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SUPREME COURT ADVOCACY AND DOMESTIC VIOLENCE:

LESSONS FROM VERMONT V. BRILLON
AND OTHER CASES BEFORE THE COURT

CHERYL HANNA*

INTRODUCTION

This Symposium, entitled Thinking Outside the Box: New Challenges and New Approaches to Domestic Violence, asks those of us participating to focus on new approaches to domestic violence law. One of the most important strategies is to broaden and expand advocacy before the United States Supreme Court. In recent years, the Court has heard numerous cases that implicate the interests of domestic violence victims either directly or indirectly. These cases involve a range of issues, including reproductive rights, federalism, search and seizure, double jeopardy, procedural due process, the defense of duress, rights

* Professor of Law, Vermont Law School. The author thanks St. John's University School of Law, especially Professor Elaine Chu, for hosting this symposium. Thanks also to Emily Sack and Gil Kujovich for comments on earlier drafts, to my research assistants Amanda George and Clare Cragan for their assistance, and to Ginny Burnham for her editorial assistance. The author can be reached at channa@vermontlaw.edu.


2 United States v. Morrison, 529 U.S. 598, 602 (2000) (deciding whether a federal civil remedy can be applied to gender motivated crimes).

3 Georgia v. Randolph, 547 U.S. 103, 106 (2006) (holding that a warrantless search is unconstitutional as to a defendant who is physically present, even if his wife consents to the search).


5 Town of Castle Rock v. Gonzales, 545 U.S. 748, 750-51 (2005) (discussing whether a
to gun ownership, speedy trial rights, international law, criminal contempt proceedings, and the Confrontation Clause. The sheer number of cases on the Court’s docket evinces that domestic violence law has now reached a new level of maturity and sophistication.

Most of the recent cases before the United States Supreme Court reflect both the progress toward, and the push back against, numerous statutory and policy reforms aimed at providing domestic violence victims greater remedies, resources, and protection. For example, in the 2008-2009 term, the Court decided United States v. Hayes, which involved a federal law known as the Lautenberg Amendment after its sponsor, Senator Frank Lautenberg. Under the law, those convicted of a domestic violence crime or subject to a restraining order are prohibited from owning or using a gun. The Court held that whenever the battered victim was in fact the wife or another relative of the offender the underlying offense did not need to
include the element of a domestic relationship as long as the state could prove a domestic relationship existed beyond a reasonable doubt. This ruling ensures a broad application of the Lautenberg Amendment, thus providing greater protections for victims. This case stands in contrast to United States v. Morrison, in which the Court struck down the civil rights remedy under the Violence Against Women Act. Both cases grew from tremendous legislative successes achieved by advocates for victims of domestic violence that convinced Congress to enact federal solutions to intimate violence.

Others cases reflect the great strides that the criminal justice system has made in arresting and prosecuting abusers. Take for examples cases like Davis v. Washington & Hammon v. Indiana, and Giles v. California. These cases, which involved the scope of the Confrontation Clause when a witness is unavailable to testify, made their way to the Court after a decade of policies that encouraged the prosecution of domestic violence cases based on the evidence rather than on the testimony of the victim. Similarly, Georgia v. Randolph, which involved the question of whether a co-occupant can consent to a search of the premises over the objection of the other co-occupant, signals the significantly improved police response to domestic violence. Dixon v. United States, a case assigning the burden of proof when a criminal defendant raises a duress defense, reveals the growing awareness that women who find themselves in the criminal justice system are often victims of domestic violence. Similarly, Town of Castle Rock v. Gonzales reflects the commitment of lawyers to seek redress for victims when the state fails in its duty to provide adequate protection from private violence even when the victim has sought a court order of protection. Gonzales is now pending in the Inter-American Court of Human Rights, marking a paradigm shift that finds that state failure to provide victims with adequate protection is a violation

of international human rights.

Overall, the Court’s record on domestic violence has been mixed. Cases like *Morrison* and *Gonzales* have been disappointing. Others, like *Planned Parenthood v. Casey*, and more recently, *United States v. Hayes*, have been positive. Yet, even in those cases that were not decided favorably, the Court continues to demonstrate a growing sophistication about and concern for the problems posed by intimate violence. It is true that in many cases, like *Georgia v. Randolph*, some members of the Court appear to use domestic violence concerns instrumentally to support a broader doctrinal agenda. Yet, rather than assign Machiavellian motives to domestic violence references, I prefer to see any mention of domestic violence and any expressed concern for victims as a positive development in the Court’s jurisprudence. The mere fact that the dynamics of domestic violence are part of the Court’s dialogue is a tremendous step in the right direction.

In many cases before the Court, the domestic violence advocacy community (DVAC) has done an outstanding job of coordinating strategies, particularly in the filing of amicus briefs. I use the term “domestic violence advocacy community” to refer to those organizations and individuals who have demonstrated a long-standing commitment to combating intimate partner violence. While it’s true that no one group or individual can claim to “speak” on behalf of all victims, there are now a number of national and state non-profit organizations, private law firms, legal scholars and practitioners that have been coordinating efforts and pursuing similar legal and policy agendas. Many scholars and advocates have been doing remarkable appellate work. Most notably, Joan Meirs, founder of the Domestic Violence Legal Empowerment and Appeals Project (DVLEAP)

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20 See infra p. 34.

21 I include in this group the National Network to End Domestic Violence, the Battered Women’s Justice Project, the National Coalition Against Domestic Violence, the Domestic Violence Legal Empowerment and Advocacy Project, the National Clearinghouse for the Defense of Battered Women, the Center for Survivor Agency and Justice, the state-based coalitions, as well as the many other organizations, law firms, and individuals who have devoted their careers to these issues. I use the term DVAC inclusively to capture the vast network of advocates and do not mean to exclude anyone group or individual that considered themselves part of this broader advocacy community.

at George Washington University Law School, was instrumental in coordinating the domestic violence community's input via amicus briefs in the critical cases of Gonzales, Davis, Giles, Hayes, Abbott, and Robertson. The National Network to End Domestic Violence (NNEDV) and the National Coalition Against Domestic Violence (NCADV) have also been doing great work in filing amicus briefs, especially in cases where the interests of victims may be less obvious. For example, in both District of Columbia v. Heller, which involved the interpretation of the Second Amendment, and Ayotte v. Planned Parenthood of N. New England, which involved the reproductive rights of minors, these organizations filed amicus briefs that highlighted the practical implications for victims of the Court's decisions. Many of these efforts have been aided by the generous pro bono work of private attorneys. In particular,


28 As of the publication of this article, the DVLEAP amicus brief in support of the respondent has not yet been filed.


Mintz Levin has been invaluable in offering assistance and support in the filing of amicus briefs before the Court, as well as doing outstanding appellate work generally. The firm has prioritized its pro bono efforts toward eradicating domestic violence and has established the Domestic Violence Project to assist the DVAC. The sheer number of people and organizations already involved in Supreme Court advocacy is breathtaking and a testament to the maturity of the field and growing sophistication of the DVAC.

While the DVAC has been doing outstanding work, opportunities remain to expand the scope of its impact on the Court's jurisprudence. In hindsight, there have been some cases in which the DVAC should have filed an amicus brief, but missed the opportunity to do so. Georgia v. Randolph is perhaps the most striking example of how the lack of involvement by the DVAC allowed the interests of victims to be defined by the state, and in conflicting ways by the Court, instead of by victims themselves. As I outline in greater detail later in this article, in Randolph, five Justices discussed domestic violence in conflicting and contradictory ways. Thus, it appears that some Justices may have disingenuously exploited the concerns of victims in order to advance their own position. Similarly, Crawford v. Washington and its requirement that testimonial evidence be subject to cross-examination under the Confrontation Clause, has frustrated the prosecution of domestic violence offenders. Yet, no one in the DVAC submitted an amicus brief in the case. An amicus brief would not likely have changed the outcome in Crawford, but it could have mitigated some of the damage. This observation is not intended as a criticism of any particular group or individual. Rather, it is intended to highlight the continued opportunities and challenges the DVAC faces as it provides even more sophisticated legal advocacy before the Court.

35 See infra p. 25.
36 541 U.S. 36 (2004) (holding that testimonial evidence must be subject to cross-examination under the Sixth Amendment's Confrontation Clause).
I. WHY FILE AMICUS BRIEFS IN DOMESTIC VIOLENCE CASES?

Participating in Supreme Court advocacy through amicus briefs is important for a number of reasons. First, amicus briefs can significantly impact the Court’s decision. The Supreme Court’s rules regarding amicus briefs are quite liberal. Supreme Court Rule 37 states that an amicus brief “that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.” Procedurally, those seeking to file a brief only need obtain either the written consent of all parties or permission from the Court. As a result of these liberal rules, amicus briefs are commonly filed and considered by the clerks and the Justices. For example, Justice Samuel Alito, while still on the Third Circuit, stated:

Even when a party is very well represented, an amicus may provide important assistance to the court. “Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group.” Accordingly, denying motions for leave to file an amicus brief whenever the party supported is adequately represented would in some instances deprive the court of valuable assistance.

A well-crafted amicus brief that brings to the Court new arguments or interpretations, particularly the practical effects of a decision, can help to influence the outcome of a case. One can point to a number of cases outside the domestic violence context, including *Grutter v. Bollinger* and *Roper v. Simmons,* in

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38 Brief for an Amicus Curiae, SUP.CT. R. 37.1 (2005).
39 SUP.CT. R. 37.2.
41 Neonatology Assocs. v. Comm'r of Internal Revenue, 293 F.3d 128, 132 (3rd Cir. 2002) (citing Luther T. Munford, When Does the Curiae Need An Amicus?, 1 J. APP. PRAC. & PROCESS 279 (1999)).
42 539 U.S. 244, 299 (2003) (referring to the amicus brief in the majority opinion).
43 543 U.S. 551, 617-18 (2005) (citing results from a study referenced in a submitted amicus brief in the majority opinion).
which the participation of amici significantly impacted the Court's opinion.

Second, some studies suggest that the Court is influenced by the sheer numbers of amici that weigh in on a particular issue. To the extent that the Court functions as a quasi-democratic institution, signaling heightened concern about a particular case may, at the very least, urge the Court to consider more serious arguments advanced by amici.

Third, such briefs provide the Court with empirical facts and theories about intimate violence that would otherwise not be presented in briefs by the parties. The most effective amicus briefs do not duplicate the brief on the merits, but rather provide the Court with extra-record evidence and the broader policy considerations. Take, for example, the Court's opinion in *Giles v. California.* At issue in *Giles* was whether a defendant forfeits his Sixth Amendment Right to Confrontation by engaging in wrongdoing that results in the absence of the witness. Most

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44 Paul M. Collins, Jr., *Friends of the Court: Examining The Influence Of Amicus Curiae Participation In Supreme Court Litigation,* 38 LAW & SOC'Y REV. 807, 808 (2004) (stating that submitting amicus briefs has an impact on whether or not the Supreme Court grants certiorari).

45 *Id.* at 812 (arguing that the number of parties participating on a brief signals to the court a broader support for a particular position).


domestic homicides take place within a relationship in which there is already domestic violence. These defendants often intend to silence their victims, particularly after the victim has sought out and made statements to law enforcement. Yet, a specific intent requirement ignores the broader context in which domestic homicides occur and creates a high burden for the prosecution to meet. Thus, critical evidence is lost when requiring specific intent. The Amicus Curiae Brief of the Battered Women’s Justice Project and Other Domestic Violence Organizations in Support of Respondent beautifully laid out for the Court how such a rule would frustrate domestic homicide prosecutions.49

Although the Court ruled that specific intent was required under the forfeiture by wrongdoing doctrine, it nevertheless gave the issue of domestic violence particular attention. For example, Justice Scalia noted at the end of the opinion:

Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution-rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.50

Additionally, language by Justice Souter in his concurring opinion suggests that intent could be “inferred on the part of the domestic abuser in the classic abusive relationship.”51 As Professor Tom Lininger has argued, this language could be helpful in crafting both legislation and legal arguments

50 Giles, 128 S.Ct. at 2693.
51 Id. at 2693.
regarding the admissibility of prior statements about abuse when the Confrontation Clause is implicated. Such language, which reflects a sophisticated understanding of domestic violence, is likely directly attributable to the amicus briefs submitted by those in the DVAC. Indeed, Justice Scalia notes the participation of amici in the opinion, and much of his discussion of domestic violence seems intended to directly address the concerns that the DVAC raised in their briefs. Besides laying the groundwork for some statutory reform, such language is also of tremendous assistance in subsequent cases, helping to build a coherent narrative about the experience of intimate violence for victims, families, and the community.

Providing the Court with data and analytic frameworks is particularly important in domestic violence cases. While domestic violence may seem like a field that any layperson could understand, the actual dynamics of such relationships are often counter-intuitive. Similar to the need for expert testimony in domestic abuse self-defense cases, amicus briefs can help explain patterns of behavior that might otherwise appear inexplicable. For example, it is easy to assume that a victim would decline to provide testimony because she either wasn’t abused or because she wants the relationship to continue. An amicus brief can help explain the dynamic of “separation assault” and why seeking help from an outsider can be a dangerous strategy for a victim to pursue.

Similarly, members of the Court may sometimes miss the gendered implications of a case. Take, for example, Safford Unified Sch. Dist. No.1 v. Redding. The case involved the strip search of a thirteen-year-old girl by school administrators who thought that she might have over-the-counter drugs in her possession. During oral argument, many of the Justices seemed sympathetic towards school administrators, not the student. Justice Ginsburg appeared frustrated with their questioning and later told the press that her colleagues simply did not understand

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53 Giles, 128 S.Ct at 2687.

54 129 S.Ct. 2633 (2009).
what it is like for a thirteen-year-old girl to be searched. Amici in the case emphasized the trauma of such a search on girls, thereby providing empirical support for Justice Ginsburg's gendered insight.

Fourth, there are many benefits to filing amicus briefs beyond influencing the outcome of any particular case. For example, state and federal legislators may be more willing to pass legislation favorable to domestic violence victims in response to troublesome Supreme Court rulings if they can see the arguments laid out in amicus briefs. The Justices, as well as their clerks, become educated about domestic violence, making it a more permanent part of their intellectual consciousness. Amicus briefs are a valuable resource for scholars, lawyers, and students. Submitting and then publicizing amicus briefs can help unite and motivate others who work in the field as well as victims themselves. The significance of domestic violence on the Supreme Court's docket also helps encourage the best and brightest new attorneys to pursue the field.

Fifth, as advocates working on behalf of people who have been abused by their intimate partners, we have an obligation to present their concerns to the Court even in cases where doing so may not have much practical effect. What we do when we file briefs is bear witness to the truths in people's lives, particularly the lives of women and their children. Filing amicus briefs is not just an act of advocacy, but an act of empowerment.

In this Essay, in order to encourage a robust and coordinated Supreme Court strategy, I begin with an overview of Vermont v. Brillon, a recent Supreme Court case involving the speedy trial rights of criminal defendants. I was counsel of record in an amicus brief filed on behalf of the Vermont Network of Domestic Violence.

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57 See Lynch, supra note 40, at 42.

58 See generally Garcia, supra note 46.

and Sexual Violence and 17 other similar organizations. Drawing upon this experience, I suggest some lessons that can be learned from Brillon, as well as other cases before the Supreme Court. Finally, I conclude with some optimistic thoughts about the future of domestic violence issues before the Court.

II. VERMONT V. BRILLON

In March 2008, the Vermont Supreme Court issued a ruling in Vermont v. Brillon that captured the interest of both the press and the public. The defendant, Michael Brillon, was a habitual domestic and sexual offender, with fourteen prior convictions, including one for the sexual assault of a fourteen-year-old child. In July 2001, he was arrested for assaulting his partner Michelle Tatro with a baseball bat. The incident took place in front of her young child. Because of his prior convictions, Brillon faced life in prison if convicted. The state appointed Brillon a public defender. In the months that followed, Brillon attempted to fire three of his six attorneys, causing each of them to withdraw. He even threatened the life of one of his attorneys. A close examination of the record revealed that he had fired attorneys in other cases as well.

In addition to delays caused by Brillon’s own behavior, his public defenders requested continuances that prolonged the pre-trial process. At least one of those continuances was requested in order to find additional witnesses to impeach the victim’s character. Another continuance appeared to be intended to delay the trial until the assigned judge, whom Brillon feared would be biased, rotated out of the county. As a result of these delays, it took three years for the case to reach trial. At trial, Brillon was convicted and received a twelve-to-twenty year

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61 Id. at 1113 (noting the details of the confrontation).
62 Id. at 1111.
63 See Brillon, 129 S. Ct. at 1291.
64 Id. at 1288.
65 Brillon, 955 A.2d at 1128–29.
66 Brillon, 129 S. Ct. at 1287–89.
67 See id., 129 S. Ct. at 1288 n.4.
68 Id. at 1288 n.2.
69 Brillon, 955 A.2d at 1111.
Brillon appealed, claiming that the delays amounted to a violation of his Sixth Amendment right to a speedy trial. He argued that because his attorneys either were not doing their job — hence his reason for firing them — or were requesting continuances because they were unprepared, the state was therefore responsible for the delays. The Vermont Supreme Court agreed. In applying the leading case on the issue, *Barker v. Wingo*, the Court found that most of the delays were attributable to assigned counsels' unwillingness or inability to move the case forward. The Court further noted that it was concerned about the under-funding of the public defender system and urged the legislature to address the problem.

This was the first time that a court had held that delays caused by a defendant and his court-appointed attorneys could be counted against the state in a speedy trial analysis under *Barker*. Of particular concern was that the rule set down by the Vermont Supreme Court had the effect of treating delays requested by public defenders differently than delays requested by private counsel. Because the remedy for a speedy trial violation is dismissal of the case, Brillon was released from prison.

After the decision, the Vermont Network Against Domestic and Sexual Violence, a statewide advocacy organization, became concerned that domestic and sexual offenders, who often tried to manipulate the trial process by attempting to fire lawyers and requesting continuances, might now have added incentive to do so in light of the Brillon decision. Those fears proved valid. In the summer of 2008, two of Vermont's most widely known murder suspects went on trial. The first, Brian Rooney, was accused of raping and murdering University of Vermont student Michelle Gardner-Quinn. The case drew national attention. Three weeks after her disappearance, her body was found in a remote gorge;
she had been brutally raped and murdered. The second defendant, Christopher Williams, had killed two people and shot two others in a killing spree intended for his ex-girlfriend, Andrea Lambesis. One of the victims was her mother, Linda Lambesis. Williams killed Linda in her home as she was folding his laundry. He also killed Alicia Shankes, Andrea's mentor and fellow teacher, at the elementary school where the two were preparing for the start of the school year.

Just after the Brillon decision, both Rooney and Williams attempted to fire their attorneys for no clear reason just as their trials were set to begin. Many speculated that the Brillon decision had been the impetus for the attempted firings. The judges did not allow the attorneys to withdraw and both trials proceeded as scheduled. But one unintended consequence of the decision was that judges in Vermont began to look skeptically at requests for continuances by assigned counsel, often refusing to grant them for fear of dismissal under Brillon. In just a few short months, Brillon was already creating problems in the criminal justice system for victims and defendants.

The United States Supreme Court granted certiorari on the case its first day back in the October 2008-2009 term. Given that the petition for certiorari had only been filed in July 2008, the quickness with which the Court agreed to hear the case proved a surprising but positive sign.

Admittedly, the first time that I became aware of the case was when the Vermont Supreme Court issued its ruling. As a legal analyst for local media (the joke in my family is that I am not really a lawyer, but just play one on TV), I commented publicly that I thought the case adversely impacted victims, and that the Vermont Supreme Court had misapplied the law. I note this because my involvement was completely happenstance. I likely would never have focused on this case or appreciated the impact the ruling would have for victims but for the intense public interest.


79 See Porter, supra note 78.
interest the case generated in the media.

Because of my public comments, Christina Rainville of the Bennington County State’s Attorney’s Office asked if I could help with an amicus brief. At the time, I was teaching a seminar on domestic violence and the law, and decided that this would be a wonderful opportunity to have my class participate in writing the brief. Rather than file a brief on my own behalf, as law professors often do, we asked the Vermont Network to be our lead client because it had already expressed concern about the impact of the decision on victims. This was the right decision pedagogically as well as strategically. Representing the Vermont Network gave the students the opportunity to work with actual clients who could provide insight into issues in the case. We also invited to our class domestic violence victims, many who had been through lengthy trials, to share their experiences so the students and I would have a deeper appreciation for the real-world consequences of our work.

We drafted a summary of the case and the argument and sent it via e-mail to organizations nationwide that serve victims, hoping to expand our list of amici and to gather as much input as possible. Eventually, seventeen other organizations signed on, including the DVLEAP, the BWPJ, and the NCEDV. In order to get a full range of views and ideas, we scheduled a series of conference calls in which every amici was invited to participate. This open process of brainstorming with both lawyers and service-providers proved invaluable.

It was through those early conference calls that we realized the fine line we had to walk in the brief. All of our amici had witnessed the kind of controlling behavior exhibited by Brillon and the kind of gaming of the system that defense counsel often engaged in to discourage victim participation. When cases are delayed endlessly, victims often give up on the process and cease to participate.80 Thus, defendants and their counsel already had adequate incentive to delay trials through strategic manipulation

80 See generally Robert C. Davis et al., Prosecuting Domestic Violence Cases with Reluctant Victims: Assessing Two Novel Approaches in Milwaukee, in LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS 71, 71–72 (1997), available at www.ncjrs.gov/pdffiles/171666.pdf. In a study of specialized domestic violence courts in Milwaukee, Wisconsin, researchers found that if cases were efficiently processed, then conviction rates increased and that reducing the time it took for a case to go to trial resulted in fewer defendants threatening or harming victims. Id.
of the system. If such delays could be counted against the state, resulting in dismissal, defendants and their counsel had every incentive to continue delaying cases in the hope that either the victim would decide not to proceed or that the case would be dismissed for lack of a speedy trial.

Thus, the main goal of the brief was to help the Court understand Brillon’s behavior within the broader context of domestic violence. It was crucial that the Court understand the impact such delays have on victims and their families, including the psychological, financial, and practical implications. It was further important to show the Court how strategic delays by defendants and their counsel frustrate the ability of the state to prosecute domestic and sexual offenders. If the Court upheld the Vermont Supreme Court’s decision, the safety of victims and the public would be at risk.

Yet, unlike the state, the interests of victims were more complex than the simple argument that delays caused by state appointed public defenders should never be counted against the state for the purposes of a speedy trial analysis under Barker v. Wingo.81 Victims of domestic and sexual assault often find themselves as defendants in the criminal justice system.82 We recognized that it is in the best interests of victims, be they victim-witnesses or defendants, to have a well-functioning public defender system in which there is adequate counsel and timely resolution. Our amici (as well as many of my defense-oriented

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81 407 U.S. 514, 530 (1972) (noting that a speedy trial analysis consists of balancing four factors: length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant).
law students) did not want us to adopt the state's theory that delays caused by assigned counsel could never be attributable to the state except in the most extreme circumstances, recognizing that such a rule could unintentionally hurt victims when they are defendants in cases.

After much discussion, we all agreed that rather than adopt the state's bright-line rule, we would argue that there was a distinction between delays caused by defendants and their counsel, and delays attributable to the state public defender system. Had Brillon not been assigned counsel for many months, we would have agreed with the Vermont Supreme Court that such a delay should be attributable to the state under the Sixth Amendment, just as there is a Sixth Amendment right to counsel as defined by *Gideon v. Wainwright.* So too could delays be counted against the state had the delays requested by Brillon's public defenders been attributable to over-crowded dockets, inexperience, or other systemic breakdowns.

The only way for courts to determine whether delays were caused by defendants and their counsel as part of the strategic back-and-forth of litigation or by an over-burdened state public defender system was to engage in the appropriate fact-finding. In doing that fact-finding, we urged the Court to alert the trial and appellate courts to the particular risks of defense delay tactics in domestic and sexual violence cases and the consequences of those delays on victims, the public, and the criminal justice system. Neither the trial court nor the Vermont Supreme Court had engaged in fact-finding relative to the question of a systemic breakdown, and there was nothing in the record that suggested the delays were attributable to the public defender system. While we shared the concerns of the majority about adequate resources for the public defender system, we argued that their ruling was not supported by the facts.

Though the brief for the State of Vermont did discuss the impact the Court's ruling would have on the criminal trial process, it did so without specific concern for domestic and sexual violence victims. The amicus briefs filed in support of the

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83 372 U.S. 335, 343 (1963) (concluding that there is a fundamental right of counsel in criminal proceedings in federal and state courts (citing *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243-44 (1936)).
petitioner by the United States, the National Governor's Association, and the State of Utah and 38 other states did not directly address the impact the Brillon decision would have on victims, nor did any of those briefs acknowledge the importance of a well-funded public defender system. Thus, our brief brought to the Court two relevant matters not at issue in any other brief: the broader context of domestic violence and an alternative theory as to how delays ought to be assigned between the defense and the state under a Barker v. Wingo analysis.

Two interesting observations can be made about the impact of our brief. First, the Respondent's Brief on the Merits referenced our brief in text four times, taking issue with our contention that Brillon had incentive to delay the case for his own strategic advantage and therefore was the actual cause of the delays. The counsel for Brillon refocused the Court's attention on arguments not as fully laid forth in the Petitioner's Brief on the Merits, and, by doing so, may have given our brief some increased weight. These references to our brief may have emphasized the argument that the Court should have examined Brillon's behavior within a broader context of his need to continue to exert power and control over both his victim and the criminal justice system. They also may have highlighted how pervasive such tactics are among domestic and sexual violence offenders.

Second, to the extent that Brillon took direct issue with our factual narrative, his amici, the American Civil Liberties Union, the ACLU of Vermont and the National Association of Criminal Defense Attorneys, in their brief, noted the clear distinction between our position and that of the other amici in support of Vermont. "Vermont's only non-government-affiliated amici (and presumably the few amici without a financial stake in funding indigent defense) 'agree that continuances and delays caused solely by an indigent defendant's public defender can rise to a

speedy trial violation if attributable to the inability or unwillingness of the state public defender system to appoint adequate counsel in a timely manner.” Thus, while Brillon disagreed with our broader narrative, his amici acknowledged the similarity of our policy position to its own position. Given the references to our brief by Brillon and his amici, I am reassured that we communicated a reasonable approach that recognized the complex interests of victims.

The Court rendered its decision in March 2009. (For a case involving the lack of a speedy trial, this case was certainly a speedy appeal – it took less than seven months from the filing of the petition for certiorari to the final decision.) None of the amicus briefs filed were cited in the relatively short and concise opinion. While one can never know for certain what impact, if any, a particular amicus brief has on a decision, we were delighted that, in a 7-2 opinion authored by Justice Ginsburg, the Court held that delays caused by public defenders could not be counted against the state in a defendant’s claim that his Sixth Amendment right to a speedy trial had been violated. The Court also held that under the analysis in Barker v. Wingo, courts must take into account the defendant’s disruptive and aggressive behavior in the overall balance. The Court found particularly troubling that the defendant had fired three lawyers and had threatened one of them. The Court said that this rule acknowledges that defendants may have incentive to employ delay as a “defense tactic,” and that, by delay, witnesses may

90 Id. at 1291-92.
92 See Brillon, 129 S. Ct. at 1292.
93 See id.

“His strident, aggressive behavior with regard to Altieri, whom he threatened, further impeded prompt trial and likely made it more difficult for the Defender General’s office to find replacement counsel . . . . Just as a State’s ‘deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the [State].’ . . . so too should a defendant’s deliberate attempt to disrupt proceedings be weighted heavily against the defendant. Absent Brillon’s deliberate efforts to force the withdrawal of Ammons and Altieri, no speedy-trial issue would have arisen. The effect of these earlier events should have been factored into the court’s analysis of subsequent delay.” Id. (internal citation omitted).
become unavailable.\textsuperscript{94} It insisted that delays caused by private counsel and state-paid counsel must be treated the same under the Sixth Amendment.\textsuperscript{95} Finally, the Court left open the possibility that delays caused by a systemic breakdown of the public defender system could be charged against the state if supported by the record.\textsuperscript{96} \textit{Brillon} is the first case in which the Court made clear that systemic delays can be counted against the state in a speedy trial analysis.

Thus, \textit{Vermont v. Brillon} removed incentive for a defendant and his counsel to manipulate the court system in the hope that the case will ultimately be dismissed for lack of a speedy trial. At the same time, it ensured that state legislatures have adequate incentive to provide counsel to indigent defendants. While we were disappointed that the Court did not include any specific language about the particular risks of strategic trial manipulations in domestic and sexual assault cases, it did emphasize that the Vermont Supreme Court had failed to give adequate weight to the defendant's behavior. The holding is one that well-serves the interests of victims be they witnesses or defendants in the criminal process. In hindsight, it was well worth the time and expense involved in filing an amicus brief. It was a humbling and empowering experience for both me and my students, and has gave me a much greater appreciation for the importance, and the overwhelming demands, of Supreme Court advocacy.

\textsuperscript{94} \textit{Id.} at 1290. "[D]efendants may have incentives to employ delay as a 'defense tactic': delay may 'work to the accused's advantage because 'witnesses may become unavailable or their memories may fade' over time." (quoting Barker, 407 U.S. at 521).

\textsuperscript{95} See \textit{id.} at 1290-91.

("Because 'the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation,' delay caused by the defendant's counsel is also charged against the defendant . . . . The same principle applies whether counsel is privately retained or publicly assigned, for 'on]ce a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program."

\textit{Id.} (internal citations omitted).

\textsuperscript{96} \textit{Id.} at 1292. "The general rule attributing to the defendant delay caused by assigned counsel is not absolute. Delay resulting from a systemic 'breakdown in the public defender system' could be charged to the State." (internal citation omitted).
III. LESSONS LEARNED FROM BRILLON AND OTHER CASES

A. Develop a deliberate strategy to identify a wide-range of cases that impact victims of domestic violence.

As noted earlier, there has been much excellent appellate work on many cases affecting the interests of victims. Yet, there have been cases in which the DVAC has not weighed in even though the interests of victims were implicated. This has been particularly true in criminal procedure cases that originate in the states in which the interests of victims are often different from that of the parties, or simply are not recognized by the parties. For example, in Brillon, both the State’s Attorney and Brillon’s counsel commented to me that the case “wasn’t about victims.” As a result, none of the pleadings or briefs articulated in detail any concerns that the decision could frustrate the ability to prosecute domestic violence cases. It would have been easy to miss this case as one implicating victims unless one did a more thorough examination of the record. Indeed, it was only in a rather sarcastic dissent by Justice Burgess in the Vermont Supreme Court decision that noted Brillon’s past domestic violence record and his current manipulation of the system. Although we were fortunate to have identified the case, as noted above, it was purely by happenstance. I suspect that one of the reasons that the DVAC didn’t file briefs in either Georgia v. Randolph or Crawford v. Washington was that the impact those cases would have on victims also wasn’t readily apparent from either the records or the filings. An experienced attorney would have had to carefully review those cases in order to identify the potential impact on victims.

97 See State v. Brillon, 955 A.2d 1108, 1126 (2008) (Burgess, J., dissenting). “Today the majority frees a convicted woman beater and habitual offender, not because of any infirmity in the evidence or unfair prejudice in the trial by which the jury found him guilty, but because the defendant delayed the proceedings for almost twenty-two months.” Id.

98 Ineffective assistance of counsel is one area of law in which there is potential to develop a long-term strategy of Supreme Court advocacy. Victims of domestic violence, particularly those convicted of killing an abusive spouse, often file ineffective assistance of counsel claims. The Court hears many of these cases, yet the DVAC has not been proactive in reviewing these cases for the potential impact in victims. For a discussion of domestic violence and ineffective assistance of counsel claims, see Sarah M. Buel, Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct, 26 Harv. Women’s L.J. 217 (2003).
Beyond cases involving criminal law issues, there may be other cases in which the DVAC might decide to file amicus briefs. Take, for example, *United States v. Stevens*, a case on the Court's 2009-2010 docket. *Stevens* involves a federal statute that bans depictions of animal cruelty. The question before the Court is whether banning such depictions in order to prevent animal cruelty is a compelling government interest under the Free Speech Clause of the First Amendment. No one in the DVAC filed an amicus brief in the case suggesting how animal cruelty may affect broader concerns about intimate violence.

However, the interests of domestic violence victims are clearly implicated in the case. For example, the Brief for a Group of American Law Professors as Amicus Curiae in Support of Neither Party argues that the link between animal cruelty and domestic violence is well-established. It further discusses how batterers often use animal abuse as a way in which to control their partners, and details the growth of laws that provide protection orders for pets. The few paragraphs that discuss domestic violence are thoroughly researched and well-crafted. These arguments support the conclusion that the Court ought to find the prevention of animal cruelty a compelling government interest because of its potential impact on humans. In addition, briefs filed by other amici, including Florida and other states, and the Humane Society of the United States, as well as the government's brief of the merits, briefly mention the relationship between domestic violence and animal cruelty.

While the interests of domestic violence victims may not be central, the case did present a unique opportunity to educate the

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101 Brief for A Group of American Law Professors as Amicus Curiae in Support of Neither Party at 21, United States v. Stevens, 533 F.3d 218 (3rd Cir. 2008) (No. 08-769), 2009 WL 1681459.

102 See id. at 22-23.


104 Brief of Amicus Curiae the Humane Society of the U.S. Supporting Petitioner, United States v. Stevens, 533 F.3d 218 (3rd Cir. 2008) (No. 08-769), 2009 WL 1681460.

Court on the relationship between animal cruelty and domestic violence. It would have been preferable to have lawyers from the DVAC submit even a short brief on the topic rather than rely on other parties to do so. Furthermore, the DVAC need not have filed on behalf of the government if it had concerns about the suppression of free speech at issue under the statute. Rather, the DVAC could have filed a brief in support of neither party, just as the Group of American Law Professors did, thus using the case as an opportunity to educate the Court about a specific aspect of the case without wading into the murky questions posed by the First Amendment.

In order to identify a wider range of cases, the DVAC should consider a coordinated Supreme Court project, in which every petition for certiorari is reviewed and evaluated for its potential impact on the interests of domestic violence victims. It might also be helpful to provide training and guidance to both state and national coalitions on how to review lower court opinions for their potential impact and provide a forum to discuss potential involvement at earlier stages in the process. To that end, it would be helpful to establish a network of attorneys and scholars who have expertise and experience in Supreme Court litigation and constitutional law. Such a network could easily communicate electronically. While this approach would require resources and funding, it is an effort that could have important long-term consequences for victims.

Analyses of the effectiveness of amicus briefs suggest that the Court often pays particular attention to briefs filed by experienced lawyers and organizations that frequently file amicus briefs, such as the ACLU.106 There is nothing preventing the DVAC from becoming a trusted advocate before the Court as well, particularly as DVLEAP takes on more and more of these cases. Indeed, given the outstanding work done in many recent cases, it is worth considering expanding the DVAC's participation in both the number and the types of cases in order to enhance its reputation before the Court.

106 Lynch, supra note 40, at 49–52. See generally Kearney & Merrill, supra note 47 (discussing success patterns of amicus curiae briefs filled by the ACLU).
B. Ensure that only the DVAC advances the interests of victims.

*Georgia v. Randolph*\(^{107}\) serves as a wake-up call to the importance of the DVAC being involved in a range of cases and defining its own interests rather than allowing its interests to be defined by other parties or particular Justices. The question before the Court in *Randolph* was whether one co-occupant could consent to a search of the home if another present co-occupant objected. The case involved a couple who had been experiencing marital problems, although, as noted earlier, there was nothing in the record to indicate whether or not the husband had abused his wife. The police came to the home after the wife notified them that her husband had taken their son. When the police arrived, the wife told them that her husband used drugs and invited them to search the house. The husband objected to the search. Relying on the wife's consent over the husband's objection, the police searched and found a straw with cocaine traces on it and arrested the husband. The Court held in a 5-3 decision (Justice Alito did not participate) that the police cannot search if one co-occupant objects under the theory that one co-occupant cannot waive the constitutional rights of other.

In the decision, four of the six opinions directly discussed the impact the holding would have on the ability of the police to respond to domestic violence. Justice Souter, writing for the majority, recognized that domestic violence was a serious problem in the United States, but argued that the Court's decision would not impact the ability of the police to protect domestic violence victims. Justice Breyer, in a concurring opinion, reiterated Souter's insistence that the holding would not frustrate law enforcement's ability to respond to domestic abuse because the risk of exigent circumstances provides an exception to the consent requirement.\(^{108}\)

In contrast, both Chief Justice Roberts and Justice Scalia claimed that the holding would harm victims. Chief Justice Roberts was particularly concerned that the doctrine of exigency would not suffice to account adequately for the realities of domestic violence calls, especially when the victim may not

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108 Id. at 125–27 (Breyer, J., concurring).
appear injured or in danger. Justice Scalia argued that the case has nothing to do with formal equality between the sexes as Justice Stevens noted in his concurring opinion. Rather, he argued, "[g]iven the usual patterns of domestic violence, how often can police be expected to encounter the situation in which a man urges them to enter the home while a woman simultaneously demands that they stay out?"

The most disturbing part of the decision is that Justices make empirical assertions without any empirical evidence to support those assertions. Is Justice Souter or Chief Justice Roberts correct about the impact of the holding on victims? We don’t know in part because no one in the DVAC weighed in on the case. Rather, the interests of domestic violence victims were only addressed in one paragraph in the brief filed by the United States as amicus curiae. As a result, the Justices were free to speculate about the interests of victims without any input from victims themselves. This is exactly the kind of situation that must be avoided in the future.

Admittedly, Georgia v. Randolph is a very difficult case for the domestic violence community, and I suspect there is some disagreement over whether the Court reached the correct decision. For example, Professor Deborah Tuerkheimer, one of the leading scholars in the field of domestic violence, has expressed concern that the decision puts increased pressure on the doctrine of exigency. As did Chief Justice Roberts, she argues that the doctrine of exigency is too narrow to adequately respond to the kinds of situations in which there is an ongoing threat of abuse. She suggests, albeit not directly, that she disagrees with the Court’s holding.

In contrast, although I share Professor Tuerkheimer’s concern about the doctrine of exigency as applied to domestic abuse situations, theoretically at least, I agree with the holding. While I

109 Id. at 139–40 (Roberts, J., dissenting) (citing United States v. Davis, 290 F.3d 1239, 1240–41 (10th Cir. 2002).
110 Id. at 145 (Scalia, J., dissenting).
111 Id. at 142 (Scalia, J., dissenting).
113 See Deborah Tuerkheimer, Exigency, 49 ARIZ. L. REV. 801 (2007). "Whether circumstances are exigent cannot be understood without consideration of a relationship characterized by the ongoing exercise of power and control." Id. at 803.
am critical of Justice Souter's references to a "man's home is his castle" reasoning, I am particularly persuaded by Justice Steven's concurring opinion in which he directly addresses the issue of gender equality. "[E]ach of the partners has a constitutional right that he or she may independently assert or waive. Assuming that both spouses are competent, neither one is a master possessing the power to override the other's constitutional right to deny entry to their castle." While Justice Stevens does not discuss domestic violence, he does reject any historical notion of the doctrine of coverture that served as the legal justification for men to chastise their wives. Thus, in this case, I would argue that the long-term interests of victims are more aligned with criminal defendants than with the state.

I raise this point of disagreement to acknowledge that there is tension in theDVAC on the extent to which the interests of victims align with the interests of the state, particularly in the context of criminal law. A number of scholars have expressed concern that the movement has become too conservative. There is further concern that courts are using arguments about the need to respond aggressively to domestic violence by expanding police power and that, as a result, the victim's autonomy has been compromised. *Georgia v. Randolph* is a hard case because it falls on the fault-line of this valid and important debate.

But this debate need not prevent the DVAC from having some input into the case, at the very least to prevent the government or particular Justices from co-opting a position. It is interesting to contemplate how the DVAC might have weighed in on *Georgia v. Randolph*. For example, it could have filed a brief which raised concerns about the relationship between domestic violence and the doctrine of exigency as Professor Tuerkheimer now has, without filing in support of either party. This would have been particularly helpful given that in *Hammon v. Indiana*, Justice Scalia's majority opinion, which was joined by Chief Justice Roberts, rejected the proposition that when the police respond to

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a domestic violence call and the police do not witness any ongoing violence, there is no on-going emergency.\textsuperscript{116} This position seems to directly contradict the Chief Justice's concern in \textit{Randolph} that there could be an on-going emergency in the domestic violence case when one party objects to a search of the home. An amicus brief focused on exigency would likely have been very instructive for the Court.

Additionally, the DVAC could have provided the Court with a brief that outlined the potential impact of the decision on domestic violence cases without necessarily advocating for a particular bright-line rule, similar to Justice Breyer's argument. Or, through a process by which different perspectives were discussed, it might have reached some consensus on which position was consistent with the long-term goals of victims.

It is true that such a process can be difficult to implement within the relatively short time one has to file a brief once the petition for certiorari is granted. Nevertheless, with modern technology, there are certainly ways to efficiently gather input from different people with different perspectives in formulating strategy, especially if cases are flagged early in the petition process. Indeed, in our experience with \textit{Brillon}, it was in those early conference calls that included victims and non-lawyers in which our best strategizing took place. We started with the philosophy that no one person or organization had the right answer or had ownership over the substance of the brief. Rather, it was our view that, as counsel, we should facilitate input to reach as broad a consensus as possible among those who had an interest in the case.

It is worth noting that Chief Justice Roberts, joined by Justice Scalia, also dissented in \textit{United States v. Hayes}.\textsuperscript{117} In that


\textsuperscript{117} 129 S. Ct. 1079 (2009).
dissent, Roberts is completely unconcerned about the impact the Court's decision would have on domestic violence victims. This kind of on-again, off-again, concern for victims indeed fuels the criticism that some members of the Court have no genuine concern for domestic violence victims. My own sense is such analysis isn't entirely helpful to the long-term interests of victims. After all, Justice Ginsburg concurred with the majority opinion in *Giles v. California*, rather than joining Justice Steven's dissent, which detailed tremendous concern for the Court's ruling on domestic violence victims.¹¹⁸ No one could legitimately suggest that Justice Ginsburg only cares about victims of domestic violence when it serves her broader agenda. Additionally, Justice Thomas' opinion in *Davis & Hammon*, in which he concurs in part, and dissents in part, shows some of the most sophisticated understanding of what happens when the police respond to a domestic violence call.¹¹⁹ Yet, I suspect that many casual observers of the Court might assume that Justice Thomas is indifferent, if not hostile, to the concerns of victims.

In cases that implicate domestic violence, every Justice evinces some relative inconsistency, which is to be expected. Advocates should not expect any Justice to put the concerns of domestic violence victims ahead of broader Constitutional principles or statutory interpretation. To the extent that we are critical of cases, it should be because the Court got the law wrong, not because it didn't properly account for the impact of its rulings on victims. To that end, it is important to assume that no Justice on the Court believes that anyone should have legal sanction to abuse an intimate partner, and to assume that every Justice is open to education and persuasion by the DVAC.

¹¹⁹ 547 U.S. at 841 (Thomas, J. concurring in the judgment part and dissenting in part). However, the fact that the officer in *Hammon* was investigating Mr. Hammon's past conduct does not foreclose the possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action. It is hardly remarkable that Hammon did not act abusively towards his wife in the presence of the officers, and his good judgment to refrain from criminal behavior in the presence of police sheds little, if any, light on whether his violence would have resumed had the police left without further questioning, transforming what the Court dismisses as "past conduct" back into an "ongoing emergency."
C. The DVAC should have no particular loyalty to either the state or the defense.

Even though in many cases the interests of the victims will be more aligned with the state than with the defense, the DVAC should not shy away from supporting the defense when warranted. Take, for example, Dixon v. United States. The defendant, Keshia Dixon purchased multiple firearms at two gun shows, during the course of which she provided an incorrect address and falsely stated that she was not under indictment for a felony. She was convicted on one count of receiving a firearm while under indictment and eight counts of making false statements in connection with the acquisition of a firearm. At trial, Dixon admitted that she knew she was under indictment when she made the purchases and that she knew doing so was a crime; her defense was that she acted under duress because her boyfriend threatened to kill her or hurt her daughters if she did not buy the guns for him.

There were two questions before the Court. The first was whether the defendant had to prove a defense of duress by a preponderance of the evidence, to which the Court answered yes. The second was whether the government had to disprove a duress defense beyond a reasonable doubt, to which the Court answered no. The burden of persuasion remained with the defendant, which makes proving a duress defense particularly difficult. Battered women defendants often raise the defense of duress, as did Keshia Dixon. Thus, the case had implications for victims well beyond the facts of the particular case.

The National Clearinghouse for the Defense of Battered Women joined with the National Association of Criminal Defense Lawyers in an amicus brief to argue that the government should bear the burden of proof. The brief itself made little mention of

\[^{120} 548 \text{ U.S. 1 (2006).}
\[^{121} \text{Id. at 3.}
\[^{122} \text{Id.}
\[^{123} \text{Id. at 3–4.}
\[^{124} \text{Id. at 4.}
\[^{125} \text{Id. at 15–17.}
\[^{126} \text{Id. at 17.}
the impact of the decision on victims.\footnote{128 See id.} Rather, it set forth an argument based largely on history and doctrine.\footnote{129 See id.} It was an excellent brief. Even though the Court ultimately ruled in favor of the Government, the case serves as an important reminder that the interests of the state are not always aligned with the interests of victims.

In addition to the brief filed by the National Clearinghouse for the Defense of Battered Women, there was also the opportunity for the DVAC to submit an additional amicus brief. For example, a coalition of national organizations might have filed a second brief pointing out the policy implications of the Court's decision on battered defendants. It might have detailed for the Court the empirical realities faced by battered defendants, and the evidentiary hurdles presented when the burden of persuasion remains with the defense. Had other organizations unaffiliated with the defense bar weighed in, it might have signaled to the government that it should not selectively support domestic violence victims in cases that expand government power but abandon them in cases which limit it. I share the concerns of many advocates that prosecutors are all too quick to abandon the interests of victims when doing so no longer serves their objective in aggressive law enforcement.

The broader points are these: first, we should not shy away from hard cases, and second, we do not owe loyalty to either the state or the defense bar in criminal cases. Advocates, scholars, and lawyers for victims are becoming increasingly sophisticated. With that sophistication comes differing opinions, but also rich and nuanced approaches that get to the heart of the concern over the relationship between private intimate violence and concerns over full citizenship and equality. Even in those cases in which there is legitimate disagreement over the best position relative to the holding, the DVAC is certainly mature enough to provide the Court with some empirical and theoretical guidance.

Furthermore, the DVAC should be cognizant that other interest groups, as well as the government, may strategically invoke the interests of domestic violence victims in order to garner the Court's support for their broader concerns. For
example, one issue raised by *District of Columbia v. Heller*\(^{130}\) was whether or not the right to bear arms for self-defense will ultimately hurt or help victims of domestic abuse. In the dissent, Justice Stevens notes that just as a handgun in the home can be used for self-defense, so too can it be used to engage in acts of domestic violence.\(^{131}\) He cited the brief filed by the National Network to End Domestic Violence\(^{132}\) and numerous domestic violence organizations. The brief argued:

One particularly ominous statistic stands out in its relevance here: domestic violence accounts for between one-third and almost one-half of the female murders in the United States. These murders are most often committed by intimate partners with handguns. And while murder is the most serious crime that an abuser with a gun can commit, it is not the only crime; short of murder, batterers also use handguns to threaten, intimidate, and coerce victims. Handguns empower batterers and provide them with deadly capabilities, exacerbating an already pervasive problem . . . .

. . . . The D.C. Council had ample empirical justifications for determining that such laws were the best method for reducing gun violence in the District. Important government interests support statutes and regulations intended to reduce the number of domestic violence incidents that turn deadly; such statutes should be given substantial deference.\(^{133}\)

Yet, the Court was also presented with an opposing point of view. An amicus brief filed by women academics and state legislators argued that women should not have to depend on men for their protection and that equality demands that women have the right to bear arms:

> Violence against women in the United States is endemic, often deadly, and most frequently committed by men superior in physical strength to their female

\(^{130}\) 128 S. Ct. 2783 (2008).

\(^{131}\) *Id.* at 2864 (Stevens, J., dissenting).

\(^{132}\) *Id.*

victims.

The District's current prohibition against handguns and immediately serviceable firearms in the home effectively eliminates a woman's ability to defend her very life and those of her children against violent attack. Women are simply less likely to be able to thwart violence using means currently permitted under D.C. law. Women are generally less physically strong, making it less likely that most physical confrontations will end favorably for women. Women with access to immediately disabling means, however, have been proven to benefit from the equalization of strength differential a handgun provides. Women's ability to own such serviceable firearms is indeed of even greater importance given the holdings of both federal and state courts that there is no individual right to police protection....

What the District's current firearms laws do is manifest "gross indifference" to the self-defense needs of women. Effectively banning the possession of handguns ignores biological differences between men and women, and in fact allows gender-inspired violence free rein. Those biological differences should, under these limited circumstances, be influential to the Court's decision.\textsuperscript{134}

These differing points of view about the Second Amendment and gender equality invite a rich, substantive debate that is beyond the scope of this article. However, this debate highlights the importance of filing amicus briefs in all cases that have some impact on victims so that the DVAC presents a consistent voice before the Court. I do not suggest that other groups who claim to represent the interests of victims before the Court are disingenuous in their concerns. Rather, it is easier for those who do not have a long-standing commitment to ending violence against women to pick and choose their issues without concern for a broader strategy and litigation objectives. Consistent, repeated briefs before the Court filed by the same organizations

is the best strategy if the DVAC hopes to ultimately have a significant impact upon the Court’s decision-making.

D. Continue to strengthen the strategic alliance with advocates for reproductive health and sexual autonomy.

The alliance between advocates for domestic violence and advocates for reproductive health and sexual autonomy has been enormously important and should continue to be fostered in the context of Supreme Court advocacy. At the core of cases involving reproductive rights and sexual autonomy is the question of women’s equality and full citizenship. No where is this better articulated than in Justice Ginsburg’s dissent in Gonzales v. Carhart in which she wrote, “legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her own life’s course, and thus to enjoy equal citizenship stature.” That fundamental question of women’s equality also lies at the heart of domestic violence cases. Even though domestic violence affects men as well as women, the historic, legal justification for chastisement as well as the empirical reality that women are far more likely to be victimized than men suggests that modern domestic violence remains deeply rooted in a broader legal and social culture that treated women as the inferior sex. Building strategic alliances before the Court could positively influence the Court’s interpretation of constitutional principles as they affect broader questions of gender equality.

The alliance between the DVAC and advocates for reproductive rights was critical in Planned Parenthood v. Casey, in which the Court struck down Pennsylvania’s spousal notification statute as creating an undue burden on a woman’s qualified right to terminate her pregnancy. The Court went to great lengths to document how domestic violence impacts a woman’s sexual autonomy and thus how requiring spousal notification would further compromise her safety. The early and ongoing involvement of domestic violence advocates, particularly the

Pennsylvania Coalition Against Domestic Violence,\textsuperscript{137} was instrumental to the success of this portion of the case.

Similarly, the amicus brief filed by the National Coalition Against Domestic Violence in \textit{Ayotte v. Planned Parenthood of N. New England}\textsuperscript{138} highlights the importance of this strategic alliance even in reproductive cases where the impact on victims of domestic violence may be less obvious. At issue in \textit{Ayotte} was whether New Hampshire's parental notification law, which contained no exception for the health of the pregnant minor, was constitutional. The NCDV argued that abused and neglected teens are at increased risk for medical emergencies requiring immediate abortions,\textsuperscript{139} and that New Hampshire law was unconstitutional because it endangered the health of those young women who had been abused or neglected. While the Court remanded the case on the question of remedy, it was still important that the particular concerns of minors who have been abused was squarely before the Court, especially considering the Court's stated concern for the impact of laws that regulate abortion of victims of domestic violence as articulated in \textit{Casey}.\textsuperscript{140}

There is also opportunity for creating strategic alliances with advocates working on issues of sexual violence. One of the most satisfying experiences in filing the amicus brief in \textit{Brillon} was working with the Victim's Rights Law Center (VRLC),\textsuperscript{141} which is dedicated to the needs of victims of sexual assault and rape. I had previously worked with Jessie Mindlin of VRLC on an amicus brief in a case before the Kentucky Supreme Court concerning a civil rape shield statute, which is how VRLC became involved in \textit{Brillon}. While the focus of VRLC is primarily on non-intimate sexual violence, the interests of their constituency closely matched the interests of domestic violence victims, many of whom are also victims of sexual violence. Both

\textsuperscript{137} Nation's First State Domestic Violence Coalition, http://www.pcadv.org/ (last visited Apr. 20, 2010).
\textsuperscript{139} Id.
\textsuperscript{140} See 505 U.S. 833, 888–92.
\textsuperscript{141} Victim Rights Law Center, http://www.victimrights.org/ (last visited Apr. 20, 2010).
sex offenders and domestic violence offenders exhibit similar patterns of controlling and manipulative behavior. In many cases these offenders have victimized women and children with whom they have had a prior relationship, as well as strangers. In both types of cases, there is often victim reluctance to proceed to trial.

To capture these more universal concerns about the impact of the Court’s ruling on violence against women, we framed the issue as one involving victims of domestic and sexual violence. Yet, our amicus brief primarily focused on those victimized in the context of intimate relationships. Thus, there was a missed opportunity to file a second brief that would have expanded upon arguments as they related to non-intimate sexual assault and rape victims, both children and adults. In the future, particularly in cases involving criminal procedure, fostering more strategic alliances can bring to the Court’s attention both the commonalities and the unique challenges that its rulings will have on victims of domestic and sexual violence.

CONCLUSION

The Domestic Violence Advocacy Community can be very proud of its Supreme Court participation. Beginning with Planned Parenthood v. Casey, it has done a superb job of providing the Court with empirical facts and data, bearing witness to the realities of the lives of abuse victims. It has presented thoughtful, cogent arguments that reflect a developing legal maturity. The Court continues to recognize domestic violence as a wide-spread and serious problem. Even when its rulings have been adverse to the interests of victims, the Court has often gone out of its way to acknowledge the seriousness of the problem and invite legislative solutions. The Court’s increased awareness of domestic violence, and its increasing sophistication in recognizing the dynamics of abuse are in no small measure attributable to the DVAC’s active role in Supreme Court litigation.

It is my hope that lawyers, scholars, and advocates who work on behalf of victims can continue and strengthen that involvement by being more deliberate in reviewing petitions for certiorari, by expanding our advocacy to include a wider range of cases, by ensuring that only committed domestic violence advocates define the interests of victims, and by fostering
alliances with those advocacy groups committed to sexual autonomy and reproductive rights. This strategy is resource intensive and often yields few, if any, easily discernable immediate results. But a long-term commitment to identifying the interests of victims and providing the Court with empirical facts and theoretical frameworks is likely to yield long-term results. Perhaps most importantly, filing amicus briefs gives victims a voice in the nation's highest Court, and I remain eternally optimistic that those voices are being heard.