

2019

WHERE THE LAW FAILS TO
PROTECT ABUSE VICTIMS

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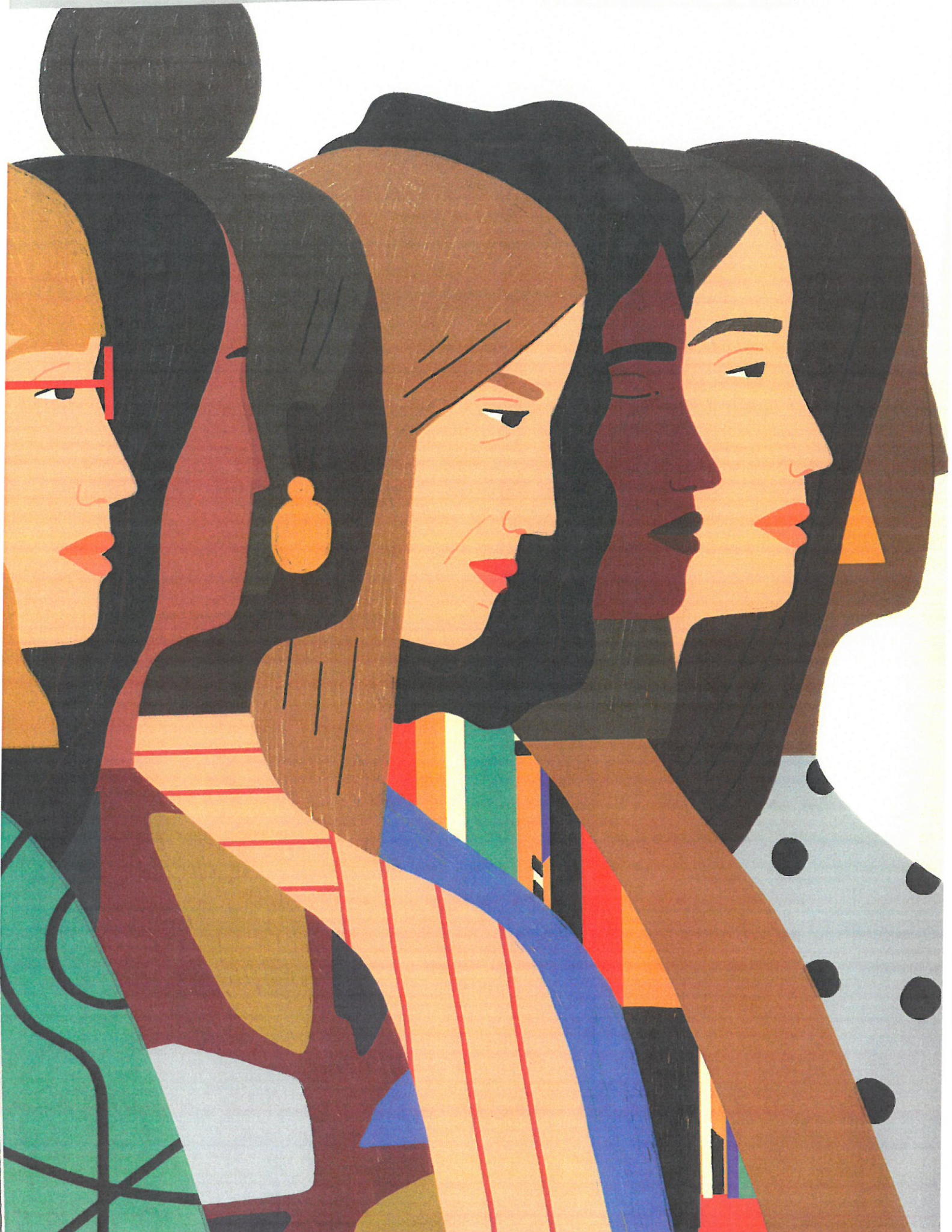
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TEXT &

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SLIVER OF THE
FULL MOON:
WHERE THE
LAW FAILS TO
PROTECT
ABUSE VICTIMS

by Sarah Greenblatt



An estimated 6.6 million women in the U.S. endured stalking or physical or sexual violence at the hands of intimate partners in 2015.

On Sept. 13, 1994, President Bill Clinton sat under a blazing late-summer Washington sun as 2,000 onlookers watched him sign a law that would protect untold Americans from violence, including abuse by spouses and intimate partners. The event came nine months after the U.N. adopted the Declaration on the Elimination of Violence Against Women, three months after the Organization of American States adopted the Inter-American Convention on Prevention, Punishment and Eradication of Violence Against Women and just 85 days after O.J. Simpson was arraigned for the murder of his wife, Nicole Brown Simpson, following a highway chase that commanded a television audience of 95 million viewers.

Yet, during the 38-minute signing ceremony, not one speaker mentioned the Violence Against Women Act or alluded to the topic of domestic abuse. The fanfare focused solely on the Violent Crime Control and Law Enforcement Act, in which the VAWA was embedded. In signing the largest crime-control effort in U.S. history, Clinton was imposing life sentences on violent offenders convicted a third time, putting more police officers on the street, expanding death-penalty eligibility, funding prison construction, banning the sale and possession of 19 assault weapons and inviting mountains of criticism and praise. Winning bipartisan support for those controversial measures rewarded the White House with a coveted tableau of unity. The press covered Clinton's triumph extensively but scarcely mentioned VAWA.

It bears acknowledging—a quarter of a century after this watershed development—that the first federal legislative package seeking to end violence against women, requiring every state to recognize orders of protection issued in other states, funding prevention, data collection and victims' services and resulting from years' worth of advocacy, unfolded in near total eclipse.

Still, statistics reveal that passage of VAWA has been a game changer in many regards. Between 1994 and

2011, serious intimate partner violence against women declined by 72 percent, according to a 2016 report by the Department of Justice Office on Violence Against Women. And between 1993 and 2010, domestic violence resulting in homicides of women fell 35 percent, according to a White House fact sheet published in 2012.

Nevertheless, an estimated 6.6 million women in the U.S. endured stalking or physical or sexual violence at the hands of intimate partners in 2015, according to the National Intimate Partner and Sexual Violence Survey, published by the Centers for Disease Control.

VAWA has heightened awareness, experts say, and there is now widespread recognition that domestic violence crosses lines of class, race, national origin, sexual orientation and gender—though women are victimized far more often than men.

“I think you can no longer really claim that domestic violence is invisible,” said Professor Deborah Epstein, director of the Domestic Violence Clinic at Georgetown University Law Center. “Most people in the country know that it’s an epidemic.”

Some of that awareness has resulted from periodic Congressional reauthorizations of VAWA, which provide victim advocates with an opportunity to seek enhancements that ripple more broadly. The 2000

reauthorization expanded VAWA to include dating violence, and the 2005 reauthorization added programs to train health care providers to screen patients for signs of psychological as well as physical abuse. An expansive 2013 reauthorization extended protections to immigrants, LGBT victims, Native Americans, college students and public housing residents.

Yet efforts to expand VAWA's protections are never guaranteed. Support wanes and waxes less predictably than the lunar cycle, leaving victims vulnerable to dictates of the political season that are as mercurial as a mean drunk. Indeed, reauthorization in 2019 will likely depend on a provision that would bar those with records of stalking or other abuse in dating relationships from purchasing guns. Opposition to that measure by the National Rifle Association may hold more sway than research cited by the National Coalition Against Domestic Violence: that the presence of a gun in a domestic violence situation increases the risk of homicide by 500 percent.

And while VAWA has afforded protections, an overreliance on criminal courts has produced unintended consequences, according to Rosie Hidalgo, the deputy director for policy with the Department of Justice's Office on Violence Against Women from 2014 to 2017 and current senior director of public policy at Casa De Esperanza National Latin@ Network.

In a 2015 article in the *University of Miami Race & Social Justice Law Review*, Hidalgo wrote that the unforeseen "consequences of VAWA have disproportionately impacted communities of color, immigrants, LGBT communities and others who do not fit the mainstream paradigm. Additionally, an overemphasis on a criminal legal response has detracted from a broader social justice analysis of gender violence and

attention to multiple forms of oppression that impact marginalized communities, as well as the need for more comprehensive responses and different pathways for survivors to pursue safety and well-being."

Hidalgo noted that Congress has declined for decades to fund prevention programs adequately—despite the identification of domestic violence as a public health issue by policy experts—creating a "one-size-fits-all" approach whereby victims are pushed to pursue orders of protection or press criminal charges.

"People feel very proud of the changes," Epstein said. "Now, lots of people get arrested and prosecuted. Women can be harmed by this one-size-fits-all approach. It's quite a blunt instrument."

Not only does racism in the justice system invite abuse victims to be blamed "for sending another African American man to prison," Epstein said, "there is quite a bit of evidence that, in some subcommunities of women, prosecution puts them at greater risk of future recidivist harm."

Efforts to protect domestic violence victims can vary, due to a multitude of factors colored by the social standing held by diverse populations and the distinct ways that diverse communities interact with the law and with legal systems.

A look at three specific communities illustrates just some of the maddening limitations of the law to protect victims of domestic abuse.

Research cited by the National Coalition Against Domestic Violence: the presence of a gun in a domestic violence situation increases the risk of homicide by

500 



President Bill Clinton signs the Violent Crime Control and Law Enforcement Act.
AP Photo/Denis Paquin



“YOU’RE GOING BACK”

The proposition of seeking protection from abuse is often paralyzing for undocumented immigrants.

“If you are a victim of domestic violence who is a resident or citizen of the U.S., there may be a lot of reasons why you decide not to call the police. But that’s always a tool in your arsenal,” said Professor Natalie Nanasi, director of the Judge Elmo B. Hunter Legal Center for Victims of Crimes Against Women at Southern Methodist University Dedman School of Law. “Immigrant survivors don’t feel that they have that tool.”

Immigration policy in the Trump era has had a powerful effect. The Obama administration’s aggressive deportations of immigrants with serious criminal records has morphed into a “free for all,” Nanasi said. “Immigrant survivors, even before Trump, were reluctant to come forward because they were afraid that the first thing a police officer would ask would be, ‘Show me your papers.’”

Testifying about abuse has become an even more perilous prospect, now that Immigration and Customs Enforcement officers make so many courthouse arrests that the administration faces lawsuits on numerous fronts, and judges across the country have lodged protests. A report released in January 2019 by the Immigrant Defense Project tallied a 1,700 percent increase in

courthouse arrests by ICE between 2016 and 2018 just in New York state.

ICE has stepped up its capacity to take immigrants into custody by signing 287(g) agreements with local police departments, allowing officers to act as agents of the federal agency. Nationwide, 28 state and local departments had signed 287(g) agreements prior to Trump’s inauguration, while 52 more have signed and 21 others have discontinued them since January 2017, according to the Immigrant Legal Resource Center.

Fears about enforcement helped drive a 391 percent decline in VAWA petitions by undocumented immigrants married to U.S. citizens and lawful residents nationwide between 2016 and 2017, according to a study conducted by the National Immigrant Women’s Advocacy Project at American University Washington College of Law and the American Civil Liberties Union.

But the study does not paint a consistently grim picture, NIWAP Director Leslye Orloff said, explaining that in communities served by savvy attorneys, where judges and law enforcement are informed and sympathetic, there was an uptick in orders of protection and other claims.

“Where the victim advocates can say, ‘I’ve taken clients to this judge, and you don’t have to worry about being taken to ICE,’ you can smooth the way,” Orloff said.

Meanwhile, the immigration status of either the abuser or the victim can bend the trajectory of a domestic violence case this way or that, said attorney Tanishka Cruz, ’12, owner of an immigration and family law practice in Charlottesville, Virginia.

Fears about enforcement helped drive a 391% decline in VAWA petitions by undocumented immigrants married to U.S. citizens and lawful residents.

“Many of my victim clients will hesitate to contact law enforcement, for fear that the main breadwinner will be deported,” and many are loath to let their family units disintegrate, Cruz said.

In mixed-status households, a spouse may use legal standing “as a weapon,” Cruz said. “‘Do what I want, or I’ll turn you in.’ That is a very real situation that a lot of people, unfortunately, are living through, almost like a hostage situation: ‘You’re going back.’”

In theory, law enforcement will not base its response to a domestic violence incident on the immigration status of a victim seeking protection, will respect her confidentiality and decline “tips” from an abuser about her lack of documentation. But in practice, Nanasi said, that may not matter.

“I don’t know that victims know that,” she said. “I don’t know that victims believe that, especially if they have an abuser speaking in their ear.”

Immigration attorney
Tanishka Cruz, '12



Under-Utilized Tools

Amidst the challenges posed by immigration policy, undocumented survivors of domestic violence—and their advocates—have access to an array of strategies that previous generations of victims lacked.

“We are decades beyond where we were,” Orloff said, citing the enactment of statutes, the addition of resources and a greater awareness of family dynamics on the part of many judges, prosecutors and police.

Congress crafted a potent tool with the 2000 passage of the Victims of Trafficking and Violence Protection Act, which made victims of domestic violence who cooperate with criminal investigations eligible to apply for U visas and, potentially, to later seek lawful status as permanent residents.

Even that tool, however, comes loaded with limitations. For starters, the U.S. issues just 10,000 U visas annually, producing a backlog of applications that puts many requests on hold for more than eight years.

And, Cruz points out, law enforcement officers who must certify eligibility are seldom eager to do so, either

because they don’t deem domestic violence a sufficiently savage crime to warrant a U visa or because they conclude that a violation like shoplifting in a victim’s distant past makes her undeserving.

“Local law enforcement is making qualified decisions about whether somebody’s worthy,” Cruz said. “You’re at their mercy.”

If police fear certifying someone who will later commit a future crime, prosecutors commonly worry that claims of abuse by undocumented immigrants will handicap their cases, said Jane Anderson, attorney advisor for Aequitas, a non-profit that develops and evaluates prosecution practices related to gender-based violence and human trafficking.

“The defense will often say, ‘She’s trumping up charges to stay in the U.S.,’ trying to inflame anti-immigrant sentiment in front of a jury,” said Anderson, who previously prosecuted domestic violence and human trafficking cases in Miami-Dade County. “Many prosecutors think it will ruin their case, or if an immigrant seeks a (status) benefit, the jury won’t accept this. It’ll become a case about her U visa.”

While it’s appropriate—and ethically obligatory—for a defense attorney to explore a witness’s motivation to lie, Anderson said, prosecutors should recognize that abusers may choose their victims deliberately, knowing that those in the U.S. illegally have little recourse.

Anderson serves on a national faculty Orloff has assembled to educate judges and prosecutors about overlapping issues in immigration and family law and best practices for promoting public safety and protecting victims of domestic violence and human trafficking.

“We are trying to change hearts and minds,” Anderson said, calling U visas a powerful tool, when handled correctly, both for crime fighting and prosecution.

But in the meantime, attitudes within the law enforcement community vary tremendously by location, and even a police department that sends an officer for training may not commit to wholesale change, said Det. Stacey Ivie of the Alexandria, Virginia Police Department, who led efforts to implement U visa certifications on that force.

“You hope they will send someone and that the chief mandates that everybody reads what the person brought back,” Ivie said. “But even if a directive is issued, who’s ensuring that there’s compliance?”

Increasingly, immigrant advocates find, victims are making their peace with life in a violent home.

“I think the calculus that women make in that situation is that, ‘He beats me up once a month; I found a way to manage that,’” Nanasi said. “That’s the choice that people are making.”

“JEWISH MEN DON'T DO THAT”

The Old Testament Book of Samuel recounts the rape of Tamar by her half-brother, Amnon, yet in the Jewish community, domestic abuse has tended to persist in relative obscurity.

Religion commonly plays a complicating factor in domestic violence, especially since faith communities may be small, insular and scattered across international borders, where civil and criminal remedies vary at least as widely as interpretations of scripture.

But in traditional Jewish homes, the matriarch is usually the person in charge of the home and family, making it easy to blame the woman for discord in a household and therefore tempting for a victim to remain mum.

“The mother or wife may feel that she, alone, is responsible for shalom bayit—peace in the home—and therefore does not want to call attention to the fact that ‘things aren’t so great,’” said Alyson Morse Katzman, associate director of Safe Havens Interfaith Partnership Against Domestic Violence in Boston.

“There’s a lot of shame, the whole shonda effect, Katzman said, using the Yiddish term for behavior that causes embarrassment in the community.

That shame can be debilitating, since tarnishing a family’s reputation can affect future generations in traditional Jewish communities.

“The shame factor is very profound,” said Rabbi David Rosenberg, coordinator of educational services for Jewish Child and Family Services of Chicago, where he serves as liaison to the Orthodox community. “People don’t want to be shamed. They want the dignity of their community to be maintained. They are concerned about their children being able to find mates.”

Jewish women who claim abuse frequently face disbelief, born in large part by stereotypes of them as loud and pushy and of Jewish men as educated and mild-mannered, said Naomi Tucker, who founded Shalom Bayit, a counseling, education and advocacy organization that serves nine counties in the Bay Area, in 1992.

“They are told: ‘You must be lying, because Jewish men don’t do that,’” Tucker said, recounting an incident some seven years ago, when a judge uttered those very words to a domestic violence survivor seeking custody rights in his courtroom. “Those beliefs are very deeply rooted.”

Those beliefs persist in the face of narratives that appear with tragic regularity in the press, including the 1997 murder of suburban Philadelphia lawyer Stephanie

Rabinowitz to which her husband confessed, the 1994 killing of Cherry Hill N.J. resident Carol Neulander of which her husband, a rabbi, was convicted, the 2012 slaying of Syracuse woman Leslie Neulander, for which her obstetrician husband faces a retrial, and the 2009 strangulation death of Manhattan banker Sheli Danishefsky, of which her husband was convicted in 2019.

Abuse does not always entail violence or criminal activity; it often involves economics, said Deborah Rosenbloom, vice president of programs and new initiatives at Jewish Women International.

Women who appear to have resources might not have a credit card in their own names, might be forced to turn over paychecks to abusers or find resources withheld, Rosenbloom said.



Dinah, Inc. founder
Shana Weiner, '13

Indeed, researchers at the University of Wisconsin’s Center for Financial Security found in a 2008 study that economic abuse factored into domestic abuse for 99 percent of victims, without respect to faith.

“We know that is a prevalent form of abuse in Jewish relationships,” Rosenbloom said. “That’s tricky. It contributes to the myth that ‘it doesn’t happen’ in these families.”

Escaping the Trap

Limited resources put many Jewish abuse victims in a bind, Tucker said, since professionals may lack the wherewithal to hire an attorney but have too much money to qualify for legal aid.

“It’s a terrible trap for our clients,” Tucker said, noting that it can cost \$50,000 to \$100,000 to gain custody rights that would shield a victim from an angry ex. “The legal system is a way that abusers continue to abuse. This is why a lot of women don’t leave. You can get a restraining order for free, but to protect the kids—if the abuser has an attorney—you’ll need one, too.”

Tucker contends that the emotional challenges of handling domestic violence—and relatively low pay—drive many family lawyers to burn out, leaving a shortage of savvy advocates.

“It’s hard to find attorneys who are good and who know the difference between a nasty divorce and actual abuse,” she said.

In Philadelphia, a new nonprofit founded by attorney Shana Weiner, ’13, aims to expand the pool of qualified advocates. Dinah Inc. refers domestic abuse survivors to attorneys it trains to become effective advocates for Jewish victims. The organization serves as the client’s point of contact, from intake to court accompaniment—when needed—Weiner said.

After conducting intake interviews, Dinah matches clients with attorneys who agree to handle the cases pro bono out of their offices, in exchange for receiving umbrella liability coverage and CLE training.

When Weiner couldn’t find a curriculum for training attorneys about orders of protection and domestic violence in the Jewish community, she decided to develop one.

Dinah has begun offering CLEs that combine legal training with education on the dynamics of abusive relationships and victim behavior, Weiner said, noting that well-intentioned but uninformed remarks can inhibit abuse survivors from seeking help.

JWI, the successor to B’nai Brith Women, has been working to educate clergy about domestic violence since the 1990s, and numerous advocacy organizations have provided programs in schools and Jewish youth organizations that educate adolescents about healthy behavior in relationships and toxic masculinity.

Many victim advocates say that rabbis in various branches of Judaism have made visible strides in recent decades.

“It’s spoken of more often,” said Rabbi Richard Hirsh of Congregation M’kor Shalom in Cherry Hill, N.J., a member of a national clergy task force that JWI created. “It’s even changing, though more slowly, in the Orthodox and Hasidic community, where there’s a practice of keeping things insular.”

Much of the change reflects a shift from male to female clergy, Hirsh said, adding that the ordination of women has eclipsed that of men in the last 30 years.

In 1988, at a program on domestic violence Hirsh organized for Philadelphia-area rabbis, a female cleric presented best practices, such as referring victims to counseling organizations. Hirsh recalled that older male rabbis in attendance had countered that it was better to counsel couples within the synagogue.

Calling such an intervention “the worst thing you could do,” Hirsh said that sending a troubled couple back home after counseling “can put the woman in incredible danger.”

Rosenberg said that clergy are increasingly more willing to refer victims to social workers and other experts. But it’s one thing to recognize the limits of one’s expertise in helping a victim, Rosenberg said, and another to disengage when an abuser steps forward to admit wrongdoing.

“It’s very gratifying to the clergy to say: ‘I accept you. God loves you,’” said Rosenberg, the co-chair of JWI’s clergy task force.

Reliable statistics on the number or frequency of domestic violence incidents within the Jewish community simply don’t exist, Rosenbloom said, “because nobody has funding to do a real survey.”

If decades of education and outreach efforts in the Jewish community have borne fruit, the harvest has not been vast.

In the 15 years since Tucker was denied space in a synagogue to lead an educational domestic violence program because no one believed it was a problem, Shalom Bayit has made inroads, building up an 85-member rabbinic advisory council. Nevertheless, 27 years after embarking on community education efforts, Tucker said “we still get a surprised response: ‘Really? It happens in the Jewish community?’”

**Limited
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A JURISDICTIONAL PATCHWORK

Domestic violence affects Native Americans in disproportionately high numbers. But jurisdiction over incidents involving abuse that occurs on Indian land may fall to federal, state or tribal officials, depending on the precise location, the category and the severity of crime, the race of the perpetrator and the race of the victim, creating a patchwork of cracks through which abuse survivors can fall.

More than 55 percent of American Indian and Alaska Native women had experienced intimate-partner violence in their lifetimes, according to a 2016 report published by the U.S. Department of Justice's National Institute of Justice.

Some 96 percent of intimate-partner incidents involving sexual violence were committed by non-Indians against native women, the report found, showing that they are much more likely to be victimized by non-Indian partners.

These grim statistics are largely the legacy of a 1973 fight that erupted during an annual celebration on the Port Madison Indian Reservation in Washington State, when Mark David Oliphant was arrested for assaulting a Suquamish tribal police officer who intervened. A non-Indian, Oliphant claimed that tribal police lacked jurisdiction to arrest him, an argument that wended its way to the U.S. Supreme Court, which agreed in 1978, stripping all tribal police of authority over crimes committed by non-Indians on Indian land.

For 35 years, the landmark ruling provided an automatic stay-out-of-jail card to non-Indians who committed crimes on Indian land, unless federal or state authorities decided to prosecute.

The rates of sexual violence against native women swelled to extremes described in a 2006 Amnesty

International report as a human-rights violation.

"That got Congress' attention," said Professor Melissa Tatum of the James E. Rogers College of Law at the University of Arizona, where she previously directed the Indigenous Peoples Law and Policy Program.

When Congress reauthorized VAWA in 2013, Tatum said, lawmakers were willing to restore tribal authority over some crimes involving domestic violence committed by non-Indians.

Though hailed as a huge victory at the time by victim advocates, it was not easily won, said Alfred Urbina, a former attorney general of the Pascua Yaqui Tribe who was appointed a tribal judge in July 2019. Washington lawmakers doubted that Indian courts possessed the will or the capacity to afford justice to non-Indians, said Urbina, who testified on behalf of the reauthorization in 2013.

"They said: 'You're going to get a limited class of cases, because we don't trust you to deliver due process,'" Urbina recalled.

Initially, just a handful of tribes gained authority to charge or prosecute non-Indians in the Special Domestic Violence Criminal Jurisdiction program (SDVCJ). Urbina enlisted Tatum to develop a protocol for training police, prosecutors and public defenders in the Pascua Yaqui Tribe.

Implementing tribes gained authority to charge non-Indian abusers for violating orders of protection or committing domestic violence and dating violence against victims on tribal lands.

Going to Bed Afraid

For all its ambition to protect Native American abuse victims, the 2013 VAWA reauthorization did not empower tribal authorities to charge non-Indian abusers with crimes against children or for the crimes of stalking, sexual assault or sex trafficking that occur outside the bounds of a domestic relationship. Nor did tribal police gain the power to charge non-Indians who assault them when they respond to domestic emergencies.

"It is just the first sliver of the full moon that we need to protect us," domestic violence survivor Lisa Brunner of the White Earth Ojibwe Nation said in a 2018 report published by the National Congress of American Indians assessing the first five years of the SDVCJ.

The report touts the success of the program's first five years, in which 18 implementing tribes tallied 143 arrests of non-Indian abusers that led to 74 convictions, five acquittals and 24 cases pending. Notably, the report adds that no petitions for habeas corpus review were brought in federal court, affirming the capacity of tribal authorities to fairly prosecute non-Indian domestic violence defendants.

Yet, as of early 2019, Urbina said, just 25 of some 150 tribes in the U.S. that maintain active courts with the capacity to exercise tribal jurisdiction had opted in.

"You're not seeing benefits trickling out to Indian country," he said. "It's like they're in the 1970s. It's almost the 'haves and have nots.' It's based on a tribe's



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ability to bring resources.”

Over the last two years, Congress has allocated some \$2.5 million for tribal courts that implement the program, enough for 10 or 15 tribes to each hire a prosecutor and a public defender, Urbina said.

“A lot of tribes are not moving forward because of cost,” he said. “That’s potentially thousands of victims that are not seeing any kind of justice. You hear the frustration of the advocacy groups. The scope is an emergency in places. You’re experiencing this in small communities. People are going to bed at night and they’re afraid.”

In April 2019, the Democratic-controlled House of Representatives reauthorized VAWA again, closing immense gaps that had left children, responding tribal police officers and victims of sex trafficking and sex assault outside of domestic relationships vulnerable.

Yet that outcome was hardly assured in the hyper-partisan environment on Capitol Hill, where nine Republican members of the House Judiciary Committee sought to strip all tribal jurisdiction provisions from the law. Rep. James Sensenbrenner of Wisconsin had claimed during a committee hearing that the provisions revoked “the constitutional rights of someone who happens to have crossed a reservation line and ends up being accused of domestic violence.”

And the 2019 reauthorization has yet to be approved in the U.S. Senate, where Republicans are not eager to support a provision that expands the authority of law enforcement to strip the right to carry a gun from those who have records of stalking or intimate partner abuse in dating relationships.

In the meantime, the enduring limitations on tribal authorities to police criminal activity by non-Indians create fertile grounds for potential abusers to establish a presence, Tatum said. At least anecdotally, some tribes believe that drug traffickers have targeted Indian country as a place of refuge for activities such as cooking methamphetamines.

“There’s a perception that non-Indian criminals are moving operations into Indian country to avoid detection,” Tatum said. “It has nothing to do with domestic violence, but it’s creating opportunities for criminals. We need to figure out if it’s true. The jurisdictional patchwork makes it impossible for (police) to do their job.”

New dangers loom for potential victims in states such as North Dakota, where the oil industry is fueling an influx of transient, chiefly non-Indian, workers.

“The increased rates of non-Indian violence perpetrated against native women in relation to extractive industries is in large part due to the presence of ‘man camps’ on or near reservation lands,” Professor Sarah Deere of the University of Kansas testified before Congress in March. The chief justice of the Prairie Island Indian Community Court of Appeals, Deere cited in her testimony a 2015 Marshal’s Service report that found a significant percentage of the booming workforce hired for temporary oil-industry jobs near the Fort Berthold Indian Reservation in North Dakota were sex offenders who had failed to register with either tribal or federal authorities.

Victim advocates know too well that vigilance is required.

“We can’t go backward,” Hidalgo said. “Progress has been made, but this is still a significant crisis in terms of intimate partner violence and sexual assault. How do we keep including others?”

Sarah Greenblatt is the director of communications at the Kline School of Law.