CHAPTER-V

PROTECTION OF WOMEN AGAINST DOMESTIC VIOLENCE IN UNITED KINGDOM AND UNITED STATES – A COMPARATIVE ANALYSIS
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5.1 Introduction

The United Nations' concerted effort over the past years to bring the problem of domestic violence into open and its request to its Member States to adopt short—and long-term strategies that will protect victims, and to adopt preventive measures to eliminate its incidence has led to a number of countries making the elimination of domestic violence against women a national priority. The further challenge is to make the penalization of domestic violence a priority in all United Nations' Member States. Such a campaign would call for the adoption of legislation to protect women from domestic violence and the enforcement of penalties in all countries.¹

Many countries, at the national level have Constitutions and laws intended to protect women against violence. Constitutions include bans on violence against human beings and the right to the integrity of the body and the right to life. Most prohibit discrimination against citizens. Equality under the law is written into most Constitutions and some refer specifically to women. National laws that protect against violence are usually part of the Penal Code. However, only 44 countries worldwide have laws that specifically protect women against domestic violence.²

The problem lies, however with the flaws in the legal framework of some countries

which contribute to impunity. For example, even though Constitutional provisions may affirm women’s right to a life free from violence, the definition may not cover all forms of violence against all women. Among the many such forms, one form most frequently absent from legislative prohibition is domestic violence. Laws may cover some forms of domestic violence but not all – for example, the law may punish domestic violence, but may omit marital rape from the definition. This is the case in countries with otherwise progressive domestic violation legislation.\textsuperscript{3} Laws against domestic violence frequently emphasize family reunification or maintenance over protecting victims. In some countries laws allow so-called “honour crimes” or allow a defence of honour to mitigate criminal penalties, putting the right of the family to defend its honour ahead of the rights of individuals in the family.\textsuperscript{4}

Violence against women is universal but it is not inevitable. A recent World Health Organisation report points out that communities that condemn violence, take action to end it and provide support for survivors, have lower levels of violence than communities that do not make such action. In a comparative study of 16 countries, researchers found that levels of partner violence are lowest in those societies with community sanctions (whether in the form of legal action, social approbation or moral pressure) and sanctuaries (shelters or family support systems).\textsuperscript{5} The United Kingdom and United States have been at the forefront in recognising domestic violence as a

\textsuperscript{4} Ibid.
\textsuperscript{5} Ibid., p.101.
serious problem. In the last few years, many positive steps have been taken in these two countries to combat domestic violence. Government aid, legal reform, shelters for battered women, women's rights organisations, empowerment programs for women and awareness training for police officers, medical professionals and judges, are examples of these positive steps. Compared to the status of the fight to eliminate domestic violence just ten years ago, great strides have been made. This chapter will focus on the legal framework utilised in dealing with domestic violence in the United Kingdom and the United States.

**5.2 Legislative Measures in United Kingdom**

**5.2.1 The Background to the New Legislation**

Urbanization and its attendant close living quarters made acts of violence against wives visible in nineteenth-century England. Police records from that era indicate that wife abuse was very common, with insubordinate and non-submissive behaviour frequently cited as cause by the abusers. John Stuart Mill's 1869 essay "The Subjection of Women" addressed the plight of battered women in England. His compelling concern for wives "against whom (a husband) can commit any atrocity except killing her, and, if tolerably cautious, can do that without much danger of the legal penalty" helped to mobilize efforts to rewrite English law. He advocated separation of wives from husbands guilty of cruelty, as well as termination of any marital obligation on the part of the wife. That led to the first statute in England in

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1853 to empower Magistrates to imprison the offender upto six months or impose fine upto 20 pounds in addition to counselling him to keep peace. The Married Women’s Property Act, 1870 gave a separate property. In 1962, the Land Reform (Husband and Wife) Act, conferred the right to an action in tort on each spouse, either during or after the dissolution of marriage. Civil remedies by way of injunction against husband to restrain him from inflicting physical hurt came under four statutes (i) Domestic Violence and Matrimonial Proceedings Act, 1976 (ii) Matrimonial Homes Act, 1983 (iii) Domestic Proceedings and Magistrate’s, Courts Act, 1978 (iv) Supreme Court Act, 1981.

Lord Scarman described the four Acts as ‘a hotch potch of enactments of limited scope passed into law to meet specific situation or to strengthen the power of particular Courts’. In May 1992 the Law Commission attempted to meet this and other criticisms in its report entitled ‘Domestic Violence and the Occupation of the Matrimonial Home’. This was designed to deal with what the report described as:

‘two distinct but inseparable problems: providing protection for one member of a family against molestation or violence by another and regulating the occupation of the family home where the relationship has broken down whether temporarily or permanently’.

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9 Law Com No.207, 1992, (hereinafter referred as Law Com).

10 Law Com para 1.1
It was said that the existing remedies were ‘complex, confusing’ and that they ‘lack integration’. The report contained a draft Bill which was intended to provide a unified body of law dealing with civil remedies for molestation, violence and occupation of the family home between family members. In February 1995, the Government published the Bill which became the Family Homes and Domestic Violence Bill, and which adopted, almost entirely, the recommendations in the Law Commission report including the format of the draft Bill. But the 1995 Bill encountered unexpected difficulties at the end of its Parliamentary progress, and was abandoned, only to reappear as part of the Family Law Bill, in this form, it became Part IV of the Family Law Act 1996. (FLA).

5.2.2 The Law before Part IV of the Family Law Act 1996 (FLA)

Before the enactment of the FLA, the three relevant statutes empowered the superior Courts to grant orders in the context of domestic violence, as well as jurisdiction in the Magistrates Courts. As these statutory provisions were complex, they overlapped and were not comprehensive, the FLA redresses this defect by providing a comprehensive and unified code that provides remedies for domestic violence. However, it is necessary to understand the law before 1996 reform, with a view to appreciating the potential merits of the reformed law. The old law also retains relevance insofar as the concept of ‘molestation’ is incorporated into the FLA, without statutory definition, and remains to be interpreted by the judiciary.

11 Ibid para 1.2
5.2.2.1 The Matrimonial Homes Act 1983 (MHA)

The Matrimonial Homes Act 1983 (MHA) (repealed and replaced by the Family Law Act 1996) consolidated the Matrimonial Homes Act 1967 and subsequent amendments to that Act. The Act of 1967 gave wives right of occupation which could be registered and enforced against third parties, and also gave the Courts powers to regulate occupation of the matrimonial home. The 1967 Act had not been envisaged as a legal response to domestic violence. Rather, it was intended as Parliament’s response to the House of Lords decision in *National Provincial Bank v. Ainsworth*,¹² which had rejected Lord Denning’s attempts in a number of cases in the 1950s and early 1960s to establish a ‘deserted wives equity’ in the former matrimonial home.

The MHA dealt with the position where one spouse was entitled to occupy a dwelling-house by virtue of some beneficial estate, or interest, or contract, or by virtue of any enactment giving him the right to remain in occupation, and the other spouse was not so entitled. In such circumstances, the ‘non-entitled spouse’ had the right, if in occupation, not to be evicted or excluded by the other spouse except by order of the Court, and, if not in occupation, the right with leave of the Court to enter into and occupy the dwelling-house.¹³ These rights were called ‘rights of occupation’. Further the Act also provides machinery whereby spouses can protect such rights against third parties.

¹² *(1966) AC 1175.*

¹³ *The Matrimonial Homes Act 1983* (hereinafter as *MHA*), Sec. 1.
In *Richards v. Richards*\(^{14}\) the House of Lord significantly widened the use of MHA to cases of domestic violence. Indeed the House went so far as to hold that other legislation, such as the Domestic Violence and Matrimonial Proceedings Act 1976, must be read subject to the overriding framework of the MHA. The legislation is available to those who are married and provides that as long as one spouse had rights of occupation, either spouse might apply to the High Court or the County Court for an order:

- declaring, enforcing, restricting or terminating the statutory rights of occupation of a spouse.

- prohibiting, suspending or restricting the exercise of the right, by either spouse, to occupy the dwelling house that has arisen by operation of law independently of the Act.

- requiring either spouse to permit the exercise by the other of that right.\(^{15}\)

The effect of the section is that either spouse can be ordered to leave the home, or be given the right to re-enter, by Court order, irrespective of their property interests.

The MHA differed from the Domestic Violence and Matrimonial Proceedings Act 1976 in the important respect that it contained specific directives to Courts as to how they should exercise their discretion to make, or not to make, as the case might be, orders. It directed the Court to:

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\(^{15}\) *MHA*, supra note 13, Sec. 2.
make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case.....16

It must be noted that the Court was not empowered under this legislation to make a non-molestation order, nor was it empowered to restrain the respondent from entering geographical area in which the matrimonial home is situated. It could, however make orders for periodical payments and impose on either spouse obligations to repair and maintain the house or discharge any obligations with respect to it.17 It could also order that certain parts of the house be excepted from a spouse’s right of occupation.18 Once a marriage is terminated by Court order (whether for nullity or divorce), no jurisdiction under MHA remains, although jurisdiction continues to vest in the Court until the decree absolute is granted.19

5.2.2.2 The Domestic Violence and Matrimonial Proceedings Act 1976 (DVMPA)

This Act (repeated and replaced by the Family Law Act 1996), was enacted as a private member’s bill. It conferred upon the County Court the power to make the following orders:

- restraining the other party to the marriage from molesting the applicant.
- restraining the other party from molesting a child living with the applicant.

16 Ibid. Sec.1(3).
17 Ibid. Sec 1(3)(b).
18 Ibid. Sec. 1(3) (c).
19 Sec. PVP (1994) 2 FLR 400.
- excluding the other party from the matrimonial home or a part of the matrimonial home.

- requiring the other party to permit the applicant to enter and remain in the matrimonial home or a part of the matrimonial home.\(^\text{20}\)

Where a judge granted such an injunction as above, he also could, if satisfied that party had caused actual bodily harm to the applicant or child and was likely to do so again, attach a power of arrest to the injunction. The result was this, that where a power of arrest was attached, a Constable could arrest without warrant a person when he had reasonable cause to suspect that person of being in breach of one of the terms of the injunction to which the power attached, and bring him before the judge.\(^\text{21}\)

The protection of the Act extended to ‘a man and woman who are living with each other in the same house-hold as husband and wife’.\(^\text{22}\)

There was no definition of ‘molestation’ in the Act,\(^\text{23}\) but it has been interpreted widely to cover pestering.\(^\text{24}\) The Act contained no specific guidelines as to

\(^{20}\) *The Domestic Violence and Matrimonial Proceedings Act 1976* (hereinafter as *DVMPA*), Sec.1.

\(^{21}\) *Ibid.* Sec.2(1).

\(^{22}\) *Ibid.* Sec.2 (1).

\(^{23}\) *The Family Law Act 1996*, Part IV (hereinafter as *FLA*) employs the concept of molestation, but leaves the concept undefined. Accordingly, the Courts’ interpretation of this concept under the *DVMPA* will remain relevant.

\(^{24}\) See *Vaughan v. Vaughan* (1973)3 All E.R.499 (hanging posters about wife and her place of work); *Homer v. Homer* (1982) Fam 90 (searching through the woman’s hand bag); *Spencer v. Camacho* (1983) 4 FLR 662 (unwanted telephone calls and other general harassment).
how the Court should exercise its jurisdiction, but the cases indicate that the same principles apply to applications for ouster, as to applications under the MHA.

5.2.2.3 Personal Protection and Exclusion Orders under the Domestic Proceedings and Magistrates' Courts' Act 1978 (DPMCA)

This act was repealed and replaced by the Family Law Act 1996. For many years Magistrates have been empowered with a jurisdiction to protect married women from physical assault by their husbands. The Matrimonial Causes Act 1878 introduced the concept of the non-cohabitation order where by Magistrates could decree that a woman was no longer bound to cohabit with her husband. Such orders were, however, of limited efficacy since, although they entitled a wife to live apart from her husband, he could not be excluded from the home.

This Act conferred on Magistrates' Courts powers similar to, but not absolutely identical with, those contained in the DVMPA. Where the Court was satisfied that the respondent has used or threatened violence against the person of the applicant or a child, it could make an order that the respondent should not use or threaten such violence. Such order is known as personal protection order. Where in addition, it was satisfied that the applicant or child was in danger of being physically injured by the respondent, it could make an order requiring him to leave the matrimonial home or prohibiting him from entering the home. Such order is known as exclusion order.

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26 MHA, supra note 13, Sec 1(3).
27 The Domestic Proceedings and Magistrates Courts' Act 1978, (hereinafter as DPMCA), Sec 16 (2).
28 Ibid., Sec. 16(3).
A power of arrest could be attached to the order if the respondent has ‘physically injured’ the applicant or a child of the family and considers that he is likely to do so again.\(^{29}\) These were not routinely attached and Magistrates had to give their reasons for attaching such a power.\(^{30}\) If no power of arrest is attached, the applicant may apply for a warrant for the arrest of a respondent alleged to have disobeyed an order\(^{31}\). The respondent may be fined or imprisoned.

The provisions applied only to ‘parties to a marriage’. They do not extend to cohabitees. An essential difference between the Magistrates’ Court and County Court was that a Magistrates’ Court had no power to commit to prison for breach of an undertaking, with the result that there was little point in accepting undertakings.

### 5.2.2.4 Supreme Court Act 1981

The Supreme Court Act 1981 (not repealed by the Family Law Act 1996), consolidating earlier legislation and effectively supplanting what used to be the ‘inherent’ jurisdiction of the High Court, gives a general power to the Court to grant an injunction ‘in all cases in which it appears just and convenient to do so’ on ‘such terms and conditions as the Court thinks fit’.\(^{32}\) County Courts enjoy an equivalent jurisdiction, in their case derived entirely from statute, which is now governed by the County Courts Act 1984.\(^{33}\)

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\(^{29}\) *Ibid.*, Sec.18(1).

\(^{30}\) See *Widdowson v. Widdowson* (1982)\(^4\) FLR 121.

\(^{31}\) *DPMCA, supra* note 27, sec 18 (4), (5).

\(^{32}\) See *Supreme Court Act 1981*, Sec.37(1) (this was declaratory of the existing law).

\(^{33}\) See *The County Courts Act 1984*, Sec.38 (as now substituted by the *Courts and Legal Services Act 1990* S.3).
The scope for using injunctions under the Supreme Court Act 1981 is subject to limitations:

- *Richards v. Richards*,\(^{34}\) makes it clear that if a married person requires an injunction to regulate occupation of the family home, he or she must proceed under the MHA.

- The power of the Court to grant an injunction may only be exercised where there are substantive proceedings in progress (or about to be initiated) to which the injunction sought is ancillary or where the injunction sought is within the scope of the remedy sought in the main proceedings. This will be satisfied if there are matrimonial proceedings, proceedings under the Children Act 1989 with respect to the residence of a child, wardship proceedings or proceedings in tort for damages for assault.

- There must be a sufficient link between the substantive proceedings and the injunction.\(^{35}\)

- An injunction will only be granted in support of a recognised legal or equitable right. This is the most important restriction on the jurisdiction and the question of whether there is the necessary legal or equitable right in the claimant is one of considerable difficulty.\(^{36}\)

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\(^{34}\) Richards, *supra* note 8.

\(^{35}\) See *Des Salles Depinioxi v. Des Saller Depinioxi* (1967) 1 WLR553 (where an order to vacate the matrimonial home could not be made in proceedings founded on neglect to maintain, as the injunction would have no effect on the husband's ability to discharge the obligation).

\(^{36}\) See *Lucas v Lucas* (1992) 2 FLR53 (this restriction has proved problematic where claimants, without proprietary interest, seek to oust defenders from the former shared home).
The jurisdiction can also be used for non-molestation orders. Here again, the injunction must be in support of an existing legal right.  

Section 2(1) of DVMPA\textsuperscript{38} applies also under the Supreme Court and County Courts Acts. There is no power to attach an arrest power if the injunction does meet the requirements under the section.\textsuperscript{39} Breach of an order is a contempt of Court, which may be punished by committal to prison for a fixed term of up to two years.\textsuperscript{40}

5.2.2.5 The Criminal Law

There is no doubt that the criminal law contains adequate provision for dealing with violence between any two persons, including husband and wife. Depending on the degree of severity of the violence, there is at the most serious murder or manslaughter, including attempts, descending through the assault offences in the Offences Against the Person Act 1861,\textsuperscript{41} down to the power of the justices to bind over to keep the peace. It is in fact largely from the criminal and police statistics of recorded offences of violence that the extent of the problem of marital violence has become apparent.\textsuperscript{42} While the law is clearly adequate there has been considerable dissatisfaction with its operation. The Select Committee concluded: “If the criminal law of assault could be more uniformly applied to domestic assaults there seems little

\textsuperscript{37} See Patel v. Patel (1988)2 FLR 179
\textsuperscript{38} Supra note 21.
\textsuperscript{39} See White v. White (1983) Fam 54.
\textsuperscript{40} See George v. George (1986) Fam Law 294.
\textsuperscript{41} i.e. Sec. 47 actual bodily harm, Sec.20. unlawful wounding, sec.18. grievous bodily harm with intent.
\textsuperscript{42} Report from the Select Committee on Violence in Marriage 1974-75 (hereinafter as Select Committee), p.63.
doubt that it would give some protection to the battered wife". However, the criminal law has proved ineffective in suppressing domestic violence. There appear to be two main reasons for this:

- Procedural requirements, which complicate the initiation of criminal proceedings.

- The police are reluctant to bring charges in cases of domestic violence. There appear to be a number of reasons for this. The battered woman may be unwilling to go to Court to give evidence against her aggressor. A wife may call in the police for her immediate protection, but that does not necessarily mean that she will provide evidence for further legal action against her husband. A wife can be compelled to give evidence against her husband under section 80 of the Police and Criminal Evidence Act, 1984, but the evidence of a spouse who is testifying reluctantly will often appear to lack cogency.

The police have also traditionally regarded domestic violence as belonging to the private sphere of family life and unsuitable for law enforcement. While insensitive interference by the police is obviously to be deplored, the reluctance of police to prosecute wife barterers has been criticised. A number of senior officers including the Metropolitan Police Commissioner, now indicate that official policy favours the vigorous prosecution of cases of domestic violence and the Home Office

43 Ibid., p.xvi.
44 Ibid., p.368.
46 Ibid., pp 375, 76-7 (Metropolitan Police Evidence to Select Committee).
has issued a number of circulars emphasising the importance of appropriate policing in family violence cases.\footnote{Ibid.}

5.2.3 The Family Law Act 1996 (FLA)

Part IV of the Act, which relates to domestic violence and occupation of the matrimonial home, came into force since October 1, 1997. Most, if not all, of the Law Commissions recommendations were enacted into law. Most significant among those recommendations that were excluded were the right of the police to intervene and pursue civil remedies on behalf of domestic violence victims, and the incorporation of same-sex relationships within the scheme of protection relating to ouster orders.\footnote{District Judge Roger Bird, Domestic Violence – The New Law, (Bristol: Jordan Publishing Limited, 1996), p.6.} Part IV of the FLA is a comprehensive piece of legislation, which is intended both to remove anomalies and to make civil protection against domestic violence more effective. It provides a single set of remedies available in all Family Courts including the High Court, County Court, and Family Proceedings (Magistrates) Court. There are two main types of orders under the Act:

- Occupation orders, which regulate the occupation of the family home and
- Non-molestation orders, for protection from all forms of violence and abuse.

These orders are ‘free-standing’ injunctions i.e., they can be applied for directly and do not have to be made ancillary to any other proceedings, such as
divorce. Provisions for enforcement, through the attachment of powers of arrest, have been strengthened.

5.2.3.1 Who can use this law?

Eligibility for orders under the FLA, Part IV depends on the type of order, and the relationships between the applicant and the other party (the respondent). The Act considerably extends the categories of people who may seek protection. It introduces the new concept of ‘associated persons’ to apply for an occupation order or a non-molestation order. The applicant must be ‘associated’ with the person against whom they wish to take out an order.

The Act defines ‘associated persons’49 as people who:

- are or have been married to each other
- are or have been cohabitants (defined as a man and a woman, not married to each other but living together as husband and wife).50
- have lived in the same household (other than one of them being the others tenant, lodger, boarder or employee). This does not therefore include those in lesbian and gay relationships and those sharing house.
- are relatives (this is defined to include most immediate relations)
- have agreed to marry (evidence by a written agreement, the exchange of a ring, or a witnessed ceremony)

49 See FLA, Sec.62(3).
50 Ibid., Sec.61(1) (a).
• in relation to a child (they are both parents, or have or have had parental responsibility of a child).  

• are parties to same family proceedings (other than proceedings under this part).

And where a child has been adopted, two people are associated if they are:

• natural parent/grandparent and adopted child.

• natural parent/grandparent and adoptive parent.  

Within the Act an order may be sought to protect from molestation or regulate occupation rights for, the applicant and any “relevant child”. A relevant child is defined as:

• any child who might be expected to live with either of the parties involved.

• any child who is the subject of adoption or Children Act proceedings, or

• any other child whose interests the Courts considers relevant.  

This extends the scope of the previous remedies that were available. Which mere previously limited to any ‘child of the family’.

In GVF the Court considered the definition and relevance of ‘associated persons’. In that the applicant had said ‘strictly speaking, we do not live together’, the parties divided their time between each other’s flats. At first instance, it  

was held that they were not associated persons. On appeal it was held that the Court should give

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51 Ibid., Sec.62 (4) (a) (b).
52 Ibid., Sec.62 (5).
53 Ibid., Sec.62(2).
54 (2000) 2 FLR 533.
the non-molestation order provisions a purposive construction and not decline jurisdiction, unless the facts of the case were plainly incapable of being brought within the statute. Since Part IV of the 1996 Act was designed to provide swift and accessible protective remedies to persons of both sexes who were the victim of domestic violence, where the criteria laid down in S.62(3) were met, it should not be narrowly construed so as to exclude borderline cases.

5.2.3.2 Occupation orders

An occupation order regulates the parties’ occupation of their present, former or intended home\(^{55}\) and replaces all previous legislation and terminology. Previously similar orders were known as ouster orders, and exclusion orders. The Act introduces a new concept of ‘entitlement’\(^{56}\):

- An entitled person is some one who has some legal right to occupy the property, e.g. she/he is the freehold owner, tenant, contractual licensee or someone with a beneficial interest; or she/he has matrimonial home rights. The term ‘matrimonial home rights’ in the new legislation replaces the term ‘rights of occupation’ contained in the ‘Matrimonial Homes Act 1983’. Spouses of entitled persons automatically have matrimonial home rights under the Act.

- An non-entitled person has neither the legal right to occupy the property, nor matrimonial home rights.

\(^{55}\) See FLA, Sec.33 (1) (b).

\(^{56}\) Ibid., Sec.33 (1) (a).
Occupation orders may be granted under five different sections of the Act depending on the nature of the relationship between the parties and whether the applicant has an existing right to occupy the home. The parties must first be associated. The main differences between the five different categories of order are, the range of people who can apply; the criteria the Court must use in assessing whether to grant an order and the length of time the order may last.

1. Applicants with estate or interest or matrimonial home right

Where a person has an entitlement to occupy a dwelling house or has matrimonial home rights, the Court may by order:

- enforce the applicant’s entitlement to remain in occupation.
- require the respondent to permit the applicant to enter and remain.
- regulate the occupation rights of either or both parties.
- suspend, prohibit or restrict the exercise of the respondents’ rights to occupy.
- restrict or terminate the respondents’ matrimonial home rights.
- require the respondent to leave the dwelling house or part thereof.
- exclude the respondent from a defined area in which the dwelling house is included.  

Orders granted under this section are terminated upon the termination of the marriage or by the death of the other spouse. The Court is required to consider all the circumstances of the case including:

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57 Ibid., Sec.33.
58 Ibid., Sec.33 (3).
59 Ibid., Sec.33(5).
• the housing needs and housing resources of the parties and any relevant children.
• the financial resources of the parties.
• the likely effect of any order on the health, safety or well-being of the parties and any relevant children and
• the conduct of the parties in relation to each other and otherwise.\(^{60}\)

The Court is required to consider whether or not the applicant or any relevant child is likely to suffer significant harm if an order is not made. If the Court feels that significant harm will be suffered, it must make an order unless it appears to the Court that the respondent or any relevant child is likely to suffer significant harm if the order is made, and that the harm likely to be suffered by the respondent is likely to be greater than, or as great as, the harm which is attributable to the respondents conduct which is likely to be suffered by the applicant or any relevant child if the order is denied.\(^{61}\) This will require the Court to enter into a careful analysis of the respective ‘harms’ alleged by both applicant and respondent.

In the case of *B v. B*\(^{62}\) the Court of Appeal allowed an appeal by a husband against the County Court judges decision to grant an occupation order to the wife. The wife, joint tenant with her husband had left the home because of the husband’s violent behaviour, taking their baby with her. The husband was looking after his six-

\(^{60}\) *Ibid.*, Sec.33(6).


\(^{62}\) (1999) 1 FLR 715.
year-old son from a previous relationship. The Court of Appeal concluded the son was likely to suffer harm if the order were made and that his needs at present outweighed those of the couple’s baby, particularly because the local authority’s duty to the husband and son would be only temporary at best, where as its duty to the wife and baby would be to rehouse them.

In Re Y\textsuperscript{63} a number of issues were considered. Unusually, an occupation order had been made in favour of the husband in that, in the light of his health and disability, the balance went in his favour. On appeal, it was held that there was no evidence that harm was ‘attributable’ to the wife, as is required by S.33 (7). The exercise of discretion under S.33 (6) of the 1996 Act to evict a co-owner of a matrimonial home was a draconian remedy, which was to be used as a last resort. It was not an order to be made lightly. The issue should have turned not on eviction but upon whether the home was capable of being divided so as to accommodate the parties, together with cross undertakings.

On the relationship between S.33(7) and (6) in G v. G\textsuperscript{64} it was held that, on an application for an occupation order under S.33 of the FCA, if the Court found that the applicant or any relevant child was likely to suffer significant harm attributable to the conduct of the respondent, the Court was required to make an occupation order under S.33(7) unless the harm which would be suffered if the order was made was greater than the harm which would follow if it was not. Even if an order under

\textsuperscript{63} (2000) 2 FLR 470.
\textsuperscript{64} (2000) 2 FLR 36.
S.33(7) was not mandatory, an occupation order could nonetheless be made in the exercise of the Court’s discretion under S.33(6), in the light of the factors set out in S.33(6). In considering for the purposes of S.33(7), whether any harm likely to be suffered by the applicant or any relevant child was attributable to the conduct of the respondent, the important factor was the effect of the conduct upon the applicant or the children, rather than the intention of the respondent. Lack of intent might be a relevant consideration, but of itself it did not mean that any such harm could not be attributed to the respondents conduct.

2. Former spouse with no existing right to occupy\(^6\)

The disentitled former spouse may apply to the Court for an order giving the applicant the right not to be evicted or excluded from the dwelling house or any, part of it by the respondent for a specified period; and may prohibit the respondent from evicting or excluding the applicant during that period.\(^6\) If the applicant is not in occupation, an order may be made giving the applicant the right to enter and occupy for a specified period.\(^6\) An order may also:

- regulate the occupation of either of the parties.
- prohibit, suspend or restrict the exercise by the respondent to occupy.
- require the respondent to leave all or part of the dwelling house.

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\(^6\) See FLA, Sec.35.
\(^6\) Ibid., Sec.35(3).
\(^6\) Ibid., Sec.35(4).
• exclude the respondent from a defined area in which the dwelling house is included.\footnote{Ibid., Sec.35(5).}

Here again the Court is directed to consider all the circumstances under S.33, and in addition must consider:

- the length of time that has elapsed since the parties have ceased to live together.
- the length of time since the marriage was dissolved or annulled.
- whether there are pending proceedings under the MCA relating to property adjustment orders.
- applications under the Children Act 1989 for property provision for a child.
- pending proceedings relating to the legal or beneficial ownership of the dwelling house.\footnote{Ibid., Sec.35(6).}

The Court must also, as under S.33, consider the issue of harm suffered and likely to be suffered as a result of making an order.\footnote{Ibid., Sec.35 (8).} Orders under this section are limited to a specified period not exceeding six months, but may be extended on one or more occasions for a further period not exceeding six months.\footnote{Ibid., Sec.35 (10).}

\section*{3. One cohabitant or former cohabitant with no existing right to occupy\footnote{Ibid., Sec.36.}}

Equivalent provisions to those under S.35 are available to cohabitants. The Court is directed to consider all the circumstances including:
• housing needs and resources, financial resources the effect of any order, the
conduct of the parties and also the ‘nature of the parties’ relationship.

• the length of time they have lived together as husband and wife.

• whether there are or have been any children for whom both parties have or had
parental responsibility.

• the length of time which has elapsed since the parties ceased living together
pending proceedings.\textsuperscript{73}

Again, the issue of harm must be considered as well as a balance of the harms,
which may be caused to either applicant or respondent through the making of an
order.\textsuperscript{74} Unlike S.35 orders, an order under S.36 lasts for six months and may only be
extended once for a further six-month period.\textsuperscript{75}

4. Neither spouse entitled to occupy\textsuperscript{76}

Either party may apply for an order under this section\textsuperscript{77} and the Court has
power to:

• require the applicant to enter and remain.

• regulate the occupation of the dwelling house by either or both parties.

• require the respondent to leave.

\textsuperscript{73} Ibid., Sec.36(6).
\textsuperscript{74} Ibid., Sec.36(8).
\textsuperscript{75} Ibid., Sec.36(10).
\textsuperscript{76} Ibid., Sec.37.
\textsuperscript{77} Ibid., Sec.37(2).
• exclude the respondent from a defined area in which the dwelling house is included.\textsuperscript{78}

An order under this section may last for six months and may be extended on one or more occasions for a further period not exceeding six months.\textsuperscript{79} The same considerations apply as to applicants under S.33 in relation to what the Court must take into consideration.\textsuperscript{80}

5. Neither cohabitant or former cohabitant entitled to occupy\textsuperscript{81}

The same provision as in S.36 is made for disentitled cohabitants. The only difference in this regard is the number of extensions to the order, which is limited to one.\textsuperscript{82} Both sections 36 and 37 do require the Court to consider the ‘balance of harm test’, but it also retains its discretion whether or not to exercise its power to, for example, require the respondent to leave the dwelling house, whereas in the cases of spouses or former spouses (even when neither is entitled to occupy), the balance of harm in favour of the applicant obliges the Court to exercise at least one of its regulatory powers.

\textsuperscript{78}Ibid., Sec.37(3).
\textsuperscript{79}Ibid., Sec.37(5).
\textsuperscript{80}Ibid., Sec.37(4).
\textsuperscript{81}Ibid., Sec.38.
\textsuperscript{82}Ibid., Sec.38(6).
6. Supplementary provisions

It is provided that, where an order is made under Ss.33, 35 or 36, the Court may impose conditions:

- as to the repair and maintenance of the home or to the discharge of any mortgage or other outgoings.
- to order the occupying party to make periodic payments to the other party.
- to grant either party possession or use of furniture or other contents.
- to order either party to take reasonable care of any furniture or other contents.
- to order either party to take reasonable steps to keep the home and contents secure.

If the parties are cohabitants or former cohabitants, the Court is directed to have regard, when considering ‘the nature of the parties’ relationship’ to the fact that ‘they have not given each other the commitment involved in marriage’.

5.2.3.3 Non-molestation orders

Non-molestation orders reproduce and extend the previous powers of the Courts to make orders prohibiting a person (the respondent) from molesting another person associated with the respondent or any relevant child. The FLA Part IV employs the concept of molestation, but leaves the concept undefined. The term molestation tends to denote sexual molestation and can be confusing to potential

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83 Ibid., Sec.40.
84 Ibid., Sec.40(1).
85 Ibid., Sec.41.
86 Ibid., Sec.42(1).
applicants or respondents. However, as under previous legislation, an order prohibiting molestation can include both general and particular acts of molestation, none of which need be overtly ‘violent’, and can be used to order someone to stop using or threatening violence against (usually) woman or relevant child, or to stop intimidating, harassing, or pestering them. It can also have very specific instructions in it to suit a particular case – for example order an ex-partner to stop telephoning or pestering the applicant at work.  

In its report, the Law Commission said that molestation was an umbrella term, which covered a wide range of behaviour. It is stated that although there is no statutory definition of molestation, the concept is well established and recognised by the Courts. Molestation includes, but is wider than violence. It encompasses any form of serious pestering or harassment and applies to any conduct, which could properly be regarded as such a degree of harassment as to call for the intervention of the Court. Examples given by the Law Commission were Horner v. Horner in which it was held that handing the plaintiff menacing letters and intercepting her on her way to work amounted to molestation, and in Johnson v. Walton, where sending partially nude photographs of the plaintiff to a national newspaper for publication

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87 The Courts interpretation of the concept 'molestation' under the DVMPA remains relevant. It has been interpreted widely see Vaughan v. Vaughan (1973)3 All ER 499 (hanging poster about the wife at her place of work); Spence v. Camacho (1983) 4 FLR 662 (unwanted .. telephone calls and other general harassment.


89 (1982) Fam 90.

90 (1990) 1 FLR 350.
with the intent of causing her distress was held to come within a prohibition against molestation.

One question, which the Law Commission had canvassed was whether there should be some statutory definition of molestation. Their conclusion was that there was no evidence of problems having been caused in practice by lack of such definition, and, indeed, concern was expressed that a definition might become overly restrictive or lead to borderline disputes. Accordingly, they recommenced that there should be no statutory definition of molestation. The Court should have power to grant a non-molestation order where this was just and reasonable having regard to all the circumstances.91

Under the FLA, the Court can make an order either if the applicant is an 'associated person',92 or, by its own motion, within any family proceedings that the respondent is party to, if the Court considers it of benefit to any other party or relevant child.93 Children under 16 may apply for non-molestation order with the leave of the Court, if the Court decides the child has sufficient understanding.94 In deciding the outcome of any application, Courts must have regard to the health, safety and well-being of the applicant or any relevant child.95 ‘Health’ is defined broadly to include

91 Law Com para 3.6.
92 See FLA, Sec. 42(2) (a).
93 Ibid., Sec.42(2)(b).
94 Ibid., Sec.43(1).
95 Ibid., Sec.42(5).
both physical and mental health.\textsuperscript{96} An order may be made for a specified period, usually six months, for an open-ended period, or until a different order is made if further provisions are needed.\textsuperscript{97} However, if the Court decides of its own volition that an order should be made in the course of other family proceedings (for example, under the ‘Children Act 1989’) then the order will cease to have effect if those proceedings are withdrawn or terminated.\textsuperscript{98}

5.23.4 Jurisdiction

Orders under Part IV may be made by the High Court, County Court or a Magistrates’ Court.\textsuperscript{99} The Lord Chancellor may specify circumstances in which particular proceedings may be commenced in a specified Court,\textsuperscript{100} and for transfer of cases between Courts.\textsuperscript{101}

5.23.5 Undertakings

Where the Court has jurisdiction to make an occupation order or non-molestation order, the Court may accept an undertaking from any party to the proceedings.\textsuperscript{102} The Court shall not accept an undertaking, however, where apart

\textsuperscript{96} Ibid., Sec.63. (1)
\textsuperscript{97} Ibid., Sec.42(7).
\textsuperscript{98} Ibid., Sec.42(8).
\textsuperscript{99} Ibid., Sec.57 (1).
\textsuperscript{100} Ibid., Sec.57(4).
\textsuperscript{101} Ibid., Sec.57(5).
\textsuperscript{102} Ibid., Sec.46 (1).
from the section (S.46), a power of arrest would be attached to the order\textsuperscript{103}. An undertaking is enforceable as if it were an order of the Court.\textsuperscript{104}

5.2.3.6 Ex-parte orders

The Court may, in any case where it considers that it is just and convenient to do so, make an occupation order or a non-molestation order even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of Court.\textsuperscript{105} In determining whether to exercise its powers under subsection (1), the Court shall have regard to all the circumstances including, any risk of significant harm to the applicant or a relevant child, by the conduct of the respondent; whether it is likely that the applicant will be deterred or prevented from pursuing the application; and whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and that the applicant or a relevant child will be seriously prejudiced by the delay involved.\textsuperscript{106} When such an order is made, the Court must afford the respondent an opportunity to make representations relating to the order as soon as just and convenient at a full hearing.\textsuperscript{107}

5.2.3.7 Power of arrest

If an occupation or non-molestation order is made, and it appears to the Court that the respondent has used or threatened to use violence against the applicant or a

\textsuperscript{103} \textit{Ibid.}, Sec.46(3).
\textsuperscript{104} \textit{Ibid.}, Sec.46(4).
\textsuperscript{105} \textit{Ibid.}, Sec.45(1).
\textsuperscript{106} \textit{Ibid.}, Sec.45(2).
\textsuperscript{107} \textit{Ibid.}, Sec.45(3). [‘full hearing’ means a hearing of which notice has been given to all the parties in accordance with rules of Court, Sec.45(5)]
relevant child, the Court must attach a power of arrest unless the Court is satisfied that in all the circumstances of the case the applicant or child will be adequately protected without such a power of arrest.\textsuperscript{108}

In the case where an \textit{ex-parte} order has been granted under S.45, the Court may attach a power of arrest if it appears to the Court that the respondent has used violence against the applicant or child and that there is a significant risk of harm to the applicant or the child attributable to the conduct of the respondent.\textsuperscript{109}

5.2.3.8 Rehousing

Many battered women do not want to be reinstated in their former matrimonial homes, and look for rehousing in the public sector, by local authorities or housing associations. The enactment of the Housing Act 1980 and the Housing Act 1985 (now the Housing Act 1996) conferred upon tenants of local authorities ‘secure tenancy’ status (i.e. rights which in some respects resemble those enjoyed by private tenants under the Rent Acts). Authorities can no longer flexibly ‘switch’ tenancies to provide an immediate remedy in cases of violence. Violent husbands can be excluded from council accommodation by exclusion orders and tenancies can be transferred under MHA S.7 and schedule 1, but these are procedures, which must be initiated by the victim and not by the local authority. The FLA extends the Court’s powers to transfer tenancies.\textsuperscript{110} Thus the Act brings in new powers to transfer joint tenancies

\textsuperscript{108} Ibid., Sec.47(1) (2).
\textsuperscript{109} Ibid., Sec. 47(3).
\textsuperscript{110} Ibid., Sec.53.
into one party's name. This may enable abused women who are afraid to stay in their former home area to exchange their existing tenancy for one in another area and result in women and children having to spend less time in refuges or other temporary accommodation.

5.2.3.9 Extent of Protection of Domestic Violence Victims under Part IV of the Family Law Act

The strength of Part IV is that it now enables a much larger group of applicants who have been abused threatened or assaulted by someone with whom they are living or have (or have had) a family-type relationship to gain access to a uniform package of protective remedies. The legislation is also now more accessible for users, as well as advisers and legal professionals. Part IV is a significant improvement in many respects. For instance, powers of arrest should be attached as a matter of course whenever physical violence has been used or threatened to all orders made ‘on notice’, except where clear argument can be made as to why this is unnecessary. This should make more of these orders readily enforceable as those with powers of arrest are lodged at police stations. Many advocates however still feel, that the new law does not go far enough and that powers of arrest should also be mandatory in ex-parte applications where violence has been used or threatened. Monitoring is needed to see if powers of arrest will be attached with more regularity than heretofore. Annual feedback from Women’s Aid workers at Conference since the Act was introduced suggests that practice is still very patchy and that there is a problem with getting an emergency occupation orders (to get the violent man out) because the Courts will not
attach powers of arrest until the man has been served notice and has a chance to come to Court. This means that at the time of most vulnerability and risk (when female homicide statistics are highest), women are not fully protected as their injunctions are not lodged at police stations to enable fast action.  

Some potentially retrogressive amendments were also introduced during the passage of the Act, the impact of which is not clear, as they are not being monitored. In particular, in relation to occupation orders, the conduct of the parties was reintroduced as a criterion i.e. past behaviour. In relation to cases of domestic violence, this means that conduct not related to matters of safety and protection from violence may be a factor when considering whether or not to make an order. Research since 1978 has consistently confirmed how violent men frequently cite the conduct of the non-violent partner (in relation to domestic services, mothering, or sexual fidelity) as ‘provoking’ or ‘causing’ the abuse. Such justifications have also been accepted by Courts as reasons not to grant occupation orders, or in more extreme cases within criminal law, as defences for killing wives or ex-wives on grounds of ‘provocation’. On the other hand, consideration of conduct (i.e. violent or abusive behaviour) could be helpful in certain contexts. There has always been concern that in cases where women who at risk of violence from their partner apply for orders after many years of abuse, the effects of that abuse on their mental or physical well-being may be used against them. For instance, the respondent might argue that his partner is

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112 Ibid.
}
mentally unstable and unfit to have care of children, which is itself often a determining factor in who is permitted to occupy the property. In such cases the removal of all considerations of past behaviour could lead to a 'snapshot' picture at the time of application, without sufficient consideration of its causes, of harm in the past, and the potential for harm in the future. In practice, whether consideration of conduct proves to be positive or negative for abused women is likely to be related to the applicants' access to effective legal representation.  

The 'balance of harm' test (to be used when assessing the need for occupation orders) is intended to be more effective in not only addressing physical violence and abuse but also mental and emotional cruelty. In principle, it removes the concept of hardship present in previous legislation, which in practice frequently led to ouster applications failing because 'hardship' to the respondent (the abuser) was given greater weight than the need for protection from violence. The balance of harm test also gives greater attention to the needs of children. It was the intention of the Law Commission to remove any considerations of behaviour, in line with the trend of reducing need for recrimination in matrimonial law, and instead to focus on the question of 'harm'. However, during its passage through parliament, a number of worrying changes were made which dilute the 'balance of harm' notion.  

A second reference to conduct has been introduced into the 'balance of harm test' itself. Any 'significant harm' suffered by the applicant and any relevant child has to be

113 Ibid.
114 Ibid.
'attributable to the conduct of the respondent', whereas this is weighted against (any) harm likely to be suffered by the respondent or any relevant child. The effect of this appears to change 'the balance of harm test' to favour respondent (violent partner) as all forms of potential harm (defined as impairment of health or ill-treatment) may be considered on his part, whereas only harm attributable to his behaviour may be considered in relation to the applicant. It has been pointed out that the fairness of the balance of harm test is now open to question, as this amendment could give unfair weight to an abuser's right to occupation of the home over a victim's rights to protection from violence through a temporary order. However, interpretation of this test remains to be challenged in Court practice or by case law which could consider the widest definition of harm suffered by the applicant attributable to the respondent’s conduct. For example, if a woman is forced to leave her home, the harm she suffers as a result of becoming homeless could be considered to be due to the respondents conduct.115

Finally, Part IV may allow new opportunities for a more holistic response to domestic violence, through the more effective linking of action under the criminal law and protection for the future under the civil law. As S.60 offers the opportunity to pilot new powers by third parties to take out injunctions on behalf of abused women; for example, for police to take out orders on behalf of women at the same time as going before Magistrates for criminal proceedings.116

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115 Ibid.
116 Ibid.
5.2.4 Reform of the Present Law: The Domestic Violence, Crime and Victims Act 2004

In order to give greater protection to victims of domestic violence and following further criticisms of the existing law, the government had introduced the Domestic Violence, Crime and Victims Bill, 2004, which received the Royal Assent on 15 November 2004 is to be implemented in stages and of which S.5 has come into force on 5 July 2005. Part 1 of this Act amends part IV of the Family Law Act 1996. Under the 1996 legislation ‘cohabitants’ did not include same-sex couples for the purposes of either non-molestation orders or occupation orders. Under the new Act for the words after ‘cohabitants are’ substituted by ‘two persons who, although not married to each other, are living together as husband and wife or (if the same sex) in an equivalent relationship’. If the couple are non-cohabitant couples then they will now, as they were not previously, be protected as the new Act includes ‘associated persons’ who ‘have or have had an intimate personal relationship with each other which is or was of significant duration’. This inclusion of same-sex couples extends to occupation orders so they will be ‘entitled person’ for the purposes of the order.

The new Act will make it a criminal offence to breach a non-molestation order. This makes the order a hybrid order. The 2004 Act creates a new offence of

\[117 \text{The Domestic Violence, Crime and Violence Act 2004, Sec.3.}
\]
\[118 \text{Ibid., Sec.4.}
\]
\[119 \text{Ibid., Sec.1.}
\]
causing or allowing the death of a child or vulnerable adult.\textsuperscript{120} This offence arises when a child or vulnerable adult suffers an unlawful death and it can be proved that one or more of a small group of people living in the same household as the victim caused the death, but not which one of them. This offence may also be known as ‘Familial Homicide’ and relates to parents, family members living within the household, step parents or relatives and adoptive parents. It will only apply to all those who had a duty to protect the victim from harm as a result of being a member of that household and who had frequent contact with the child or vulnerable adult. The new offence is designed to close the loophole whereby there is no case to answer against any member of a household for murder or manslaughter because those living in the household are reluctant or refuse to give information or parents are blaming each other.

Part 2, 3 and 4 of the 2004 Act greatly strengthens the protection and support for victims of crime and heralds tough new powers for the police and the Courts to tackle offenders. Key provisions include:

- Making common assault an arrestable offence.\textsuperscript{121}
- Stronger legal protection for victims of domestic violence by enabling Courts to impose restraining orders when sentencing for any offence.\textsuperscript{122} Until now,

\textsuperscript{120} Ibid., Sec.5.
\textsuperscript{121} Ibid., Sec.10.
\textsuperscript{122} Ibid., Sec.12.
such orders could only be imposed on offenders convicted of harassment or causing fear of violence.

- Enabling Courts to impose restraining orders on acquittal for any offence (or if a conviction has been overturned on appeal) if they consider it necessary to protect the victim from harassment.\textsuperscript{123} This will deal with cases where the conviction has failed but it is clear from the evidence that victim need protecting.

- Putting in place a system to review domestic violence homicide incidents, drawing in the key agencies, to find out what can be done to put the system right and prevent future deaths.\textsuperscript{124}

- Providing a code of practice, binding on all criminal justice agencies, so that all victims receive the support, protection, information and advice they need.\textsuperscript{125}

- Allowing victims take their case to the Parliamentary Ombudsman if they feel the code has not been adhered to by the criminal justice agencies.\textsuperscript{126}

- Setting up an Independent Commissioner for victims to give victims a powerful voice at the heart of Government and to safeguard and promote the interest of victims and witnesses, encouraging the spread of good practice and reviewing the statutory code.\textsuperscript{127}

\textsuperscript{123} Ibid., Sec.12(3).
\textsuperscript{124} Ibid., Sec.9.
\textsuperscript{125} Ibid., Sec.35 to Sec.44.
\textsuperscript{126} Ibid., Sec.47.
\textsuperscript{127} Ibid., Sec.48 to Sec.53.
• Giving victims of mentally disordered offenders the same rights to information as other victims of serious violent and sexual offences.  
  
• Giving the Criminal Injuries Compensation Authority the right to recover from offenders the money it has paid to their victims in compensation.  
  
• A surcharge to be payable on criminal convictions and fixed penalty notices which will contribute to the Victims Fund. For motoring offenders the surcharge will only apply to serious and persistent offenders.

The Act is the biggest shake-up of domestic violence legislation for thirty years. With a statutory code of practice providing a range of rights to victims for the first time ever, and the establishment of an independent Commissioner, the measures in the Act build on the Governments ongoing reform to put victims at the heart of the criminal justice system and ensure more offenders pay towards supporting victims. The Act ensures that victims get the help, support and protection they need to rebuild their lives, as well as helping to convict the guilty. These measures, which were called for ten years, if fully implemented and properly resourced, should go a long way to safeguard the rights and needs of victims.

\[128\] Ibid., Sec.46.

\[129\] Ibid., Sec.57.

\[130\] Ibid., Sec.14.


\[132\] Dame Helen Reeves, Chief Executive of Victim support, Ibid.
5.3 Legislative Measures in United States

During the 1960s and 1970s the women’s movement politicised domestic violence, calling public attention to this heretofore private issue viewing it as a crucial means by which men exercised illegitimate dominance over women. “Wife abuse is chronic and widespread at all economic and social levels”, declared the National Plan of Action at the National Women’s Conference in Houston in 1977. The Conference urged Congress to consider “the elimination of violence in the home to be a national goal”, and called for expanded “legal protection” at the state level to permit women “to sue their assailants for civil damages”.133 Due to the women’s movement, the American criminal justice system finally responded to the crime of familial violence. It was not until the early 1990’s, however, that any federal bills regarding domestic violence were introduced in the Congress. Indeed, it was not until 1994 that the Violence Against Women Act (VAWA) was actually even codified into law. The recent changes in the laws for women’s from the 1960’s to the present represent progress. However, the historic existence of gender bias within American law contributes to and reinforces familial violence in America today, but increased awareness and understanding of its devastating effects has prompted stronger criminal justice responses by both the federal and state governments.134 Responses include:

Criminalizing Domestic Violence; Civil Protection Orders; The Violence Against

Women Act 1994; The Violence Against Women Act 2000; The Amendment to the Gun Control Act 1968. Each response will now be discussed in turn.

5.3.1 The Criminal System’s Responses

5.3.1.1 Criminalizing Domestic Violence

Traditionally, domestic violence was considered a matter between a man and his wife, an area where law enforcement had no jurisdiction. Officers believed and were taught that domestic violence was a private matter, ill suited to public intervention.\footnote{Joan Zorza, “The Criminal Law of Misdemeanor Domestic Violence, 1970-1990” (1992)83, J.Crim.L.& Criminology, p.46.} Police offices frequently told abusive spouses to take a walk around the block to cool down and attempted to mediate between abusers and their victims.\footnote{Ibid., p.48-50.} Not until the 1970s did the criminal system begin to treat assaults committed by intimate partners in the same way that it handled assaults committed by strangers.\footnote{Deborah Epstein, “Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Court system”, (1999), 11 Yale J.L. & Feminism, p.3.} Efforts to increase the responsiveness of the criminal system were buoyed by the Department of Justice’s 1984 Report of the Attorney General’s Task Force on Family Violence, which detailed the failures of the criminal justice system in family violence cases and made recommendations for improvement.\footnote{U.S. Dept of Justice, Report of the Attorney General: Task Force on Family Violence, (1984), p.10-16.} Assault and battery is always a crime, but some states have created a separate category of domestic violence crimes. These statutes differ in how domestic violence is defined and the types of relationships that are protected. Creating domestic violence crimes distinct from the
already existing assault and battery statutes was intended to call attention to these crimes and underscore the state’s commitment to protecting battered women. To help ensure compliance with Court orders, the majority of the states have also criminalized violation of a civil restraining order.\textsuperscript{139}

Ensuring that domestic violence was treated, as a crime was certainly a first step towards building a responsive legal system. But advocates soon found that the police were reluctant to move from a “walk around the block” regime to one where allegations of domestic violence required police to investigate and, when appropriate, arrest.\textsuperscript{140} Advocates soon began to press for another tool to ensure that batterers would be held accountable i.e. the mandatory arrest laws.

5.3.1.2 Mandatory Arrest Laws

Mandatory arrest laws were designed to deprive police of discretion in determining whether to make arrests when responding to domestic violence calls. Mandatory arrest laws require that a police officer make an arrest if he has probable cause to believe that a crime of domestic violence has been committed. These laws are now in place in twenty states and in the District of Columbia.\textsuperscript{141} Mandatory arrest laws have been credited with improving police response to domestic violence; in the

\textsuperscript{139} Sue Ellen Schuerman, “Establishing a Tort only for Police Failure to Respond to Domestic Violence”, (1992) 34 Ariz L.Rev p.355.

\textsuperscript{140} Ibid., p.358.

\textsuperscript{141} Zorza, supra note 136, p.61.
District of Columbia, the arrest rate in domestic violence cases went from 5% in 1990 to 41% in 1996 after the inception of the mandatory arrest law.\textsuperscript{142}

Mandatory arrest laws ensured that a greater number of cases were coming into the criminal system and to the attention of prosecutors. Prosecutors frequently found, however, that victims were reluctant to testify against their batterers. This reluctance stemmed from a number of sources: ambivalence about employing the legal system against their partners, mistrust of the justice system, and / or the belief that the batterer would simply be more dangerous to her because of her participation.\textsuperscript{143} But failure to pursue the larger numbers of cases coming into the system as a result of mandatory arrest laws could have dissuaded police from taking these laws seriously. Confronting huge numbers of battered women who recanted their stories of abuse, asked that charges be dropped, or simply refused to appear in Court to testify, prosecutors began to look for ways to push domestic violence cases forward in the face of the victims reluctance.\textsuperscript{144}

5.3.1.3 “No-Drop” policies

Some prosecutors' offices, beginning with San Diego, California, and Duluth Minnesota in the 1980s, saw “No-Drop” policies as the answer to this problem. No-drop or pro-prosecution policies prevent prosecutors from dismissing charges at the

\textsuperscript{142} Epstein, \textit{supra} note 138, p.14.


victims request. Instead, prosecutors are required to pursue any case where there is sufficient evidence. Prosecutors' officer throughout the country adopted no-drop polices, explaining to victims and batterers that decision to pursue a domestic violence case would be made by the government, not the victim. This strategy is intended to take the onus off the victim to pursue the case against her abuser and render threats against the victim ineffective, as she is no longer able to ask that charges be dismissed.

With the widespread adoption of no-drop polices has come further refinement in the practice. Prosecutors' offices employ either “hard” or “soft” no-drop polices. Hard no-drop jurisdictions push cases forward regardless of the victim’s wishes. In these jurisdictions, if the victim’s testimony is deemed essential, prosecutors will even subpoena reluctant victims to testify and arrest or request imprisonment of victims who refuse to appear pursuant to the subpoena. Victims in hard no-drop jurisdictions are also expected to participate extensively, in pre-trial preparation, signing statements, being photographed and interviewed, and providing the state with information. In soft no-drop jurisdictions, which are thought to be more prevalent, victims are not forced to testify in criminal matters but are provided with services designed to increase comfort with the criminal system and are encouraged to cooperate. In cases where the victim will not testify despite receiving these services,

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145 Ibid.
146 Esptein, supra note 138, p.15.
and the case cannot be made without her, prosecutors are likely to dismiss charges despite the no-drop policy.\textsuperscript{148}

The adoption of evidence-based prosecution polices has further enabled prosecutors to pursue cases when the victim is unwilling to participate. In evidence-based prosecution, police and prosecutors focus on gathering sufficient physical and testimonial evidence to make their cases without the victim, rendering the victim's testimony useful but unnecessary for conviction — much the way that homicide cases, where victims are not available to testify, are investigated. Police collect and prosecutors use evidence like tapes, statements to responding officers, photos of injuries, the testimony of medical personnel, physical evidence, and witnesses statements to make their cases.\textsuperscript{149} With all of that evidence, the victim is no longer essential, and the prosecutor can proceed without her.

Studies have found that fewer cases are dismissed and more batterers are convicted in jurisdictions adopting no-drop polices. No-drop policies are also credited with decreasing levels of violence and recidivism.\textsuperscript{150} Domestic homicides dropped from thirty in 1985 to seven in 1994 after San Diego implemented its hard no-drop policy. Some victim advocates argue that no-drop policies are beneficial to victims who are initially reluctant to cooperate, resulting in feeling of empowerment.

\textsuperscript{148} Hanna, \textit{supra} note 145, p.1867.


\textsuperscript{150} Epstein, \textit{supra} note 138, p 15-16.
for her that can alter the balance of power in the battering relation and lower rates of future violence.\textsuperscript{151}

5.3.2 The Civil System Response

5.3.2.1 Civil Protection Orders

Frustrated with the unwillingness of police and prosecutors to protect battered women, advocates in the 1970s had turned to the civil legal system.\textsuperscript{152} Relief came in the form of Civil Protection Orders. First appearing in state law in the 1970s, by 1989 all fifty states and the District of Columbia had enacted statutes providing civil remedies for battered women via protection orders, known as the “grand mother of domestic violence law”.\textsuperscript{153} Civil protection orders are injunctive legal remedies, “proscribing future assault or threat of assault” and other violent or harassment type behaviours. Said orders may prohibit the alleged abuser from contacting, threatening or physically abusing the victim. Additionally, the orders can provide for a wide variety of civil remedies such as orders determining custody, deciding support issues, demanding that the abuser vacate the residence, to stay away from the victim’s residence, to stay away from the victim’s place of employment and may include the payment of the victim’s abuse related attorney’s fees. A battered women’s initial

\textsuperscript{151} Hanna, \textit{supra} note, 145, p.1864.

\textsuperscript{152} Joan Zorza, “\textit{Using the Law to Protect Battered Women and their Children}”, (1994) 27 Clearing \textit{House Rev.} p.1142. (Before 1972, the only civil legal tools available to battered women were injunctions pursuant to divorce or legal separation, remedies that were short in duration, available in limited states, difficult to enforce, and useful for battered women not married to their batterers).

requirement for invoking criminal justice system is the civil protection order. Such Court orders assist women victims by removing the abuser, forbidding contact with the victim and granting custody and child support in favour of the victim.\(^\text{154}\)

The majority of states grant civil protection orders to spouses and former spouses; family members such as parents, siblings, aunts, uncles, etc; children; parents of a child in common; unmarried persons of different genders living as spouses; and intimate partners of the same gender.\(^\text{155}\)

Why are these orders so important? These civil protection orders are vital to the family and household members who petition for them because of their broad and discretionary scope. For example, Courts nationwide often issue the following orders:

- Orders to refrain from other physical or psychological abuse or even to restrict any contact with an alleged victim;
- Orders to vacate a domicile....or to allow... exclusive use of certain personal property;
- Orders to enter counselling;
- Orders to pay support, restitution, or attorney fees;
- Orders granting temporary custody of minors to the victim; and
- Orders limiting visitation rights to minor children.\(^\text{156}\)

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156 Ibid., p.801.
The broad scope of the civil protection order remedy allows judges to fashion the appropriate form of legal remedy to domestic violence cases, which have common themes and yet uncommon fact patterns.

Although protection orders seemingly protect women, “the most serious limitation of civil protection orders is widespread lack of enforcement”.157 Prior to 1994, and the enactment of the VAWA, state Court issued orders of protection were enforceable only within the issuing state. The majority of states, in conflict with Article IV, Section 1 of the United States Constitution, did not afford full faith and credit to foreign protection orders.158 For example, a battered woman in the State of Hawaii who had obtained an order of protection against her abusive husband could not flee to the State of California and enforce the Hawaii orders against her husband, if he followed her to California. Such polices in many states left a severe gap in the protection afforded to women. Specifically, a victim fleeing her abuser could not leave the boundaries of her state without losing the heightened protection derived from such an order.159 States in which fleeing victims sought refuge historically refused to enforce the victims’ protective order because most states ignored the full faith and credit clause of the United States Constitution.160 Most states refused to enact any full faith and credit legislation expressly validating such foreign orders of

157 Brenneke, supra note 155, p.33.


159 Ibid., p.254-56.

160 Ibid., p.270; See also U.S. CONST. Art.IV, S.1 (stating that full faith and credit shall be given in each state, to the public acts, records, and judicial proceedings of every other state).
protection. Without full faith and credit statutes, the states were limited to protecting women from only those acts of domestic violence, which took place within their jurisdiction. Therefore, the victim who is forced to flee or move to escape her crazed and violent spouse had no special legal protection against her batterer who may be stalking her to re-assert his control through kidnapping, violence or murder.\textsuperscript{161}

Prior to VAWA, and absence of any full faith and credit statute, any attempt to seek the protection of a refuge state through a new order of protection required the petitioning to the refuge state Court. Constitutional due process, it was argued, required that the batterer be served notice of the new protection proceedings. However, the notice served contained the victim's new address in the refuge state.\textsuperscript{162} The irony is clear: a fleeing victim, whose domestic situation was so abusive and threatening that she had to leave her home and escape to another state, was required to reveal her location to the one person from whom she was attempting to flee. A woman fleeing her male batterer by crossing state lines takes extremely dangerous risks. Indeed, many incidents of spousal abuse or murder occur during the victims attempt to leave her abusers. Thus, the majority of domestic violence victims who cross state lines to escape their abuser relinquish the legal protection afforded by protective orders just when those orders may be most important to the victims' survival.\textsuperscript{163}

\textsuperscript{161} Ibid., p.253-54.
\textsuperscript{162} Ibid., p.259.
5.3.3 The Violence Against Women Act of 1994 (VAWA)

To fill this gap in the protection of domestic violence victims and to “deter, punish, and rehabilitate batterers in order to prevent abuse” on September 13, 1994, President Clinton signed on VAWA into law as a section on of the Omnibus Crime Bill of 1994. The VAWA is “one of the Crime Bill’s largest crime-prevention programs, providing $1.6 billion to confront the national problem of gender-based violence”. The statute mandates new federal crimes, increased penalties for crimes against women and full faith and credit for foreign orders of protection. The VAWA contains seven subtitles concerning violence against women: subtitle A, Safe Streets for Women, increases sentences for repeat offenders who commit crimes against women. Subtitle B, Safe Homes for Women, focuses on crimes of domestic violence. Subtitle C, Civil Rights for Women, creates the first civil rights remedy for violent gender-based discrimination. Subtitle D, Equal Justice for Women in the Court provides training for state and federal judges to combat widespread gender bias in the Courts. Subtitle E, Violence Against Women Act Improvements, contains a variety of measures concerning penalties for federal sex offences, testing for sexually transmitted diseases for victims of sexual assault, federal studies on various aspects of sexual assault and domestic violence and other topics. Subtitle F, entitled National Stalker and Domestic Violence Reduction, focuses on improving federal, state, and local record-keeping and information sharing on domestic violence and stalking offences. Subtitle G, Protections for Batterd Immigrant Women and Children, is

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164 Klein, supra note 159, p.253.
designed to enable battered immigrant women to obtain lawful immigration status without having to seek the assistance of an abusive partner. The discussion of the VAWA here is limited to that legislation's domestic violence provisions.

5.3.3.1 Subtitle B- Safe Homes for Women

Subtitle B contains various amendments to exiting legislation, such as the Family Violence Prevention and Services Act,\(^{165}\) and the Omnibus Crime Control and Safe Streets Acts of 1968,\(^{166}\) as well several new statutory provisions.

1. Chapter 1- National Domestic Violence Hotline

Chapter 1 provides for the awarding of grants to a private, non-profit entity to establish a federal national domestic violence hotline.\(^{167}\) The national domestic violence hotline will provide information and assistance to domestic violence victims through a national toll-free telephone service, available twenty-four hours a day for information and assistance. In recognition of the difficulty of providing such a service to a diverse national population, the grant applicant must demonstrate “a commitment to diversity, and to the provision of services to ethnic, racial, and non-English speaking minorities, in addition to older individuals and individuals with disabilities”.\(^{168}\)

There are several advantages to a national domestic violence hotline. It provides an additional and necessary comprehensive resource center for women. It is


\(^{167}\) The Violence Against Women Act, 1994 (hereinafter a VAWA) Sec.40211.

\(^{168}\) Ibid., sec.40211.
useful for women who might otherwise abstain from utilising local initiatives because they fear an abuser's retaliation, or a lax response from local enforcement personnel or social services. It is also a crucial resource for women who leave their homes and cross-state boundaries, looking for shelter or trying to reunite with families, because it centralizes information for easy access on interstate services. The large-scale anti-violence message inherent in a national hotline is another benefit only available through such a federal service. The establishment of a national hotline sends the message that domestic violence is a matter of national importance, and that federal resource has allocated to it both because of its impact on women individually and collectively, and because of the effect of such violence on the general population. It emphasizes a commitment to reach out to all women, and to provide a broad range of services within a federal framework. It serves as a mechanism for institutionalising opposition and resistance to violence against women and for promoting national support for victims of this type of violence. It is a provision, which addresses both the public education and the preventive aspects of the VAWA. 169

2. Chapter 2 - Interstate Enforcement

Chapter 2 amends Part I of Title 18 of the United States Code by adding a new chapter: Chapter 110A- domestic Violence. 170 This chapter may be properly called the “federal domestic abuse crime statute”. It criminalizes certain domestic abuse where the abuses or the abuser's target crosses state boarders, or where the actions

170 Ibid., Sec.40221, §§ 2261-2266.
otherwise implicate interstate transgressions of a woman's security resulting in bodily
injury to the woman. The most important aspects of this section are its definitions of
the abuser and the abuser's target and the nature of the conduct, which constitutes a
criminal violation.

The chapter includes a broad definition of "spouse or intimate partner", reflecting the various relationships in which abuse occurs. It extends protection to
current and former spouses and unmarried intimate partners. The definition is gender
neutral on its face and thus does not exclude gay and lesbian couples who are
recognised by the domestic or family violence laws of the states. The statute defines
"spouse or intimate partners" as:

a present, or former spouse, a person who shares a child in common with the
abuser, and a person who cohabits or has cohabited with the abuser as a spouse; and
any other person similarly situated to a spouse who is protected by the domestic or
family violence laws of the state in which the injury occurred or where the victim
resides.\textsuperscript{171} This definition ensures that former domestic partners — regardless of
whether, they have married, have a child, or are former cohabitants — are subject to
the criminal sanctions set forth in the VAWA. By casting a wide net the VAWA
ensures that all those who commit violence will be prosecuted.

Chapter 2 applies to interstate conduct when: a person who travels across a
state line or enters or leaves Indian country with the intent to injure, harass, or
intimidate that person's spouse or intimate partner, and who, in the course of or as a

\textsuperscript{171} Ibid., Sec.40221, § 2266.
result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished herein.\textsuperscript{172} A person who forces a spouse or intimate partner to cross state lines “by force, coercion, duress or fraud” and injures the person is also punishable under the VAWA.\textsuperscript{173} The penalties under this section are severe and depend on the victims’ injury. Any person who inflicts fatal injuries may be sentenced to life imprisonment. Permanent disfigurement or life threatening bodily injury carries a penalty of up to twenty years imprisonment, serious body injury or use of a dangerous weapon comes a maximum penalty of ten years imprisonment, and a penalty of up to five years imprisonment applies in all other cases.\textsuperscript{174}

Violations of orders of protection are similarly sanctioned and carry the same penalties, depending on the severity of the violent consequences flowing from the violation of the order. For examples, the violation of an order of protection, which results in permanent disfigurement or life threatening bodily injury, is punishable by up to twenty years imprisonment.\textsuperscript{175} In an effort to afford the greatest possible national protection to women, orders of protection are accorded full faith and credit in non-issuing states and granted the same enforcement power as if issued by the enforcing State.\textsuperscript{176} To be accorded such expansive authority, these orders must

\textsuperscript{172} Ibid., Sec.40221, § 2261 (a) (1).
\textsuperscript{173} Ibid., Sec.40221, § 2261 (a) (2).
\textsuperscript{174} Ibid., Sec.40221, §§ 2261 (b).
\textsuperscript{175} Ibid., Sec.40221, § 2262 (b).
\textsuperscript{176} Ibid., Sec.40221, § 2265 (a).
comply with certain jurisdictional and procedural requirements aimed at ensuring protection of basic due process rights.\textsuperscript{177}

Courts are required to provide the victim with restitution.\textsuperscript{178} Restitution is expansive and may include medical costs, lost income, and attorneys' fees. The defendant cannot escape liability based on economic status.\textsuperscript{179} However, the Court may consider the defendants' economic status when fashioning a repayment schedule.\textsuperscript{180}

One obvious benefit of this section is its provision of a federal forum to address domestic violence. A federal venue is important for women who are suspicious of local officials' commitment to the enforcement of state anti-violence laws, or for women who have left their original jurisdiction and are unfamiliar with the local laws and customs of the jurisdiction in which they subsequently reside. These women might feel more comfortable or receive more appropriate treatment in federal Court.\textsuperscript{181} Criminalization of abuse, which occurs across state lines is responsive to the form of violence, which is prevalent among domestic partners. Data reveals that domestic violence escalates once the woman attempts to leave the

\textsuperscript{177} Ibid., Sec.40221, § 2265 (b). (The Court in the state issuing the order of protection must have both personal and subject matter jurisdiction under its state law. The respondent must be given notice and an opportunity to be heard. Exparte orders are permissible, so long as the jurisdictional requirement is satisfied and notice and an opportunity to be heard are provided under the states law, or at least within a reasonable time.

\textsuperscript{178} Ibid., Sec.40221, § 2264 (a) - (b) (4).

\textsuperscript{179} Ibid., Sec.40221, § 2264 (b) (3), (b) (4), (b) (1).

\textsuperscript{180} Ibid., Sec.40221, § 2264 (b) (4) (c) (i).

\textsuperscript{181} Good mark, supra note 170, p.11.
Women and their advocates are provided with a new weapon in their struggle against the violence whenever these brutal incidents occur across geographic boundaries. The statute reaches behaviour which constitutes psychological warfare against women or which seeks to force a woman against her will, through blackmail, threats, or other coercive methods, to travel interstate. Federal criminalizaiton and the imposition of the severe penalties in the VAWA help deter such conduct, eliminate any state conflict of law issues, and facilitates prosecution of an abuser.¹⁸²

3. Chapter 3 – Arrest Policies in Domestic Violence Cases

A corollary to the VAWA’s enforcement of penalties for abusive conduct at the federal level is its encouragement of state’s strict enforcement of arrest practices in domestic violence cases. The stated purpose of subtitle B, Chapter 3 — Arrest policies in Domestic Violence cases, is “to encourage states, Indian tribal governments, and units of local government to treat domestic violence as a serious violation of criminal law”.¹⁸³

Localities are eligible for grants under Chapter 3 for the following purposes:

- To implement mandatory arrest or pro-arrest programs and policies in police departments including mandatory arrest programs and policies for protection order violations.
- To develop policies and training in police departments to improve tracking of cases involving domestic violence.

¹⁸² Ibid.
¹⁸³ VAWA, Sec.40231, (a) (3), § 2101 (a).
• To centralise and coordinate police enforcement, prosecution, or judicial responsibility for domestic violence cases in groups or units of police officers, prosecutors, or judges.

• To coordinate computer tracking systems to ensure communication between police, prosecutors, and both criminal and family Courts.

• To strengthen legal advocacy service programs for victims of domestic violence.

• To educate judges in criminal and other Courts about domestic violence and to improve judicial handling of such cases.¹⁸⁴

Grant eligibility requirements focus on the effective and serious implementation of policies regarding arrest and orders of protection. For example, the locality must certify that its laws or official policies encourage or mandate arrests based on probable cause. In the case of abusers who have violated orders of protection, the locality must discourage dual arrests of the abuser and the victim, and prohibit issuance of mutual restraining orders, except where the Court finds that both parties acted either as aggressors or in self-defence. The local laws or policies cannot require that the abused bear costs associated with the issuance or service of a warrant, protection order, or witness subpoena.¹⁸⁵ Moreover, the locality must identify the non-profit private victim services programmes, which will be consulted in the

¹⁸⁴ Ibid., Sec.40231, §§ 2101 (b).
¹⁸⁵ Ibid., Sec.40231, § 2101 (c).
development and implementation of the programme.\textsuperscript{186} Priority in the issuance of grants shall be given to localities, which, \textit{inter alia}, "demonstrate a commitment to strong enforcement of laws and prosecution of cases, involving domestic violence."\textsuperscript{187}

The positive aspects of criminalization and mandatory arrest are the philosophical bases for this section of the VAWA. The emphasis is on the identification and prosecution of the abuser. The VAWA assumes the legitimacy of the fear of further violence and retaliation, and seeks to facilitate the acquisition of orders of protection against abusers.\textsuperscript{188}

4. Chapter 5- Youth Education and Domestic Violence

Chapter 5 allocates appropriations for the selection and implementation of four model programmes aimed at educating youth about domestic violence. Each programme targets four different youth population by school-age, i.e. separate programmes would be developed for primary schools, middle schools, secondary schools, and higher education institutions. Educational, legal, and psychological experts on battering, as well as victim advocate organisations, including battered women's shelters, will participate in the selection, implementation, and evaluation of these programmes.\textsuperscript{189}

\textsuperscript{186} \textit{Ibid.}, Sec.40231, § 2102 (a) (3).

\textsuperscript{187} \textit{Ibid.}, Sec.40231, § 2101 (b) (2).

\textsuperscript{188} Good Mark \textit{supra} note 170, p.16.

\textsuperscript{189} VAWA, Sec.40251, § 317 (b) (\textit{VAWA} authorises § 400,000 for fiscal year 1996 for the implementation of this section. \textit{Id.}, Sec.40251, § 317 (d).
Prevention is clearly the focus of this section, yet, the most meaningful aspect of this subtitle is the legislatures recognition of the need for educational programs which cut across all age groups. For example, the inclusion of advocates in the development and implementation of youth education programmes is important to ensure that the programs will not merely provide lip service to the issue or become a purely academic exercise.

5. Chapter 6 – Community Programs on Domestic Violence

This chapter amends the Family Violence Prevention and Services Act, 42 U.S.C. 10401 et.seq., as amended by section 40251, and adds as new section entitled S.318 “Demonstration Grants for Community Initiatives”. This new provision authorises the secretary to award grants for up to three years to non-profit private organisations to “establish projects in local communities involving many sectors of each community to coordinate intervention and prevention of domestic violence”.\footnote{190} Grantee candidates shall include community representatives and may include domestic violence advocates.\footnote{191}

The apparent intention of this section is to create an active community program. For example, the grantee must bring together community leader to coordinate anti-domestic violence strategies, and to improve and expand existing community efforts.\footnote{192}

\footnote{190} Ibid., Sec.40261, § 318 (a).
\footnote{191} Ibid., Sec.40261, §§ 318 (b) (2), (E).
\footnote{192} Ibid., Sec.40261, §§ 318 (c) (1) (c) (2).
Chapter 9 establishes and provides the financial basis for federal and state research ventures. Section 40291 of Chapter 9 authorises the Attorney General to request the National Academy of Sciences to develop a research agenda for the purpose of "increasing the understanding and control of violence against women, including rape and domestic violence". The agenda must focus on "preventive, educative, social, and legal strategies, including addressing the needs of underserved populations". The VAWA commands the National Academy of Sciences to "convene a panel of nationally recognised experts on violence against women, representing a broad cross section of professions, such as law, medicine, and service providers. The agenda must be completed and a report presented to the committee on the Judiciary of the House of Representatives within one year of the VAWA's enactment. Section 40292 of this chapter requires the Attorney General to study and propose to the states and Congress how the states may collect "centralised databases on the incidence of sexual and domestic violence offences within a state". The study should be based upon consultations with experts in the field, and their recommendations must be presented in the report. This study shall be completed

193 Ibid., Sec.40291, (a).
194 Ibid.
195 Ibid.
196 Ibid., Sec.40291 (c).
197 Ibid., Sec.40292 (a).
198 Ibid., Sec.40292 (b).
within one year and presented to the committee on the Judiciary of the Senate and the House of Representatives.  

Finally, section 40293 mandates that the Secretary of Health and Human services, through the Centre for Disease Control Injury Control Division, conduct a study to obtain a national projection of the incidence of injuries resulting from domestic violence the cost of injuries to health case facilities, and recommended health care strategies for reducing the incidence and cost of such injuries.  

5.3.3.2 Subtitle C – Civil Rights for Women  

Under subtitle C, a new civil remedy for violence against women was included that would have permitted private damage suits in federal Court by victims of “gender motivated violence”. This provision was struck down (5-4) on May 15, 2000, by the Supreme Court in *United States v. Morrison* as unconstitutional under the commerce clause and the Fourteenth Amendment. The Court found that such violence does not substantially affect interstate commerce. It further noted that the Fourteenth Amendment is directed at state actions, and not those of private citizens. Nonetheless, victims can still bring damage suit in state Courts.

199 *Ibid.*, Sec.40292 (c).  
201 *Ibid.*, Sec.40302 (a).  
5.3.3.3 Subtitle D- Equal Justice for Women in the Courts

Subtitle D contains two chapters, one applicable to state Courts, the other to federal Courts. This part of the VAWA targets federal and state judges and Court personnel for education and training on violence against women and laws redressing gender-based crimes through the issuance of education and training grants.

Chapter 1, “Education and Training for Judges and Court Personnel in State Courts”, authorises grants for the purpose of developing, testing, presenting, and implementing legal education and training model programs for state judges and Court personnel. The VAWA also requires that law enforcement officials, victim’s advocates, legal experts and experts on gender bias in the Courts be included in the development of these programs.

Chapter 2, “Education and Training for Judges and Court Personnel in Federal Courts”, encourages circuit judicial councils to undertake studies, and similar education and training programmes for federal judges and Court personnel on the issue of gender bias in the federal judicial system. Specifically, chapter 2 encourages the circuit judicial councils to “conduct studies of the instances, if any, of gender bias in their respective circuits and to implement recommended reforms.

Chapter 2 allows individual federal circuits to determine whether a gender-related issue merits study and analysis. This is a weak statement on bias at the federal

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204 VAWA, Sec.40412.
205 Ibid., Sec.40413.
206 Ibid., Sec.40421 (a).
level, and is inconsistent with Subtitle D’s provisions suggesting issues for study. It is also inconsistent with, and undermines the thrust of the VAWA itself. The VAWA emphasises that gender bias is real and prevalent and requires that legislative action be taken immediately in order to secure equality for women. This language contained in chapter 2 is particularly troublesome, as well as perplexing, since the original senate version contained language which recognised systematic gender bias in the criminal justice system. One of the findings in senate Title III specially stated that: Existing bias and discrimination in the criminal justice system often deprives victims of gender-motivated crimes of equal protection of the laws and the redress to which they are entitled.  

The weak commitment in Chapter 2 to federal education is further marked by language which permits, rather than mandates, the Federal Judicial Centre to include information on gender bias in the Courts in its educational and training programmes for newly appointed judges. The need for education, sensitisation, and training of those involved in domestic violence matters, as part of the judicial system at the state and federal levels, is well documented by studies of gender discrimination in the Courts and studies of the treatment of domestic violence cases.

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208 VAWA, See 40421 (d) (1).
5.3.3.4 Subtitle G - Protection for Battered Immigrant Women and Children

This subtitle amends the Immigration and Nationality Act\textsuperscript{210} and provides specifically for abused immigrant women and children. Under this new section, battered women and children may file petitions apart from and independent of their spouse or, in the case of an abused child the parent. This provision is critical because it permits immigrant domestic violence survivors to seek legal status in this country without relying on the abusive spouse or parent. This provision provides survivors with the opportunity to leave a battering situation without fear of reprisal based on their immigration status. Subtitle G facilitates termination of a marriage to a batterer by allowing immigrant domestic violence survivors to petition, even after the marriage ends, so long as the marriage was entered into on good faith. \textsuperscript{211}

5.3.3.5 Extent of Protection of Domestic Violence Victims under the Violence Against Women Act 1994

The VAWA necessarily transforms the discourse on domestic violence because it brings domestic violence from the private to the public arena and positions it with a highly visible milieu: the federal system. Moreover, the VAWA is set forth as an integral component of a comprehensive crime bill. The VAWA is cast as part of the war on crime, and as a result, bears the imprimatur of a legitimate federal criminalisation strategy. Further more, the VAWA employs a carrot-and-stick strategy by providing financial incentives to the states: to limit law enforcement


\textsuperscript{211} VAWA, Sec.40701 (a) (1) (c) (iii) (1), 40701 (c).
discretion through the promotion of mandatory arrest and the discouragement of dual
arrest and mutual orders of protection; to initiate community anti-violence projects;
and to develop anti-violence education programmes for children.\footnote{212}

The VAWA also encourages, and often mandates, the strategic inclusion of
advocates and service providers in the planning stages of programmatic development
initiatives. Consequently, the VAWA provides a certain area of credibility to such
advocates and service providers, which may avert the devaluation of their knowledge
and expertise. In addition, the VAWA provides for programmes which focus on the
past experiences of women and their representatives, and which seek to integrate such
experiences into anti-violence strategies.\footnote{213}

VAWA has changed the state of knowledge about violence against women.
The statute has spurred data collection and research. The importance of being able to
harness federal institutions in the fight against domestic violence against women
should not be underestimated. For the first time, violence against women has been
made a top priority at the highest levels of government. As a result of passage of
VAWA, the United States Department of Justice created a Violence Against Women
Office devoted to implementing the Act, and the Department of Health and Human
Services undertook a similar effort. Federal involvement has also galvanised public
attention to this issue. While VAWA was pending in Congress, it triggered extensive

\footnote{212}{Kelli C. McTaggart, "The Violence Against Women Act: Recognising A Federal Right To Be Free
From Violence", (1998), 86 Geo. L. p.1150.}
\footnote{213}{Ibid.}
press coverage and became a focal point for a national debate.\textsuperscript{214} The passage of VAWA in 1994 paved the ways for further federal legislative action. In 1996, VAWA was amended to create an additional federal crime of interstate stalking.\textsuperscript{215} As VAWA proved to be a remarkable success at addressing and ending Violence Against Women, in 2000 the law was reauthorised and passed as the Violence Against Women Act of 2000.

5.3.4 The Violence Against Women Act of 2000 (VAWA 2000)

On October 28, 2000, President Clinton signed into law the Violence Against Women Act of 2000 as Division B of the Victims of Trafficking and Violence Protection Act of 2000 (P.L. 106-386). VAWA 2000 sought to build on the success by improving and strengthening the original law, and doubling funding for VAWA from $ 1.6 billion dollars over 6 years in 1994 to $ 3.3 billion dollars over 5 years. VAWA 2000 improved law enforcement responses to domestic violence provided education and training on violence, against women issues and provides services for victims. VAWA 2000 also reauthorised the Domestic Violence Hotline, as well as, grants funded under the original law. Finally, VAWA 2000 added new provisions to the law.\textsuperscript{216}

Key provisions of VAWA 2000 relating to domestic violence include:


\textsuperscript{216} 10 years of Ending Violence Against Women: The YWCA USA celebrates the 10th Anniversary of the Violence Against Women Act, available at http://www.ojp.usdoj.gov/vavo/regualtions.htm
• Establishing initiative to address the impact of domestic violence on children;
• Recognising the unique needs of disabled and older victims of violence;
• Enhancing the protections for immigrant battered women and children;
• Providing transitional housing assistance and services to domestic violence who are homeless and in need of housing;
• Improving the laws regarding protection orders, sex offender registration and interstate domestic violence. 217

The current status is that VAWA has been a success at combating violence against women. Between, 1993 to 2001 there was virtually a 50% drop in incidents of non-fatal domestic violence and from 1993 to 2000 there was a 20% drop in women killed by current or former intimate partners. And in 2003, after being in existence for only seven years, the National Domestic Violence Hotline answered its one-millionth call for assistance. Now, it answers over 16,000 calls a month and provides access to translators in 139 languages. 218

5.3.5 The Gun Control Act of 1968 (GCA) and Preventing Domestic Homicide

To combat the widespread and lethal use of firearms in familial violence, the federal criminal justice system recently enacted the Omnibus Consolidated Appropriations Act of 1997 (OCAA). The OCAA amended the GCA to make it unlawful for any person to sell or otherwise dispose of an firearm or ammunition to any federal firearm licensee knowing or having reasonable cause to believe that such

217 Ibid.
218 Ibid.
federal firearm licensee has been convicted of misdemeanour crime of domestic violence. 219

The Amended Act mandates that all federal firearms licensees, such as police and military officers, surrender their firearm if said officers had been convicted of a misdemeanor crime of domestic violence.220 The act contains two amendments to the 1968 GCA, which affect federal firearms licensees,221 one of which directly protects female victims of abuse from death by firearms. The relevant amendment prohibits familial violence perpetrators from possessing firearms or ammunition.222 This denies batterers their most commonly used instrument of abuse and eventually will save lives. The Act, “makes it unlawful for any person convicted of a misdemeanor crime of domestic violence’ to ship transport, possess, or receive firearms or ammunition”.223 The Act also makes it “unlawful to sell firearms or ammunition to any recipient knowing or having reasonable cause to believe that the person has been convicted of such a misdemeanor”.224 This illustrates the federal governments zero tolerance of domestic homicide and continued commitment to fighting violence against women. The definitions of key terms in the Act also demonstrate the federal governments commitment to eliminating domestic violence.

220 Ibid.
221 Ibid.
222 Ibid.
223 Ibid.
As defined in the act, a "misdemeanour crime of domestic violence means an offence that:

a) as is a misdemeanor under Federal or State law; and

b) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.225

This definition includes all misdemeanors involving the use of attempted use of physical force committed by one of the defined parties.226 This broad definition easily disqualifies all federal firearm licensees who have been convicted of even a misdemeanor crime of domestic violence.

Although the definition of a "misdemeanor crime of domestic violence" creates a broad scope under the Act, the law's retroactive character further extends the scope of the Act and the federal government's commitment. The Act's prohibition applies to all persons convicted of such misdemeanors at any time, even if the conviction occurred prior to the law's effective date of September 30, 1996. Thus, as of the

226 Ibid.
effective date, persons included under the broad reach of the statute, may no longer legally possess a firearm or ammunition.  

In contrast to the statute’s strict prohibitions above, the Act employs a self-reporting enforcement mechanism: any persons convicted of a misdemeanor are asked to turn over to the Court any firearms in their possession. There is no formal law enforcement mechanism beyond the voluntary surrender of firearms by affected parties included under the Act. Clearly, a potential problem with such voluntary enforcement measures is that convicted spouse abusers will not surrender their firearms as directed. This is especially troubling considering the substantial benefits afforded to women under the Act; the Act directly saves victim’s lives by taking guns out of the hands of potential murderers. There is, therefore, a serious potential for abuse and lax enforcement as actual enforcement depends on either the affected law enforcement agency’s discovery or the convicted federal firearm licensee abuser’s self-reporting of such misdemeanor convictions and possession of firearms.

5.4 Conclusion

Domestic violence is a problem of national proportion in both United Kingdom and United States. Statistics on its frequency are shocking, and its impact on the nation’s welfare and economy is immeasurable. What is the effect on women who must live in fear who must move frequently to protect their safety, uprooting their

227 Supra note 217.
229 Ibid.
family and economic ties? What is the effect on children raised in an environment without security, in which violence becomes a fact of life? How can children subjected to this violent environment succeed in school or in work and establish their own peaceful family relationships? They certainly start life at a tremendous disadvantage. The amount of resources the nation must spend on police service, societal services, medical services, and incarceration as a result of domestic violence surely is staggering. The problem was how to break this cycle of violence.

Changing attitudes and cultural perceptions can take a long time. But in the short term, legislation can have a powerful impact if there is a political will to implement it. Careful implementation of laws designed to provide women with equality and protection can help create an environment where women’s rights become the norm.

Legislation is an appropriate response to a national problem like domestic violence. It sends a message to the nation, including law enforcement officers and prosecutors, that domestic violence is a serious national epidemic. The provisions tell victims that the nation takes their plight seriously, provide them with civil remedies that acknowledge and partly compensate them for the harm they have suffered and also protect them by prohibiting the offenders to continue the abuse. Problems undoubtedly will arise with the implementation of the laws. The legislations in both the countries are a well conceived and generally well drafted response to, a serious national problem even though there is much more to be done. If properly applied they provide the government a proper role in policing domestic violence. The laws that
have been passed or amended in the last decade reflect recognition by the
governments that they must take measures against domestic violence against women.
Although Legislation will certainly not end domestic violence it sends a powerful
message and its a good start toward changing societal attitudes about domestic
violence.