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# It's Complicated: Privacy and Domestic Violence

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# **It's Complicated: Privacy and Domestic Violence**

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**It's Complicated: Privacy and Domestic**  
**Violence**

**ABSTRACT:** *This Article challenges the notion that there is no role for privacy in the domestic violence context. Privacy is a complicated concept that has both positive and negative aspects, and this Article examines the value that more privacy could provide for domestic violence victims. While privacy was historically used as a shield for batterers, more privacy for domestic violence victims could protect their personhood, ensuring that they are treated with dignity and respect. In addition, current mandatory criminal justice policies have become so intrusive in many victims' lives that limitations are needed to prevent the threat of state abuse. These protections are particularly important for poor victims and victims of color who are more vulnerable to such abuses. In many cases, a domestic violence victim's choice not to pursue the arrest and prosecution of her batterer should be respected by state authorities. In addition, no victim should be required to cooperate as a witness against her batterer.*

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## It's Complicated: Privacy and Domestic Violence

*"I swear I won't call no copper  
If I'm beat up by my papa  
Ain't nobody's business if I do"*<sup>1</sup>

### INTRODUCTION

It was not that long ago that the formal legal system did very little to protect women from domestic violence because state actors believed that violence between intimates was a private matter that should be handled within the family.<sup>2</sup> Activists in the women's liberation and early battered women's movements, however, strongly critiqued the use of privacy to shield batterers from legal intervention and made significant strides in changing the public's perception of the state's role in this area.<sup>3</sup> Now, whenever there is a news story highlighting yet another brutal injury or murder of a woman by an intimate partner, there is a public outcry demanding to know why no one did anything to prevent it<sup>4</sup>; state intervention is now viewed as a necessary tool in combating violence in the home.

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<sup>1</sup> BILLIE HOLIDAY, *AIN'T NOBODY'S BUSINESS IF I DO* (CBS 1975).

<sup>2</sup> Reva B. Siegel, *"The Rule of Love": Wife Beating As a Prerogative and Privacy*, 105 YALE L. J. 2117, 2170-71 (1996). *But see* ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 18-23, 92 (2004) (discussing how judges in the late nineteenth century viewed marital rape as a legitimate ground for divorce and how informal community pressure, church courts, and criminal law were used to limit family violence in Puritan communities); KRISTEN S. RAMBO, *TRIVIAL COMPLAINTS* 23, 35 (2009) (discussing how during the late nineteenth century victims sometimes did get help through informal measures implemented by family members, church congregations, and even the Ku Klux Klan).

<sup>3</sup> Kimberly D. Bailey, *Lost in Translation: Domestic Violence, "The Personal is Political", and the Criminal Justice System*, 100 J. OF CRIM. L. & CRIMINOLOGY 1255, 1259-1265 (2010); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 748-56 (2007); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 258-59 (2005).

<sup>4</sup> See, e.g., Erika Slife, *When Cop Causes Family Violence; Many Victims May Have Nowhere to Turn, Experts Say*, CHI. TRIBUNE, September 3, 2008, at W1 (using the Drew Peterson case to highlight the need to provide more support for domestic violence victims who are the spouses of police officers). See also Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L. J. 2, 44-45 (2006) ("In the oral culture of a prosecutor's office, a misdemeanor [domestic violence] defendant has the potential to be an O. J. Simpson. In other words, every case is to be treated as a potential prelude to murder. Rookie prosecutors are warned that their DV misdemeanors are the cases that could get their names in the newspaper for failure to prevent something more serious. Thus in DV cases prosecutors make decisions in the shadow of public oversight and have an enhanced incentive to use every means available

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Still, although the general public tends to believe that domestic violence is a public issue that should be handled by the criminal justice system, many victims view the violence that they experience as a personal or private matter. According to National Crime Victim Surveys, twenty-two percent of victims reported that they did not seek help from the police after experiencing violence for precisely this reason.<sup>5</sup> One of the reasons that feminists argued so forcefully in favor of the conception of domestic violence and other crimes against women as public matters was because there were so many victims who wanted assistance from the police, but were nevertheless ignored.<sup>6</sup> It appears, however, that there is actually a significant number<sup>7</sup> of women who actually *do* want to be ignored—at least by the criminal justice system.

In Part II of this Article, I describe in detail how the activism of feminists in the women's liberation and early battered women's movements changed the cultural and legal view of domestic violence. I also describe the creation of mandatory arrest and prosecution policies, which require the intervention of the criminal justice system regardless of the wishes of the victim.

In Part III, I make a normative argument in favor of allowing most domestic violence victims to choose not to engage with the criminal justice system.<sup>8</sup> To support my view that victims' choices should matter, I re-examine the concept of privacy.<sup>9</sup> Because privacy

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to protect victims.”). Yet the fact that the general public now takes domestic violence more seriously does not mean that there are not victims who still experience skepticism from the criminal justice system. See *infra* Part \_\_\_\_; see also Bailey, *supra* note \_\_\_\_, at 1277-80.

<sup>5</sup> SHANNON CATALANO, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipvus.pdf> [hereinafter INTIMATE PARTNER VIOLENCE].

<sup>6</sup> Gruber, *supra* note \_\_\_\_, at 757-58; Miccio, *supra* note \_\_\_\_, at 279.

<sup>7</sup> Some might question whether twenty-two percent is really a significant number of victims. Given that 4.3 million women claimed to have experienced physical violence at the hands of an intimate partner in the twelve months prior to taking the Center for Disease Control's 2010 National Intimate Partner and Sexual Violence Survey, this number cannot be taken lightly. MICHELE C. BLACK ET AL., CENTER FOR DISEASE CONTROL, THE NATIONAL INTIMATE PARTNER & SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 43 (2011), available at [http://www.cdc.gov/ViolencePrevention/pdf/NISVS\\_Executive\\_Summary-a.pdf](http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Executive_Summary-a.pdf).

<sup>8</sup> For other critics of mandatory policies see Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001); Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1 (2009); Gruber, *supra* note \_\_\_\_, at 741; Linda G. Mills, *Commentary: Killing Her Softly: Intimate Abuse & the Violence of State Intervention*, 113 HARV L. REV. 550 (1999).

<sup>9</sup> It is worth noting why I choose to ground my discussion of victims' choices in the concept of “privacy” instead of “autonomy” or “liberty.” See ANITA ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 4 (1988) (discussing how many scholars believe that some misuse the term “privacy” when they really mean “liberty”). First, when the Supreme Court discusses the right to make personal choices about family life with limited interference by the state, such as in the context of contraceptive use and abortion, they have grounded

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was historically used to shield batterers from state intervention, its benefits for domestic violence victims have been ignored. The concept of privacy is already strongly valued in both American culture and jurisprudence, and it is the foundation for significant women's rights such as contraception use and abortion.<sup>10</sup> Instead of accepting the notion that the concept of privacy is always detrimental to domestic violence victims, I draw upon this tradition to describe the aspects of privacy that could actually be valuable. With respect to domestic violence victims and the criminal justice system, two forms of privacy are at stake. The first is the type of "restricted access" privacy defined by Anita Allen as a "degree of inaccessibility of persons, of their mental states, or of information about them to the sense and surveillance devices of others."<sup>11</sup> The second is "decisional privacy," or the freedom to make choices in family matters with limited state intervention.<sup>12</sup> Both types of privacy are essential to preserve victims' personhood and to ensure that they are treated with dignity and respect. More privacy also limits the threat of state abuse. Poor victims and victims of color are particularly at risk for privacy violations.

Part IV argues that when one acknowledges the interrelatedness of the public and private spheres, it is not theoretically inconsistent to provide affirmative protection to victims while preserving some of their privacy. With this in mind, Part V urges policymakers, feminist activists, and victims' advocates to consider the possibility that the criminal justice system can be more effective without imposing mandatory policies. Furthermore, a potential line-drawing problem in determining when to intervene in a violent relationship is not an excuse to ignore victims' privacy. Finally, a grassroots approach must work in conjunction with a criminal justice solution in order to help a greater number of victims.<sup>13</sup>

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these discussions in the concept of privacy. *See infra* Part \_\_\_\_\_. *But see also* Lawrence v. Texas, 539 U.S. 558, 562 (2003) (grounding its discussion in the concept of liberty); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (same). For this reason, I have decided to use this same language in order to remain consistent with this jurisprudence. A full discussion regarding whether these types of choices should be grounded in privacy, liberty, or the equal protection clause is beyond the scope of this Article. I do not view decisional privacy, however, as involving atomistic choice or decision-making that is purely based on one's individual needs; the reality is that domestic violence victims make their decisions in the context of their intimate relationships with their partners and children.

<sup>10</sup> *See infra* Part \_\_\_\_\_.

<sup>11</sup> ALLEN, *supra* note \_\_\_\_\_ at 3.

<sup>12</sup> ANITA, *supra* note \_\_\_\_\_ at 32.

<sup>13</sup> It should be noted that a significant amount of domestic violence is addressed through the civil legal system through the civil protection order. Jane Aiken & Katherine Goldwasser, *The Perils of Empowerment*, 20 CORNELL J. L. & PUB. POL'Y 139, 146 (2010). A discussion

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### II. HOW THE BATTERED WOMEN'S MOVEMENT CHANGED THE NATIONAL CONVERSATION ABOUT DOMESTIC VIOLENCE

Physically chastising one's wife was once legal in the United States.<sup>14</sup> Even though "wife beating" was eventually defined as a crime on the books<sup>15</sup>, it would be decades before state actors took serious steps to enforce these laws.<sup>16</sup> Influenced by liberal theorists such as John Locke, state actors believed that domestic violence was a matter that should be handled within the privacy of the home.<sup>17</sup> Locke is associated with the view that there are two separate spheres of life: the public sphere, which is appropriate for government intervention, and the private sphere, in which government intervention is inappropriate.<sup>18</sup> Family life was included in the

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regarding privacy in the civil context is beyond the scope of this Article, but for a discussion about the merits of protective orders that prohibit abuse but allow partners to have contact and to maintain their relationship see Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487 (2008). For a critique of the routine practice of denying domestic violence victims' motions to vacate a civil protection order see Tamara L. Kuennen, *'No Drop' Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN'S L.J. 39 (2007).

<sup>14</sup> Anglo-American common law provided that a husband could subject his wife to corporal punishment or "chastisement" with the only limitation being that he could not inflict permanent injury. Siegel, *supra* note \_\_\_\_ at 2170-71. *But see* PLECK, *supra* note \_\_\_\_ at 21 (noting that spousal abuse was illegal as early as the seventeenth century in American Puritan communities).

<sup>15</sup> Wife beating was illegal in all states by 1920. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996). Some feminist scholars have argued that the repudiation of the right of chastisement was partially about controlling African-American men because some of the seminal cases in this area involved African-American defendants. RAMBO, *supra* note \_\_\_\_, at 29. In one Alabama Supreme Court case, the victim and the perpetrator were emancipated slaves. *Id.* The Alabama Supreme Court stated that "the wife is not to be considered as the husband's slave." *Fulgham v. State*, 46 Ala. 143, 146 (1871). Reva Siegel has questioned whether the court meant "to ensure that the woman is not treated like a 'slave,' or to prevent her recently emancipated husband from asserting the 'privileges' of a master". Siegel, *supra* note \_\_\_\_, at 2135. In another case, the Supreme Court of Mississippi repudiated the right of chastisement and noted "a belief among the humbler class of our colored population of a fancied right in the husband to chastise his wife." *Harris v. State*, 14 So. 266, 266 (Miss. 1884). Kristen Rambo notes that the reference of race and class in this case coupled with the implication that Harris did not know his place "suggest that [the judges] intentions were not solely focused on protecting women from abuse." RAMBO, *supra* note \_\_\_\_, at 29.

<sup>16</sup> Siegel, *supra* note \_\_\_\_, at 2170-71. *See also* PLECK, *supra* note \_\_\_\_ at 23 (noting that although wife beating was illegal in some American Puritan communities in the seventeenth century, courts placed more of a priority on family preservation than on the physical protection of victims).

<sup>17</sup> Bailey, *supra* note \_\_\_\_, at 1259-60.

<sup>18</sup> Bailey, *supra* note \_\_\_\_, at 1259-60.



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private sphere.<sup>19</sup> What was most significant about this view of privacy was that “Locke’s formulation of citizen-as-head-of-household” led judges “to recognize the right of privacy only for the heads of households [, which] made this particular privilege a specifically patriarchal one.”<sup>20</sup> This view was reflected in the actions of social workers, the police, and prosecutors. For much of the twentieth century, “judges and social workers urged couples to reconcile, providing informal or formal counseling designed to preserve the relationship whenever possible. Battered wives were discouraged from filing criminal charges against their husbands [and] urged to accept responsibility for their role in provoking the violence.”<sup>21</sup> Similarly, on those occasions when the police were called to the home, the typical response was to give the husband an opportunity to cool off, and the police would then leave it up to the couple to resolve their differences.<sup>22</sup> Even if the wife wanted stronger intervention measures, such as arrest and prosecution, the police and prosecutors routinely ignored these cries for help.<sup>23</sup>

Feminist scholars and activists involved in the women’s liberation movement in the late 1960’s and 1970’s vehemently challenged this theoretical dichotomy between public and private life.<sup>24</sup> First, they highlighted the fact that it has never been the case that the state had no role in family life.<sup>25</sup> Indeed, determining what constitutes a family and what rights and privileges a family possesses has always been the role of the state.<sup>26</sup> Thus, the state selectively chose when to intervene, and by ignoring the plight of women in the home, affirmatively maintained their subordination.<sup>27</sup> In other

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<sup>19</sup> Bailey, *supra* note \_\_\_\_, at 1259-60.

<sup>20</sup> RAMBO, *supra* note \_\_\_\_, at 22. Rambo notes, however, that the lack of legal formal measures to deal with domestic violence led to the use of more informal measures. *Id.* at 23. “A variety of groups and individuals—ranging from victims’ family members to church congregations to feminists to vigilante groups, and even the Ku Klux Klan—all took deliberate measures to punish batterers and to protect victims of domestic violence.” *Id.* These measures ranged from expelling batterers from church congregations to public floggings. *Id.* at 35.

<sup>21</sup> Siegel, *supra* note \_\_\_\_, at 2170.

<sup>22</sup> *Id.* at 2170-71.

<sup>23</sup> *Id.*

<sup>24</sup> Bailey, *supra* note \_\_\_\_, at 1260.

<sup>25</sup> See Frances E. Olsen, *The Myth of State Intervention in the Family*, 28 U. MICH. J. L. REFORM 835, 842-44 (1985) (“The state is responsible for the background rules that affect people’s domestic behaviors. Because the state is deeply implicated in the formation and functioning of families, it is nonsense to talk about whether the state does or does not intervene in the family.”)

<sup>26</sup> *Id.*; see also Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Family Life*, 94 IOWA L. REV. 1253, 1255 (2009) (arguing that criminal law has always regulated family life).

<sup>27</sup> See Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VANDERBILT L. REV. 1665, 71-72 (1990). Melissa Murray argues that

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words, it was complicit in the violence that these women were experiencing.<sup>28</sup> Furthermore, by treating domestic violence as a personal matter, the state advocated the notion that the phenomenon was merely the result of personal squabbling between husband and wife.<sup>29</sup> If each woman were to look inside herself, so it was commonly thought, perhaps she could figure out how she was contributing to her situation.

Feminists involved in the women's liberation movement convincingly made the case, however, that so-called "personal" issues such as domestic violence were actually political issues.<sup>30</sup> Women were not victims of violence because they were lousy homemakers or because they mouthed off too much to their husbands. Instead, they were victims because of the political subordination of women as a class in society. In her influential essay, "The Personal is Political," Carol Hanisch argued that "[w]omen are messed over, not messed up! We need to change the objective conditions, not adjust to them."<sup>31</sup> Within the context of these consciousness-raising groups<sup>32</sup>, women began to realize that violence in the home was a prevalent political problem and that political solutions would be necessary to overcome it.<sup>33</sup>

The battered women's movement grew out of this political consciousness.<sup>34</sup> Similar to the women's liberation movement, the battered women's movement was initially a grassroots one.<sup>35</sup> Shelters were created, often by women who themselves were

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while the general feminist narrative is that the state's intervention into family life has not included the use of criminal law, the reality is that criminal law has always been used to regulate the family. Murray, *supra* note \_\_\_\_ at 1264. The criminalization of incest and prostitution are a couple of examples of how the state uses criminal law to maintain a specific normative understanding of marriage. *Id.* at 1267-70. Murray further argues that the lack of criminal justice intervention in family violence also was to maintain this understanding of marriage. *Id.* at 1270. ("By refusing to characterize spousal violence as assault and unwanted conjugal sex as rape, criminal law underscored that marriage was a status relationship with attendant obligations and prerogatives...It was a space where husbands had a right to 'correct' wives and where conjugal sex was expected and welcomed.").

<sup>28</sup> See Minow, *supra* note \_\_\_\_, at 71-72 ("When clerks in a local court harass a woman who applies for a restraining order against the violence in her home, they are part of the violence.").

<sup>29</sup> Siegel, *supra* note \_\_\_\_ at 2170-71.

<sup>30</sup> Bailey, *supra* note \_\_\_\_ at 1263-64.

<sup>31</sup> Carol Hanisch, *The Personal is Political*, NOTES FROM THE SECOND YEAR: WOMEN'S LIBERATION 76 (1970).

<sup>32</sup> Consciousness-raising groups were small gatherings of women where participants discussed their personal everyday experiences. CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 84-85 (1989).

<sup>33</sup> Bailey, *supra* note \_\_\_\_ at 1263-64.

<sup>34</sup> Miccio, *supra* note \_\_\_\_ at 258.

<sup>35</sup> *Id.* at 258-59.

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survivors of abuse, to provide material and emotional support for domestic violence victims.<sup>36</sup> These residents were not viewed as “clients,” and they had active voices in determining how the shelters should be run.<sup>37</sup> In addition, on those occasions when a resident decided not to end her relationship with the partner who had battered her, those wishes were respected.<sup>38</sup>

Activists in the battered women's movement saw the benefit of maintaining a movement that was grassroots and non-hierarchical. Specifically, many were skeptical of engaging with the state that they believed was an active force in maintaining the oppressive patriarchal norms that they were trying to transform.<sup>39</sup> Yet as already discussed, the reality was that domestic violence victims sometimes needed the aid of the legal system, even though they often had negative experiences when they sought its aid. For this reason, activists recognized that something needed to be done about the fact that the police, prosecutors, and judges consistently ignored victims; they grudgingly engaged with the state in order to remedy this problem.<sup>40</sup> These activists were instrumental in providing easy access to civil protection orders, which gave victims legal recourse when batterers continued to harass and assault them.<sup>41</sup> They also filed equal protection lawsuits in jurisdictions where police had repeatedly failed to protect women.<sup>42</sup>

Furthermore, some of these activists later advocated for the creation of mandatory or preferential arrest policies.<sup>43</sup> Under mandatory arrest policies, the police are strongly encouraged or required to make an arrest if there is probable cause to believe there has been a misdemeanor domestic violence violation.<sup>44</sup> Many jurisdictions also became more aggressive in prosecuting domestic violence cases by instituting no-drop policies, which require or encourage prosecutors to go forward with these cases regardless of the victim's wishes.<sup>45</sup> It was believed that by removing some official discretion, domestic violence cases would be prosecuted at the same

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 286, 302.

<sup>39</sup> Gruber, *supra* note \_\_\_\_ at 758.

<sup>40</sup> Miccio, *supra* note \_\_\_\_ at 274-82.

<sup>41</sup> Emily J. Sack, *Battering Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1667 (2004) (“By the mid-1990’s, every state had enacted a civil protection order statute, including provisions for obtaining an emergency ex-parte order.”).

<sup>42</sup> Gruber, *supra* note \_\_\_\_ at 756; Mills, *supra* note \_\_\_\_, at 558-59; Siegel, *supra* note \_\_\_\_ at 2171.

<sup>43</sup> Bailey, *supra* note \_\_\_\_ at 1270.

<sup>44</sup> Sack, *supra* note \_\_\_\_ at 1669-70.

<sup>45</sup> Hanna, *supra* note \_\_\_\_ at 1859-60.

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rate as other assault cases, resulting in formal gender equality.<sup>46</sup> Advocates of these policies also hoped that they would deter future violence and that they would prevent batterers from intimidating victims into eschewing criminal remedies.<sup>47</sup> They also believed that these policies had expressive value and that they showed that the criminal justice system was finally taking domestic violence seriously.<sup>48</sup> Jurisdictions were at first very slow in implementing these statutes,<sup>49</sup> but the confluence of “war on crime” political rhetoric, as well as the publicity from the O. J. Simpson case in the 1990’s, created political momentum for the widespread institution of tougher criminal justice policies.<sup>50</sup>

Now all fifty states allow a warrantless arrest when a police officer has probable cause to believe that there has been a violation of a domestic abuse statute.<sup>51</sup> Furthermore, many jurisdictions have implemented mandatory or preferential arrest and no-drop prosecution statutes.<sup>52</sup> Feminist activists, therefore, were quite successful in changing the national conversation about domestic violence. Now, both members of society and policymakers agree that the criminal justice system is an appropriate tool in combating domestic violence and that it is a necessary one in order to increase victim safety.

### **III. PRIVACY AND DOMESTIC VIOLENCE VICTIMS**

Although mandatory arrest and prosecution policies were drafted to ensure that the criminal justice system is responsive to victims’ cries for help, the reality is that many victims do not report their abuse to the authorities.<sup>53</sup> In addition, when violence does come to the attention of the criminal justice system, it is often the case that victims become highly resistant to the state’s intervention.<sup>54</sup> It is

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<sup>46</sup> Gruber, *supra* note \_\_\_\_ at 758.

<sup>47</sup> Bailey, *supra* note \_\_\_\_ at 1270-71.

<sup>48</sup> *Id.* at 1271.

<sup>49</sup> Miccio, *supra* note \_\_\_\_ at 278-79.

<sup>50</sup> Gruber, *supra* note \_\_\_\_ at 793.

<sup>51</sup> Hanna, *supra* note \_\_\_\_ at 1859. Prior to 1984, most police officers could not arrest a suspect without a warrant unless the misdemeanor was committed in the officer’s presence. Officers could arrest a suspect without a warrant if they had probable cause to believe that a felony had been committed. *Id.*

<sup>52</sup> Sack, *supra* note \_\_\_\_ at 1859-60.

<sup>53</sup> DONALD G. DUTTON, THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES 218 (1995); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 11 (1991).

<sup>54</sup> EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 182 (2003); Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 751 (2005).

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estimated that as many as sixty to eighty percent of domestic violence victims either recant or refuse to testify against their batterers.<sup>55</sup> The reasons for this resistance are as complex and varied as the victims themselves and include lack of material resources, poor interactions with state actors, fear of the batterer, desire to maintain the relationship, desire to keep their children in a two-parent home, and love for the batterer.<sup>56</sup>

Indeed, although feminists worked very hard to change the public perception that domestic violence is a private issue, a significant number of victims do not engage with the state precisely because they still view the violence that they experience at the hands of their intimate partners as private. According to National Crime Surveys of Victimization, approximately twenty-two percent of those victims who did not seek criminal justice assistance cited privacy as the reason.<sup>57</sup> Given the fact that privacy is highly valued in American culture and jurisprudence, it should not be surprising that some domestic violence victims might also value their privacy. For this reason, we must challenge the notion that privacy has no value for these women. The truth is that privacy is complicated. While it was historically used to shield batterers from state intervention, some degree of privacy for domestic violence victims is crucial if we value their personhood and seek to limit the risk of state abuse.

#### **A. Privacy and the Supreme Court.**

Scholars have noted the paradox that privacy has presented for women.<sup>58</sup> On the one hand, feminists and activists worked very hard to convince members of society and the state that privacy in the home is a dangerous thing for women because of the inaction it engendered regarding domestic violence matters.<sup>59</sup> Yet privacy is also the foundation of important women's rights such as contraception use and abortion.<sup>60</sup>

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<sup>55</sup> EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 182 (2003); Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 751 (2005).

<sup>56</sup> Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1253 (2001); Donna Coker, *Piercing Webs of Power: Identity, Resistance, and Hope in Latcrit Theory ANDPRAXIS: Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1048-49 (2000).

<sup>57</sup> INTIMATE PARTNER VIOLENCE, *supra* note \_\_\_\_.

<sup>58</sup> See, e.g., RAMBO, *supra* note \_\_\_\_, at 4; JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 5-6 (2009).

<sup>59</sup> See *supra* Part \_\_\_\_.

<sup>60</sup> RAMBO, *supra* note \_\_\_\_, at 4 (2009) ("The concept of state noninterference in the private realm that was so critical to the success of the abortion rights movement has also been used to protect batterers within the same private realm. That these two movements

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Obviously, not all individual decisions implicate the Constitution, but in the early part of the twentieth century the Supreme Court established that there is a private realm of family life protected from state interference that is rooted in the Fourteenth Amendment. In *Meyer v. Nebraska*, the Supreme Court interpreted the liberty interest enumerated in the Fourteenth Amendment as including a right to marry, to establish a home, and to raise children.<sup>61</sup> Relying on *Meyer*, the Court then determined in *Pierce v. Society of Sisters* that it is a violation of parents' Fourteenth Amendment liberty interest to enact a statute that requires them to send their children to public school: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>62</sup> Furthermore, although the Court later stated in *Prince v. Massachusetts* that the family is not beyond state regulation, it again reiterated that "the custody, care and nurture of the child reside first in the parents. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter."<sup>63</sup>

In *Griswold v. Connecticut*, the Court asserted that the guarantees in the Bill of Rights "create zones of privacy"<sup>64</sup> and that

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emerged almost contemporaneously highlights an important legal paradox, as courts and activists have had to reconcile these contrasting effects upon women's rights of the use of the concept of privacy."); SUK, *supra* note \_\_\_\_, at 6 ( "The version of feminist critique according to which home privacy is coterminous with violence is being successfully woven into our legal system. Nevertheless, even after the assimilation of this critique, privacy remains a value that is difficult to give up in our constitutional framework and in many people's intuitions about the home." ).

<sup>61</sup> *Meyer*, 262 U.S. at 399.

<sup>62</sup> *Id.* at 535. Alice Ristroph and Melissa Murray argue that *Meyer* and *Pierce* are animated by a concern about governmental tyranny. Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L. J. 1236, 1263-1270 (2010). They assert that the Court saw the potential for limited family diversity to provide a pluralism that serves as a check on the totalitarian and homogenizing impulses of the state, which was evidenced by statutes fueled by anti-immigrant and anti-Catholic sentiments. *Id.* This diversity is limited in the sense that the protection seemed to be limited to those families that fit the marital family norm. *Id.* at 1267. I do not negate Ristroph and Murray's view nor do I mean to suggest that family privacy was the only or chief concern of the Court in *Meyer* and *Pierce*. Instead, I reference these cases to make the point that the Court established that a type of family privacy does exist under the Constitution.

<sup>63</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>64</sup> *Griswold v. Connecticut*, 381 U.S. 479, 514 (1965). Specifically,

The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their

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the marriage relationship lies “within the zone of privacy created by several fundamental constitutional guarantees.”<sup>65</sup> As a result, a state statute that prohibited the use of contraceptives by married persons was deemed unconstitutional.<sup>66</sup> The Court later clarified, however, that the right of privacy belongs to the individual and not to the marital couple as one entity:

Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>67</sup>

In acknowledging the significance of such a decision in an individual's life, the Court cited Justice Brandeis' dissent in *Olmstead v. United States*: “The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man”<sup>68</sup> In *Roe v. Wade*, the Court expounded on this connection between the pursuit of individual happiness and well-being and the right to privacy when it extended this right “to encompass a woman's decision whether or not to terminate her pregnancy.”<sup>69</sup> In justifying its decision the Court explained:

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persons, houses, papers, and effects, against unreasonable searches and seizures.’ The Fifth Amendment in its Self-Incrimination Clause enables the Citizen to create a zone of privacy which the government may not force him to surrender to his detriment. The Ninth Amendment provides: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’” *Id.* 514-15.

<sup>65</sup> *Id.* at 515-16.

<sup>66</sup> *Id.*

<sup>67</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that a statute denying unmarried people access to contraceptives is a violation of the Equal Protection Clause).

<sup>68</sup> *Id.* at 454 n.10 (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))

<sup>69</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973) (suggesting that this right of privacy is “founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon the state”).

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The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent . . . . Maternity, or additional offspring, may force upon the woman a distressful life and future . . . . Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.<sup>70</sup>

Again, the Court highlighted the connection between family planning and individual emotional, psychological, and economic well-being.<sup>71</sup> Similarly, in *Lawrence v. Texas* the Court reaffirmed that “the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>72</sup> For

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<sup>70</sup> *Id.* at 153.

<sup>71</sup> The Court in *Roe* made it clear, however, that a woman’s right to an abortion is not completely unfettered. It deemed state regulation of abortions appropriate for the purposes of protecting the health of the mother and protecting the potentiality of human life of the viable fetus. *Id.* at 164-65. In opinions subsequent to *Roe*, the Supreme Court has increasingly shown its support of state regulations that limit the ability of women to obtain abortions when the purported purpose is to provide these protections. See generally *Gonzales v. Carhart*, 550 U.S. 124 (2006) (upholding a federal statute banning intact dilation and evacuation procedures, also known as partial-birth abortions); *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833 (1992) (upholding a state abortion statute containing informed consent provisions). One fair reading of these cases is that they are eroding away the privacy right of women guaranteed by *Roe*. See *Carhart*, 550 U.S. at 191 (Ginsburg, J., dissenting) (“In candor, the [Partial-Birth Abortion Ban] Act, and the Court’s defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women’s lives”). These cases also highlight, however, the complications that arise once we recognize rights on the part of each individual in a family unit. In other words, one could view the abortion debate as a disagreement regarding whose rights should trump whose: should a woman’s right to privacy trump the potential right to bodily integrity of the fetus or the other way around? A thorough discussion about how to resolve the potential conflicting interests among individuals within a family from a constitutional standpoint is beyond the scope of this article, but this issue is certainly a complicated byproduct of the Court’s determination that the right to family privacy belongs to the individual. See Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L. J. 557, 598-99 (2006) (“[N]orms of privacy might fundamentally collide with those of equality insofar as the rhetoric of privacy-based non-intervention leave the less powerful vulnerable within the private sphere.”); Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1257 (1999) (“I am concerned the ideology of privacy may obscure and condone injustice to children, as it obscured and condoned injustice to women”).

<sup>72</sup> *Lawrence*, 539 U.S. at 574.



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this reason, it concluded that the right of liberty includes the right of same-sex individuals to engage in private sexual conduct without state intervention<sup>73</sup> and that this right “should counsel against attempts by the State, or a court, to define the meaning of the [personal] relationship or to set its boundaries.”<sup>74</sup> The opinion, therefore, connects one’s self-identity with the creation of personal relationships.

In summary, the line of Supreme Court cases discussed above establishes several important aspects of privacy in the personal and family relationship context that could be quite valuable for domestic violence victims. First, they emphasize a right of privacy that is a right to be free from interference from the state. Second, this right to be let alone is essential in order for people to make certain personal decisions. Third, a certain level of privacy is necessary in order to pursue happiness, to find personal fulfillment, to engage in self-identification, and to maintain emotional, psychological, and economic well-being. Fourth, because of the strong connection between family life and the pursuit of these goals, the need to be let alone to make decisions regarding some family matters is particularly acute. In other words, decisions related to the family and personal relationships can have long-lasting effects on one’s identity and fate.<sup>75</sup> Finally, the right to be let alone to make personal family decisions belongs to the individual, not to the family unit or to the patriarchal head of the household.

#### **B. What is at Stake for Domestic Violence Victims?**

##### **1. The Value of the Domestic Violence Victim’s Personhood.**

One of the goals of privacy doctrine is to protect one’s personhood, or one’s ability to engage in self-definition<sup>76</sup> and “to define one’s own concept of existence, of meaning, of the universe,

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<sup>73</sup> *Id.* at 578.

<sup>74</sup> *Id.* at 567.

<sup>75</sup> See Roberts, *supra* note \_\_\_\_ at 1465 (“The concept of decisional privacy seeks to protect intimate or personal affairs that are fundamental to an individual’s identity and moral personhood from unjustified government intrusion.”); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989) (“Anti-abortion law, anti-miscegenation laws, and compulsory education law all involve the forcing of lives into well-defined and highly confined institutional layers...[The right to privacy] is the fundamental freedom not to have one’s life too totally determined by a progressively more normalizing state.”).

<sup>76</sup> Roberts, *supra* note \_\_\_\_ at 1468; Rubenfeld, *supra* note \_\_\_\_ at 752-54.

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and of the mystery of human life.”<sup>77</sup> When domestic violence victims cannot have a say in how the abuse in their homes is handled, the state sends the message that they are not worthy of respect as individuals who are capable of making rational decisions about their family lives. Domestic violence victims are not given this respect because of prevalent negative stereotypes that paint them as psychologically damaged. The work of Lenore Walker has been heavily influential in the evolution of the image of the domestic violence victim.<sup>78</sup> Particularly well known is her concept of “learned helplessness.”<sup>79</sup> After finding that they cannot control or stop the violence they experience, Walker asserted that domestic violence victims cease to actively resist their aggressors and instead become passive and fatalistic.<sup>80</sup> Although Walker (herself a feminist) cautioned against over generalizing about women’s responses to violence,<sup>81</sup> the unfortunate byproduct of her work has been that domestic violence victims now are seen as weak, powerless,<sup>82</sup> and passive.<sup>83</sup> If the victim happens to be poor, her poverty adds to this conclusion.<sup>84</sup> Domestic violence victims are also viewed as emotionally damaged individuals<sup>85</sup> who cannot make decisions for themselves or for their families,<sup>86</sup> and therefore they are terrible mothers.<sup>87</sup> Furthermore, if a woman opts to stay in a relationship, it

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<sup>77</sup> Lawrence, 539 U.S. at 574.

<sup>78</sup> Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J. L. & FEMINISM 75, 82 (2008).

<sup>79</sup> *Id.* at 82.

<sup>80</sup> *Id.* at 83.

<sup>81</sup> Mahoney, *supra* note \_\_\_\_\_, at 40.

<sup>82</sup> Goodmark, *supra* note \_\_\_\_\_, at 83; Lisa A. Harrison, *Myths and Stereotypes of Actors Involved in Domestic Violence: Implications for Domestic Violence Culpability Attributions*, 4 AGGRESSION AND VIOLENT BEHAVIOR 129, 130 (1998); Mahoney, *supra* note \_\_\_\_\_, at 38.

<sup>83</sup> PAMELA J. JENKINS & BARBARA PARMER DAVIDSON, STOPPING DOMESTIC VIOLENCE: HOW A COMMUNITY CAN PREVENT SPOUSAL ABUSE 61 (2001); Goodmark, *supra* note \_\_\_\_\_, at 77. See also Kate Cavanagh, *Understanding Women’s Responses to Domestic Violence*, 2 QUALITATIVE SOCIAL WORK 229, 232 (2003) (“Conceptions of abused women as passive participants in their own intimate relationships are reflected in these assumptions. However, while such conceptions have been refuted for many years, their explanatory power continues to exert significant influence in practice”).

<sup>84</sup> See *infra* Part \_\_\_\_\_. But see *supra* Part \_\_\_\_\_ (discussing how poor women of color often are viewed as the instigators or perpetrators of violence instead of the victims of violence).

<sup>85</sup> Harrison, *supra* note \_\_\_\_\_, at 130.

<sup>86</sup> Mahoney, *supra* note \_\_\_\_\_, at 38-39.

<sup>87</sup> ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 154 (2000) (“Hard as it is for society to imagine that a woman who is battered is “reasonable,” it is even more difficult to imagine that a women [sic] who is battered could be a good mother.”).

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is believed to be because of learned helplessness rather than because of other rational reasons.<sup>88</sup>

The reality is that there are complex and varied reasons why a victim may opt to stay in a relationship or avoid a criminal justice solution.<sup>89</sup> Evidence suggests that rather than being passive and emotionally damaged, many victims are quite rational, and often exercise agency even under constrained circumstances.<sup>90</sup> Even though many may choose not to end their relationships with their batterers, they still try to end the violence. Qualitative research suggests that many victims eventually try to engage their partners in a dialogue about their abuse in order to confront the violence.<sup>91</sup> During this process, women are very much in tune with their partners' moods in order to gauge the best time to get their partners to "hear" them.<sup>92</sup> Victims evaluate their partners' "use of alcohol, tone of voice, repertoire of gestures and mannerisms."<sup>93</sup> Domestic violence victims are also often quite calculated in their attempts to cajole their partners and to defuse potentially violent moods.<sup>94</sup> When victims find that these strategies do not work, they often employ more challenging responses such as "verbal confrontation; physical confrontation"<sup>95</sup>; leaving the relationship<sup>96</sup>; ejecting him from the house; and telling others about the violence."<sup>97</sup>

The lack of choice that victims have in the resolution of the violence in their lives, therefore, is problematic because it is based on

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<sup>88</sup> Mahoney, *supra* note \_\_\_\_, at 38 ("Significantly, this description explains her continued presence in the relationship, her failure to separate: her emotional paralysis and inability to think clearly are the reasons she cannot think clearly about escape.").

<sup>89</sup> See *infra* note \_\_\_\_.

<sup>90</sup> Cavanagh, *supra* note \_\_\_\_ at 229, 232.

<sup>91</sup> Cavanagh, *supra* note \_\_\_\_ at 238.

<sup>92</sup> Cavanagh, *supra* note \_\_\_\_ at 238..

<sup>93</sup> Cavanagh, *supra* note \_\_\_\_ at 238.

<sup>94</sup> Cavanagh, *supra* note \_\_\_\_ at 238. Examples of such cajoling might include making coffee or tea to keep one's partner in a good mood, acting affectionate and cuddling with one's partner even when the victim did not actually feel such affection, and agreeing with one's partner all of the time in order to keep the peace. Cavanagh, *supra* note \_\_\_\_ at 238.

<sup>95</sup> Victims often either hit their partner first in the hopes of preventing an assault or they hit back after an assault to defend themselves. Cavanagh, *supra* note \_\_\_\_ at 240. These physical confrontations tend to have mixed results. Sometimes it temporarily stops the violence; other times it antagonizes one's partner further. Cavanagh, *supra* note \_\_\_\_ at 240.

<sup>96</sup> Some victims find that temporarily leaving the relationship can sometimes reduce the violence for a period of time. Cavanagh, *supra* note \_\_\_\_ at 241. Many women end up returning to the relationship for a variety of reasons including their feelings for their partner, a desire to make the relationship work, the desires of their children, and their partner's promises to change. Cavanagh, *supra* note \_\_\_\_ at 241. Often these reasons have a cumulative effect on women, which can create a significant amount of pressure. Cavanagh, *supra* note \_\_\_\_ at 241.

<sup>97</sup> Cavanagh, *supra* note \_\_\_\_ at 239.

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the false premise that most, if not all, of them are incapable of making rational decisions. While this paternalistic premise is partially the result of the well-intentioned advocacy of Lenore Walker and other proponents of battered women's syndrome, it is also likely a part of the historical denial of respect and dignity to women.<sup>98</sup> In addition, the fact that the poor and women of color are disproportionately affected by mandatory criminal justice domestic violence policies<sup>99</sup> emphasizes how the intersectionality of race and class with gender can have devastating effects on one's access to privacy.<sup>100</sup> It is important that current criminal justice policies not be a continuation of this systematic and historical disrespect. Furthermore, criminal justice policies should not be just another form of subordination and disrespect that replaces that of one's intimate partner.<sup>101</sup>

## **2. The Anti-Totalitarian Value of Privacy.**

According to Jed Rubenfeld, the goal of privacy doctrine is to protect individuals against the "totalitarian" abuse of state power.<sup>102</sup> It may seem extreme to label the state as abusive in the domestic violence context because the current mandatory criminal justice policies seem to suggest that the legal system is finally taking women's right to be free from violence seriously and that they are making them safer.<sup>103</sup> Even if one accepts that these policies were created with the best of intentions, though, the state's motives are irrelevant. According to Rubenfeld, the right of privacy depends on the "productive or affirmative consequences" of a law.<sup>104</sup> In other words, what is important is the extent to which the laws "occupy and preoccupy"<sup>105</sup> an individual's life. When these laws "operate positively to take over and direct the totality of our lives,"<sup>106</sup> privacy

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<sup>98</sup> See Siegel, *supra* note \_\_\_\_ at 2122 ("Until the late nineteenth century, Anglo-American common law structured marriage to give a husband superiority over his wife in most aspects of the relationship. By law, a husband acquired rights to his wife's person, the value of her paid and unpaid labor, and most property she brought into the marriage.").

<sup>99</sup> See *infra* Part \_\_\_\_.

<sup>100</sup> See Roberts, *supra* note \_\_\_\_ at 1470 ("Poor women of color are especially vulnerable to government control over their decisions").

<sup>101</sup> See Mills, *supra* note \_\_\_\_ at 557 (arguing that mandatory policies have some of the emotionally abusive elements of a violent intimate relationship).

<sup>102</sup> Rubenfeld, *supra* note \_\_\_\_ at 784; see also Roberts, *supra* note \_\_\_\_ at 1468.

<sup>103</sup> But see Mills, *supra* note \_\_\_\_ at 557 (arguing that mandatory policies have some of the emotionally abusive elements of a violent intimate relationship).

<sup>104</sup> Rubenfeld, *supra* note \_\_\_\_ at 784.

<sup>105</sup> Rubenfeld, *supra* note \_\_\_\_ at 784.

<sup>106</sup> Rubenfeld, *supra* note \_\_\_\_ at 787.

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concerns are implicated.<sup>107</sup> As will be discussed in more detail below, current criminal justice policies seriously affect the emotional, psychological, and economic well-being of many domestic violence victims, particularly those who are poor or of color; this fact signals a threat that their lives are “too totally determined by a progressively more normalizing state.”<sup>108</sup>

#### **a. Mandatory Policies and State-Imposed De Facto Divorce**

I will discuss some of the serious negative consequences that can result from mandatory policies below, but one of the more troubling aspects of current criminal justice policies is a practice documented by Jeannie Suk, the “state-imposed de facto divorce.”<sup>109</sup> In Manhattan, the mandatory protocol for domestic violence cases includes arrest and prosecution.<sup>110</sup> In addition, during the defendant’s arraignment, the prosecutor is required to request a temporary protection order from the criminal court that prevents the defendant from contacting the victim or going to her home, even if that is also where he lives.<sup>111</sup> This order is issued regardless of whether the victim wants the protection.<sup>112</sup> In addition, contact with children shared with the victim is banned.<sup>113</sup>

The protective order is a powerful tool because even if a prosecutor would have a hard time prosecuting the underlying domestic violence charge because of the noncooperation of the victim, an arrest and prosecution can easily be made based on evidence of a defendant’s subsequent contact with the victim or presence in the home.<sup>114</sup> The order is considered violated even if the victim was the one to initiate contact,<sup>115</sup> and unannounced home visits by police officers are routine in order to enforce these orders.<sup>116</sup> If a defendant is convicted of domestic abuse, the court can enter a final order of protection for a specified period of time.<sup>117</sup> Even if there is no conviction, a final order of protection may be entered based upon a plea agreement or “an adjournment in contemplation of dismissal, which does not require the defendant’s acknowledgement

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<sup>107</sup>Rubinfeld, *supra* note \_\_\_\_ at 787.

<sup>108</sup>Rubinfeld, *supra* note \_\_\_\_ at 784.

<sup>109</sup>SUK, *supra* note \_\_\_\_ at 42.

<sup>110</sup>SUK, *supra* note \_\_\_\_, at 36-37.

<sup>111</sup>SUK, *supra* note \_\_\_\_, at 37.

<sup>112</sup>SUK, *supra* note \_\_\_\_, at 38.

<sup>113</sup>SUK, *supra* note \_\_\_\_, at 38.

<sup>114</sup>SUK, *supra* note \_\_\_\_, at 38-39.

<sup>115</sup>SUK, *supra* note \_\_\_\_, at 38.

<sup>116</sup>SUK, *supra* note \_\_\_\_, at 38.

<sup>117</sup>SUK, *supra* note \_\_\_\_, at 42.

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of guilt and is 'deemed a nullity' after a year if the defendant has met the conditions specified by the prosecutor."<sup>118</sup> These options are appealing to a defendant who has been in jail since arraignment or to a defendant who does not want to risk jail time because of a conviction.<sup>119</sup> They are also appealing to those defendants who do not want to risk losing their jobs because of the amount of time they would have to spend to attend court appearances adjudicating their charges.<sup>120</sup>

Under the practice of state-imposed de facto divorce, the criminal justice system has moved beyond arrest and prosecution into actually controlling intimate relationships. This fact may not be troubling to many because they equate all domestic violence cases to the Coercive Controlling Violence model of abuse.<sup>121</sup> Under this model, physical violence is part of a larger pattern of control, intimidation, and emotional abuse that the abuser wields over his partner.<sup>122</sup> This type of abuse is frequent and severe and often escalates over time, but not all intimate violence falls under this category.<sup>123</sup> There are circumstances where couples have managed to end the abuse in their relationships.<sup>124</sup> This may particularly be the case with minor acts of violence, which often are the subject of state-imposed de facto divorce in Manhattan because the District Attorney's office defines domestic violence so broadly.<sup>125</sup> This policy, therefore, strongly curtails one's ability to maintain intimate relationships (an ability that the Supreme Court has connected with one's personal fulfillment and self-identification).<sup>126</sup> It also prevents batterers from visiting their children, since criminal courts do not have the jurisdiction to issue orders on visitation or custody.<sup>127</sup> Constitutional challenges to this practice have been unsuccessful.<sup>128</sup>

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<sup>118</sup> SUK, *supra* note \_\_\_, at 42.

<sup>119</sup> SUK, *supra* note \_\_\_, at 42-43.

<sup>120</sup> SUK, *supra* note \_\_\_, at 43.

<sup>121</sup> Bailey, *supra* note \_\_\_, at 1297.

<sup>122</sup> Bailey, *supra* note \_\_\_, at 1297.

<sup>123</sup> Bailey, *supra* note \_\_\_, at 1297.

<sup>124</sup> Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 76-77 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

<sup>125</sup> SUK, *supra* note \_\_\_ at 35-37.

<sup>126</sup> See *supra* Part \_\_\_\_.

<sup>127</sup> SUK, *supra* note \_\_\_, at 44.

<sup>128</sup> See, e.g., *State v. Ross*, No. 35448-5-I, 1996 WL 524116, at \*3-4 (Wash. Ct. App. Sept. 16, 1996) (concluding that the compelling state interest of preventing future domestic violence crimes outweighed the fundamental right to marry).

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The poor and women of color are the most vulnerable to these policies.<sup>129</sup> As Suk notes, “[t]he initial arrest that sets the [criminal justice] wheels in motion is much more likely to occur if people live in close quarters in buildings with thin walls, and neighbors can easily hear a disturbance and call the police...Most people arrested for [domestic violence] in Manhattan are black or Hispanic.”<sup>130</sup> Yes, the initial surveillance may be by one’s neighbors and not by the state, but the ultimate result is the same: the state has greater access to the intimate details of one’s life, which leads to less decisional privacy.<sup>131</sup> Those who are middle-class are more likely to have the privilege of limited accessibility.<sup>132</sup> Thus, a domestic violence victim living in a house in the suburbs with a relative amount of distance from others will be less accessible, and therefore will more likely have more decisional privacy.

#### b. Economic Vulnerability

As illustrated by the previous section, criminal justice intervention is often premised on the notion that the victim must separate from her batterer. Separation, however, can sometimes make a victim economically vulnerable. A domestic violence victim faces a fifty percent chance that her income will fall below the poverty level if she leaves her batterer.<sup>133</sup> Indeed, a significant number of those in the homeless population are domestic violence victims and their children.<sup>134</sup> These vulnerabilities also exist under state-imposed de facto divorce because a criminal court does not have the jurisdiction to issue orders regarding financial support.<sup>135</sup> As a result, victims often receive no support during these separations.<sup>136</sup> Moreover, if convicted, a batterers’ criminal record can also have negative economic consequences for the family because those with convictions often have difficulty finding and maintaining employment.<sup>137</sup> Immigrant abusers who are convicted

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<sup>129</sup> SUK, *supra* note \_\_\_\_, at 45.

<sup>130</sup> SUK, *supra* note \_\_\_\_, at 45.

<sup>131</sup> See *supra* Part \_\_\_\_.

<sup>132</sup> ALLEN, *supra* note \_\_\_\_, at 61.

<sup>133</sup> Lininger, *supra* note \_\_\_\_, at 769.

<sup>134</sup> Mahoney, *supra* note \_\_\_\_ at 62. Ongoing domestic abuse can jeopardize a victim’s employment, and victims often lose their jobs as a direct or indirect result of abuse. Aiken & Goldwasser, *supra* note \_\_\_\_, at 160. A spotty work record and poor credit hinder the ability of some women to get adequate housing. *Id.* at 161.

<sup>135</sup> SUK, *supra* note \_\_\_\_, at 44.

<sup>136</sup> SUK, *supra* note \_\_\_\_, at 44.

<sup>137</sup> DEVAH PAGER & BRUCE WESTERN, INVESTIGATING PRISONER REENTRY: THE IMPACT OF CONVICTION STATUS ON THE EMPLOYMENT PROSPECTS OF YOUNG MEN 4 (2009), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf> . Even a misdemeanor conviction can

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may be subject to deportation, which can be particularly problematic for their partners if they are the main economic providers.<sup>138</sup> Many immigrant women without proper legal counsel also have been deported after pleading guilty in response to a dual arrest.<sup>139</sup>

In addition, those women who publicly disclose their abuse often find that they have difficulty maintaining employment.<sup>140</sup> There have been cases where victims who have chosen to take legal action against their perpetrators have been terminated because they had to miss work to attend court dates and engage in other necessary steps in the criminal justice and safety planning processes.<sup>141</sup> Moreover, there is evidence that some employers terminate employees based on pure prejudice against domestic violence victims.<sup>142</sup> Given the fact that jurisdictions are beginning to allow electronic records on legal actions to become public,<sup>143</sup> it is becoming easier for employers to act on such prejudices: an employer can simply search an individual's name, find out that she was a party to a domestic violence matter, and terminate or refuse to hire her without her even knowing about it.

There have also been cases where landlords have denied housing or evicted domestic violence victims and where insurance companies have denied them coverage based on prejudices.<sup>144</sup> Maintaining housing can be particularly challenging for victims who opt to stay with partners convicted of abuse, since even a misdemeanor can make it difficult to rent an apartment.<sup>145</sup> A misdemeanor can also make one ineligible for public housing for a period of time in some jurisdictions.<sup>146</sup> Those with felonies are ineligible for public housing for five years.<sup>147</sup> In addition, under

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bar eligibility for numerous professional licenses and can affect food stamp eligibility. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. \_\_\_\_ (2012).

<sup>138</sup> Coker, *supra* note \_\_\_\_, at 1048-49.

<sup>139</sup> Coker, *supra* note \_\_\_\_, at 1048-49.

<sup>140</sup> Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 25 FLA. ST. U. L. REV. 669, 677 (2008).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See, e.g., Maryland Judiciary Case Search, [www.casesearch.courts.state.md.us/inquiry/inquiry-index.jsp](http://www.casesearch.courts.state.md.us/inquiry/inquiry-index.jsp) and Missouri Judiciary Case Search, [www.courts.mo.go/casenet](http://www.courts.mo.go/casenet).

<sup>144</sup> Leigh Goodmark, *State, National, and International Legal Initiatives to Address Violence Against Women*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 191, 193-95 (Claire M. Renzetti et al. eds., 2011). In addition, under federal law, individuals may be evicted from public housing if they are “associated” with criminal activity.

<sup>145</sup> Natapoff, *supra* note \_\_\_\_ at \_\_\_\_.

<sup>146</sup> Natapoff, *supra* note \_\_\_\_ at \_\_\_\_.

<sup>147</sup> MICELLE ALEXANDER, *THE NEW JIM CROW : MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 141 (2010).



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federal law, individuals may be evicted from public housing if they are “associated” with criminal activity,<sup>148</sup> which arguably could include a domestic violence victim. There are states that have enacted laws to combat some of these practices, but because statutory language and court interpretations vary, many victims still have to worry about these consequences.<sup>149</sup> For all of these economic reasons, domestic violence victims may feel the need to keep the violence that they experience private.<sup>150</sup>

#### **c. Safety**

Separation can also be particularly dangerous for many domestic violence victims. Martha Mahoney has documented the phenomenon of “separation violence”<sup>151</sup> “At least half of women who leave their abusers are followed and harassed or further attacked by them. In one study of interspousal homicide, more than half of the men who killed their spouses did so when the partners were separated.”<sup>152</sup>

Empirical research suggests that state intervention may create even more danger for some victims. It was originally believed that stricter criminal justice policies would deter future intimate violence,<sup>153</sup> This belief arose from studies conducted by Lawrence Sherman in the 1980's.<sup>154</sup> Replications of these studies, however, suggest that while arrest may deter the violence from those who have something to lose, such as employment, it may actually lead to an increased level of violence for those men who are African-American,

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<sup>148</sup> *Id.* at 144.

<sup>149</sup> *Id.*

<sup>150</sup> Ola W. Barnett, *Why Battered Women Do Not Leave, Part 1: External Inhibiting Factors Within Society*, 1 TRAUMA, VIOLENCE AND ABUSE 343, 347-49 (2000) (citing several studies that show a positive association between a lack of independent income and a woman's inability to leave an abusive relationship); Hee Yun Lee et al., *When Does a Battered Woman Seek Help From the Police? The Role of Battered Women's Functionality*, 25 J. FAM. VIOLENCE 195, 196 (2010) (citing research that has found that “[w]omen who are financially dependent on the perpetrator are also less likely to call [the] police”); Sack, *supra* note \_\_\_\_, at 1734 (arguing that the number one reason women stay with batterers is economic dependence and the most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the economic resources to survive without him).

<sup>151</sup> Mahoney, *supra* note \_\_\_\_, at 63-64.

<sup>152</sup> Mahoney, *supra* note \_\_\_\_, at 63-64.

<sup>153</sup> Bailey, *supra* note \_\_\_\_, at 1292.

<sup>154</sup> Richard A. Berk et al., *Studies: A Bayesian Analysis of the Colorado Springs Spouse Abuse Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 170, 170-71 (1992).

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unemployed, and uneducated.<sup>155</sup> Moreover, even though intimate partner homicides generally have decreased in the past twenty years, one study has found that homicides are fifty percent higher in states that have mandatory laws than in states without these laws.<sup>156</sup> The reason for this increase is not entirely clear,<sup>157</sup> but at the very least these statistics suggest the need for a serious re-evaluation of how these laws affect victims' safety.

#### **d. Loss of Children**

If a woman publicly discloses that she has been abused by her partner, there is a very real risk that she could lose her children. In some cases, police officers have threatened to take a victim's children from her if she makes multiple calls to the police reporting abuse in one evening.<sup>158</sup> In the mid-1990's, Kristian Miccio was one of the first to identify a troubling trend in various jurisdictions, including New York, where women were charged with neglect simply because their children witnessed their abuse.<sup>159</sup> In 2001, a class action was filed in the Eastern District of New York on behalf of all battered mothers and their children who had been separated because there had been abuse in the home.<sup>160</sup> Sharwline Nicholson, the named plaintiff in the case, was the quintessential example of this pattern and practice. At the time of her assault, Nicholson was separated from her infant daughter's father, who lived in South

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<sup>155</sup>*Id.*; see also J. David Hirschel & Ira W. Hutchinson, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 73, 115 (1992); Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 168 (1992).

<sup>156</sup>Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence From Mandatory and Recommended Arrest Laws*, 93 J. OF PUB. ECON 85, 97 (2009).

<sup>157</sup>Iyengar interprets the results from her study as suggesting that victims are less likely to contact the police when faced with mandatory laws. *Id.* "This failure to contact the police results in fewer interventions risking an increased probability of escalating violence." *Id.* She acknowledges, however, that it is an open question as to whether mandatory policies deter less serious violence. *Id.* In addition, to the extent that victims are not contacting the police because they are afraid they will not be adequately protected or because of the threat of dual arrest, she leaves open the possibility that mandatory policies could be more effective with stronger sentences that seriously incapacitate abusers and with more comprehensive police training on how to properly apply the law. *Id.* She also stresses the importance of providing resources to victims so that they are able to leave an abusive relationship. *Id.*

<sup>158</sup>JENKINS & DAVIDSON, *supra* note \_\_\_\_ at 78.

<sup>159</sup>Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the "Protected Child" in Child Neglect Proceedings*, 58 ALB. L. REV. 1087, 1088-90 (1995).

<sup>160</sup>Jill M. Zuccardy, *Nicholson v. Williams: the Case*, 82 DENV. U. L. REV. 655, 661 (2005).

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Carolina.<sup>161</sup> During their actual relationship, this man had never threatened her or physically abused her, but during one of his visits with their child after the relationship ended, he and Nicholson got into an argument and he severely beat her.<sup>162</sup> Her son was at school and her daughter was asleep in another room at the time of the beating.<sup>163</sup> Nicholson called 911, and her abuser left the scene.<sup>164</sup>

Nicholson suffered severe injuries including a broken arm, a concussion, and numerous bleeding wounds throughout her body.<sup>165</sup> Before the ambulance came, she contacted her neighbor and asked her to care for her daughter and to pick up her son from school.<sup>166</sup> Nicholson also provided the police with as much information as she could so that they could catch her abuser.<sup>167</sup>

While Nicholson was in the hospital, the police went to her neighbor's home with guns drawn and seized the children.<sup>168</sup> They called Nicholson and told her that her children could not stay with strangers and that she would have to find a relative to take them.<sup>169</sup> Nicholson called her cousin, who lived in New Jersey, but when the cousin went to the police station to pick up the children, she was told that she could not take the children out of state.<sup>170</sup>

Nicholson received a call from the Administration for Children's Services ("ACS") early the next morning telling her that they had her children and that she would have to go to court to get them back.<sup>171</sup> Against her doctor's advice, she left the hospital immediately to find her children.<sup>172</sup> It took ACS five days to file a petition in court and during that time Nicholson had no idea where her children were.<sup>173</sup> Nicholson was ultimately charged with child neglect for "engaging in domestic violence" when she actually was the victim of her ex-boyfriend's brutal beating.<sup>174</sup> Her children were eventually returned back to her, fourteen days after the family court ordered their return and twenty-one days after the initial

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<sup>161</sup> *Id.* at 657.

<sup>162</sup> *Id.* at 658.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* Apparently, what the police told Nicholson was not even a correct statement of New York law. *Id.*

<sup>170</sup> *Id.* Apparently, this also was not a correct statement of law. *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

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separation.<sup>175</sup> There was evidence that the children suffered abuse and neglect during their time in foster care.<sup>176</sup>

The Nicholson class action represented many other plaintiffs with similarly disturbing stories.<sup>177</sup> One of the plaintiffs was forced to quit her job and to resort to public assistance because she was only allowed to have custody of her children if she agreed to stay in a homeless shelter and the shelter's strict curfew conflicted with her work schedule.<sup>178</sup> The actions and demands of ACS underscore the lack of understanding that the agency had about the complex decisions that domestic violence victims must make. Unsurprisingly, these plaintiffs were primarily poor, women of color.<sup>179</sup>

The Eastern District of New York ultimately held that the systematic removal of battered mothers without adequate investigations as to whether they were actually neglectful was a violation of these mothers' procedural and substantive due process rights.<sup>180</sup> As a result, a preliminary injunction was issued to eliminate this practice.<sup>181</sup>

Dr. Evan Stark's research on the effect of domestic abuse on children was highly influential in the court's decision.<sup>182</sup> While researchers initially believed that exposure to domestic violence creates substantial harm for children, Dr. Stark ultimately found that these studies were methodologically weak.<sup>183</sup> In his subsequent research, Stark found that "the vast majority [of severely abused women] exhibits unimpaired capacities to parent."<sup>184</sup> "Perhaps the most telling findings are that children of battered mothers in battered women shelters reported relatively high and stable scores on their self-concept across time, and exhibited overall adjustment that fell within the range of what is considered normal."<sup>185</sup> In terms of witnessing abuse, over eighty percent of children "retain their overall

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<sup>175</sup> Nicholson, 203 F. Supp. 2d at 172.

<sup>176</sup> *Id.* During a visit with her children, Nicholson witnessed a rash on her daughter's face and yellow pus running from her nose. *Id.* Her son had a swollen eye. *Id.*

<sup>177</sup> *Id.* at 173-93.

<sup>178</sup> *Id.* at 176.

<sup>179</sup> Evan Stark, *Nicholson v. Williams Revisited: When Good People Do Bad Things*, 82 DENV. U. L. REV. 691, 693 (2005).

<sup>180</sup> Nicholson, 203 F. Supp. 2d at 262.

<sup>181</sup> *Id.* at 286-92. After a series of appeals, the case finally ended in settlement. Zuccardy, *supra* note \_\_\_\_, at 670.

<sup>182</sup> Nicholson, 203 F. Supp. 2d at 198.

<sup>183</sup> Stark, *supra* note \_\_\_\_, at 698.

<sup>184</sup> Evan Stark, *The Battered Mother in the Child Protective Service Caseload*, 23 WOMEN'S RIGHTS LAW REPORTER 107, 111 (2002). Ninety-eight percent were emotionally available to their children, ninety-one percent continued to value parenting, and ninety-one percent provided appropriate supervision and discipline. *Id.*

<sup>185</sup> *Id.* at 111-12.

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psychological integrity.”<sup>186</sup> Over seventy percent of children in a violent home become normal functioning parents.<sup>187</sup> In other words, many abused women are good mothers who just happen to be in bad circumstances and who parent children who ultimately become well-adjusted, functioning adults. Furthermore, as was the case for Nicholson’s children, removing a child from her abused mother and placing her in foster care can often result in even more harm.<sup>188</sup>

Perhaps the *Nicholson* case will lead to a sea-change in the way that battered women are viewed as mothers. There is evidence that ACS did dramatically reduce the number of mothers cited for neglect simply because they were abused.<sup>189</sup> The reality is, however, that not all New York judges liked the *Nicholson* opinion.<sup>190</sup> For this reason, it is not clear how many abused women are still being punished based on pretextual grounds.<sup>191</sup> It remains to be seen whether abused mothers can fully trust the system to understand the complexity of their situations and to not punish them as mothers simply because they have been abused.

#### **e. The Stigmatic Nature of the Criminal Justice System**

Even when engaging with well-informed legal actors who have the best of intentions, criminal prosecutions are simply not pleasant. Regardless of how the general public perceives domestic violence victims, it is not a good thing to be associated with the criminal justice system—in any way, shape, or form. First, the victim has to retell her story over and over again to the police, the prosecutor, the judge, and anyone else who is charged with helping her case. Many victims may find this process particularly difficult because they must relive the violent experience again and again, and the adversarial nature of the prosecution process emphasizes their role as the victim when they may not view themselves in such a light.<sup>192</sup> Second, the victim has to confront her abuser in a public forum and to put the abuse on the public record. Even if the victim is not fearful of her batterer, it is still difficult to confront someone who she still may love and with whom she shares a history (and probably

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<sup>186</sup> *Id.* at 116.

<sup>187</sup> *Id.* at 117.

<sup>188</sup> *Id.* at 119.

<sup>189</sup> Stark, *supra* note \_\_\_\_\_, at 718.

<sup>190</sup> Zuccardy, *supra* note \_\_\_\_\_, at 670.

<sup>191</sup> Stark, *supra* note \_\_\_\_\_, at 719.

<sup>192</sup> See Mahoney, *supra* note \_\_\_\_\_, at 10-19 (arguing that most victims of domestic violence do not view themselves as “battered women” because of the negative stereotypes associated with victimization that are not consistent with victims viewing their experiences as periodic episodes of violence in otherwise normal intimate relationships).

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children). Furthermore, documenting the abuse on the public record stigmatizes the batterer because he is marked as a criminal. As already discussed, the conviction of the batterer has negative social and economic consequences for the entire family.<sup>193</sup>

Some women, especially those involved in extremely violent relationships, are willing to engage in this difficult process because they believe that it is the only way to stop the violence in their lives. Indeed, fear of serious injury or death is often an impetus for women to seek a criminal justice response to the violence.<sup>194</sup> But the stigmatizing public nature of the criminal justice system also causes some women to avoid arrest and prosecution altogether.

Thus, mandatory policies really do threaten to take over and direct the totality of many victims' lives. State-imposed de facto divorce literally breaks up intimate relationships and families that some victims may think are worth salvaging for their own personal fulfillment and self-identification. Criminal justice intervention has also led to many good mothers losing custody of their children. Even if others do not agree with these women's choices in intimate partners, we should always closely scrutinize the circumstances under which the state chooses to aggressively reorder a family's structure. Mandatory policies also make many victims economically vulnerable, unsafe, and subject to all of the stigmatic, social, and economic harm that derives from association with the criminal justice system in general. These facts suggest that although it is important to recognize the public aspects of domestic violence, it is just as important to recognize that it has private aspects as well.

## **IV. THE PRIVATE AND PUBLIC ASPECTS OF DOMESTIC VIOLENCE**

One of the reasons that domestic violence victims may be experiencing less privacy is that the privacy right as presented in *Roe* is arguably theoretically inconsistent with the notion that the state has an obligation to protect women. It is interesting to note that at the same time that feminists and activists in the women's liberation movement were highlighting how privacy undermined the safety of women in the home, the Supreme Court was using privacy to secure

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<sup>193</sup> See note \_\_\_\_ and accompanying text.

<sup>194</sup> HILLARY POTTER, BATTLE CRIES: BLACK WOMEN & INTIMATE PARTNER ABUSE 145 (2008); see also Lee, *supra* note \_\_\_\_, at 196 (citing research that found that the "more severe and the more frequent the abuse, the more likely women call the police").

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the rights of contraception use and abortion. Activists in the women's movement were quite involved in the reproductive rights cases, but apparently the two movements did not share or compare legal strategies; it was not until after *Roe* that anti-domestic-violence activists saw any potential theoretical inconsistency that the case created<sup>195</sup> and criticism internal to the movement began to emerge.<sup>196</sup>

Catharine MacKinnon argued that the concept of privacy is dangerous for women because the Court treats privacy as a negative right, or a right to be free from governmental intrusion.<sup>197</sup> Under this view of privacy, the government has no affirmative duty to protect an individual's rights. With respect to domestic violence, men's right to be left alone in their homes historically meant that their partners could be beaten without governmental intrusion.

This negative view of the privacy right, however, is also problematic for MacKinnon with respect to rights that purportedly are for the benefit of women. For example, while the Court has recognized a privacy right that allows a woman to choose whether to have an abortion,<sup>198</sup> it has refused to obligate the government to pay for her abortion<sup>199</sup>. In other words, while the government must leave women alone in making the decision whether to have an abortion, it is not required to foster the conditions to make that choice easier.<sup>200</sup> Thus, with respect to abortion, the Court has reinforced the public/private dichotomy that feminists have so vehemently critiqued.<sup>201</sup>

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<sup>195</sup> RAMBO, *supra* note \_\_\_\_, at 91.

<sup>196</sup> RAMBO, *supra* note \_\_\_\_, at 87-89.

<sup>197</sup> MACKINNON, *supra* note \_\_\_\_ at 184-194; *see also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385-86 (1985) (arguing that it would be easier to justify public funding for abortions had the Supreme Court based abortion rights on sex equality grounds and not on patient-physician autonomy). It should be noted that in the years preceding *Roe* some feminist activists defined privacy more expansively as an affirmative right to bodily integrity and autonomy instead of the negative right that the Court ultimately adopted. RAMBO, *supra* note \_\_\_\_ at 89-90.

<sup>198</sup> *Roe*, 410 U.S. at 153.

<sup>199</sup> *Harris v. McRae*, 448 U.S. 297 ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."),

<sup>200</sup> *Harris*, 448 U.S. at 316 ("[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation.")

<sup>201</sup> *See supra* Part \_\_\_\_.

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According to MacKinnon, the problem with this view is that it presumes that there is equality in the private sphere.<sup>202</sup> With respect to reproductive control, however, she does not view women as being equal to men.<sup>203</sup> Furthermore, MacKinnon argues that reproductive control is necessarily affected by the public sphere in the form of “social learning, lack of information, social pressure, custom, poverty and enforced economic dependence, sexual force, and ineffective enforcement of laws against sexual assault.”<sup>204</sup> Yet, when privacy is treated as a negative right, the state has no obligation to intervene and to address these inequalities that exist in the so-called private sphere.<sup>205</sup> If a woman cannot afford an abortion, MacKinnon argues, she does not have a true choice when it comes to reproductive control, which is essential for sex equality.<sup>206</sup>

As a result, MacKinnon argues that this “is why feminism has had to explode the private . . . . Feminism confronts the fact that women have no privacy to lose or to guarantee . . . . To confront the fact that women have no privacy is to confront the intimate degradation of women as the public order.”<sup>207</sup> To MacKinnon, the “right to privacy is a right of men ‘to be let alone’ to oppress women one at a time.”<sup>208</sup>

MacKinnon is correct that decisional privacy does not mean anything if an individual does not have adequate choices available to

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<sup>202</sup> MACKINNON, *supra* note \_\_\_\_, at 194 (“Privacy law assumes women are equal to men in there. Through this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape, and women’s exploited domestic labor. It has preserved the central institutions whereby women are deprived of identity, autonomy, control, and self-definition.”). *But see* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991) (arguing that for members of racially subordinated groups the home may “function as a safe haven from the indignities of life in a racist society”); Roberts, *supra* note \_\_\_\_ at 1470-71 (arguing that the private sphere can often be a place of solace from racial oppression for many women of color and that “the imminent danger faced by poor women of color comes from the public sphere, not the private”).

<sup>203</sup> MACKINNON, *supra* note \_\_\_\_ at 184-86.

<sup>204</sup> MACKINNON, *supra* note \_\_\_\_ at 246.

<sup>205</sup> MACKINNON, *supra* note \_\_\_\_, at 194 (“Privacy law assumes women are equal to men in there. Through this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape, and women’s exploited domestic labor. It has preserved the central institutions whereby women are deprived of identity, autonomy, control, and self-definition.”). *But see* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991) (arguing that for members of racially subordinated groups the home may “function as a safe haven from the indignities of life in a racist society”); Roberts, *supra* note \_\_\_\_ at 1470-71 (arguing that the private sphere can often be a place of solace from racial oppression for many women of color and that “the imminent danger faced by poor women of color comes from the public sphere, not the private”).

<sup>206</sup> MACKINNON, *supra* note \_\_\_\_ at 191-93, 246.

<sup>207</sup> MACKINNON, *supra* note \_\_\_\_ at 191.

<sup>208</sup> MACKINNON, *supra* note \_\_\_\_ at 194.



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her. These choices are necessarily affected by the public sphere, which relates to the key feminist insight that the personal is political. If a victim chooses to get a protective order against her batterer, the order cannot be effective without a state that enforces it.<sup>209</sup> If a victim chooses to involve the criminal justice system, this solution cannot be effective if the police ignore her calls for help or if prosecutors ignore her desire to pursue prosecution. Furthermore, many victims will feel trapped in a violent relationship because inequities in the public sphere make it infeasible to leave the relationship; as long as they are unable to find economic empowerment in the public sphere, many victims feel that they have no choice but to stay in a violent home.<sup>210</sup> Finally, in order to protect their children, domestic violence victims need a state system that understands that a woman can be both a victim of domestic violence and a good mother at the same time.

Yet, when the government does take affirmative steps to provide some individuals with material support, it is often the case that it already explodes the private. For example, when welfare programs were first created in the United States, many mothers had to comply with “standards of sexual and reproductive” behavior in order to receive payments from many states.<sup>211</sup> Many women must currently participate in mandatory paternity proceedings that scrutinize their intimate lives in order to be entitled to receive welfare benefits.<sup>212</sup> The Supreme Court has also limited welfare recipients’ entitlement to Fourth Amendment protection by holding that they may be subject to warrantless home visits by state actors.<sup>213</sup> Because of their dependence on the state, poor families and families of color are also more likely to be exposed to the child protection system.<sup>214</sup>

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<sup>209</sup> See Aiken & Goldwater, *supra* note \_\_\_\_\_, at 153-54 (noting very few arrest rates for violations of protective orders).

<sup>210</sup> Bailey, *supra* note \_\_\_\_\_, at 1281-88.

<sup>211</sup> Dorothy Roberts, *In the Context of Welfare and Reproductive Rights*, 72 DENV. U. L. REV. 931, 941 (1995). For example, eligibility for Aid to Dependent Children was based on “suitable-home or ‘man-in-the-house’ rules.” *Id.* at 942; see also Janet Simmonds, Note, *Coercion in California: Eugenics Reconstituted in Welfare Reform, the Contracting of Reproductive Capacity, and Terms of Probation*, 17 HASTINGS WOMEN’S L. J. 269, 276-281 (2006) (arguing that family cap programs that limit the receipt of welfare benefits to a certain number of children in several states is a type of social control that infringes on women’s reproductive rights); Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 125 (2002) (arguing that “welfare policy has become a prominent site of sexual regulation” and that “the rights of poor single mothers are at stake”).

<sup>212</sup> Smith, *supra* note \_\_\_\_\_, at 123.

<sup>213</sup> *Wyman v. James*, 400 U.S. 309, 326 (1971).

<sup>214</sup> Dorothy Roberts, *The Dialectic of Privacy and Punishment in the Gendered Regulation of Parenting*, 5 STAN. J. CR. R. & C. L. 191, 194 (2009) (“In Chicago, most child protection cases are clustered in a few zip code areas, which are almost exclusively African-American.

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Furthermore, pregnant women who have to use public assistance to pay for their prenatal care must undergo intrusive questioning about their nutrition and finances, whether their child is wanted, their history of parenting, their immigration status, whether they have engaged in criminal activities to support themselves, and their contraceptive strategies to prevent future births.<sup>215</sup>

Interestingly, families that meet the middle-class, heterosexual nuclear family norm do receive subsidies from the government as well as respect for their privacy.<sup>216</sup> These subsidies come in the form of Federal Housing Authority or Veterans Affairs loans at below market interest rates, employer subsidized health and life insurance, and tax deductions for the interest paid on home mortgage loans.<sup>217</sup> It is only in the context of those who do not fit the nuclear family norm, including single mothers and the poor, that American culture finds it paradoxical to provide governmental support while still protecting one's privacy.<sup>218</sup> This history of governmental intrusion in subordinated groups' lives is the reason why some African-American feminist scholars challenge Catharine MacKinnon's view that privacy is a problematic concept for all women.<sup>219</sup> Oppressed people need more privacy, not less, in order to protect them from a state that historically has been overly intrusive.

Some feminist scholars have advocated for a more "positive" view of privacy. This view recognizes that the public and private spheres are interrelated and acknowledges that it is important for the government to provide individuals with some privacy, even when it chooses to provide affirmative measures to maintain equality in the

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The overrepresentation of black children in the foster care population, then, represents massive state supervision and dissolution of families concentrated in black neighborhoods."); see also Annette Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J. L. REFORM 683, 770 (2001). As is the case with domestic violence criminal justice policies, child welfare policies probably originate from a legitimate and benign motivation, but they result in overreaching in the populations most vulnerable to privacy loss: the poor and people of color.

<sup>215</sup> Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J. OF L. & GENDER 113, 118-34 (2011).

<sup>216</sup> MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY* 191 (1995).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> But see Crenshaw, *supra* note \_\_\_\_, at 1257 (arguing that for members of racially subordinated groups the home may "function as a safe haven from the indignities of life in a racist society"); Roberts, *supra* note \_\_\_\_, at 1470-71 (arguing that the private sphere can often be a place of solace from racial oppression for many women of color and that "the imminent danger faced by poor women of color comes from the public sphere, not the private").

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private sphere.<sup>220</sup> In the domestic violence context, Elizabeth Schneider has argued for an affirmative right of privacy “that is grounded on equality, and is viewed as an aspect of autonomy that protects bodily integrity and makes abuse impermissible.”<sup>221</sup> Drawing upon Justice Douglas’s concurring opinion in *Roe v. Wade*, she notes the importance in linking women’s privacy rights to liberty, rather than being limited by the narrow vision of privacy that is implied in some Supreme Court jurisprudence.<sup>222</sup> Instead of simply providing a passive right to just be left alone, liberty underscores the importance of autonomy, self-determination, and self-expression.<sup>223</sup> Liberty creates a right to be free from violence, and therefore, the state is no longer justified in failing to protect women.<sup>224</sup>

Dorothy Roberts acknowledges that the “definition of privacy as a purely negative right serves to exempt the state from any obligation to ensure the social conditions and resources necessary for self-determination and autonomous decision-making.”<sup>225</sup> Instead of heeding Catharine MacKinnon’s call to explode the private, however, she advocates for “an affirmative guarantee of personhood and autonomy.”<sup>226</sup> As an example, she argues that because African-American women historically have been devalued as mothers, the prosecution of African-American drug addicted mothers continues the racist governmental practice of infringing on African-American women’s right to decisional privacy with respect to bearing children.<sup>227</sup> Furthermore, because African-American women historically have been the recipients of inadequate health care, African-American drug addicted mothers are entitled to governmentally provided drug treatment and prenatal care.<sup>228</sup> Under this view, acknowledging these women’s right to decisional privacy does not negate the government’s obligation to foster the conditions for racial, gender, and class equality.

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<sup>220</sup> See Roberts, *supra* note \_\_\_\_, at 1478. Elizabeth Schneider, *The Violence of Privacy*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 36, 53 (Martha Alberston Fineman & Roxanne Mykitiuk eds., 1994).

<sup>221</sup> Schneider, *supra* note \_\_\_\_ at 36, 53.

<sup>222</sup> *Id.* at 52.

<sup>223</sup> *Id.* Justice Kennedy echoed this sentiment in *Lawrence*. *Lawrence*, 539 U.S. at 562 (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate contact”).

<sup>224</sup> Schneider, *supra* note \_\_\_\_, at 53. See also RAMBO, *supra* note \_\_\_\_ at 212-221 (advocating for an affirmative right of privacy based on autonomy and bodily integrity that would ensure state protection for domestic violence victims).

<sup>225</sup> Roberts, *supra* note \_\_\_\_, at 1478.

<sup>226</sup> Roberts, *supra* note \_\_\_\_, at 1479.

<sup>227</sup> Roberts, *supra* note \_\_\_\_, at 1471.

<sup>228</sup> Roberts, *supra* note \_\_\_\_, at 1477-80.

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When one acknowledges the interrelatedness of the public and private spheres, these scholars demonstrate that it is not theoretically inconsistent to expect the state to protect women from violence in their homes while recognizing that they are entitled to some privacy. Furthermore, it is not necessary for the Supreme Court to constitutionalize this perspective in order for legislatures and policymakers to provide these protections. According to the present Court, victims of private violence do not have a constitutional right to affirmative protection from the state.<sup>229</sup> Nevertheless, state legislatures have still chosen to enact domestic violence criminal justice policies that encourage this type of protection.

Similarly, constitutional law in its present state does not provide a right to privacy that precludes the criminal justice system from intervening in domestic violence matters every time that the victim wishes. *Lawrence v. Texas* makes it clear that the state can define the meaning of a relationship or set its boundaries if someone is injured or if there is an “abuse of an institution the law protects.”<sup>230</sup> In other words, regulating domestic violence through the criminal justice system is well within the state’s domain. Even if I am not able to persuade the Supreme Court to create a constitutional privacy right for domestic violence victims, however, it is my hope that I can persuade policymakers and legislators to rethink current mandatory criminal justice policies based on normative constitutional privacy principles.<sup>231</sup> The following Section will discuss some initial steps that they could take toward such criminal justice reform.

## V. WHAT’S NEXT?

A criminal justice solution to domestic violence is a complicated proposition for domestic violence victims. The purpose of this Article is to make the case that mandatory criminal justice policies in particular implicate privacy concerns; this fact is something of grave concern, and policymakers, feminist activists, and victims’ advocates should acknowledge and address it.

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<sup>229</sup> *Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (holding that there is no procedural due process right to the enforcement of a protective order); *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189, 196-97 (1989) (holding that there is not a substantive due process right to protection from private violence).

<sup>230</sup> *Lawrence*, 539 U.S. at 567.

<sup>231</sup> See Roberts, *supra* note \_\_\_, at 1426 (asserting that her constitutional arguments “might be directed more fruitfully to legislatures than to courts”); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 717 (1990) (characterizing progressive interpretations of the constitutional guarantees of liberty and equality as “political ideals to guide legislations, rather than as legal restraints on legislations”).

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Abolishing mandatory policies without thinking carefully about the appropriate alternatives, however, would be a mistake. While a complete and thoughtful discussion regarding what these alternatives should be is beyond the scope of this Article, I think it is important that policymakers recognize that it may be possible to make the criminal justice system more effective without imposing mandatory policies; the fact that there is a potential line-drawing problem in determining when the state should intervene in a violent relationship is not an excuse to take victims' privacy less seriously. In addition, a grassroots approach to domestic violence must work in conjunction with a criminal justice solution in order to help a greater number of victims.

#### **A. A Criminal Justice System Without Mandatory Policies.**

Given that the determination of whether there is probable cause of domestic abuse involves discretion, there is some evidence that some police officers are nonresponsive even under mandatory policies.<sup>232</sup> For this reason, I acknowledge that many police officers still may not take domestic violence seriously. In that case, a discretionary policy that focuses more on the wishes of the victim regarding arrest and prosecution could create the risk that the criminal justice system will become nonresponsive to domestic violence victims just as it was a few decades ago. Since societal views in general have changed regarding this issue, however, I am hopeful that most officers do feel that they have a role in keeping women safe from abusive partners.<sup>233</sup>

The tougher problem is that success in our current criminal justice system is measured by the number of arrests, prosecutions, and convictions that are executed.<sup>234</sup> Without mandatory policies, the police may get tired of making repeat visits to the same home with no resulting arrests or prosecutions to show for their efforts.<sup>235</sup> There are two potential solutions to this particular issue. The first would require a radical transformation of the criminal justice system. Instead of success being measured on a retributive basis, goals such as rehabilitation and restorative justice would become more prominent.<sup>236</sup> With these goals in mind, success would not be

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<sup>232</sup> Sack, *supra* note \_\_\_, at 1696.

<sup>233</sup> *But see* Bailey, *supra* note \_\_\_ at 1279 (discussing evidence that a significant of police officers may themselves be batterers).

<sup>234</sup> PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 93-94, 116-18 (2009).

<sup>235</sup> Bailey, *supra* note \_\_\_ at 1272-73.

<sup>236</sup> Thus far empirical studies suggest that batterer intervention programs that focus on rehabilitating the batterer have had limited effectiveness. Melissa Labriola et al., *Do*

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measured by the number of arrests and prosecutions that are made against batterers each year. It would be measured by whether a particular arrest kept a woman safe in that moment, by whether a batterer could change his behavior, and by how many families were able to move past the violence and remain intact. Like many other scholars,<sup>237</sup> I believe a move away from the intensively retributivist focus of our current criminal justice system would be a good thing in general, not solely in the domestic violence context. I am not convinced that the conservatization<sup>238</sup> of our criminal justice system over the past few decades has made our society safer,<sup>239</sup> and in many ways I think that these policies have actually harmed certain communities.<sup>240</sup>

Nevertheless, I am a realist. For this reason, I do not think that the retributivist focus of the American criminal justice system is going to change any time soon. A more realistic approach would be to make the criminal justice system more appealing to more victims by addressing some of the reasons why they choose to not engage with it.<sup>241</sup> Some of these reasons are beyond the scope of the criminal justice system, as they are rooted in the social, political, and economic structure of our country.<sup>242</sup> Yet, some jurisdictions have made successful attempts at addressing other reasons.

Not understanding the complexity of the dynamics of domestic violence, the police and prosecutors often get frustrated and impatient when victims seem hesitant to follow through with the prosecutions of their batterers.<sup>243</sup> As a result, they sometimes make

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*Batterer Programs Reduce Recidivism? Results from a Randomized Trial in the Bronx*, 25 JUST. QUARTERLY 252, 279 (2008). Some stress, however, that even a small reduction in recidivism could translate to eliminating violence for thousands of women. Larry W. Bennett et al., *Partner Completion and Re-Arrest in a Batterer Intervention System*, 17 RESEARCH ON SOCIAL WORK PRACTICE 42, 42 (2007); George L. Stuart et al., *Improving Batterer Intervention Programs Through Theory-Based Research*, 298 JAMA 560, 561 (2007). Others blame these programs' limited effectiveness on their "one-size-fits all" nature and suggest a more targeted approach that moves beyond the feminist and cognitive behavioral therapy models and that considers the different backgrounds of batterers. Stuart, *supra* note \_\_\_\_, at 560-61; see also Beth S. Catlett et al., *Men's Gendered Constructions of Intimate Partner Violence as Predictors of Court-Mandated Batterer Treatment Drop Out*, 45 AM. J. COMMUNITY PSYCH. 107, 121 (2010).

<sup>237</sup> See, e.g., BUTLER, *supra* note \_\_\_\_ at 23-40; Gruber, *supra* note \_\_\_\_ at 818-819.

<sup>238</sup> By using the term "conservatism" I do not mean to suggest that "war on crime" political rhetoric belongs solely to conservative or Republican politicians. Instead, it refers more generally to the shift toward retributivist type goals within criminal justice policies. This focus has been embraced by both political parties. Bailey, *supra* note \_\_\_\_ at 1266-68.

<sup>239</sup> See Richard A. O'Connell Jr., *Steady Decline in Major Crime Baffles Experts*, N.Y. TIMES, May 23, 2011, at A1.

<sup>240</sup> See BUTLER, *supra* note \_\_\_\_, at 137-40, 229-33.

<sup>241</sup> Bailey, *supra* note \_\_\_\_, at 1276-1280.

<sup>242</sup> Bailey, *supra* note \_\_\_\_, at 1280-1293.

<sup>243</sup> BUZAWA & BUZAWA, *supra* note \_\_\_\_, at 189.

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victims “prove” that they are serious about pursuing prosecution by creating additional procedural hurdles.<sup>244</sup> It has also been documented that the police often do not believe a victim’s claim of abuse.<sup>245</sup> Instead, they believe the victim is trying to manipulate the system, such as trying to get more child support from the partner.<sup>246</sup> Women of color particularly face skepticism from the police because bruises are more difficult to see on dark skin.<sup>247</sup> In addition, many African-American women tend to defend themselves from physical abuse by fighting back.<sup>248</sup> Instead of getting the protection that they seek,<sup>249</sup> this defensive behavior often leads to the victims being arrested themselves under dual-arrest policies.<sup>250</sup> For all of these reasons, victims often make the calculated choice not to engage with the state because they cannot rely upon it for protection.<sup>251</sup> To address these problems, some cities have worked to better educate legal actors about domestic violence victims in order to improve their experience with the criminal justice system.<sup>252</sup>

It also has been documented that many victims stop cooperating with the criminal justice system because they are not adequately informed about what to expect with respect to the prosecution process.<sup>253</sup> They have unrealistic expectations about how long the process takes,<sup>254</sup> or they are not confident that they are going to be adequately protected by the legal system<sup>255</sup>. In response, some jurisdictions work more closely with the victims to make sure that they are better informed about the prosecution process.<sup>256</sup>

In addition, some jurisdictions have implemented a coordinated community response approach. For those victims who

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<sup>244</sup> BUZAWA & BUZAWA, *supra* note \_\_\_\_, at 189. .

<sup>245</sup> POTTER, *supra* note \_\_\_\_ at 177.

<sup>246</sup> POTTER, *supra* note \_\_\_\_ at 177.

<sup>247</sup> POTTER, *supra* note \_\_\_\_ at 178.

<sup>248</sup> POTTER, *supra* note \_\_\_\_ at 47.

<sup>249</sup> Bailey, *supra* note \_\_\_\_, at 1289.

<sup>250</sup> Under dual-arrest policies, which many jurisdictions have, a police officer may make an arrest of both parties if they cannot determine who caused a domestic dispute. *See* Bailey, *supra* note \_\_\_\_, at 1289.

<sup>251</sup> Bailey, *supra* note \_\_\_\_, at 1289. *See also* Lisa R. Pruitt, *Place Matters: Domestic Violence and Rural Differences*, 23 WIS. J. OF L., GENDER, & SOC’Y 349, 378-86 (2008) (describing the negative attitudes that victims living in rural areas experience from legal actors).

<sup>252</sup> Hanna, *supra* note \_\_\_\_, at 1893.

<sup>253</sup> BUZAWA & BUZAWA, *supra* note \_\_\_\_, at 189.

<sup>254</sup> BUZAWA & BUZAWA, *supra* note \_\_\_\_, at 189.

<sup>255</sup> OFFICE JUST. PROGRAMS, U.S. DEP’T JUST., DOMESTIC VIOLENCE RESEARCH: SUMMARIES FOR JUSTICE PROFESSIONALS 13 (Barbara E. Smith ed., 2003) (summarizing JOANNE BELKNAP ET AL., FACTORS RELATED TO DOMESTIC VIOLENCE COURT DISPOSITIONS IN A LARGE URBAN AREA (2000)), *available at* <http://www.ncjrs.gov/pdffiles1/nij/202564.pdf>.

<sup>256</sup> Bailey, *supra* note \_\_\_\_, at 1294.

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are hesitant to engage with the criminal justice system because of limited access to material resources, some jurisdictions provide victims with immediate access to support services in the community during the intake process.<sup>257</sup> Some jurisdictions also make it easier to obtain access to civil attorneys to help with protective orders, divorce, and child custody and support issues.<sup>258</sup>

There have also been attempts by some jurisdictions to improve their ability to adequately protect victims. In Brooklyn, high-risk victims are given cell phones with speed dial to 911.<sup>259</sup> Some victims also are given pendants that are connected through the security company ADT.<sup>260</sup> In Washington, D.C., courtrooms dedicated to domestic violence cases are staffed with several security guards.<sup>261</sup> Whether these measures are actually keeping victims safer is not clear, but at least they are a step in the right direction and an attempt to address some of the safety issues that these victims face. As jurisdictions try these different approaches, they will be able to determine what works and what does not; victims who desire criminal justice intervention can then have more confidence that the state takes their safety seriously.<sup>262</sup>

Jurisdictions that have implemented a coordinated community response have higher participation rates from domestic violence victims.<sup>263</sup> These statistics suggest that changing the views of legal actors toward domestic violence victims and addressing some of the practical obstacles that some victims face encourages them to engage more with the criminal justice system. Perhaps if criminal justice actors saw more cooperation from domestic violence victims, even if not from all of them, they would be more willing to be responsive to these victims' desires without the need for mandatory policies that force them to be responsive.

Finally, while there may be victims who neither need nor want help from the criminal justice system, it may be the case that

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<sup>257</sup> Bailey, *supra* note \_\_\_\_, at 1294.

<sup>258</sup> Bailey, *supra* note \_\_\_\_, at 1294.

<sup>259</sup> Bailey, *supra* note \_\_\_\_, at 1295.

<sup>260</sup> Bailey, *supra* note \_\_\_\_, at 1294.

<sup>261</sup> EMILY SACK, CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES 55 (Lindsey Anderson et al. eds., (2002)).

<sup>262</sup> It may be the case that in some cases safety will not be a victim's number one priority. *See supra* Part \_\_\_\_ for a discussion about how the state might balance its own interest in victim safety with the decisional privacy of victims.

<sup>263</sup> Bailey, *supra* note \_\_\_\_, at 1295. It is possible, however, that these programs are most successful for high-risk victims who are in extreme danger and that they may not have the same success rates for less severe cases. Bailey, *supra* note \_\_\_\_, at 1296. Further research also is needed to ensure that these programs are not still coercing victims in ways that undermine their satisfaction with the criminal justice system. Bailey, *supra* note \_\_\_\_, at 1296.



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there are women who do need and want help, but they do not ask for it because they fear losing control over their situations and becoming subject to greater state scrutiny.<sup>264</sup> For example, perhaps a victim may be successful in stopping a violent episode by calling the police, but she would not want to take any further action against her batterer. Current policies would not allow her to make that type of choice. If a victim's violence is exposed to the criminal justice system by someone else, she may deny the abuse in order to stymie the prosecution process. If she knew, however, that she could choose not to prosecute even if she admits the abuse, the criminal justice system could at least potentially provide a gateway to social services that she may actually desire. There may also be victims who are wary of seeking informal support from family or friends out of a legitimate fear that they will then be pressured to engage with the state. We must make sure that there are not victims who might otherwise seek help if they knew that they would have a say in how the violence they experience is ultimately handled.

#### **B. When Should the Victim Have a Choice: A Line-Drawing Problem.**

To be clear, I am not arguing that victims should always dictate whether a prosecutor proceeds with a prosecution against a batterer. The criminal justice system works on behalf of the entire community, not just the victim.<sup>265</sup> The state, as a representative of the community, certainly does have an interest in keeping women safe in their homes. For this reason, there may be occasions when it is appropriate for the state to proceed with a prosecution regardless of the wishes of the victim.<sup>266</sup> For example, evidence suggests that incarceration is the only way to keep victims and society at large safe from chronic, seriously violent abusers.<sup>267</sup> For these types of abusers it may make sense to disregard the wishes of the victim out of concern for victim and public safety, as long as the state is willing to take on the responsibility of protecting both through serious incapacitation.<sup>268</sup> In addition, the state may need to intervene when

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<sup>264</sup> Iyengar, *supra* note \_\_\_\_ at 97.

<sup>265</sup> Bailey, *supra* note \_\_\_\_ at 1257.

<sup>266</sup> Bailey, *supra* note \_\_\_\_ at 1273-74; *see also* Lawrence, 539 U.S. at 567 (asserting that the state can define the meaning of a relationship or set its boundaries if someone is injured or if there is an "abuse of an institution the law protects").

<sup>267</sup> Bailey, *supra* note \_\_\_\_ at 1273.

<sup>268</sup> Unfortunately, batterers currently usually serve little or no jail time. Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1508, 1521-22 (1998).

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children in the home are being harmed since protecting the safety of these children is also in the state's interest.

Yet as I have already argued, many victims do not suffer serious violence, and state intervention may actually put some in more danger.<sup>269</sup> In addition, some evidence suggests that many children of domestic violence victims do not suffer serious physical or long-term emotional harm.<sup>270</sup> It is on behalf of *these* victims that I hope to make the following point: because of the special nature of intimate relationships, there are benefits to conferring additional decisional privacy, and therefore respecting the wishes of most victims. I acknowledge that there is a line-drawing problem in determining when the state's interest in victim safety should outweigh a victim's decisional privacy. In fact, some may even argue that mandatory policies strike the perfect balance because they at least provide better assurance that the criminal justice system is responsive to those victims who need it; those women who do not want to engage with the system simply will not call the police. As already discussed, however, there is a racial and socio-economic disparity with respect to who can actually choose to engage with the criminal justice system.<sup>271</sup> A policy that provides privacy only to whites or the middle-class and well-to-do is indefensible, immoral, and unacceptable.

That it is not an easy task to determine in which cases the state should intervene is not reason enough to ignore the importance of privacy in domestic violence victims' lives. With respect to determining the seriousness of the physical harm to the victim, there have been attempts to use lethality experts to predict serious and escalating violence in a relationship.<sup>272</sup> This type of work could be a starting point in determining when the state's interest in safety should trump a victim's desires. This interest is only valid, however, if the

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<sup>269</sup> See *infra* Part \_\_\_\_.

<sup>270</sup> See *infra* Part \_\_\_\_.

<sup>271</sup> See *infra* Part \_\_\_\_.

<sup>272</sup> For example, the Target Abuser Call program in Chicago focuses on high-risk misdemeanor cases and focuses on risk factors such as strangulation, resisting arrest, violation of orders of protection, whether the victim has indicated she wants to end the relationship, public incidents of violence, and stressors such as the offender's job status. Kimberly D. Bailey, *The Aftermath of Crawford and Davis: Deconstructing the Sound of Silence*, 2009 BYU L. REV. 1, 50 (2009). A lethality screen is also used by police departments in other states, including Maryland, which has seen a forty percent drop in domestic violence homicides since 2007. Tim Stelloh, *Fighting Back: Has one state discovered a simple way to combat domestic violence?*, THE NEW REPUBLIC, april 20, 2012, available at <http://www.tnr.com/article/politics/magazine/102779/domestic-violence-vawa-maryland-abuse-women?page=0,0>. At this point, it is not clear whether this decrease is due to the screening or because of other factors. *Id.*

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state actually makes the victim safer.<sup>273</sup> In addition, while serious emotional harm is also an integral part of an abusive relationship, this type of harm alone would probably be difficult for the state to measure in a particular relationship given the fact that many relationships involve partners being emotionally unkind to one another. For that reason, while emotional abuse should be considered in the overall assessment of the danger of a particular relationship, state intervention should probably be limited to those relationships that actually involve physical violence. Furthermore, assessing the risk of harm to children in a violent home should involve more than merely determining that they have seen the violence.<sup>274</sup>

Finally, in the event that the state does decide to intervene in a particular case, no victim should be required to cooperate with the criminal justice system as a witness should the state choose to pursue charges against her batterer. Some may argue that the only way to ensure a conviction against dangerous offenders is with the cooperation of the victim, but the truth of the matter is that the idea of compelled cooperation is self-contradictory—if a victim truly does not want to cooperate with the authorities, she will often end up recanting or refusing to show up to the proceedings.<sup>275</sup> Contempt or perjury charges might remedy this problem, but if we truly appreciate these victims' privacy, it seems repugnant to incarcerate victims when they act so as to protect their families.<sup>276</sup>

### **C. A Grassroots Approach**

Because of the particularly public and stigmatizing nature of the criminal justice system or because of other personal reasons, a grassroots approach similar to the early battered women's movement will be more appealing to some victims. Indeed, some victims manage to stop violence in their lives without the criminal justice

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<sup>273</sup> See *supra* note \_\_\_\_.

<sup>274</sup> See *infra* Part \_\_\_\_.

<sup>275</sup> See *supra* Part \_\_\_\_.

<sup>276</sup> See Goodmark, *supra* note \_\_\_\_, at 32-33 (describing the experience of Noellee Mowatt who was jailed for a week without bail until she agreed to testify against her batterer); State v. Finney, 591 S.E.2d 863, 865 (2004) (describing how Virginia Finney was threatened with arrest if she did not cooperate with the prosecution of her husband's first-degree rape case). See also Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149 (2009) (arguing for a balanced approach in determining when domestic violence victims should be prosecuted for perjury given the complexity of their situations).

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system.<sup>277</sup> They do this by finding a support system through friends and family and creating a safety plan.<sup>278</sup>

There have already been some efforts in creating this type of grassroots approach. In Chicago, SHALVA is an independent agency that specifically focuses on the needs of the Jewish community.<sup>279</sup> Sensitive to the specific needs of women of the Jewish faith, they provide a 24-hour crisis hotline and support services for Jewish domestic violence victims.<sup>280</sup> They also provide educational and prevention programs for the Jewish community, and they educate rabbis, police, hospital social workers, teachers, camp counselors and friends and families about domestic abuse.<sup>281</sup> Similarly, Trinity United Church of Christ, also in Chicago, has an outreach program that educates members of the church and the community about domestic violence and its effect on the family, and it provides confidential referral, emergency shelter, and counseling services to domestic violence victims.<sup>282</sup> On a more secular level, "CUT IT OUT" is a national program that trains hair stylists on the signs of domestic abuse and encourages them to provide their clients with information about support agencies in their area.<sup>283</sup> While a strong criminal justice response to domestic violence is extremely important--especially for cases involving chronic, serious abuse,<sup>284</sup>--grassroots programs are also necessary for those women who will never engage with the criminal justice system.

There is still a legitimate concern that these grassroots programs might become as intrusive in women's lives as the criminal justice system, especially if they are funded by the state. This is always the dilemma that seems to occur; once the state provides support to an individual, it is believed to be justifiable for the state to infringe on the individual's privacy.<sup>285</sup> It is certainly the case that as battered women's shelters received more governmental funding, they

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<sup>277</sup> LEE H. BOWKER, BEATING WIFE-BEATING 124-25 (1983) (citing the examples of Sharon, who was able to end her religious husband's violence through religious arguments, and Karen, whose daughter convinced Karen's husband to attend Alcoholic's Anonymous, which ultimately led him to stop abusing his wife); Coker, *supra* note \_\_\_\_ at 826.

<sup>278</sup> BOWKER, *supra* note \_\_\_\_ at 75-80; BUZAWA, *supra* note \_\_\_\_, at 201; Mahoney, *supra* note \_\_\_\_ at 73.

<sup>279</sup> See <http://www.shalvaonline.org>.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> See <http://www.trinitychicago.org>.

<sup>283</sup> See <http://www.cutitout.org>.

<sup>284</sup> Eve. S. Buzawa & Aaron D. Buzawa, *Courting Domestic Violence Victims: A Tale of Two Cities*, 7 CRIMINOLOGY & PUB. POL'Y 671, 681-82 (2008) (citing research that suggests that prolonged incarceration may be the only way to protect victims from chronic, repeat offenders).

<sup>285</sup> See *supra* Part \_\_\_\_.

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became more “professionalized” and moved away from the nonhierarchical grassroots feel of the early battered women’s movement.<sup>286</sup> As already discussed, however, the interconnectedness of the public and private spheres justifies the right that victims have to both affirmative support and privacy from the state.<sup>287</sup>

### **CONCLUSION**

Participants in the women’s liberation and battered women’s movements worked very hard to change the legal view that domestic violence is a private matter. This activism led to important changes in the criminal justice system’s treatment of domestic violence and to the creation of shelters and other support programs for domestic violence victims. Yet there are still victims who do not want to share their abuse with the criminal justice system because they view their violence as private. This attitude probably stems from the fact that limiting the amount of state intrusion into the intimate details of one’s life necessarily increases one’s decisional privacy, which is highly valued not only by many domestic violence victims, but by Americans in general.<sup>288</sup> Privacy is a complex concept that can be harmful to victims in some contexts, but it can also be beneficial to them by giving victims more of a voice about which solutions are appropriate for their particular situation. Indeed, more privacy would protect the personhood of domestic violence victims and limit the threat of an abusive state. For these reasons, it is worth examining the benefits of a privacy right that not only entitles victims to state protection from violence but that also entitles victims to not engage with the criminal justice system should that be their choice. Furthermore, grassroots approaches outside of the criminal justice system are necessary in order to provide assistance to those women who choose to exercise this choice.

Victims’ hesitancy to engage with the criminal justice system may mean that this system just needs to be implemented in better ways, such as improving the responsiveness of state actors to victims or creating better access to material support. This hesitancy also probably means, however, that a criminal justice solution is simply not the best choice for all victims.

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<sup>286</sup> SCHNEIDER, *supra* note \_\_\_\_, at 22-23.

<sup>287</sup> Roberts, *supra* note \_\_\_\_, at 1477-80 (arguing for “an affirmative guarantee of personhood and autonomy” that allows for decisional privacy and the provision of services that ensure racial, gender, and class equality).

<sup>288</sup> See *supra* Part \_\_\_\_.