, women do their best to avoid these systems.<sup>126</sup> It has been well documented, for example, that the threat of child welfare involvement – particularly for women

<sup>121</sup> See Luann Gingrich, “Single Mother, Work(fare), and Managed Precariousness” (2010) 21:2 *J Progressive Human Services* 107; Krystle Maki, “Neoliberal Deviants and Surveillance: Welfare Recipients under the watchful eye of Ontario Works” (2011) 9:1 *Surveillance & Society* 47; Tina G Patel, “Surveillance, Suspicion and Stigma: Brown Bodies in a Terror-Panic Climate” (2012) 10:3/4 *Surveillance & Society* 215; John Gilliom, *Overseers of the Poor: Surveillance, Resistance, and the Limits of Privacy* (Chicago: University of Chicago Press, 2001).

<sup>122</sup> In the *Walking on Eggshells* research, several women returned to their abusers, citing more control in the abusive relationship than in their relationships with state actors and agencies. Mosher, Evans & Little, *supra* note 118.

<sup>123</sup> The Vancouver YWCA report notes hearing “numerous anecdotes from service providers of cases of child protection workers telling mothers that they must leave the abuser or risk having their children removed from their care.” Burns, *supra* note 45 at 19.

<sup>124</sup> The Working Group notes the tension between the “growing body of research on the negative impact of family violence and the indicators of risk of severe violence and homicide in families struggling with violence” and “the increasing support for co-parenting and promoting contact between children and their parents after separation or divorce.” Working Group, *supra* note 30 at 4.

<sup>125</sup> See Kevin D Haggerty & Richard V Ericson, “The Surveillant Assemblage” (2000) 51:4 *British J Sociology* 605. They define a “surveillant assemblage” as “the increasing convergence of once discrete systems of surveillance.”

<sup>126</sup> Burns, *supra* note 45.

in Indigenous and African Canadian communities whose children are over-represented in the child welfare system – is the reason women often do not call the police, seek help, or access services.<sup>127</sup> So too, fear of drastic immigration consequences silences many women and locks them in abusive relationships.<sup>128</sup>

Dean Spade argues that while these various legal and administrative systems – criminal justice, child welfare, social assistance, immigration – are often held out as offering women protection from violence, they function, instead, especially for marginalized women, as sources of racialized gender violence.<sup>129</sup> The claim that these systems offer protection from violence to women is, he suggests, used to justify policies that both fail to provide relief from gender violence and create sites of expansion of the systems that enact this racialized gender violence.<sup>130</sup> These state structures and systems not only embolden coercive controllers and facilitate women’s entrapment as Stark has argued but also enact their own forms of control over marginalized women. As such, the incident-based focus operating within legal systems obscures not only patterns of coercive control and how that control is enabled by legal and administrative systems but also how legal systems themselves perpetrate racialized gender violence.

Clearly, as Spade has argued, this critique shifts our focus from discrete incidents and individuals – from specific interactions of multiple systems, conflicting orders, and so on – to how “multiple systems ... operate simultaneously to produce harms directed not at individuals but at entire [marginalized] populations.”<sup>131</sup> These insights suggest that increased system collaboration and communication may serve to deepen state control of marginalized women, erode their autonomy, and silence their voices, rather than enhancing safety, reducing harm, and facilitating meaningful access to justice. There is no doubt that many calls for enhanced system communication and collaboration are grounded in commitments to women’s safety, dignity, and equality. And, similarly, there is little doubt that in individual cases improved communication between systems will work to improve women’s safety and enhance access to justice. However, these additional insights make clear that as we forge ahead to implement measures intended to

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<sup>127</sup> Kendra Nixon & Kyllie Cripps, “Child Protection Policy and Indigenous Intimate Partner Violence: Whose Failure to Protect?” in S Strega et al, eds, *Failure to Protect: Moving Beyond Gendered Responses* (Halifax: Fernwood, 2013) 166; Bhuyan et al, *supra* note 45; Neilson, *supra* note 16 at 12; Dragiewicz & DeKeresedy, *supra* note 21 at 50–51; Working Group, *supra* note 30 at 65, noting in particular measures designed to address this reluctance. Koshan, *supra* note 38, also observes that increased “information sharing may make victims more susceptible to losing children through child protection proceedings and to other negative family law outcomes” (at 1012).

<sup>128</sup> EVA BC, *supra* note 46 at 115.

<sup>129</sup> Dean Spade, “Intersectional Resistance and Law Reform” (2013) 38:4 *Signs* 1031 at 1042. See also Anannya Bhattacharjee, *Whose Safety? Women of Colour and the Violence of Law Enforcement*, edited by Rachael Kamel (2001) 13–55, online: American Friends Service Committee <[www.afsc.org/sites/afsc.civicaactions.net/files/documents/whose%20safety.pdf](http://www.afsc.org/sites/afsc.civicaactions.net/files/documents/whose%20safety.pdf)>.

<sup>130</sup> Spade, *supra* note 129 at 1039. See also Kristin Bumiller, “The Nexus of Domestic Violence Reform and Social Science: From Instrument of Social Change to Institutionalized Surveillance” (2010) 6 *Annual Rev L & Social Science* 173; Bhattacharjee, *supra* note 129; Goodmark *supra* note 22.

<sup>131</sup> Spade, *supra* note 131 at 1035–1036.

improve access to justice, we need to anticipate the “unintended consequences” that may accompany enhanced system collaboration and communication.<sup>132</sup>

### III. CONCLUSION

Conceptualizing access to justice from the perspective of women abused in their intimate relationships must proceed from women’s experiences, alive to the ways in which substantive law and legal processes may unequally distribute meaningful access to justice among women. As I have argued, building knowledge and understanding of domestic violence so that all legal system actors appreciate the tactics and dynamics of coercive control is essential. Without this appreciation, significant risks to women’s physical, emotional, and spiritual well-being will remain obscured from view, as will the strategic use of legal systems and processes by coercive controllers to tighten their grip on power. Legal actors need understand not only how legal proceedings are manipulated by coercive controllers in their desperation to hold onto power but also how administrative systems are deployed to the same end. In this regard, the impact of recent developments in the United Kingdom, where the paradigm of coercive control has been legislatively embraced, including through the introduction of a new criminal offence, will be important to watch in order to determine whether women’s access to justice is improved.<sup>133</sup>

It is no doubt clear, given the serious issues at stake and the complex, and often opaque, systems that women must navigate in seeking safety, that access to legal representation is tremendously important. While access to legal information may be a constituent element of access to justice, it is not a substitute for the skillful and knowledgeable legal representative that women require.<sup>134</sup> This skill and knowledge extends beyond understanding the dynamics of

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<sup>132</sup> Wellman, *supra* note 36.

<sup>133</sup> *Serious Crime Act 2015*, c. 9, clause 76. Pursuant to clause 76(1), “[a] person (A) commits an offence if – (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive, (b) at the time of the behaviour, A and B are personally connected, (c) the behaviour has a serious effect on B, and (d) A knows or ought to know that the behaviour will have a serious effect on B.” Further sub-clauses define “personal connection” (sub-clause 2), and “serious effect” (sub-clause 4). The latter is defined as behaviour that “causes B to fear, on at least two occasions, that violence will be used against B,” or “causes B serious alarm or distress which has a substantial adverse effect on B’s usual day-to-day activities.” A controversial provision is sub-clause (8), which creates a defence where “A believed that he or she was acting in B’s best interest, and the behaviour was in all the circumstances reasonable.” Note that this defence is not available to an accused in relation to behaviour that causes B to fear that violence will be perpetrated against B. See Jennifer Youngs, “Domestic violence and the criminal law: Reconceptualising reform (2015) 79:1 *Journal of Criminal Law* 55, who argues that the new legislation reflects a misunderstanding of the nature of coercive control in separating it so sharply from physical and sexual assaults. See also the *Council of Europe Convention on preventing and combating violence against women and domestic violence*, which provides that “[p]arties shall take the necessary legislative or other measures to ensure that the intentional conduct of seriously impairing a person’s psychological integrity through coercion or threats is criminalised”, Council of Europe, Committee of Ministers, 121<sup>st</sup> Sess, *Convention on preventing and combating violence against women and domestic violence*, CETS 210, (2011) at A33.

<sup>134</sup> *Needs Assessment and Gap Analysis for Abused Women Unrepresented in the Family Law System: Final Report and Recommendations* (Toronto: Queen’s Printer for Luke’s Place Support and Resource Centre, 2008); *Increasing Access*, *supra* note 1.

abuse to also include the multi-layered and interlocking systems that shape women's lives as they seek to end the violence in their lives.

As suggested, we need to also develop access to justice reforms with a view to avoiding unintended consequences. More particularly, with a view to carefully considering whether proposed reforms, including those designed to improve cross-system coordination and collaboration, enlarge male, or state, control over women and put women's safety and well-being at risk. Two recent projects, one in Australia and another in Ontario, offer some interesting possibilities as to how we might go about this. The Australian Law Reform Commission released a mammoth 600-page report in 2011 entitled *Family Violence and Commonwealth Laws: Improving Legal Frameworks*, which examines the legal treatment of "family violence" across a range of areas of law: child support, family assistance, immigration, employment, social security, superannuation, and privacy.<sup>135</sup> These areas of law and their intersections were assessed against the touchstone of "safety," defined not only as safety from harm but also as access to financial security and independence. In addition, the review identified seven guiding principles: seamlessness (from the point of view of those who engage with the law); accessibility (to legal and other responses and elaborated to include the avoidance of re-traumatization and consequential under-reporting), fairness (defined to include, among other considerations, that applicable system requirements not exacerbate safety concerns and that concerns about safety are properly heard and understood), effectiveness (here again with attention to understanding the reluctance to disclose), self-agency or autonomy, privacy, and system integrity (to ensure that, where a benefit or beneficial outcome is included in the relevant laws, any requirements to verify family violence are appropriate to the benefit sought).<sup>136</sup>

The Ontario "Policies Matter" project, undertaken by feminist advocacy organizations, maps the intersecting policy regimes that impact abused women against proxy indicators for women's safety.<sup>137</sup> As in the Australian Law Reform Commission report, "safety" is conceptualized not only as freedom from physical violence but also as access to income security, to safe and affordable housing, to supports, and to legal representation, as freedom from discrimination, and as the maintenance of caring relationships with children and community.<sup>138</sup>

Without suggesting that these projects have by any means produced definitive definitions of safety or of the guiding principles, what they do offer is a methodological approach as we move forward in the development of responses to the "crisis" in access to justice. They reveal the

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<sup>135</sup> Australian Law Reform Commission (ALRC), *Family Violence and Commonwealth Laws: Improving Legal Frameworks*, ALRC Report 117 (November 2011), online: Australian Law Reforms Commission <[www.alrc.gov.au/sites/default/files/pdfs/publications/whole\\_alrc\\_117.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_alrc_117.pdf)>.

<sup>136</sup> *Ibid* at 69–74.

<sup>137</sup> Harmy Mendoza, Amanda Dale & Michelle Coombs, *Policies Matter: Addressing Violence against Women Through Reflection, Knowledge and Action, Blueprint for Action* (Toronto: Woman Abuse Council of Toronto, Barbra Schlifer Commemorative Clinic & Elizabeth Fry Toronto, July 2013), online: Woman Abuse Council of Toronto <[www.womanabuse.ca/policiesmatter/docs/PoliciesMatter\\_Final.pdf](http://www.womanabuse.ca/policiesmatter/docs/PoliciesMatter_Final.pdf)>. See also the *Policies Matter When Women Experience Violence* interactive pictogram of intersecting policy regimes, which very effectively captures the multiple and intersecting layers of complexity. See online: Woman Abuse Council of Toronto <[womanabuse.ca/policiesmatter/intersections/intersections.html](http://womanabuse.ca/policiesmatter/intersections/intersections.html)>.

<sup>138</sup> Mendoza, Dale & Coombs, *supra* note 137 at 3–4.

importance of a careful, systematic consideration of various legal regimes and their intersections against the benchmarks of women's safety, understood more expansively than freedom from physical violence. It is also abundantly clear that this careful consideration requires the participation of diverse groups of women in developing these benchmarks, evaluating legal frameworks, and predicting the consequences of potential reforms. As Canada's leading access to justice scholar, the late Roderick Macdonald, has so eloquently reminded us in his work, access to justice requires meaningful participation in all of the forums where law is constituted and justice is sought and not simply clearing the path of obstructions blocking access to the doors of the courthouse.<sup>139</sup>

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<sup>139</sup> Roderick A Macdonald, "Access to Justice and Law Reform" (1990) 10 Windsor YB Access Just. 287; "Access to Justice in Canada Today: Scope, Scale, Ambitions" in Julia Bass, WA Bogart & Frederick Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005).