

EMANCIPATORY POLITICS AND REBELLIOUS
PRACTICES: INCORPORATING GLOBAL
HUMAN RIGHTS IN FAMILY VIOLENCE
LAWS IN PERU

MICHELLE A. MCKINLEY*

I. INTRODUCTION

This Article examines the impact of global human rights laws and conventions on national legal systems, with a particular focus on the redaction, reform, and implementation of gender violence laws in Peru. In tracking the reform process in Peruvian family violence laws, I argue that legal reform is a critical part of the process of indigenization of global human rights, as “rights” are contested, interpreted, and negotiated by local, national, and regional actors in civil society. My goal in studying the multiple interpretations of “rights” is to understand the ways that global recommendations for legal reform are transformed through local processes of accommodation and resistance at the grassroots level. Given the continued challenges to the recognition of women’s human rights in both theoretical discourse and in national political forums, it is important to identify the ways human rights can be successfully promoted through social change legislation and collective action.

In reviewing the impact of global human rights discourse on Peruvian family law, this Article contributes to the increas-

* Visiting Associate Professor, University of Kansas School of Law. My thanks go to Michael Hoeflich, Elizabeth Kuznesof, Maria Emma Mannarelli, Sally Merry, Joane Nagel, Maruja Rodríguez and Guillermo Zorogastua for helping me organize my chaotic ideas about the local impact and importance of global feminist discourse, colonial legal history, and human rights promotion. I am eternally grateful to Norma and Fernando Meléndez Rodríguez for taking care of my three children during the time I conducted this research, and my thanks go to my children for their patience and understanding during the course of field research and writing. Parts of this research were presented at the Universidad Mayor Nacional de San Marcos, Program in Gender, Sexuality, and Public Policy, and the Andean and Amazonian Worlds Seminar at the Hall Center for the Humanities, University of Kansas.

ing interest¹ in examining family law as a critical component of a restrictive gendered ideology that is informed by and reinforces a set of norms, values, and assumptions about the way family life should be organized. As Radhika Coomaraswamy has persuasively argued:

[Family law] . . . is, in fact, the litmus test in any society with regard to legal norms and the status of women It is also the area where the law, ethnicity, and ideology with regard to the rights of women merge to become a powerful ideological force.²

Yet is family law purely redacted for the purpose of regulating and controlling women's lives, or should we look closer to see how it can be a useful resource for women to struggle against predetermined gender roles? The ways in which family violence cases are viewed objectively are influenced by global processes, civil codes, and human rights policies that use legal interventions to promote women's human rights. The ways in which family violence cases are viewed subjectively are shaped by local moral contexts that transform these global policies into actionable rights. The cases described herein point to the contemporary operation of family courts in Peru and the role of individual agency in shaping the multiple local interpretations of gender violence laws that emanate from the global women's human rights movement. In sum, the cases that women

1. See, e.g., Lama Abu-Odeh, *Modernizing Muslim Family Law: the Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043 (2004) (discussing the tension between feminist demands for liberal family law reforms in Egypt and the opposition by conservative religious factions antagonistic to the secularization of family law); Charles J. Ogletree, Jr. & Rangita da Silva-de Alwis, *The Recently Revised Marriage Law of China: The Promise and the Reality*, 13 TEX. J. WOMEN & L. 251 (2004) (describing the practical obstacles faced by Chinese women after divorce that impede equitable distribution of property between spouses and diminish the impact of laws designed to protect women leaving situations of domestic violence); Margaret Woo, *Shaping Citizenship: Chinese Family Law and Women*, 15 YALE J.L. & FEMINISM 99 (2003) (analyzing reforms in China's Marriage Law through comparing the experiences of male and female divorce litigants); Radhika Coomaraswamy, *To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 39, 39-57 (Rebecca J. Cook ed., 1994) (using four case studies of family law in South Asia to illustrate the weak implementation of women's international human rights conventions in national courts).

2. Coomaraswamy, *supra* note 1, at 48.

like Sara, Silvia, and Maria bring under the current Family Violence Law³ to combat the abuse in their lives illustrate the nexus between international human rights and the local interpretations of those rights on the ground.

In Part III of the article, I outline some of the methodological constraints associated with a traditional comparativist or nationalist approach to family law. In Part IV, I review the history of family law codes in Peru to highlight the regional influences that ushered in the processes of codification throughout the early republican period. The historical experience of the drafting and promulgation of the 1852 and 1936 republican civil codes demonstrates continuities and epistemic shifts in the contemporary efforts of the feminist human rights movement to promote the implementation of gender violence laws. Rather than assuming that global policies are imposed from above and abroad, this Article traces the ways that colonial and republican family law shape the current reception and resistance to laws inspired by feminist conceptions of human rights. Moving to the present, I discuss the influence of global human rights conventions on the redaction of national laws protecting women and children against gender violence in Part V. Finally, in Part VI, I explore the international human rights/women's rights nexus through an in-depth examination of three cases brought by women under the Peruvian Family Violence Law.

II. PERU'S INTERNATIONAL TREATY OBLIGATIONS TO ERADICATE GENDER-BASED VIOLENCE

Advocates for women's human rights have broadened the human rights framework as they seek to establish state responsibility for combating gender violence, promoting sexual and reproductive health, and ensuring equal opportunity in housing, education, employment, and development. The Peruvian government is a signatory nation to all major human rights conventions and has publicly demonstrated its commitment to prevent, investigate, punish, and remedy gender-specific acts of violence. Peru's treaty obligations include the American

3. See Ley No. 26260, de 8 de diciembre de 1993, D.O. "El Peruano," de 8.12.1993 (Peru).

Convention on Human Rights⁴ (ratified in 1978); the Convention on the Elimination against all Forms of Discrimination Against Women (CEDAW) (ratified in 1982); the Convention on the Rights of the Child (ratified in 1990); the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights (both ratified in 1978).⁵ Peru's obligations to eliminate violence against women are explicitly enumerated in the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women (the Convention de Belém do Pará), which the government ratified in 1996.⁶ The Convention de Belém do Pará defines violence against women as "any act or conduct based on gender, which causes death or sexual or psychological harm or suffering to women, whether in the public or private sphere."⁷ In the Americas, these acts include sexual assault, domestic violence, honor killings, forced prostitution, and trafficking in women.⁸ With specific reference to CEDAW,

4. The American Convention on Human Rights is the governing instrument of the Inter American human rights protection system. Under the Convention, individuals, NGOs and governments may lodge human rights petitions with the Inter-American Commission of Human Rights when all domestic remedies have been exhausted. The Commission conducts an investigation of the merits of the complaints, and may submit the case for adjudication by the Inter American Court of Human Rights. The Inter American Court of Human Rights has jurisdiction over all cases submitted to the Commission. See *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 rev. at 704 (2000), available at <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Brazil12.051.htm> (Court's recent ruling on a gender violence petition).

5. U.N. Office of the High Comm'r for Human Rights, *Fact Sheet No. 2 (Rev. 1)*, *The International Bill of Human Rights* (Dec. 10, 1948), available at <http://www.unhchr.ch/html/menu6/2/fs2.htm>.

6. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belem Do Para," June 9, 1994, available at <http://www.oas.org/juridico/english/signs/a-61.html>.

7. *Id.* at ch. I, art 1.

8. Gender-specific acts of violence are clearly in violation of the American Convention on Human Rights as well as CEDAW. With reference to the American Convention, sexual assault, and domestic violence violate the right to physical, mental, and moral integrity (Art. 5(1)); honor killings violate the right to life (Art. 4); and forced prostitution and trafficking in women violate the right to personal liberty and security (Art. 7). When the acts are directed at minors, these acts also violate the rights of the child. See Anthony

human rights organizations have critically assessed Peru's performance, and the Committee on the Elimination of Discrimination against Women has consistently monitored Peru's progress towards the realization of the convention's goals.⁹

While international human rights law plays a catalytic role in establishing state responsibility to combat gender violence, national efforts by feminist and popular social movements are critical in the implementation of progressive legislation through code reform.¹⁰ Code reform is an important activity, but the awareness and enforceability of new laws depend heavily on the agitational politics of civil society. The pace and scope of legal reform demonstrate an ongoing and dynamic relationship to the social sphere, even if the adoption of social change legislation is not neatly correlative with the demands of feminists and human rights advocates. The incorporation of key women's human rights concerns in the contemporary Peruvian civil code includes formal gender equity in marriage, divorce, child custody, maternity and paternity laws, and prop-

P. Ewing, *Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention of Human Rights*, 26 COLUM. HUM. RTS. L. REV. 751, 763-65 (1995), for a comprehensive review of relevant human rights instruments in combating gender-based violence in Latin America; Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas* 34 HARV. INT'L L.J. 507 (1993), for a comparative analysis of domestic violence laws guided by international human rights instruments in Brazil, Chile, and the United States.

9. CEDAW is widely regarded as an international bill of rights for women. The Convention defines gender specific acts of violence, as "violence directed at a woman because she is a woman or which affects women disproportionately, including acts which inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty." General Recommendations Made by the Committee on the Elimination of Discrimination Against Women, No. 19, Jan. 29, 1992, ¶ 7, available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#top>.

10. See, e.g., Elizabeth Heger Boyle & Sharon E. Preves, *National Politics as International Process: The Case of Anti-Female-Genital-Cutting Laws*, 34 LAW & SOC'Y REV. 703, 708-23 (2000) (discussing the adoption of legislation banning female genital cutting by African governments); Sally Engle Merry, *Constructing a Global Law - Violence against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941, 959-68 (2003) (describing the ways in which three countries—Guinea, India and Egypt—use CEDAW to improve domestic violence legislation).

erty rights.¹¹ All of the above are issues that emerge from global pressures to eliminate all forms of gender discrimination and violence against women but become indigenized as a result of pressures exerted by civil society to influence the code reform process. The changes in civil codes and national constitutions that result from international pressures demonstrate how local concerns in turn shape universal categories of rights and how these concerns are paramount in their implementation in local contexts.

Domestic violence has always been a rallying point for women's groups in Latin America.¹² Feminist advocates have used international treaty obligations to raise awareness of the widespread nature of gender violence, secure support for survivors of violence, and draft legislation to prosecute abusive partners.¹³ Notwithstanding notable advances in the adoption of laws to protect women and children in abusive situations, there is no singular understanding of, or approach to, combating family violence. The terms "family violence" and "domestic violence"—while used interchangeably—are rooted in political choices and approaches to the problem of gender-specific acts of violence. When the emphasis is on domestic

11. Legislative Decree No. 295, Derecho Familiar, bk. III, art. 4 (1984) (Peru). See also C.F. Sessarego, *Peru: Toward Equality in Marriage*, 32 U. LOUISVILLE J. FAM. L. 395, 395 (1994) ("Under the new regime established in Peru, a husband and wife share equally the authority over the household and jointly decide matters affecting among other things, the upbringing of children, the location of their home and the domestic economy.")

12. See Soledad Larraín, *Curbing Domestic Violence: Two Decades of Action*, available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=361449>; Culliton, *supra* note 8, at 512; *Regional Network Against Domestic Violence and Sexual Violence Expanded*, 1 J. WOMEN'S HEALTH 20 (1991) (discussing the creation of the Latin American and Caribbean Network Against Domestic and Sexual Violence); Ana Tallada Iglesia, *Violencia en la pareja: nuevo milenio, antiguos pesares*, in MUJERES, FAMILIA Y SOCIEDAD EN LA HISTORIA DE AMÉRICA LATINA, SIGLOS XVIII-XXI 239, 245 (Scarlett O'Phelan Godoy & Margarita Zagarra Flórez eds., 2006) (using interviews and case studies to examine the root causes of domestic violence in three regions of Peru). See also *Women's Human Rights: Toward an Integral View*, 1 BOLETÍN, RED FEMINISTA LATINOAMERICANA Y DEL CARIBE CONTRA LA VIOLENCIA DOMESTICA Y SEXUAL 19, 20 (1993).

13. Merry, *supra* note 10, at 943; see also Jacqueline Pitanguy, *Bridging the Local and the Global: Feminism in Brazil and the International Human Rights Agenda*, 69 SOC. RES. 805 (2002) (explaining the role of women's organizations in influencing human rights and reshaping gender relations in Latin America).

violence, the sphere of intervention is combating violence between spouses or domestic partners, and the sources of international obligations are CEDAW and the Convention de Belém do Pará.¹⁴ These conventions are geared towards empowering women and children to combat domestic violence—an objective viewed with considerable antagonism from the perspective of a conservative, paternalistic judiciary that is more vested in ensuring the perpetuity of the patriarchal family than in promoting social change. When the emphasis is on family violence, the laws are mobilized to protect the integrity of the family.¹⁵ Advocates refer to the nation's obligations under the Convention of the Rights of the Child and the articles of the civil code that protect minors from child abuse.¹⁶ The welfarist approach represented in child abuse laws is politically more palatable to a cross section of national interest groups and, thus, has been pragmatically adopted to galvanize the state to pass legislation combating the widespread problem of “family” violence.¹⁷ Yet, the family/domestic distinction is ill

14. See, e.g., Larraín, *supra* note 12, at 12; Berta Esperanza Hernández-Truyol, *Law, Culture and Equality—Human Rights' Influence on Domestic Norms: The Case of Women in the Americas*, 13 FLA. J. INT'L L. 33 (2001) (reviewing the Inter-American human rights system as an alternative legal forum for promoting gender equality, and its influence on domestic Latin American laws).

15. See, e.g., Decreto Supremo No. 005-2004-MIMDES “Plan Nacional de Apoyo a la Familia 2004-2011” (2006) (Peru), available at http://www.mimdes.gob.pe/dgna/pnaf_infpreliminar_Isem2006.pdf (stating that the community and the nation protect the family and promote marriage; also recognizing the marital unit and family as the natural and fundamental institution of society). See also Iglesia, *supra* note 12, at 240 (arguing that the unitary concept of the nuclear family does not take into account power relations and dynamics *between* and *among* members of the family).

16. *Id.*; Plan Nacional de Apoyo a la Familia 2004-2011, D. O. El Peruano—N.L., D.S. 005, 8852 N.L. 276395, 15 de septiembre de 2004 (Peru), available at <http://www.elperuano.com.pe/gesponl/wfrmNormasBuscar.htm>.

17. See, e.g., *Information of Resolution CIM/RED.224 (XXXI-0/02) Follow up of the Convention of Belém do Pará, Adopted at the Thirty-First Meeting of the Assembly of Delegates of the CIM*, available at <http://www.oas.org/CIM/REMIM%20II/CIM-REMIMII-doc.7.ing.doc>, for country-wide adoption of both family violence and domestic violence legislation. As this report points out, despite the ratification of the Convention of Belém do Pará, the more forceful claims of domestic violence legislation are muted by a family-centered approach to family violence legislation. “Laws that violate the Convention need to be amended in a number of countries where the concept of women as being morally upright remains in place, incest is not classified as an of-

suites to address *gender* violence, and, more importantly, it does not adequately reflect the cultural, economic, and social reality of family dynamics in Latin America.¹⁸

Peru was among the first Latin American countries to adopt a Family Violence Law in 1993 and strengthened this law in 1997 to respond more efficiently to the needs of women living in situations of domestic abuse.¹⁹ These, and subsequent, amendments attest to vigorous lobbying on the part of

fense, excusing the relationship of the victim with the aggressor in a domestic context, and forms of violence that are not physical in nature are not taken into account." *Id.* at 27.

18. The dynamics of male-on-male sexual and intimate violence is an area of research that is clearly understudied. The focus of attention in intra-family violence studies has been devoted almost exclusively to its impact on women and children, reflecting a consensus in research (and official reporting) that the targets of abuse are primarily female. See, e.g., Pan-American Health Organization, *Deconstructing Intra-Family Violence: State and Civil Society. The Role of the Health Sector*, GENDER AND PUBLIC HEALTH SERIES 10, 15 (2001), available at <http://www.paho.org/English/AD/GE/gph10english.pdf>. See also Lorraine Nencel, *Pacharacas, Putas, y Chicas de su casa: Labeling, Femininity and Male Sexual Selves in Lima, Peru*, in MACHOS, MISTRESSES MADONNAS: CONTESTING THE POWER OF LATIN AMERICAN GENDER IMAGERY 56 (Marit Melhuus & Kristi Anne Stolen eds., 1996) for an analysis of male sexuality and machismo.

19. Memorandum from the Women's Rights Div. of Human Rights Watch to Aurora Torrejón Riva de Chíncha (Mar. 31, 2000), available at <http://www.hrw.org/background/wrd/peru-women.htm>.

Subsequent modifications to the Family Violence Law (Ley No. 26260) were passed in 1998, 2000, and 2003. See Ley de Protección Frente a la Violencia Familiar, D.O. El Peruano—N.L., Ley 26260, 24 de diciembre de 1993 (Peru); Modifican la Ley de Protección Frente a la Violencia Familiar, D.O. El Peruano—N.L., Ley 26763, 25 de marzo de 1997 (Peru); Ley que modifica el Artículo 29 del Texto Único Ordenado de la Ley No. 26260, D.O. El Peruano—N.L., Ley 27016, 6752 N.L. 167503, 20 de diciembre de 1998 (Peru); Ley que modifica el Texto Único Ordenado de la Ley de Protección Frente a la Violencia Familiar, D.O. El Peruano—N.L., Ley 27306, 7327 N.L. 190251, 15 de julio de 2000 (Peru); Ley que modifica el Texto Único Ordenado de la Ley No. 26260, D.O. El Peruano—N.L., Ley 27982, 8375 N.L. 244987, 29 de mayo de 2003 (Peru) available at <http://www.congreso.gob.pe/ntley/LeyNumEP.htm> (all laws listed above) and <http://www.elperuano.com.pe/gesponl/wfrmNormasBuscar.htm> (laws after 1997). A comprehensive five-year national plan against gender-based violence (*Plan Nacional Contra la Violencia hacia la Mujer para el Período 2002-2007*) was approved in 2001. See Plan Nacional Contra la Violencia hacia la Mujer 2002-2007, D.O. El Peruano—N.L., D.S. 017, 7699 N.L. 207156, 21 de Julio de 2001 (Peru), available at <http://www.elperuano.com.pe/gesponl/wfrmNormasBuscar.htm>. A long-range plan aimed at preventing family violence

feminist groups and civil society to modify the legislation. In 2000, for instance, the Family Violence Law was amended to overturn the obligatory conciliation requirement because of pressures from feminist organizations concerned about the implications of forcing women to reconcile with their abusive partners.²⁰ As such, the promulgation and subsequent reforms of family violence laws are important indices in evaluating the empowering effect of laws in women's lives. From a feminist perspective, the law should strengthen women's position within the family and the society—the conscious goal of feminist politics. The Family Violence law must form part of a growing legal consciousness among Peruvian women to encourage them to bring claims of domestic abuse to the courts. A cursory look at statistics shows that the Family Violence law is increasingly invoked by women to combat domestic abuse. According to the statistics released by the Peruvian National Police in 2004, there were over 58,000 reports²¹ of domestic abuse. Given the under-reporting of family violence,²² and the attrition rate between reporting incidences of abuse and actual prosecution,²³ we can safely assume that the actual numbers are much higher. Nevertheless, family violence cases are

and providing social services and support to at-risk families was approved in 2004. See Plan Nacional de Apoyo a la Familia 2004-2011, *supra* note 16.

20. Memorandum from the Women's Rights Div. of Human Rights Watch to Aurora Torrejón Riva de Chíncha, *supra* note 19.

21. DIVFAM, Policía Nacional de Perú, 2004. Statistics released by the Institute for Legal Medicine reveal a total of 78,441 medical examinations performed in 2004, 19,638 of these were specifically related to sexual violence (IML 2004). These statistics are available at <http://www.manuela.org.pe/violencia.asp>. In addition to these figures, annual statistics are also available from the forty-two Emergency Women's Centers nationwide (*Centro de Emergencia de la Mujer*) and that have women's police stations (*Comisaría de Mujeres*) housed within the Centers. The network of Municipal Defender's Offices for Minors, called DEMUNAS (*Defensoría Municipal del Niño y Adolescente*) also deals with family and sexual violence cases, particularly in underserved neighborhoods and rural areas. DEMUNA-COMUDENA, *Programa de Protección y Promoción Municipal del Niño y Adolescente*, available at <http://www.accionporlosninos.org.pe/enacc1.htm>.

22. Ministerio de la Mujer y Desarrollo Social, *Violencia Familiar en las Personas Adultas Mayores en el Perú*, available at http://www.mimdes.gob.pe/pncvfs/mimdes_adultos_mayores_libros.pdf.

23. Lucrecia Oller, *Domestic Violence: Breaking the Cycle in Argentina*, in WOMEN AND VIOLENCE 229, 229–34 (Miranda Davies ed., 1994); Rosemary Ofeibe Ofei-Aboagye, *Altering the Strands of the Fabric: A Preliminary Look at Domestic Violence in Ghana*, 19 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 924,

processed in far greater numbers than other types of cases (such as child custody, property settlements, or divorce) in the family court system.²⁴ Women are increasingly using the courts and the specialized police stations (*comisaría de mujeres*) to defend themselves against family violence.²⁵ Moreover, women are using the discourse of rights in the family courts to prosecute abusive partners and, in so doing, are claiming that domestic violence is unacceptable, offensive, and illegal.²⁶ This is in marked distinction from the rhetoric of vulnerability, honor, and protection that prevailed in the past in the family courts.²⁷ This transition from obligation to rights is more than semantic. It signifies a transformation in the ways that women view themselves as rights-bearing subjects vis-à-vis a legal system that is marked by paternalism.

The local transformation of rights discourse is most evident in claims against family violence. In examining the ways in which women, particularly poor women, use the Peruvian family violence laws, my interest is twofold. First, how does a

929 (1994); Dorothy Q. Thomas, *In Search of Solutions: Women's Police Stations in Brazil*, in *WOMEN AND VIOLENCE* 32, 39–43 (Miranda Davies ed., 1994).

24. Preliminary statistics from the court in which I observed case proceedings in Lima Cercado's *Sala de Familia* showed the following case load: neglect, moral endangerment, and mistreatment (486 cases); termination of parental rights (317 cases), and family violence (2,458 cases). República del Perú, Poder Judicial, Expedientes por materias en los juzgados tutelares de familia (2003) (on file with author).

25. Ministerio de la Mujer y Desarrollo Social, *Nuestros Servicios*, available at <http://www.mimdes.gob.pe/pncvfs/nservicios1.htm>.

26. Sally Engle Merry, *Global Human Rights and Local Social Movements in a Legally Plural World*, 12 *CANADIAN J.L. & SOC'Y* 247, 247–71 (1997) (describing the increasing trend in domestic violence cases brought by women).

27. See generally SARAH CHAMBERS, *FROM SUBJECTS TO CITIZENS: HONOR, GENDER AND POLITICS IN AREQUIPA, PERU 1780-1854* (1999); HONOUR AND SHAME: THE VALUES OF MEDITERRANEAN SOCIETY (John George Péristiany ed., 1966); THE FACES OF HONOR: SEX, SHAME AND VIOLENCE IN COLONIAL LATIN AMERICA (Lyman L. Johnson & Sonya Lipsett-Rivera eds., 1998). These authors document the effect of honor codes on female sexual conduct and male sexual violence. Decades of ethnographic research have been conducted in societies ranging throughout the Mediterranean, the Middle East, Southern Asia, Western Europe, the Southern United States, and Latin America. Drawing upon the nuances of (mostly) anthropological studies, research shows that honor societies evaluate their members on the basis of strict behavioral codes for men and women. Sexual purity is demanded of women. Deviations from the honor code give rise to shame (its correlative) and a debasement of social worth.

relatively narrow conception of individual autonomy or bodily integrity become translated into “rights” across vastly different social, cultural, and political contexts? As Chandra Mohanty has argued, concepts like social maternity or family violence cannot be used “without their specification in local and historical contexts.”²⁸ The discourse of rights gains legitimacy when women frame their grievances as a violation and enlist the support of the prosecutorial process to fight against abusive partners. The process of translation is necessarily linked to women’s perceptions of enforceable, responsive, and efficient laws that resolve their immediate problems. In this vein, my second interest is to assess whether the laws are actually empowering women to survive and leave abusive situations. Considering that the family unit is critical to survival for poor women, and yet keeping in mind as well that the family is undeniably the site of most violence against women and children, what are the impediments against using those laws that pur-

28. Brenda Cossman, *Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project*, 1997 UTAH L. REV. 525, 533 (1997) (quoting Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, in *Third World Woman and the Politics of Feminism* 67 (Chandra Talpade Mohanty et. al eds. 1991)); see also CHANDRA TALPADE MOHANTY, *Feminist Encounters: Locating the Politics of Experience*, in *SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS* 68, 78, 82, 83 (Linda Nicholson & Steven Seidman eds., 1995) (writing that the “politics of location” refers to the historical, geographical, cultural, psychic, and imaginative boundaries which provide the ground for political definition and self-definition for contemporary US feminists). Mohanty also suggests that the politics of location raises a “particular notion of political agency, since my location forces and enables specific modes of reading and knowing the dominant.” Within the Latin American context, the term “social maternity” gained significance in the popular self-help movements created by women in the 1980s. Women mobilized their “private,” maternal roles to demand social justice and human rights for their communities throughout the turbulent decade of civil war and spiraling debt crises. See, e.g., LORAINÉ BAYARD DE VOLO, *MOTHERS OF HEROES AND MARTYRS: GENDER IDENTITY POLITICS IN NICARAGUA, 1979-1999* (2001) (describing the mobilization of the maternal role in rallying troops during the Nicaraguan civil war); MARGUERITE GUZMÁN BOUVARD, *REVOLUTIONIZING MOTHERHOOD: THE MOTHERS OF THE PLAZA DE MAYO* (1994) (analyzing the mobilization of the mother’s role to protest the disappearances and human rights violations of family members during Argentina’s “dirty war”). For a review of women’s mobilization of social maternity in Central America, see LYNN STEPHEN, *WOMEN AND SOCIAL MOVEMENTS IN LATIN AMERICA: POWER FROM BELOW* (1997).

portedly protect women from domestic partners and what are the benefits that women perceive in using these laws?

III. FAMILY LAW IN COMPARATIVE AND NATIONALIST PERSPECTIVES

Family law provides a privileged view into the intersection of law, ideology, class, ethnicity, and religion because of its capacity to normalize family discourse and codify ideal family patterns.²⁹ But in Latin America, although much attention has been paid to the political gains of the feminist human rights movement, there has been surprisingly little interest in family law.³⁰ My criticism is not only that we have overlooked family law; it is also that we have ignored its potential for effective social change. If we are concerned with the struggles for women's human rights, then we need to consider family law as an important resource or tool that has been used to advance or refute women's rights claims.

In part, the reluctance to embrace the family courts as allies in securing women's human rights is related to structural problems in the judicial system. The Peruvian legal system is criticized for its corruption, incapacity, prolonged pre-trial detention, excessive formalism, and burdensome bureaucratic requirements that render courts inaccessible to ordinary citizens.³¹ Family law, like all other areas of public and private

29. See, e.g., Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 833-70 (2004) (analyzing the relationship between family law and social inequality); Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555 (2004) (arguing that the 2003 California Act succeeds from a civil rights perspective in giving same-sex couples parity with heterosexual couples, but fails to give same sex couples sufficient family law rights in terms of access to the institution of marriage).

30. A notable exception is Berta Hernández-Truyol's work on family law in the Americas. See Berta Esperanza Hernández-Truyol, *Asking the Family Question*, 38 FAM. L.Q. 481 492-99 (2004) (analyzing the case of the United States embargo against Cuba to demonstrate its devastating impact on Cuban families); Hernández-Truyol, *supra* note 14, at 37-40.

31. The criticisms of Latin American legal formalism are forcefully described in the Law and Development movement. See generally, Keith S. Rosenn, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and its Developmental Implications*, in LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK, 514-49 (Kenneth L. Karst & Keith S. Rosenn eds., 1975); David

law in Latin America, is characterized by an insuperable distance between the laws on the books and the laws by which ordinary citizens live their lives—wittily summed up in the Spanish quip “*entre el hecho y el derecho*.”³² In short, the legal system is seen in dire need of reform and modernization and, therefore, is viewed as an unlikely ally by progressives, despite the obvious link between human rights and the rule of law. Yet if we consider the positive impact of civil society on the implementation and reform of family violence laws, it is clear that the infamous breach between Latin American law and society is overstated. By examining the ways in which social movement activists, legislators, and jurists have acted in concert to effect reform in the family violence laws, we counteract the axiomatic status of the gap between *el hecho y el derecho*.

This does not mean that the contemporary Peruvian family court is a hotbed of progressive social engineering or judicial activism. As will become clear throughout my discussion, the judiciary demonstrates considerable discomfort with and resistance to the activist role that courts can play in promoting social justice. However, the allure of popular social movements leads activists and scholars to invest their interests, talents, and energies in pursuing oppositional politics in the social sphere while despairing of the conservatism of the judicial sector.³³ The argument—tautological at best—is that the ef-

M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1 (1972); David M. Trubek, *Unequal Protection: Thoughts on Legal Services, Social Welfare, and Income Distribution in Latin America*, 13 TEX. INT'L L.J. 243 (1978); Jorge L Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41 (2003).

32. A literal translation would be “between the act and the law.” However, the witticism refers to the perceived gap between the law on the books and actual practice—the fact that multitudinous laws exist on paper but are rarely enforced. For a discussion of the gap between legal formalism and social reality in Peru, see Dale Beck Furnish, *Court and Statute Law in Peru*, 28 AM. J. COMP. L. 487 (1980); JORGE BASADRE GROHMANN, *HISTORIA DEL DERECHO PERUANO* 277 (1937).

33. It would be unfair to criticize the new social movement theorists for their gloomy assessment on the capacity of law to foster meaningful social change when legal scholars have also lambasted the legal system for its complicity in perpetuating unequal relations of power and domination. Legal scholars writing from the perspectives of Critical Legal Studies, Law and Development, Critical Race Theory, and postmodern scholarship have encouraged us to look outside of the courts and the legal system for sites of popular struggles and resistance. These arguments are largely coterminous

fluorescent social sphere is the site of real change, and the paternalist judiciary is nothing but window dressing for conservative, anti-feminist interests.³⁴ Activist NGOs, which form part of influential transnational advocacy networks, put pressure on the political system to establish rules based upon human rights norms, but there is virtually no expectation among members of the society that the rules will be judicially enforced. As such, the courts occupy an ambiguous position within the transnational advocacy networks to which we attribute effective social change. This investment in oppositional popular polit-

with the analytical enterprise of identity-based social movement scholarship. As Merry writes, "The 1960s civil rights movement and the law and development movement confronted the gap between what laws aspire to do and the kinds of changes they produce Indeed, law has lost its heroic role as the scaffold for social justice and the edifice within which the struggle for justice should take place both in popular consciousness and in left-liberal scholarship." Sally Engle Merry, *Resistance and the Cultural Power of Law*, 29 *LAW & SOC'Y REV.* 11, 13 (1995).

34. My sense is that this despair comes from the minimal attention paid by social movement theorists to the legal sphere as opposed to the studies of civil society and the NGO sector. See, e.g., MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998). While both authors acknowledge the influence that international human rights movements have on local laws, they argue: "The existence of legal mechanisms does not necessarily make them feasible instruments . . . ; Brazil has had a diffuse interests law granting standing to environmental and consumer advocacy organizations since 1985, but the sluggishness of Brazil's judiciary makes it largely ineffective." *Id.* at 25. The sluggishness of the judiciary thus relegates the judicial field as unworthy of inquiry or even expectation that any vibrant, activist legislation could emanate from the formalistic, weak, under-funded, and poorly organized Latin American judiciary. This expectation of under-performance and judicial conservatism is in marked distinction to studies that document the judicial activism of high courts to enforce social and economic rights and to promote gender justice. See, e.g., Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 1985 *THIRD WORLD LEGAL STUD.* 107 (1985) (discussing the Indian Supreme Court's Directive Action Principles promoting economic and social rights through public interest legislation). See also Martha Morgan, *Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court*, 30 *U. MIAMI INTER-AM. L. REV.* 253 (1999) (analyzing the jurisprudence of the Colombian Constitutional Court in its rulings on abortion, affirmative action, domestic violence, sexual orientation, teenage pregnancy and other contemporary gender issues); Martha Morgan & Monica Alzate Buitrago, *Constitution-Making in a Time of Cholera: Women and the 1991 Colombian Constitution*, 4 *YALE J.L. & FEMINISM* 353 (1992) (providing a thoughtful reflection on the potential for advancing women's interests through the drafting of the 1991 Colombian Constitution).

ics practically ensures the continuity of non-participatory practices in the legal system.³⁵ Moreover, the frustration that Peruvian progressives feel towards their legal system deprives reform efforts of their vital energies. Although it is important to look outside of the law to understand alternative points of resistance, people organize around more than their social identities: They organize around injustice.³⁶ As such, the demands they place on judicial and political structures to remedy their grievances, and the way that the judicial system responds to those demands, are worthy of critical analysis.

Code reform relies on civil society and NGOs to build political will, strengthen constituencies, and garner public support to approve new laws.³⁷ In the case of family violence legal reforms, NGOs play a vital role in heightening awareness about the impact of pending legislation and the need to adopt and enforce domestic violence laws.³⁸ Although their involve-

35. See Esquirol, *supra* note 31, at 67–69, 92 (critiquing the legacy of the law and development movement in Latin America in reinforcing non-participatory legal processes); Ugo Mattei, *The Peruvian Civil Code, Property and Plunder: Time for a Latin American Alliance to Resist the Neo Liberal Order*, GLOBAL JURIST TOPICS, vol. 5, no. 1, art. 3, available at <http://www.bepress.com/gj/topics/vol5/iss1/art3> (2005) (discussing the interpretation of the Peruvian Civil Code as a neutral depository of rules rather than as a potential document aimed at promoting social justice); Morgan, *supra* note 34, at 256 (describing the activist role of the Colombian judiciary in promoting gender justice).

36. See Jon Shefner, *Moving in the Wrong Direction in Social Movement Theory*, 24 THEORY & SOC'Y 596, 609 (1995), for a critical review of new social movement theorists' failure to account for resource mobilization, including legal resource mobilization. For an excellent study of legal resource mobilization, see MICHAEL McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994).

37. See Linn Hambergren, U.S. Agency for International Development, *Code Reform and Law Revision*, PN-ACD-022 (1998), available at http://pdf.dec.org/pdf_docs/pnacd022.pdf, at 28-30 (critically analyzing the effectiveness of donor-driven code reform projects in U.S.A.I.D.'s international administration of justice initiatives in Latin America).

38. As Keck and Sikkink note, national NGOs use a boomerang tactic in which they pursue links with NGOs of another, more powerful country, and this alliance puts pressure on donor governments to push the less powerful government to restructure laws and strategies to promote human rights. KECK & SIKKINK, *supra* note 34, at 13. I have argued elsewhere that this boomerang tactic should account for the strategic alliances between grassroots and established NGOs because the former are viewed as more connected to the communities or constituencies that benefit from global rights-based policies of development, equality, and non-discrimination. See

ment is highly partisan, NGO participation is critical to the success of code revision and enforcement. Indeed, it is the combined efforts of NGO agitational politics, together with civil society, which attenuate the gap between the law and social life.

Although the impasse between the legal and social spheres is reasonably attributed to the problems with the legal system, the lack of attention to family law is also disciplinary. When I began researching the topic of family law reform, my aim was explicitly interdisciplinary—to use the methods of legal anthropology,³⁹ feminist international legal studies,⁴⁰ and social movement theory⁴¹ in order to delineate the connection of national laws to global developments in women's human rights. However, family law is rarely studied from a transnational perspective. As a largely transnational field of inquiry, human rights scholarship has found comparative law methods

Michelle McKinley, *Planning Other Families: Negotiating Population and Identity Politics in the Peruvian Amazon*, 10 IDENTITIES: GLOBAL STUD. IN CULTURE & POWER 31, 36, 54 (2003).

39. See generally CULTURE AND RIGHTS (Jane K. Cowan, Marie-Bénédicte Dembour & Richard A. Wilson eds., 2001); NEGOTIATING CULTURE AND HUMAN RIGHTS (Lynda S. Bell, Andrew J. Nathan & Ilan Peleg eds., 2001); HUMAN RIGHTS, CULTURE AND CONTEXT: ANTHROPOLOGICAL PERSPECTIVES (Richard A. Wilson ed., 1997). These three works, among others, critique the universalist presumption assigning primacy to "rights" in human rights theory and practice, arguing instead for a culturally constructed vision of rights, duties and obligations that encompasses the discourses of African and Asian societies.

40. See generally HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW (2000); WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES (Julie Peters & Andrea Wolper eds., 1995); Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN, *supra* note 1, at 85–115; Coomaraswamy, *supra* note 1, at 39–57; Frances Olsen, *International Law: Feminist Critiques of the Public/Private Distinction*, 25 STUD. TRANSNAT'L LEGAL POL'Y 157 (1993); Rebecca Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125 (1994).

41. See generally KECK & SIKKINK, *supra* note 34, at 7–8; CULTURE OF POLITICS/POLITICS OF CULTURE: RE-VISIONING LATIN AMERICAN SOCIAL MOVEMENTS (Sonia E. Alvarez, Evelina Dagnino & Arturo Escobar eds., 1998); GLOBALIZATIONS AND SOCIAL MOVEMENTS (John A. Guidry, Michael D. Kennedy & Mayer N. Zald eds., 2000); POWER AND POPULAR PROTEST: LATIN AMERICAN SOCIAL MOVEMENTS (Susan Eckstein ed., 1989).

largely inhospitable and unsuitable for analysis.⁴² Within law faculties, when family law is studied cross-culturally, it is examined within the classical comparative tradition—trapped in the belief that state laws are shaped solely by national characteristics, bearing the imprimatur of a nation’s “family values”—without regard to globalization or transnational advocacy.⁴³ Even when studied cross-culturally, family law is lodged firmly between the insular anthropological exercise of codifying “marriage customs among the X” (as part of the attempt to administer colonial populations or within a legal pluralist paradigm) and the classic comparative law endeavor to illuminate differences in the civil and common law traditions (i.e. among “civilized” nations).⁴⁴ The intellectual and methodological history of family law scholarship raise intriguing challenges for investigations that propose to study family law from a global and interdisciplinary perspective.

Drawing upon the insights of social movement theory, critical international legal studies, legal anthropology, and

42. There is a growing interest in the field of international family law among scholars and practitioners, particularly with regard to international adoption, marriage, divorce, child abduction, and trans-border enforcement of child support. See, e.g., *FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW* 9 (D. Marianne Blair & Merle H. Weiner eds., 2003) [hereinafter *FAMILY LAW IN THE WORLD COMMUNITY*]; Carol S. Bruch, *International Family Law as the Century Turns*, 33 *FAM. L.Q.* 607 (2000) (analyzing the Senate’s ratification of the Hague Intercountry Adoption Convention and the Hague Convention on the Civil Aspects of International Child Abduction and the influence of these international family law conventions on domestic family law); Barbara Stark, *Introduction: Practical Applications and Critical Perspectives in International Family Law*, 38 *FAM. L.Q.* 475 (2005) (briefly tracing the impact of globalization on the practice of contemporary family law); Adair Dyer, *The Internationalization of Family Law*, 30 *U.C. DAVIS L. REV.* 625 (1997) (describing the historical demise of the nationality principle as the sole mechanism for resolving transnational family law disputes, and the gradual development of international legal norms through recourse to the international treaty drafting process); Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 *BERKELEY J. INT’L L.* 213 (2003) (identifying emerging principles of international law that address involuntary family separation as a human rights violation).

43. *FAMILY LAW IN THE WORLD COMMUNITY*, *supra* note 42, at 9.

44. See, e.g., JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (1969) (tracing the venerated European influences, particularly of Roman Law on Latin American jurisprudence and civil law systems).

comparative law, I posed broader questions about the connection between macro-level reforms and micro-level changes in peoples' lives. I intended to focus intensively on the world of the family *court* to examine the ways that family law subordinates or empowers women in situations of family violence. Who after all uses the family courts? What do courts actually do and with what broader consequences? Do legal reforms imposed from above and abroad effect real changes in people's lives in the ways they raise children, form and dissolve conjugal unions, or distribute responsibility for child support?

I soon realized that an exclusive focus on the ambit of the family court in the particular context of domestic violence was too narrow. The Family Violence Law is invoked—and hence is most effective—long before cases actually come to the courts, and the overwhelming majority of domestic violence complaints are dropped before the trial stage.⁴⁵ In fact, the Family Violence Law is most relevant *outside* of the court: in women's complaints to the police, their appeals to the Municipal Defender's offices (DEMUNAS) and NGO legal aid clinics, their submission to forensic medical examinations, and their counseling sessions at conciliation centers.⁴⁶ When cases do get on the family court docket, the judge determines whether the petitioner has put forth a credible claim of family violence

45. Feminist NGOs emphasize the large numbers of women who file domestic violence complaints and attribute the attrition rate to the burdens placed by the legal system to continue the prosecutorial process. Family court judges complain that the domestic violence laws are too broad and imply that the majority of cases are frivolous because of repeated spousal reconciliation. *See infra*, note 164 and accompanying text (providing a Peruvian judge's account of the perceived problems with enforcing family violence laws). The police are required to report all complaints, but officers are reluctant to take the complaints seriously unless women submitted to forensic medical examinations in certified health centers. This medical examination requirement serves as a filter for "weeding out" those complainants who are less committed to the prosecutorial process. *See also* Memorandum from the Women's Rights Div. of Human Rights Watch to Aurora Torrejón Riva de Chíncha, *supra* note 19 ("Police are unresponsive and ineffectual, medical examinations by forensic doctors are frequently cursory and inadequate, tending to minimize injuries women have sustained through domestic violence").

46. Interviews with Jessica Camacho, Social Worker, DEMUNA, in Lurin, Perú (June 30, 2005), and Zoila Hernandez, Social Worker, DEMUNA, in Los Huertos de Manchay, Perú (July 7, 2005).

in order to deny or grant cause for divorce.⁴⁷ As such, the court's intervention occurs long after a woman decides to initiate proceedings against an abusive partner, and the initial proceedings can take months,⁴⁸ if not years, before a judge reviews the family violence petition.⁴⁹

Instead of an exclusive focus on the family courts, I cast my net around all of the agents involved in the prosecutorial process. I asked judges how they decided cases about women and families in situations of violence, particularly when the litigants were women whose lives most closely conformed to the underlying cultural assumptions of sacrificial motherhood and female vulnerability.⁵⁰ I interviewed litigants who did not demonstrate a conventional sacrificial stance, who instead resisted their abuse by retaliating with verbal, psychological, and physical abuse against their partners and children. I observed police officers at women's police stations taking testimonies of women reporting instances of abuse (*denuncios*) and asked them their impressions of the merits of the case to ascertain their commitment to the prosecutorial process. I interviewed social workers who encourage reconciliation in abusive fami-

47. Código Civil, [CC] [Civil Code], *as amended*, Art. 333, El Peruano [D.O.], 25 de Julio de 1984 (Peru) [hereinafter *1984 Civil Code*]. Under the Peruvian civil code, divorce can only be granted on the basis of adultery, physical and psychological injury, attempted murder against a spouse, abandonment of the home for a period greater than two years, drug addiction and substance abuse, venereal disease contracted after the date of marriage, homosexuality, incarceration for over two years, incompatibility, dishonorable conduct which renders married life impossible, and if both parties agree to it after being separated for a period of two years (four if there are minor children involved).

48. All of the women with whom I spoke alluded to at least a twelve-to-eighteen month delay in the process of getting legal advice, figuring out where to file a case, and getting their cases on the docket of the *Sala de Familia* in their region. Once the case is on the docket it takes about twenty-four months to be concluded, because family violence cases get expedited processing.

49. See H.H.A. Cooper, *The Law Relating to Sexual Offenses in Peru*, 21 AM. J. COMP. L. 86, 100 (1973) (describing the "inordinate delay" at every stage of Peruvian criminal procedure).

50. Cossman, in her study of family law in India, found that women whose lives conformed to the prevailing patterns of motherhood, monogamous unions, and marriage "are more likely to have their claims vindicated than women whose lives have deviated from these ascribed roles." Cossman, *supra* note 28, 532.

lies.⁵¹ Finally, I attended informational clinics offered by lawyers in feminist NGOs to assess their efforts in ensuring justice for victims of family violence.

Contemporary concepts of human rights are tentatively being employed both in the minds and vocabulary of Peruvian women bringing domestic violence cases. Human rights discourse offers a new vocabulary for poor women, but it is grafted onto their previous understandings of the discourse of honor and protection that prevailed in the colonial and republican periods. How does this transformation occur, and what are the ramifications that result from it?

The contemporary implementation of family violence laws cannot be examined without considering the codification processes throughout the republican and early twentieth century periods. Given the longevity of the civil codes (lasting on average fifty years),⁵² their replacement marks political and epistemic shifts in the scope and terms of state intervention in family life.⁵³ A contemporary analysis of Silvia's story (*see infra* Part V), a woman severely beaten by her domestic partner for

51. Interview with Jessica Camacho, *supra* note 46; Interview with Denise Ramos, Social Worker, CASP, in San Miguel, Perú (June 7, 2005). Prior to 2001, conciliation was mandatory for all couples before beginning the prosecutorial process. *See* Ley No. 27398, de 1 de diciembre de 2001, D.O. "El Peruano," de 13.01.01 (Peru). In practice, conciliation is still encouraged by social workers, judges, and police officers. Interview with Dora Garrido, Attorney, Movimiento Manuela Ramos, in Lima, Perú (July 1, 2005).

52. Mattei, *supra* note 35, at 1.

53. The last major civil code reform effort in Peru occurred in 1984. The 1984 Civil Code replaced the 1936 Civil Code. The 1936 Civil Code, in turn, had replaced the 1852 Civil Code, the first Code of the new independent republic. Mattei, note 35, at 1. *See also* J.V. FAJARDO, CÓDIGO CIVIL: COMMENTARIOS—CONCORDANCIAS, JURISPRUDENCIA Y EXPOSICIÓN DE MOTIVOS 31-182 (n.d.) (reviewing the changes in family law between the Civil Codes of 1852 and 1936); JORGE BASADRE AYULO, II HISTORIA DEL DERECHO 289-291 (n.d.) (discussing the changes in family law between the 1852 and 1936 Codes). Codification is a monumental task in the civil law tradition, generally undertaken by a cohort of jurists with similar ideological objectives. *See, e.g.,* Hammergren, *supra* note 37, at 11. New laws are incorporated into the civil code as articles become outdated or inconsistent with the cases brought before the court. Visit the Peruvian Congressional website for procedural issues associated with legislative reform. *See* Peruvian Congressional Website, http://www.presidencia.gob.pe/elpalacio/secretaria_consejo_ministros.asp (last visited Aug. 22, 2006). These amendments are debated by Congress as *dictamen*, and formally incorporated into the code after a thirty-day period,

her adulterous transgressions, is meritorious in its own right. However, we do not appreciate the judicial system's treatment of Silvia's case if we overlook the historical criminalization of female adultery (as opposed to the virtual tolerance of male adultery), the canon law courts' recognition of men's right to use corporal punishment to discipline errant wives and children, the moral codes underlying society's beliefs regarding appropriate female conduct and masculine power, and the disparate judicial treatment of common-law unions in the recent past.⁵⁴

In sum, although women continue to look to the courts for a vindication of their honor and to punish abusive spouses, their vocabulary is now beginning to reflect a rights-based orientation. Peruvian women bringing family violence claims have appropriated the discourse of the feminist human rights movement in framing their claims, although their reliance on the judicial system demonstrates striking similarities with colonial and republican cases of domestic violence. Thus, in looking at the ways that poor women engaged with the colonial legal system to resist domestic and sexual violence, we gain insight into the recurrent patterns that persist in the contemporary legal process.

IV. FAMILY LAW IN COLONIAL LATIN AMERICA (1534–1821)

This section briefly discusses the ways in which family behavior, marriage, and beliefs about proper gender relations were regulated in colonial and republican civil codes. The relations, status, and obligations between husband and wife are enumerated in very precise terms in the civil law tradition. Colonial family law was founded on the Roman legal principle of *patria potestas*—absolute familial authority over the women, offspring, slaves, and servants vested in the father—the *paterfamilias*.⁵⁵ The *Siete Partidas* (drafted initially in 1265, but later circulated in the 16th century as the foundation of private law in the Americas) regulated family relations between Spaniards

Portal Parlamentario del Perú y Mundo, available at <http://www.congreso.gob.pe/procedimientos/parlamentarios.htm>.

54. BERNARD LAVALLÉ, AMOR Y OPRESIÓN EN LOS ANDES COLONIALES 30, 33, 38, 51 (1999); HÉCTOR CORNEJO CHÁVEZ, DERECHO FAMILIAR PERUANO 69-74 (10th ed. 1999).

55. ALAN WATSON, ROMAN SLAVE LAW 37 (1987).

and the indigenous and African slave populations.⁵⁶ In the initial stages of the Conquest, the *Siete Partidas* recognized the exclusive obligations of Spanish men to their female dependents living in Spain by disregarding the illegitimate offspring of colonists and indigenous women.⁵⁷ Illegitimate offspring were never recognized as legal subjects; legitimacy had to be sought on a case-by-case basis through personal petitions to the Crown known as *Gracias al Sacar*.⁵⁸ The Spanish Crown penalized men who abandoned their wives in Spain and imposed strict penalties for those convicted of bigamy through the courts of the Inquisition.⁵⁹ Despite the limited effectiveness of these measures, the marital obligations of colonial subjects were the subject of intense scrutiny by the Viceroyalty, the Spanish Crown, and the Catholic Church, and laws were

56. ALAN WATSON, *SLAVE LAW IN THE AMERICAS* 40–62 (1989); *see also*, Alejandro de la Fuente, *Slave Law and Claims-Making in Cuba: The Tannenbaum Debate Revisited*, 22 *LAW & HIST. REV.* 339 (2004) (reviewing Tannenbaum's influential yet contested sociological thesis regarding the availability of manumission as a popular option in Latin American civil law as opposed to its limited possibility as a legal remedy for slaves to obtain freedom in U.S. common law); Robert J. Cottrol, *The Long Lingering Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*, 76 *TUL. L. REV.* 11 (2001). On the specific question of colonial family law derived from the *Siete Partidas*, *see* BIANCA PREMO, *CHILDREN OF THE FATHER KING: YOUTH, AUTHORITY AND LEGAL MINORITY IN COLONIAL LIMA* 22 (2005) (arguing that although the *Leyes de Toro* were regarded in theory as the principal body of legislation for family legislation in the Americas, Lima's judges, litigants, and lawyers especially relied almost exclusively on the *Siete Partidas* in cases involving legal minors).

57. M.C. MIROW, *LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA* 57 (2004).

58. *See* Ann Twinam, *Honor, Sexuality and Illegitimacy in Colonial Spanish America*, in *SEXUALITY AND MARRIAGE IN COLONIAL LATIN AMERICA* 118, 118–55 (Asunción Lavrin ed., 1989) (describing the petitions of elite applicants who appealed to the Council of the Indies for legitimation). Legitimation had to be purchased from the Crown, and applicants had to demonstrate their superior moral and social character, as well as sufficient financial resources, in order for their petitions to be granted. *See also* Estelle T. Lau, *Can Money Whiten? Exploring Race Practice in Colonial Venezuela and its Implications for Contemporary Race Discourse*, 3 *MICH. J. RACE & L.* 417, 435–39 (1998) (describing the process of purchasing “whiteness” from the Spanish Crown for petitioners of mixed “racial” ancestry in colonial Venezuela in the late 18th and early 19th centuries).

59. MIROW, *supra* note 57, at 57.

clearly designed to keep couples together in the face of migration and prolonged spousal absence from the peninsula.⁶⁰

The initial period of the Peruvian Conquest (1530s) was punctuated by instances of exchange of women from the Inca nobility to prominent Conquistadors.⁶¹ This reflected a tradition of the Inca elite to form alliances and consolidate their power through the exchange of women.⁶² These inter-ethnic relationships led to the formation of an emergent mestized elite, who together with the burgeoning offspring of the lower ranks of the Spanish nobility and the plebian classes with indigenous and African women, established the foundation for a large *mestizo* population in the Americas.⁶³ An analysis of the intriguing processes of elite alliances, defeats, miscalculations, and rapidly changing identity formation of the early years of Conquest is far beyond the scope of this Article and has been exhaustively studied by outstanding colonial historians.⁶⁴ For the purposes of this discussion, the insights of these studies are

60. The Crown's policies to promote marriage were also reflected in their decision to grant *encomiendas* (large estates with Indian labor) exclusively to married conquistadors. *Id.* at 57.

61. PETER F. KLARÉN, *NACIÓN Y SOCIEDAD EN LA HISTORIA DEL PERÚ* 66-67 (2004).

62. MARIA EMMA MANNARELLI, *PECADOS PÚBLICOS: LA ILEGITIMIDAD EN LIMA, SIGLO XVII* 42-53 (1993).

63. These early inter-ethnic alliances founded the basis of the caste system. Inter-ethnic unions did not have precedents in terms of personal status laws, these ethnic categories had to be defined and regulated by law after the unions and births had taken place. *See* KLARÉN, *supra* note 61, at 76, 82. Estelle Lau describes at least eleven possible racial categorizations in colonial Venezuela, which hold true for the entire Latin American continent. These are: *blancos* (whites): persons of Spanish descent; *negros* (blacks): persons of African descent; *indios* (indians): persons indigenous to the region; *mestizos*: children of *blancos* and *indios*; *mulatos*: children of *negros* and *blancos*; *zambos*: children of *indios* and *negros*; *zambos prietos*: children of *negros* and *zambos*; *tercerones*: children of *mulatos* and *blancos*; *cuarterones*: children of *tercerones* and *blancos*; *quinterones*: children of *cuarterones* and *blancos*; *salto-atrás*: children who were darker than their mothers. *See* Lau, *supra* note 58, at 423. Cottrol also describes 16 categories for 18th century Mexico, that include categories such as "Calpa Mulatto," "Cambujo," "Gíbaro," "Leper," and "Zambaigo." Cottrol, *supra* note 56, at 31-32.

64. *See* BASADRE GROHMANN, *HISTORIA DE LA REPUBLICA 1822-1899* (1939) and JOSÉ DE LA RIVA AGÜERO, *LA HISTORIA EN EL PERÚ* (1952). Despite their critical ideological differences, both Basadre and Riva Agüero's masterful compilations are among the most prominent and respected works of Peruvian colonial and republican history.

useful to highlight the intersection of customary and codified law in regulating the contours of colonial inter-ethnic sexual and conjugal unions.

During the colonial period, family law *within* the indigenous population was largely regulated by customary laws.⁶⁵ Indians, for example, were not subjected to the jurisdiction of the Courts of the Inquisition—the principal institution charged with enforcing the mandatory religious and moral codes of the period.⁶⁶ Land laws, marriage, procreation, and inheritance—what Chanock⁶⁷ has called the “building blocks” of rural, indigenous society—were mandated by local custom.⁶⁸ Communal land was inalienable and passed down through lineage lines.⁶⁹ Conjugal relationships were founded on the institution of *servinakuy*, or trial marriages, which gradually assumed stability after the birth of multiple children.⁷⁰ As such, procreation was not limited to marriage and indigenous women could experience several trial marriages before settling with a life partner.⁷¹ Perhaps because of the sheer impossibility of promoting Christian marriages in the indigenous population, the formalization of indigenous marriages was peripheral (though never unimportant, given the profound link between religion and colonization) to the overwhelming priority of wealth extraction in the colonies. Beyond ensuring the timely collection of tribute, neither the Spanish nor the *creole* ruling elite had much interest in regulating issues of inheritance, marriage, adoption, or concubinage of the indigenous population. Colonial family laws were much more relevant to the relationships between the large urban slave and mulatto

65. See, e.g., JAVIER VARGAS, *MATRIMONIO, FAMILIA, Y PROPIEDAD EN EL IMPERIO INCAICO* 52-55 (1988) (discussing a form of common law marriage “outside the Catholic sacrament” that became popular among the indigenous after the Conquest).

66. JUAN JOSÉ VEGA, *LA EMANCIPACIÓN FRENTE AL INDIO PERUANO* 19 (1958).

67. Martin Chanock, *Human Rights and Cultural Branding: Who Speaks and How*, in *CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA* 61, 62 (Abdullahi An-Na'im ed., 2002).

68. VARGAS, *supra* note 65, at 70, 54, 85.

69. *Id.* at 85.

70. *Id.* at 52-55; CORNEJO CHÁVEZ, *supra* note 54, at 74-81.

71. *Id.* at 52.

populations and the Spaniards and to the regulation of the boundaries of *mestizo*-Spanish relationships.⁷²

A. *Family Law and Codification during the Republican Period (1821–1936)*

During the republican era, the Napoleonic Code (1804) replaced the *Siete Partidas* as the foundational text for the codification efforts to meet the needs of newly independent states.⁷³ The heady period of Independence was ushered in by intense codification efforts throughout Latin America.⁷⁴ Codification was essential to the consolidation of state power in a strong central government based on the rule of law.⁷⁵ Codification was also a means of social engineering: gathering, compiling, and reforming existing laws by importing modern and forward-thinking civil codes from Europe to create a “better” society.⁷⁶ Indeed, Enlightenment discourse was co-opted by republican political elites as a dominant and fashionable vocabulary for thinking about emancipation—albeit for propertied men.⁷⁷ Legislators from the liberal elite were enamored with continental ideas, having spent considerable time in France, Spain, and England.⁷⁸ Their preferences for the *Code*

72. VARGAS, *supra* note 65, at 52-55; LAVALLÉ, *supra* note 54, at 113-16; CHRISTINE HÜNEFELDT, LIBERALISM IN THE BEDROOM: QUARRELLING SPOUSES IN NINETEENTH CENTURY LIMA 182 (2000).

73. See generally CARLOS RAMOS NÚÑEZ, HISTORIA DEL DERECHO CIVIL PERUANO: LA CODIFICACIÓN DEL SIGLO XIX: LOS CÓDIGOS DE LA CONFEDERACIÓN Y EL CÓDIGO CIVIL DE 1852 (2001); see also, María Luisa Murillo, *The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification*, 11 J. TRANSNAT'L L. & POL'Y 163, 171 (2001) (describing the widespread codification in 19th Century Latin America).

74. M.C. Mirow, *Borrowing Private Law in Latin America: Andrés Bello's Use of the Code Napoléon in Drafting the Chilean Civil Code*, 61 LA. L. REV. 291 (2001) (describing the codification trend in Latin America that followed the Chilean Code of 1855).

75. M.C. Mirow, *The Power of Codification in Latin America: Simón Bolívar and the Code Napoléon*, 8 TUL. J. INT'L & COMP. L. 83 (2000) (arguing that codification may act as a means to consolidate state power in a central government).

76. *Id.* at 86; Mirow, *supra* note 74, at 303, 309–11.

77. BASADRE GROHMANN, *supra* note 64, at 17–33 (discussing in particular the roles of San Martín, Bolívar, Luna Pizarro, and Sánchez-Carrión during the initial years of the Peruvian republic).

78. KLARÉN, *supra* note 61, at 166 (discussing the enthusiasm for liberalism within Peruvian universities, particularly San Marcos, disseminated by

Civil reflected a rejection of Spanish hegemony and an exaltation of French liberal political ideals in order to establish their independence from the peninsula.⁷⁹

Throughout the early republican period (i.e. during the transition from colony to independent republic) family law was the site of contradictory impulses between modernization and “cultural tradition” or authenticity. Among Latin American nations aspiring to a cosmopolitan republican status, it was *de rigueur* to have a modern civil code imported wholesale or with slight modifications from Western European sources.⁸⁰ However, pre-existing colonial elements of family law were either accommodated or largely left intact in the new civil codes, while other areas of public and private law were restructured to facilitate global trade and foreign investment.⁸¹ As the newly independent nations struggled to define themselves and consolidate power in a volatile political environment, family law retained features of idealized gender relations that were celebrated by the church and the aristocracy; thus, it became a quintessential expression of nationalism.⁸² Indeed, as Duncan Kennedy writes, family law was characterized by elites in emergent republican states as “popular, political, religious, cultural and particular and therefore as eminently national.”⁸³ The pa-

the jurists Vidaurre, Sánchez Carrión, and Luna Pizarro, but then clarifying the limited revolutionary potential that these urban intellectuals wielded over the conservative elite during the preceding years to the wars of Independence).

79. The return to Spanish hegemony is evident in the 1863 codification of criminal law in Peru. As Cooper writes, “[Real] power remained in the hands of a small, Europeanized elite and the law and its administration reflect this. Instead of a criminal law deriving out of the indigenous culture . . . these ruling precepts were drawn . . . from the Hispanic mainland The events leading up to the liberation of Peru in 1821 and her early attempts at drawing up a liberal Constitution are in fascinating contrast to the later return to Spanish thralldom by way of the adoption of the criminal code of 1863.” Cooper, *supra* note 49, at 92.

80. Duncan Kennedy, *Two Globalizations of Law and Legal Thought: 1850–1968*, 36 SUFFOLK U. L. REV. 631, 642-46 (2003).

81. *Id.* at 645-46; Mirow, *supra* note 74, at 301–02.

82. Carlos Ramos Núñez, *Derecho y modernidad en el Perú del Ochocientos: Comentarios a propósito de una reimpresión*, 1 CRÓNICAS DE HISTORIA DE DERECHO 63-71 (1994) (Peru); BASADRE, *supra* note 32, at 335.

83. Kennedy, *supra* note 80, at 646. Andrés Bello, codifier *nonpareil* of the early republican period, held that liberal European norms were not reflective of Latin American social and religious customs relating to family and

triarchal family was regarded by the state as the locus of political and moral socialization, the privileged social institution that formed the basic productive unit of society. Issues of productivity, market stability, and state intervention in the private sphere were poured into this mold of “acceptable family relations.” Whether as a compromise on the part of ruling elites to conservative interests among the clergy or as a genuine belief that law reflected the norms and customs of the people, family law became a repository of national values immunized from corrosive external influences. Although the power wielded by the Catholic Church regarding marriage was abrogated in a few Latin American republics after Independence, Peruvian family law was left exclusively in the hands of canon law and administered by the Catholic Church until 1936.⁸⁴

the disposition of family property. Mirow, *supra* note 74, at 292, 297, 302. Bello was not the only one to resist incorporating the liberal European norms into Latin American family law. The Liberator President Simón Bolívar also sought to modify the Napoleonic Code to the local customs and prevailing norms of republican Latin America. Drawing his inspiration from Montesquieu and Filangieri, Bolívar declared: “Does not the Spirit of the Law say that it should be characteristic of the people who make it . . . to the climate . . . to the type of life of its peoples . . . the religion of its inhabitants . . . their customs, to their manners?” Mirow, *supra* note 75, at 93-94. *See also* CARLOS RAMOS NÚÑEZ, *EL CÓDIGO NAPOLEÓNICO Y SU RECEPCIÓN EN AMÉRICA LATINA* (1997), for an analysis of the importation of the Napoleonic Code in the early republican period. Núñez writes: “*El Code, napoleónico así como los ordenamientos que en él se inspiraban, tuvieron una adaptación más o menos grande con la realidad social.*” [“The Napoleonic Code, together with the laws that it inspired, was basically adapted to the social reality of the Latin American continent.”]. *Id.* at 135. Núñez discusses at length the Peruvian refusal to adopt the more liberal provisions of the family laws in the Napoleonic Code and cites Chilean congressional debates on the same topic. *Id.* at 172-73 (Peru) and 281-83 (Chile). As a result of these modifications, Núñez concurs with Basadre that the Peruvian code represented the first “authentic” Latin American civil code, a syncretic version adapted to the needs of the people rather than a literal importation of the French code. *Id.* at 167-70; *see also* BASADRE GROHMANN, *supra* note 32, at 345-56.

84. Héctor Cornejo Chávez writes at length about the historical process of secularized marriage in Peru. “[E]l Código Civil de 1852 no estableció otro matrimonio con efectos legales que el . . . matrimonio canónico En 1920, el Congreso aprobó una ley que secularizaba el matrimonio; pero, observada por el Poder Ejecutivo en uso de sus atribuciones constitucionales, no pudo entrar en vigencia hasta el 4 de octubre de 1930 A partir de entonces y hasta la promulgación del Código Civil de 1936, se llegó a prohibir a los sacerdotes . . . que celebrasen el matrimonio canónico mientras no comprobasen que los pretendientes habían contraído previamente matrimonio civil.” [“The 1852 Civil Code established canonical

Yet this insistence on nationalistic family values was merely a discursive technique employed by populist and/or conservative regimes.⁸⁵ When it was politically expeditious to

marriage as the only legal form of marriage. In 1920, Congress approved a law that secularized marriage, but the law was vetoed by the Executive Power (i.e., President Augusto Leguía—author's observation) through his constitutional privilege and so could not take effect until October 4, 1930. After 1930 and until the promulgation of the 1936 Civil Code, priests were prohibited from performing marriages without proof that the couple had already undergone a civil ceremony."] CORNEJO CHÁVEZ, *supra* note 54, at 56-57 (author's translation). For a discussion on the drafting process, see Núñez, *supra* note 83, at 167.

85. The case of President Augusto Leguía, twice-term president of Peru (1908–1912 and 1919–1930) is instructive in showing the disjuncture between liberalizing economic policies and conservative family laws that persisted into the later republican period. Leguía passed a series of sweeping economic reforms to facilitate capital investment in the country's mining and agricultural sectors, promulgated a new constitution in 1920 (the liberal parts of which he ignored), launched the first round of major public works projects in Lima, and established a national public health system. See, e.g., Alfonso Quiróz, *Financial Leadership and the Formation of Peruvian Elite Groups, 1884-1930*, 20 J. LATIN AM. STUD. 49 (1988) (describing the rise and decline of Leguía's financial endeavors); Thomas M. Davies, Jr., *Indian Integration in Peru, 1820-1948: An Overview*, 30 AM. 184, 195–98 (1973) (noting that upon taking office, Leguía sought to appeal to rural indigenous constituencies); Florencia E. Mallon, *Gender and Class in the Transition to Capitalism: Household and Mode of Production in Central Peru*, 13 LATIN AM. PERSP. 147, 160 (1986) (arguing that improvements in the urban sector led to increasing migration to Lima, placing pressures on the rural, patriarchal system). In spite of his modernizing reforms in the economic and social sectors, Leguía continually vetoed the articles of the civil code that recognized the right of divorce, and formal equality in marriage. See CORNEJO CHÁVEZ, *supra* note 54, at 36, 57. Upon seizing power in 1919 and throughout the second term of his presidency, Leguía made deals with the clergy vetoing the right to divorce. See Frederick B. Pike, *Church and State in Peru and Chile since 1840: A Study in Contrasts*, 73 AM. HIST. REV. 30 (1967), for a discussion of Leguía's deals with the Catholic Church. Pike notes that "as a shrewd opportunist who wished to preserve the main features of capitalism as traditionally practiced and who was concerned by the rise of extremist reform groups, Leguía saw in the Church an important ally in his opposition to drastic change." See *id.* at 41. Civil marriage and divorce were not legally recognized until 1930 in Peru although the Church "formally" handed over power to the civil courts in 1918. CORNEJO CHÁVEZ, *supra* note 54, at 36, 57-63. Leguía's oppressive regime must be viewed vis-à-vis the emergence of mass-based labor movements throughout Peru; the birth of left-wing political parties and *indigenismo*, the agitational politics of the student movement, and the rise of Peruvian Marxism which drew inspiration from the Mexican and Russian revolutions. Leguía's refusal to capitulate to women's demands for the secularization of

resist the hegemony of Eurocentric (and later, American) modernity, family law was intractably insular, customary, divine, and national. In Peru, these instances of resistance were internally directed (as opposed to the oppositional deployment of family or personal status laws in theocratic states against Westernization);⁸⁶ family law was central to the struggles between the Catholic Church along with its Conservative allies, and liberals who sought a firm separation between Church and State.

In the early decades of the 1900s, republican family code legislation was again clearly determined by transnational influences—even if national legislation was a reaction *against* prevailing European trends—because European ideals of the 1900s (liberalism, Marxism, and universal suffrage) provided progressive, mass-based movements with a normative basis to demand far-reaching social reforms that the republican governments were unwilling to concede.⁸⁷ The insights of feminist human rights theory have demonstrated the conceptual limits of sovereignty in state behavior and international law.⁸⁸ Less appreciated are the transnational influences on civil codes, particularly through the confluence of donor power, the allure of open markets, and the global interchange (or im-

marriage and universal suffrage, and his repressive policies towards oppositional social movements were intended to calm the fears of the clergy and the elite about the potential revolutionary effects of wholesale modernization. See Pike, *supra* note 85, at 41; see also Jeffrey L. Klaiber, *The Catholic Lay Movement in Peru: 1867-1959*, 40 *THE AMERICAS* 149 (1983).

86. See, e.g., Abu-Odeh, *supra* note 1, at 1046; Jeanne Maddox Toungara, *Inventing the African Family: Gender and Family Law Reform in Cote D'Ivoire*, 28 *J. Soc. Hist.* 37, 37-38 (1994) (arguing that through the drafting of the 1983 Family Code, elite Ivorian women did not seek a return to traditional marriage practices, but rather a legally pluralistic Code that permitted them to emulate Western marriages and retain traditional status).

87. Roger Atwood, *Democratic Dictators: Authoritarian Politics in Peru from Leguía to Fujimori*, 21 *SAIS REV.* 155 (2001). See also José Carlos Mariátegui, *The Problem of the Indian*, in *SEVEN INTERPRETIVE ESSAYS ON PERUVIAN REALITY* (1928) (agitating for land reform and changes in political structures to address the “Indian Problem”).

88. With particular regard to the critiques of feminist human rights theory on the doctrinal bases of sovereignty and statehood, see Hilary Charlesworth, *What are “Women’s International Human Rights?”*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 58 (Rebecca Cook ed., 1994) [hereinafter *HUMAN RIGHTS OF WOMEN*]; Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in *id.* at 85.

position) of legal ideas and concepts associated with civil law reform. As Peru opened up to foreign investment and new markets in the years following the economic devastation of the War of the Pacific, revising the Civil Code to facilitate modern economic conditions, those parts of the Civil Code regulating family law fiercely retained their conservative elements. The gradual progression from norms of obedience to norms of gender equality in Latin American marriage codes during the last two centuries demonstrates the dynamic relationship between international influences and local/national “traditions” in the redaction of family law codes.

B. *Colonial and Early Republican Interventions in Domestic Abuse: The Canon Law and the Civil Codes of 1852 and 1936*

The ideology of colonial and republican family law privileged a patriarchal extended family structure that revolved around an elder, authoritarian male figure.⁸⁹ The particularized roles of women as wives, concubines, mothers, female servants, slaves, daughters, daughters-in-law, and grandmothers in the patriarchal family were regulated exhaustively in the 1852 Peruvian civil code.⁹⁰ The 1852 civil code, for example, required obedience on the part of wives in return for their husband’s protection and support.⁹¹ Even when the republi-

89. Richard Boyer, *Women, La Mala Vida, and the Politics of Marriage, in SEXUALITY AND MARRIAGE IN COLONIAL LATIN AMERICA*, *supra* note 58, at 252–86. See also, Susan De Vos, *Latin American Households in Comparative Perspective*, 41 *POPULATION STUD.* 501, 503 (1987).

90. *Código Civil, [CC] [Civil Code], El Peruano [D.O.], de 1852 (Peru)* [hereinafter *1852 Civil Code*].

91. *Id.* at Art. 175 (“*El marido debe proteger a la mujer, y la mujer obedecer al marido.*”). Even later modifications to the republican civil code state: Men and women enjoy the same rights, with the exception of those restrictions established with respect to married women. *Código Civil, [CC] [Civil Code], El Peruano [D.O.] 1936 (Peru)* [hereinafter *1936 Civil Code*]. (“*Los varones y las mujeres gozan de los mismos derechos civiles, salvo las restricciones establecidas respecto de las mujeres casadas.*”). Art. 161 states: “The husband is the head of the conjugal unit. The wife owes to her husband help and advice for the common prosperity of the family, and she has the right and duty to personally tend to the household affairs.” *Id.* at Art. 161 (“*El marido dirige la sociedad conyugal. La mujer debe al marido ayuda y consejo para la prosperidad común y tiene el derecho y el deber de atender personalmente al hogar.*”). With respect to changing domiciles, Art. 162 asserts: It is completely within the husband’s domain to decide where the household will reside, and his responsi-

can codes granted nominal autonomy to elite married women to administer their property or dowry,⁹² the patriarchal underpinnings of family law were left intact by the State's refusal to intervene in the fortified private sphere.⁹³ If threatened by a wife or child's "disobedience," a husband could use moderate corporal punishment within the limits laid down by nature, customs, and the canon law to restore household order and discipline their wives and children.⁹⁴

Although women's roles were severely circumscribed during the colonial period, the courts provided an outlet for women seeking remedies for disputes, particularly around rights to property, marriage, and personal status, in which conflicting cultural conceptions of gender were contested and redefined.⁹⁵ In this vein, colonial historians have examined numerous cases of premarital sexual relations, bigamy, illegitimacy, homosexuality, and adultery that were brought before

bility to make decisions about the household economy. *Id.* at Art. 162 ("Al marido compete fijar y mudar el domicilio de la familia así como decidir sobre lo referente a su economía."). Art. 164 provides: "The husband is obligated to provide for his wife and his family everything that is necessary for their well-being and survival, according to his potential and his [economic] situation." *Id.* at Art. 164 ("El marido esta obligado a suministrar a la mujer, y en general al la familia, todo lo necesario para la vida, según sus facultades y situación.").

92. Carmen Diana Deere & Magdalena León, Liberalism and Married Women's Property Rights: Continuity and Change in Nineteenth Century Latin America (March 2003) (unpublished manuscript, on file with the *New York University Journal of International Law & Politics*), available at http://www.uoregon.edu/~caguirre/Deere_Leon.pdf.

93. See Kennedy, *supra* note 80, at 645 ("It was equally if not more important that [Classical Legal Thought] combined movement toward formal equality with a powerful doctrine of legal non-intervention in the family that rendered many of the formally equal rights of wives unenforceable.")

94. See Arlene Gautier, *Legal Regulation of Marital Relations: A Historical and Comparative Approach*, 19 INT'L J.L. POL'Y. & FAM. 47 (2005) for an extensive review of marriage codes from 142 countries throughout the 19th and 20th centuries.

95. In her insightful study of early Mexican legal transformation, Susan Kellogg notes that Mexican women used the courts in unprecedented numbers as a new, powerful resource to combat the rigid hierarchy of Tenochcan society. SUSAN KELLOGG, *LAW AND THE TRANSFORMATION OF AZTEC CULTURE, 1500-1700*, at 107 (1995). See also STEVE STERN, *THE SECRET HISTORY OF GENDER: WOMEN, MEN, AND POWER IN LATE COLONIAL MEXICO* 299-300 (1995) (describing the gendered dimension of domestic violence as contingent upon culturally constructed roles for men and women in colonial Mexico, and the myriad ways in which women from subaltern groups mobilized these roles to combat violent partners).

the colonial courts.⁹⁶ Cases abound in the Archbishopric Archives of Lima and Mexico City⁹⁷ that were brought by women who revealed their loss of honor and their sexual improprieties by suing men who had jilted them out of marriage or had left illegitimate children without support.⁹⁸ Women—particularly of mixed ethnic backgrounds—who were identified as concubines (*mancebas*) also denounced their lovers in the canon law courts.⁹⁹ Why would women risk disclosing these indiscretions in a public forum when the cost to them and their families was so great? At the risk of oversimplification, the answer may lie in the appeal of the legitimating function of the canon law courts. Women who sued men after their loss of virginity in canon law courts were searching for “a restitution of their honor, whether through marriage or economic compensation.”¹⁰⁰ Hapless wives also turned to the ecclesiastical courts to terminate abusive unions.¹⁰¹ Physical punishment, abandonment, heresy, alcoholism, violence, flagrant infidelity and licentiousness, and insanity were routine accusations in women’s divorce petitions to ecclesiastical courts.¹⁰² Yet these divorce petitions could only be successful if women appealed to the very codes of male and female honor and propriety that ultimately constrained them. Canon lawyers were more likely to rule favorably when women were of

96. HÜNEFELDT, *supra* note 72, at 1-3; Twinam, *supra* note 58, at 122.

97. Lima and Mexico City were the sites of the *Real Audiencias* during the Viceroyalty.

98. See Twinam, *supra* note 58, at 119; HÜNEFELDT, *supra* note 72, at 13-14.

99. A typical complaint of concubinage is summarized in this way: “In 1725, Isabel Maria de Céspedes filed a petition against Matias de Esquivel, master blacksmith, denouncing him for an incestuous marriage with her natural daughter, Josefa Joaquina, a quadroon, when Matias Esquivel had been carnally involved (“*amancebado*”) with the petitioner Isabel Maria de Céspedes.” Archivo Arzobispal de Lima, folio Amancebados 1725.

100. Asunción Lavrín, *Introduction: The Scenario, the Actors, and the Issues, in SEXUALITY AND MARRIAGE IN COLONIAL LATIN AMERICA*, *supra* note 58, at 12.

101. HÜNEFELDT, *supra* note 72, at 147-78; see MANNARELLI, *supra* note 62, at 137-50); LAVALLÉ, *supra* note 54, at 20, 32. See also Sarah C. Chambers, “To the Company of a Man like My Husband, No Law Can Compel Me”: *The Limits of Sanctions against Wife Beating in Arequipa, Peru, 1780-1850*, J. WOMEN’S HIST., Spring 1999, at 31, 38 (noting the Church’s contradictory stance on domestic violence cases because the clergy was persuaded by men’s entitlement to correct their wives through physical punishment).

102. LAVALLÉ, *supra* note 54, at 30, 32, 51, 64, 89.

impeccable character and when men's transgressions violated notions of appropriate relations between castes and class.¹⁰³

One woman's divorce petition illustrates the importance of framing one's legal claim in terms of the interlocking boundaries among caste, ethnicity, religion, and class. Maria Joaquina do Nascimento alleged that her husband was,

a gambler, and adulterer, and a violent, sacrilegious man . . . who having forgotten the obligations and duties of an honest and Catholic husband . . . beat her and threatened her with death . . . and reaching such excesses that despite her being pregnant, he promoted an abortion . . . and all this is due to his living in concubinage with a *mulata* with whom he commits adultery contrary to the fidelity he owes to the sacrament of matrimony.¹⁰⁴

For Maria Joaquina's petition to prevail in an ecclesiastical court, it was important to depict her husband's transgressions as violations of acceptable inter-racial relations (he lived openly with a *mulata*) and to denounce him for his provocation of a miscarriage. Canon law courts refused to grant divorces unless men's peccadilloes went beyond the boundaries of accepted licentiousness, or unless the abuse violated men's ordained disciplinary powers.¹⁰⁵ It was "accepted" that white men could have casual sexual relations with black, *mestizo*, *mulata*, or Indian women, but not to the point of abandoning their marital home and neglecting their financial responsibilities to their faithful, pious Catholic wives to live in concubinage with lower-caste women. Regarding the miscarriage, even the Church was not swayed by Maria Joaquina's husband's right to discipline his wife, because his right of corporal

103. By caste, I refer to the ascriptive categories of *zambo*, *pardo*, *mulatto*, *quarterona*, *mestizo*, *indio*, and *blanco* that were determined according to the mixtures of one's "racial" heritage. See, e.g., Cottrol, *supra* note 56, at 31. Personal status laws were contingent on one's caste which made distinctions on the basis of religion, gender, occupation, marital status, birthplace, wealth, and family lineage. See Lau, *supra* note 58, at 423-25; Twinam, *supra* note 58, at 126.

104. Marfa Beatriz Nizza da Silva, *Divorce in Colonial Brazil: The Case of São Paulo*, in *SEXUALITY AND MARRIAGE IN COLONIAL LATIN AMERICA*, *supra* note 58, at 330.

105. *Id.* at 314; see also LAVALLÉ, *supra* note 54, at 32-35, 51, 87-92; Chambers, *supra* note 101, at 32.

punishment was suspended while his wife was in a “delicate condition.”¹⁰⁶ In sum, his physical abuse violated the limits of custom and nature as understood in both canonical law and colonial society.

In the contemporary period, women continue to appeal to the court or the prosecutorial process to vindicate their rights for the same reasons that women relied on the colonial courts in the past: to reclaim their honor and integrity in a public forum and to use that forum to call attention to their partner’s transgressions from their socially determined roles as protector and provider. Men’s disciplinary rights and expectations of women’s fidelity and obedience are contingent on men’s fulfilling their duties of support and protection. When men fail in their provider/supporter role, their disciplinary powers are suspended and contestable in a public forum.¹⁰⁷ As a consequence, the foundational assumptions of appropriate gender roles and responsibilities are reified, rather than challenged, by their contestation in the judicial forum. Who determines what constitutes a “tolerable” exercise of power between domestic partners or within a family? In the colonial and republican periods, this determination was subject to the discretion of the Church and necessarily conformed to the divine plan for married couples that vested disciplinary powers in men. Today, civil courts decide whether to grant a divorce on grounds of excessive cruelty,¹⁰⁸ but their determination rests implicitly upon a threshold of tolerability. This stance of the courts is in marked distinction to the demands of feminist NGOs with regard to family violence; these NGOs insist upon its total eradication rather than a casuistic determination of whether violence has occurred.¹⁰⁹ In a legal system unwilling

106. As Hünefeldt writes, “Conflicts [which disrupted public tranquility] were beyond acceptable limits because of their brutality and because they upset people’s lives The limit was defined by the degree of violence: Husbands should be more sensitive, wives should not be treated like slaves; moreover, pregnant women should not be beaten at all.” HÜNEFELDT, *supra* note 72, at 71.

107. See STERN, *supra* note 95, at 77.

108. See 1984 Civil Code, *supra* note 47.

109. The current slogans for the anti-violence campaigns launched by the feminist NGOs Movimiento Manuela Ramos and the Centro de la Mujer Peruana “Flora Tristán” call on each citizen to exercise personal responsibility in ending violence against women: “*Yo lucho por un mundo sin violencia ¿y tú? No más violencia contra la mujer.*” [“I struggle for a world without violence.

to engage in judicial activism, courts merely hold parties to their mutual duties and intervene when physical violence crosses the customary boundaries of disciplinary power. Courts do not intervene proactively to prevent violence (much less to empower women to reduce their vulnerability to family violence); the entire judicial process relies passively on the extensive provisions for marital duties and obligations in the Civil Code.

C. *Contemporary Family Law in the 1984 Civil Code*

The contemporary Peruvian civil code recognizes formal gender equality as a basic principle.¹¹⁰ The 1984 Civil Code incorporates concepts such as age of consent and grants equity in divorce, division of marital property, and parental custody—which are hallmarks of a liberal family law code.¹¹¹ Women are entitled to manage their own property, administer their salaries (albeit for the benefit of the family), and to work outside the home without securing their husband's consent.¹¹² Reflecting the reality of high rates of consensual unions (*uniones de hecho*), the Civil Code does not distinguish between formal and informal marriages in terms of child support and custody, inheritance, or separation of property accumulated during the union.¹¹³ Consensual unions are recognized as “the union of an unmarried man and woman who live together for over two years, in a peaceful, overt, continuous and enduring way as if they were married and under a duty to support each other and who are not prevented from contracting marriage by any legal impediment.”¹¹⁴

The debate surrounding the legal recognition of informal marriages in the 1984 Code is riddled with contradictions. On one hand, it was argued that the recognition of informal un-

And what about you? No more violence against women.”]. Advertisement, Movimiento Manuela Ramos (author's translation) (on file with author).

110. 1984 Civil Code, *supra* note 47 at art. 4.

111. *Id.* at arts. 290 (equality in the home), 292 (equality in the marriage), 295 (division of marital property), 305 (administration of each other's property), 65 (age of consent); 288 (parental custody).

112. *Id.* at art. 293.

113. *Id.* at art. 326.

114. *Id.*; see also Julio Guitron, *Mexico: A Decade of Family Law 1983-1994*, 33 U. LOUISVILLE J. FAM. L. 445, 451-52 (1994) (describing the Mexican Hidalgo Code's definition of cohabitation and its legal implications).

ions would deter couples from formalizing their relationships through civil marriage—the preferred policy of the church and state.¹¹⁵ On the other hand, those arguing for recognition used social welfare rhetoric to protect vulnerable common-law wives and illegitimate children from abandonment.¹¹⁶ These arguments, which highlight a position that Ratna Kapur has labeled the “victim subject,”¹¹⁷ have reinforced a welfarist/protectionist and conservative discourse within family law and have weakened its potential as an instrument of emancipatory politics.¹¹⁸ Although the law in theory does not discriminate against informal unions, unmarried mothers continue to be unduly burdened by the legal requirements of paternal recognition of illegitimate children—an area of serious concern for enforcing child support judgments. The requirement for paternal recognition extends even to straightforward processes, for instance, in matriculation to parochial schools or in admission to the hospital, when presentation of a birth certificate is required. These requirements stigmatize single mothers and children born out of wedlock, reflecting a policy decision to penalize informal unions.

While the ideal of the patriarchal family still dominates Latin American legal discourse,¹¹⁹ the proportion of consen-

115. CORNEJO CHÁVEZ, *supra* note 5, at 74.

116. The jurist Hector Cornejo Chávez outlines the prevailing social problem of abandonment that has legitimized discussion of the recognition of informal unions. Chávez writes,

[W]hat has most worried jurists and even legislators . . . is the possibility that a woman could be abandoned by her lover upon dissolution of the union. Several solutions to this problem have been suggested, including . . . [t]hat of recognizing the concubinage union as a corporation. The effect of this would be that, upon dissolution of the relationship, the parties would undertake a family liquidation through which each would receive what he or she justly deserves.

Id. at 68 (author’s translation).

117. Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 2 (2002).

118. *Id.* at 2.

119. On the persistence of the patriarchal myth, Dore writes,

That society was patriarchal there is little doubt; that it rested on a universe of male family heads is a myth Female-headed households in Latin America are not nontraditional—in the sense of being historically rare. [This discovery] produced a shift in paradigm,

sual unions¹²⁰ surpasses that of formal marriages among lower economic segments of the population, indicating that couples routinely form lifelong partnerships outside the traditional marriage framework. Sociologists and demographers attribute the reasons for the persistence of informal unions to a long historical and cultural tradition,¹²¹ precarious economic con-

but a quiet one And if historians have been slow in grasping the importance of the new Latin American family history, policy makers have ignored it. Its discoveries are threatening; they subvert the cosy picture of the natural family type.

Elizabeth Dore, *The Holy Family: Imagined Households in Latin American History*, in GENDER POLITICS IN LATIN AMERICA: DEBATES IN THEORY AND PRACTICE 108, 101-02, (Elizabeth Dore ed., 1997). Similarly, in Anglo-American family law, the ideology privileges a heterosexual, nuclear, patriarchal family. See, e.g., MICHÈLE BARRETT & MARY MCINTOSH, THE ANTI-SOCIAL FAMILY 8 (1982) ("The stereotypical nuclear family accounts, roughly, for only a third of households in Britain today. Yet the media give the impression that the entire population is securely bound up in it.").

120. Consensual unions are themselves a heterogeneous category. These unions are best regarded as a continuum ranging from lasting lifelong unions among couples from lower economic segments, to residential partnerships among single parents and/or widows, secondary partnerships between men and women previously or concurrently married to other spouses, and an alternative living arrangement among well educated couples in urban areas. See Teresa Castro Martin, *Consensual Unions in Latin America: Persistence of a Dual Nuptiality System*, 33 J. COMP. FAM. STUD. 35 (2002). In rural areas, particularly among indigenous Andean communities, "servinakuy" or trial marriages are still dominant. See CORNEJO CHÁVEZ, *supra* note 54, at 74-81.

121. The colonial period was characterized by high rates of illegitimacy and informal unions. See MANNARELLI, *supra* note 62, at 160-65; Astrid Cubano-Iguina, *Legal Constructions of Gender and Violence Against Women in Puerto Rico Under Spanish Rule, 1860-1895*, 22 LAW & HIST. REV. 531, 536-37 (2004); Elizabeth Kusnesof, *Sexual Politics, Race, and Bastard-Bearing in Nineteenth-Century Brazil: A Question of Culture or Power?*, 16 J. FAM. HIST. 241 (1991). The high rates of illegitimacy have been attributed to the demographic imbalance between "marriageable" Spanish women and the availability of a larger pool of non-marriageable *mestizo*, indigenous, and African women; the need for women's salaried domestic labor in large urban centers which led to female urban migration; the practice of casual sexual relations between *hacendados* and *mestizo*/African women; and the generalized power of men to reproduce without recognizing their offspring. See, e.g., STERN, *supra* note 95, at 258; Lavrin, *supra* note 100, at 43, *Sexuality in Colonial Mexico: A Church Dilemma*, in SEXUALITY AND MARRIAGE IN COLONIAL LATIN AMERICA, *supra* note 58, at 57-58. Illegitimate children were further characterized by law into two separate categories which, in turn, affected their rights to inheritance and child support. The first legal category, "*hijos naturales*," were illegitimate children born out of wedlock to parents whom, at the time of conception, had no canonical impediment to contracting mar-

ditions, the prohibitively high cost of formal marriages, and the scarcity of legal and church authorities in rural areas to perform formal marriages. In light of the enormous difficulties associated with obtaining a legal separation or ecclesiastical divorce, alternative arguments point out the flexibility of informal marriages for purposes of exiting an unsuccessful relationship.¹²²

Despite the high regard still attributed to ecclesiastically sanctioned marriages, marriage and divorce are now regulated by civil law.¹²³ This is due in large part to the pressures from the women's movement in Peru, which draws support from the global democratizing trend in marriage codes toward gender equality and from international human rights instruments, which generally posit a broader interpretation of women's human rights.

riage—either through consanguinity or existing marital commitments to other spouses. The second category, “*hijos espurios*,” were children conceived through adulterous sexual relations, incest, children of clerics, and children born to prostitutes or women of “ill repute.” This latter category of illegitimate children was unable to inherit property. See Scarlett O’Phelan Godoy, *Entre el afecto y la mala conciencia. La paternidad responsable en el Perú borbónico*, in *MUJERES, FAMILIA Y SOCIEDAD EN LA HISTORIA DE AMÉRICA LATINA, SIGLOS XVIII-XXI*, *supra* note 12, 37, 37-39; Muriel Nazzari, *An Urgent Need to Conceal: The System of Honor and Shame in Colonial Brazil*, in *THE FACES OF HONOR: SEX, SHAME AND VIOLENCE IN COLONIAL LATIN AMERICA*, *supra* note 27, at 103, 118. Illegitimacy in the colonial Latin American context had different implications than in the matrifocal Caribbean, where illegitimacy was far less stigmatized in rural communities. See EDITH CLARKE, *MY MOTHER WHO FATHERED ME: A STUDY OF THE FAMILY IN THREE SELECTED COMMUNITIES IN JAMAICA* (2d ed. 1966), for a classic study of Caribbean matrifocality and female-headed households. In the matrifocal communities of the Caribbean, childbirth and child rearing are rites of passage into adulthood and illegitimate offspring are incorporated and cared for within maternal kinship networks. See also Mindie Lazarus-Black, *Bastardy. Gender Hierarchy and the State: The Politics of Family Law Reform in Antigua and Barbuda*, 26 *LAW & SOC’Y REV.* 863 (1992) (describing the 1986 repeal of bastardy as a legal category for matters of inheritance in light of an eighty percent illegitimacy birthrate in the islands of Antigua and Barbuda).

122. De Vos, *supra* note 89, at 503-04.

123. 1984 Civil Code, *supra* note 47 at Art. 233-659.

V. REGULATION OF FAMILY VIOLENCE THROUGH INTERNATIONAL TREATIES AND NATIONAL LAW

This section discusses the impact of global human rights instruments and conventions on Peruvian family law. The regulation of Peruvian family violence laws by international covenants is largely due to the recognized power of the human rights movement to protect the human rights of vulnerable citizens and to the appalling human rights conditions in Peru during the 1980s and 1990s. Peru's path to democracy has been a troubled one. At a time when many Latin American countries were emerging from military dictatorships and transitioning to democracy,¹²⁴ Peru was embroiled in intense civil strife with the internal wars waged by *Sendero Luminoso* and the *Movimiento Revolucionario Tupac Amaru*.¹²⁵ During the 1980s, this civil war compromised the human rights of hundreds of

124. See Susan C. Bourque & Kay B. Warren, *Democracy Without Peace: The Cultural Politics of Terror in Peru*, 24 *LAT. AM. RES. REV.* 7, 7 (1989) (commenting that "[t]he twelve years of military rule in Peru between 1968 and 1980 witnessed few abuses of human rights, in marked contrast to the activities of military governments in Southern Cone countries like Brazil, Argentina, and Chile. Yet, paradoxically, the return to democracy in Peru, with the election of Fernando Belaúnde in 1980 and Alan García in 1985, has brought sharp escalations in political violence and terror.").

125. *Sendero Luminoso* or the Shining Path as it is known in English, emerged during the 1960s as a student organization led by the charismatic and inscrutable philosophy professor Abimael Guzman at the University of Huamanga in the central highland province of Ayacucho. Drawing inspiration from Maoist class analysis and indigenist visions of an agrarian communist society, *Sendero* launched a brutal insurgency against the Peruvian civilian governments and any elements of civil society that posed a threat to its existence. See generally Ronald Berg, *Sendero Luminoso and the Peasantry of Andahuaylas*, 28 *J. INTERAMERICAN STUD. & WORLD AFF.* 165, 165-96 (1986); *SHINING AND OTHER PATHS: WAR AND SOCIETY IN PERU, 1980-1995* (Steve J. Stern ed., 1998) (documenting *Sendero's* nefarious strategies, which included developing a rural base of support for a prolonged guerrilla warfare, cutting off the food supply of the cities (principally Lima), and the taking of power through a worker-peasant alliance). Cynthia McClintock noted that between 1980-1987, *Sendero* had, "carried out more than 9,500 attacks, primarily against banks, factories, police stations, and political party headquarters; . . . *Sendero* ha[d] assassinated numerous political leaders, military officials, development workers and even priests The southern highlands and Lima are the sites of most of the attacks." See McClintock, *The Prospects for Democratic Consolidation in a "Least Likely" Case: Peru*, 21 *COMP. POL.* 127, 130 (1989). See also COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, PERU, INFORME FINAL (2003), available at <http://www.cverdad.org.pe/ifinal/index.php>.

thousands of Peruvians living primarily in the Andean highlands and north and central Amazonian regions.¹²⁶ The Peruvian government—under the successive leadership of Presidents Belaúnde, García, and Fujimori—retaliated with brutal and at times senseless force to quash the insurgency and restore state security.¹²⁷

The study of *Sendero Luminoso*—its aims, objectives, strategies, targets, and impact on civil society have been the subject of exhaustive analysis and debate.¹²⁸ It is beyond the scope of this article to discuss the nuances of these analyses. However, three points are important to mention for the purposes of this discussion. First, Peru's deplorable human rights record had placed the country under greater scrutiny from human rights and international governmental organizations, which pressured the Fujimori government to improve the human rights situation and to restore democracy.¹²⁹ Second, there was a defined, articulated optimism in civil society to support the reconstruction of democratic governance at the end of the civil war.¹³⁰ Third, the reconstruction process opened up a process of debate about generalized violence and all forms of oppres-

126. During the decades of the 1980s and 1990s, the civil war claimed the lives of as many as twenty thousand people, and led to the internal displacement of as many as two hundred thousand citizens in a vicious cycle of insurgency and repressive violence. See HUMAN RIGHTS WATCH, *PERU UNDER FIRE: HUMAN RIGHTS SINCE THE RETURN TO DEMOCRACY*, 141-142 (1992). See also, Orin Starn, *Maoism in the Andes: The Communist Party of Peru-Shining Path and the Refusal of History*, 27 J. LAT. AMER. STUD. 399, 409-11 (1995); Jeffrey D. Thielman, *Peru's Failure to Make the Military Subservient to Civilian Law: The Absence of Prosecution After the 1988 Cayara Massacre*, 12 B.C. THIRD WORLD L.J. 433, 451-54 (1992). Both articles demonstrate evidence of civilian massacres by the insurgents in *Sendero* and the Peruvian military.

127. [TOMO I] COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, PERU, INFORME FINAL, *supra* note 125, at 67-77; see also Bourque & Warren, *supra* note 124, at 12-19 (discussing Belaúnde and García's military responses to insurgency).

128. See generally JULIO COTLER, *DEMOCRACIA E INTEGRACION NACIONAL* (1980); CARLOS IVAN DE GREGORI, *SENDERO LUMINOSO: LUCHA ARMADA O UTOPIA AUTORITARIO* (1992); DAVID SCOTT-PALMER, *THE SHINING PATH OF PERU* (David Scott Palmer ed., 1992); CYNTHIA MCCLINTOCK, *SENDERO LUMINOSO: PERU'S MAOIST GUERRILLAS* (1983); COLETTA A. YOUNGERS, *DECONSTRUCTING DEMOCRACY: PERU AFTER PRESIDENT ALBERTO FUJIMORI* (2000).

129. COLETTA YOUNGERS & SUSAN C. PEACOCK, *PERU'S COORDINADORA DE DERECHOS HUMANOS: A CASE STUDY OF COALITION BUILDING*, 14-22, available at http://www.wola.org/andes/Peru/Peru_Coordinadora_eng.pdf.

130. [TOMO I] COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, PERU, INFORME FINAL, *supra* note 125, at 67-77.

sion in Peruvian society.¹³¹ As such, if violence and oppression of disenfranchised groups in the public sphere was a subject of debate, criticism, and scrutiny, this provided an opportunity to simultaneously question the violence and oppression of women and children in the private sphere. Gender violence was regarded as a generalized problem of authoritarian rule that privileged male power and dominance over women and had to be addressed in the reconstruction process of a democratic and egalitarian society.¹³² These three factors are essential in considering the impetus and clamor for legal and constitutional reform and human rights protection in Peru.

Although President Fujimori was initially considered an advocate of women's human rights with regard to reproductive choice and gender violence; in retrospect, his government cannot be regarded as anything but a civilian dictatorship.¹³³ Nevertheless, it was during the early years of the Fujimori regime that the Law for Protection from Family Violence was adopted (1993) and the Ministry for the Promotion of Women and Human Development (now the Ministry for Women and Social Development) demonstrated a serious commitment to respond to family violence within the home.¹³⁴ At the time that the family violence legislation was drafted, the government was battling the authority of the Catholic Church over the right to contraception and reproductive choice—a much more politically volatile issue.¹³⁵ Passing a family violence law

131. *Id.*

132. HUMAN RIGHTS WATCH, *UNTOLD TERROR: VIOLENCE AGAINST WOMEN IN PERU'S ARMED CONFLICT* (1992); [TOMO 8] COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, PERU, *INFORME FINAL*, *supra* note 125, at 45-100.

133. Bruce H. Kay, "*Fujipopulism and the Liberal State in Peru, 1990-1995*," 37 *J. INTERAMERICAN STUD. & WORLD AFF.* 55, 91 (1997), (noting that "[a]s a regime form, 'Fujipopulism' is neither consolidated democracy nor authoritarianism, but a hybrid of the two; it is the essence of an authoritarian regime embedded within the procedural framework of polyarchy.").

134. After Fujimori's visit to the Beijing conference, he established PROMUDEH in 1996 to demonstrate compliance with Peru's obligations to women's rights. PROMUDEH, in conjunction with DEMUS, a feminist organization dedicated to eradicating gender-based violence, launched a series of campaigns to combat domestic violence. *See* DEMUS Website, http://www.demus.org.pe/Menus/Articulos/informe_politicasweb.ppt (providing a history of the gender based violence eradication program).

135. William R. Long, *Peru's President, Church Clash Over Birth Control Programs*, *HOUS. CHRON.*, Oct. 29, 1995, at A44; *see also* McKinley, *supra* note 38, at 43; Anna Britt Coe, *From Anti-natalist to Ultra conservative: Restricting Repro-*

was far less politically divisive at the time and could be framed in expedient and acceptable terms as a measure to protect women and children and keep families together.¹³⁶

As mentioned earlier, feminist advocates and human rights organizations held the Peruvian government accountable to prevent, investigate, punish, and remedy acts of gender violence by invoking its treaty obligations under CEDAW, the ICCPR, the ICESCR, the American Convention on Human Rights, the Convention de Belém do Pará, and the articles of the Peruvian constitution guaranteeing physical integrity and the right to life. Consonant with universalist human rights discourse, provisions in these documents propose a minimum standard of rights guaranteeing physical integrity that must be protected in all societies regardless of cultural or religious differences or levels of socio-economic development.¹³⁷ Women's human rights advocates made strategic use of the "opportunity structures" proffered by donor power and by a global feminist human rights network to establish state responsibility for violations committed in the private sphere, and to treat gender violence and discrimination as heinous acts on par with disappearances, torture, and other actionable civil

ductive Choice in Peru, 12 REPRODUCTIVE HEALTH MATTERS, Nov. 1, 2004, at 56, available at 2004 WLNR 16804051 ("Furthermore, although Fujimori was initially extremely vocal in his support for family planning . . . his government desperately needed the backing of the Catholic Church, whose officials have long played a privileged and powerful role in Peru's public affairs and adamantly oppose access to modern contraceptives.").

136. The relative neglect or lack of importance that legislators pay to the issue of family violence laws has been noted in El Salvador and Chile. Hammergren, *supra* note 37, at 38. In El Salvador, wholesale family law code reform in 1994 was achieved largely because the Congress paid little attention to the process. *Id.* In his analysis of the Chilean Family Violence legislative act, Bacigulpe notes that despite disagreements about the ideological meaning of family violence, "the underlying assumption was that any family violence law that was going to be approved should have as its most important goal the maintenance of the family united within conservative family values." Gonzalo Bacigulpe, *Family Violence in Chile: Political and Legal Dimensions in a Period of Democratic Transition*, 6 VIOLENCE AGAINST WOMEN 427, 441 (2000).

137. See generally JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (1989); MICHAEL IGNATIEFF ET AL., HUMAN RIGHTS AS POLITICS AND IDOLATRY (Amy Gutmann ed., 2001). Cf. CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA (Abdullahi An-Na'im ed., 2002).

and political rights violations.¹³⁸ As such, sexual violence between a man and woman is not actionable solely when it is committed by a uniformed combatant against a defenseless female civilian during armed conflict. A state is accountable if it fails to prosecute honor killings as murder under the criminal code.¹³⁹ Moreover, sexual or domestic violence is actionable if the state does not protect women against abusive partners, if the legal system dismisses their claims, or if it does not provide mechanisms to prosecute and promote a society free from gender-based violence.¹⁴⁰

The principal mechanism for ensuring state compliance with human rights conventions is the reporting and monitoring function of the U.N. Commission on Violence Against Women, which operates under the CEDAW mandate.¹⁴¹ The inextricable link between gender specific acts of violence and the elimination of gender discrimination demonstrates the Commission's underlying conviction that improving women's status with relation to men will reduce their vulnerability to violence.

CEDAW, like other human rights conventions, is an unenforceable law. The Commission's power lies in its shaming potential and its ability to deny membership (and by extension, deny the benefits for trade and bilateral aid) of non-compliant states into the international community of human rights respecting states.¹⁴² The U.N. Special Rapporteur requires states to submit annual reports to the Commission documenting

138. See *Mejía v. Peru*, Case 10.970, Inter-Am. C.H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7 at 157 (1996), available at <http://www1.umn.edu/humanrts/cases/1996/peru5-96.htm> (last viewed Aug. 25, 2006) (holding the Peruvian government responsible for the rape of Raquel Mejía by military personnel in retaliation for her alleged subversive political beliefs and her marital connection to Fernando Mejía Egocheaga, a human rights activist, journalist and lawyer).

139. Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in HUMAN RIGHTS OF WOMEN, *supra* note 88.

140. See Ewing, *supra* note 8, at 768.

141. Although the State submits official reports to the UN Commission, NGOs are also able to submit "shadow" or alternative reports to Rapporteur for her review. See, e.g., CLADEM Website, http://www.cladem.org/espanol/regionales/monitoreo_convenios/cedawperu.asp (most recent shadow report issued by CLADEM (Comité de América Latina y el Caribe para la Defensa de los Derechos de la Mujer)).

142. Merry, *supra* note 10, at 943.

strategies adopted at institutional, political, and societal levels to combat gender violence.¹⁴³ Despite the unenforceability of CEDAW, the Convention is an essential tool for implementing laws promoting women's human rights in Peru. Based on the reservations and "issues of concern" expressed by the Special Rapporteur in her annual review of Peru's country reports, the state has consistently modified the law to respond to the Commission's concerns regarding gender specific acts of violence.¹⁴⁴ The government has responded by establishing "one-stop" Women's Emergency Centers; extensively training police personnel; instituting a domestic violence division within the National Police; overturning the conciliation requirement for domestic violence petitions; launching extensive outreach campaigns in schools, hospitals, and community-based organizations; and expediting the legal process for domestic violence petitions.¹⁴⁵ Nevertheless, two issues of concern persist in the Special Rapporteur's recommendations. First, marital rape laws are handled separately from family violence laws.¹⁴⁶ Second, the extension of family violence laws pertains exclusively to cohabitating couples.¹⁴⁷ Women's groups are working tirelessly to overturn the residential requirement and to enable women to use the expedited process for family violence in marital rape cases.¹⁴⁸

143. The Convention obliges States parties to submit to the Secretary-General a report on the legislative, judicial, administrative, or other measures that they have adopted to implement the Convention within a year after its entry into force and then at least every four years thereafter or whenever the CEDAW so requests. These reports, which may indicate factors and difficulties in implementation, are forwarded to the CEDAW for its consideration. See Division for the Advancement of Women, CEDAW, *Reporting Guidelines* (June 13, 2006), available at <http://www.un.org/womenwatch/daw/cedaw/reporting.htm>.

144. Radhika Coomaraswamy, Special Rapporteur On Violence Against Women, Its Causes and Consequences, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, U.N. Doc. E/CN.4/2003/75/Add.1, 2/27/2003 ¶ 1431-37, available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/a9c6321593428acfc1256cef0038513e/\\$FILE/G0311304.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/a9c6321593428acfc1256cef0038513e/$FILE/G0311304.pdf).

145. Memorandum from the Women's Rights Div. of Human Rights Watch to Aurora Torrejón Riva de Chíncha, *supra* note 19.

146. Coomaraswamy, *supra* note 144, at ¶ 1431-37.

147. *Id.*

148. Memorandum from the Women's Rights Div. of Human Rights Watch to Aurora Torrejón Riva de Chíncha, *supra* note 19.

There are clear differences in the global influences on family law code redaction and reform between the republican and contemporary period. Today, it is accepted that international organizations and civil society can influence (through suggested recommendations, expressions of concern, and agitational politics) the adoption and enforcement of family legislation. In the republican period, family law was off limits to international regulation or scrutiny, even if the drafters of the civil codes were not impervious to the liberal European trends. Of course, this shift toward greater international oversight of internal laws largely results from the erosion of state sovereignty and the contested inviolability of the private sphere.¹⁴⁹ Today, there is a defined space for civil society (and, by extension, the human rights movement) in determining a threshold standard of social norms that regulate family behavior. In the colonial and republican periods, this space was occupied exclusively by the Church. Even if the relationship is at times antagonistic or oppositional, women's groups, civil society, and the executive, legislative, and judicial branches of the state now act in a concerted fashion to devise strategies to remedy gender violence and promote human rights.

VI. THE INDIVIDUAL AGENCY OF WOMEN AND THE STRUGGLE
TOWARDS A RIGHTS BASED DISCOURSE OF FAMILY
VIOLENCE: THE CASES OF SILVIA, SARA,
AND MARIA

This section examines the efforts of three Peruvian women: Silvia, Maria and Sara, who have attempted to use the

149. Nevertheless, the family's central place in society is enshrined in all major human rights instruments and national constitutions. According to article 16 of the Universal Declaration of Human Rights,

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Universal Declaration of Human Rights, G.A. Res. 217, ar. 16, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

contemporary Family Violence Law to prosecute their partners for domestic and sexual violence. As will become clear, Silvia, Maria, and Sara occupy different subject positions due to their ages, marital status, and the ways in which they either resisted or experienced domestic and sexual violence. But understanding their predicament is vital to the aims and objectives of the feminist human rights movement, because they are the women who embody the burden of domestic and sexual violence. Their engagement with legal and extra-legal processes brings them into the focus of human rights interventions, and their experiences tell us about the boundaries and limitations of contemporary family violence laws, individual agency, and the relationship between family law and dominant gendered discourse.

Silvia¹⁵⁰ is a thirty-seven-year old woman charging her common-law husband with battery, rape, and psychological abuse.¹⁵¹ Silvia was involved in a fifteen-year relationship with her common-law husband.¹⁵² She alleges that her former partner, with whom she had three children, almost beat her to death when he discovered her extra-marital affair with the man whom she now has an ongoing (non-residential) relationship.¹⁵³ Silvia further alleges that her partner was frequently abusive throughout their relationship, but that the incident which led her to instigate proceedings against him under the Family Violence Law was the most severe.¹⁵⁴ During their union, Silvia worked tirelessly as an administrator in a number of her partner's transportation enterprises.¹⁵⁵ If Silvia is successful in her family violence petition, she intends to sue her former spouse for child support, full custody of her children, and division of assets. Her family violence petition alleges pain and suffering due to repeated beatings, verbal disputes, and threats to abduct her children.¹⁵⁶

150. All names have been changed to protect the identity of the subjects.

151. Interview with Silvia A., in San Juan de Lurigancho, Perú (June 21, 2005).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

Sara is a fourteen-year old girl who was raped by a close family relative.¹⁵⁷ After taking her case to the DEMUNA (Municipal Defender's Office for Adolescents and Minors), her mother brought the complaint to the family court.¹⁵⁸ Sara's case was dismissed because penetration was not vaginal and Sara's virginity (and thus family honor) remained intact.¹⁵⁹ The judge determined that forced anal intercourse could not be charged as sexual violence under the Family Violence Law.¹⁶⁰

Maria is a fifty-seven-year old woman who recently sought legal advice about the Family Violence Law after enduring years of domestic abuse with her common-law husband.¹⁶¹ Her mature children encouraged her to present documentation of the battery and psychological abuse that characterized her marriage.¹⁶² During our first and subsequent meetings, Maria's children seemed to be the protagonists of the case. Maria was much more reluctant to pursue a legal claim against her husband and expressed a preference for an extra-legal solution to resolve her problems.¹⁶³

Each petitioner entered the legal system at varied stages and so their experiences differ markedly as they worked through the architecture of the prosecutorial process. How did each woman initiate her complaint? How did Maria, for example, become aware of the existence of a family violence law and invoke it after three decades of domestic abuse? Why does Silvia think the law should prevail in her case, even though she admits to being less than a perfect wife and

157. Interview with Sara M., in Surquillo, Perú (June 28, 2005).

158. *Id.*

159. *Id.*

160. Technically, anal and oral penetration were amended within the rape laws at a much later date, and was deemed on par with vaginal penetration due to lobbying associated with the passage of the Marital Rape Laws. The amended provision states: "*El que con violencia o grave amenaza, obliga a una persona a tener acceso carnal por vía vaginal, anal o bucal . . . será reprimido con pena privativa de libertad no menor de cuatro ni mayor de ocho años*" ["Whoever obliges an individual through violence or grave threats to have carnal access through vaginal, anal or oral penetration shall be punished for no less than four years and no more than eight years."]. Ley No. 28251 de 7 de junio de 2004, D.O. "El Peruano," de 6.08.2004 (Peru).

161. Interview with Maria U., in Lima Cercado, Perú (June 30, 2005).

162. *Id.*

163. *Id.*

mother? The only case that was closed was Sara's; however, her case was not favorably resolved by invoking the Family Violence Law. What does this ruling signal to other women experiencing inter-family sexual abuse about the prospects for their cases under the Family Violence Law?

The mindset of the judges whom I interviewed is clearly geared towards maintaining the integrity of the family and holding men and women to their preordained social roles. As one judge rather querulously pointed out,

The feminists are trying to classify everything in terms of family violence to get these cases on the docket. Our caseloads are backlogged with thousands of these family violence complaints. By the time we review the cases, the woman has long since returned to the man. But we have to keep the case open under the provision of the Family Violence Law for at least two years. But these characterizations are too broad. We know that violence in the family is caused by economic pressures and problems of poverty and unemployment. These are problems which are not just the result of inequality between men and women. What else does the [Family Violence] provision say? We must send the man for a physical examination to make sure he is not crazy. When we get the doctor's report, we see that he is healthy in the body but maybe not in the head. We know that something is wrong. When we look deeper, it is economic problems wreaking pressures in the home, especially when the couple has children to educate, house, and feed.¹⁶⁴

Judges see the problems with family violence as rooted in larger structural problems of economic deprivation, joblessness and/or under-employment, and their characterization of the cases unconsciously traffic in gendered stereotypes of male and female roles.¹⁶⁵ They contend that family violence levels would be reduced if men's economic situation improved—a belief based more on intuition and idealized gender roles than on empirical fact. Although aware of the feminist goals of fe-

164. Interview with Judge Luz Maria Capuñay Primer Sala de Familia, Lima Cercado, Perú (June 15, 2005).

165. *Id.*

male empowerment smuggled into the family violence laws, judges are impervious, if not openly hostile, to these goals. In a typical family violence petition, judges strive to ascertain if the episodic loss of (male) control was provoked by jealousy or joblessness.¹⁶⁶ This reflects prevailing social attitudes, customs, and traditions that privilege men's breadwinning responsibility and their understandable frustration vis-à-vis economic pressures. Curiously, even though women are often the primary providers for their children, the economic pressures they face are never considered as an extenuating circumstance for their acts of violence against their children or spouses.¹⁶⁷ If judges determine that family violence has occurred, they then recommend that the abusive partner undergo a period of counseling and a physical examination as a corrective measure to stop the abuse.¹⁶⁸ In short, the judicial recommendation is simply a cessation of violence. If domestic violence continues after the parties undergo counseling and the stipulated round of medical examinations, the judge will, in theory, grant the petitioner a cause of action to seek divorce or dissolution of the union.¹⁶⁹ However, unless they view a given case as utterly reprehensible, judges are reluctant to grant causes of action under the Family Violence Law because they see their function as one of keeping families together.¹⁷⁰

The subliminal legitimization of male violence is found at all levels of the prosecutorial process (in the police stations, the hospitals, and the family courts) and is a powerful counter-

166. *Id.*; Interview with Judge Oscar Chavez, Juez Rotatorio, Primer Sala de Familia, in Lima Cercado, Perú (June 16, 2005); interview with Judge Teresa Velazquez, Primer Sala de Familia, in Lima Cercado, Perú (June 17, 2005).

167. During my interviews, I asked the social workers and judges about women's corporal punishment of their children in child abuse cases. The social workers classified women who hit their husbands were "*brava*" (angry and out of control). But both mothers and fathers who hit their children were given a lot of latitude as disciplinarians, unless of course this crossed the line of tolerable corporal punishment into child abuse. Interview with Zoila Hernandez and Denisse Ramos, Social Workers, CASP, *supra* note 46; interview with Judges Velazquez and Chavez *supra* note 166.

168. Interview with Judges Capuñáy and Velazquez, *supra* notes 164 and 166.

169. Interview with Garrido, *supra* note 51, at the Women's Emergency Center, in Lima Cercado.

170. Interview with Judge Chavez, *supra* note 166.

vailing force that vitiates the punitive effect of family violence laws. Moreover it leads inexorably to conciliation. Despite the explicit illegality of urging conciliation in family violence cases, the practice still prevails.¹⁷¹ Conciliation is either a result of a systemic corrective mechanism for overloaded case dockets or a result of the law's perceived inability to change culturally ingrained behavior. The insistence on conciliation is contingent on a widely held belief that conflict leading to physical violence is an inevitable—if regrettable—part of domestic relations.¹⁷² Moreover, the judicial preference is to keep families together (a policy decidedly at odds with that of promoting human rights of women) because judges see no other feasible solution to the children's survival.¹⁷³ Imposing child support judgments on abusive spouses, for instance, is symbolic and unenforceable given the precarious employment stability of men in poor districts.¹⁷⁴ In addition, women's employment prospects are generally no better than their male counterparts, and women are doubly disadvantaged if they have to care for young children.¹⁷⁵ Judges, police officers, priests, and social workers all agree that it is imperative for couples to overcome their problems for the welfare of their children if there is even the slightest chance for reconciliation through counseling. More importantly, reconciliation de-emphasizes the need to devise preventative strategies in domestic violence. Prevention and reconciliation are two distinct extra-legal approaches to the problem of family violence, and their prioritization has different implications for women in abusive relationships.

Silvia's claim for child support and alimony is problematic because she "provoked" her husband's reaction with her adulterous conduct. Upon instigating the complaint at the local *comisaría*, Silvia's partner was briefly apprehended and re-

171. Interview with Garrido, *supra* note 51.

172. *Id.*

173. Interview with Judge Capuñáy, *supra* note 164.

174. *Id.*

175. Children in abusive families are increasingly taken into custody through the state run foster-care program INABIF (*Instituto Nacional del Bienestar Familiar*) because there are fewer extended family members capable or willing to take children of separated parents. See Ministerio de la Mujer y Desarrollo Social, <http://www.inabif.gob.pe> (last visited July 17, 2006) (describing the INABIF).

moved from the family home under a restraining order that Silvia astutely obtained from the Prefect's Office (*La Prefectura*).¹⁷⁶ Silvia alleges that her husband bribed the police with a hefty sum to drop her complaint and release him the next day from jail.¹⁷⁷ The police sympathized with his case as one in which he justifiably defended his right to his wife's fidelity.¹⁷⁸ Apparently, the police even offered to accompany him to rough-up Silvia's lover.¹⁷⁹ He returned to the house in clear contempt of the restraining order, which he scoffed at as worthless in light of his "arrangement" with the local police.¹⁸⁰ Undaunted, Silvia turned to the Women's Emergency Center¹⁸¹ in her district for help with her case.¹⁸² Once her case was taken by the legal counsel at the Women's Emergency Center, prosecution began in earnest.¹⁸³ The forensic medical officer at the Emergency Center reported that Silvia had sustained life-threatening injuries—three broken ribs, severe contusions, and internal hemorrhaging.¹⁸⁴ Silvia was treated for these injuries at a public hospital and returned to her house with police protection approximately one week later.¹⁸⁵ Dur-

176. The Prefect's office is an upper level branch of the National Police which issues restraining orders. Restraining orders can only be obtained from the *Prefectura* or the Prosecutor's Office (*La Fiscalía*). See Policía Nacional del Perú, <http://www.pnp.gob.pe/inicio.asp> (last visited Aug. 24, 2006).

177. Interview with Silvia A., *supra* note 151.

178. *Id.*

179. *Id.*

180. *Id.*

181. There are ten Women's Emergency centers distributed throughout the poorer districts in Lima. These centers are operated by the Ministry for Women's Affairs and Social Development (MIMDES) and provide psychological counseling and legal advice to women seeking relief from abusive partners. The Centers also have a women's police station and a certified physician from the Institute for Legal Medicine to register domestic abuse cases. See *supra* note 21.

182. Interview with Silvia A., *supra* note 151.

183. *Id.*

184. *Id.*

185. The fact that Silvia was interned for less than ten days is important because her aggressor will get a civil rather than a criminal sanction. Código Penal del Perú, [CP] [Penal Code], Art. 122, El Peruano [D.O.], 3 de abril de 1991 (Peru) [hereinafter *Penal Code*]. For injuries that require hospitalization longer than ten days, cases must proceed to a criminal court. The logic is that shorter periods of internment result from less severe blows or physical aggression. Although the Family Violence Law contemplates psycho-

ing the time she was in the hospital, her children were taken from the house by her new partner and cared for by his mother.¹⁸⁶

Silvia's relationship with her former partner was highly volatile, with the classic cycles of repeated abuse and reconciliation characterizing the battered wife syndrome. She admits to having filed complaints at her local police station before to "put her husband on notice" (*para llamar su atención*).¹⁸⁷ Silvia's case is also one of mutual abuse. Interviews with Silvia were a revealing change from the stereotyped victimization of women in family violence petitions. On one occasion she said to me:

I gave as good as I got. You think I was going to let him get away with [slapping me around]? My mother told me that the first time you let a man beat you and you don't fight back, you're fucked (trans. *te jodistes*). The first time he came at me, he yanked my head by my braids. I was young, you see, and I'd just come down from the mountains to the city. He thought he could dominate me because I still used a *pollera* (trans. traditional skirt) and wore my braids like a *cholita*. I was late getting started with his lunch and he was mad. I brandished the kitchen knife that I was using and I splashed boiling water in his face to make him loosen his grip on my neck. He said, "Hey woman, what are you doing? I was just playing around!" I said, "Yes, well, I'm just playing around too. Let's see how far this game gets us." I know men are in charge, but I say you have to set your own limits. Every time he came at me, I fought back.¹⁸⁸

logical violence, the hospitalization requirement complicates petitions for women claiming psychological abuse, since forensic doctors are not able to determine the extent of psychic aggression through a perfunctory medical examination. In the event that a woman leaves the home because of unbearable violence or physical danger, her lawyers automatically allege psychological abuse to counteract the claim of abandonment of the home (*abandono del hogar*) that her partner will inevitably put forth if the case proceeds to court. See 1984 Civil Code, *supra* note 47 for the causes of action of divorce.

186. Interview with Silvia A., *supra* note 151.

187. *Id.*

188. *Id.*

The fact that Silvia was also abusive, coupled with her own admission of her adulterous conduct (defiantly confirmed to me during personal interviews),¹⁸⁹ raises red flags in her case. Silvia has rejected the possibility of reconciliation with her former spouse, and she is now openly involved with another man who appears to be providing interim support to her children—a further complicating factor in determining child support or alimony. In order to claim child support and maintenance, Silvia must neutralize the problem presented by her adultery by emphasizing her husband's abuse. Despite these potential negative factors, Silvia is firmly committed to the prosecutorial process and is optimistic about her chances for a favorable ruling in her case.¹⁹⁰

If she initiates the prosecutorial process, Maria may prevail because of her age,¹⁹¹ her impeccable character, and the extent of her suffering. Maria's daughter offered a memorable part in Maria's testimony, explaining that she was born prematurely as a result of the husband's blows to Maria's stomach during the late stages of her pregnancy.¹⁹² Maria's daughter rightfully attests that her mother nearly sacrificed her life to save that of her unborn child.¹⁹³ It seems that after this

189. When I asked Silvia about her own infidelity, she retorted, "Didn't he (*i.e.*, her husband) have countless other women? This man came to me and I wanted him. Why shouldn't I have him?" Interview with Silvia A., *supra* note 151. Yet any reputable divorce lawyer would encourage Silvia to exercise prudent self-restraint and refrain from these kinds of revelations to win a favorable decision in her case. *Id.*

190. *Id.*

191. However, Maria may not prevail because of her age. At one of the legal aid family violence clinics that I attended, a lawyer told me about a case in which she represented an older woman seeking a cause of action for divorce under the Family Violence law. Interview with Garrido, *supra* note 51. The judge reproached her client for seeking divorce at her mature age, saying that she should be preparing for death rather than for divorce. *Id.* When her lawyer responded that one is never too old to seek a better life, the judge asked why her client did not bring her claim years ago if she was so unhappy during her marriage. *Id.* The lawyer responded reasonably that the Family Violence Law was enacted relatively recently, and her client would not have had a cause of action under the previous laws. *Id.* The judge concluded that all feminist lawyers were trying to break up families rather than keep them together, and threatened to lodge a complaint with the Bar Association (*Colegio de Abogados*) for disrespectful conduct and unethical behavior. *Id.*

192. Interview with Maria U., *supra* note 161.

193. *Id.*

near fatal incident to both mother and infant, Maria's husband calmed down and the family relations were relatively peaceful.¹⁹⁴ However, the violence resumed as the children grew older and as Maria withdrew physically and emotionally from the relationship to devote herself exclusively to her children.¹⁹⁵ Maria augmented her income as an in-home laundress, but her husband continued to financially support the family.¹⁹⁶ It is not clear where or with whom he lived or how frequently he would appear to take up residence in the home, but his erratic and episodic physical presence, frequently accompanied by violent beatings, added to Maria's insecurity and psychological abuse.¹⁹⁷ Once the children were financially independent, Maria was encouraged by her family to inquire about the possibility of divorce under the Family Violence Law.¹⁹⁸

Maria's case is "meritorious" in the eyes of a dispassionate jurist for three principal reasons. First, she stuck with an abusive partner until her children reached the age of majority. Second, her husband's behavior is not founded in acceptable spousal "discipline" because, unlike the adulterous Silvia, Maria was a model wife and mother. Third, both sides of the family corroborate her accounts of her husband's reproachable abusive conduct. Both sides of the family intervened on repeated occasions to dissuade her husband from his behavior towards his wife and children.¹⁹⁹ Barring divine intervention, the husband's cessation of violence or behavior modification is only a remote possibility in light of his pathology. In sum, Maria personifies the necessary criteria of monogamous vulnerability and suffering in order to warrant an unequivocal determination of family violence by the judge.

Yet Maria is not the "hard" case for advocates of the family violence laws. It is not clear how embedded the rights discourse is in Maria's consciousness. She articulates a vague knowledge of a law "out there" that might protect her against her husband's pathological temper, but this is not as a result of

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

a heightened rights consciousness as evident in Silvia's case.²⁰⁰ At one point in our interview when I asked her how confident she felt about going forward with her case, Maria said:

I don't really know. We came here to find out what the law could do. He (i.e. her partner) is a policeman and he knows all the laws. He's the first one to violate them. All these years I took his blows, his insults, he broke my bones and I didn't complain. I took it because I thought better me than the children. Every time we heard the door, we trembled and I told the children to run and hide. We never knew what he would hit us with. His mother, she told him, "Son, you can't live like this, like an animal. You have a good woman, she takes care of your children, she cooks for you, washes your clothes. She never goes on the street. You should respect her." He never listened. Now we can manage on our own. We are here to see what the law can do.²⁰¹

Maria does not know about CEDAW or the American Convention, though feminist NGOs allude to these conventions in their consciousness-raising sessions with women's solidarity groups in her neighborhood.²⁰² Maria is neither an educated nor autonomous post-modern subject attuned to the global trends of human rights discourse. Maria is simply a woman who is burned out, used to avoiding conflict as a way of diffusing her husband's violent temper, and obviously worried about his ability to retaliate even more violently if she engages him in a legal battle.

Sara's case (already dismissed) was disregarded as a lamentable one-time event.²⁰³ Even the unflappable court clerk mentioned the poignancy of Sara's case because of her tender age.²⁰⁴ The judge recommended psychological counseling for both parties and the eventual marriage between the rapist and the petitioner, with parental consent.²⁰⁵ His ruling illuminates the ways that many judges and the broader society compre-

200. *Id.*

201. *Id.*

202. *Id.*

203. Interview with Sara M., *supra* note 157.

204. *Id.*

205. *Id.*

hend intra-family sexual abuse, as well as the dimensions of family relations than shape the offense. The judge's ruling is based on the need to restore family relations first and foremost, emphasizing the importance of honor and reparation.²⁰⁶ Even though the judicial system is (universally) biased against victims of sexual violence, in Latin American countries like Peru, informal and formal modes of conflict resolution still promote marriage between aggressor and victim as a remedy, because sexual violence is seen as a violation of family honor rather than the violation of a woman's bodily integrity or human rights.²⁰⁷ According to the jurist César San Martín, "a man's promise to marry the woman whose honor he has violated is the greatest act of reparation he can offer, and if she accepts his promise of marriage, she has forgiven his conduct."²⁰⁸ This logic clearly shows the limits of judicial paternalism and points out why women would be hesitant about using the courts to vindicate their claims of sexual violence.²⁰⁹

206. See Richard Boyer, *Honor Among Plebeians: Mala Sangre and Social Reputation*, in *THE FACES OF HONOR: SEX, SHAME AND VIOLENCE IN COLONIAL LATIN AMERICA*, *supra* note 27, at 152, 152-53 ("Colonial courts . . . viewed complaints of sexual assault with suspicion. Women who accused men of assault, judges reasoned, had probably provoked them. Justice represented . . . more of a 'male than a moral order'; the outcome of assault claims hinged more on family and clientele connections (networks of friends and dependents) than the merits of cases [M]arriage as a solution to rape or seduction assumed the social equality of the contracting parties (implicit in custom from early times and explicit in Spanish marriage laws of the late eighteenth century). Women of lower standing therefore had to settle for a small monetary settlement Often, however, she might have to settle for nothing at all.").

207. See BEATRIZ MERINO LUCERO, *MATRIMONIO Y VIOLACIÓN: EL DEBATE DEL ARTÍCULO 178 DEL CÓDIGO PENAL PERUANO* 30-33 (1997).

208. The exoneration of perpetrators of sexual violence through marriage was overturned in 1997 through an amendment to the penal code which states "*El matrimonio que, posterior a la violación, contrae el agente con la víctima no es cause que exima la responsabilidad penal.*" ["Marriage which takes place after the rape does not exonerate the aggressor from criminal charges."] Ley No. 2677 de 11 de abril de 1997, D.O. "El Peruano," de 15.04.1997 (Peru). San Martín, who was actually in favor of changing Article 178 of the Penal Code in order to eliminate the exemption from criminal liability for rapists who marry their victims, went on to say that pardon and personal reparation are not substitutes for criminal sanction in the case of sexual violence. See MERINO LUCERO, *supra* note 207, at 30.

209. See Boyer, *supra* note 206, at 152.

Indeed, one wonders why women demonstrate such willingness to engage with the formal legal system when the chances of a favorable outcome are negligible. Women invest considerable time and effort in pursuing the prosecutorial process.²¹⁰ Some of the constraints rendering the legal system inaccessible to poor people have already been outlined. Corruption, prolonged delays, and burdensome evidentiary requirements are part of the transaction costs that litigants accept when dealing with the courts. These are structural constraints for all litigants, but they present additional burdens for poor women in family violence cases.

Marginalized people often embrace the formal system for many seemingly contradictory reasons. In an influential article “speculating on the limits of legal change,” Marc Galanter cautions against an immediate assumption that the readiness to resort to official tribunals is directly reflective of a “rights consciousness” or an appetite for retribution through authoritative institutions.²¹¹ Dependence on formal vindication of a claim, a grievance, or a right may not be the only positive outcome sought. Galanter argues that there is a high symbolic valuation of official rules attached to the legal process, which predicts the willingness of litigants to submit their claims to the courts for vindication.²¹² However, he also argues that a range of options exists in people’s minds: from “lumping it” to formal adjudication based on people’s calculation of risks and opportunities, the psychic stress involved in civil litigation, and effectiveness of informal dispute resolution strategies.²¹³ Although Galanter does not directly address the issue of domestic violence or legal systems of developing countries, his observations are nevertheless applicable to the judgment calls women make in addressing their problems with abusive partners.

210. Every woman whom I interviewed complained of excessive delays in her case. Sara’s mother, a domestic employee, lost her job due to the time consuming legal process she waged. Even though the proceedings are free of charge, women still have to take time off from work or from their domestic duties to pursue their cases, which move at a glacial pace through the legal system.

211. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc’y REV. 95, 104–06 (1974).

212. *Id.* at 106.

213. *Id.* at 125–26.

Sara's case, for example, is emblematic of the need for formal vindication of the horrific sexual violence that young women can experience at the hands of a more powerful male family member. The rapist was taken into custody, but Sara's mother could not rely on police protection because his family would merely have bribed the police or the court clerk to secure their son's release.²¹⁴ Sara's mother attributed the imbalance of power between herself and the parents of the rapist to their greater financial resources.²¹⁵ The rapist's family clearly considered Sara beneath their son's status, and his family's relative wealth conditioned his ability to commit acts of sexual violence with impunity against young girls from lower social strata.²¹⁶ Informal modes of conflict resolution through disciplinary family sanctions would not have been sufficient to vindicate Sara's—and, by extension, her mother's—honor.²¹⁷ Marriage was not the solution that Sara's mother sought in turning to the court.²¹⁸ If marriage had been a possibility or a desirable solution, it would have been proposed by Sara's mother. The burden of shame contaminated inter-family relations and precluded further negotiations between the families.²¹⁹ By turning to the court, Sara's mother sought a judicial ruling which reaffirmed the abominable nature of Sara's experience to restore her daughter's honor.²²⁰ She would have used this against the rapist's family to counteract their weak position within the family. The fact that this judicial affirmation did not occur was extremely painful to Sara's mother. The exculpation of Sara's rapist reaffirms the belief of poor women in the bias of the judicial system, and rulings like this

214. Interview with Sara M., *supra* note 157.

215. Interview with Sara's mother, Margarita M. in Surquillo, Peru (July 15, 2005).

216. *Id.* This was further confirmed to me by Sara's mother who claimed that two weeks after the rapist was released from jail, he committed the act again with another young girl, but this girl's family insisted that he marry her, and so he was privately exonerated. The family was either tired of the boy's repeated infractions, or persuaded by the girl's social status to accept marriage as the solution in the subsequent episode. *Id.* On the point of male sexual predatory behavior with women from lower classes, see Nencil, *supra* note 18, at 69.

217. Interview with Margarita M., *supra* note 210.

218. *Id.*

219. *Id.*

220. *Id.*

understandably stand out in people's memory as evidence of the corruption of the public law. When I mentioned the possibility of appeal, given the convoluted logic of the judge's decision and the obvious misapplication of the Family Violence Law in Sara's case, Sara's mother was so disillusioned with the judicial system, she thought that an appeal was pointless.²²¹

Despite the repeated failure of the Family Violence Law to redress situations of domestic and sexual violence, as is evident in the numbers of complaints registered with the police, women increasingly rely on the prosecutorial process to call attention to their plight. At some level, women are making a positive determination about the risks and opportunities in invoking the Family Violence Law. If we compare the 58,000 complaints registered in the past year with the actual number of cases brought to trial, we can reasonably conclude that women are conflating the complaint process with effective legal action. The tendency to equate complaints (*denuncios*) with effective legal action is not founded on Peruvian litigiousness. Litigiousness is not a realistic feature of Peruvian legal culture given the judicial system's incapacity or unwillingness to engage in judicial activism.²²² Neither is the emphasis on extra legal methods of conflict resolution contingent on the "harmony ideology" which other commentators have noted in Latin America.²²³ Many of the broader observations of working class consciousness and identity that downplay court use in favor of informal dispute resolution²²⁴ are applicable in Peru-

221. *Id.*

222. But see Morgan, *supra* note 34, at 262, for an example of the explosion of *tutelas* used by women to take their grievances to the Colombian Constitutional Court.

223. See, e.g., LAURA NADER, HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE (1990) (stating that the litigiousness of Zapotec Indians is a strategy of asserting local control and autonomy through settling matters in their own courts by resisting the intervention of the national legal system. Zapotec litigiousness is contingent upon a prevailing harmony ideology: the components of which emphasize conciliation, prioritize consensus, and regard continued conflict as dysfunctional and uncivilized).

224. See, e.g., SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 5 (1990) (describing the legal consciousness of working class litigants in the United States by drawing on the ways in which they talked about and perceived their rights and entitlements, and how the courts are persistently used to settle disputes between neighbors, lovers, spouses, and small business associates).

vian family violence cases, but their relevance is at the first-instance courts, in the DEMUNAS and police stations, and in the waiting rooms of Women's Emergency Centers where women seek external support in redressing the terms of their relationships when they become unbearable. The cycles of reconciliation which invariably occur after women initiate the complaints diminish their credibility, and women are viewed disparagingly as "*chifladas*" (frivolous women) who return to abusive spouses rather than viewing their dependency on the complaint process as a pragmatic or rational response to setting the terms of an acceptable relationship.²²⁵ We need to reorient, or broaden the scope of our thinking about formal vs. informal legal terrains to incorporate these lower-level instances peripheral to the courts where women engage with the prosecutorial system.

A. *The Role of the Police in Enforcing Family Violence Laws*

Although there are serious problems with the judicial treatment of women's complaints, the larger problem lies with the police. The *comisariás* all have trained personnel in their domestic violence division to handle complaints of family violence.²²⁶ Silvia's case (in which her common-law husband violated the restraining order that she had secured from the Prefect's Office by bribing the local police) demonstrates the persistent problem of police propensity to accept bribes to drop or delay investigations or simply give women the runaround. This is consistent with official and anecdotal reports about police bribes and corruption throughout the very institution which is entrusted with public safety.²²⁷ As such, a woman who

225. Interview with Judge Teresa Velazquez, *supra* note 166.

226. Memorandum from the Women's Rights Div. of Human Rights Watch to Aurora Torrejón Riva de Chíncha, *supra* note 19.

227. Police personnel in the Women's Emergency Centers are more committed to the integrity of the prosecutorial process than the police officers in the *comisariás*. Although the police officers assigned to the Women's Emergency Centers process half the number of family violence cases reported by the National Police, there is greater supervision over the cases taken on by the Women's Emergency Centers than occurs in the National Police. In 2004, the Women's Emergency Centers processed a total of 25,608 cases of family violence, compared with the 58,050 complaints processed by the National Police. *See supra* note 21. The Women's Emergency Centers are accountable to the Ministry of Women's Affairs and Social Development (MIMDES), while the National Police report directly to the Ministry of the

denounces an abusive spouse must return home to face his wrath, since he may become more violent as a result of her actions. Moreover, in embracing the legal system to denounce spousal abuse, women risk cutting themselves off from the family networks which are their primary source of support vis-à-vis the vagaries of the legal system.²²⁸

Unlike the protective system in the United States, unless there are signs of imminent, life-threatening violence, the Peruvian police do not intervene to remove an abusive spouse from the home. Complaints are rarely accompanied by requests to *permanently* remove the abusive spouse. At most, women expect that their spouses will be apprehended briefly, especially if the abuse is sparked by drunkenness, and hope that men will sober up, come to their senses, and reform their behavior because they fear future arrests and fear, most importantly, their wives' ability to turn to the legal system for help.

Interior. In my interviews with MIMDES representatives, it appeared that there is marked resistance to the oversight of MIMDES in family violence cases, even though the shared jurisdiction is a political decision to work cooperatively to combat family violence. Interview with Juan Sanchez, Legal Adviser, MIMDES, in Lima, (June 3, 2005); Interview Raquel Hurtado, Director, Inter-sectorial Unit of Reproductive and Sexual Health, Ministry of Health, Lima (June 2, 2005).

228. In her survey of family violence cases in Trinidad, Lazarus-Black writes

[By] continuing a case . . . a woman exposes the people she loves to the consequences of legal intervention, the anger of the accused, and the displeasure of others. She may stand to lose critical financial aid for herself, her children or members of other kinship networks in which she is ensconced. Moreover a host of agents are likely to press her to keep her out of court. [T]he players involved in the culture of reconciliation . . . are the abusive partners with whom women "settle" for the "sake of the family." They are children, parents, and other relatives. They are religious leaders and probation officers who offer counseling. And they are lawyers . . . [who] work to resolve their clients' conflicts without recourse to formal orders. Making peace and attending to the needs of children are preferred courses of action in the minds of many lawyers, they urge reconciliation rather than legal remedy In short, when a Trinidadian woman goes to court to protest the violence in her life, she will inevitably encounter myriad players who will work to convince her not to continue the case.

Mindie Lazarus-Black, *Empowering Rights and Disempowering Practices: Processing Domestic Violence Cases in Trinidad* (June 2003) (unpublished manuscript, on file with author).

However, in intervening violent episodes, women remove themselves and their children from the home if they can take shelter with a relative or friend until the spouse's anger is neutralized. Women refer to this cooling off period colloquially in Spanish as "*hasta que le pase la rabia*."²²⁹ When I asked Carmen Rosa, a twenty-five-year-old woman who came to lodge a family violence complaint at her local DEMUNA, why she left the house with her children instead of seeking her partner's removal, she retorted, "Men? They never leave. They are perfectly comfortable in their houses. We are the ones who have to leave. Isn't that the way it is where you come from?"²³⁰

Women like Carmen Rosa living in zones of extreme poverty, who are dependent on their partners for income and maintenance, are more likely to turn to the police but less likely to pursue the prosecutorial process. Women living below the poverty line rely primarily on their networks of "*vecinas*"²³¹ to protect themselves from abusive partners. Even if the "*vecinas*" are quicker to suggest turning to the police for protection than a family member would, none of the women I talked to in these marginal neighborhoods are aware of the path from the *comisaria* to the family court, because the court is not their point of engagement with the formal system.²³² Their principal point of reference within the formal system is the police and the low-ranked justices of the peace (*jueces de paz letrados o mixtos*).²³³ Silvia and Maria, on the other hand, are farther enmeshed in the formal legal system. But Maria and Silvia are not women in extreme poverty, although they

229. *Trans.* Until his rage passes.

230. Interview with Carmen Rosa, in Los Huertos de Manchay, Perú (July 3, 2005).

231. *Trans.* neighbor. The term connotes more than residential proximity, it signifies solidaristic ties between women in the popular classes, on par with that of kinship relations.

232. Interview with clients at the DEMUNA in Pachacamac, the CEM in Lima Cercado, the CEM in San Juan de Lurigancho, interviews with social worker Zoila Hernandez from CASP, May 31, 2005, *supra* note 46.

233. Although justices of the peace (*jueces de paz letrados*) have the capacity to register complaints and initiate investigative functions, they cannot issue sentences or rulings on a case. They are itinerant, low-ranked members of the judicial system, generally members of the communities in which they exercise jurisdiction. For a thorough discussion of the roles of the *jueces de paz letrados*, see MARIANELLA LEDESMA NARVAEZ, *LA JUSTICIA DE PAZ EN LIMA* (2002).

are classified as belonging to the lower economic sector. In this regard, it is important to note that Silvia and Maria are linked to men with a steady if modest income. Silvia's partner has a small fleet of rickshaw taxis and minibuses ("*combis*"), which brings in a fair amount of income (on and off the books) that could be divided if her case goes to court.²³⁴ Ironically, Maria's husband is a policeman, who appears to have a lucrative side business recycling contraband and pirated DVDs that he confiscates as part of his official duties.²³⁵ Both women feel entitled to a financial settlement as part of their divorce proceedings if their family violence petitions are successful.

VII. CONCLUSION

The global human rights movement has positively affected Peruvian family law reform through the state's adoption and modification of family violence laws. Peruvian women are increasingly turning to the judicial system for support in dealing with abusive spouses. Nevertheless, there are persistent structural problems that weaken the effectiveness of the family violence laws. The state is committed on one level to combating family violence, but it is unable (or unwilling) to provide the social welfare system for women and children necessary for family violence laws to be effective. Social safety nets commonly found in developed countries are virtually non-existent in Peru. Without shelters, foster-care, halfway houses, child support subsidies, and stable employment, it is difficult, if not impossible, for the law to resolve the domestic problems of women and children whose survival depends on the breadwinning capacity of abusive spouses. Absent state willingness or capacity to intervene quickly and effectively, and to provide long term integrated support and social safety nets to families at risk of domestic abuse, the Family Violence Law is akin to treating a serious, life threatening wound with first aid measures.

Despite these seemingly insurmountable problems, women's use of the prosecutorial process demonstrates a considerable degree of agency and an incipient rights consciousness.

234. Interview with Silvia A., *supra* note 151.

235. Interview with Maria U., *supra* note 161.

Although most of the complaints are dropped and women return to abusive spouses (repeating the classic pattern of reconciliation and abuse), when we consider the problems of judicial incapacity and the systemic reluctance to treat intra-family violence seriously, it is not surprising that the laws are most relevant in the pre-trial, complaint stage. Given their constraints, women are availing themselves in the fullest capacity that they can in equating the complaint process with prosecution. The complaint calls attention to the abusive spouse that women will fight back, and it allows women a brief respite from bearing the burden of family violence in silence. When women go to the Emergency Centers or the DEMUNAS, they find solace in psychological counseling and relief from their solitary burden. They learn about the cycle of violence and reconciliation itself, and its oscillation between the poles of abuse and companionship, duty and neglect.²³⁶ The complaint represents an empowering resource for poor women to demarcate the boundaries of acceptable behavior even though they do not pursue cases beyond the initial stage.

The cases of Silvia, Maria, and Sara are best viewed as a continuum between the calls for court intervention to restore honor at one end and to promote women's human's rights on the other. Sara, whose case most closely conforms to the honor paradigm, was clearly not resolved by invoking the family violence laws. Her case shows the persistence of colonial and republican legal norms that privilege family integrity over women's human rights even though the family is the site of sexual violence. Maria is a transitional case, who approaches a rights-based discourse with considerable trepidation but at the same time rejects the erstwhile code of sacrificial womanhood and vulnerability. Although Maria is hesitant, she did not come to the legal aid clinic to protest her honor or even call attention to her husband's abuse. Maria came to see "what the law could do." Silvia vociferously embraces a rights based discourse, but she also forces us to confront the shortfalls of a law that only extends protection to women who are the paragons of virtue that the courts and society expect.

236. Indeed, much of the work performed by social workers at the DEMUNAS helps women understand the larger psychological dimensions of domestic violence patterns. Interviews with social workers Jessica Camacho, Zoila Hernandez, and *supra* notes 46, 51, and 230.

The three cases described herein underscore the subjective and objective ways that human rights discourse is internalized and understood by courts, police, and women bringing family violence claims. The distance between these seemingly separate spheres of law and social change is attenuated by advocates in the trenches fighting for effective family violence laws and by the women seeking relief from the violence in their lives. The way women use complaints may seem like low-level wrangling at the bottom of the judicial scale, but this relegation unwittingly obfuscates women's agency and their valiant attempts to improve their lives. There is a long way to go before realizing the goals of international conventions, but through continued agitational politics and the steadfast efforts of women like Silvia, Maria and Sara, we can only hope that laws will one day play a vital role in securing peace and justice for women surviving family violence.

