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Privacy and Domestic Violence in Court

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PRIVACY AND DOMESTIC VIOLENCE IN COURT

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INTRODUCTION

The problem of domestic violence has long centered on the question of what is public and what is private. Historically, this dichotomy acted to prevent the state from interfering in the home to address domestic violence.¹ In the past several decades, domestic violence advocates, feminist legal theorists, and others have succeeded in chipping away at the public-private distinction such that states began to pass laws and adopt practices to address the problem.² The state became so active in addressing domestic violence, in fact, that many jurisdictions put in place mandatory arrest and no-drop prosecution policies *requiring* the state to act against abusers even in instances in which victims preferred otherwise.³ These policies led many to question the contours of privacy in the domestic violence setting. Do mandatory arrest policies and no-drop prosecutions violate victims' privacy interests? Should a domestic violence victim have the right to define who comes in and out of her home and make decisions about domestic violence prosecutions that affect her family?

A less examined question is the nature of domestic violence victims' privacy interests once the matter goes to court. Unlike the home — the archetypal zone of human privacy — courtrooms and court records feature the exact opposite presumption: what happens in court is public. A presumption of open access to both court proceedings and court records dominates, at least in principle. But the limited nature of the presumption has always left room at the margins for debate about when openness should be sacrificed for privacy and other interests. Particularly with the rise of the Internet and its shake-up of the traditional privacy-versus-access balance in courts, the question of what is “public” and what is “private” in court has become a messy one.

1. See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as a Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996) (noting that domestic violence law started from the notion of “marital prerogative”).

2. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1860-62 (1996) (describing development of statutes that require arrests and prosecutions in domestic violence cases).

3. *Id.* at 1862.

This paper will examine the privacy interests of domestic violence⁴ victims⁵ in court. What are the contours of these interests? What is the impact of the Internet on privacy and domestic violence court records? And finally, in what ways, if at all, might technology help promote privacy interests of domestic violence victims in court?

I. SITUATING “PRIVACY” IN THE DOMESTIC VIOLENCE CONTEXT

The centerpiece of the effort to understand and remedy abuse in the home began as an effort to understand the boundaries between public and private. Feminist legal theorists first began to describe the problem and seek solutions by critiquing the public-private distinction.⁶

Concurrently, academic and legal circles, including feminist legal theorists, started to examine the concept of “privacy” as a social and legal construct.⁷ In the process of trying to define exactly what

4. This paper uses the term “domestic violence” to describe violence in the home between adults largely because most courts adopt this reference when categorizing these kinds of cases. Statistically speaking, such violence is most typically perpetrated by a man against a woman. Interesting scholarship has emerged shedding light on other aspects of family violence including same-sex intimate partner violence, dating violence, and domestic violence perpetrated by women against men. *See, e.g.*, Linda Kelly, *Disabusing the Definition of Domestic Violence: How Women Batter Men and the Role of the Feminist State*, 30 FLA. ST. U. L. REV. 791, 792 (2003) (noting that studies suggest “men and women commit violence at similar rates”); Nancy E. Murphy, *Queer Justice: Equal Protection For Victims Of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 339 (1995) (citation omitted) (noting that same-sex domestic violence rates are proportionate to heterosexual domestic violence rates); Amanda J. Schmesser, Note, *Real Men May Not Cry, But They Are Victims of Domestic Violence: Bias in the Application of Domestic Violence Laws*, 58 SYRACUSE L. REV. 171, 172 (2007) (noting that “women are just as capable of abusing men as vice versa”); Kathryn E. Suarez, Comment, *Teenage Dating Violence: The Need for Expanded Awareness and Legislation*, 82 CAL. L. REV. 423, 425 (1994) (noting that “the patterns of abusive behavior in the teenage dating scenario tend to mirror the patterns of abuse prevalent in marital settings”). As scholars and activists point out, the term “domestic violence” therefore falls short as an accurate descriptor.

5. The author acknowledges problems associated with using the term “victim” to describe those who suffer assault in the home. *See, e.g.*, Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371, 379-80 (2003) (“A common question is whether the term ‘victim’ or the term ‘survivor’ should be used when referring to a woman who suffers abuse. A concern is that the word ‘victim’ imposes on women a pernicious perception of weakness and vulnerability, which perpetuates the subjugated status inherent within domestic violence. On the other hand, the word ‘survivor’ is problematic in its implied commentary on those women who either kill or are killed as a result of the abuse. . . . I choose to refer to women in domestic violence situations as victims and to the process of harm as victimization. In no way is the term ‘victim’ used to suggest inferiority or weakness.”).

6. CAROLE PATEMAN, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM, AND POLITICAL THEORY* 118 (1989).

7. *See* Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 233-34 (1977) (describing the legal development of the concept of privacy).

privacy is, it quickly became clear that the answers were muddled, and that “privacy” meant one thing in one context and a very different thing in another.⁸

A. *The Public-Private Distinction*

*The dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is, ultimately, what the feminist movement is about.*⁹

Philosophers and political theorists have long employed the public-private distinction to explain social mechanisms.¹⁰ A consistent feature of this discourse relegated the “domestic” to the private realm and the “political,” or alternatively “economic,” to the public realm.¹¹ A critical aspect of the public-private distinction is that law regulates the public whereas the private, at least in theory, “should be free from interference from the state.”¹² This dichotomy has had important implications for women who, until relatively recently, the vast majority of theorists viewed unquestioningly as inhabitants of the private sphere.¹³

8. *Id.* at 234 (noting that one observer quipped that privacy has an oddly “protean capacity to be all things to all lawyers”).

9. PATEMAN, *supra* note 6, at 118.

10. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 325 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (explaining the contours of the public and private spheres); JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 1-2 (Thomas Burger trans., MIT Press 1989) (discussing the development of the public sphere from the perspective of class concepts); Hannah Arendt, *Public Rights and Private Interests*, in SMALL COMFORTS FOR HARD TIMES: HUMANISTS ON PUBLIC POLICY 103, 104 (Michael Mooney & Florian Stuber eds., 1977) (“The reckless pursuit of private interests in the public-political sphere is as ruinous for the public good as the arrogant attempts of governments to regulate the private interests of the citizens are ruinous for private happiness.”); see also SHIRAZ DOSSA, THE PUBLIC REALM & THE PUBLIC SELF: THE POLITICAL THEORY OF HANNAH ARENDT 73 (1989) (“Arendt’s theory formally defines the public realm in opposition to that which is private, natural, and removed from the common.”).

11. See Michelle Zimbalist Rosaldo, *Women, Culture and Society: A Theoretical Overview*, in WOMEN, CULTURE AND SOCIETY 42 (Michelle Zimbalist Rosaldo & Louise Lamphere eds., 1974) (noting that American society relegates women to the private, domestic sphere and men to the public, working world); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 21-22 (1992) (“The paradigmatic private sphere contains the realm of domestic and family life, whereas the paradigmatic public sphere encompasses the realm of politics . . .”); see also Jeff Weintraub, *The Theory and Politics of the Public/Private Distinction*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE 28-29 (Jeff Weintraub & Krishan Kumar eds., 1997) (defining the private sphere as the domestic, and the public sphere as “extrafamilial economic and political”).

12. Lousie Marie Roth, *The Right to Privacy is Political: Power, the Boundary Between Public and Private, and Sexual Harassment*, 24 LAW & SOC. INQUIRY 45, 49 (1999).

13. See Gavison, *supra* note 11, at 22 (“In modern, post-industrial societies, women have remained relegated to the private.”); Raia Prokhovnik, *Public and Private Citizenship*:

A critique of the public-private distinction and women's place in it form the core of the feminist movement.¹⁴ Since its inception, the movement sought both to challenge the existence of the distinction itself and, short of that, at least to bring women more fully into the "public" realm.¹⁵ Feminists critiqued women's relegation to the private sphere on a number of levels. First and foremost, feminist theorists argued that the historical inability to participate in the public sphere denied women full citizenship rights.¹⁶ Without access to public occupations and participation in the electoral process, women were effectively barred from political discourse about decisions that affected their lives. Other feminists critiqued the idea that women were in a private sphere at all, noting that, historically, wealthy white women may have been confined there, but that less "privileged" women had been working and interacting outside the home for centuries.¹⁷ More radical feminist scholars argued that the private — family, marriage, etc. — was the root of gender oppression and must be "smashed" to free women from the bonds of family.¹⁸ The impact of these critiques, and indeed other social forces at play, succeeded in challenging the public-private distinction, as evidenced by the successful suffrage movement and women's entrance on a large scale into sectors of the American workforce which had not previously been open to them.¹⁹

The domestic violence movement in many ways has pursued the mirror outcome: to bring the state into the home — the public into the private.²⁰ The legal history of the state's refusal to interfere

From Gender Invisibility to Feminist Inclusiveness, 60 FEMINIST REV. 84, 87-88 (1998) (noting that, historically, the private realm was sustained by women and that the public realm has been for men).

14. PATEMAN, *supra* note 6, at 118; *see also* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 124 (1989) (noting that "the personal is political" is the central message of feminist critiques of the public/domestic dichotomy").

15. Prokhovnik, *supra* note 13, at 89-91.

16. *Id.* at 85-86.

17. EVERYDAY REVOLUTIONS: EIGHTEENTH CENTURY WOMEN TRANSFORMING PUBLIC AND PRIVATE 23-24 (Diane E. Boyd & Marta Kvande eds., 2008); JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 88 (1991); LONNAE O'NEAL PARKER, I'M EVERY WOMAN: REMIXED STORIES OF MARRIAGE, MOTHERHOOD, AND WORK 29 (2005).

18. *See, e.g.*, SHULAMITH FIRESTONE, THE DIALECTIC OF SEX 74-75 (Bantam Books 4th prt. 1972) (noting that "women have been oppressed due to their biological functions" and that the word "family" was used by Romans to denote a social unit in which the male head ruled over wife, children, and slaves).

19. THE SEX OF CLASS: WOMEN TRANSFORMING AMERICAN LABOR 3 (Dorothy Sue Cobble ed., 2007); *see also* CATHERINE GOURLEY, GOOD GIRL WORK: FACTORIES, SWEATSHOPS, AND HOW WOMEN CHANGED THEIR ROLE IN THE AMERICAN WORKFORCE 79 (1999) (noting for example, that women in the early to mid-1900s were working in factories and attending union meetings and rallies).

20. *See, e.g.*, JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 41-50 (2009) (arguing that the pendulum has in

in matters domestic stretches far back, particularly in the area of violence against women.²¹ Early laws in England and the United States codified the right of chastisement: the right of husbands to subject wives to corporal punishment.²² Later, as the women's movement succeeded in bringing about widespread reform in marriage laws, the right of chastisement lost favor.²³ States passed laws making it illegal to beat one's wife.²⁴ In the century and a half that followed, however, courts still refused to pierce the domestic veil, citing not a husband's right to beat his wife, but instead the evolving "right to privacy."²⁵ As a North Carolina court put it in 1868,

[H]owever great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber. Every household has and must have, a government of its own, modelled [sic] to suit the temper, disposition and condition of its inmates. Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive; and each member will find excuse for the other in his own frailties. But when trifles are taken hold of by the public, and the parties are exposed and disgraced, and each endeavors to justify himself or herself by criminalizing the other, that which ought to be forgotten in a day, will be remembered for life.²⁶

"Raising the curtain" was a central mission of the domestic violence movement that gained momentum in the 1970s and continues today.²⁷ Efforts to address domestic abuse have been widespread and sustained, and have been — although uneven and with great distance yet to go — fruitful.²⁸ Community infrastructures to support

fact swung too far, resulting for example in state-imposed de facto divorce through the common practice of non-victim-initiated (or supported) criminal protection orders in the domestic violence context).

21. Siegel, *supra* note 1, at 2118.

22. *Id.* at 2123-25.

23. *Id.* at 2129.

24. *See id.* at 2129-30 ("By the 1870s, there was no judge or treatise writer in the United States who recognized a husband's prerogative to chastise his wife. . . . [T]hree states even revived corporal punishment for the crime, providing that wife beaters could be sentenced to the whipping post.").

25. *See id.* at 2119 (noting the shift "from a law of marital prerogative to a law of marital privacy").

26. *State v. Rhodes*, 61 N.C. (Phil.) 453, 457 (1868).

27. *See* JEFFERY FAGAN, NAT'L INST. OF JUSTICE, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 6-10 (1996) (discussing the origins of legal intervention in family violence).

28. Examples of progress include the passage of the Violence Against Women Act (VAWA) in 1994, which among other things provides significant discretionary grant

victims of domestic violence are now commonplace.²⁹ Some statistics reveal improvements.³⁰

The drive to question the boundaries and even the existence of the public-private distinction gained so much traction that many jurisdictions implemented mandatory arrests and no-drop prosecution policies in domestic violence cases.³¹ Discourse about the public-private distinction in this area has led to vigorous debate about the problems associated with such policies. One side is confident that shining a public light on the private sphere is the very best means to address abuse.³² Others have questioned whether foisting the public legal apparatus into the domestic realm represents a violation of women's core interests — namely their privacy.³³

funding to domestic violence programs, including funding for shelters, judicial training and program development, advocacy training and development, and so forth. Title IV of the Violent Crime Control and Law Enforcement Act, Pub. L. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18 & 42 U.S.C.); *see also* GARINNE P. LANEY, CONGRESSIONAL RESEARCH SERV., VIOLENCE AGAINST WOMEN ACT: HISTORY AND FEDERAL FUNDING (2008), *available at* <http://www.ilw.com/immigdaily/news/2005,0802-crs.pdf> (including tabular listing of funds dispersed under the law).

29. *See* LANEY, *supra* note 28 (showing figures of funding from the Violence Against Women Act that allow for community infrastructures to support victims of domestic violence).

30. U.S. Dep't of Justice, Bureau of Justice Statistics, Intimate Partner Violence in the U.S., <http://bjs.ojp.usdoj.gov/content/intimate/table/totipv.cfm> (last visited Jan. 20, 2010) (noting that in 1993, nonfatal intimate partner violence was 5.8 victimizations per 1,000 US residents, but by 2005, the violence rate fell to 2.3 victimizations per 1,000 individuals); U.S. Dep't of Justice, Bureau of Justice Statistics, Homicide Trends in the United States, Intimate Homicide, <http://bjs.ojp.usdoj.gov/content/homicide/intimates.cfm#intimates> (last visited Jan. 20, 2010) (noting that the number of women killed by intimates was stable for nearly two decades and that since 1993 the number has declined). Note that the Department of Justice statistics are controversial. PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE & THE CTRS. FOR DISEASE CONTROL & PREVENTION, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN, (2003), *available at* <http://www.ncjrs.gov/txtfiles1/nij/183781.txt> (finding the rate of domestic violence against women to be significantly higher than the Department of Justice survey). Commentators have attributed the decline to greater access to legal services for victims, improvements in women's economic status, and demographic trends, such as the aging population. Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 CONTEMP. ECON. POL'Y 158, 169 (2003). Plausibly, tougher state action against abusers may be impacting the number of reported incidents if tough consequences for abusers discourages victims from coming forward.

31. Hanna, *supra* note 2, at 1860-62; *see also* ABA, COMM'N ON DOMESTIC VIOLENCE, DOMESTIC VIOLENCE ARREST POLICIES BY STATE (2007), http://www.abanet.org/domviol/docs/Domestic_Violence_Arrest_Policies_by_State_11_07.pdf (providing an overview of domestic violence arrest policies by state).

32. KRISTIN A. KELLY, DOMESTIC VIOLENCE AND THE POLITICS OF PRIVACY 68 (2003).

33. Hanna, *supra* note 2, at 1870; *see* KELLY, *supra* note 32, at 3 (noting that over seventy percent of the people who do not report incidents of domestic abuse cite privacy as a primary reason); SUK, *supra* note 20, at 6-7 (arguing that consequences of increased state action in the home have lead to "not only the protection of some women but also . . . substantial reductions in the autonomy of women . . . vis-à-vis the state").

At least some of this tension can be attributed to the definitional problem of privacy.

B. The Problem of "Privacy"

1. Defining Privacy

Legislators, scholars, advocates, and others have tried hard to pin privacy down.³⁴ How to understand and categorize the different interests that make up what we call "privacy" has become a sustained effort.³⁵

American privacy law hails its origins in large part to Samuel Warren and Louis Brandeis's 1890 Harvard Law Review article, *The Right to Privacy*.³⁶ In their article, Warren and Brandeis reached out to find a legal remedy for a wrong not then protected by law. They called it, "the right 'to be let alone.'"³⁷ Their call stemmed in large part from invasive technological innovation: instantaneous photography and the rise of yellow journalism regaling the masses with details of individuals' private lives.³⁸ Taking Warren and Brandeis's arguments to heart, judges began providing tort remedy for claims of invasions of privacy.³⁹

Seventy years later, William Prosser published his seminal article, *Privacy*, in which he categorized four types of privacy torts judges had recognized in the years since Warren and Brandeis wrote.⁴⁰ Prosser's privacy torts include:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs
2. Public disclosure of embarrassing private facts about the plaintiff
3. Publicity which places the plaintiff in a false light in the public eye
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.⁴¹

34. See, e.g., Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1340 (describing the many efforts).

35. *Id.*

36. See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 767 (1996) (noting that according to a study completed in 1996, Warren & Brandeis's *Right to Privacy* was the ninth most cited law review article).

37. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

38. *Id.* at 195.

39. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 386 (1960).

40. *Id.* at 389.

41. *Id.*

Consistent with the harms Warren and Brandeis first identified, Prosser's torts each related to protecting individuals' autonomy in a way that kept the "private private."⁴²

In 1967, amidst the Cold War and social upheavals of the time, Alan Westin published a categorization of privacy called *Privacy and Freedom*.⁴³ Westin's privacy focused on its nature as a human requirement and a foundational value in a functioning democracy.⁴⁴ In Westin's view, "individual privacy" could be broken down into four separate categories: personal autonomy, emotional release, self-evaluation, and limited and protected communication.⁴⁵ Westin was interested in understanding how privacy could help us attain personhood by fostering values that respected individual autonomy. But as with Warren and Brandeis's characterization, the focus on individual autonomy failed to speak to an entire category of persons, as discussed below, for whom autonomy was neither a goal nor a reality.

Contemporary privacy scholarship has developed a fuller picture of the range of interests under the privacy umbrella. In the past twenty years, such categorizations of privacy have become more sensitive to new, networked realities. For example, in 1998, as the rise of technology began to implicate privacy in dramatic ways, scholar Jerry Kang sought to create a categorization that could help tame splintering understandings of privacy in different contexts.⁴⁶ Kang described three overlapping "clusters" of privacy interests — spatial, decisional, and informational — that further brought into focus a categorization of interests associated with privacy.⁴⁷ As its name implies, "spatial privacy" refers to privacy and physical space like the ability to keep junk mail out of your mailbox⁴⁸ or the police out of your living room.⁴⁹ Decisional privacy relates to the ability to make decisions without unwanted interference, such as the choice to use birth control⁵⁰ or terminate a pregnancy.⁵¹ Informational privacy refers to people's control over the flow of information about themselves.⁵² Viewed through

42. Note that this is also the preoccupation in other legal areas that address privacy issues, such as constitutional search and seizure law.

43. ALAN WESTIN, *PRIVACY AND FREEDOM* (photo. reprint 1970) (1967).

44. *Id.* at 7-8.

45. *Id.* at 32.

46. Jerry Kang, *Information in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1193 (1998).

47. *Id.* at 1202-03.

48. *Rowan v. U.S. Post Office Dep't.*, 397 U.S. 728, 736-37 (1970).

49. See Kang, *supra* note 46, at 1202 (describing spatial privacy as, *inter alia*, "the extent to which an individual's territorial solitude is shielded from invasion by unwanted objects or signals").

50. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

51. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

52. Kang, *supra* note 46, at 1203.

Kang's clusters, the privacy of domestic violence victims in court comes into sharper focus. Spatial privacy interests might be addressed by making physical accommodations to the court space, such as separate waiting rooms; informational privacy relates to victims' right to control information courts collect; and decisional privacy, in the court context, might be seen in a number of ways ranging from how much control victims are able to assert about the course of litigation to making decisions and controlling the content and use of court records in their cases.

The categorizations developed by these observers and the many more who have tried to unpack "privacy" in the modern context reflect the complicated and evolving nature of the term.⁵³ For their part, feminist legal scholars who have taken up the question have encountered just as much complexity.

2. *Feminist Legal Thought: Interpreting Privacy*

Feminist legal scholarship on privacy reveals a deep divide not only about what privacy is, but whether it is a good or bad thing. In many narratives, privacy is the villain⁵⁴ and, in others, it is the hero.⁵⁵

Some feminist scholars have argued that privacy operates to women's benefit. With echoes of Warren and Brandeis, privacy as a form of "restricted access" to the self⁵⁶ can include, for example, the ability to "limit and define the nature of one's involvements with others."⁵⁷ Through this lens, privacy meets several interests feminist scholars vaunt. For example, the ability to restrict access to oneself enables "seclusion, solitude . . . , anonymity[,] and confidentiality — all

53. One of the most prolific scholars on the topic of categorizing privacy interests in the past few decades is Daniel Solove, who has written several articles defining and sorting the term. See, e.g., DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 1-2 (2008) (discussing how difficult it is to articulate a complete and workable definition of privacy); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 486-89 (2006) (describing "privacy" as a general umbrella term that often is too broad and can lead to misunderstandings, and so breaking the term into a taxonomy of four basic groups of harms is more functional); Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1088-89 (2002) (arguing that before the problems of privacy can be solved a satisfactory conceptualization must be developed).

54. See Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974 (1991) ("[W]e also must examine [privacy's] underside: the dark and violent side of privacy."). Note, for example, the title of Elizabeth Schneider's 1991 Connecticut Law Review piece. *Id.* at 973.

55. See Anita Allen, *Privacy*, in A COMPANION TO FEMINIST PHILOSOPHY 456, 456 (Alison M. Jaggar & Iris Marion Young eds., 1998) (reviewing formulations of privacy and their treatment by feminists).

56. ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 32 (1988).

57. *Id.* at 27.

important and basic privacy values that serve women's interests in a variety of ways.⁵⁸

Other feminist scholars have rejected the benefits of privacy to women altogether, noting for example that privacy has often worked against women's interests. Most famous, perhaps, is Catherine MacKinnon's observation that privacy is the "right of men 'to be let alone' to oppress women one at a time."⁵⁹ As another scholar put it, home, the archetypal locus of spatial privacy, is "a man's castle but a woman's place."⁶⁰

Feminists also critique the concept of privacy for the "autonomy" perspective so central to prominent characterizations of the idea noted above.⁶¹ Some argue that the traditional paragon of the private individual alone and untouched, wandering unmolested in the woods, is a model that does not apply to most women's lives and therefore fails to represent their interests.⁶² Scholars like Mary Ann Glendon have argued that the social world defined by an individualistic value of privacy is one of neglect, in which social support and community are missing.⁶³ As John Gilliom expresses it, "[individualistic] privacy rights language may serve to exclude a significant portion of the population for whom the idea of the private individual is just silly — people, many of them women and others who are deeply involved in family life, caregiving, or other relation involving significant dependency and interdependency."⁶⁴

58. Anita L. Allen, *Privacy at Home: The Twofold Problem*, in REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY 193, 207 (Nancy J. Hirschmann & Christine Di Stefano eds., 1996).

59. Catharine MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in ABORTION: MORAL AND LEGAL PERSPECTIVES 45, 53 (Jay L. Garfield & Patricia Hennessy eds., 1984).

60. ALLEN, UNEASY ACCESS, *supra* note 56, at 63. Another scholar deserving careful consideration on the matter of privacy and gender is Jeannie Suk, whose work suggests that rather than categorizing different types of privacy per se, a useful lens in interpreting privacy is often the perception of the kind of woman at issue. SUK, *supra* note 20, at 108-25. "The privacy debate operates on one level as a debate about what sort of woman we have in mind . . ." *Id.* at 124. Suk asks, provocatively, "Is Privacy a Woman?" *Id.* at 106-31.

61. See Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759, 760 (1999) (discussing the feminist critique of privacy and suggesting a reconstruction of the concept).

62. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3 (1988) (stating that "feminist theory of the last decade has been that woman [sic] are 'essentially connected,' not 'essentially separate,' from the rest of human life").

63. See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 48 (1991) ("[T]he history of the American version of privacy . . . [pays] extraordinary homage to independence and self-sufficiency, based on an image of the rights-bearer as a self-determining, unencumbered, individual, a being connected to others only by choice.").

64. JOHN GILLIOM, OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY 123-24 (William M. O'Barr & John M. Conley eds., 2001). This

In the domestic violence context, this critique is particularly useful, and may go a long way in explaining why traditional assumptions about “privacy” become so confused in the domestic violence context. The complex interconnectedness of domestic violence victims within their families means that the privacy interests at stake often do not involve an “autonomy” interest, at least as previously understood.

Another important focus of feminist scholarship on privacy is decisional privacy. When it is understood as women’s ability to exercise control over decisions about their lives, it is commonly hailed as a centerpiece right.⁶⁵ One need look no further than *Griswold v. Connecticut*,⁶⁶ *Roe v. Wade*,⁶⁷ and *Eisenstadt v. Baird*⁶⁸ to understand the importance of this kind of privacy to the feminist cause.⁶⁹ It should be noted that not all scholars have been comfortable with characterizing decision-making autonomy as a kind of privacy. Some worry that the concept of decisional privacy encompasses too much, thereby diluting its utility.⁷⁰ As Anita Allen explains, “some theorists have emphatically contended that it is inaccurate and confusing to view questions of the proper limits of state intervention in freedom of choice respecting sex, childbearing, and the discharge of familial obligations as questions about privacy. They maintain that such ‘decisional privacy’ is not privacy at all.”⁷¹

As discussed above, the importance of decisional privacy forms the basis of criticism of responses to domestic violence that disenfranchise victims of abuse from making decisions about the course of arrest and prosecution of their abusers.⁷² In contrast, others argue

perspective allows retreat from valuable interaction within society; privacy becomes a source of alienation and neglect. ALLEN, *UNEASY ACCESS*, *supra* note 56, at 49.

65. Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 456 (2006).

66. 381 U.S. 479, 485 (1965) (establishing the right of married couples to purchase contraceptives).

67. 410 U.S. 113, 152-53 (1972) (establishing the right of a woman to decide whether to terminate a pregnancy).

68. 405 U.S. 438, 453 (1972) (establishing the right of unmarried individuals to purchase contraceptives).

69. *See, e.g.*, DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 258-262 (1986) (discussing the development of a constitutional right to privacy).

70. *See* Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 438-39 (1980) (suggesting that certain conceptions of privacy “may obscure the nature of the legal decision and draw attention away from important considerations”).

71. ALLEN, *UNEASY ACCESS*, *supra* note 56, at 32. The distinction becomes important because, as legal theorists have noted, a denial of liberty is “evaluated against the Fourteenth Amendment procedural standard that citizens shall not be deprived of liberty without due process of law, rather than against a putative, substantive standard of fundamental rights of privacy.” *Id.*

72. SUK, *supra* note 20, at 6-7; *see, e.g.*, Jessica Dayton, *Essay, The Silencing of a Woman’s Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic*

that intimate abuse impairs victims' ability to make rational decisions and thus requires the state to make decisions for them.⁷³

Privacy understood as the ability to exercise control over information about oneself has held an important place in feminist privacy critiques. Rape shield laws passed in the 1970s and 1980s provide an ideal example. Rape shield laws limit rape defendants' ability to cross-examine victims about past sexual behavior as a means of discrediting their allegations.⁷⁴ Controlling the flow of information about oneself was hailed in this context as a meaningful victory against a criminal justice system that used sexual history information about women against them inappropriately.⁷⁵ Laws prohibiting media publication of the identity of alleged rape victims are another example of privacy as information control.⁷⁶ States passed such statutes on the related theory that rape victims would not come forward if their identities were revealed in the press when doing so.⁷⁷

Violence Cases, 9 CARDOZO WOMEN'S L.J. 281, 284-86 (2003) (arguing that women should have the authority to decide whether to prosecute their batterers); Miriam H. Ruttenberg, Note, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171, 190 (1994) (asserting that "no-drop" and mandatory arrest policies remove control from the hands of the victims).

73. Barbara Fedders, Note, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 290 (1997). Note that this plays into the feminist critique that women are vulnerable to privacy invasion "because they are perceived as inferiors, ancillaries, and safe targets and that women's privacy is sometimes probed by others who implicitly assume that daughters, pregnant women, mothers, and wives are more accountable for their private conduct than their male counterparts." Anita L. Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175, 1178 (2000) [hereinafter Allen, *Cyberspace*] (citation omitted).

74. Richard I. Haddad, Note, *Shield or Sieve? People v. Bryant and the Rape Shield Law in High-Profile Cases*, 39 COLUM. J.L. & SOC. PROBS. 185, 189 (2005). Note that some states are softening rape shield laws. See, e.g., Press Release, Nat'l Org. for Women, NOW Alarmed by Court's Weakening of Colorado's Rape Shield Law (Mar. 25, 2004) <http://www.now.org/press/03-04/03-25.html/> (discussing the judge's decision to allow defense lawyers to question NBA basketball player Kobe Bryant's accuser in closed session about her sexual history despite Colorado's rape shield law). Sadly, an unfortunate testament to the impact of human error in the court records privacy world, the court, by mistake, emailed to members of the press the transcript of the *in camera* review that the Colorado statute required to review the sexual history of the alleged victim. See *People v. Bryant*, 94 P.3d 624, 626 (Colo. 2004) (explaining that though the publication ban was a prior restraint, the state's interest in protecting the victim's privacy outweighed the First Amendment right of the press to publish information lawfully, though mistakenly, obtained).

75. See Haddad, *supra* note 73, at 189 (discussing the legal reform movement that led to adoption of rape shield laws).

76. *Id.* at 211; see also Kang, *supra* note 46, at 1203 (discussing the idea of privacy as information control).

77. Daniel M. Murdock, Comment, *A Compelling State Interest: Constructing a Statutory Framework for Protecting the Identity of Rape Victims*, 58 ALA. L. REV. 1177, 1177-78 (2007). Note, however, that the Supreme Court has repeatedly struck down the constitutionality of state statutes that made it illegal for media outlets to publish the names of rape victims when the media obtained victims' names from public records. See

This brief review of the feminist critique of privacy illuminates the very complex nature of “privacy” as a descriptor of distinct interests and values. These complexities have important implications for domestic violence victims in court.

*C. Privacy and Domestic Violence in Court*⁷⁸

A principal privacy interest in court is the extent of domestic violence victims’ ability to exercise control over information courts use to dispense their cases.⁷⁹ This information includes data victims voluntarily provide the court and data the court mandates they submit. “Court records privacy,” or what information the public (and abusers) can gather about domestic violence proceedings and records, is at the core of “privacy” for domestic violence victims in court. Multiple related concerns grow out of this central interest. When and under what circumstances should courts grant domestic violence victims’ motions to seal records? Proceed anonymously? Shield identifying information?

These questions become considerably more complex with the rise of online court records. As discussed in greater detail below, the past decade has witnessed a great struggle in courts over whether and to what extent records ought to be made available online.⁸⁰ In court, victims may already have reduced privacy; they have, after all, come to a public place. Yet the Internet raises the specter of amplification of this “publicness.”⁸¹ One domestic violence advocacy organization characterized this distinction as the difference between being “public” and being “published.”⁸² This risk of amplification and the associated

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (Georgia statute prohibiting the press from broadcasting the identity of a rape victim unconstitutional on First Amendment grounds); *The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (Florida statute making it unlawful to print, publish, or broadcast the name of a victim of a sexual offense violates the First Amendment).

78. This discussion will focus primarily on state courts, in large part because domestic violence cases fall most typically within state jurisdiction.

79. The question of ownership or control over information about oneself has spurred interesting scholarship. *See, e.g.*, Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1137-38 (2000) (assessing the idea of giving individuals property rights in their personal data); Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2057 (2004) (arguing that personal data is becoming a commodity in the United States).

80. *See infra* Part II.B.3.

81. Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 120 (2004).

82. SAFETY NET, NAT’L NETWORK TO END DOMESTIC VIOLENCE, PUBLIC & INTERNET ACCESS TO COURT RECORDS 4, available at http://projects.ischool.washington.edu/law_symposium/docs/courtrecordsandvictims.pdf. [hereinafter SAFETY NET].

harms that may result explains at least in part domestic violence advocates' ⁸³ insistence that domestic violence records stay offline. ⁸⁴

A further set of privacy interests for domestic violence victims in court relate to spatial privacy interests at the courthouse. Relevant issues include whether a court offers separate waiting rooms for domestic violence victims and whether domestic violence victims are escorted out of the courthouse safely. ⁸⁵ If courts are seen as unsafe or if victims risk too much physical safety in seeking justice through the courts, they may be unwilling to enter the building. Indeed, the issue goes beyond physical safety. Domestic violence victims who choose to pursue court remedies risk their abusers using the venue to embarrass and humiliate them. ⁸⁶ The more public the venue, the more likely victims may hesitate to use courts. ⁸⁷

83. The term "domestic violence advocate" refers to individuals who work to address the problem of domestic violence, lobby on behalf of domestic violence victims, and provide services to those who suffer domestic abuse. Some prefer the term "anti-domestic violence advocates," which certainly more accurately describes their position. However, because the domestic violence community more typically drops the "anti," this paper will as well.

84. SAFETY NET, *supra* note 81, at 2. Domestic violence advocates point out that it is not just domestic violence-related records that threaten victims' privacy interests. For victims on the run from abusers, any court interaction that results in personal information that ends up online can tip an abuser off on her whereabouts. *Id.* ("For example, if a victim of domestic violence flees her abuser in Virginia, relocates to Texas, buys property, and files her land record with a court that posts such records on the Web, her abuser can find her with a simple, national HTML search."). These phenomena are referred to as "indirect" domestic violence cases, and are discussed in detail *infra* Part III.A-B.

85. *See, e.g.*, Telephone Interview with Cathleen Monahan, Domestic Violence Liaison for the Office of the Circuit Court Clerk of Cook County, Illinois, in Williamsburg, Va. (June 17, 2009) (noting that the Cook County specialized domestic violence court offers separate waiting rooms and separate elevators to victims) [hereinafter Cook County Interview].

86. *See* VOICES OF WOMEN ORG. PROJECT & THE HUMAN RIGHTS PROJECT OF THE URBAN JUSTICE CTR., JUSTICE DENIED: HOW FAMILY COURTS IN NYC ENDANGER BATTERED WOMEN AND CHILDREN 50 (Tracey Bingham et al. eds., 2008), available at <http://www.vowwrc.org/pdf/justiceDeniedRep.pdf> [hereinafter JUSTICE DENIED] (discussing the negative experiences of victims in domestic violence courts).

87. Cindy Southworth & Sarah Tucker, *Technology, Stalking, and Domestic Violence*, 76 MISS. L.J. 667, 671 (2007); Kristen M. Driskell, Note, *Identity Confidentiality for Women Fleeing Domestic Violence*, 20 HASTINGS WOMEN'S L.J. 129, 132 (2009); *see also* Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1006 (N.H. 2003) (describing the case of a woman who was murdered after her stalker used an information broker to get information about her); Laura Silverstein, *The Double Edged Sword: An Examination of the Global Positioning System, Enhanced 911, and the Internet and Their Relationships to the Lives of Domestic Violence Victims and Their Abusers*, 13 BUFF. WOMEN'S L.J. 97, 128 (2004-2005) (discussing the implications of technology for victims of domestic violence). Note that the question of what information can and cannot be shared, and the particular impact of information sharing on women in the digital age has sparked much scholarly interest among feminist legal scholars. *See* Allen, *Cyberspace*, *supra* note 73, at 1178 (asserting that cyberspace presents particular privacy problems for women); Ann Bartow, *Our Data, Ourselves: Privacy, Propertization, and Gender*, 34 U.S.F. L. REV. 633, 634 (2000) (suggesting that granting property rights in personal data would allow individuals to control their own information privacy).

But the possibility of humiliation and embarrassment is a risk arguably shouldered by many other types of litigants in court.⁸⁸ What arguably sets domestic violence victims apart from many other parties are the very real risks to physical safety raised by the choice to use courts.⁸⁹ In the case of domestic violence in court, a central privacy interest can be characterized as a “privacy-as-safety” interest. The animating principle behind victims and their advocates’ push to keep records offline, for example, is to keep abusers from tracking victims down and hurting them.⁹⁰ Similarly, those courts that provide separate waiting rooms for victims and escort them out of court do so to protect victims’ physical safety and limit physical intimidation by abusers.⁹¹

There is some question as to whether safety can be understood as a privacy interest at all. Often, privacy and safety are values in conflict: protecting certain individuals’ privacy risks the safety interests of others.⁹² Judith Jarvis Thomson was one of the first philosophers to identify the privacy-as-safety value as a derivative privacy right. Thomson identified privacy as a cluster of rights that arise from a number of other rights including property rights, rights to integrity, and physical safety of the person.⁹³ To illustrate, Thomson compared two cases of torture, one in which a man is tortured to divulge a puff pastry recipe.⁹⁴ In the other, a man is tortured to reveal “what he does in the kitchen all alone at midnight.”⁹⁵ The first is a violation of the

88. See John C. Hendrickson, *Selected Materials on Employment Discrimination Law*, in EMPLOYMENT LAW INSTITUTE (38TH ANNUAL) 1083, 1097 (2009) (discussing the risk of embarrassment that litigants run by bringing various types of claims, particularly in the employment discrimination context).

89. See JUSTICE DENIED, *supra* note 86, at 47-51 (citing dangers posed by long wait times outside the courthouse, isolated stairwells and lack of knowledge about safe waiting areas). This report also found that “[forty-three percent] of the interviewees had their confidential address [sic] revealed in court via court papers. . . . [Thus] putting them in danger or forcing them to move.” *Id.* at 50; see also Nat’l Inst. of Justice, Domestic Violence Courts: Reducing Pretrial Domestic Violence, <http://www.ojp.usdoj.gov/nij/topics/courts/domestic-violence-courts/pretrial-abuse.htm> (2009) (“A critical issue in domestic violence cases is the risk of continued victimization during the pretrial period.”).

90. SAFETY NET, *supra* note 82, at 1.

91. JUSTICE DENIED, *supra* note 86, at 47.

92. See, e.g., Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 90 (1996) (discussing the balance that must be struck with sex offender registries); Sarah G. Johnston, Comment, *The Mental Health Security for America’s Families in Education Act: Helping Colleges and Universities Balance Students’ Privacy and Personal Safety*, 46 DUQ. L. REV. 211, 222 (2008) (“Following the suicidal massacre at Virginia Tech . . . more people are beginning to question whether our desire to protect student privacy has gone too far, trumping student safety in the meantime.”).

93. Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 313 (1975).

94. *Id.* at 308.

95. *Id.*

right not to be physically harmed.⁹⁶ The second can be seen as a privacy violation.⁹⁷ But we do not, according to Thomson, have a privacy right not to be tortured to reveal private information.⁹⁸ We rather have a right not to be harmed.⁹⁹ In this instance, Jarvis notes, “one is inclined . . . to say that it is because I have [the right not to be harmed] that I have a right to privacy.”¹⁰⁰

At least in part, privacy for domestic violence victims in court derives from a right not to be physically harmed as a result of their interaction with the court system. Privacy in this light is a derivative right of the right to personal safety.¹⁰¹

An obvious critique of placing too much emphasis on the privacy-as-safety interest is that such a reductionist perspective denies or diminishes other important privacy interests domestic violence victims possess.¹⁰² Still, isolating the privacy-as-safety interest may help clarify judges’ reaction to domestic violence victims’ privacy interests.¹⁰³ In many cases, judges champion domestic violence victims’ privacy-as-safety rights but may be less moved when other kinds of privacy concerns are in play.

For example, in *Indigo Real Estate Services v. Rousey*, a victim of domestic violence sought to substitute her initials for her full name on an eviction detainer action that was later dismissed.¹⁰⁴ She argued that her right to privacy should outweigh the public interest in access to her full name in the records.¹⁰⁵ But the privacy interest Ms. Rousey forwarded was not a privacy-as-safety interest. Her abuser knew where she lived; an altercation with him at her apartment had led to the wrongful eviction in the first place.¹⁰⁶ Instead, the privacy interest Ms. Rousey forwarded in her motion was “protection against unjustified disqualification from future housing opportunities.”¹⁰⁷ The trial court dismissed this interest on the ground that plenty of other litigants would like wrongful eviction records out of the court’s

96. *Id.*

97. *Id.*

98. *Id.* at 312.

99. *Id.*

100. *Id.*

101. Thomson’s work has been criticized for its reductive perspective — essentially sidelining privacy as merely a derivative right of more “important” rights. See ALLEN, UNEASY ACCESS, *supra* note 56, at 41.

102. See *id.* (noting that one of the criticisms of Thomson’s reductionism is that “it obscures the distinctive meaning of ‘privacy’”).

103. See Thomson, *supra* note 93, at 313-14 (arguing that breaking privacy rights into derivative rights may help clarify thinking on that privacy issue).

104. *Indigo Real Estate Servs. v. Rousey*, 215 P.3d 977, 978 (Wash. Ct. App. 2009).

105. *Id.*

106. *Id.*

107. *Id.*

computerized record system as well.¹⁰⁸ Ms. Rousey had not articulated a privacy interest that outweighed the strong presumption of access.

Ms. Rousey's experience illustrates the hesitance of courts to recognize domestic violence victims' privacy rights when they do not amount to a privacy-as-safety interest. The statute at the heart of Ms. Rousey's case, Washington's Victim Protection Act, was meant to protect victims of domestic violence from losing housing as a result of an abuser's actions.¹⁰⁹ The practical effect of Ms. Rousey's dismissed case being listed in the computerized court record system could in fact be that she may in the future be denied housing. Yet, assuming the trial court does not reverse itself on remand, the presumption of openness was too strong to overcome the non-safety privacy interest Ms. Rousey forwarded.

Ms. Rousey's experience is not uncommon. In many cases even outside the domestic violence context, courts routinely dismiss non-safety-related privacy interests like embarrassment and humiliation.¹¹⁰ Although this may be lamentable in Ms. Rousey's case (in which the privacy interest at stake was clearly more than avoiding embarrassment), it speaks to the strength of the presumption of openness of court proceedings records, which, as will be discussed below, is not without important benefits for domestic violence victims in court.

II. PUBLIC ACCESS TO COURT PROCEEDINGS AND RECORDS: GENERAL OVERVIEW

In the court context, the line of what is public and what is private is arguably quite stark. Either a trial is open or it is closed; either a record is accessible to the public or it is not. Judges and court administrators involved in drafting access policies have often viewed the project with this binary choice as the central template. This duality has formed the basis of the policy clash between those who argue for openness to encourage judicial oversight and accountability and those

108. *See id.* at 981 (noting that the trial court held "[t]here are lots of cases every day that are filed and either a voluntary nonsuit is taken or a stipulation order is taken. . . . We don't get to . . . essentially seal the names of the defendants in all of those cases. . . . I understand that this has a different effect . . . on the tenants potentially, but I still don't think that it's a basis upon which the Court can seal a file. . . . I just don't see that under the rules that this is an appropriate case to seal."). On appeal, the Court of Appeals remanded the case on the grounds that the trial judge had not properly enunciated the standards applied, leaving plenty of room for the trial court to again refuse Rousey's request, albeit with more explanation as to why. *Id.*

109. *Id.* at 978; *see* WASH. REV. CODE § 59.18.580(1) (2009) (providing that "[a] landlord may not terminate a tenancy, fail to renew a tenancy, or refuse to enter into a rental agreement based on the tenant's or applicant's or a household member's status as a victim of domestic violence").

110. *See infra* Part II.B.1.

who advocate for more restricted access due to concerns about, *inter alia*, unfair publicity, threats to due process, and privacy.¹¹¹ Amidst these tensions, the U.S. court system — both civil and criminal, state and federal — maintains a presumption of openness: proceedings and court records should be open to the public, at least in principle.

A. *The Presumption of Openness*

*THAT in all publick [sic] courts of justice for tryals [sic] of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals [sic] as shall be there had or passed, that justice may not be done in a corner nor in any covert manner.*¹¹²

The presumption of openness in court proceedings and records is codified in the U.S. Constitution, most prominently in the Sixth Amendment which ensures criminal defendants a public trial.¹¹³ This Sixth Amendment guarantee rests on the premise that greater confidence in the outcome and the system of justice will ensue if members of the public are allowed access. The Supreme Court characterized the Sixth Amendment's protections this way: "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."¹¹⁴

The Supreme Court has also located the presumption of openness to criminal proceedings in the First Amendment. In *Richmond Newspapers v. Virginia*, the press sought access to a criminal trial after the defendant waived his Sixth Amendment right to a public trial.¹¹⁵ The Court was confronted with a simple question: does the *public* maintain a right to an open trial when the defendant has waived it?¹¹⁶ Despite an absence of explicit language in the Constitution guaranteeing the public access to trials, the Court found that the "right to attend criminal trials is implicit in the guarantees of the First Amendment;

111. *Id.*

112. *Concessions and Agreements of West New Jersey reprinted in SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS* 184, 188 (Richard L. Perry ed., 1959).

113. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . .").

114. *In re Oliver*, 333 U.S. 257, 270 (1948).

115. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 555-56 (1980).

116. *Id.* at 558.

without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'"¹¹⁷

The Court located this constitutional right in the historical evolution of the justice system, noting that since the time of the Norman Conquest, open access to trials has served a fundamental set of purposes.¹¹⁸ Public trials, the Court explained, "gave assurance that the proceedings were conducted fairly . . . discouraged perjury . . . misconduct, [ensured against] decisions based on secret bias or partiality," and provided important community healing, catharsis, and closure after criminal acts.¹¹⁹

The presumption of openness is not limited to the criminal context. While no constitutional proclamation safeguards access to civil proceedings, the Third Circuit was the first federal court to proclaim a First Amendment right to attend civil hearings and to "inspect and copy public records and documents, including judicial records and documents" in civil trials.¹²⁰

B. Presumption Limited

1. At the Discretion of the Judge

Despite the lofty pronouncements, in both the criminal and civil contexts the presumption of openness is carefully qualified.¹²¹ Concerns over prejudicial pretrial publicity, the danger of impairing law enforcement, protecting privacy interests of litigants and third parties (witnesses, jurors, and so forth), promoting public safety, and minimizing public reluctance to use the courts have all been forwarded as legitimate counterbalances to the presumption of openness.¹²² When

117. *Id.* at 580 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1971)); *see also* *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) (extending the right of access to preliminary proceedings in criminal cases); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (finding *voir dire* proceedings must be open to the public unless "closure is essential to preserve higher values and is narrowly tailored").

118. *See Richmond Newspapers Inc.*, 448 U.S. at 556 ("[T]he King's will was that all evil doers should be punished after their deserts, and that justice should be ministered indifferently to rich as to poor; and for the better accomplishing of this, he prayed the community of the county by their attendance there to lend him their aid in the establishing of a happy and certain peace that should be both for the honour of the realm and for their own welfare.").

119. *Id.* at 569-70.

120. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1069-70 (3d Cir. 1984).

121. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1977); *Publicker Indus., Inc.*, 733 F.2d at 1071.

122. *See Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113, 118 (Fla. 1988) (finding that court proceedings can be closed in order to, among other reasons, "protect

such concerns arise, the burden falls to the trial judge to weigh those concerns against the principles supporting openness.¹²³

It is worthy of note that the presumption is quite strong.¹²⁴ Judges are not often easily persuaded to seal records or close proceedings. As one judge put it, “embarrassment, damage to reputation and the general desire for privacy do not constitute good cause to seal court records.”¹²⁵

2. *At the Discretion of the State Legislature or the Court*

Aside from those instances in which judges are persuaded to seal records or close proceedings, the presumption of openness is also overcome in more systematic ways.

Certain kinds of proceedings and court records, particularly those that feature sensitive personal information, may be inaccessible by statute or court rule. For example, court records from adoption cases, mental health cases, juvenile dependency cases, and termination of parental rights cases are inaccessible to the public at many courts by statute or court rule.¹²⁶ In addition to case types, certain specific documents within case files are typically not available for public review such as pre-sentence reports, financial disclosure statements in family law cases, and medical records.¹²⁷ Increasingly, courts have begun

trade secrets . . . protect a compelling governmental interest [such as] national security . . . to avoid substantial injury to innocent third parties,” and protect privacy); *Cohen v. Everett City Council*, 535 P.2d 801, 803 (Wash. 1975) (excluding the public from a courtroom in order “to prevent overcrowding . . . to prevent disorder, to avoid intimidation of witnesses and to prevent minors from hearing salacious testimony” is within a court’s inherent power).

123. *See Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) (noting that trial courts must “conscientiously balance[] the competing interests”).

124. *See Kamakana v. City of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) (holding that “compelling reasons” and not just “good cause” is needed in order to keep judicial records sealed).

125. *Doe v. NYU*, 786 N.Y.S.2d 902 (App. Div. 2004); *see also Kamakana*, 447 F.3d at 1179 (noting that embarrassment or incrimination without more does not justify sealing records).

126. *See, e.g.*, The Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(4)(B)(i) (2006) (prohibiting publication of information related to any specific child protection case); CAL. WELF. & INST. CODE § 346 (West 2008) (closing juvenile court hearings to the public); FLA. STAT. § 39.0132(3) (2009) (closing hearings and records related to children); FLA. STAT. § 39.809(4) (2009) (closing parental termination hearings).

127. ALAN CARLSON & MARTHA WADE STEKETEE, NAT’L CTR. FOR ST. CTS. & THE JUST. MGMT. INST., PUBLIC ACCESS TO COURT RECORDS: IMPLEMENTING THE *CCJ/COSCA GUIDELINES* FINAL PROJECT REPORT 12 (2005), available at <http://www.jmijustice.org/Data/DocumentLibrary/Documents/1141965236.05/JMI%20NCSC%20Public%20Access%20to%20Court%20Records%20Implementing%20Guidelines%20-%20Final%20Report%2015OCT05.pdf> [hereinafter Public Access 2005].

to adopt policies that restrict access to certain types of information contained within court records regardless of case or document type — Social Security numbers are a good example.¹²⁸

3. *The Impact of the Internet*

A final systemic means of curtailing access to court records has been developed to address recent technological advances that enable “remote access” to court proceedings and records on the Internet.¹²⁹ Once upon a time, members of the public had no choice but to trudge to the courthouse to obtain records from the clerk or observe proceedings.¹³⁰ Now, those same records and proceedings, in rapidly increasing numbers, are becoming available online.¹³¹

Judges, court administrators, scholars, and others have struggled with this new landscape. The central question is whether court access policies should be altered in light of new and changing technological

128. See, e.g., CAL. GOV'T CODE § 27302 (West 2008) (requiring truncation of social security numbers); MICH. COMP. LAWS ANN. § 445.84 (West Supp. 2009) (establishing confidentiality of social security numbers).

129. Many courts are experimenting with Internet access to proceedings, typically at the appellate level. Examples of courts currently webcasting include the supreme courts of Florida, Indiana, Massachusetts, Mississippi, New Hampshire, New Jersey North Dakota, Ohio, Texas and West Virginia. Fl. Supreme Court, Oral Argument Schedule & Briefs, http://www.floridasupremecourt.org/pub_info/summaries/index.shtml (last visited Jan. 20, 2010); N.H. Judicial Branch, Supreme Court WebCast, <http://www.courts.nh.gov/cstream/index.asp> (last visited Jan. 20, 2010); N.D. Supreme Court, Listen to the Supreme Court, <http://www.ndcourts.gov/court/webcasts.htm> (last visited Jan. 20, 2010); Supreme Court of OH., Supreme Court Video, <http://www.supremecourt.ohio.gov/videostream/default.asp> (last visited Jan. 20, 2010); Radio Television Digital News Assoc., Cameras in the Court: A State-by-State Guide, http://www.rtnda.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php (last visited Jan. 20, 2010); St. Mary's Univ. Sch. of Law, Supreme Court of Tx. webcasts, <http://www.stmarytx.edu/law/index.php?site=supremeCourtWebcasts> (last visited Jan. 20, 2010); State of Miss. Judiciary, Supreme Court: Oral Argument Webcasts, http://www.mssc.state.ms.us/appellate_courts/sc/scoralarguments.html (last visited Jan. 20, 2010); W. Va. Supreme Court of Appeals, Argument Webcast, <http://www.state.wv.us/wvsca/webcast.htm> (last visited Jan. 20, 2010). Trial courts are also experimenting with webcasting, though examples are few and far between. The Circuit Court of Wise County, Virginia, for example, has experimented extensively with webstreamed trials. See Kathy Still, *Clerk Disputes Broadcast Contention*, RICHMOND TIMES-DISPATCH, Apr. 24, 2000, at B3 (stating that the Wise County court system is one of the few that has the technology to do webcasting).

130. Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307, 316 (2004).

131. See Admin. Office of the U.S. Courts, Service Center, <http://pacer.psc.uscourts.gov/> (last visited Jan. 20, 2010) (providing online access to federal court documents); see also The Reporter's Comm. for Freedom of the Press, *Access to Electronic Records: A state-by-state guide to obtaining government data*, http://rcfp.org/electaccess/elect_access_main.htm (last visited Jan. 20, 2010) (providing a list of state-by-state electronic access to records).

realities.¹³² Many argue that “public is public” — i.e., if a document is public, it should be made available online as well.¹³³ Availability online should not alter its status in any way.¹³⁴ In fact, the “public is public” camp argues that giving the public more meaningful and convenient access through the Web upholds and forwards the values that underlie the presumption of openness.¹³⁵ The other side argues that the increased access to records online signals the need for a major shift in policy.¹³⁶ Privacy interests of litigants once protected by dusty and hard-to-access files (a protection commonly referred to as “practical obscurity”) are now thrust out there for all to see, requiring new policies to protect litigants’ privacy interests.¹³⁷ As courts have wrestled with this issue, inventive strategies have appeared that move away from a black and white open-or-closed dichotomy. For example, a whole category of “courthouse only” access has emerged.¹³⁸ Many courts have determined that certain court records (or information within those documents) are, either by courthouse rule, by state statute, or in rare instances by federal statute,¹³⁹ inappropriate for release on the Internet, even though that same document or the information within it is publicly available at the courthouse.¹⁴⁰ Courts maintaining a “courthouse only” approach will often provide a computer kiosk in the clerk’s office at which the public can search for the record sought.¹⁴¹

132. See MARTHA WADE STEKETEE & ALAN CARLSON, NAT’L CTR. FOR STATE COURTS & THE JUSTICE MGMT. INST., DEVELOPING *CCJ/COSCA GUIDELINES FOR PUBLIC ACCESS TO COURT RECORDS: A NATIONAL PROJECT TO ASSIST STATE COURTS* vi, 1 (2002), available at <http://www.jmijustice.org/Data/DocumentLibrary/Documents/1141964905.77/CCJ-COSCA%20Access%2018Oct2002FinalReport.pdf> [hereinafter Model Policy] (noting that from May 2001 to June 2002, an advisory panel created by the National Center for State Courts met to study access to electronic court records and develop model guidelines to be applied to state court systems).

133. Winn, *supra* note 130, at 322.

134. *Id.* at 315, 322.

135. See The Reporter’s Comm. for Freedom of the Press, *supra* note 131 (providing arguments why reporters and others need access to court records).

136. Winn, *supra* note 130, at 315.

137. *Id.* at 316-17.

138. Alan Carlson, *Public Access to Court Records: Reducing the Risk of Disclosure of Personally Identifiable Information*, in NATIONAL CENTER FOR STATE COURTS FUTURE TRENDS IN STATE COURTS 19, 20 (2007), available at http://www.ncsconline.org/wcl/publications/KIS_Ctfutu_trends07.pdf [hereinafter Public Access Trends].

139. See *infra* note 163 and accompanying text.

140. See Model Policy, *supra* note 132, at 39-41 (suggesting such an approach in § 4.50); Public Access Trends, *supra* note 138, at 20 (discussing a recent study indicated that twelve out of twenty-two states reviewed employed courthouse-only strategy).

141. See, e.g., CYNTHIA Y. COBBS, ADMIN. OFF. OF THE ILL. COURTS, ELECTRONIC ACCESS POLICY FOR CIRCUIT COURTS RECORDS OF THE ILLINOIS COURTS 5 (2004), <http://www.state.il.us/court/SupremeCourt/Policies/Pdf/PubAccess.pdf> (listing items that, while public,

III. DOMESTIC VIOLENCE AND THE ACCESS-VERSUS-PRIVACY TENSION

Despite progress made in addressing domestic violence issues in the past several decades,¹⁴² domestic violence remains “the leading cause of injury to women” in the United States.¹⁴³ “[A]n estimated 1.3 million women are victims of physical assault by an intimate partner each year” in the United States.¹⁴⁴ One study estimated “that [sixty percent] of orders of protection [are] violated within one year” of issue, while another found that approximately seventeen percent of domestic violence victims ultimately murdered by their abusers had obtained an order of protection prior to their murders.¹⁴⁵ Troubling statistics such as these, along with the passage of the Violence Against Women Act (VAWA),¹⁴⁶ have helped push law enforcement agencies, advocates, and courts to experiment with new ways of addressing domestic violence.¹⁴⁷ Much advocacy has centered on the role of law enforcement, the availability and accessibility of shelters, and access to legal services.¹⁴⁸ Within the court system, the response to domestic violence has been spotty, with some jurisdictions devoting significant resources to develop a sophisticated judicial response including establishing specialized domestic violence courts,¹⁴⁹ while other jurisdictions have largely maintained the status quo.¹⁵⁰

are “excluded from public access in electronic form unless access is provided at the office of the clerk of court”).

142. See *supra* note 30 and accompanying text.

143. American Inst. on Domestic Violence in the Workplace, Domestic Violence Statistics, <http://www.aidv-usa.com/statistics.htm> (last visited Jan. 20, 2010).

144. NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, DEP'T OF HEALTH AND HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 14 (2003), available at http://www.cdc.gov/ncipc/pub-res/ipv_cost/ipvbook-final-feb18.pdf.

145. Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1292 (2000).

146. 42 U.S.C. § 3796gg(b) (providing for “personnel, training, technical assistance, data collection and other equipment for the more widespread apprehension, prosecution, and adjudication of persons committing violent crimes against women” (emphasis added)).

147. See, e.g., Dep't of Justice, Office on Violence Against Women Home Page, <http://www.ovw.usdoj.gov/index.html> (last visited Jan. 20, 2010) (displaying the DOJ's myriad outreach attempts and programs to support VAWA); Proclamation by Barack Obama, President of the United States, National Domestic Violence Awareness Month 2009 (Oct. 1, 2009), available at <http://www.whitehouse.gov/asset.aspx?AssetId=3103> (“proclaim[ing] October 2009, as National Domestic Violence Awareness Month”).

148. Farmer & Tiefenthaler, *supra* note 30, at 158-59.

149. See *infra* Part III.C.

150. See Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 FAM. L.Q. 353, 359 (2008) (“Family court judges are often hostile and disbelieving towards claims of domestic violence.”); Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 169-70 (1990) (discussing continuing judicial reluctance to intervene in family disputes).

A. Domestic Violence Cases: Public Access

As an initial matter, it is not a simple job to identify a “domestic violence case.” Domestic violence can be implicated in — or central to — a variety of civil and criminal cases. Domestic violence can be part of, for example, divorce or custody cases, criminal and civil protection order motions, and criminal assault cases.¹⁵¹ But an overly restrictive view of what kinds of cases implicate the privacy interests of domestic violence victims in court is problematic. Cases which litigate some aspect of physical assaults on domestic partners (referred to here as “direct” domestic violence cases) have one set of associated privacy interests.¹⁵² Other “indirect” cases — those in which domestic violence victims are engaged in the court system for reasons unrelated to incidents of domestic violence — also present important privacy challenges.¹⁵³ With this distinction in mind, this section will look first at public access in direct domestic violence cases.

Because each state, jurisdiction, and sometimes each court within a jurisdiction adopts its own rules and procedures for managing direct domestic violence cases, it can be difficult to draw general conclusions about how these cases are dispensed and how the access-versus-privacy issue is weighed. That said, proceedings and records of cases containing criminal and civil direct domestic violence matters are public in the vast majority of states.¹⁵⁴ The presence of domestic violence in a case does not necessarily weaken the general presumption of openness. In fact, the presumption of openness remains strong even in cases when domestic violence is directly implicated, and especially in criminal cases where the presumption is at its strongest.¹⁵⁵

151. Schneider, *Domestic Violence Law Reform*, *supra* note 150, at 354, 359.

152. *See, e.g.*, Model Policy, *supra* note 132, at 6-7 (addressing the privacy-as-safety issue faced by domestic violence victims).

153. *See, e.g.*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, COMMENTS ON THE MODEL POLICY GOVERNING ELECTRONIC ACCESS TO COURT RECORDS 6 (2002), <http://www.ncdsv.org/images/CommentsModelPolicy.pdf> [hereinafter Model Policy Comments] (discussing the danger that domestic violence victims face when land records are available online); COMM'N ON PUBLIC ACCESS TO COURT RECORDS, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 10-11 (Feb. 2004), *available at* http://www.nycourts.gov/ip/publicaccess/Report_PublicAccess_CourtRecords.pdf [hereinafter New York Report] (explaining that domestic abusers, batterers and stalkers will often take advantage of any available information to locate their victims and suggesting that courts “liberally grant requests by [victims] to protect their identity and location from public disclosure”).

154. *See* CITIZEN MEDIA LAW PROJECT, LEGAL GUIDE, <http://www.citmedialaw.org/legal-guide> (last visited Jan. 20, 2010).

155. *See, e.g.*, *Ex parte Hearst-Argyle Television, Inc.*, 631 S.E.2d 86, 90 (S.C. 2006) (finding trial court's reliance on domestic violence concerns did not justify closing hearing). A notable exception is when the interests of children are implicated. *See, e.g.*, *P.B. v. C.C.*, 647 N.Y.S.2d 732, 734-35 (1996) (upholding closure of child protective hearing in

Federal, state, and local statutes and regulations may act to restrict access to certain information *within* records related to domestic violence, although the record itself may remain public. For example, in child custody cases, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)¹⁵⁶ limits public access to identifying information within records when a party's health or a child's health, safety, or liberty is threatened.¹⁵⁷ Likewise, in divorce cases, some states maintain specific provisions that allow a party to prevent access to identifying information within otherwise public records upon a showing of good cause, which can include concerns related to domestic violence.¹⁵⁸ Domestic violence victims' ability to redact or otherwise restrict access to information about them in court records is often not easily accomplished, as demonstrated in *Indigo Park v. Rousey*.¹⁵⁹ That said, the rise of identity theft has forced courts to be more protective of personally identifying information in court files, which has only helped victims of domestic violence interested in protecting their information from public access, albeit for different reasons (i.e., financial safety vs. personal safety).¹⁶⁰

Domestic violence victims have numerous means by which to protect information in otherwise public records by moving to seal records, close courtrooms, or redact personally identifying information. Policies and procedures for doing so vary from court to court. Most courts take no affirmative action to protect the privacy interests of litigants, in domestic violence cases or otherwise, relying instead

order to protect best interests of child where the press had "revealed allegations of alcohol and drug abuse and domestic violence").

156. U.C.C.J.E.A. (1997), available at <http://www.law.upenn.edu/bll/archives/ulc/uccjea/final1997act.htm>. The UCCJEA has been adopted in 48 states and in the District of Columbia. Massachusetts, Vermont, and Puerto Rico have not adopted the UCCJEA. Massachusetts and Vermont are weighing adoption. Nat'l Conference of Comm'rs on Unif. State Laws, A Few Facts About the Uniform Child Custody Jurisdiction & Enforcement Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uccjea.asp (last visited Jan. 20, 2010).

157. U.C.C.J.E.A. § 209(e) (1997) ("If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice.").

158. See W. Thomas McGough, Jr., *Public Access to Divorce Proceedings: A Media Lawyer's Perspective*, J. 17 J. AM. ACAD. MATRIM. LAW 29, 31, 33 (noting that "[a]t least twenty-four states have open court provisions in their constitutions, many of which have been cited in admitting the public to divorce proceedings" though they may be closed "for good cause shown").

159. See *supra* notes 104-109 and accompanying text.

160. Public Access Trends, *supra* note 138, at 19.

on litigants to independently elect to protect their privacy interests when possible.¹⁶¹

*B. Online Access to Domestic Violence Records*¹⁶²

The question of whether and to what extent domestic violence records should be available online has been hotly contested. In some instances, the matter has been settled by federal statute. VAWA prohibits the publication on the Internet of identifying information in protective orders and restraining orders.¹⁶³ Such information may still be public (i.e., courts can still provide such information to the public by other means, for example at the courthouse). VAWA's restriction forbids only Internet amplification. In general, state courts have proceeded very cautiously when considering which records to place online.¹⁶⁴

161. See, e.g., Arizona Plaintiff's Guide Sheet for Protective Orders § 11 (2009), available at <http://www.supreme.state.az.us/nav2/selfserv/GuideSheet.pdf> (noting that a plaintiff's must request that their address be kept private); Colorado Verified Complaint/Motion for Civil Protective Order § 6 (2009), available at <http://www.courts.state.co.us/Forms/PDF/jdf402.pdf> (allowing requesting party to omit address for safety concerns). In some states, such as California or Michigan, the courts both require litigants to take a proactive approach to concealing their home address and request a public mailing address in lieu of the litigant's private home address. California Request for Order (Domestic Violence Prevention) § 1, available at <http://www.courtinfo.ca.gov/forms/documents/dv100.pdf>; Michigan Personal Protection Order (Domestic Relationship) § C, available at <http://courts.michigan.gov/scao/courtforms/personalprotectionorders/cc376.pdf>. In Florida, petitioners filing for a civil protective order must file a separate "Request for Confidential Filing of Address" form for their home address to remain private. Florida Petition for Injunction for Protection Against Domestic Violence § 1, available at http://www.flcourts.org/gen_public/family/forms_rules/980a.pdf. A few states, however, such as North Carolina, do not ask the petitioner for a home or mailing address when applying for a civil protective order. North Carolina Instructions for Domestic Violence, available at <http://www.nccourts.org/forms/Documents/220.pdf>.

162. Note that online access to domestic violence *proceedings* through webstream or other method is currently unavailable, to the author's knowledge, even though many such proceedings are open to the public. See *infra* Part III.C.2.b. Although some courts are experimenting with webstreaming proceedings, they are typically appellate level proceedings. See *supra* note 129 and accompanying text. These venues, unlike trial-level proceedings, are juror- and witness-free and feature relatively less sensitive personal information than trials tend to dredge up. Courts are unlikely to experiment with webstreaming domestic violence hearings; indeed, such a move would put victims in danger and discourage them from using the court system to address abuse. For this reason, the discussion focuses solely on online domestic violence *records*.

163. 18 U.S.C. § 2265(d)(3) (2006) ("A State, Indian tribe, or territory shall not make available publicly on the Internet any information regarding the registration, filing of a petition for, or issuance of a protection order, restraining order or injunction . . . in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order.").

164. See Public Access Trends, *supra* note 138, at 19 (noting reluctance of courts to make additional information available online). Notable exceptions include the recent Oklahoma

In 2002, the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) published the Guidelines for Public Access to Court Records (Model Policy).¹⁶⁵ The authors of the Model Policy, relying on a diverse set of recommendations from a wide variety of commentators, sought to develop a model to provide courts a blueprint for navigating the evolution from paper to digital records.¹⁶⁶

The advisory committee charged with preparing the Model Policy recognized that domestic relations records, particularly those involving child maltreatment and direct domestic violence, required special attention due to the sensitive nature of the information contained in these records.¹⁶⁷ At a special session of the Second Conference on Privacy and Public Access to Court Records in 2002,¹⁶⁸ participants developed a list of key questions to examine in domestic relations court records, that demonstrate how complex privacy interests are in these cases:

- Should we protect interests of [third] parties involved in family cases?
- Should court [sic] restrict access to some personal identifiers in family case records?

fiasco. Court administrators elected to place unredacted public records online and faced harsh criticism. *Oklahoma County Clerk's Records Reveal Social Security Numbers; Carolynn Caudill Seeks Redaction Service*, THE MCCARVILLE REPORT ONLINE, Mar. 11, 2008, <http://www.tmrcom.blogspot.com/2008/03/oklahoma-county-clerks-records-reveal.html> (quoting an article from *The Oklahoman* that discussed Oklahoma County Clerk Carolynn Caudill's efforts to make all county records available online); *see also id.* ("Almost all of some 8.7 million documents — 17 million pages — are online, from mortgage documents, mineral deeds, liens and other legal 'papers,' from original land patents granted after the Land Run of 1889 to last week's property deals, said Mark Mishoe, chief deputy for County Clerk Carolynn Caudill. . . . The conversion cost about \$2.5 million — from a \$5 fee assessed since 2000 on most documents filed."). The effort was halted when news organizations and bloggers found personally identifiable information of various public figures within these online records. *Id.* On March 11, 2008, the Oklahoma Supreme Court reacted, adopting rules that flatly prohibited access to court records online. Associated Press, *Okla High Court Withdraws Order Restricting Court Records*, Mar. 26, 2008, available at <http://www.firstamendment.org/news.aspx?id=19843>. A few weeks later, on March 25, 2008, under fire from access advocates, the Oklahoma Supreme Court withdrew the order to "give the issue further study and consideration." *Id.*

165. Model Policy, *supra* note 132.

166. *Id.* at iii, 2.

167. Martha Wade Steketee, *CCJ/COSCA Guidelines Project Focuses on Court Records*, FAM. VIOLENCE FORUM (Fall 2003), <http://www.ncsconline.org/COPs/FamVio/FVForumFall2003/CCJCosca.htm>.

168. The Conference, sponsored by the Center for Legal & Court Technology (formerly Courtroom 21) and the National Center for State Courts meets every 18 months. The Seventh Conference will take place in March 2010. The Center for Legal and Court Technology, CLCT Privacy Website, <http://privacy.legaltechcenter.net/privacy/default.aspx>.

- Should detailed financial information contained in family case records be accessible to the public?
- Should sensitive reports (e.g., financial and mental health) in family cases be available to the public?
- How can courts address the special concerns presented in domestic violence case court documents?
- How are court rules enforced in this arena, especially when many parties in family and domestic relations court cases are unrepresented?¹⁶⁹

Engaging these important questions, the Model Policy acknowledges the privacy problems publicly available court records present to domestic violence victims, with a particular nod to the safety interest. For example, the commentary to Section 1.00(a)(5) notes that:

[U]nrestricted access is not always in the public interest. The interest in personal safety can be served by restricting access to information that someone could use to injure someone else, physically, psychologically or economically. Examples of actual injury to individuals based on information obtained from court records include: intimidation of, or physical violence towards, victims, witnesses, or jurors, repeated domestic violence, sexual assault, stalking, identity theft, and housing or employment discrimination. While this does not require total restriction of access to court records, it supports restriction of access to certain information that would allow someone to identify and find a person to whom they intend harm. This is an especially serious problem in domestic violence cases where the abused person is seeking protection through the court.¹⁷⁰

Acknowledging the safety interests public records jeopardize, the Model Policy suggests that certain kinds of records remain public but stay offline.¹⁷¹ In the commentary to Section 4.50 (“Court Records That Are Only Publicly Accessible At A Court Facility”), the Model Policy recommends several categories of information that courts should consider be restricted to courthouse-only access, including:

- Addresses, phone numbers and other contact information for victims (not including defendants) in domestic violence, stalking, sexual assault, and civil protection order proceedings; . . .
- Addresses, phone numbers and other contact information for witnesses (other than law enforcement witnesses) in criminal, domestic violence, sexual assault, stalking, and civil protection order cases; . . . [and]

169. Steketee, *supra* note 167.

170. Model Policy Comments, *supra* note 153, at 6-7.

171. *Id.* at 39.

- Family law proceedings including dissolution, child support, custody, visitation, adoption, domestic violence, and paternity, except final judgments and orders¹⁷²

In some cases, the Model Policy recommends that certain information not be available for public inspection at all, online or otherwise. Section 4.60, “Court Records Excluded From Public Access,” stops short of listing suggested categories.¹⁷³ The commentary to Section 4.60, however, notes that many states bar public access to certain information within records, including the “[n]ame, address, telephone number, e-mail, or places of employment of a victim, particularly in a sexual assault case, stalking or domestic violence case [and the] [n]ame, address or telephone number of witnesses (other than law enforcement personnel) in criminal or domestic violence protective order cases.”¹⁷⁴

Numerous commentators, including the National Network to End Domestic Violence (NNEDV), weighed in with comments to the proposed CCJ/COSCA Model Policy.¹⁷⁵ A common thread in such commentary centered on concerns over victim safety. For example, in its submission, the NNEDV acknowledged the public interest and benefit of online records access, but noted that the interest of domestic violence victims’ safety often outweighs public access justifications and should therefore be protected in several ways.¹⁷⁶ The NNEDV recommended that the Model Policy be amended to, *inter alia*:

- exclude documents in civil protection matters and family law cases from remote access;
- exclude domestic violence victim and witness identities from public access;
- . . .
- allow petitioners to exclude all records from remote access;
- . . .
- provide more robust notification of electronic record management to litigants and victim communities;
- recommend processes for preventing and remedying failures to properly exclude information from public access.¹⁷⁷

172. *Id.* at 39-40. Note that this is only a partial list.

173. *Id.* at 45.

174. *Id.* at 48. Note that the commentary to Section 4.60 notes that the names and addresses of children involved in domestic violence cases are also commonly excluded from the public record. *Id.* at 49.

175. Model Policy Comments, *supra* note 153, at 1.

176. *Id.* at 2.

177. *Id.*

In the end, the Model Policy recognized concerns associated with the vulnerability of domestic violence victims and online records, but left to the states to decide how to manage the privacy/access balance with respect to domestic violence records.¹⁷⁸

Using the Model Policy as a guide, courts have struggled with the question of the extent to which records ought to be made available online, if at all.¹⁷⁹ In general, at the state level, online records remain relatively spare. Those state courts that do put records online typically do so in a very perfunctory way, for example, posting docket-level information only (party names, case number, filing types and filing dates, minute records, hearing dates, and so forth).¹⁸⁰ Few jurisdictions post online copies of filings themselves and other more detailed documents in the court record. When such records are available online, they often require a subscription and/or fees to access, like PACER, or are available only to authorized users such as the parties and their attorneys.¹⁸¹ In this way, courts are able to provide a layer of protection for records placed online that had, in paper form, relied on the protection of practical obscurity.¹⁸² In many instances, whole categories of cases are excluded from online access. For example, some courts keep all family court records offline as a matter of policy.¹⁸³

178. Model Policy, *supra* note 132, at 3, 5.

179. *See, e.g.*, New York Report, *supra* note 153, at 3-4 (discussing the difficulty of balancing the interests of “broad public access” against “the need to take reasonable steps to safeguard individual privacy and security” especially given the nature of the Internet).

180. *See, e.g., id.* at 28 (providing an example of the basic information available electronically in the New York State Unified Court System).

181. *See, e.g.*, Iowa Courts Online Search, <http://www.iowacourts.state.ia.us/ESAWebApp/DefaultFrame> (last visited Jan. 20, 2010) (allowing access to docket information, and a list of documents filed, but requiring registration to access information such as exhibits, judgments, and liens).

182. Many jurisdictions offer subscription-only access to online court records. *See, e.g.*, Sedgwick County Courthouse, Records Access, http://www.dc18.org/info/records_access.shtml (last visited Jan. 20, 2010) (requiring that users pay a fee to access court records). For the general public (which includes any non-affiliated member of the public, attorneys, title companies, background checkers, etc.) the fee is \$225 to set up the account, a monthly access fee of \$49, along with a \$.05 per screen usage fee. Telephone Interview with a Subscriber Access Consultant, Sedgwick County Courts, Kansas, in Williamsburg, Va. (2009). The system averages roughly 50 corporate subscribers at any given time, but hundreds of “users” (meaning employees of subscribers). *Id.* Family court records, including domestic violence records, are not available online, although members of the public can search those records electronically from a computer kiosk at the court (i.e., “courthouse only availability”). *Id.*

183. *See, e.g.*, Clark County Courts in Las Vegas, Questions and Answers, <http://www.clarkcountycourts.us/clerk/faq.html> (last visited Jan. 20, 2010) (offering online access to court records, but “[o]nline records are not available for family-related matters”); New York State Unified Court System, WebCivil Supreme, <http://iapps.courts.state.ny.us/webcivil/FCASSearch?param=p> (last visited Jan. 20, 2010). Note, however, that New York family case records are not publicly accessible at the courthouse either. *See infra* note 219 and accompanying text.

Even in jurisdictions that post family court records online, domestic violence cases are routinely excluded.¹⁸⁴ Surprisingly, although it is quite difficult in general to find domestic violence records online that contain details beyond basic docket information, it is not entirely impossible. In Fresno, California, for example, court records can be searched by docket report (name, case number, filing date, or case type¹⁸⁵). Searching under the name “Smith,” my research assistant located the domestic violence case of Dana Y. Smith v. Daryl E. Davis Sr.¹⁸⁶ that included a home telephone number for both the petitioner and the defendant.¹⁸⁷

As courts develop online access policies, domestic violence and privacy advocates have been vocal in advocating that records relating to direct domestic violence cases be kept offline.¹⁸⁸ Those advocating against posting records online have also consistently voiced concerns about indirect cases as well, with an eye, as in direct cases, to victim safety.¹⁸⁹ When victims of domestic violence are on the run from their

184. See, e.g., Superior Court of California, County of Alameda, DomainWeb, <http://apps.alameda.courts.ca.gov/domainweb/html/index.html> (last visited Jan. 20, 2010) (providing access to “General Civil, Probate, and Family Law cases”); State of Connecticut Judicial Branch, Civil/Family Case Detail Inquiry, <http://civilinquiry.jud.ct.gov/GetDocket.asp> (last visited Jan. 20, 2010) (providing access to Civil and Family cases); Johnson County Kansas District Court, Document Search, <http://www.jococourts.org/> (last visited Jan. 20, 2010) (allowing users to search cases in the following categories: Criminal/Juvenile/Traffic; Civil; Marriage License; Probate); Dallas County Online Record Search, http://www.dallascounty.org/applications/english/record-search/rec-search_intro.html (last visited Jan. 20, 2010) (providing access to civil and family case records).

185. Superior Court of California, County of Fresno, Case Information, http://fresno.superiorcourt.org/case_info (last visited Jan. 20, 2010). Note that this includes two case types for domestic violence (one for cases in which children are involved; the other for those in which children are not involved). *Id.*

186. Smith v. Davis, No. 08CEFL02399 (May 14, 2008) (dismissed after hearing by domestic violence court), http://banweb.co.fresno.ca.us/cprodsnp/ck_public_qry_doct.cp_dktrpt_frames?backto=P&case_id=08CEFL02399&begin_date=&end_date=.

187. *Id.* (last visited summer 2009) (copy on file with author). Note that a recent visit to this website found that Ms. Smith and Mr. Davis’s phone numbers are no longer listed. *Id.* (last visited Jan. 20, 2010). Interestingly, my research assistant was only able to locate telephone numbers in domestic violence cases in which the two parties’ phone numbers were identical (presumably because the number does not pose a threat to the victim if she and the alleged batterer both use it). Another interesting feature of the Fresno online access system, used by many other courts as well, is that it assigns an ID to each party. Clicking on that ID allows the searcher to see a list of cases in which that person is involved. Superior Court of California, County of Fresno, Banner CourtConnect, http://banweb.co.fresno.ca.us/cprodsnp/ck_public_qry_main.cp_main_srch_options (last visited Jan. 20, 2010).

188. See *supra* notes 175-177 and accompanying text; see also Letter from Marc Rotenberg, Executive Dir. of Electronic Privacy Info. Ctr., et al., to D.C. Superior Court (Oct. 19, 2007) available at http://epic.org/privacy/dv/DC_Court_records.pdf (discussing privacy issues inherent in remote access to court docket information and recommending safeguards to protect certain types of information).

189. SAFETY NET, *supra* note 82, at 2.

abusers and are trying to keep identities secret, inclusion of the victim's name in *any* court record can do damage.¹⁹⁰ To use an example provided by the NNEDV, "if a victim of domestic violence flees her abuser in Virginia, relocates to Texas, buys property, and files her land record with a court that posts such records on the Web, her abuser can find her with a simple . . . search."¹⁹¹

C. Specialized Domestic Violence Courts, Privacy, and Access

1. Overview

The past several decades have witnessed a trend towards specialized courts, which modify the traditional court system to address the needs of particularized populations. Drug courts, juvenile courts, and unified family courts provide a few examples of such experimentation.¹⁹² Specialized domestic violence courts are another illustration of the effort to modify the structure and goals of the justice system when confronted with a set of issues for which the typical adversarial model falls short.¹⁹³ Specialized domestic violence courts grew from the sense that the justice system treated victims of domestic violence unfairly in systematic and troubling ways,¹⁹⁴ and that "fear, economic dependence, and even affection . . . made prosecution of such cases in a traditional court setting extremely difficult."¹⁹⁵ A unique characteristic

190. *Id.* ("The mere existence of a victim's name on a court website could lead a batterer or stalker to a victim's new community, if not exact address.")

191. *Id.*; see also Silverstein, *supra* note 87, at 124-28 (discussing the relationship between online court records and cyberstalking).

192. See JAMES L. NOLAN JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 40 (2003) (discussing the unique characteristics of drug courts); Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 473 (1998) (discussing the court reform that led to unified family courts); Michael C. Dorf & Jeffrey A. Fagan, *Community Courts and Community Justice*, 40 AM. CRIM. L. REV. 1501, 1503 (2003) (discussing the movement toward juvenile courts).

193. See Mae C. Quinn, *Anna Moscovitz Kross and the Home Term Part: A Second Look at the Nation's First Domestic Violence Court*, 41 AKRON L. REV. 733, 734-35 (2008) (discussing the fascinating history of the first dedicated domestic violence court, established in 1946 by a judge ahead of her time, the Hon. Anna Moscovitz Kross).

194. See Donna Wills, *Mandatory Prosecution in Domestic Violence Cases: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 177 (1997) (discussing the tendency of domestic violence victims to be too afraid to assist in prosecuting their abusers). Note that there has also been resistance to the development of separate models for addressing domestic violence. Some observers, particularly judges, argue that criminal assaults should be treated blindly and equally by the justice system. See Leonore M.J. Simon, *Do Criminal Offenders Specialize in Crime Types?*, 6 APPLIED & PREVENTATIVE PSYCHOL. 35, 35-36 (1997) (discussing the theory that criminals do not specialize in crimes and should be treated blindly by the courts).

195. HON. DONALD E. SHELTON, THE CURRENT STATE OF DOMESTIC VIOLENCE COURTS IN THE UNITED STATES, 2007, at 9, <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=173> (citing Judith S. Kaye & Susan K. Knipps, *Judicial*

of domestic violence courts compared to other types of specialized courts is that they do not follow the “therapeutic” or “problem solving” model. Most specialized courts are therapeutic or problem solving courts because they focus on the rehabilitation of the offender, typically through specialized supervision and monitoring procedures, rehabilitative services, treatment offerings, and so forth.¹⁹⁶ Domestic violence courts follow instead a victim-centered model, derived from the theory that the problem with traditional methods of handling domestic violence cases is that they are an ineffective and even dangerous means of helping victims:

[The] adversarial legal system . . . focuses on procedural issues and society’s goals of deterrence, punishment, and retribution at the expense of the victim’s welfare. The adversarial system may be better suited to litigating crimes between strangers However, it may be less effective when dealing with crimes between intimate partners where the adversarial approach may exacerbate the problem and increase the danger to victims.¹⁹⁷

Modern domestic violence courts began proliferating in earnest in the 1990s.¹⁹⁸ A 2000 study estimated that more than 300 court systems operate nationwide with specialized methods specific to domestic violence cases.¹⁹⁹ Specialized domestic violence courts can hear cases involving an array of domestic violence-related matters such as “criminal misdemeanor and felony assault and battery, child custody, juvenile and other family law matters, and civil restraining orders.”²⁰⁰

As jurisdictions experiment, distinct specialized domestic violence court models have emerged.²⁰¹ One model features dedicated domestic

Responses to Domestic Violence: The Case for a Problem Solving Approach, 27 W. ST. U. L. REV. 1, 4 (2000)); see also *id.* at 8 (explaining one of the biggest criticisms of specialized domestic violence courts is the argument that when judges are part of a larger effort to monitor and plan programs together with prosecutors, probation officers, victim advocates and others, their impartiality is threatened).

196. Drug courts provide the perfect example of the therapeutic model. See NOLAN, *supra* note 192, at 40 (explaining the current drug court model).

197. Randal B. Fritzler & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, 37 CT. REV. 28, 33 (2000).

198. SHELTON, *supra* note 195, at 7.

199. SUSAN KEILITZ ET AL., NAT’L CTR. FOR STATE COURTS, SPECIALIZATION OF DOMESTIC VIOLENCE CASE MANAGEMENT IN THE COURTS: A NATIONAL SURVEY 3 (2000), <http://www.ncjrs.gov/pdffiles1/nij/grants/186192.pdf>. The Center for Court Innovation, partnered with several other organizations, is currently conducting a “national portrait of domestic violence courts” survey. SHELTON, *supra* note 195, at 3.

200. Julia Weber, *Domestic Violence Courts: Components and Considerations*, 2 J. CENTER FOR FAM. CHILD. & CTS. 23, 24 (2000).

201. EMILY SACK, FAMILY VIOLENCE PROT. FUND, CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES 24-29 (2002), available at http://www.endabuse.org/programs/healthcare/files/FinalCourt_Guidelines.pdf.

violence civil protection order dockets, often handled by a single dedicated judge (or set of judges on a rotating basis).²⁰² Some manage enforcement of orders imposing civil or criminal penalties, depending on the penalty structure in that jurisdiction.²⁰³ A second form is the criminal model in which the criminal domestic violence cases are separated out from other criminal cases and dispensed by one or more dedicated judges.²⁰⁴ A final model is the specialized domestic violence court that consolidates related caseloads (e.g., integrated domestic violence courts, unified family courts, and coordinated courts).²⁰⁵

The most popular, and some argue most effective, model of domestic violence court combines civil and criminal jurisdiction to allow for a variety of hearings, from civil protection orders to criminal assault charges.²⁰⁶ Domestic violence courts implementing this practice are commonly referred to as “integrated domestic violence courts” because of their ability to bridge the gap between the civil and criminal systems.²⁰⁷ Some of the most developed domestic violence courts follow this model, including: “Quincy, Massachusetts; New York City; Dade County, Florida; the District of Columbia,”²⁰⁸ and

202. *Id.* at 24. Note that some dedicated civil protection order courts are not exclusively domestic violence courts. For example, the Denver County, Colorado, dedicated civil protection order court hears all types of protection order cases, including those between neighbors, etc. Telephone Interview with Clerk of the Denver County Courts, Colorado, in Williamsburg, Va. (July 23, 2009) [hereinafter Denver Interview July 23].

203. See SACK, *supra* note 201, at 24 (“This model offers many . . . advantages [including] increased safety, educated judges, sensitivity to victims, understanding of the dynamics of abuse, access to advocacy, and more. For several reasons, such a docket may be a good place to start in developing a domestic violence court. First, much of the domestic violence caseload consists of petitions for protection orders and violation hearings. Second, since litigants in civil protection order cases frequently appear pro se, these cases especially require judges and court personnel well versed in domestic violence issues. Finally, the protection order docket is often the entry point for a great many victims into the judicial system.”).

204. See *id.* at 25 (“Because domestic violence defendants tend to have repeated and often escalating cases, when misdemeanor and felony cases are combined, a clearer picture of these defendants emerges. Compliance follow-up is more likely to happen in a criminal model because there are the mechanisms to facilitate it, such as probation. This structure of a domestic violence court, then, offers a strong opportunity to provide effective monitoring and demonstrate that the system takes domestic violence crime seriously. On the disadvantage side, just as a purely civil court cannot address criminal actions that may be going on, a criminal-only caseload does not address related civil cases that also may be pending.”).

205. *Id.* at 26; see also Jennifer Thompson, Comment, *Who’s Afraid of Judicial Activism? Reconceptualizing a Traditional Paradigm in the Context of Specialized Domestic Violence Court Programs*, 56 ME. L. REV. 407, 427 (2004) (discussing courts that have a comprehensive approach to domestic violence cases as an improvement on traditional models).

206. Nancy K.D. Lemon, *Access to Justice: Can Domestic Violence Courts Better Address the Needs of Non-English Speaking Victims of Domestic Violence?*, 21 BERKLEY J. GENDER & JUST. 38, 50-51 (2006).

207. Anat Maytal, *Specialized Domestic Violence Courts: Are They Worth the Trouble in Massachusetts?*, 18 B.U. PUB. INT’L. L.J. 197, 210 (2008).

208. Thompson, *supra* note 205, at 427. For more information about these courts, see The Mass. Ct. Sys., Quincy Dist. Ct., <http://www.mass.gov/courts/courtsandjudges/courts/>

Vancouver, Washington.²⁰⁹ Combining civil and criminal hearings gives the victims of domestic violence abuse a “one-stop shop,” which can smooth the path to filing a complaint and also potentially shorten the wait for relief.²¹⁰ In addition, the integrated model allows a single judge, or group of judges, to oversee multiple related cases, allowing them to see a fuller picture.²¹¹

An important distinguishing characteristic of specialized domestic violence courts is information sharing.²¹² Management and operation of domestic violence courts are rarely limited to the court itself, often spilling over into other areas of the community. Running a domestic violence court typically requires cooperation between the courts, law enforcement, probation officers, rehabilitation centers, and community programs (such as shelters and advocacy programs).²¹³ The District of Columbia domestic violence court provides an example. It maintains a web of services including a centralized intake center at which counselors assist victims with preliminary matters and a domestic violence coordination unit in which staff helps victims set court dates and review prior information on the parties.²¹⁴ Links between the court, community organizations, and the community at large are a common feature of domestic violence courts.²¹⁵

2. *Specialized Domestic Violence Courts and Public Access*

The discussion below focuses on two elements of access to specialized domestic violence courts: access to records and access to proceedings.

a. Records

Does the public have broad access to records of specialized domestic violence court cases? In general, the specialized domestic

quincydistrictmain.html (last visited Jan. 20, 2010), N.Y. State Unified Ct. Sys., N.Y.C. Crim. Ct., <http://www.nycourts.gov/courts/nyc/criminal/index.shtml> (last visited Jan. 20, 2010), Eleventh Jud. Cir. of Fla., About the Court, http://www.jud11.flcourts.org/about_the_court/judicial_circuit_overview.htm (last visited Jan. 20, 2010), Super. Ct. of D.C., Domestic Violence Unit, <http://www.dccourts.gov/dccourts/superior/dv/index.jsp> (last visited Jan. 20, 2010).

209. Maytal, *supra* note 207, at 219.

210. Fritzler & Simon, *supra* note 197, at 37.

211. Maytal, *supra* note 207, at 219.

212. SACK, *supra* note 201, at 9-11.

213. Tsai, *supra* note 145, at 1298.

214. *Id.* at 1305.

215. *See, e.g., id.* at 1303 (discussing the Dade County Domestic Violence Court’s requirement that judges make public appearances to educate the public about domestic violence issues).

violence courts surveyed allow open access to their records,²¹⁶ with exceptions for certain kinds of records, such as juvenile²¹⁷ and medical records.²¹⁸ In the Brooklyn Domestic Violence Court, a member of the public may review criminal records but not civil family records (note that New York is one of the few states that denies public access to all family records).²¹⁹ None of the domestic violence courts surveyed permit online access to otherwise public records.²²⁰ Some courts, such as the Cook County, Illinois Domestic Violence Court, do make public records available digitally at a computer kiosk in the clerk's office.²²¹

Because of widespread understanding of the need (and, as described above, often the statutory or court rule imperative) to keep personal identifiers out of public records involving domestic violence, many specialized domestic violence courts and advocacy organizations are experimenting with redaction techniques.²²² For example, in Pinal County, Arizona, a victim advocacy organization automatically redacts victims' personal information.²²³ At other specialized domestic violence courts, such as in Denver, Colorado, the District of Columbia, and Brooklyn, New York, the court takes responsibility for redacting

216. The courts surveyed for this paper were: Pinal County, Arizona, Denver County, Colorado; Washington, D.C.; Cook County, Illinois; Brooklyn, New York; and the Rhode Island Family Court. Not all persons were willing to provide their names. Telephone Interview with Tawnya Kude, Manager of Victim Services for Victim Notification, Pinal County Superior Court, Arizona, in Williamsburg, Va. (June 16, 2009) [hereinafter Pinal County Interview]; Telephone Interview with Court Clerk, Denver County Court, Colorado, in Williamsburg, Va. (June 17, 2009) [hereinafter Denver Interview June 17]; Denver Interview July 23, *supra* note 202; Telephone Interview with Denise Benet, Women Empowered Against Violence, Washington, D.C., in Williamsburg, Va. [hereinafter D.C. Interview]; Cook County Interview, *supra* note 85; Telephone Interview with Clerk of the Integrated Domestic Violence Unit, Brooklyn, New York, in Williamsburg, Va. (June 16, 2009) [hereinafter Brooklyn Interview]; Telephone Interview with Kim Seebeck, Director of Domestic Violence Services, Rhode Island Family Court, in Williamsburg, Va. (June 17, 2009) [hereinafter Rhode Island Interview].

217. *See, e.g.*, Cook County Interview, *supra* note 85 (stating that juvenile records are closed).

218. *See, e.g.*, Brooklyn Interview, *supra* note 216 (stating that certain records, including medical records, are not accessible to the public).

219. N.Y. Fam. Ct. Act § 166 (McKinney 2009) ("The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."). In Brooklyn's domestic violence court, the public is also not allowed access to records in which a sex crime is involved. Brooklyn Interview, *supra* note 216.

220. *See supra* note 216.

221. Cook County Interview, *supra* note 85.

222. Public Access Trends, *supra* note 138, at 21.

223. Pinal County Interview, *supra* note 216.

personal identifiers.²²⁴ In yet others, such as Rhode Island and Cook County, Illinois, victims are responsible for affirmatively redacting personal identifiers.²²⁵

All domestic violence courts surveyed have in place the ability to file a motion to seal part or all of the record in a given case. In Denver, for example, victims may file a motion to seal the whole record, which the judge may grant depending on the circumstances of the case.²²⁶ However, for the majority of domestic violence courts surveyed, securing an order to seal an entire file can be difficult, particularly in the case of criminal records.²²⁷ The District of Columbia Domestic Violence Court, for example, will typically seal records only if sexual violence is involved.²²⁸

b. Proceedings

Without exception, the domestic violence courts surveyed allow public access to proceedings.²²⁹ This may seem counterintuitive. One might expect that victim-centered domestic violence courts would take steps to protect the privacy of domestic violence victims. That open proceedings are the norm speaks to the complex nature of privacy interests in this context: sometimes, privacy is the enemy.²³⁰

224. Denver Interview June 17, *supra* note 216; D.C. Interview, *supra* note 216; Brooklyn Interview, *supra* note 216.

225. Cook County Interview, *supra* note 85; Rhode Island Interview, *supra* note 216. Note that holding litigants and their attorneys responsible for redaction is the most common redaction technique that courts currently use, since requiring court clerks to redact personal identifiers is inefficient and prohibitively expensive. Public Access Trends, *supra* note 138, at 21.

226. Denver Interview June 17, *supra* note 216.

227. *See supra* note 216 (the exceptions are Denver and Cook County).

228. D.C. Interview, *supra* note 216.

229. *See supra* note 216. The domestic violence courts surveyed reported that public attendance is sparse. The clerk at Pinal County reported that in about one of ten proceedings in its domestic violence court, a family member of one of the parties attends. Pinal County Interview, *supra* note 216. Likewise, the District of Columbia court reported that the general public rarely attends, noting that on occasion a family member or member of a domestic violence-related non-profit organization will attend. D.C. Interview, *supra* note 216. Most courts reported virtually no attendance by members of the media to proceedings at their courts. *See supra* note 216 (the exception is Cook County). That said, some specialized domestic violence hearings are packed to the brink, not by members of the public there to observe, but by litigants awaiting hearings. New York City domestic violence courts often hear a hundred domestic violence cases a day, five days a week. Telephone Interview with Liberty Aldrich, Dir. of Domestic Violence, Sexual Assault and Family Court Programs at the Center for Court Innovation, in Williamsburg, Va. (July 9, 2009) [hereinafter Aldrich Interview]. The average court date in the Syracuse, New York domestic violence court will include seventy-five cases on the docket. *Id.* These heavy dockets translate to packed courtrooms, assuring that at least some of the public oversight function that open access enables is present.

230. *See Schneider, The Violence of Privacy, supra* note 54, at 974 (discussing the negative side of privacy).

An ideal means of illustrating the point is an organization called “Women at the Court House” or “WATCH.”²³¹ WATCH operates in twenty-nine states (with programs at multiple courthouses in several states) plus the District of Columbia.²³² The idea behind WATCH programs is simple, and derives from the very same impulses that led to the presumption of openness in the first place. With its slogan, “bringing a public eye to justice,” WATCH works to monitor the justice system’s response to domestic violence²³³ by sitting in court and *watching*.²³⁴

Some WATCH volunteers self-identify by wearing bright badges or holding brightly-colored clipboards (most WATCH programs want judges, attorneys, defendants, and victims to know they are there); others appear anonymously.²³⁵ WATCH volunteers describe starting WATCH programs in their area after witnessing a void. Laura Williams, the Board Chair and Program Director of CourtWatch Florida, noted that when she, a vocal anti-domestic violence advocate, gave lectures at local domestic violence shelters, women would frequently approach her afterwards with complaints about the court system.²³⁶ These complaints prompted Williams to establish a WATCH program in her jurisdiction.²³⁷ CourtWatch Florida has between twenty and twenty-five active volunteers in any given month watching, conservatively, twenty to thirty hearings per week.²³⁸ Some programs are smaller; for example, a WATCH program in Colorado

231. See Kimberly Wilmont Voss, *Court Watchers Changing Courthouse Rules*, Women’s eNEWS, Aug. 22, 2003, <http://www.womensnews.org/article.cfm/dyn/aid/1496> (noting that, since its inception, many men have joined the effort).

232. See National Court WATCH Programs and Projects, <http://www.ncdsv.org/images/NationalListofCourtWatchProgramsUPDATEDMARCH08.pdf> (updated March 2008) (listing WATCH programs in the United States and abroad including three in Canada and one in Bulgaria).

233. WATCH, Court Monitoring, <http://www.watchmn.org/court-monitoring> (last visited Jan. 20, 2010). Note that some WATCH programs also observe other kinds of hearings besides domestic violence such as child abuse and sexual assault. Voss, *supra* note 231.

234. WATCH, *supra* note 233.

235. A Colorado “WATCHer” explained that she does not identify herself with a badge or clipboard because she is part of a larger advocacy organization that helps victims of domestic violence. Telephone Interview with Representative of Chaffee County, Colorado’s WATCH program, in Williamsburg, Va. (June 30, 2009) [hereinafter Chaffee County Interview]. She explained that her WATCH program, therefore, is sensitive to whether the victim feels comfortable with a connection to the organization being known, particularly to the defendant. *Id.* This same WATCHer noted that although she does not self-identify as being affiliated with WATCH, the county is small enough that the judges, prosecutors, and others with regular business before the court know her association with WATCH. *Id.*

236. Telephone Interview with Laura Williams, Board Chair, CourtWatch Florida, in Williamsburg, Va. (June 30, 2009) [hereinafter Williams Interview].

237. *Id.*

238. *Id.* (recollection of the author).

reports that one staff person watches an average of five to six domestic violence proceedings a week.²³⁹

WATCH organizers and volunteers report wide receptiveness to their efforts within courts. None interviewed reported being asked to leave during proceedings.²⁴⁰ In fact, several noted that probation officers, police, attorneys, and advocacy organizations will often call WATCH volunteers to request their presence when they believe a problem may be imminent in court, or might otherwise be helpful towards ensuring that justice is done.²⁴¹

While WATCH programs report strict adherence to a policy of non-interference during the observed proceedings,²⁴² one of the most fascinating aspects of WATCH programs is what they do with the information collected during observation. As one might suspect, many WATCH organizations compile statistics and reports that can be very useful in assessing domestic violence court outcomes.²⁴³ But many WATCH organizations also take a more direct approach to addressing problems they observe. Several WATCH organizations contacted describe a process by which WATCH programs send letters to judges, attorneys, and sometimes the media communicating their observations.²⁴⁴ If an attorney has done something particularly well, WATCH programs might send a “kudos letter” both to the judge or attorney and, where applicable, his or her boss.²⁴⁵ One volunteer described an attorney who posted such letters on his wall as a badge of honor.²⁴⁶ When a judge or attorney fails to adequately discharge their duty in the eyes of the WATCH volunteers, the WATCH program may send a letter to that person and his or her superior alerting them to the

239. Telephone Interview with Mandy Trollip, Representative of Chaffee County, Colorado’s WATCH program, in Williamsburg, Va. [hereinafter Trollip Interview] (recollection of the author).

240. WATCH programs in Colorado, Florida, Minnesota, and Montana were interviewed for this article. Trollip Interview, *supra* note 239; Williams Interview, *supra* note 236; Telephone Interview with Sarah Coulter, Court Monitoring Coordinator, in Minn. (2009) [hereinafter Coulter Interview], Telephone Interview with Jill Martinez, Executive Dir., YMCA, in Mont. (2009) [hereinafter Martinez Interview].

241. *See supra* note 240.

242. Trollip Interview, *supra* note 239; Coulter Interview, *supra* note 240. *But see* Williams Interview, *supra* note 236 (describing one instance of speaking to a prosecutor at recess during one proceeding about his repeated use of the word “wife beater” to refer to a man’s undershirt).

243. *See, e.g.*, WATCH, *supra* note 233 (listing accomplishments of the Minnesota WATCH program, including “a review of domestic strangulation cases following passage of new legislation in 2005”).

244. Williams Interview, *supra* note 236; Coulter Interview, *supra* note 240.

245. Williams Interview, *supra* note 236.

246. *Id.*

problem and suggesting changes in attitude or behavior.²⁴⁷ In Florida, for example, WATCH volunteers identified a particular judge who presided over protective order hearings who was unprofessional, rude, and disrespectful towards women petitioners.²⁴⁸ WATCH put together a spreadsheet of the judge's cases and behavior, sent information to the judge's superiors.²⁴⁹ Within two months of delivering this information, the judge stopped presiding over protection order cases.²⁵⁰

In particularly egregious instances, WATCH will tip the media.²⁵¹ In a recent case in Orange County, Florida, WATCH volunteers tipped the press about a judge they believed gave undue leniency to a firefighter for stalking his ex-wife.²⁵² In that case, the judge reminisced about his own days as a firefighter while the jury deliberated.²⁵³ When the jury returned with a guilty verdict, the judge, "to the astonishment of people in the courtroom, completely wiped the jury's guilty verdict off his record. He didn't want the [defendant] to lose his job."²⁵⁴ A segment featuring the incident aired on the nightly news to the great displeasure of the judge, to be sure.²⁵⁵ The example demonstrates the principles of oversight and accountability that undergird the presumption of openness and demonstrate the importance of open hearings in this context.

Some WATCH programs adopt a less direct approach. The Colorado WATCH program, for example, does not publish findings or reports.²⁵⁶ WATCH observations instead become part of the client file.²⁵⁷ However, if volunteers encounter mistreatment, incidents will be presented at a bi-monthly meeting of the local domestic violence coalition, leaving further action up to the District Attorney.²⁵⁸

247. See sources cited *supra* note 244; see also MONTANA COALITION AGAINST DOMESTIC AND SEXUAL VIOLENCE, COURT WATCH TRAINING MANUAL 58-59 (2007), <http://www.mcadsv.com/documents/CourtwatchTrainingManual10.15.07.pdf> [hereinafter MCADSV Manual] (making suggestions for "Compiling Results & Providing Feedback").

248. Williams Interview, *supra* note 236.

249. *Id.*

250. *Id.* (noting that WATCH volunteers described receiving dirty looks on occasion from the recipients of such letters, but the WATCH organizations interviewed reported no serious repercussions from such action).

251. MCADSV Manual, *supra* note 247, at 58.

252. E-mail from Laura Williams, Board Chair, CourtWatchFlorida, to William & Mary *Journal of Women and the Law* (Jan. 31, 2010, 22:07 EST) (on file with author); see also *Judge Under Fire for Going Easy on Firefighter Who Stalked Ex-Wife*, WFTV.com, Feb. 7, 2008, <http://www.wftv.com/news/15247420/detail.html> [hereinafter *Judge Under Fire*].

253. *Judge Under Fire*, *supra* note 252.

254. *Id.*

255. See *id.* (stating that the judge refused to talk to reporters about the incident).

256. *Id.*

257. *Id.*

258. See *id.* (stating that the community domestic violence coalition operating in Chaffee County includes the district attorney, sheriff's department, local police, the probation

WATCH programs provide a perfect example of how privacy interests in the domestic violence court context are complex. The knee-jerk reaction when seeking to protect the privacy interests of domestic violence victims in court might be to close courtrooms. Certainly this has been the response with respect to other categories of cases, particularly in areas like juvenile justice in which the well-being of litigants is of primary concern.²⁵⁹ WATCH, however, demonstrates the positive impact of openness and why too much privacy can often work against effective dispensation of these cases.²⁶⁰

But openness has its limits. When asked whether WATCH volunteers would support webcasted domestic violence hearings, the responses were uniformly negative.²⁶¹ Although one can see oversight benefits to webcasting domestic violence hearings (webcasting hearings has the potential to allow for far greater oversight),²⁶² the downsides to online amplification of open access are multiple.²⁶³ In the end, the degree of openness must be calibrated to the privacy and safety interests of parties in court.

IV. THE NEW HORIZON: TECHNOLOGY, ACCESS, AND DOMESTIC VIOLENCE CASES

Courts have begun to move beyond the initial shock of digital technology to look at ways in which it can help manage the access/privacy balance. The discussion below features two examples of ways in which courts are experimenting with technology to improve the administration of domestic violence matters.

department, the victims' advocate from the sheriff's department, members of the Alliance Against Domestic Violence, and representatives from the perpetrators' treatment providers, and meets once every other month).

259. See Jennifer Flint, Comment, *Who Should Hold the Key? An Analysis of Access and Confidentiality in Juvenile Dependency Courts*, 28 J. JUV. L. 45, 51-52 (2007) (recognizing the welfare of the child as a reason to close a public hearing).

260. Note that even in the area of juvenile justice, the value of open records and proceedings is starting to be recognized. See, e.g., William McHenry Horne, Note, *The Movement to Open Juvenile Courts: Realizing the Significance of Public Discourse in First Amendment Analysis*, 39 IND. L. REV. 659, 676 (2006) (noting that closed courtrooms allow "juvenile issues to fall from the public's radar").

261. See *supra* note 240 (recollection of the author).

262. For example, in 2006, Texas set up webcams along the Mexican border as part of a pilot program to harness the energies of Internet users to fight illegal immigration. In the month that the pilot program ran, the webcast received just under 28 million hits. Users emailed approximately 13,000 tips about suspicious activity observed on the site. JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 209 (2008).

263. Concerns would include victim safety, victims' willingness to use the court system, the possibility that webcasts could be manipulated to the detriment of victims; and so forth. See *supra* Part II.B.

A. The Domestic Violence Court Technology Application and Resource Link

As noted above, a unique characteristic of specialized domestic violence courts is the information sharing infrastructure.²⁶⁴ From a victim safety perspective, accurate and up-to-date information, particularly in the context of civil protection order enforcement, can be critical.²⁶⁵ Many communities undertake careful coordination between courts, law enforcement, probation officers, rehabilitation centers, and community domestic violence services such as battered women's shelters, batterers' intervention programs, and advocacy groups.²⁶⁶ At the Quincy, Massachusetts program, for example, the police operate a tracking system that alerts the District Attorney's Office the moment a domestic violence incident is reported, allowing more time for the District Attorney and victim advocates to contact and guide the victim.²⁶⁷ The District of Columbia domestic violence court operates a domestic violence coordination unit, in which employees help set up court dates while checking for prior information on the parties.²⁶⁸ Another example is in New York, where a domestic violence court in Brooklyn has experimented with technology that links courts to the other relevant agencies and organizations in order to ensure that all information is current and accurate.²⁶⁹

New York was an early leader in developing information sharing platforms in the domestic violence context. In 2000, the New York State Unified Court System developed the Domestic Violence Court Technology Application and Resource Link (hereinafter, the "Application") for the Brooklyn Felony Domestic Violence Court.²⁷⁰

264. See *supra* notes 212-215 and accompanying text.

265. To this end, the National Crime Information Center operates a database that currently contains protection order data from about two-thirds of U.S. states. Interview with Denise Dancy, Court Research Assoc., Nat'l Ctr. for State Courts, in Williamsburg, Va. (July 9, 2009). The database is an attempt to provide accurate and updated protection order information across state boundaries used principally to facilitate law enforcement response to incidents of domestic violence. *Id.* The National Center for State Courts is working with other state and federal agencies to develop a standardized protection order form to facilitate information sharing across states called Project Passport. Nat'l Ctr. for State Courts, Project Descriptions, http://www.ncsconline.org/D_research/descriptions.html (last visited Jan. 20, 2010); see also Nat'l Ctr. for State Courts, Extending Project Passport, http://www.ncsconline.org/D_research/Passport/Revised_Passport_Project_Description_7_051.pdf (last visited Jan. 20, 2010) (discussing an extension of the project).

266. Tsai, *supra* note 145, at 1298.

267. *Id.* at 1299-1300.

268. *Id.* at 1305.

269. *Id.* at 1301-02.

270. The Brooklyn Felony Domestic Violence Court was established in 1996. PAMELA YOUNG, CTR. FOR COURT INNOVATION, AN INFORMED RESPONSE: AN OVERVIEW OF THE

The Application was intended to provide an early model for domestic violence courts across the country.²⁷¹ It was designed to enable three perceived advantages technology could offer: help judges “to make [more] informed decisions, enhance[] the accountability of offenders, and [improve] collaboration with court partners” such as police, probation, victim service agencies, and batterers’ intervention programs.²⁷² As one report noted,

Without accurate and immediate information, it was difficult for the system to address victim concerns and ensure that cases were handled swiftly. Planners believed that technology could both improve the efficiency of case processing and increase the speed and comprehensiveness of communication. “We wanted to see how a technology application could help fulfill the domestic violence court model’s principles of victim safety, defendant accountability and swift judicial response.”²⁷³

The Application featured several fascinating capabilities. First, planners recognized that sensitive information within the Application should be seen by some but not others amidst the domestic violence community necessitating different levels of access to the database.²⁷⁴ Judges, for example, needed broad access whereas an employee of a batterers’ intervention program’s access would ideally be circumscribed.²⁷⁵ The Application was therefore structured such that different users have different levels of access.²⁷⁶ Users can also have varying ability to interact with the Application (e.g., some can edit, add and delete content; others can read only).²⁷⁷

A second concern was security of the system.²⁷⁸ As we are learning after states began to pass laws requiring notification of data breaches and the subsequent blizzard of data breach reports, security of information in databases is often haphazard, a particular concern in the domestic violence context since a breach can impact the safety of potentially hundreds of victims.²⁷⁹ The Application therefore features

DOMESTIC VIOLENCE COURT TECHNOLOGY APPLICATION AND RESOURCE LINK 1 (2001), *available at* http://www.courtinnovation.org/_uploads/documents/Informed%20Response1.pdf.

271. *Id.*

272. *Id.* at 3.

273. *Id.* (quoting New York Chief Judge Judith Kaye).

274. *Id.* at 4.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *See id.* at 3 (“Given the safety and confidentiality concerns of domestic violence victims, planners worked closely with victim advocates to develop a secure system.”).

automatic logout, encryption, and an address-filtering firewall.²⁸⁰ For accountability and security, the Application also allows administrators to track access of all logins and changes, “creat[ing] an audit trail of all activity by specific users.”²⁸¹

The Application also has the capability to allow a freer information flow between the court and the broader domestic violence community in real time.²⁸² For example, its features included “victim advocates report” screens on which victim advocates can “notify the court immediately of alleged violations of protective orders and provide other information — with the victim’s consent” pertinent to the court’s decision-making and enforcement responsibilities.²⁸³ “Service providers, such as batterers’ intervention programs, [can] use the [A]pplication as a [case] management tool.”²⁸⁴ Planners designed the software to allow service providers access to information about only their clients, further protecting the privacy interests of others populating the database.²⁸⁵

Finally, the Application features an oversight function. Unlike court oversight in the past in which policymakers relied on throwing the doors of courtrooms and file drawers open,²⁸⁶ the Application manages oversight of the court — and indeed the broader system — in a more controlled (and arguably far more efficient) manner without compromising the privacy interests of domestic violence victims and others included in the database. As the 2001 report describing the Application explains, “researchers are exploring ways to harness information from the [A]pplication’s database in order to accurately measure and monitor the court’s performance.”²⁸⁷ The software offers the promise of helping researchers identify domestic violence trends far more efficiently than traditional oversight mechanisms would have allowed.²⁸⁸ Because different jurisdictions prosecute domestic violence cases differently, researchers have been unable to efficiently gather data on domestic violence. For example, some jurisdictions prosecute domestic violence simply as “assault,” meaning a researcher would have to know the relationship between the assaulter and the assaultee to know to characterize it as an instance of intimate partner violence.²⁸⁹ The software offers the ability to label data so that

280. *Id.* at 4.

281. *Id.*

282. *Id.* at 3.

283. *Id.* at 10.

284. *Id.* at 11.

285. *Id.*

286. *See supra* note 130 and accompanying text.

287. YOUNG, *supra* note 270, at 5.

288. Aldrich Interview, *supra* note 229.

289. *Id.*

such information can be more easily extracted, enabling researchers and others overseeing the system to get a fuller and more accurate picture in this area.²⁹⁰

The software provides exactly the type of oversight and accountability that undergirds the presumption of openness, and does so with a far more fine-tuned tool than throwing records open to broad scrutiny. This feature provides a beautiful example of how technology promises to free policymakers from the blunt tools that have historically dominated the access versus privacy debate.

The Application is now in use at only one court, the Bronx Misdemeanor Domestic Violence Court.²⁹¹ Practical and operational difficulties adapting the Application to the needs of other jurisdictions led its developers to trim down the initial idea, although the same basic principles animate subsequent iterations.²⁹² New York State domestic violence courts now use an application called the “IDV Application” which is similar to the original Application but scales back the level of access afforded to “outsiders” (i.e., probation, domestic violence advocates, batterer intervention programs, and so forth).²⁹³ The IDV Application is used by court staff only, principally by judges and clerks.²⁹⁴ Outside access was reduced in later iterations of the software not because of privacy concerns or problems with the functioning of the original Application. Rather technical and practical problems led developers to rein in the parameters of the software, in part so it would be more transferable in New York courts and beyond.²⁹⁵

B. The Global Justice Technical Privacy Framework

The roadblocks the Application encountered highlight some of the significant problems associated with automating information sharing in the justice system. Particularly in state court, different jurisdictions maintain different procedures for different kinds of cases.²⁹⁶ Add

290. YOUNG, *supra* note 270, at 7.

291. Aldrich Interview, *supra* note 229.

292. *Id.*

293. *Id.*

294. YOUNG, *supra* note 270, at 12. One of the most useful tools that the developers of the Application identified is the ability to directly upload orders of protection into a state’s domestic violence registry. *Id.* Once a judge’s signature on the order is complete, the software automatically loads the order into the state registry, resulting in hugely increased efficiency in law enforcement’s ability to police such orders. *Id.* See the National Stalker and Domestic Violence Reduction Act § 40601, 28 U.S.C. § 354 (2006), for the current law regarding the dissemination of information to courts in domestic violence cases by the National Crime Information Center.

295. Aldrich Interview, *supra* note 229. Ms. Aldrich notes that the hope is to update the IDV Application to include a functionality that allows outsiders to access the system, which will require greater resources than presently available to accomplish. *Id.*

296. *Id.*

these realities to the variety of access policies courts maintain, and one can begin to understand how difficult a challenge it is to design a one-size fits all platform.

Outside the domestic violence context, an enormous effort is underway to create an automated justice information sharing system that enhances privacy protections. The U.S. Department of Justice's Global Justice Information Sharing Initiative (Global) is undertaking a series of justice information sharing initiatives "to provide justice and public safety communities with timely, accurate, complete, and accessible information in a secure and trusted environment."²⁹⁷ Global's approach stems from the growing realization among judges, court administrators, and court technologists that even the most in-depth training cannot prevent human error.²⁹⁸ As access policies become more and more complicated, they become difficult to enforce. Computers, at least in theory, can solve this problem.²⁹⁹

One piece of Global's mandate is focused on conforming court access policies with a standardized technical structure that "codes" the policy, meaning that computers, rather than people, read court access policies and determine who may have access to what data.³⁰⁰ The idea is to promote a standards-based electronic information exchange in which the code, in the form of metadata, travels with pieces of information, and access policies are enforced by machines, not humans.³⁰¹

The Global working group charged with developing standards to automate court access policies completed a report in 2007 that lays out the basic contours of the project. The 2007 report, *Implementing Privacy Policy in Justice Information Sharing: A Technical Framework*, notes that "[t]he goal is to identify an approach and framework for protecting privacy which will be generally applicable to information sharing in the justice environment and which can be readily implemented using existing information technology architectures, standards, and software tools."³⁰²

Global's Technical Privacy Task Team "compiled a set of technical requirements, specifications, industry standards, guidelines, and recommendations for applying technology mechanisms to support the

297. GLOBAL SEC. WORKING GROUP TECHNICAL PRIVACY TASK TEAM, IMPLEMENTING PRIVACY POLICY IN JUSTICE INFORMATION SHARING: A TECHNICAL FRAMEWORK iii (October 31, 2007), available at http://it.ojp.gov/documents/privacy_Report_Final_v_1_0_10-31-2007_with_cover.pdf [hereinafter GLOBAL].

298. Telephone Interview with Tom Clarke, Vice President for Research and Tech. at the Nat'l Ctr. for State Courts, in Williamsburg, Va. (July 20, 2009).

299. See *id.* (discussing goal to automate the process in order to reduce human error).

300. GLOBAL, *supra* note 297, at 7-8.

301. *Id.* at v.

302. *Id.*

electronic expression and enforcement of privacy policy.”³⁰³ The technical requirements developed are called the Privacy Policy Technical Framework (Framework), which not surprisingly share many characteristics of New York’s Application, only on a broader and more comprehensive scale.³⁰⁴ The hope is that each jurisdiction will develop its privacy policies using the Framework such that the privacy rules selected by the jurisdiction will be expressed in machine-readable format along the following parameters:

- Content metadata
 - DATA CATEGORIES — Properties of the data, including data type categories, associations of the data with persons and organizations, data classifications, and data quality information.
 - PURPOSE — The business purposes for which private data was originally collected.
- Context metadata
 - USER CATEGORIES — Properties (attributes) about requestors who potentially access private data. These properties can be used to classify requestors (e.g., role) and/or used to make dissemination decisions regarding certain pieces of data.
 - CONDITIONS — Expressions that evaluate the context of a request for data. (e.g., the Subject must be in detention, and the user category must be Law Enforcement).
 - OBLIGATIONS — Additional steps that a requestor is obligated to take after they receive the information.
 - ACTIONS — Type of access (e.g., create, read, update, delete) to the information by the requestor.
- Decision metadata
 - OUTCOMES — Privacy-relevant outcomes to a request (e.g., disclose, redact, withhold, notify).³⁰⁵

A critical feature of Global’s pursuit is credentialing. Access policies must restrict access to certain individuals or organizations to certain kinds of information. As the Framework report explains,

Individuals (or organizations), internal or external to the justice community, will have identity credentials that can be applied in determining their rights to access or perform operations on information covered by a privacy policy. . . . There is currently a Global Security Working Group initiative to develop guidelines

303. *Id.* at 1.

304. *Id.* at v.

305. *Id.* at 11.

for expressing user identity credentials in XML [Extensible Markup Language]. This initiative is called Global Federated Identity and Privilege Management (GFIPM).³⁰⁶

A third feature of the Framework is its audit trail, a mechanism by which court administrators can follow the trail of who has accessed or tried to access what information,³⁰⁷ according to the following parameters:

The logged data must be of sufficient detail to identify unauthorized attempts to obtain secure information, to support detection of abnormal usage patterns, and to produce a variety of audit reports verifying conformance to the information service provider policies. The audit logs become an information asset that must also be secured by the information service provider.³⁰⁸

The audit trail represents a major innovation technology enables. Courts have not traditionally logged information about those who request records. Critics may complain that important access principles will be compromised if the identities of those accessing records can be discovered.³⁰⁹ Under traditional principles of open government, one's reason for requesting access to court records and the identity of the requestor is not to be considered when determining whether access should be granted or not.³¹⁰ That said, domestic violence advocates have reason to support the audit trail function for at least two reasons. First, it may deter abusers from using court records for the wrong reason if their actions can be exposed through an audit. Second, audit records may provide evidence of harassment that advocates for victims of domestic violence can use to address it.³¹¹

306. *Id.* at 7.

307. *Id.* at 8.

308. *Id.* at 19.

309. See E-mail from Tom Clarke, Vice President for Research and Tech. at the Nat'l Ctr. For State Courts, to author (July 22, 2009, 21:35 EST) (on file with author) [hereinafter Clark E-mail July 22] (anticipating steps that will likely be taken to preserve requester anonymity).

310. Federal Freedom of Information Act (FOIA) cases provide a perfect example of the principle that the identity of the requester should not impact access. See, e.g., Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004) ("A person requesting the information needs no preconceived idea of the uses the data might serve. The information belongs to citizens to do with as they choose. Furthermore, as we have noted, [access] does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all.").

311. But audit trails can only go so far. Abusers will inevitably access information pretextually or through agents to get around the problem. See, e.g., Remsburg v. Docusearch, Inc., 816 A.2d 1001 (N.H. 2003) (discussing the case of a murder victim whose stalker obtained her work address by hiring a contractor to place a "pretexting" phone call). In

Although the Framework offers great promise, there is reason for pause. Global's goals are ambitious, requiring seamless interaction between a large field of diverse players. An analogous effort proved difficult to pull off in the consumer context. The Platform for Privacy Preferences (known as "P3P") was conceived to enable websites to communicate their privacy practices in a standard format allowing consumers' computers, upon encountering the website, to determine whether the site matches the consumers' privacy preferences.³¹² The idea, similar to the Framework, is to automate the privacy transaction between the consumer and the website.³¹³ While the idea may have been a good one in theory, few consumers today are aware of P3P,³¹⁴ and, because websites are not required to comply with P3P standards it has been difficult for P3P to take hold in a meaningful way.³¹⁵

Global will likely avoid some of the hurdles that P3P encountered.³¹⁶ The justice system, unlike the wild west of at-large consumer websites, is a more controlled environment in which data managers are by and large anxious to set standards and find ways for information to flow efficiently.³¹⁷ Already, the Framework has gained traction, with numerous vendors and software developers rising to the challenges laid out in the 2007 report.³¹⁸ While it remains to be seen

addition, audit trails may not ultimately have the capacity to identify individual users, only categories of users. Clarke E-mail July 22, *supra* note 309. For example, responding to the assumption that the public has a right to anonymous access to court records, courts may ultimately design audit trails to reveal only that information was accessed by a member of the public, not *which* member of the public. *Id.* According to Tom Clarke of the National Center for State Courts, "[t]he technical solution that accords with the policy requirements for anonymous public requests is well understood and implemented in a number of places." *Id.*

312. Platform for Privacy Preferences (P3P) Project, <http://www.w3.org/P3P> (last visited Jan. 20, 2010).

313. *Id.*

314. Carlos Jensen et al., *Privacy Practices of Internet Users: Self-reports Versus Observed Behavior*, 63 INT'L J. OF HUMAN-COMPUTER STUD. 203, 212 (2005).

315. See Platform for Privacy Preferences (P3P) Project, *supra* note 312 (stating that work was suspended on the project due to lack of support from browser implementers).

316. See Clarke E-mail July 22, *supra* note 309 (noting that the Framework is more likely to succeed than previous attempts at automation).

317. See *id.* (discussing the reasons that this Framework is likely to succeed, citing the difference between implementation by an authoritative agency as opposed to implementation with "a semi-proprietary approach").

318. E-mail from Tom Clarke, Vice President for Research and Tech. at the Nat'l Ctr. for State Courts, to author (July 29, 2009, 11:49 EST) (on file with author). According to Mr. Clarke, Global's efforts are more likely to work than past efforts for several reasons. *Id.* First, previous efforts used semi-proprietary approach by a specific vendor; Global's approach is indigenous to the judiciary. *Id.* Second, open standards for major pieces of the technical architecture had not been written or had not been included in most off-the-shelf products. *Id.* Now, increasingly, they are. *Id.* Third, previous efforts did not design for a truly federated strategy where it was not assumed that everyone would adopt their

whether or not the justice community can bring the Framework to life, the possibility holds great promise for at least three reasons.

First, the Framework offers a digital environment that is far more secure than a scheme that relies on human enforcement. Once metadata is attached to pieces of information, it becomes much easier to control what happens with that information — how it is used, by whom, and even for how long.³¹⁹ It also becomes easier to control the accuracy and integrity of data so held.³²⁰ Assuming the Framework functions as promised, a court's access policy turns from an aspirational document into code-driven, secure reality (at least in theory).

Second, like the Application discussed above, the Framework also promises enhanced oversight. When data is tagged, it becomes more easily manipulable.³²¹ Those interested in using court data for oversight purposes (the press, researchers, citizens) will have an easier time locating and using the information sought. Importantly, tagged data can easily be anonymized, meaning that oversight need not compromise privacy and other interests of litigants and third parties.³²²

Third, the Framework offers great promise for domestic violence litigants because it may help overcome the privacy-as-safety dilemma described above: even if domestic violence courts are careful with victim records, courts in non-domestic violence cases may not be. Conceivably, courts could mark domestic violence victims' data with a "safety risk" tag that would secure personally identifying information regardless of whether the person is involved in a domestic violence case, being sued for eviction, or registering land records. When metadata can travel with information in court records, the possibilities for controlling *and protecting* that information downstream are greatly heightened.

Of course, as with other attempts to secure information, there are many potential pitfalls. New technologies have always given the domestic violence advocacy community pause.³²³ Whether it is GPS on

strategy. *Id.* The new approach uses open standards that are widely adopted to ensure interoperability. *Id.* Fourth, major vendors providing sufficient standards support to implement the Framework essentially off-the-shelf include all major vendors of security model products. *Id.* Fifth, pilots have been implemented in several places now and the concept is proving out. And finally, the Framework builds systematically on the identity architecture, which is much more practical for many agencies to implement. *Id.*

319. See GLOBAL, *supra* note 297, at 6.

320. See *id.* at 65 (discussing the Framework's use of metadata to verify information).

321. See *id.* at 62-63 (identifying the different ways that tagged data can be used).

322. See *id.* (discussing the different groupings of metadata types and how they can be used to protect privacy).

323. Interview with Julie Kunce Field, Executive Dir., Confidentiality Inst., in Williamsburg, Va. (July 16, 2009). For information on the Confidentiality Institute, see The Confidentiality Institute, <http://confidentialityinstitute.org/Site/Welcome.html> (last visited Jan. 20, 2010).

cell phones or online court records, domestic violence advocates rightly think through the implications and pitfalls for victims of domestic violence. Still, online court records have not created the great scourge that many domestic violence advocates feared.³²⁴ Likewise, although possible shortcomings of the Framework must be thought through carefully, it holds great promise in addressing the complex privacy interests of victims of domestic violence who use the courts.

CONCLUDING THOUGHTS

The above analysis reveals several interesting facets of domestic violence victims' interface with the court system and the problem of court access and privacy. There is a great deal of consensus that (1) domestic violence records should not be put online, (2) proceedings and records should remain open to the public, and (3) domestic violence victims should be granted the means to redact personally identifiable information, seal records, or close courtrooms as circumstances warrant.³²⁵ The non-controversial and relatively uniform access policies at specialized domestic violence courts highlight the consensus. But the consensus overlooks the privacy problems associated with indirect domestic violence cases. Courts must begin to take a wider view of their access policies to take into account the impact of open records on domestic violence victims. For this subset of litigants, when privacy-as-safety interests are implicated, courts must rethink their approach to foisting indirect domestic violence records online when such records include data that identifies and locates domestic violence victims.

A second general point is that, as we push further into the Age of the Internet, practical obscurity is practically dead. Courts are catching on to the vast efficiencies of digital court records. More and more courts not only require parties to file documents electronically, but are retroactively digitizing paper records. As these processes become the norm, practical obscurity fades and court records (past and present) become much simpler to get. Assuming that this trend continues, parties must be more careful about what they file at court and courts must become more thoughtful about what information they require litigants to provide. Lax practices with respect to redaction

324. *Id.*

325. *See supra* Part III.C. Note that one major area deserving of review is the extent to which courts effectively make domestic violence victims aware of means to protect their privacy. Currently, at many courts, domestic violence victims must affirmatively redact their information and are not counseled on their ability to do so by court staff. *See supra* note 161 and accompanying text.

and needless inclusion of personal identifiers are already tightening up as courts and parties become more sophisticated about operating in a digital records world. As the above discussion of the Framework demonstrates, courts are increasingly turning to technological fixes to the death of practical obscurity. Courts and court technologists are discovering that technology promises far better privacy protections than dust ever did. It would be naïve to think that a technological fix is around the corner, but it is appearing on the horizon.

A final important point is that the dichotomy between public and private in the court records context is a false one. The “privacy” vs. “access” dichotomy is too stark. Just as feminist legal scholars find the complex notion of “privacy” at times the foe and at times the hero, privacy and court access also produces a similarly conflicted picture. In the case of domestic violence victims and court, it is important to ensure that victims continue to use the court system without fear for personal safety. On the other side, however, “privacy” in the form of closed records and proceedings can be the enemy. Without open access to domestic violence proceedings and records, needed and valuable oversight is lost.

Using the technologically sophisticated mechanisms described above, we can start to picture a world that can better accommodate the complex picture of privacy in court. Perhaps technology will provide domestic violence victims and their advocates, researchers, scholars, law enforcement officers, and the numerous other interested persons and organizations the tools to oversee and work with the court system without compromising privacy interests at all. Still, too much hope should not be pinned on a technological fix. As activist organizations like Court WATCH so beautifully show, there is no substitute for the old-school approach: human eyes and ears monitoring hearings both to laud the system when it works, and address injustice when it arises.