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# Lost in Translation: Domestic Violence, "The Personal Is Political," and the Criminal Justice System

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# CRIMINAL LAW

## LOST IN TRANSLATION: DOMESTIC VIOLENCE, “THE PERSONAL IS POLITICAL,” AND THE CRIMINAL JUSTICE SYSTEM

KIMBERLY D. BAILEY\*

*Current criminal justice domestic violence policies have been severely criticized by some feminist scholars as undermining victim autonomy. This criticism is puzzling given the fact that these policies were drafted in response to the activism of feminists involved in the early battered women’s movement and that autonomy, or the agency of women, was a key goal of this movement. This apparent paradox can be explained, however, by the fact that activists involved in the early battered women’s movement and actors in the current criminal justice regime speak in two different “languages.” Thus, victim autonomy is a concept that got lost in the translation of some of the goals of the early battered women’s movement into criminal justice policy. While this Article acknowledges that victim autonomy is not the chief goal of the criminal justice system, it still urges proponents of current criminal justice policies to take seriously the fact that a high number of victims currently do not want to engage with the criminal justice system. This number is an important metric in analyzing the*

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*effectiveness of domestic violence policies. First, it underscores the fact that improvements need to be made in victims' interactions with the criminal justice system and in the criminal justice system's response to those victims who do ask for help. Second, it highlights the fact that the criminal justice system is a limited tool in addressing what is a social, political, and economic problem. For this reason, a criminal justice solution should be part of broader domestic violence policies that address the complexity of this issue. The economic disparities that women experience as a class and the intersectionality of race, class, sexuality, and gender are important aspects of a broader approach to the domestic violence problem.*

## I. INTRODUCTION

One of the difficulties of language translation is that it is impossible to capture perfectly the meaning that is signified by the words in one language in the words of another. A good translation will serve utilitarian purposes in that basic concepts are communicated between parties. Yet, it is often the case that a word in one language does not have a perfect counterpart in another language, and it is inevitable that certain nuances and cultural meanings get lost in the translation process. A similar phenomenon has occurred with respect to domestic violence policy. Specifically, the current debate regarding domestic violence criminal justice policies underscores the difficulties of translating the vision of the early battered women's movement into the "language" of the criminal justice system.

Current criminal justice domestic violence policies have been severely criticized by some feminist scholars as disregarding victim autonomy.<sup>1</sup> This critique is puzzling given the fact that feminist activism within the women's liberation movement was a driving catalyst in the creation of a criminal justice response to domestic violence<sup>2</sup> and that one of the important goals expressed in this movement was the autonomy of women.<sup>3</sup>

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<sup>1</sup> See, e.g., 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); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007).

<sup>2</sup> See *infra* Part II.A.

<sup>3</sup> See *infra* Part II.A. I define "autonomy," or what some call "agency," as a person's ability to have decisionmaking authority in her life, even if under constrained circumstances. See *infra* Part II for further discussion. While the concept of autonomy has been the subject of much debate within feminist scholarship, see *infra* note 124, the general advocacy for decisionmaking authority in women's lives can be found throughout feminist literature discussing the issues of rape reform and abortion. See, e.g., Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 359-60 (1993) (discussing the

Indeed, feminists involved in the early battered women's movement, which evolved from the women's liberation movement,<sup>4</sup> did see a place for victim autonomy within domestic violence policy and initially envisioned that victims would determine when the criminal justice system would intervene when they experienced violence in their personal lives.<sup>5</sup> Those scholars who currently advocate for more victim autonomy in criminal justice policy, therefore, speak in the same language as those activists involved in the early battered women's movement. The reality is, however, that this early vision of victim autonomy is simply not translatable within the context of the current American criminal justice regime. Crime is viewed as a violation against the state, not just the victim. Thus, the concept of complete victim autonomy does not have much meaning within the criminal justice system, and victim autonomy is not the primary priority of the current criminal justice response to domestic violence.

This Article argues, however, that acknowledging that victim autonomy is not the chief priority of criminal justice policies does not mean that proponents of these policies should not be concerned about the fact that so many domestic violence victims currently do not want to engage with the criminal justice system. It has been estimated that as many as sixty to eighty percent of domestic violence victims ultimately either recant their testimony or refuse to testify altogether against their batterers.<sup>6</sup> Moreover, it is believed that domestic violence is underreported.<sup>7</sup> For this reason, there are probably many women who do not report their abuse to the authorities at all. The limited number of domestic violence victims who actually engage with the criminal justice system is an important metric in determining the effectiveness of this system.

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effort in rape law reforms to protect female sexual autonomy); Linda R. Hirshman, *Bronte, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177, 205–06 (1988) (defining the issue of abortion as an autonomy issue). More controversially, some feminists have advocated for the legalization of prostitution and pornography on autonomy grounds. See Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN'S L.J. 137, 163–64 (2004) (discussing the feminist debate on prostitution); Anita Bernstein, *Better Living Through Crime and Tort*, 76 B.U. L. REV. 169, 182 n.48 (1996) (discussing the feminist-libertarian approach to pornography).

<sup>4</sup> See *infra* Part II.A.

<sup>5</sup> See *infra* Part II.A.

<sup>6</sup> EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 87 (1996); Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 751 (2005).

<sup>7</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).

Part II of this Article will discuss the inherent difficulty in translating some of the goals of the early battered women's movement into criminal justice policy. It will first discuss how the women's liberation movement was an important catalyst in changing the perception that domestic violence is a private matter that should be resolved in the home. Arguing that the "personal is political," activists convincingly made the case that domestic violence is actually a political issue that requires political solutions. This activism led to the battered women's movement, and early activists initially envisioned that victims would have autonomy in determining when the criminal justice system would intervene in their lives. While this concept of victim autonomy made sense in the context of the battered women's movement, it got lost in the translation of the early battered women's movement's activism into current criminal justice policy, which is primarily focused on prosecution and punishment.<sup>8</sup>

Part III will then argue that although complete victim autonomy is not the primary focus of the criminal justice system, proponents of current domestic violence policies should still be concerned about the large number of women who do not engage with the criminal justice system. This number is an important metric in determining the effectiveness of this system in addressing this problem. This Part will first make the case that the criminal justice system is an important component of domestic violence policies. It then argues that the high number of victims who do not want to engage with the criminal justice system highlights the need for improvement in the interactions that victims have with the criminal justice system and in the level of responsiveness that this system has to victims when they do ask for help. This Part further argues that the lack of engagement of victims highlights the fact that criminal justice solutions must be part of broader domestic violence policies that address the social, political, and economic aspects of this issue. Addressing the economic disparities of women as a class and the intersectionality of race, class, sexuality, and gender are important aspects of these broader policies.

While developing a global solution to the problem of domestic violence is beyond the scope of this article, Part IV offers some considerations for future reform. It offers examples of jurisdictions that provide some models for improving upon domestic violence victims' experiences with the criminal justice system. This Part also recommends that empirical studies that suggest that not all intimate violence fits the

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<sup>8</sup> It has been argued that current criminal justice policies are quite consistent with dominance feminism, which values safety and perpetrator accountability over autonomy. See Goodmark, *supra* note 1, at 4–5. Rather than focusing on a particular strand of feminism, however, this Article focuses on the goals of the early battered women's movement.

Coercive Controlling Violence model be used to inform future domestic violence policy. Finally, this Part cautions that regardless of the activism of early feminists, many victims still view the violence that they experience in their homes as a private matter. This viewpoint also needs to be incorporated into future domestic violence policy.

## II. THE INHERENT DIFFICULTY IN TRANSLATING THE BATTERED WOMEN'S MOVEMENT INTO CRIMINAL JUSTICE POLICY

### A. THE FEMINIST DECONSTRUCTION OF THE PUBLIC/PRIVATE DICHOTOMY AND THE BATTERED WOMEN'S MOVEMENT

The current focus of domestic violence law and policy on the criminal justice system is a recent phenomenon. By 1920, wife beating<sup>9</sup> was illegal in all states,<sup>10</sup> yet for decades the police and prosecutors did very little to enforce these laws.<sup>11</sup> Because domestic violence was viewed as a private matter, victims got very limited responses to their cries for help; if the police responded to them at all, the typical response was to separate the parties involved and to try to act as a peacemaker, rather than to make an arrest.<sup>12</sup>

This perspective that the state should play a minimal role in regulating matters within the family unit is linked to the public/private dichotomy described by John Locke and advocated by other liberal theorists.<sup>13</sup> According to these theorists, the state's role is to protect people and their property while guaranteeing maximum freedom from interference from the state and others.<sup>14</sup> Because individuals often have competing interests, liberal theorists assert that the state has a legitimate role in regulating the public sphere and individuals consent to such regulation as participating

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<sup>9</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. Reva B. Siegel, *"The Rule of Love": Wife Beating as a Prerogative and Privacy*, 105 YALE L.J. 2117, 2122–23 (1996).

<sup>10</sup> Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996).

<sup>11</sup> Siegel, *supra* note 9, at 2170–71.

<sup>12</sup> *Id.*

<sup>13</sup> Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 281, 283–84 (Stanley I. Benn & G.F. Gaus eds., 1983). In this context, the term "public" means the areas of life that are legitimate for state regulation; the term "private" refers to the areas of life where state regulation is deemed illegitimate. ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 34 (1983). Generally speaking, liberal theorists believe that every person has "intrinsic and ultimate value" and that political institutions must be constructed in ways that prevent the subordination of one person to the will or judgment of others. *Id.* at 33.

<sup>14</sup> JAGGAR, *supra* note 13, at 33.

members of society.<sup>15</sup> In order to maximize one's autonomy and ability for self-fulfillment, however, the state should limit its regulation of the private sphere, which includes matters related to the home and the family.<sup>16</sup>

Arguing that "the personal is political," feminist scholars and activists have taken a variety of approaches in critiquing this so-called dichotomy between the public and private and in demonstrating that making such a division can have harmful effects on women. The phrase "the personal is political" first originated as the title of an essay written by Carol Hanisch in 1970.<sup>17</sup> In this essay, Hanisch criticized those who characterized consciousness-raising groups<sup>18</sup> as "personal" therapy sessions.<sup>19</sup> She argued that this characterization suggested that women are to blame for their so-called personal problems in the home and that these women must change themselves as a solution to these problems.<sup>20</sup> Instead, Hanisch insisted that there are political explanations not only for women's situation in the public sphere, but also for their situation inside of the home.<sup>21</sup> Hanisch argued, "Women are messed over, not messed up! We need to change the objective conditions, not adjust to them."<sup>22</sup> Thus, the feminist critique of the public/private dichotomy seeks to deconstruct the liberal notion that the home is a personal and non-political sphere.

First, some have noted that it is simply false to even suggest that the state has not always regulated the so-called private sphere. In fact, the law and social norms have always both defined and regulated contract, property, marriage, divorce, and child custody.<sup>23</sup> Frances Olsen has argued:

Supporters of nonintervention [of the state in family matters] insist that the state protect families from third-party interference . . . . Once the state undertakes to prevent such third-party action, the state must make numerous policy choices, such as what human grouping constitutes a family and what happens if parents disagree. These choices are bound to affect the decisions people make about forming families, the distribution of power within the family, and the assignment of tasks and roles among family members. The state is responsible for the background rules that affect

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<sup>15</sup> *Id.* at 34.

<sup>16</sup> *Id.*

<sup>17</sup> Carol Hanisch, *The Personal is Political*, in NOTES FROM THE SECOND YEAR: WOMEN'S LIBERATION 76 (Shulamith Firestone ed., 1970).

<sup>18</sup> Consciousness-raising groups were small meetings where women met to discuss their common experiences. For further discussion, see *infra* notes 44–54 and accompanying text.

<sup>19</sup> Hanisch, *supra* note 17, at 76.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 76–77.

<sup>22</sup> *Id.* at 76.

<sup>23</sup> Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 842–44 (1985); see also Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1255–56 (2009) (arguing that criminal law has always regulated family life).

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>24</sup>

Furthermore, some critique the public/private dichotomy as stemming from an idealized male view of the home as a place to retreat from the stress of the outside world and the natural place where one can maximize one's self-fulfillment. Instead of being a place to maximize their self-fulfillment, however, the home has historically been a place of subordination of women.<sup>25</sup> Thus, radical feminists<sup>26</sup> such as Catharine MacKinnon argue that the personal interactions that women have in the home are political because the domination of women appears in every area of their lives.<sup>27</sup> To these feminists, all interactions between men and women are institutionalized relationships of power that are appropriate for political analysis.<sup>28</sup> Male power is exercised in the home through the marital relationship and the distribution of housework and child-rearing.<sup>29</sup> These feminists eschew "[t]he assumption that these institutions and practices are 'natural,' or of purely individual concern."<sup>30</sup> Instead, this notion of a private sphere "is shown to be an ideological curtain that conceals the reality of women's systematic oppression."<sup>31</sup> Furthermore, for many women, their subordination is reinforced by rape and other forms of physical and emotional violence.<sup>32</sup> Women and children will not adequately be protected, therefore, if the public/private distinction is drawn in such a way that the relations between family members are not regulated by the state.<sup>33</sup> Moreover, by not intervening, the state is complicit in this violence:

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. Society is organized to permit violence in the home; it is organized through images in mass media and through broadly based social attitudes that condone violence . . . . Some police

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<sup>24</sup> Olsen, *supra* note 23, at 837.

<sup>25</sup> SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 129 (1989).

<sup>26</sup> Radical feminists are associated with the belief that the root of all systems of oppression is the oppression of women. JAGGAR, *supra* note 13, at 84. Their goal has been described as "uncovering and eradicating the systematic or root causes of women's oppression." *Id.* For examples of theorists who are considered to be radical feminists, see ANDREA DWORKIN, *WOMAN HATING* (1974); SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* (1970); CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

<sup>27</sup> JAGGAR, *supra* note 13, at 101; MACKINNON, *supra* note 26, at 193–94.

<sup>28</sup> JAGGAR, *supra* note 13, at 101; MACKINNON, *supra* note 26, at 193–94.

<sup>29</sup> JAGGAR, *supra* note 13, at 101; MACKINNON, *supra* note 26, at 193–94.

<sup>30</sup> JAGGAR, *supra* note 13, at 101.

<sup>31</sup> *Id.*; see also MACKINNON, *supra* note 26, at 193–94.

<sup>32</sup> MACKINNON, *supra* note 26, at 193–94.

<sup>33</sup> See *id.*; OKIN, *supra* note 25, at 129.



officers refuse to respond to domestic violence . . . . Some clerks and judges think domestic violence matters do not belong in court. These failures to respond to domestic violence are public, not private, actions.<sup>34</sup>

This complicity suggests “that women are not important enough to merit legal regulation.”<sup>35</sup>

In addition to noting how the veil of privacy around the home keeps women unsafe and vulnerable, MacKinnon also argues that the personal is political because the production/public sphere is intimately connected to the reproductive/private sphere.<sup>36</sup> MacKinnon points out how women literally produce the labor pool through reproduction.<sup>37</sup> She also notes that male workers traditionally have been able to focus on work outside of the home because they have women performing unpaid work in the home.<sup>38</sup> Furthermore, discrimination in the public sphere keeps women poor and socially dependent on men in the private sphere.<sup>39</sup> As Deborah L. Rhode has articulated, “Public opportunities shape private choices just as private burdens constrain public participation. Women’s unequal responsibilities in the home limit options in the world outside it. Reduced earning capacity in the market also correlates with reduced power and increased obligations in the family.”<sup>40</sup>

Thus, the dynamics in the public and private spheres reinforce one another. Carole Pateman characterizes the feminist critique of the public/private dichotomy this way:

Feminists have emphasized how personal circumstances are structured by public factors, by laws about rape and abortion, by the status of ‘wife’, by policies on childcare and the allocation of welfare benefits and the sexual division of labour in the home and workplace. ‘Personal’ problems can thus be solved only through political means and political action.<sup>41</sup>

Pateman acknowledges that for some radical feminists, “the personal is political” literally means that there is no distinction between public and private life, or that there should be no distinction between the two.<sup>42</sup> But

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<sup>34</sup> Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 71–72 (1990).

<sup>35</sup> Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 978 (1991).

<sup>36</sup> MACKINNON, *supra* note 26, at 66–68.

<sup>37</sup> *Id.* at 66.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 168.

<sup>40</sup> Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1187 (1994); *see also* MACKINNON, *supra* note 26, at 168–70; OKIN, *supra* note 25, at 123.

<sup>41</sup> Pateman, *supra* note 13, at 295.

<sup>42</sup> *Id.*; *see also* MACKINNON, *supra* note 26, at 191 (“For women the measure of the intimacy has been the measure of the oppression. This is why feminism has had to explode the private. This is why feminism has seen the personal as the political. The private is

for many feminists, the critique of the public/private dichotomy mainly seeks to stress the interrelatedness of the public and private spheres.<sup>43</sup>

During the 1960s and 1970s, the methodology used for making the personal political was the consciousness-raising group.<sup>44</sup> These groups were small gatherings of women where participants discussed their personal everyday experiences:<sup>45</sup> “Springing up spontaneously in the context of friendship networks, colleges and universities, women’s centers, neighborhoods, churches, and shared work or workplaces, they were truly grassroots.”<sup>46</sup> Through the discussion of their personal experiences, participants in these groups began to see similarities in their experiences and the systematic way that women were treated in society.<sup>47</sup> Thus, through this sharing these women discovered the political nature of their private lives and relationships.<sup>48</sup> This discovery removed the isolation that many women felt in their lives and led the way to action and empowerment.<sup>49</sup>

For example, a victim of domestic violence who is isolated from those who are outside of the home may easily personalize the violence she may be experiencing. She may think that her partner has hit her because she is not a good wife or mother. She may think that she may be able to stop the violence in her home if she works on improving these personal shortcomings. If, however, she engages in a discussion with other women who also share their stories of abuse, she is no longer isolated and she may then see that the problem is much larger than her experience. She may see friends who are unquestionably good cooks who are also being beaten. She may see friends who she believes are undoubtedly good mothers who are also being beaten. She may begin to see that the abuse is not about her

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public for those for whom the personal is political. In this sense, for women there is no private, either normatively or empirically. Feminism confronts the fact that women have no privacy to lose or to guarantee.”).

<sup>43</sup> Pateman, *supra* note 13, at 295; *see also* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 29 (1992) (“While there are particular contexts in which a feminist agenda can be identified as advocating a change in the public/private mix, it is hard to specify even one context or dimension of the distinction in which the claim is that the whole category of the private is useless, or that private structuring should be discontinued. The normative debates concern relationships between private and public, but their conclusions do not assert that the differences should be obliterated or even greatly reduced.”).

<sup>44</sup> MACKINNON, *supra* note 26, at 83; *see also* ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 35–36 (2000).

<sup>45</sup> MACKINNON, *supra* note 26, at 84–85.

<sup>46</sup> *Id.* at 84.

<sup>47</sup> *Id.* at 84–87.

<sup>48</sup> *Id.* at 94–95.

<sup>49</sup> *Id.*

personal shortcomings, but rather it seems to have a connection to the political status of men and women in general. This realization may then empower women in similar situations to act toward changing the political structures that allow violence to occur in their private homes.

Thus, consciousness-raising groups inspired the creation of shelters for domestic violence victims during the early battered women's movement.<sup>50</sup> These shelters were run by survivors of domestic abuse, and the women who lived there were not viewed as "clients," but rather as active participants in the day-to-day organization of the shelter.<sup>51</sup> In other words, these shelters were based on a grassroots, bottom-up approach where everyone, including the residents, had a voice in the goals and direction of the shelter.<sup>52</sup> Furthermore, early shelters respected women's choices and their decision to either leave or stay in a relationship.<sup>53</sup>

Indeed, this bottom-up approach was a common thread among various feminist organizations throughout the United States during the late 1960s and 1970s.<sup>54</sup> The women's liberation movement was made up of decentralized, grassroots organizations, and many organizations were focused on just a single issue.<sup>55</sup> In addition, some women organized based on particular theoretical groupings such as radical feminists, social feminists, cultural feminists, and Marxist feminists.<sup>56</sup> Some women also organized by race and created sub-groupings within that race such as black radical feminists, black social feminists, and black cultural feminists.<sup>57</sup> Formal procedural structures like Roberts' Rules of Order were rejected as part of the private/public distinction and a more personal, familial form of conversing was adopted during meetings.<sup>58</sup>

To these participants of the women's liberation movement, therefore, making the personal political meant looking at the personal experiences of

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<sup>50</sup> 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 (2005).

<sup>51</sup> *Id.* at 259.

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

<sup>53</sup> *Id.* at 286, 302.

<sup>54</sup> ROSALYN BAXANDALL & LINDA GORDON, *DEAR SISTERS: DISPATCHES FROM THE WOMEN'S LIBERATION MOVEMENT* 13–14 (2000).

<sup>55</sup> *Id.* at 14.

<sup>56</sup> *Id.* at 13.

<sup>57</sup> *Id.* at 13–14.

<sup>58</sup> *Id.* at 14–15. It should be noted that while this grassroots, decentralized approach was a hallmark of the women's liberation movement in the 1970s, not all feminists favored this type of approach. Allowing everyone to have a voice inevitably limits the number of goals that can be accomplished. As a result, liberal feminists who were part of the National Organization for Women (NOW) actually adopted a more formalized and centralized approach to addressing issues. *Id.* at 14.

real women in order to learn about the systematic ways that they were subordinated and abused in society.<sup>59</sup> Moreover, making the personal political meant creating community among women and removing any sources of isolation. It was this sense of community that created the source of empowerment for political action. But an important aspect of this political action was the fact that every woman was to have a voice in how to politicize her personal life.

While feminists involved in the early battered women's movement at first focused on providing resources to women and on creating programs to address the social and economic realities that keep women in abusive relationships,<sup>60</sup> they also saw a role for the criminal justice system in addressing this issue. They noted in particular the lack of enforcement of laws against men who committed crimes against women.<sup>61</sup> Activists saw this under-enforcement as "a symptom of patriarchal values and a tool for maintaining gender dominance, in which the state was complicit for its failure to intervene."<sup>62</sup> For this reason, the early battered women's movement focused on addressing systematic inequality and patriarchal social attitudes.<sup>63</sup>

Activists spearheaded class action suits against cities and police officers that failed to intervene and protect battered women.<sup>64</sup> In addition, they began training prosecutors and police officers to treat domestic violence victims with respect.<sup>65</sup> "Such early reforms did not mandate that victim's wishes necessarily coincide with state prosecutorial aims. Rather, they sought to give victims the option to access the legal system or external services if they so desired."<sup>66</sup> Thus, this particular feminist vision of making the personal political is not necessarily inconsistent with a vision of complete victim autonomy because participants in the early battered women's movement envisioned a criminal justice system where victims could choose whether or not to engage with it. Those feminists who argue for more victim autonomy today, therefore, seem to be more in line with this earlier vision of the battered women's movement. This view, however, is not fully translatable within the current criminal justice political system.

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<sup>59</sup> SCHNEIDER, *supra* note 44, at 35.

<sup>60</sup> Gruber, *supra* note 1, at 748–49.

<sup>61</sup> *Id.* at 752.

<sup>62</sup> *Id.* at 754.

<sup>63</sup> *Id.* at 755.

<sup>64</sup> *Id.* at 756; Siegel, *supra* note 9, at 2171; Linda G. Mills, Commentary, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 558–59 (1999).

<sup>65</sup> Gruber, *supra* note 1, at 756.

<sup>66</sup> *Id.* at 757.

## B. A LOSS IN TRANSLATION

It is true that the idea of the state intervening in private interactions is not alien to the criminal justice system.<sup>67</sup> Crimes such as theft, homicide, and assault all are examples of actions committed by private actors that are subject to state censure. Yet, while participants of the early battered women's movement saw women or domestic violence victims as being the central focus of the politicization of personal interactions, the central focus of the American criminal justice is not just the victim. When an individual violates a criminal law, he is considered to have committed a "social harm," in that the injury suffered involves "a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity."<sup>68</sup> Thus, while the prosecutor certainly should consider the victim's interests and desires when prosecuting a case, he technically represents the state, which means that he ultimately must act in the interest of the entire community.<sup>69</sup> For this reason, while a victim can influence the disposition of a criminal case, she does not have the authority to dismiss charges on her own.<sup>70</sup> In addition, judges generally may dismiss a case without consulting the victim.<sup>71</sup>

What is in the best interest of the entire community is what lawmakers and their respective constituents say is best at particular time. By the late 1960s, a societal shift occurred where a retributivist view of the criminal justice system became more dominant in mainstream American culture.<sup>72</sup> The reasons cited for this shift are varied, including an increase in the crime

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<sup>67</sup> See Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 938–42 (1985) (discussing how, historically, there has been an evolution in criminal law away from the "private" sphere toward a "public" one).

<sup>68</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 1 (4th ed. 2006) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769)).

<sup>69</sup> *Id.*; see also Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 19, 21 (1999) (noting that the community includes both the victim and the defendant).

<sup>70</sup> Dubber, *supra* note 69, at 21.

<sup>71</sup> *Id.*

<sup>72</sup> See Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1423 (2002). In contrast, during the first half of the twentieth century political sensibilities viewed the criminal justice system as being a vehicle for rehabilitation and reform. Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1318–20 (2000). During this time, liberal theories of crime, which focused on curing the causes of crime, such as "poverty, alienation, lack of education, and discrimination" were influential. Henderson, *supra* note 67, at 943. There was also a focus on protecting the constitutional rights of defendants, which was evident by the Warren Court's criminal procedure jurisprudence at the time. *Id.*

rate,<sup>73</sup> a concern that discretionary rehabilitative policies were adversely impacting poor African Americans and other cultural minorities,<sup>74</sup> and a loss of confidence in rehabilitative programs.<sup>75</sup> Because of these events, the political will of the people drove lawmakers to draft criminal justice policies with more of a retributivist focus.<sup>76</sup> It cannot be denied, however, that politicians also probably affected the will of the people in this regard.<sup>77</sup> Taking advantage of the rising crime rates, politicians saw an appealing campaign issue and instituted a “war on crime,” which seized on the fear of their constituents by pushing a message that the best way to combat crime is to institute severe and harsh punishments on “bad criminals.”<sup>78</sup> Richard Nixon asserted:

I was in Philadelphia the other day. I found that a cab driver who had been cruelly murdered and robbed, and the man who murdered and robbed him had confessed the crime, was set free because of a Supreme Court decision. An old woman, who had been brutally robbed and then murdered—the man who confessed the crime was set free because of a Supreme Court decision . . . . My friends, when that’s happening in

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<sup>73</sup> Henderson, *supra* note 67, at 945 (noting also that photographs and news reports of “riots, burning cities, and vicious and barbaric crimes” fed Americans’ fear of crime and their particular fear of interracial crime).

<sup>74</sup> DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 56 (2001) (“The striking thing about this first major assault upon the penal-welfarism is the extent to which it was launched from *within* the framework of welfarist, social democracy . . . it continued to view crime as a product of social and economic deprivation, and it looked to the state to provide the social reforms and welfare support needed to address this social problem.”); *see also* Brown, *supra* note 72, at 1425 (stating that liberal scholars began advocating “just desert” theory of punishment “as a means to *reduce* excessive and inequitable sentencing rather than as a rationale to justify more consistently harsh incarceration, as it was used a few years later”).

<sup>75</sup> GARLAND, *supra* note 74, at 61–63; Michael Tonry, *Theories and Policies Underlying Guidelines Systems: Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1236 (2005).

<sup>76</sup> Dubber, *supra* note 69, at 5–6. The importance of public opinion in criminal policy is a somewhat recent phenomenon. “A few decades ago public opinion functioned as an occasional brake on policy initiatives: now it operates as a privileged source. The importance of research and criminological knowledge is downgraded and in its place is a new deference to the voice of ‘experience’, of ‘common sense’, of ‘what everyone knows’.” GARLAND, *supra* note 74, at 13.

<sup>77</sup> KATHLYN TAYLOR GAUBATZ, *CRIME IN THE PUBLIC MIND* 5–6 (1995).

<sup>78</sup> Henderson, *supra* note 67, at 945–47 (noting that the focus of conservatives was on the responsibility of the individual rather than on the causes of crime); *see also* Dianne L. Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 OSOODE HALL L.J. 151, 180 (1998) (arguing that the “crime card” has always had particular appeal to politicians because it can serve as a distraction from less popular initiatives); Tonry, *supra* note 75, at 1247–48 (noting that calls for increased toughness on crime were a part of every presidential campaign from Barry Goldwater in 1964 “until Bill Clinton nullified its emotive force by refusing to let Republicans get to his right on law and order”).

thousands of cases all over America, I say this. Some of our courts have gone too far in their decisions weakening the peace forces as against the criminal forces in the United States of America. And we're going to change that.<sup>79</sup>

Thus, the political will of society and the political messages of politicians mutually influence each other.<sup>80</sup>

It was within this context of the general conservatization<sup>81</sup> of criminal justice policy and the rise of the so-called victims' rights movement<sup>82</sup> in the 1980s that current mandatory domestic violence law policies were drafted.<sup>83</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>84</sup> All fifty states now allow warrantless arrests in cases where there is probable cause of a misdemeanor domestic violence offense,<sup>85</sup> and most states have enacted preferential or mandatory arrest statutes.<sup>86</sup>

<sup>79</sup> LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 248 (1983) (quoting language from a campaign speech that Nixon made in Ohio two weeks before the 1968 presidential election).

<sup>80</sup> GAUBATZ, *supra* note 77, at 5–6 (suggesting that the harsh public opinion about crime probably was a precursor to the political “tough on crime” rhetoric, but that politicians certainly escalated the public views on this subject through their political messages).

<sup>81</sup> It should be noted that while this retributive focus on crime is generally viewed as a conservative approach, many so-called liberal Democrats also have embraced the “tough on crime” rhetoric as part of their political platforms. *See* GARLAND, *supra* note 74, at 13–14; *see also* Tonry, *supra* note 75, at 1247–48.

<sup>82</sup> Aya Gruber notes that the “victims’ rights” movement is not about victim agency.

[W]hile the movement engages the rhetoric of individual rights and victim autonomy, it is really not about victim agency. Rather than securing victim autonomy without qualification, many victims’ rights reforms simply seek to position the victim in the legal system in a way that inexorably leads to more liability and punishment for the defendant. In a sense, the victim is a foil, a tool of an even larger and more dangerous program of vigorous individuality and denial of social responsibility. The victims’ rights movement is and always has been a product of conservative tough-on-crime ideology.

Gruber, *supra* note 1, at 749–50; *see also* Henderson, *supra* note 67, at 948–49 (noting that the victims’ rights movement was in part in response to the Warren’s Court’s jurisprudence which strengthened the constitutional rights of the accused: “The ‘discovery’ of the crime victim provided an individual to substitute for the state on the side of the scales opposite the accused, thus making it appear that the balance was more ‘equal.’”).

<sup>83</sup> Gruber, *supra* note 1, at 792–800; *see also* Deborah M. Weissman, *The Personal Is Political—and Economic: Rethinking Domestic Violence*, 2007 *BYU L. REV.* 387, 396 (2007) (discussing how the “feminist agenda that demanded legal parity for domestic violence with other crimes found a receptive environment in the law-and-order agenda of the 1970s and 1980s”).

<sup>84</sup> Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 *WIS. L. REV.* 1657, 1669–70 (2004).

<sup>85</sup> Hanna, *supra* note 10, 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.

In addition, many jurisdictions became more aggressive in prosecuting domestic violence cases by instituting no-drop policies, which require or encourage prosecutors to prosecute domestic violence cases regardless of the victim's wishes.<sup>87</sup> Sometimes hard no-drop jurisdictions will sanction or arrest victims who refuse to voluntarily participate in the prosecution.<sup>88</sup> Most jurisdictions with no-drop policies, however, do not force victims to participate in the prosecution.<sup>89</sup> Instead, when possible, prosecutors use the out-of-court statements of victims made in police statements or during 911 calls in lieu of their live testimony in what are called "victimless" or "evidence-based" prosecutions.<sup>90</sup>

Aya Gruber has documented how proponents of the "war on crime" used Nicole Brown Simpson and the image of the vulnerable Caucasian, upper-class domestic violence victim as the poster woman for their general criminal justice policy of tough prosecution and harsh sentences.<sup>91</sup> Indeed, mandatory arrest legislation had languished for years in several jurisdictions, and it was not until Simpson's death that there was a political push for "zero tolerance" with respect to domestic violence.<sup>92</sup> Politicians focus on high arrest and prosecution numbers in order to convince their constituents that they are doing something tangible to curtail crime, even when these actions may not actually be keeping individuals safe.<sup>93</sup> Public

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Officers could arrest a suspect without a warrant if they had probable cause to believe that a felony had been committed. *Id.*

<sup>86</sup> Hanna, *supra* note 10, at 1859–60.

<sup>87</sup> Mills, *supra* note 64, at 561.

<sup>88</sup> Hanna, *supra* note 10, at 1863.

<sup>89</sup> *Id.*

<sup>90</sup> Kimberly D. Bailey, *The Aftermath of Crawford and Davis: Deconstructing the Sound of Silence*, 2009 BYU L. REV. 1, 2 (2009). The use of out-of-court statements at trial have been limited by the Supreme Court decisions *Crawford v. Washington* and *Davis v. Washington*. *See id.* at 2–3.

<sup>91</sup> Gruber, *supra* note 1, at 793; *see also* Martin, *supra* note 78, at 157–58 (noting that the victims' rights movement only cares about "innocent" and "good" victims and that the "unworthy, such as 'bad' mothers, 'bad' girls, and unruly youth, are never real victims, on the other hand"); Henderson, *supra* note 67, at 951 (noting that with respect to the victims' rights movement, "[v]ictims' are not prostitutes beaten senseless by pimps or 'johns'"). It is also worth noting that the fact that Nicole Brown Simpson's ex-husband, O.J. Simpson, was African-American probably also heightened her victimhood given the stereotypes of angry black men and vulnerable white women.

<sup>92</sup> Gruber, *supra* note 1, at 793 n.222.

<sup>93</sup> Martin, *supra* note 78, at 160 (arguing that when citizens express anger and disappointment with the inability of the criminal legal system to keep them safe, politicians move away from addressing the complex problem of actual security and toward the symbolic and easier task of recognizing the wrong committed); *see also* Dubber, *supra* note 69, at 18–20 (noting that prosecutors' and judges' decisions are affected by the electorate).



oversight is particularly palpable with respect to domestic violence cases after the publicity following Simpson's murder:

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 to protect victims.<sup>94</sup>

It is important to note that during the early stages of the battered women's movement in the 1970s and 1980s, many feminists were quite wary of aligning their interests with the state, which represented to them the patriarchal domination that they were seeking to overcome.<sup>95</sup> But the reality was that legal actors did not treat domestic violence victims the same as victims of other crimes covered by discretionary arrest and prosecution policies.<sup>96</sup> G. Kristian Miccio, an advocate instrumental in drafting the mandatory arrest policy in New York, has poignantly discussed the ambivalence she and other advocates felt about engaging with the state in dealing with domestic violence.<sup>97</sup> Yet, because women's cries for help were routinely being ignored under discretionary policies, she recalls that she felt that feminists had "no other alternative" but to support mandatory policies.<sup>98</sup> Proponents believed that these policies would enable victims to reclaim their bodies from their batterers and that these policies were essential for women's safety and bodily integrity.<sup>99</sup>

First, feminists who supported these policies believed that making arrests and prosecutions mandatory for domestic violence cases would ensure formal gender equality because the percentage of domestic violence cases prosecuted would equal the number of cases prosecuted with respect to other crimes.<sup>100</sup> In addition, feminists and advocates for domestic violence victims hoped that these policies would deter future violence and that they would empower women to remain abuse free.<sup>101</sup> Finally, proponents of mandatory policies felt that these policies had an important

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<sup>94</sup> Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 44–45 (2006).

<sup>95</sup> Gruber, *supra* note 1, at 758.

<sup>96</sup> *Id.* at 757.

<sup>97</sup> Miccio, *supra* note 50, at 274–82.

<sup>98</sup> *Id.* at 279.

<sup>99</sup> *Id.*

<sup>100</sup> Gruber, *supra* note 1, at 758.

<sup>101</sup> *Id.* at 759–60.

symbolic value in that it meant that state actors were taking the issue of domestic violence seriously.<sup>102</sup>

There are some who still argue that mandatory policies are an important component of domestic violence law and policy. In addition to the reasons detailed above, they argue that mandatory policies prevent batterers from intimidating their partners into not proceeding with charges against them.<sup>103</sup> They also argue that lax prosecution policies will decrease police officers' confidence in the value of arrest and will undermine their diligence in policing domestic violence.<sup>104</sup> Furthermore, some have argued that even if prosecution and incarceration do not rehabilitate batterers, it is better to put batterers in jail than to force victims into shelters.<sup>105</sup> Finally, they argue that domestic violence offenders are a threat to all members of society, not just to their intimate partners.<sup>106</sup> Some research suggests that violent offenders in a family are more likely to assault nonfamily members.<sup>107</sup> Some scholars also note that batterers will continue to be abusive to future partners and that mandatory policies protect children from violence.<sup>108</sup>

Yet, mandatory policies have had staying power not because they have actually protected women in the ways that their proponents originally hoped, but because they are written in a language that makes sense in a retributivist and prosecutorially-focused criminal justice system. If batterers are going to be considered criminals, then they need to be arrested and prosecuted. There is no room for victim ambivalence or hesitancy, and victim autonomy simply does not make sense in this context. For all of these reasons, complete victim autonomy got lost in the translation of the early battered women's movement's vision of domestic violence policy into concrete criminal justice policies.

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<sup>102</sup> *Id.* at 759.

<sup>103</sup> Hanna, *supra* note 10, at 1892; Sack, *supra* note 84, at 1673, 1690.

<sup>104</sup> Hanna, *supra* note 10, at 1893; *see also* Sack, *supra* note 84, at 1673.

<sup>105</sup> Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 180 (1997).

<sup>106</sup> Hanna, *supra* note 10, at 1889.

<sup>107</sup> *Id.* at 1889.

<sup>108</sup> *Id.* at 1895–96.

### III. THE NUMBER OF DOMESTIC VIOLENCE VICTIMS WHO ENGAGE WITH THE CRIMINAL JUSTICE SYSTEM IS AN IMPORTANT METRIC IN DETERMINING THE EFFECTIVENESS OF CURRENT DOMESTIC VIOLENCE POLICY

#### A. WHY THE CRIMINAL JUSTICE SYSTEM IS AN IMPORTANT COMPONENT OF DOMESTIC VIOLENCE POLICY

Some may argue that the criminal justice system should not play any role at all within domestic violence law and policy given its impact on victim autonomy. The problem is, however, that it cannot be denied that many domestic violence victims do call the police to their aid during and after acts of violence. In addition, many victims want their batterers prosecuted. In fact, sixty-five percent of the African-American women who participated in a study by Arlene N. Weisz supported the prosecution of their batterer.<sup>109</sup> Furthermore, many victims probably need the resources of the criminal justice system in order to be adequately protected from the violence in their lives. Thus, the criminal justice system does play an important role for some domestic violence victims, and we do not want to go back to a system that is nonresponsive to their needs.

Another potential response to the inevitable tension between complete victim autonomy and the goals of the criminal justice system could be that a new, victim-centered model for criminal justice should be created. Under this model, the desires and wishes of the victim would determine the role of the criminal justice system in a particular circumstance. For example, one potential model could be that instead of focusing on arrest and prosecution of the batterer, the focus would be on keeping the victim safe during a particular moment. In some circumstances, that might mean arresting the batterer and detaining him for a few hours until the immediate danger has passed. In other circumstances, the victim may determine that the threat from the call to the police was all that was needed to diffuse the situation and that arrest is not even necessary. If the victim ultimately decides to drop charges or to not prosecute her batterer, she would not be vilified by the system under the victim-centered approach. Instead, each moment that the police keep a victim safe would be considered the victory, not the successful prosecution and the jail sentence.

One potential problem with this model is that there is a danger that the police would become less responsive to victims if they are asked to make repeated calls to the same house with no hope of an ultimate prosecution.

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<sup>109</sup> HILLARY POTTER, *BATTLE CRIES: BLACK WOMEN AND INTIMATE PARTNER ABUSE* 84 (2008). Hoan N. Bui found that African-American women were more likely to want to prosecute their partners than Caucasian women. *Id.*

Indeed, one of the reasons for instituting no-drop prosecution policies was because it was believed that police officers would be more motivated to answer domestic violence calls if they believed that the batterer would actually be prosecuted; otherwise, police officers would find their actions to be futile.<sup>110</sup> This prosecutorial focus of the police should not be surprising given the current language of the criminal justice system. There is also still evidence that some police officers are not responsive even under mandatory policies since they still exercise discretion in determining whether there is probable cause of a domestic violence violation.<sup>111</sup>

Perhaps policies could be instituted to make sure that police officers remain responsive. For example, police officers could be required to complete paperwork verifying that they answered domestic violence calls. Follow-up interviews could also be conducted with victims who made calls to the police. When there is a pattern of officers ignoring domestic violence calls in a particular locale, class action suits could be filed on equal protection grounds just as was done in the early part of the battered women's movement. Realistically, however, this type of follow-up probably would be difficult for many jurisdictions to maintain due to limited resources. There is a potential danger, therefore, that a victim-centered approach could end up going back to a system where criminal legal actors do not take domestic violence seriously.<sup>112</sup>

The other potential problem with the victim-centered approach is that there may be occasions where we do not want the victim's desires to trump the interests of the state. For example, a domestic violence victim may have a legitimate need for her batterer to stay out of jail because he is the main economic provider for her household. If her batterer, however, has a history where he has committed serious violence not only against his domestic partner, but also against members of society at large, it may be in the state's interest to incapacitate him in order to prevent him from being a danger not only to the victim, but also to those who are not in an intimate relationship with him. Moreover, there is research that suggests that prolonged incarceration may be the only way to protect victims from chronic, repeat offenders.<sup>113</sup> In those situations where the offender has exhibited seriously violent behavior, therefore, the state's interest in

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<sup>110</sup> See *supra* note 104 and accompanying text.

<sup>111</sup> Sack, *supra* note 84, at 1690, 1696. Prosecutors also have discretion under no-drop policies; they just do not have the discretion to drop a case merely because a victim does not want to go forward. *Id.* at 1696.

<sup>112</sup> *Id.* at 1688–90 (expressing skepticism that police and prosecutors would be responsive to domestic violence victims without mandatory policies).

<sup>113</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).

protecting both the victim and society at large should trump the victim's desires with respect to the criminal justice system, and we should deal with her economic interests through other means. Finally, the state also has an interest in protecting children who experience violence in the home.<sup>114</sup>

For all of these reasons, the criminal justice system is an important component of domestic violence policy, and I acknowledge that the wishes of the victim should not always be the priority of the criminal justice system. As I discuss below, however, acknowledging that victim autonomy should not always be the priority of the criminal justice system does not mean that there is no reason to be concerned about the fact that so many domestic violence victims currently choose not to engage with the system.

#### B. WHY THE LACK OF ENGAGEMENT OF MANY DOMESTIC VIOLENCE VICTIMS IS A CAUSE FOR CONCERN

Although the complete autonomy of every domestic violence victim is not the main priority of the criminal justice system, the fact that so many victims do not want to engage with this system should still be troubling because it suggests that this system is not as effective in addressing the issue of domestic violence as one might hope. One would think that more victims would take advantage of this resource if it were truly helpful to them. Instead, it has been estimated that as many as sixty to eighty percent of domestic violence victims ultimately either recant their testimony or refuse to testify altogether against their batterers.<sup>115</sup>

Some might dismiss these alarming statistics because they believe that domestic violence victims are psychologically damaged individuals who cannot make logical decisions for themselves.<sup>116</sup> For this reason, these victims need the state to make decisions for them. The reality is, however, that the profiles of domestic violence victims are much more complex than some might presume. The literature on these victims suggests that many of

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<sup>114</sup> Jennifer Collins, *Criminal Law Comes Home to a Family*, in *CRIMINAL LAW CONVERSATIONS* 699 (Paul H. Robinson et al. eds., 2009). But for a discussion regarding the complications that arise for battered women who are mothers, including being more vulnerable to findings of child neglect and losing custody of their children, see SCHNEIDER, *supra* note 44, at 148–78.

<sup>115</sup> BUZAWA & BUZAWA, *supra* note 6, at 87; Lininger, *supra* note 6, at 751.

<sup>116</sup> The sensationalism surrounding homicide cases involving battered women who killed their husbands and the introduction of expert testimony on battered women has contributed to this stereotype. See Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1243–44 (2001); Martha R. Mahoney, *supra* note 7, at 36–43. Feminists advocated for the use of this type of expert testimony for the purpose of explaining the complexity of these women's lives; the law and popular culture, however, have distorted battered women's syndrome into a dysfunctional caricature of these women's lives. *Id.*; see also SCHNEIDER, *supra* note 44, at 124–25.

them are quite rational individuals who are making the best choices they can under constrained circumstances.<sup>117</sup>

Others might presume that most victims do not engage with the criminal justice system because they are afraid of their batterers. As a result, they may fear that giving voice to victims' desires to not prosecute a case essentially allows batterers to control the process. While fear is sometimes a reason that victims hesitate to engage with the criminal justice system, there are many other complex and legitimate reasons why they choose not to engage.<sup>118</sup> Thus, if domestic violence victims are rational and have legitimate reasons for not engaging with the criminal justice system, we should not be ignoring this lack of engagement. Instead, we should be paying attention to their reasons for not engaging with the system in order to determine whether current criminal justice policies are harming them and whether there are improvements that can be made within the criminal justice system that can help them. For example, if it is the case that arrest and prosecution may put some domestic violence victims in more danger,<sup>119</sup> completely ignoring the victim's wishes is a serious problem because many victims may be able to gauge quite accurately whether criminal justice intervention is in their best interest on a particular occasion.<sup>120</sup> It is particularly troubling that the women who seem to be the most detrimentally affected by mandatory policies are the same women who have the least amount of political power, specifically, poor women, women of color, and immigrants.<sup>121</sup> Mandatory policies, therefore, seem to be a continuation of the voicelessness and subordination that these women already experience within the political system.

Furthermore, it is believed that domestic violence is underreported.<sup>122</sup> It seems that many women do not report their abuse to the authorities at all. If most resources are directed toward a criminal justice solution to domestic violence, this means that there are a lot of women who are not getting any help at all. Donna Coker has documented the ways that mandatory policies have made battered women more vulnerable to state control, which can

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<sup>117</sup> See SCHNEIDER, *supra* note 44, at 123–24; Chiu, *supra* note 116, at 1259–60.

<sup>118</sup> These include fear of the batterer, an emotional attachment to the batterer and a desire to make the marriage work, and a lack of material resources, safety, and positive interactions with the criminal justice system. Chiu, *supra* note 116, at 1253; Coker, *supra* note 1, at 1048–49.

<sup>119</sup> See *supra* Part III.

<sup>120</sup> See also Coker, *supra* note 1, at 826–27; Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1159–60 (1994).

<sup>121</sup> See *infra* Part III.

<sup>122</sup> DUTTON, *supra* note 7, at 218; Mahoney, *supra* note 7, at 11.

ultimately lead to harmful consequences for these women.<sup>123</sup> If domestic violence victims are not seeking assistance from the state in order to avoid these consequences, mandatory policies may be alienating and isolating domestic violence victims instead creating the empowerment and sense of community that feminists originally envisioned with respect to political solutions to private violence.

I acknowledge that the concept of autonomy,<sup>124</sup> or the ability to have decisionmaking authority in one's life, is a particularly complicated concept in the domestic violence context. For example, if a woman chooses not to prosecute her batterer because he is the main economic provider in the family, some might argue that she is not making a "true" choice in the sense that she is surely not "choosing" to continue to live in violence, but rather she is choosing what she views as the lesser of two evils. I do not deny the constraints in victims' lives that limit their choices. Yet, it is important to consider whether victims, rather than the state, may sometimes be in the best position to make the best choice under those constrained circumstances.<sup>125</sup> Acknowledging these constraints, however, should not lessen the burden on society to create ways to limit the extent that those constraints are based on gender, class, and racial subordination so that women can make more meaningful choices.<sup>126</sup>

### C. WHAT THE LACK OF ENGAGEMENT TELLS US

In order to examine the lack of victim engagement further, one of the key insights from the women's and early battered women's movements can prove quite helpful: a grassroots approach that focuses on the perspectives of individual women can be beneficial in creating effective political solutions. Applying this bottom-up approach, we should focus on why it is that so many victims refuse to engage with this system. Evidence thus far shows that there are two important reasons why many victims do not engage. First, there is a need for improvement in the criminal justice treatment of domestic violence. Second, the current focus on the criminal

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<sup>123</sup> See *infra* notes 212–214 and accompanying text.

<sup>124</sup> For a discussion on feminist debates regarding how to define autonomy and what role the government should play in fostering autonomy, see Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond 'Empty' Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19, 124–29 (1998); Miccio, *supra* note 50, at 310–16.

<sup>125</sup> But see Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 426 (1985) (arguing that individuals do not always make choices in order to increase their own well-being, but rather in order to submit to authority).

<sup>126</sup> See *infra* Part III.C.2.

justice system as the main solution to this problem is of limited effectiveness given the social, political, and economic aspects of this issue.

*1. Ways the Criminal Justice System Needs to Improve*

a. Poor Interactions with Legal Actors

By listening to the personal experiences of domestic violence victims, one discovers that the quality of victims' interactions with actors in the criminal justice system affects their willingness to participate in the prosecution of their batterers.<sup>127</sup> One survey found that women were more afraid of the courts and the law than they were of harming their relationship with their partner or of retaliation from their partner.<sup>128</sup> The women's two greatest concerns were that the prosecutors would not prepare them for trial and that the defendant would not be found guilty.<sup>129</sup> Eve and Carl Buzawa also have documented how ill-informed domestic violence victims are about the prosecution process, which can lead to high rates of victim attrition.<sup>130</sup>

In addition to a lack of communication and information, some actors in the criminal justice system sometimes exhibit a negative response to battered women. Prosecutors are baffled when victims refuse to leave abusive partners or to help with the prosecution of their batterers.<sup>131</sup> This lack of understanding can leave some prosecutors feeling frustrated, indifferent, or cynical.<sup>132</sup> Likewise, victims feel frustrated that prosecutors are so out of touch with the everyday realities of their lives. Hillary Potter interviewed a woman who expressed her frustrations this way:

I felt like I was a walking statistic. I was this number out of the sociology books, I felt like, "You really can't relate, leave me alone." My victim advocate, I forget her name, she would ask me questions, go on and on. I was like, "Lady, leave me alone. I'm dealing with trying to pay my rent." . . . I felt like, "Leave me alone, I've got enough going on. You're not helping me. What can you do to help me? Unless

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<sup>127</sup> Coker, *supra* note 1, at 840; *see also* Mills, *supra* note 64, at 595 (citing studies that suggest that when a battered woman has a negative interaction with the state, she is less likely to rely on state assistance in the future).

<sup>128</sup> OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T JUSTICE, DOMESTIC VIOLENCE RESEARCH: SUMMARIES FOR JUSTICE PROFESSIONALS 13 (Barbara E. Smith ed., 2003), *available at* <http://www.ncjrs.gov/pdffiles1/nij/202564.pdf> (summarizing JOANNE BELKNAP ET AL., FACTORS RELATED TO DOMESTIC VIOLENCE COURT DISPOSITIONS IN A LARGE URBAN AREA (2000)).

<sup>129</sup> *Id.*

<sup>130</sup> BUZAWA & BUZAWA, *supra* note 6, at 95.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*



you're going to write me a check, you can't help me . . . ." I was dealing with my own emotions and I still had to get up and cook and do all the things I had to do.<sup>133</sup>

Prosecutors also may erect barriers that "test" the commitment of victims to prosecute.<sup>134</sup> This attitude then leads more victims to drop charges or to not appear in court, which reinforces the beliefs of prosecutors, police, and other staff that becoming involved in domestic violence cases is futile.<sup>135</sup> Thus, the vicious cycle between the lack of cooperation of victims and the negative attitudes among legal actors that result from this lack of cooperation continues.

Domestic violence victims also have reported that legal and court personnel are sometimes demeaning and patronizing.<sup>136</sup> One study found that court clerks, who were supposed to help women file protective orders, provided little assistance to women with special needs such as literacy barriers and language translation.<sup>137</sup> In addition, some clerks actively discouraged women from filing protective orders.<sup>138</sup> Furthermore, there have been cases where judges condescendingly trivialized the fears of domestic violence victims and ignored their requests for protection, ultimately placing these victims in grave danger.<sup>139</sup>

Poor interactions with the police, who are the first line of defense for many domestic violence victims, are particularly troubling. As has already been discussed, police still have quite a bit of discretion even under mandatory policies because they must determine whether there is probable cause for arrest. Unfortunately, when dealing with the police, victims have found some skeptical of their reports of abuse and suspicious that they are acting in retaliation in order to get something out of the batterer, such as child support.<sup>140</sup> There have also been situations where officers have talked

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<sup>133</sup> POTTER, *supra* note 109, at 142.

<sup>134</sup> BUZAWA & BUZAWA, *supra* note 6, at 189.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 172 (1993).

<sup>138</sup> *Id.*

<sup>139</sup> JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 4–5 (1999) (describing the case of Pamela Dunn who was shot, stabbed, and strangled by her husband five months after a judge chastised her for requesting a police escort to her apartment to gather her belongings); Bailey, *supra* note 90, at 45–46 (describing the case of Evette Cade whose estranged husband doused her with gasoline and set her on fire after a judge ignored Cade's request to leave a protective order him in place).

<sup>140</sup> POTTER, *supra* note 109, at 177. One of the women that Hillary Potter interviewed recounted one specific incident as follows:

At one point I actually did call the police. . . . They came to my house and I thought, "OK, good, I'm going to take care of this." They told me, "You're just doing this because you're mad at

to women in the presence of their batterers, limiting the victims' willingness to talk frankly about the abuse.<sup>141</sup>

The poor interactions between victims and the police may be partially explained by the fact that it has been documented that a significant number of police officers may themselves be batterers. The Neidig Study documented that approximately twenty-eight percent of police officers self-reported that they had committed an act of physical aggression against their spouse in the previous year.<sup>142</sup> In an unpublished study conducted by Lanor Johnson, forty percent of officers "surveyed reported that they had behaved violently toward their spouse and/or children in the last six months."<sup>143</sup> If a substantial number of police officers are engaging in domestic violence, it cannot be expected that they will adequately protect victims from the same type of behavior. Furthermore, as victims sense that the police are not taking the violence in their homes seriously, they will be less willing to engage with the criminal justice system or less likely to expect that the criminal justice system will ever help them. Finally, victims of abusive police officers often feel that they cannot seek out help from the same criminal justice that employs their intimate partners. There has been a great deal of media attention surrounding the case of Drew Peterson, the former police officer who is suspected of being involved in the disappearance of his wife, Stacy Peterson.<sup>144</sup> One of the most disturbing allegations related to this case is that Stacy was a domestic violence victim who felt that she had nowhere to turn because her husband was a police officer.<sup>145</sup>

#### b. Lack of Adequate Protection

An attempt to separate from one's batterer can be very dangerous.<sup>146</sup> According to Martha Mahoney, "[a]t least half of women who leave their abusers are followed and harassed or further attacked by them. In one study

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him. Are you doing this because you want child support?" I was so hurt. They was going through my drawers and my kitchen and asking me if I was on welfare. They weren't even asking me what happened. They were like drilling me. So after that I killed it. My whole mind and my body and my spirit, I killed it, and I never talked about it again, until one day I finally told my mother.

*Id.*

<sup>141</sup> *Id.* at 178.

<sup>142</sup> Peter H. Neidig, Harold E. Russell, & Albert F. Seng, *Interspousal Aggression in Law Enforcement Families: A Preliminary Investigation*, 15 POLICE STUD.: INT'L REV. POLICE DEV. 30, 32 (1992).

<sup>143</sup> *Id.* at 31.

<sup>144</sup> See *The Real Story Here*, CHI. DAILY HERALD, May 19, 2009, at A1.

<sup>145</sup> See Erika Slife, *When Cop Causes Family Violence; Many Victims May Have Nowhere to Turn, Experts Say*, CHI. TRIB., Sept. 3, 2008, at W1.

<sup>146</sup> Mahoney, *supra* note 116, at 80.

of interspousal homicide, more than half of the men who killed their spouses did so when the partners were separated.”<sup>147</sup> Some argue that women are safest when they willingly partner with state actors to investigate and prosecute domestic violence cases.<sup>148</sup> The truth is, however, that the criminal justice system often fails to protect these women even when they are willing participants. As has already been discussed, even after the institution of mandatory policies, some victims still find the criminal justice system nonresponsive to their cries for help.<sup>149</sup> If a victim has found the system to be nonresponsive in the past, she may determine that it is not worth her time to contact the police on future occasions.<sup>150</sup> Moreover, if a victim fears that her partner may retaliate once she contacts the police, she certainly is not going to report the abuse if she believes that she is not going to be protected from that retaliation. For these reasons, domestic violence victims cannot be expected to engage with the criminal justice system if they cannot rely on it for adequate protection.

## 2. Domestic Violence is a Social, Political, and Economic Issue

Feminists who advocated for a strong criminal justice response to domestic violence also recognized that arrest alone was not going to curb this problem; criminalization would be meaningless if victims did not also have access to housing, jobs, and social support systems.<sup>151</sup> Furthermore, these feminists were interested in deconstructing the political structures that subordinate women and keep them vulnerable to violence.<sup>152</sup> Thus, the high lack of engagement of domestic violence victims highlights the fact that while the criminal justice system is an important tool, it is an extremely limited one. There are social, political, and economic aspects of domestic violence that cannot be addressed within the criminal justice system itself. These factors also constrain some victims’ ability or willingness to fully

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<sup>147</sup> *Id.* at 64–65.

<sup>148</sup> Mills, *supra* note 64, at 551.

<sup>149</sup> For examples of victims who found the criminal justice system nonresponsive, see *Castle Rock v. Gonzales*, 545 U.S. 748 (2004); Bailey, *supra* note 90, at 45–46.

<sup>150</sup> BUZAWA & BUZAWA, *supra* note 6, at 78 (“Perhaps the most insidious effect of past poor police practices may be a contribution to the inordinately high rates of victims not calling the police or victim screening.”); Sara R. Benson, *Failure to Arrest: A Pilot Study of Police Response to Domestic Violence in Rural Illinois*, 17 AM. U. J. GENDER SOC. POL’Y & L. 685, 700 (2009) (suggesting that inadequate police responses in rural areas may be discouraging victims from seeking further assistance).

<sup>151</sup> See Miccio, *supra* note 50, at 263–67; see also Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 1030 (2004) (arguing that criminal law “is a critical component of what must necessarily be a multi-faceted enterprise”).

<sup>152</sup> *See id.*

engage with and take advantage of the criminal justice system. Thus, while activists and scholars should continue to advocate for improvements within the criminal justice system, they should also view this system as a very limited tool that should be part of a broader set of social, political, and economic policies.

a. Limited Economic Resources

As already discussed, one of the important insights behind the mantra “the personal is political” is that the public spheres and the private spheres are interrelated. The fact that women have less economic power than men in the public sphere necessarily correlates to their vulnerability to violence in their personal lives.<sup>153</sup> Women often do not want to testify in court, or often recant and testify on behalf of their batterers in court, because of limited economic resources. “Women’s decisions whether or not to support criminal justice intervention are often related to whether or not they can afford to prioritize prosecution over other more immediate concerns such as food, employment, and childcare.”<sup>154</sup> For many women, the reality is that the incarceration of their spouses means destitution and homelessness for their families.<sup>155</sup> In addition, many women may not want to report domestic violence to the authorities because they do not want to affect future job prospects for either themselves or for their partners.<sup>156</sup>

Furthermore, while the current criminal justice response is based on the premise that the victim will separate from her batterer, the reality is that many victims cannot afford separation. A domestic violence victim faces a fifty percent chance that her standard of living will drop below the poverty line when she chooses to leave her batterer.<sup>157</sup> It also has been estimated that nearly half of all homeless women and children have fled violence in

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<sup>153</sup> Donna Coker, *Addressing Domestic Violence Through a Strategy of Economic Rights*, 24 WOMEN’S RTS. L. REP. 187, 188 (2003); *see also* Sack, *supra* note 84, at 1734 (arguing that the number one reason women stay with batterers is economic dependence and that 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); Ola W. Barnett, *Why Battered Women Do Not Leave, Part 1: External Inhibiting Factors Within Society*, 1 TRAUMA, VIOLENCE & 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).

<sup>154</sup> Coker, *supra* note 1, at 823; *see also* Mahoney, *supra* note 7, at 62 (noting a lack of resources for women who separate from their batterers).

<sup>155</sup> Mahoney, *supra* note 7, at 62; *see also* Coker, *supra* note 1, at 188 (“Abusive men cause women to lose jobs, educational opportunities, careers, homes, savings, their health, their ability to enter the workplace.”).

<sup>156</sup> Weissman, *supra* note 83, at 435.

<sup>157</sup> Lininger, *supra* note 6, at 769.

the home.<sup>158</sup> When women with children do take the economic risk to escape abuse, they often find they are punished for their lack of resources with findings of child neglect and further state scrutiny.<sup>159</sup> Thus, some of the current policies in the criminal justice system may actually be putting some women in more danger due to their economic circumstances.

The complexity of this economic issue, however, cannot be ignored. Providing domestic violence victims with shelter, subsidies, and education after suffering from abuse are certainly important, but these remedies are not enough. A key goal of domestic violence law and policy must be to address the institutionalized economic vulnerability of women in society.

In *Justice, Gender, and the Family*, Susan Okin gives an extensive analysis of this vulnerability. She notes how women are socialized from an early age to believe that marriage and family are very important.<sup>160</sup> Part of this socialization entails the expectation that the woman is to be the primary caretaker in the family.<sup>161</sup> This expectation necessarily affects the choices that young girls make regarding the extent and field of education they will pursue and how purposeful they are about their careers; they are cognizant of the effects of family life on their work and the effects of work on their family life.<sup>162</sup> As a result, the occupational aspirations of adolescents tend to be differentiated by sex, and this differentiation is similar to sex segregation that is found in the workplace.<sup>163</sup> Young girls are attracted to careers that can accommodate a parent who is the primary caregiver; these

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<sup>158</sup> Barnett, *supra* note 153, at 348 (citing research suggesting that twenty-one to sixty-four percent of clients in shelters are homeless); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 8 (1999).

<sup>159</sup> Mahoney, *supra* note 7, at 69–72.

<sup>160</sup> OKIN, *supra* note 25, at 142.

<sup>161</sup> *Id.*; see also JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1 (2000).

<sup>162</sup> OKIN, *supra* note 25, at 142.

<sup>163</sup> *Id.* at 142–43. In 2007, only nine percent of female professional workers worked in the high-paying fields of computers and engineering. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT 1008, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2007, at 2 (2008) [hereinafter HIGHLIGHTS OF WOMEN'S EARNINGS]. In contrast, forty-three percent of professional male workers worked in these fields. *Id.* Professional women are more likely to work in the lower-paying fields of education and health care; sixty-seven percent of female professionals worked in these fields in 2007, compared to only thirty percent of their male counterparts. *Id.* According to the Current Population Survey, in 2005, women made up only thirty-one percent of workers in the highest earnings category, while they made up a slight majority of those in the lowest earnings category. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, ISSUES IN LABOR STATISTICS, SUMMARY 06-03, WOMEN STILL UNDERREPRESENTED AMONG HIGHEST EARNERS 1 (2006); see also WILLIAMS, *supra* note 161, at 66 (“Three-fourths of all working women still work in predominantly female occupations.”).

careers tend to provide salaries on the lower end of the pay scale.<sup>164</sup> These professions also tend to have less opportunity for mobility and advancement.<sup>165</sup> In 2007, women who were full-time wage and salary workers made about eighty percent of what their male counterparts made.<sup>166</sup> The differential increased by age group. Thus, women between the ages of sixteen and twenty-four made ninety-two percent of what their male counterparts earned, women between the ages of twenty-five and thirty-four made eighty-seven percent of what their male counterparts earned, and women between the ages of fifty-five and sixty-four earned only seventy-three percent of what their male counterparts earned.<sup>167</sup> These statistics demonstrate that women do not advance in their careers, and therefore do not increase their earnings, at the same rate as men.<sup>168</sup>

Because many women enter marriage making lower salaries than their spouses, the traditional family model where the wife handles a disproportionate share of the work at home makes rational and economic sense.<sup>169</sup> Since the husband is making more money, many families decide to make his career the priority, and the wife takes on more duties at home and becomes the primary caregiver to their children.<sup>170</sup> The wife's lower salary gives her less leverage in challenging the traditional division of labor in the household and in demanding more equal sharing of child-rearing and household chores.<sup>171</sup> As a result, many men can work late hours and accept overtime assignments with the confidence of knowing that their wives are taking care of any home and family obligations.<sup>172</sup> In contrast, the amount

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<sup>164</sup> OKIN, *supra* note 25, at 143.

<sup>165</sup> *Id.* at 143–44.

<sup>166</sup> HIGHLIGHTS OF WOMEN'S EARNINGS, *supra* note 163, at 1.

<sup>167</sup> *Id.* The differential decreases again for women sixty-five and older, who earned seventy-eight percent of their male counterparts. *Id.* at 9 tbl.1.

<sup>168</sup> See also *infra* note 190 and accompanying text (discussing how career disruption during a woman's childbearing years is another reason why women do not earn as much as men during the lifespan of their careers); WILLIAMS, *supra* note 161, at 66 (noting also that limited access to "mentoring and social contacts" impede promotion to high-level managerial and professional jobs).

<sup>169</sup> See OKIN, *supra* note 25, at 146.

<sup>170</sup> *Id.* Interestingly, as a class, African-American men spend longer hours on household work than their Caucasian counterparts. Yoshinori Kamo & Ellen L. Cohen, *Division of Household Work Between Partners: A Comparison of Black and White Couples*, 29 J. COMP. FAM. STUD. 131, 141 (1998). Yet, overall, they still only perform 34.5% of the total household work load in their homes. *Id.*

<sup>171</sup> OKIN, *supra* note 25, at 148. Note, however, that as a class, women still perform a disproportionate share of household work even when they make equivalent or higher salaries than their husbands. Kamo & Cohen, *supra* note 170, at 141.

<sup>172</sup> WILLIAMS, *supra* note 161, at 71–72, 79–81 (noting that the most successful executives tend to have wives who work full-time in the home and that the best factory jobs require overtime).

of time and energy needed to tend to their disproportionate share of work in the home<sup>173</sup> provides many women with less time and energy for paid work outside of the home.<sup>174</sup> Unfortunately, the distribution of power within the home can be affected by the possession by each spouse of resources valued outside of the home, specifically money and status.<sup>175</sup> The distribution of duties between husbands and wives, therefore, reinforces the asymmetric power relation between them.<sup>176</sup> In other words, the limited access that many women have to the public sphere can decrease their economic and political power within the marital relationship and make them more vulnerable to subordination and violence.

In addition, discrimination in the workplace does not make it an attractive place for many women to be. They are demeaned and sexually harassed, and they are represented in token numbers in positions of influence that could help shape workplace and political policies that would make things more equal.<sup>177</sup> Employment discrimination issues are compounded for women of color and immigrant women.<sup>178</sup> Not only does discrimination in the workplace limit some women's economic independence, but this discrimination can also reinforce some women's "choice" to focus more on household duties and to support their husband's higher paying career.<sup>179</sup> Due to these stressors both inside and outside of

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<sup>173</sup> On average, women handle seventy-five percent of household duties. SYLVIA ANN HEWLETT, *OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS* 36 (2007). In addition, there is a growing trend where women's caretaking duties include not only taking care of their children, but also taking care of their parents and grandparents. *Id.* at 33–36. On average, African-American women spend more time on elder and extended family care than Caucasian women. *Id.* at 36.

<sup>174</sup> OKIN, *supra* note 25, at 154–55; see Gavison, *supra* note 43, at 14; see also WILLIAMS, *supra* note 161, at 79–80 (noting how women are particularly disadvantaged in blue-collar jobs because taking time off to care for children affects their seniority and limits their time for extra training, both of which are crucial for advancement); Weissman, *supra* note 83, at 426 (noting that women that choose to focus more of their time on paid work outside of the home "are often disparaged as bad mothers").

<sup>175</sup> OKIN, *supra* note 25, at 158; WILLIAMS, *supra* note 161, at 57.

<sup>176</sup> OKIN, *supra* note 25, at 156–59.

<sup>177</sup> *Id.* at 132–33; see also WILLIAMS, *supra* note 161, at 66 (noting the prevalence of sexual harassment in traditionally male blue-collar jobs).

<sup>178</sup> SCHNEIDER, *supra* note 44, at 63; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241–49 (1991). In 2007, the median earnings for full-time wage and salary African-American women workers was eighty-five percent of that earned by their Caucasian women counterparts. HIGHLIGHTS OF WOMEN'S EARNINGS, *supra* note 163, at 8 tbl.1.

<sup>179</sup> OKIN, *supra* note 25, at 146–48; see also Gavison, *supra* note 43, at 17. Note that African-American and Latina women make ninety percent of what their male counterparts make, compared to Caucasian and Asian women who earned only eighty percent of what their male counterparts earned. HIGHLIGHTS OF WOMEN'S EARNINGS, *supra* note 163, at 1.

the home, some women even decide to focus on working in the home full-time.<sup>180</sup>

Moreover, an increase in education level does not eliminate the issue of economic dependence for many women.<sup>181</sup> Indeed, while the number of women who have obtained graduate degrees and have aspired for more prestigious careers has increased since Okin's analysis,<sup>182</sup> it has been documented that there is a "brain drain" in these professions as many of these women either leave these careers entirely in order to work full-time in the home or they take a "scenic route"<sup>183</sup> through their careers in order to allow more time to handle household demands.<sup>184</sup> Most careers are still based on a model where the employee has a partner who is taking care of most of the duties in the home.<sup>185</sup> Joan Williams describes this situation as the "ideal-worker" norm.<sup>186</sup> Because many women still operate in a family

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Yet, these women still on average perform a disproportionate share of unpaid work in the home. See *supra* note 169 and accompanying text.

<sup>180</sup> See Weissman, *supra* note 83, at 426 (noting also that women sometimes leave their jobs "because of their concerns that work outside of the home conflicts with the proper fulfillment of the role of a good mother"). Of course, the ability to work full-time in the home is related to socioeconomic status. For example, African-American women have always been more likely to work outside of the home than their Caucasian counterparts, beginning with slavery. Kamo & Cohen, *supra* note 170, at 131–32. In addition, shifts in the economy caused by globalization have made work outside of the home necessary for many women. Weissman, *supra* note 83, at 410.

<sup>181</sup> See WILLIAMS, *supra* note 161, at 67 (noting that the narrowing of the gap between men and women in education level "has not led to proportional representation of women in high-level white-collar jobs").

<sup>182</sup> See Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003 at 44 (noting that in 2003, sixty-three percent of the graduating class at Berkeley Law School, forty-six percent of the graduating class at Harvard Law School, and fifty-one percent of the graduating class at Columbia Law School were women; similarly, forty-seven percent of all medical students were women).

<sup>183</sup> "They don't step out entirely; rather, they step back a bit—taking a part-time job, a flexible work arrangement, or a telecommuting option, or turning down a promotion, deciding that they cannot take on additional responsibility." HEWLETT, *supra* note 173, at 29–30.

<sup>184</sup> *Id.* at 14, 43 (stating that thirty-seven percent of highly qualified women surveyed [defined as women with a graduate or professional degree or a high-honors undergraduate degree] voluntarily left their careers for a period of time, more than thirty percent took a "scenic route" in their careers, and many women found it difficult to re-enter the workforce on a full-time basis after taking time off); Belkin, *supra* note 182, (noting that ninety-five percent of Caucasian men with M.B.A.'s are working full-time, compared with sixty-seven percent of their Caucasian women counterparts; the numbers of African-American women are closer to those of Caucasian men).

<sup>185</sup> WILLIAMS, *supra* note 161, at 1.

<sup>186</sup> *Id.* Williams notes that the ideal-worker norm does not define all jobs, but it does define the best jobs, including full-time blue-collar jobs and high-level professional jobs. *Id.* In addition to working long hours, an ability to relocate is also important for advancement in



structure where they handle a disproportionate share of the duties of the home, however, managing a work–life balance has become difficult.<sup>187</sup> This reality is compounded by the experience of sex discrimination and harassment in the workplace. Kathleen Gerson conducted a study where she found that many women made the decision to work full-time in the home at the same time that they became frustrated with the dead-end nature of their jobs.<sup>188</sup> Similarly, women who originally viewed themselves as being more “domestically oriented” found themselves more career oriented when opportunities for work advancement opened up to them.<sup>189</sup> This “brain drain” has serious economic consequences for this group of highly skilled women.<sup>190</sup>

Thus, Okin recognizes the interrelatedness of the public and private spheres in assessing the economic situation of women as a class. She eschews the notion that one must choose either the “human capital” approach or the “workplace discrimination” explanation in determining why

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many careers. *Id.* at 75. Women are also disproportionately affected by this fact in that their partners are less willing to move for their careers or in that their careers are disrupted in order to support their partners’ relocations. *Id.*

<sup>187</sup> HEWLETT, *supra* note 173, at 13–16; WILLIAMS, *supra* note 161, at 71–72, 79–81; *see also* Sylvia Ann Hewlett, *We Can Stop the Female Brain Drain*, SUNDAY TIMES (London) (Mar. 6, 2005), <http://www.timesonline.co.uk/tol/news/article420087.ece> (stating that the “overwhelming evidence shows that women want to work—and work hard—but they find it almost impossible to clone the unbroken, competitive model of work created by men”).

<sup>188</sup> OKIN, *supra* note 25, at 148; *see also* Hewlett, *supra* note 173, at 36–37 (noting that twenty-nine percent of women surveyed left their jobs because they were unsatisfying; these numbers increased for women who worked in business and law: fifty-two percent and fifty-nine percent, respectively).

<sup>189</sup> OKIN, *supra* note 25, at 148; *see also* Hewlett, *supra* note 173, at 37 (“A new child or a mother-in-law recently diagnosed with Alzheimers does not necessarily signal that a woman will quit. Whether or not a woman off-ramps also has a whole lot to do with whether an employer can conjure up support—and opportunities—in the workplace.”).

<sup>190</sup> Obviously women who work full-time in the home become completely economically dependent on their spouses, but the decision to take a “scenic route” in one’s career also has consequences. Ninety-three percent of women surveyed who left their careers eventually wanted to rejoin the workforce, but only seventy-four percent were able to do so. HEWLETT, *supra* note 173, at 43. Of the group that was able to rejoin the workforce, only forty percent were able to return to full-time positions. *Id.* Furthermore, on average, women lose eighteen percent of their earning power when they leave the workforce, even for a short period of time. *Id.* at 45. For those who spend three or more years outside of the workforce, they can lose as much as thirty-seven percent of their earning power. *Id.* at 45; *see also* WILLIAMS, *supra* note 161, at 73 (“Even if someone who has been working part time later takes a full-time job, she (or he) is likely to earn far less than someone who always worked full time.”). Williams also notes that workers who take advantage of “family friendly” part-time policies are more at risk for marginalization in the workplace and ultimately complete termination. WILLIAMS, *supra* note 161, at 74–75.

there are inequalities based on sex in the workplace.<sup>191</sup> The human capital approach explains this inequality based on the notion that women “choose” to enter lower paying or more dead-end jobs because of expectations about their family lives.<sup>192</sup> The workplace discrimination explanation looks at factors outside of the control of the female employee.<sup>193</sup> Because the public and private spheres are interrelated, however, Okin recognizes that these explanations complement one another: “A cycle of power relations and decisions pervades both family and workplace, and the inequalities of each reinforce those that already exist in the other.”<sup>194</sup>

Furthermore, research on the effect of divorce on women underscores the difficulty many women have maintaining economic independence should they choose to separate from their partner. Generally speaking, after divorce, women’s incomes fall substantially, while their husbands’ decline more modestly, or in many cases, their incomes actually rise.<sup>195</sup> As has already been stated, many women make substantially less money than their spouses in the workplace. Yet, because women usually get custody of their children, they have larger economic needs than their husbands because of their larger households.<sup>196</sup> Moreover, their work lives are constrained by the needs of their children.<sup>197</sup> Thus, women who are already economically constrained because of their lower paying jobs find that their ability to improve their economic situation in the workplace is constrained by needs in the home.<sup>198</sup>

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<sup>191</sup> OKIN, *supra* note 25, at 146–47; *see also* WILLIAMS, *supra* note 161, at 37, 83–84 (arguing that the marginalization of women in the workplace is not just because of choice, but it is also a result of discrimination).

<sup>192</sup> OKIN, *supra* note 25, at 147.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*; WILLIAMS, *supra* note 161, at 38–39 (noting how the organization of market and family in American culture creates a “force field” that pulls women into “traditional gender roles”) (emphasis added).

<sup>195</sup> Pamela J. Smock, Wendy D. Manning & Sanjiv Gupta, *The Effects of Marriage and Divorce on Women’s Economic Well-Being*, 64 AM. SOC. REV. 794, 794 (1999). *But see* Matthew McKeever and Nicholas H. Wolfinger, *Reexamining the Economic Costs of Marital Disruption for Women*, 82 SOC. SCI. Q. 202, 215 (2001) (discussing findings that suggest that women’s increased level of participation in the work force over the last several years has improved the general economic condition of divorced women). Roughly forty percent of divorced women live in poverty, and a disproportionate number of their children “do not attain the educational level, or the class status, of their fathers.” WILLIAMS, *supra* note 161, at 3.

<sup>196</sup> OKIN, *supra* note 25, at 162.

<sup>197</sup> *Id.*

<sup>198</sup> In 2007, unmarried women workers without children made fourteen percent more than married women with children. HIGHLIGHTS OF WOMEN’S EARNINGS, *supra* note 163, at 2. In contrast, unmarried men with children made twelve percent more than unmarried men

To be clear, I am not arguing that there are not women who choose to become economically dependent on their husbands because they sincerely want to spend more time with their children and on household duties. Instead, I am arguing that because of the interrelatedness of the public and private spheres, it is difficult to determine how much of this choice is also influenced by the societal view that a good mother and wife should forgo career ambition outside of the home and by the difficult realities of the ideal-worker norm, which often includes sex discrimination and sexual harassment.

I am also not arguing that every woman who is economically dependent on her partner is necessarily disempowered by that choice. It certainly can be the case that a couple determines that it is most efficient for their household to divide the labor in such a way that the woman is economically dependent on her partner, but her partner still respects her and views her as an equal partner. The point of this analysis is not to deny the possible existence of such a relationship. In addition, the point of this analysis is not to suggest that women stay in abusive relationships only because of economic dependence. As has already been discussed, there are a variety of reasons why a woman may remain in an abusive relationship.<sup>199</sup> Instead, the purpose of this analysis is to underscore that economic dependence can make women more vulnerable to violence in relationships that are abusive because it makes it more difficult for them to engage with the criminal justice system or for them to leave the relationship should they choose to do so.<sup>200</sup> Obviously, the criminal justice system is not equipped to address the complexity of this issue. For that reason, while criminal justice policies are important, it is also the case that domestic violence policies that focus more on improving the economic conditions of women will have a greater and longer lasting impact on many victims.<sup>201</sup>

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without children. *Id.*; see also WILLIAMS, *supra* note 161, at 2 (noting that single mothers earn the lowest percentage of average men's pay).

<sup>199</sup> See *supra* note 118 and accompanying text.

<sup>200</sup> See *supra* Part III.C.2.a (discussing how a domestic violence victim faces a fifty percent chance that her standard of living will drop below the poverty level should she choose to leave her batterer and that nearly half of all homeless women and children have fled violence in the home).

<sup>201</sup> Some scholars have already begun proposing potential policies for improving the economic conditions for women. For example, Susan Okin has argued that a partner who has been able to maintain a career "largely unencumbered by domestic responsibilities" should be responsible for supporting the other partner in the form of alimony and child support for at least the number of years the division of labor took place. OKIN, *supra* note 25, at 183. Furthermore, she argues that "postdivorce households should enjoy the same standard of living." *Id.* (emphasis omitted). She also argues that shared household duties between the sexes would require a change in the demands of work life, which is currently based on the ideal-worker norm. *Id.* at 175–76. Similarly, Joan Williams advocates for a

## b. Intersectionality

Feminists of color recognized years ago that feminism must take into account the intersectionality of race, class, sexuality, and gender in women's lives in order to have a complete picture of the subordination that all women experience.<sup>202</sup> Race can compound the economic disparities that some domestic violence victims experience. In 2007, the median earnings of full-time wage and salary African-American women workers was eighty-five percent of those earned by their Caucasian women counterparts.<sup>203</sup> The differential for Latina women was seventy-six percent.<sup>204</sup> Women of color have been particularly harmed by the most recent economic recession. They have taken out a disproportionate share of subprime loans.<sup>205</sup> In addition, a disproportionate number of low-income African-American women have been evicted from their homes.<sup>206</sup>

Women of color also have their own specific challenges when dealing with legal actors. First, they especially have been victimized by dual arrest policies,<sup>207</sup> which provide that victims may be arrested along with their perpetrators when the police claim that they cannot determine who the aggressor in the attack was.<sup>208</sup> One of the reasons that African-American

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restructuring of market work and family work so that the "ideal worker" can spend more time on caregiving and work performed in the home is valued so that women and their children are protected from economic vulnerability. WILLIAMS, *supra* note 161, at 56. She also suggests a way to calculate "income equalization" between separated households post-divorce. *Id.* at 115–16, 129–31. Martha Fineman advocates the abolition of the legal category of marriage and the "redistribution or reallocation of social and economic subsidies" to the caregiver and her dependent, instead of to the "natural family." MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 228–33 (1995).

<sup>202</sup> AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER: ESSAYS & SPEECHES* 110, 110 (1984); Crenshaw, *supra* note 178, at 1241–45; see also Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585 (1990).

<sup>203</sup> HIGHLIGHTS OF WOMEN'S EARNINGS, *supra* note 163, at 8 tbl.1.

<sup>204</sup> *Id.*

<sup>205</sup> Heidi Hartman, *Women, the Recession, and the Stimulus Package*, *DISSENT*, Fall 2009, at 43.

<sup>206</sup> Erik Eckholm, *A Sight All Too Familiar in Poor Neighborhoods*, *N.Y. TIMES*, Feb. 19, 2010, at A14.

<sup>207</sup> Gruber, *supra* note 1, at 805–06; see also Sack, *supra* note 84, at 1680–81 (noting that women of color are more likely to be arrested than Caucasian women are and are charged with more serious crimes).

<sup>208</sup> Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 *U. PA. L. REV.* 1171, 1185 (2002) (noting that many statutes have "primary aggressor" language that require the police to determine who was the most significant aggressor). *But see* David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 *J. CRIM. L. & CRIMINOLOGY* 255, 296 (2007) (finding that overall dual arrest rates are low in domestic violence cases, but also noting that there are

women may be disproportionately affected by dual arrest policies is that they tend to fight back against their abusers at higher rates than their Caucasian counterparts.<sup>209</sup> Yet because of the stereotypical image of the “angry black woman,” the police are more apt to view these acts as acts of aggression instead of as acts of self-preservation.<sup>210</sup> In fact, Hillary Potter found in her discussions with African-American victims that in cases where they tried to physically defend themselves from their abusers, they were hesitant to call the police because they were afraid that they might be viewed as the aggressor, or at least as contributors to the abuse.<sup>211</sup>

Donna Coker notes that women who are arrested risk losing custody of their children, may be barred for life from receiving welfare benefits, and may have student financial aid compromised.<sup>212</sup> She also notes that arrests of immigrant women have also had disastrous effects because, not having proper legal counsel, they often plea bargain in order to avoid jail time, which can result in deportation.<sup>213</sup> In addition, immigrant abusers may be subject to deportation if they are convicted of a domestic violence crime, which may be a result that many victims do not want, particularly if the partner is the primary economic provider.<sup>214</sup>

Some women of color have also found that police officers doubted their reports of abuse because physical evidence can be harder to see on darker skin.<sup>215</sup> In addition, the “angry black woman” stereotype not only applies to interactions with the police, but also to those interactions with legal and court personnel, including judges.<sup>216</sup>

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considerable variations in dual arrest rates both among and within states); Sack, *supra* note 84, at 1691 (arguing that discretionary policies would not solve the problem of victim arrest and that they might actually make the problem worse).

<sup>209</sup> POTTER, *supra* note 109, at 47. A study by Russell P. Dobash and R. Emerson Dobash suggests that seventy-five percent of women who physically attacked their partners were acting in self-defense. *Id.* at 119; *see also* Schneider, *supra* note 44, at 67 (stating that most women arrested for domestic violence were actually acting in self-defense in jurisdictions with mandatory arrest laws).

<sup>210</sup> *See* POTTER, *supra* note 109, at 180.

<sup>211</sup> *Id.*

<sup>212</sup> Coker, *supra* note 1, at 839.

<sup>213</sup> Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1048–49 (2000).

<sup>214</sup> *Id.* *But see* Sack, *supra* note 84, at 1693 (arguing that discretionary policies will not solve the problems that immigrant domestic violence victims face and that a better solution is to directly address immigration policy rather than dismantling mandatory policies).

<sup>215</sup> POTTER, *supra* note 109, at 178.

<sup>216</sup> *Id.* at 183–84; *see also* Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 99–100 (2008) (discussing how both the “angry black woman” or Sapphire stereotype and the promiscuous and dishonest Jezebel stereotype make it difficult for African-American women who fight back to get sympathy from judges and juries).

Furthermore, women of color and immigrant women often want to limit the amount of interaction they have with the criminal justice system because of the history of poor interactions between this system and communities of color and immigrant groups. Kimberle Crenshaw has noted that these women do not want to “subject their private lives to the scrutiny and control of a police force that is frequently hostile” to people of color.<sup>217</sup> She argues that for members of racially subordinated groups, the home may function as a “safe haven from the indignities of life in a racist society. . . . [B]ut for this ‘safe haven,’ in many cases women of color victimized by violence might otherwise seek help.”<sup>218</sup> Similarly, lesbians also are hesitant to seek out help from the criminal justice system because of a fear of the discrimination and “the sensationalism frequently visited on same-sex couples.”<sup>219</sup> Lesbian victims who fight back against their abusive partners also tend to get less sympathy from legal actors.<sup>220</sup>

In addition, many African-American women may feel pressure to conceal the violence they experience because they want to limit racial stereotyping against African-American men.<sup>221</sup> Similarly, some Asian and Latina women hide the violence they experience at home in order to avoid shaming their families.<sup>222</sup> Hillary Potter found that the African-American women she spoke with were hesitant to engage with the criminal justice system because of the imbalance in punishment imposed upon defendants based on race.<sup>223</sup> Indeed, Donna Coker has noted that disproportionately high numbers of African-American and Latino men are subject to criminal justice intervention in domestic violence cases.<sup>224</sup> In addition, because of the prevalence of police brutality against African-American men, some

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<sup>217</sup> Crenshaw, *supra* note 178, at 1257. *But see supra* note 109 and accompanying text (suggesting that some African-American women support criminal justice intervention).

<sup>218</sup> Crenshaw, *supra* note 178, at 1257. *But see also supra* note 109 and accompanying text (discussing studies that show that many African-American women do desire that their batterers be prosecuted).

<sup>219</sup> Weissman, *supra* note 83, at 401; *see also* SCHNEIDER, *supra* note 44, at 68–70. It is important to note that the existence of domestic violence in same-sex relationships suggests that the traditional patriarchal analysis of domestic violence may be incomplete. *Id.* This fact underscores the importance of theorization that considers the intersectionality of various factors in domestic violence victim’s lives so that appropriate policies can be created that protected a larger segment of victims.

<sup>220</sup> Goodmark, *supra* note 216, at 112–13 (suggesting that the police may not be willing to intervene because they view the violence in same-sex cases as mutual).

<sup>221</sup> Crenshaw, *supra* note 178, at 1257.

<sup>222</sup> *Id.*; SCHNEIDER, *supra* note 44, at 64.

<sup>223</sup> POTTER, *supra* note 109, at 174.

<sup>224</sup> Coker, *supra* note 213, at 1034–45.

women are worried about how their partners will be treated by the police.<sup>225</sup> Because incarceration in general has had disproportionate effects on the poor, communities of color, and immigrant groups, Aya Gruber has been particularly critical of the current focus on arrest and prosecution within mandatory policies.<sup>226</sup>

Empirical research further supports the argument that an examination of the intersectionality of victims' identities is an important aspect of creating domestic violence policy. Many have concerns about mandatory arrest and prosecution policies given the fact that there is evidence that arrest and prosecution may not deter future violent conduct and that they may actually put some victims in more danger. Support for the view that mandatory arrest could serve as a deterrent for batterers was originally supported by an early study conducted by Lawrence Sherman in the early 1980s. At that time, the National Institute of Justice (NIJ) supported Sherman's study of the Minneapolis Police Department, which involved a field experiment of misdemeanor spousal abuse with three intervention strategies: arrest, ordering the suspect away from the scene for twenty-four hours, and trying to restore order.<sup>227</sup> Based on the results from this experiment, Sherman concluded that arrest was the most effective treatment in reducing the likelihood of renewed violence.<sup>228</sup>

Sherman ended up questioning the results from his original study, however. After his initial study in Minneapolis, the NIJ funded replication studies in six different cities.<sup>229</sup> The results from the experiments in Omaha, Nebraska and Charlotte, North Carolina suggested that arrest was no more of a deterrent than other types of police responses, such as separation or mediation.<sup>230</sup> The results from the experiment in Milwaukee suggested arrest reduced the likelihood of renewed violence for employed, married, Caucasian suspects who were high school graduates, but increased

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<sup>225</sup> POTTER, *supra* note 109, at 175. Interestingly enough, Potter did not find that the women she spoke with felt guilty about the prospect of putting "another Black man" through the criminal justice system. *Id.* They seemed more concerned about taking their children's father, anger from the batterer, or removing extra income. *Id.*

<sup>226</sup> Gruber, *supra* note 1, at 798. *But see* Sack, *supra* note 84, at 1690 (arguing that discrimination against the poor and people of color would be worse under discretionary versus mandatory policies).

<sup>227</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).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 173–74; 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>230</sup> Berk, *supra* note 227, at 171–72; J. David Hirschel & Ira W. Hutchinson, III, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 73, 115 (1992).

the likelihood of renewed violence for unemployed, unmarried, African-American suspects who were high school dropouts.<sup>231</sup> It should be noted that these replication studies have been criticized.<sup>232</sup> Thus, at this point it is not clear how effective arrest is as a deterrent for future violence in a relationship, but the replication studies suggest that class and race are important considerations in determining the effectiveness of mandatory policies.

Some may argue that issues related to race, class, and sexuality can be addressed by creating programs that encourage greater sensitivity within the criminal justice system. These types of efforts are certainly important, but as is the case with the economic disparities that women experience as a class, a comprehensive solution to racism, classism, and sexism is clearly beyond the scope of the criminal justice system. I do not raise this issue to suggest that the criminal justice system has no value in addressing domestic violence against women of color, but it is important to recognize the challenges of using a criminal justice solution in certain communities. Given that these challenges may cause some victims not to engage with the criminal justice system at all, a broader approach that includes solutions outside of the criminal justice system is critical in providing support for a larger group of victims.

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<sup>231</sup> Berk, *supra* note 227, at 173–74; *see also* Sherman et al., *supra* note 229, at 168.

<sup>232</sup> Joan Zorza has criticized the validity of the replication studies arguing that none of them fully replicated the original Minneapolis study or each other, each study had its own definition of a domestic relationship, and the type of police responses used in each study differed. Joan Zorza, *Mandatory Arrest for Domestic Violence: Why It May Prove the Best First Step in Curbing Repeat Abuse*, 10 CRIM. JUST. 2, 4–5 (1995). Critics of the NIJ studies also argue that it is incorrect to assume that renewed violence is a retaliatory response to arrest when the NIJ studies showed fewer re-offenses in the short term, and those treating batterers believe any retaliation from arrest would happen shortly after arrest. *Id.* at 8; *see also* Cynthia Grant Bowman, *Commentaries, The Arrest Experiments: A Feminist Critique*, 83 J. CRIM. L. & CRIMINOLOGY 201, 204 (1992) (arguing that the lower recidivism rate for employed men may be because their partners do not report future violence out of fear of sacrificing their lifestyle and status); Coker, *supra* note 1, at 856 (citing study that reviewed the NIJ arrest study data in Milwaukee and that concluded that residence in the most marginalized neighborhoods is a stronger predictor of increased violence following arrest than unemployment status); Lisa A. Frisch, *Research that Succeeds, Policies that Fail*, 83 J. CRIM. L. & CRIMINOLOGY 209, 213 (1992). *But see* Sack, *supra* note 84, at 1677–78 (noting that an important criticism of the NIJ replication studies is that they do not “examine the impact of the arrest policy in the context of other components of the justice system, such as prosecution and conviction rates, sentencing and monitoring policies, and access to services for victims” and stating that more recent reanalysis of the NIJ replication studies shows that there is a reduction in recidivism among domestic violence offenders who are arrested).



## IV. CONSIDERATIONS FOR FUTURE REFORM

Developing a global solution to the domestic violence problem is beyond the scope of this Article. Using the personal experiences of domestic violence victims as a starting point, however, this Part will provide some thoughts about considerations that should be made with respect to future reform.

## A. REFORM WITHIN THE CRIMINAL JUSTICE SYSTEM

An important step with respect to criminal justice reform is to directly address some of the inadequacies that domestic violence victims are currently experiencing within the criminal justice system. There are jurisdictions that have already begun to make such reforms. For example, in Washington, D.C., in order to enhance victim safety, the courtrooms dedicated to domestic violence cases as part of the Domestic Violence Unit are staffed with several security guards.<sup>233</sup> In addition, the Domestic Violence Intake Center, which is on-site at the courthouse, houses advocates who help victims with safety planning.<sup>234</sup> The U.S. Attorney's Office also runs a program that focuses on high-risk offenders and that collaborates with advocates who work with the victims in these cases.<sup>235</sup>

Furthermore, the Domestic Violence Unit seeks to improve victims' experiences with the legal system and to keep them better informed about the legal process. For example, independent victim advocates are present in the courtroom to assist victims during the court process.<sup>236</sup> The Intake Center is also staffed by independent victim advocacy organizations, the Office of Corporate Counsel, and prosecutors and advocates from the U.S. Attorney's Office who address victims' civil court and criminal justice needs in one place.<sup>237</sup> Victims' needs for material resources are also addressed in the Intake Center where representatives from victim advocacy organizations provide emergency services and referrals to multiple service organizations.<sup>238</sup>

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<sup>233</sup> EMILY SACK, CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES 55 (Lindsey Anderson et al. eds., 2002).

<sup>234</sup> *Id.* at 57.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 55.

<sup>237</sup> *Id.* at 57.

<sup>238</sup> *Id.*

In addition to Washington, D.C., many other jurisdictions have also improved coordination among courts, domestic violence organizations, and social service agencies.<sup>239</sup> Chicago has implemented the Target Abuser Call (TAC) program.<sup>240</sup> In 2004, the Department of Justice awarded over \$20 million for the creation of Family Justice Centers around the country, which all also implement a coordinated community response.<sup>241</sup> In July 2005, one such center was opened in Brooklyn.<sup>242</sup> In addition to implementing a coordinated community response, Brooklyn also has taken advantage of technological advances. ADT Securities Systems has donated electronic alarm pendants to some of the most severely at-risk victims.<sup>243</sup> These pendants “send[] a level-two response through the 911 police emergency system, the same response used for a police officer in need of assistance.”<sup>244</sup> Donated cell phones have also been distributed to some at-risk victims that have a speed dial connection to 911.<sup>245</sup>

Preliminary research thus far suggests that a coordinated response between all parts of the criminal justice system and community-based organizations is a promising response to domestic violence at this time.<sup>246</sup> In addition, these types of programs appear to have higher victim participation rates.<sup>247</sup> Thus, it may be the case that victims’ participation rates may be increased by directly addressing the reasons why they ordinarily choose not to engage with the criminal justice system. Moreover, if more victims participate in the prosecution of their batterers, it may be the

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<sup>239</sup> Sack, *supra* note 84, at 1724–28.

<sup>240</sup> Bailey, *supra* note 90, at 49.

<sup>241</sup> Sack, *supra* note 84, at 1730; *see also* *Frequently Asked Questions*, NAT’L FAM. JUST. CENTER ALLIANCE, <http://www.familyjusticecenter.org/index.php/faqs/fjcs/frequently-asked-question.php> (last visited June 30, 2009).

<sup>242</sup> Charles J. Hynes, *Combating and Preventing Domestic Violence*, CRIM. JUST., Spring 2010, at 47.

<sup>243</sup> *Id.* at 46.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> Sack, *supra* note 84, at 1726–28; *see also* GARLAND, *supra* note 74, at 205 (arguing that true crime control in modern society must involve coordination between the state, local organizations, and communities).

<sup>247</sup> For example, when adequately funded, as many as eighty percent of TAC victims participate in the prosecution of their batterers. Bailey, *supra* note 90, at 50. In a study of randomly selected cases from the TAC program and the General Court in Chicago, seventy-three percent of the TAC victims participated in the prosecution of their batterers, compared to a forty percent participation rate in General Court. CAROLYN COPPS HARTLEY & LISA FROHMANN, U.S. DEP’T OF JUSTICE, THE COOK COUNTY TARGET ABUSER CALL (TAC): AN EVALUATION OF A SPECIALIZED DOMESTIC VIOLENCE COURT 4 (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/202944.pdf>.

case that more legal actors would be motivated to respond to victims' cries for help, even without strict mandatory policies.<sup>248</sup>

On a practical level, however, funding is going to be a serious impediment to developing coordinated community response programs in many jurisdictions. Thus, jurisdictions may have to implement them on a small-scale level.<sup>249</sup> Yet, even small-scale programs that help only some domestic violence victims are better than no changes at all.

Even with an increase in resources, however, it is not clear that these types of programs are going to be successful for all victims. It could be the case that these types of programs will work best for high-risk cases where victims are in extreme danger, rather than for less severe cases.<sup>250</sup> In her discussions with African-American domestic violence victims, Hillary Potter found that few of them cited fear of further injury as a reason why they did not leave their batterer. She did find, however, that fear actually is often an impetus to finally get out of a violent situation.<sup>251</sup> Scholars also need to further research whether these programs, particularly those that are focused on prosecution of the batterer, are not coercing victims in ways that undermine their level of satisfaction with the criminal justice system.<sup>252</sup> Finally, as discussed in the Part III, efforts need to be made to improve relationships between the criminal justice system and poor communities and communities of color.

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<sup>248</sup> Some argue that mandatory policies are necessary to keep legal actors responsive to domestic violence victims' cries for help. See *supra* note 104 and accompanying text.

<sup>249</sup> In fact, TAC's focus on high-risk misdemeanor cases means that most domestic violence cases in Chicago do not go through this program. In 2003, it was reported that TAC only took in about 1,920 cases per year. Bailey, *supra* note 90, at 52 n.331. It is estimated that Chicago has as many as 70,000 domestic violence cases per year. *Id.* Funding for TAC from government grants has been reduced since the program's inception. *Id.*

<sup>250</sup> TAC looks for repeat offenders at the misdemeanor level in order to stem violence before it escalates. A focus group of lethality experts came up with a list of high-risk factors for escalating violence: strangulation, resisting arrest, violation of orders of protection, status of the relationship, public incidents of violence, and stressors. The most important factor is whether the victim has indicated that she wants to end the relationship. Bailey, *supra* note 90, at 50. In a study of randomly selected cases from the TAC program and the General Court in Chicago, "TAC women were significantly more likely to report prior defendant threats to kill and use of knife and gun in assaults than General women . . ." HARTLEY & FROHMANN, *supra* note 247, at 2.

<sup>251</sup> POTTER, *supra* note 109, at 145.

<sup>252</sup> Research suggests that participants in the TAC program have a higher level of satisfaction with legal actors in the criminal justice system than victims who are part of the General Court system in Chicago. HARTLEY & FROHMANN, *supra* note 247, at 3.

## B. NOT ALL INTIMATE VIOLENCE IS THE SAME.

Empirical research suggests that not all of the violence that occurs in intimate relationships is the same, which is an important consideration for future domestic violence policy.<sup>253</sup> Most of this Article has focused on the Coercive Controlling Violence model of abuse, which is the model that most people have in mind when they think about domestic violence. 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>254</sup> The vast majority of the victims under this model are women.<sup>255</sup> In addition, the violence is more frequent and severe under the Coercive Controlling Violence model than in other types of intimate partner violence.<sup>256</sup> Male abusers are often characterized as having misogynistic tendencies in this category as well.<sup>257</sup>

In contrast, Situational Couple Violence does not have the same type of pattern of intimidation and control that the Coercive Control Model has.<sup>258</sup> Instead, this model involves specific situations or arguments that have escalated into violence.<sup>259</sup> Unlike, the Coercive Control Model, men and women equally engage in violence in the Situational Couple Violence model.<sup>260</sup> Fear of the partner is not characteristic of this type of violence, and men engaged in Situation Control Violence do not differ from nonviolent men on measurements of misogyny.<sup>261</sup> While the violence that can occur under this model can sometimes be severe, in most cases it is less likely to escalate over time in the same way that the Coercive Controlling Violence model does, it sometimes stops altogether, and it is more likely to stop after separation.<sup>262</sup>

Separation-Instigated Violence occurs as a result of a separation in the relationship, but it differs from Coercive Controlling Violence in that there was not a history of abuse or violence in the relationship.<sup>263</sup> Violence can range from mild to severe, and it typically entails only one or two acts of

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<sup>253</sup> Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update & Implications for Interventions*, 46 FAM. CT. REV. 476, 476–77 (2008).

<sup>254</sup> *Id.* at 481–82.

<sup>255</sup> *Id.* at 481.

<sup>256</sup> *Id.* at 482.

<sup>257</sup> *Id.* at 485.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 486.

<sup>263</sup> *Id.* at 487.

violence at the beginning or during the separation period.<sup>264</sup> Both men and women engage in this type of violence, and parties typically comply with orders of protections that are issued against them to stop the violence.<sup>265</sup>

Current criminal justice policies seemed to be designed with the Coercive Controlling Violence model in mind. While most of the cases that come in contact with the criminal justice system probably involve this model, empirical studies suggest that a significant number probably involve other types of violence.<sup>266</sup> Even if one assumes that mandatory policies are the best approach for the Coercive Controlling Violence model, it may not be the case that it is the best approach for other types of violence. In addition, dual arrest policies seem to wrongfully arrest many women who are actually defending themselves or who are engaged in what has been called Violent Resistance.<sup>267</sup> Future domestic violence policy should acknowledge, therefore, the differences in the types of violence that can occur in intimate relationships in order to more effectively address each type of violence and in order to make sure that those who are defending themselves are not being punished unjustly.

### C. PRIVACY

Because of the special nature of intimate relationships, some victims may view the violence in their home as a personal matter in the sense that they do not want criminal justice intervention under any circumstances.<sup>268</sup> Indeed, according to results from National Crime Surveys of Victimization conducted between 2001 and 2005, privacy is the most frequently cited reason for not reporting domestic violence.<sup>269</sup> It may be the case that this statistic would change if domestic violence laws and policies were to address the economic realities of women and the negative interactions between domestic violence victims and legal actors. But it also may be the case that some victims will always want their family lives to stay outside of the criminal justice system. Interactions with the criminal justice system can have the effect of separating families and of subjecting families to

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<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 482.

<sup>267</sup> *Id.* at 484–85.

<sup>268</sup> See Baker, *supra* note 79, at 1483 (“Most people would rather think of their families and personal lives as private . . . the battered women’s movement must be sensitive to how difficult it is for abused women to let go of an identity and private space that those lucky enough not to be in abusive relationship can still cherish.”)

<sup>269</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES 28 (2007). According to this report, 22% of female victims cited privacy as the reason for not reporting intimate violence. *Id.*

humiliating state scrutiny. Thus, it makes sense that some women may view a criminal justice solution to the violence they experience in their lives as an invasion of their privacy.

While it is important to understand the political nature of private violence and to provide political solutions to this violence, many women are not seeking out any help at all because they are not comfortable with the public nature of the criminal justice system. Perhaps a more grassroots approach, similar to the early battered women's movement, that focuses on networks of supportive individuals who can provide victims with material and emotional support might be more appealing to some victims. This type of approach gives victims access to help outside of the home, but it also allows for more privacy than a criminal justice response, which creates a public record of a family's home life. Unless this desire for privacy is acknowledged and further explored, a significant number of women will continue to be alienated and to suffer from private violence in silence.<sup>270</sup>

#### V. CONCLUSION

By arguing that the personal is political, feminists challenged the notion that domestic violence is a private matter that should be handled within the family. Instead, they argued that violence in the home is the result of the political disempowerment of women as a class. As a result, this violence is appropriate for political analysis and regulation. Furthermore, by not regulating this violence, the state is complicit in the subordination of women in their homes. Participants of the early battered women's movement saw a role for the criminal justice system in addressing this problem, but they envisioned that victims would have autonomy in determining when this system would intervene in their lives. This vision of autonomy, however, is not translatable within the current criminal justice system.

Acknowledging that complete victim autonomy is not the primary objective of the criminal justice system, however, does not mean that proponents of current criminal justice policies should not be alarmed by the fact that such a high number of domestic violence victims do not want to engage with the criminal justice system. Indeed, the limited number of victims who desire to engage with this system is an important metric in determining the criminal justice system's effectiveness. It underscores that improvements need to be made in the interactions that victims have with the system. It also highlights the fact that the criminal justice system is a limited tool in addressing what is a social, political, and economic problem. Future policies should improve upon the experiences that victims have

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<sup>270</sup> I plan to explore this issue of privacy further in future articles.

engaging with the criminal justice system. They also should address the economic disparities that women experience as a class and the intersectionality of race, class, sexuality, and gender. Finally, future policies should acknowledge that not all intimate violence falls under the Coercive Controlling Violence model and that the invasive nature of the criminal justice system may cause some victims to seek out less public solutions to the violence they experience in their lives.