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Transcending the Criminal Law's "One Size Fits All" Response to Domestic Violence

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TRANSCENDING THE CRIMINAL LAW'S "ONE SIZE FITS ALL" RESPONSE TO DOMESTIC VIOLENCE

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ABSTRACT

Domestic violence is no longer a private matter confined within the four walls of the home. The shift from private to public is connected with marked progress within the legal system, which strives to protect victims and hold batterers accountable through a myriad of specific responses that have ranged from attitudinal and logistical shifts from law enforcement to increased attention within legal education to a general acknowledgment of the impact of domestic violence on individual victims, children, families, and the broader community to the passage of federal and state legislation.

The state legislative landscape has historically centered around a very narrow subset of laws that mandate or encourage arrest and criminalize domestic violence-related acts. Research demonstrates both compelling support for and against the effectiveness of these laws, making it difficult to draw meaningful conclusions about their actual impact. Scholars and advocates have also expressed diverging opinions about the desirability of this response.

This article takes a different approach to exploring the criminalization of domestic violence by transcending the pervasive either/or dichotomy that dominates the field. It builds on my previous body of work that examines how mandatory arrest laws are often incorrectly categorized into a uniform classification scheme, leading to a complexity of problems like different research outcomes. Despite the actual variance in these laws, however, there remains a problematic uniformity that is characteristic of the current approach: many of the existing laws, policies, and practices tend to impose a "*one size fits all*" solution to a problem that is incredibly complex. The current singular approach might be necessary as a matter of practicality and public welfare, but it does not adequately respond to all of a particular victim's needs or to the needs of all victims. Many never

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become engaged with the criminal justice system in the first place. Others, who do, still face tremendous barriers that compromise their safety and/or impede their ability to leave their abuser. Reconciling these competing ideas has proved challenging.

Through analysis of recent state-based legislative and policy innovations focused on two areas that are particularly relevant for victims—housing and victim safety as it relates to improving the effectiveness of orders of protection—this article proposes a new conceptual framework. Using these victim-centered state laws and policies as a starting place, this article illustrates how the existence of a myriad of strategies and innovations can ultimately transcend the limitations inherent in the existing one size fits all response of the criminal law.

INTRODUCTION

Domestic violence no longer exists primarily as a private matter confined within the four walls of the home. The shift from private

to public is due in large part to the efforts of battered women's advocates who fought tirelessly for social and legal recognition of this problem for victims and society generally.[1] In the context of domestic violence as a social movement, progress has been made to protect victims, hold batterers accountable, and educate the public about the dynamics and far-reaching consequences of domestic violence. This progress has manifested in a myriad of specific responses like state and federal legislation focused on criminal sanctions, attitudinal shifts among law enforcement, and general public acknowledgment of domestic violence's impact on individual victims, children, families, and the broader community.

Despite these advances, little has changed in terms of the pervasiveness of the problem. Each year, approximately 1.3 million women and 835,000 men are assaulted by an intimate partner.[2] Research reveals that at least one in four women will be a victim of domestic violence,[3] and seventy-one percent of Americans personally know someone who is or has been a victim of domestic violence.[4] Though profound, these statistics do not even begin to capture the stories of the invisible victims—those whose experiences are never reported—or the countless children and bystanders who are also harmed, sometimes less obviously, by witnessing violence perpetrated against

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1. I use the terms domestic violence and interpersonal violence (IPV) interchangeably throughout this paper to refer generally to abuse that is perpetrated in the context of dating, marriage, or other intimate relationships in which two people may or may not cohabitate. I also consciously use the term "victim" to refer to those individuals who are harmed by their intimate partners. Although the term is imperfect, it effectively connotes the power imbalance inherent in abusive relationships and also is inclusive, in a way that the term survivor is not, of those individuals who have been killed at the hands of their batterer. Further, although I use the pronoun "she" to refer to victims, this is simply reflective of the reality that most victims are female. *See infra* note 2. The intention, however, is not to dismiss the reality that there are many male victims of domestic violence. *See infra* note 2.

2. PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE & CTRS. FOR DISEASE CONTROL & PREVENTION, NCJ 183781, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN iv (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/183781.pdf. In the year 2000, 1247 women and 440 men were killed by an intimate partner. CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, NCJ 197838, CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993–2001, at 1 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf.

3. PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE & CTRS. FOR DISEASE CONTROL & PREVENTION, NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 9 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/181867.pdf. Actual numbers of victims range depending on studies. Generally, women make up about eighty-five percent of victims of domestic violence, and men account for the remaining fifteen percent. RENNISON, *supra* note 2, at 1.

4. ALLSTATE FOUND., THE ALLSTATE FOUNDATION NATIONAL POLL: "CRISIS: ECONOMICS AND DOMESTIC VIOLENCE" 5 (2009), *available at* http://www.clicktoempower.org/media/2038/executive_summary.pdf.

a parent or loved one.[5] Domestic violence cuts across lines of class, race, religion, and ethnicity, and it infiltrates both heterosexual and homosexual relationships alike. It affects men and women of all ages, ranging from children to the elderly. It also reaches far beyond tangible, visible, physical harm.[6] Domestic violence commands attention from practitioners in fields like medicine, law enforcement, psychology, social work, and the legal profession, who strive to meet the needs of victims on an individual level and who also focus their attention more systemically by providing education and advocating for legal and policy reform.

The legal system, without question, has played an integral role in addressing this epidemic and has made important, measurable progress.[7] Law enforcement has refocused priorities and moved beyond a systemic pattern of non-response to domestic violence, and prosecutors frequently adopt aggressive policies designed to impose sanctions on batterers. Many law schools offer education in their core curricula and create specialized domestic violence courses and clinics to educate future lawyers about the intricacies of the problem and prepare them for issues they may encounter in practice.[8] Additionally, bar associations routinely offer continuing education programs on

5. Studies show that between 3.3 and 10 million children annually witness some sort of domestic violence. *See* Bonnie E. Carlson, *Children's Observations of Interparental Violence*, *in* BATTERED WOMEN AND THEIR FAMILIES: INTERVENTION STRATEGIES AND TREATMENT PROGRAMS 145, 160 (Albert R. Roberts ed., 1984) (projecting that "at least 3.3 million children yearly are at risk of exposure to parental violence" (emphasis omitted)); Murray A. Straus, *Children as Witnesses to Marital Violence: A Risk Factor for Lifelong Problems Among a Nationally Representative Sample of American Men and Women*, *in* CHILDREN AND VIOLENCE 98, 98 (1992), *available at* http://pubpages.unh.edu/~mas2/VB48.pdf (estimating ten million child witnesses). Children under the age of twelve resided in thirty-eight percent of households with domestic violence incidents involving female victims, and in twenty-one percent of households involving male victims between 2001 and 2005. SHANNAN M. CATALANO, U.S. DEP'T OF JUSTICE, NCJ 210675, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES: VICTIM CHARACTERISTICS 17 (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ipvus.pdf.

6. Domestic violence transcends the physical, and can include multiple kinds of abuse. The Power & Control Wheel, developed by the Domestic Abuse Intervention Project in Duluth, Minnesota, highlights many of these mechanisms of power, including emotional and sexual abuse. *Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROJECT, http://www.theduluthmodel.org/pdf/PowerandControl.pdf (last visited Jan. 18, 2013).

7. For example, the number of battered women who kill their intimate partners each year has made a significant, marked decline. SHANNAN M. CATALANO ET AL., U.S. DEPT OF JUSTICE, NCJ 228356, SELECTED FINDINGS: FEMALE VICTIMS OF VIOLENCE 3, 4 (2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fvv.pdf (finding that between 1993 (the year the National Crime Victim Survey was redesigned) and 2007, the total number of intimate partner homicides dropped from 3300 to 2340.). Females have consistently made up about seventy percent of all intimate partner homicide victims. *Id.* at 3.

8. *See, e.g.*, AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, TEACH YOUR STUDENTS WELL: INCORPORATING DOMESTIC VIOLENCE INTO LAW SCHOOL CURRICULA: A LAW SCHOOL REPORT (2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/domviol/teach_students.authcheckdam.pdf.

domestic violence for practicing lawyers.[9] Over time, state legislatures have crafted legislation that criminalizes domestic violence-related acts, informed largely by the intersecting goals of punishing batterers, protecting individual victims, and protecting the public welfare.[10]

This criminalization of domestic violence has elicited both praise and criticism, often from those within the same movement. Even empirical research studies demonstrate both compelling support for and against the effectiveness of criminal laws like mandatory arrest, making it difficult to draw meaningful conclusions.[11] Some scholars argue that the existing legal framework is inherently problematic. They suggest it compromises the autonomy and agency of victims of violence. In other words, by forcing state intervention, a victim has no right to exercise an opinion about whether arresting the perpetrator is desirable. Some think that the mandatory interventions further perpetuate the power and control inherent in the battering relationship, with the state stepping in to wield further control over the victim.[12] Others find that these policies deny victims access to important material resources.[13] The perpetuation of racism is also frequently cited as a negative consequence of these policies.[14]

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9. *Commission on Domestic and Sexual Violence*, AM. BAR ASS'N, http://www.americanbar.org/groups/domestic_violence.html (last visited Jan. 18, 2013) (listing a number of upcoming events related to domestic violence training).

10. *See, e.g.*, MICH. LEGISLATURE, DOMESTIC VIOLENCE, STALKING, DATE RAPE: AN INFORMATION AND RESOURCE GUIDE 4–5 (1998), *available at* http://www.legislature.mi.gov/documents/publications/DomesticViolence.pdf (outlining several domestic violence laws that Michigan has passed since 1978).

11. *See infra* Part III.

12. The power and control wielded over victims by their abusers is often replicated by the influence and rigidness of the state. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1865 (1996) ("[M]any advocates for battered women argue that the use of state power, such as subpoenas, has the unintended effect of punishing or 'revictimizing' the victim for the actions of the abuser by forcing the victim into a process over which she has no control.").

13. *See, e.g.*, Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009 (2000).

14. Donna Coker writes about the connection between the disproportionately high rate of arrests and incarceration of African American women due to conspiracy laws, drug war policies, and disparate criminal penalties, with "[b]attered women . . . are hesitant to call the police because they are aware that mandatory arrest policies increase their *own* chances of arrest . . . ." Donna Coker, *Race, Poverty, and the Crime-Centered Response to Domestic Violence: A Comment on Linda Mills's Insult to Injury: Rethinking Our Responses to Intimate Abuse*, 10 VIOLENCE AGAINST WOMEN 1331, 1333 (2004). Other scholars, like Miriam Ruttenberg, argue that mandatory arrest laws perpetuate racism because the laws still require a level of police discretion, which historically has meant higher arrest rates for the black male community. Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171, 182 (1994); *see also* SHAMITA DAS DASGUPTA PREPARED BY PATRICIA ENG, MS. FOUND. FOR WOMEN, SAFETY & JUSTICE FOR ALL: EXAMINING THE RELATIONSHIP BETWEEN THE WOMEN'S ANTI-VIOLENCE MOVEMENT AND THE CRIMINAL LEGAL SYSTEM 12 (2003), *available at* http://files.praxisinternational.org/safety_justice.pdf

Many scholars occupy extreme positions on both sides of the debate about whether public policy dictates a strong criminal justice response with a focus on holding batterers accountable at all costs. Others try to mediate more of a middle ground between these divergent perspectives.[15] The competing ideas about the effectiveness, desirability, and impact of the criminal justice response have formed the basis of strong disagreement and discourse among scholars and practitioners,[16] and the proffered solutions vary widely and range across a spectrum.[17]

My approach to assessing the criminalization of domestic violence moves beyond the characteristic either/or dichotomy in various ways. In an earlier research study, for example, my co-authors and I examined the mechanism by which mandatory arrest laws are, often incorrectly, categorized by researchers and others.[18] This project,

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(noting the unduly high rate of domestic violence arrests of African American men and discussing the racial bias in the criminal legal system itself, including an increased risk for the African American male of police abuse, being denied bail, and receiving harsher sentences); Lisa M. Martinson, Comment, *An Analysis of Racism and Resources for African-American Female Victims of Domestic Violence in Wisconsin*, 16 WIS. WOMEN'S L.J. 259, 270 (2001) ("The specific concerns of African-American women such as maintaining racial unity and avoiding the propagation of stereotypes against African-American men are not addressed by the common state domestic violence resources of mandatory arrest and restraining orders offered by the police and the court system."); Symposium, *Battered Women & Feminist Lawmaking: Author Meets Readers, Elizabeth M. Schneider, Christine Harrington, Sally Engle Merry, Renée Römkens, & Marianne Wesson* 10 J.L. & POL'Y 313, 332 (2002) ("I wonder if the success of the battered women's movement in bringing [domestic violence] cases to court and achieving at least minimal standards for arrest, prosecution, and even occasional incarceration is in part because it dovetailed with . . . the increase of control and surveillance over men of color." (quoting Sally Engle Merry)). *Contra* Evan Stark, *Insults, Injury, and Injustice*, 10 VIOLENCE AGAINST WOMEN 1302, 1321 (2004) (demonstrating that mandatory arrest laws decrease police bias against black men).

15. *See, e.g.*, Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159 (2003) (analyzing mandatory arrest policies and no-drop prosecution policies and concluding that these policies are not mutually exclusive with victim empowerment policies).

16. *See, e.g.*, Thomas L. Hafemeister, *If All You Have Is a Hammer: Society's Ineffective Response to Intimate Partner Violence*, 60 CATH. U. L. REV. 919, 974 (2011) ("In general, the criminalization of domestic violence and IPV in particular has engendered considerable debate.").

17. Linda Mills argues, for example, that the criminal realm is not the ideal forum in which to address domestic violence, preferring instead a kind of restorative justice model that places accountability on both victim and perpetrator. LINDA G. MILLS, INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE 103 (2003) ("The Intimate Abuse Circle . . . is designed to counteract the punishment-oriented trend that precludes dialogue between the parties."). Other scholars suggest that the desires of victims be taken into account when making decisions about arrest and prosecution. *See, e.g.*, Han, *supra* note 15, at 166–67. In Donna Coker's view, all domestic violence provisions should be analyzed first through a "material resources test" to determine whether they offer a tangible benefit to victims. Coker, *supra* note 13, at 1009.

18. April M. Zeoli et al., *A Summary and Analysis of Warrantless Arrest Statutes for Domestic Violence in the United States*, 26 J. INTERPERSONAL VIOLENCE 2811, 2811, 2814 (2011).

while illuminating important differences among laws that tend to be categorized similarly, something that is vital for researchers and practitioners alike, does not offer solutions to the problematic nature of what remains a traditional one size fits all approach. As a general matter, I am intensely critical of this uniformity. So many of the existing laws, policies, and practices tend to impose a prescribed response—namely arrest—to a problem that is vastly different for each victim and batterer in a violent relationship.[19]

Scholars have long recognized that the complexity of domestic violence renders the creation of solutions inherently problematic: "In crafting the societal response to IPV, it should be recognized that IPV is a complex phenomenon for which the most appropriate and effective response can vary considerably."[20] The current singular criminal response that might, on the one hand, be necessary as a matter of practicality and public welfare, may in many ways be considered a "win" for victims,[21] and is arguably effective in some respects. It at least theoretically removes offenders from the relationships and imposes some kind of punishment. It does not, however, respond to the needs of all victims, or respond to all of a particular victim's needs. Many victims never become engaged with the criminal justice system in the first place; others who do still face tremendous barriers that compromise their safety and/or impede their ability to break away from the abuser. "In particular, women who are otherwise marginalized within society remain on the outside with respect to these services and remedies."[22] Reconciling these competing ideas has proved challenging.

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19. Other scholars have observed this phenomenon. *See, e.g.*, Cheryl Hanna, *Because Breaking Up Is Hard to Do*, 116 YALE L.J. POCKET PART 92, 94 (2006), http://www.thepocketpart.org/images/pdfs/65.pdf (last updated Aug. 09, 2011) (arguing for a constant rethinking of domestic violence laws that resist uniformity and explaining that "[t]he criminalization of domestic violence is still in its infancy, and we have much to learn about what works best and for whom."); *see also* Hafemeister, *supra* note 16, at 942 ("Scholars who have researched IPV similarly diverge as to the nature of the problem, its contributing factors, and how to ameliorate it. However, this divergence may be caused in part by a mistaken tendency to address IPV as a monolithic phenomenon, when in actuality there exists two relatively distinct forms of IPV that require different societal responses."). For a different take on the one size fits all response, see Zeoli et al., *supra* note 18, at 2814–15 (exploring the considerable differences in the mandatory arrest law requirements, and noting that the laws are often lumped together into one general category by scholars, experts, and practitioners).

20. Hafemeister, *supra* note 16, at 1001.

21. It was not that long ago that the wide-ranging discretion exercised by law enforcement and prosecutors in deciding whether to arrest or prosecute resulted in an extensive pattern of non-response.

22. Conference, *Mainstream Legal Responses to Domestic Violence vs. Real Needs of Diverse Communities*, 29 FORDHAM URB. L.J. 13, 60 (2001) (quoting Jenny Rivera) (focusing specifically on the experience of Latina women and their difficulties in accessing domestic violence services).

The debate about whether criminalization is the right response, in theory or as applied, functions largely as a distraction. To be sure, there are valid arguments made by experts on both sides of the debate about the utility of criminal law as a response to domestic violence. But despite the important ongoing work that attempts to assess and evaluate the criminal law response, the divergence in opinions has resulted in what might best be described as an impasse in the movement. This work should be ongoing, and researchers and social scientists should continue to assess and test the effectiveness of the existing scheme, preferably working collaboratively and involving a variety of actors in their efforts. The limitations inherent in reconciling the complex problem of domestic violence with the singularity of the current legal response begs the conceptualization of a new, victim-centered framework—one which builds on, offers improvements to, and complements the existing criminal law.

As a point of illustration, some states have recently enacted legislative and policy initiatives that address domestic violence in new ways by acknowledging the complexity of the issue, especially in the context of the impact on and relevance for victims.[23] These innovations, which range in their focus from addressing housing discrimination to improving victim safety as it relates to victim protective orders, have the potential to provide more far-reaching help for those affected by domestic violence beyond the obvious arrest or punishment of the batterer. They move beyond the "one size fits all" characteristic of existing mandatory arrest legislation and serve as a *complement to*, not necessarily a replacement for, the traditional criminal law response. A survey of these new laws reveals that many recognize the multiplicity of domestic violence victims' experiences and support the idea that "[w]omen's perceptions and reactions to abuse, as well as the help available to them, are influenced by the lens through which they see the world and the intersectionality of the different cultural influences on their lives."[24] In other words, they move beyond the very narrow assumption that arrest of a batterer is the best (or only) way to address the problem of domestic violence and recognize that the actual abuse is but one part of a much larger web of issues faced by victims.

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23. *See infra* Part IV.A.

24. Fran S. Danis & Shreya Bhandari, *Understanding Domestic Violence: A Primer*, *in* DOMESTIC VIOLENCE: INTERSECTIONALITY AND CULTURALLY COMPETENT PRACTICE 29, 29 (Lettie L. Lockhart & Fran S. Danis, eds., 2010) (exploring the impact of "different cultural influences" that affect victims of domestic violence, including "race, ethnicity, age, citizenship status, (dis)ability, sexual orientation, religion, military involvement, and geographical location.").

The next phase of the movement should purposefully work to transcend the traditional approach by incorporating more victim-centered laws and policies. In doing so, however, I do not suggest that there ought not be a criminal law response, but that the existing debate is not the only way to inform solutions that are ultimately beneficial to victims of domestic violence. In making such a recommendation, I am not suggesting that the uniform criminal response be replaced by a similarly uniform civil response. Rather, quite to the contrary, I advocate for the creation of an array of laws and policies from which victims might find additional workable solutions and remedies. A state that includes a comprehensive menu of legislative options is likely to meet a greater number of any particular victim's needs, and the needs of a larger number of victims. Not everyone will access all of the available options, but this scheme will allow for a more tailored, victim-specific approach, which transcends the more uniform response that is currently in place.

This paper focuses on selected laws and policies, specifically those in the realm of housing and victim safety vis-à-vis orders of protection, as a model for such a proposal. These laws were chosen for two primary reasons. First, they address issues that are inherently relevant to victims whether or not they have intersected with the criminal justice system. Second, they have been the subject of recent legislative action; their arrival is relatively new and also quite novel.

There are many specific intersections between domestic violence and housing, including a strong connection between homelessness and domestic abuse. Victims often face discrimination in finding housing because of their status, or they are subject to eviction based on their "involvement" with the crime of domestic violence. Sometimes victims even find themselves legally bound to a lease with their abuser; as a practical matter in such instances, the law effectively aids the batterer in maintaining control over the person he is abusing.

Civil and criminal orders of protection provide a measure of protection against future abuse, but the protection is not automatic, guaranteed, or even inherently effective and is largely dependent on the willingness of third parties (i.e., law enforcement) to intervene. Orders of protection bear a relationship to the criminal law in that they are put into place by the courts either in conjunction with criminal sanctions or are sought by victims who have been harmed. Laws and policies that attempt to improve the limitations of orders of protection offer a victim-centered approach to a mechanism that has the potential to be beneficial.

Both of these issues, housing and orders of protection, are ripe for the creation of new legislative strategies, and some states have

seized on this opportunity. Together they offer an illustration of the kinds of innovations that might be most effective in transcending the criminal law's "one size fits all" approach to domestic violence.

Although these particular state-based interventions are clearly more victim-centered and exist outside of the traditional criminal law response, which focuses on the arrest of batterers, they are also subject to criticism in that their impact may not be very far-reaching. States and localities, however, influence one another in various ways; they are aware of and often model their legislation after one another.[25] One might argue that advocating a preference for more uniformity in state laws gets right back to the place of prescribing a "one size fits all" response to the problem as is characteristic of the criminal law. However, these new legislative innovations in the area of housing and orders of protection offer options to victims; not all victims will need protection from discrimination in housing, nor will all victims require electronic monitoring of their abusers as part of an order of protection. But the existence of these new laws does allow for a more tailored response to the problem of domestic violence, one that ultimately exists outside of the criminal law. Ideally, states will see these as models that will inspire the creation of even more innovative, victim-centered laws.

This article begins with an exploration of the impact and dynamics of domestic violence and includes a historical and contemporary overview of the legal system's response. It also includes a discussion of what research reveals about the needs of victims and argues that this ought to inform the direction of any future policy agenda. This article also explores the debate that has ensued among scholars and activists about the effectiveness and desirability of using criminal law as a primary tool to combat domestic violence. Finally, this article concludes by proposing a new conceptual framework using selected victim-centered laws and policies as a starting place to illustrate how such innovations can effectively complement the existing criminal law response. This vision requires that lawyers, law enforcement, and legislators work more closely with social scientists, victims, mental health practitioners, and battered women's advocates to craft effective, far-reaching solutions.[26] I rely on innovative expressions of federalism to define the potential impact of

25. *See* discussion *infra* Part IV.C.

26. In a different context, my co-authors and I similarly argue that "social science researchers must team with legal scholars to clearly define these constructs and conduct the legal research required to determine classifications and implementation dates so that the field may advance and inform the ongoing debate on the appropriateness and effectiveness of these laws." April M. Zeoli et al., *Mandatory, Preferred, or Discretionary: How the Classification of Domestic Violence Warrantless Arrest Laws Impacts Their Estimated Effects on Intimate Partner Homicide*, 35 EVALUATION REV. 129, 149 (2011).

state-based legislation, using the example of innovative state laws in the area of housing and victim protection orders as a point of illustration. This new framework should inform the next phase of the domestic violence movement.

I. HISTORICAL CONTEXT AND BACKGROUND

A. The Problem of Domestic Violence

Domestic violence has been and continues to be a serious issue in the United States, despite a greater awareness of the issue by politicians and law enforcement agencies. It is estimated that one in every four women in the United States will experience domestic violence in her lifetime.[27] Each year, 1.3 million women are victims of physical assault by an intimate partner,[28] and eighty-five percent of all victims of domestic violence against an intimate partner are women.[29] Statistics reflecting violence among members of marginalized communities are also revealing. For instance, "American Indian and Alaskan Native women experience a higher rate of violence than any other group, including African-American men and other marginalized groups."[30] It is believed that nearly forty percent of Native American women have experienced domestic violence.[31] Women in immigrant communities are also at risk.[32] "In addition to the economic and social challenges facing immigrant women, empirical research consistently demonstrates that immigrant women

27. TJADEN & THOENNES, *supra* note 2, at 9.

28. *Id.* at iv. Women are much more likely than men to be victimized by a current or former intimate partner. MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, NCJ 224390, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2007 6 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cv07.pdf. Women are "84% of spouse abuse victims and 86% of victims of abuse at the hands of a boyfriend or girlfriend," and "about three-fourths of the persons who commit[] family violence [are] male." MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, NCJ 207846, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 1 (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fvs02.pdf.

29. *See* RENNISON, *supra* note 2, at 1.

30. Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 456 (2005); *see also* STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, NCJ 203097, AMERICAN INDIANS AND CRIME v (2004), *available at* http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf; CALLIE RENNISON, U.S. DEP'T OF JUSTICE, NCJ 176354, VIOLENT VICTIMIZATION AND RACE, 1993–98, at 9 (2001), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/vvr98.pdf.

31. TJADEN & THOENNES, *supra* note 2, at 26.

32. Deborah K. Weissman, *Addressing Domestic Violence in Immigrant Communities*, 65 POPULAR GOV'T 13, 13 (2000) (illuminating the prevalence of domestic violence in immigrant communities in the United States, and describing how immigrant victims face an added vulnerability because of their immigration status).

married to U.S. Citizens and Lawful Permanent Residents are especially vulnerable to domestic abuse."[33]

Females who are twenty to twenty-four years of age have the highest risk of nonfatal intimate partner violence.[34] Although most cases of domestic violence are never reported to the police, one-third of female homicide victims that are reported in police records are killed by an intimate partner.[35] On average, more than three women a day are murdered by their husbands or boyfriends in the United States.[36]

Domestic violence is in itself a vicious cycle.[37] Witnessing violence between one's parents or caretakers is the strongest risk factor for transmitting violent behavior from one generation to the next.[38] For instance, "[b]oys who witness domestic violence are twice as likely to abuse their own partners and children when they become adults."[39] In addition to the negative (and sometimes permanent) physical and emotional impact on individual victims of domestic violence, society as a whole is also affected by the aftermath this problem.

Domestic violence can be perpetuated in a variety of ways. Batterers can engage in physical, emotional, sexual, and/or financial control over their victims. It is more complex than is immediately obvious, involving, most characteristically, a pattern of control exerted over one's intimate partner or family member. Legal scholar and expert on domestic violence Elizabeth Schneider explains that "[b]attering fits within a larger picture of abuse of power."[40] This manifests most obviously as physical violence perpetrated by one spouse against another, but it also includes emotional abuse and sexual violence and extends into a myriad of intimate or familial relationships. "Domestic violence is perpetrated by adults or adolescents against their intimate partners in current or former dating, married, or cohabiting relationships of heterosexuals, gay men, lesbians,

33. Jacqueline P. Hand & David C. Koelsch, *Shared Experiences, Divergent Outcomes: American Indian and Immigrant Victims of Domestic Violence*, 25 WIS. J.L. GENDER & SOC'Y 185, 190 (2010) ("Indeed, the lifetime prevalence of intimate partner violence among Latina immigrant women exceeds the 21 percent prevalence in the general population by almost twofold.").

34. CATALANO, *supra* note 5, at 9.

35. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2000 18 (2001), *available at* http://www.fbi.gov/news/pressrel/press-releases/crime-in-the-united-states-2000.

36. In 2005, 1181 women were murdered by an intimate partner. CATALANO, *supra* note 5, at 7.

37. *See Power and Control Wheel*, *supra* note 6.

38. Irene Hanson Frieze & Angela Browne, *Violence in Marriage, in* FAMILY VIOLENCE 163, 185 (Lloyd Ohlin & Michael Tonry eds., 1989).

39. NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE FACTS 1 (2007), *available at* http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf.

40. ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 12 (2000).

bisexuals, and transgendered persons."[41] The Power and Control Wheel depicts the tools that batterers use to control their partners beyond physical violence.[42] While the legal system deals primarily with physical abuse, understanding the wide-ranging ways in which batterers abuse their partners is critical to understanding the dynamics of domestic violence and the complexity surrounding the questions of why victims fail to leave abusive relationships or cooperate with law enforcement and prosecutors.[43]

The effects of domestic violence extend beyond the acute battering or control that occurs within the context of a relationship. Domestic violence is connected, for example, with poverty.[44] Specifically, "[w]omen in low-income households experience violence at significantly higher rates than women with higher annual incomes."[45] This can be particularly problematic when those victims living in poverty want to leave their abusive partner; their resolve to remain independent of the batterer is often challenged by their (lack of) economic resources.[46]

As a related matter, domestic violence is also a leading cause of homelessness because access to affordable housing is often not available.[47] "The lack of affordable housing, often combined with loss of employment, leads many victims of domestic violence and their

41. Danis & Bhandari, *supra* note 24, at 30.

42. *Power and Control Wheel*, *supra* note 6. Forms of violence include coercion and threats, using immigration status as a tool of control, intimidation, financial control, asserting male privilege, using children as a mechanism of control, isolation, and minimizing or denying the abuse and blaming the victim. *Id.*

43. For a comprehensive and compelling discussion of obstacles that preclude victims from leaving abusive relationships, see Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a. Why Abuse Victims Stay*, 28 COLO. LAW. 19, 19 (1999).

44. To provide some context for the frequency of the connection between poverty and domestic violence, research shows that women who receive Temporary Assistance to Needy Families experience IPV ten times more often than other women. Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 38 (2004).

45. *Id.*

46. Nancy Wright, *Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers*, 4 CRIM. L. BRIEF 76, 84 (2009).

47. *See* Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 377, 389 (2003); *see also* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, SOME FACTS ON HOMELESSNESS, HOUSING, AND VIOLENCE AGAINST WOMEN 1 (2009), *available at* http://www.nlchp.org/content/pubs/Some%20Facts%20on%20Homeless%20and%20DV.pdf. Congress identified the link between domestic violence and homelessness when it passed the Violence Against Women Act and Department of Justice Reauthorization Act of 2005. 42 U.S.C. § 14043(e)(7) (2006) ("Victims of domestic violence often return to abusive partners because they cannot find long-term housing."); *see also* SCHNEIDER, *supra* note 40, at 13 (explaining how many victims of domestic violence become homeless due to the abuse, and how the battering and homelessness can force victims into a difficult cycle from which to break free).

children into homelessness if they try to leave abusive relationships."[48] This further complicates the choices for victims of domestic violence who consider leaving their abusers. "Thus, violence is a tool for maintaining women's economic inferiority to, and dependency on, men."[49]

The battered women's movement helped place the problem of domestic violence on the public policy agenda; the resulting proliferation of research that generated statistics and information about dynamics has helped change attitudes and shift priorities. "Society now widely accepts elimination of intrafamily abuse as a crucial goal, and it has been illegal in most states since the late nineteenth century. But the problem remains one of epidemic proportions."[50]

B. Early Origins: The Private Nature of Domestic Violence

An understanding of how the legal system currently responds to domestic violence is best informed by looking at its early origins. Domestic violence was once thought of as a private matter, best dealt with within the confines of the home. This approach is not inconsistent with the historic reluctance of the legal system generally to intervene into marital or family concerns, with the doctrine of coverture, or with the widely recognized right of chastisement, that is, a man's common law right to "subject his wife to corporal punishment . . . as long as he did not inflict permanent injury on her."[51] And even a hundred years after courts no longer recognized this right, "the American legal system continued to treat wife beating differently from other cases of assault and battery."[52]

As recently as the 1970s, law enforcement was routinely encouraged as a matter of policy to "look the other way" when officers encountered disturbances among family members. Scholars Lisa Goodman and Deborah Epstein explain, "police officers historically failed to recognize the criminal dimension of intimate partner abuse, ignoring domestic violence calls, delaying their response by several hours, or insisting on mediation rather than arrest."[53] A 1968–69

48. Meris L. Bergquist, *After the Violence: Using Fair Housing Laws to Keep Women and Children Safe at Home*, 34 VT. B.J. 46, 46 (2008).

49. Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 70 (2002).

50. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 3 (1999).

51. Reva B. Siegel, *Civil Rights Reform in Historical Perspective: Regulating Marital Violence*, *in* REDEFINING EQUALITY 29 (Neal Devins & Davison M. Douglas eds., 1998).

52. *Id.* at 30.

53. Lisa Goodman & Deborah Epstein, *Refocusing on Women: A New Direction for Policy and Research on Intimate Partner Violence*, 20 J. INTERPERSONAL VIOLENCE 479, 480 (2005).

International Association of Police Chiefs Training manual further illustrates this point:

> Once inside the home, the officer's sole purpose is to preserve the peace . . . [a]ttempt to soothe feelings, pacify parties. . . . In dealing with family disputes the power of arrest should be exercised as a last resort. The officer should never create a police problem when there is only a family problem existing.[54]

Such instructions suggest a reluctance to acknowledge the seriousness of battery. In Michigan, a manual for the Police Training Academy encouraged officers to "[a]void arrest if possible" and to try to "[a]ppeal to their vanity."[55] This policy of non-intervention fortunately did not continue for the duration of the century. Beginning in the 1970s, the battered women's movement gained momentum and major changes in policy, laws, and attitudes took hold.

During the 1980s and 1990s, a flood of legislation regulating the discretion of law enforcement in cases of domestic violence was implemented throughout the United States. Police officers' discretion about whether to make an arrest when they encountered domestic violence was restricted and they were subsequently "statutorily mandated to make arrests upon a finding of probable cause."[56] The legal system's response was initially predicated on an assumption that those who experienced domestic violence were "uncomplicated victims in need of protection."[57] This view was short-lived, however, as the inherent complexity that characterized battering relationships became more evident and widely understood.

II. THE LEGAL SYSTEM'S CURRENT RESPONSE TO DOMESTIC VIOLENCE

As evidenced by the historical evolution of domestic violence as a societal problem, "[u]ntil recently, legal fictions, social prejudices, and criminal justice apathy and ignorance combined to define domestic violence as a nonevent."[58] Today, the legal system offers a fairly comprehensive response that has been constructed around the idea that

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54. Siegel, *supra* note 51, at 38, 39 (emphasis omitted) (citing INT'L ASS'N OF POLICE CHIEFS, TRAINING KEY NO. 16, HANDLING DISTURBANCE CALLS 94–95 (1968–1969)).

55. Steven M. Cook, *Domestic Abuse Legislation in Illinois and Other States: A Survey and Suggestions for Reform*, 1983 U. ILL. L. REV. 261, 268 (1983).

56. Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE, 191, 199 (2008).

57. *Id.* at 200.

58. NEAL MILLER, INST. FOR LAW & JUSTICE, DOMESTIC VIOLENCE: A REVIEW OF STATE LEGISLATION DEFINING POLICE AND PROSECUTION DUTIES AND POWERS 3 (2004), *available at* http://www.ilj.org/publications/docs/Domestic_Violence_Legislation.pdf.

domestic violence is a critical social problem requiring a shift from considering it a private family matter and that victims are often uncooperative in the role they play as part of the broader system.[59]

It has only been over the course of the past thirty-five years that legislation has been used as a tool to combat the problem of domestic violence. "Waves of unprecedented statutory changes beginning in the 1970s have altered the official response to domestic violence."[60] Most of the state legislative changes took place around mandatory arrest.[61] On the federal level, Congress responded to the epidemic of domestic violence with its passage of the Violence Against Women Act in 1994.[62] And across the country, law schools, the site of educating future lawyers, judges and lawmakers, adopted new courses and curriculum on the topic.[63]

A. State Legislation: Mandatory Arrest and Victim Protection Orders

State legislatures eventually passed laws that addressed the historic pattern of non-response to domestic violence by law enforcement; these mandatory arrest laws required various degrees of arrest (usually mandatory, discretionary or preferred) by law enforcement responding to domestic violence-related crimes.[64] Previously left up to the discretion of an officer responding to the scene of a domestic violence incident, today every state allows for warrantless arrests in misdemeanor cases of domestic violence,[65] "subject to a police officer's determination that probable cause exists to believe domestic violence occurred."[66] Professor Emily Sack explains, "[t]he goals of these changes were to counter police resistance to arrests in domestic violence cases by removing or restricting police officer discretion; mandatory arrest policies would increase police response and reduce

59. Kohn, *supra* note 56, at 193. As a result, "[s]ystem actors have reconciled these conflicting conclusions by implementing aggressive intervention policies that exclude victims." *Id.*

60. EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 109 (3rd ed. 2003) (explaining how "explosive change" in the legislative arena followed Pennsylvania's passage of the Protection from Abuse Act of 1977).

61. *See* Zanita E. Fenton, *State-Enabled Violence: The Story of* Town of Castle Rock v. Gonzales, *in* WOMEN AND THE LAW STORIES 379, 391 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011) (discussing how the battered women's movement brought about legal and social reforms that led to the enactment of mandatory arrest laws).

62. BUZAWA & BUZAWA, *supra* note 60, at 123.

63. *See, e.g.*, AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, *supra* note 8.

64. *See* Zeoli et al., *supra* note 18, at 2811.

65. *Id.*

66. MILLER, *supra* note 58, at 4.

batterer recidivism."[67] The motivation behind this legislation had at its core a desire to increase the number of arrests made in domestic violence cases.[68] The policies also had the objective of taking the pressure off of victims to make the decision about whether to have the batterer, who was often also her husband or intimate partner, arrested. Further, a related goal was to change community perceptions about the seriousness of domestic violence.

Many feminist scholars and activists pushed hard for such mandatory interventions.[69] These statutes have, without question, opened up victims' access to the criminal justice system.[70] "These policies also represent an important symbolic shift: a clear declaration by the state that it no longer condones violence against women."[71] Every state now has a criminal statute that directs law enforcement on standards for arrest when responding to domestic violence calls.[72]

These arrest laws, commonly referred to as "mandatory arrest" provisions, actually vary widely in their requirements and are the subject of considerable debate.[73] Passed initially to regulate what amounted to widespread discretion and patterns of non-response by law enforcement, today experts debate the utility and impact of these provisions, with little agreement.[74] One major critique is that mandatory arrest laws do not allow for recognition of the complexity of domestic violence or the marked variance among victims: "Mandatory intervention strategies are crafted to seek a unitary goal that does not vary from case to case or victim to victim."[75]

State legislatures also passed laws beginning in the 1970s providing for the availability of civil protection orders, which prohibited, at least on paper, a batterer from making further contact with the victim.[76] "By the mid-1990s, every state had enacted a civil protection order statute, including provisions for obtaining an emergency ex parte order."[77] Orders of protection provide a remedy to victims

67. Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1670 (2004).

68. Kohn, *supra* note 56, at 235.

69. *See, e.g.*, Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 271–72 (1985) (articulating sweeping legislative changes to address the ongoing problem of domestic violence).

70. Goodman & Epstein, *supra* note 53, at 481.

71. *Id.*

72. *See* Zeoli et al., *supra* note 18, at 2811.

73. *See id.; see also* Zeoli et al., *supra* note 26, at 130.

74. For a comprehensive discussion about the debate that has ensued about the utility of the criminal justice response, see *infra* Part IV.

75. Kohn, *supra* note 56, at 235.

76. Pennsylvania was the first state to allow victims to obtain a civil protection order in 1977. *See* BUZAWA & BUZAWA, *supra* note 60, at 109.

77. Sack, *supra* note 67, at 1667.

of domestic violence by requiring batterers to stay away from victims in very specific ways like "prohibiting abusers from continuing to assault, threaten, harass, or physically abuse victims; requiring that they stay away from victims' homes, places of employment, children's schools, and other places frequented by the victim; [and] precluding batterers from contacting their victims . . . ."[78] Advocates and scholars argued for their widespread availability. In 1983, for example, Stephen Cook wrote that "[m]any states have responded to the domestic violence crisis by enacting domestic abuse legislation which provides for a temporary restraining order, or protective order."[79]

Violations of any of the provisions outlined in the victim protective order are considered criminal contempt in most states.[80] Despite the conceptual and practical benefits of victim protection orders, and their extremely widespread utilization by victims,[81] they offer only limited protection from abuse and their utility has been subject to much criticism: victims do not utilize them, batterers are often not served with the orders, they are frequently violated, courts sometimes provide for mutual orders of protection where both parties are ordered to stay away from one another, the orders are frequently not enforced by law enforcement, nor do victims have a right to have them enforced, and perpetrators are not punished for violations.[82] Problems abound with service of process and research shows that about one-fourth of all protection orders are violated by the batterer;[83] it is not uncommon for these violations to go unnoticed or unpunished and victims therefore are left without remedies.[84] Rosenfeld describes the

78. Goodmark, *supra* note 44, at 10.

79. Cook, *supra* note 55, at 271. States also addressed other facets of interpersonal violence through legislation:

> Among the more significant advances in criminal law relating to domestic violence are (1) the adoption of antistalking laws in 50 states where there were none in 1989; (2) repeal or limitation of states' spousal exemption laws in rape cases; and (3) passage of new domestic violence battery laws that provide unique penalties in family-related assault and battery cases.

MILLER, *supra* note 58, at 4.

80. Sack, *supra* note 67, at 1667 (stating that as of 2002, thirty-eight states and the District of Columbia had enacted laws making violation of a civil order criminal contempt).

81. MAUREEN SHEERAN & EMILIE MEYER, NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES: FAMILY VIOLENCE DEP'T, CIVIL PROTECTION ORDERS: A GUIDE FOR IMPROVING PRACTICE 2 (2010), *available at* http://www.ncjfcj.org/sites/default/files/cpo_guide_0.pdf ("Today, civil protection orders are the predominant legal remedy victims use to extricate themselves from the violence.").

82. *See* discussion on the problems with enforcement of orders of protection, *infra* Part IV.A.2; *see also* Diane L. Rosenfeld, *Correlative Rights and the Boundaries of Freedom: Protecting the Civil Rights of Endangered Women*, 43 HARV. C.R.–C.L. L. REV. 257, 257–58 (2008) (lamenting the weakening of rights protecting victims of domestic violence, explaining the limitations inherent in orders of protection, and advocating for new solutions).

83. Rosenfeld, *supra* note 82, at 258.

84. *Id.*

widespread belief that, "[o]rders of protection provide limited and unreliable protection from further abuse of the victim by the offender."[85]

When a victim does report a violation of an order of protection and law enforcement refuses to take action, the results can be tragic. Such a scenario played out for Jessica Gonzales, a mother of three children with an order of protection in place that prohibited her abusive husband from making unscheduled visits.[86] "While the Gonzales children played outside in their front yard on June 22, Simon made an unscheduled visit and took possession of the three girls in violation of the protective order."[87] Despite repeated phone calls to law enforcement by Ms. Gonzales that her husband took the children in violation of the order, the police refused to respond.[88] Later that evening, "after ten hours, five phone calls and a police report at the station requesting enforcement of the validly obtained protective order, Simon Gonzales came to the police station on his own accord and opened fire."[89] Later, "the murdered bodies of ten-year old Rebecca, eight-year old Katheryn and seven-year old Leslie Gonzales were found inside the cab of their father's bullet-ridden truck."[90]

The *Castle Rock* case exemplifies the problematic nature of under-enforcement. According to Cheryl Hanna, "[i]t can be incredibly difficult to get the criminal law to respond—even when a victim is clear and consistent about what she wants."[91] After *Castle Rock*, those difficulties are even more profound. Further,

> [c]ritics claim this ruling significantly undercuts the strength and value of protective orders, as it allows police officers to enforce the orders—or not—at their own discretion, it leaves victims of IPV with little legal recourse when they are not enforced, it perpetuates and condones law enforcement's indifference to IPV calls, and it conveys to both abusive individuals and their victims that IPV will be tolerated by society.[92]

Although the passage of legislation reflects an increasing awareness of, and responsiveness to, the problem of domestic violence, limitations remain.

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85. *Id.*
86. Castle Rock v. Gonzales, 545 U.S. 748, 751 (2005).
87. Fenton, *supra* note 61, at 379.
88. *Id.*
89. *Id.* at 380.
90. *Id.*
91. Hanna, *supra* note 19, at 92, 94 (critiquing arguments made by legal scholar Jeannie Suk, who suggests that states are intervening too heavily into the private lives and relationships of individuals in ways like mandatorily issuing criminal orders of protection).
92. Hafemeister, *supra* note 16, at 991.

B. Federal Legislation: The Violence Against Women Act

Congress passed the Violence Against Women Act (VAWA) in 1994,[93] and subsequently reauthorized the Act in 2005,[94] which created an array of protections and policies on domestic violence. "The Violence Against Women Act of 1994 . . . was the nation's first attempt at a wide-ranging federal response to the devastation caused by rape, domestic violence, and other forms of violence against women."[95] VAWA was a culmination of four years of Congressional consideration of the epidemic of domestic violence.[96] Extracted from the data and statistics studied by Congress was the fact that as the rate of crimes dropped, gender-based crimes like rape and domestic violence rose at alarming rates.[97]

VAWA requires that states enforce out-of-state orders of protection, and creates special immigration policies for victims.[98] In addition, VAWA "advocates mandatory arrest and pro-prosecution policies, training for court personnel and judges, better record keeping of statistics, and an increased commitment to victims' services and rehabilitation."[99] It also provides special discrimination and early lease termination protections for victims who reside in subsidized housing, as discussed more fully in Part IV.[100]

Scholars tend to agree that "[t]he most significant and most controversial aspect of VAWA was the civil rights provision, which declared for the first time that gender-motivated violent crime is a violation of the victim's federal civil rights."[101] The provision allowed for a civil cause of action to be initiated against anyone, regardless

93. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified at scattered sections of 42 U.S.C.), *42 U.S.C. § 3981 declared unconstitutional by* United States v. Morrison, 529 U.S. 598 (2000).

94. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006) (codified as amended in scattered sections of 42 U.S.C.).

95. Goldfarb, *supra* note 49, at 64. Importantly, the civil rights provision of VAWA made clear that gender-motivated violence goes far beyond just an individual assault. *Id.* at 73 ("[I]t is part of a social pattern of discrimination by members of one group against members of another.").

96. *Id.* at 66.

97. *Id.*

98. *Id.* at 64. There are three general ways that VAWA helps undocumented victims of domestic violence: VAWA Self Petition, Cancellation of Removal, and Battered Spouse Waiver. *See* 8 U.S.C. § 1154(a)(1)(A)(iii)(I)(bb) (2006); 8 U.S.C. § 1229b(b)(2) (2006); 8 U.S.C. § 1186c(4)(C) (2006).

99. Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1516 (1998).

100. *See infra* Part IV.A.1.

101. Goldfarb, *supra* note 49, at 64–65.

of whether they were acting under state law, for crimes that were motivated by gender.[102] Indeed, the controversy was ultimately addressed by the Supreme Court in 2000 when it declared the provision unconstitutional, effectively stripping victims of violence of one of their few existing federal protections.[103] The federal VAWA civil rights protection read:

> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.[104]

In *United States v. Morrison*, the Court refused to find a basis for a victim's private cause of action against her attacker in the commerce clause.[105] "Without access to a federal cause of action, many women now lack an effective legal remedy for acts of violence motivated by gender."[106] Writing the Court's opinion, Justice Rehnquist conceded that, assuming the facts to be true in the instant case, "no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison."[107] Despite this concession, however, he was unwilling to extend that remedy federally. He continued, "under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States."[108] Ultimately,

> The civil rights remedy of the Violence Against Women Act was one in a long line of federal legislative measures that the Rehnquist Court has invalidated, in whole or in part, on federalism grounds during the past decade. *Morrison* thus provides fertile ground for an examination of the Court's current mode of federalism analysis.[109]

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102. *Id.* at 65.
103. United States v. Morrison, 529 U.S. 598, 627 (2000).
104. 42 U.S.C. § 13981(c) (2006).
105. *Morrison*, 529 U.S at 617–19.
106. Goldfarb, *supra* note 49, at 94 (explaining how at the time Morrison was decided, "[s]tate and local civil rights remedies for gender-discriminatory violence [were] nonexistent in most jurisdictions; where they [did] exist, they [were] inconsistent and often inadequate").
107. *Morrison*, 529 U.S. at 627.
108. *Id.*
109. Goldfarb, *supra* note 49, at 62.

Many states responded after the Morrison decision by passing their own mini-VAWA statutes, extending a state-based, private cause of action to survivors of domestic violence.[110]

While VAWA is critical in that it extends a myriad of protections to victims of domestic violence and brings this issue to the forefront of the national agenda, inherent limitations permeate the legislation, as evidenced by the ruling in *Morrison*. It also does not go far enough.

C. The Response of Legal Education

Finally, it is worth noting that the legal profession has, over the past twenty years, been increasingly responsive in its efforts to address domestic violence, particularly in the context of law schools. The American Bar Association (ABA), as evidence of its commitment to this issue, created a section on domestic violence;[111] its priorities include increased attention to how law schools are—or are not, as the case may be—addressing domestic violence in the classroom.[112] Through the initiative *Educating to End Domestic Violence*, the ABA encouraged law schools to address domestic violence in core curricular offerings (e.g., in property and torts courses) in addition to offering specific courses and clinics devoted to the topic.[113] Professor Schneider explains that "legal education plays a crucial role in shaping the attitudes of future lawyers and judges who will be handling these cases, and in directing the future of feminist lawmaking."[114] In my own seminar on domestic violence, I emphasize the importance of law students gaining at least a cursory understanding of the problem, in order that they best serve the interests of their clients. Today, numerous law schools have taken up the issue of domestic violence in their curricula, either by the creation of special domestic violence course or clinics, or by including relevant materials in other core courses.[115]

Yet, despite such efforts, Professor Schneider remains critical of the lack of formal education and training about domestic violence that is provided to lawyers: "Lawyers who do not know about the complexity of intimate violence, or who bring to the process of

110. *See, e.g.*, Hafemeister, *supra* note 16, at 994 (highlighting another example of how state laws have changed since *Morrison* to benefit survivors of domestic violence).
111. *See* AM. BAR. ASS'N COMM'N ON DOMESTIC VIOLENCE, *supra* note 8, at I-9.
112. *Id.* at I-8.
113. *Id.* at I-15.
114. SCHNEIDER, *supra* note 40, at 229.
115. *Id.* at 223, 225.

representation biases and misconceptions concerning battered women, are not going to be able to listen. They will dismiss the woman's story as trivial or see the woman as 'difficult.'"[116] She also notes that it is critically important that our nation's judges understand many of the "myths and misconceptions" that surround the experiences of victims of domestic violence.[117] A legal profession, and particularly its judiciary, that is informed on these dynamics will serve victims and society well in addressing this problem.[118]

III. DIVERGING OPINIONS ON THE EFFECTIVENESS AND DYNAMICS OF THE CRIMINAL LAW RESPONSE TO DOMESTIC VIOLENCE

Legal scholars, researchers, lawyers, and activists disagree about the desirability of using criminal law as a tool to address the problem of domestic violence. Historically, many feminists were skeptical about engaging with the state for a variety of reasons.[119] A legal system that previously refused to take victims seriously could hardly be trusted to suddenly advocate for them. On the other hand, however, some argued for strong state intervention to create legitimacy around the problem of domestic violence.[120] The debate about the effectiveness and utility of criminal domestic violence laws results largely in a dichotomy of opinions: some in favor of and others in opposition to mandatory criminal laws and policies like mandatory arrest and aggressive prosecution.[121]

Today, the debate rages on, with strong, often divergent, opinions about the role of criminal law in addressing domestic violence.

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116. *Id.* at 229.

117. *Id.*

118. *See, e.g.*, *id.* at 211 ("The critical work of feminist lawmaking on domestic violence can be accomplished only if there are lawyers who are sensitive to these issues of gender and violence, lawyers who are committed to representing battered women and understanding the problems of domestic violence, and lawyers who are not so personally involved with or conflicted about violence that they are hindered from effective representation.").

119. *Id.* at 182–84 (providing a comprehensive overview of the breadth of feminists who were reluctant to engage with the state surrounding issues of violence against women).

> Many in this movement were skeptical of an affirmative role for the state; they saw the state as maintaining, enforcing, and legitimizing male violence against women, not remedying it; they rejected the idea that battered women activists ought to trust the state, expect much from the state, or engage with the state in any way.

Id. at 182.

120. SCHNEIDER, *supra* note 40, at 186.

121. Although the focus of this paper is on criminal laws like mandatory arrest, these laws can easily be addressed alongside aggressive/no-drop prosecution because of the tendency to compare them in the literature; many of the arguments criticizing and supporting them are similar. *See* Hafemeister, *supra* note 16, at 984 ("Mandatory-arrest laws and no-drop prosecution policies are supported by similar arguments.").

On one end of the spectrum, legal scholar Linda Mills criticizes the criminal approach, rejecting it as an adequate or desirable solution to reduce violence against women.[122] Mills is well known for her critique of the use of mandatory arrest and no-drop prosecution policies to combat the problem.[123] She does not view domestic violence as something that can be effectively solved with punishment; instead, she sees it as a problem of psychological dimensions that exists between the victim and perpetrator, both of whom bear a share of responsibility.[124] Mills acknowledges, as others have, that "[a]s the studies so strongly suggest, the criminal justice system has not found a way to adequately address the problem of intimate abuse."[125] Although she shares the goal of reducing all intimate partner violence, her work departs from others in suggesting that both parties bear responsibility for abuse, and rejects the use of the labels "victim" and "batterer."[126] She instead advocates for a removal of domestic violence from the criminal justice realm.[127] In her view, domestic violence is best addressed with a version of restorative justice, something she refers to as the Intimate Abuse Circle.[128]

Other scholars also take issue with the criminal justice approach, but, unlike Mills, are inclined to continue to primarily address domestic violence in the criminal realm.[129] Their critique concerns the way in which the criminal justice system has used mandatory arrest and aggressive prosecution policies, arguing that they ignore the opinions of victims, and deny them agency and autonomy.[130] "[A]s police and prosecutors escalate their response to domestic violence cases, survivors increasingly confront a criminal justice system that can perpetuate the kinds of power and control dynamics that exist in the battering relationship itself."[131] Prosecutors, in many situations, drown out victims' voices by taking charge of the case and taking over as the sole decision-maker.[132] Critics maintain that these

122. MILLS, *supra* note 17, at 32. *But see* Sack, *supra* note 67, at 1716 (critiquing Linda Mills's approach to domestic violence. According to Sack, Mills "lambasts the criminal justice system and the feminists who support its use in domestic violence for disempowering victims" and has replaced the criminal approach with one that similarly exclusively relies on mental health professionals to address the problem.). In Sack's view, Mills simply replaces one ineffective structural mechanism with another. *Id.*

123. *See, e.g.*, Coker, *supra* note 14, at 1331.

124. MILLS, *supra* note 17, at 137.

125. *Id.*

126. *Id.* at 87, 138.

127. *Id.* at 134, 140.

128. *Id.* at 137–38.

129. *See, e.g.*, Epstein, *supra* note 50, at 4–5.

130. *Id.* at 17.

131. *Id.*

132. *Id.*

laws "disempower victims of IPV by taking away their ability to decide whether the batterer should be removed or punished, which implies that victims are too weak, helpless, or incapable to make these decisions themselves."[133] Legal scholar Elizabeth Schneider explains, "[i]t is widely recognized that mandatory arrest and no-drop rules are, at best, imperfect solutions to domestic violence because of the extreme risk to women's autonomy."[134] Schneider identifies four major criticisms in the criminal justice response.[135] She argues that this response essentializes women's experiences, presuming to know what all women need in a somewhat paternalistic manner; it puts victims in a position of re-victimization and coercion by the state, beyond what was done at the hands of their batterer; it raises the potential for retaliation by the perpetrator; and it disempowers women by destroying their autonomy.[136]

Others strongly advocate for the existence and continued proliferation of mandatory criminal laws and policies.[137] Professor Hafemeister explains how "[p]roponents argue that such policies are necessary for public safety, for protecting the victims, and for preventing the batterer from pressuring the victim to drop the complaint."[138] Despite the controversy that surrounds mandatory arrest laws, those in favor of such laws argue that they require law enforcement to take the issue seriously and diminish the possibility of it being dismissed as unimportant or trivial.[139] On the other side of this debate, "[p]roponents contend that society should more routinely and directly intervene in cases of IPV by utilizing the mechanisms of mandatory reporting, investigation, arrest, prosecution, and sentencing—even over objections from victims who assert that they neither want nor need assistance."[140]

There are also scholars who take a more middle ground approach. Professor Emily Sack identifies the limitations of mandatory policies, but is also persuaded by their utility.[141] "[D]o proponents of this discretionary structure really believe that without mandatory policies in place, the criminal justice system would make the 'right' choices and adhere to victims' desires to treat domestic violence seriously

133. Hafemeister, *supra* note 16, at 980; *see* Kohn, *supra* note 56, at 211 (explaining how victims opposing the prosecution of their batterer are silenced by the policies and procedures of aggressive prosecution).

134. SCHNEIDER, *supra* note 40, at 185.

135. *Id.* at 186.

136. *Id.*

137. *See id.* at 185–86 (identifying four major strands of arguments in favor of mandatory prosecution).

138. Hafemeister, *supra* note 16, at 984.

139. *Id.* at 979.

140. *Id.* at 940.

141. Sack, *supra* note 67, at 1687.

(when they wanted them to)?"[142] Sack rejects an outright abandonment of mandatory policies.[143] Instead, she argues that implementation problems should be dealt with by examining the problematic components of these laws and policies.[144] While physical violence perpetrated against a person requires legal intervention:

> [T]he legal system's definition of domestic violence and the totality of battered women's experiences of domestic violence bear little resemblance to one another. While many abused women are victims of physical violence, the daily reality of their abuse is so much more than physical violence, a reality not reflected in the narrow range of behaviors that the legal system can reach.[145]

To add to the complexity and confusion, the social science research on the effectiveness of mandatory arrest policies is inconclusive.[146] "Studies now show that mandatory arrest has, at best, a mixed impact on reducing intimate partner violence."[147] There are many explanations for the lack of consensus about whether these laws make a difference in reducing violence.[148] Indeed, much of the conversation about domestic violence and the criminal law response has focused on whether mandatory arrest laws and aggressive prosecution strategies are actually effective or desirable as a matter of policy. This focus has proved distracting from a central issue at the core of the debate: for many victims, the criminal response is not adequate to address their complex web of needs.

IV. TRANSCENDING THE CRIMINAL LAW'S "ONE SIZE FITS ALL" RESPONSE TO DOMESTIC VIOLENCE

The criminalization of domestic violence is both revered and criticized by scholars, lawyers, advocates and others, and the debate has been well documented.[149] "Continuing controversy remains

142. *Id.* at 1690.
143. *Id.* at 1694.
144. *Id.* at 1697.
145. Goodmark, *supra* note 44, at 28–29.
146. Goodman & Epstein, *supra* note 53, at 482.
147. *Id.*; *see* SCHNEIDER, *supra* note 40, at 185–86 (exploring some of the major arguments in favor of and against mandatory arrest policies).
148. In an earlier project, I explored the lack of consistency among researchers in their classifications of mandatory arrest laws. Zeoli et al., *supra* note 26, at 148–49 (suggesting that researchers who analyze effectiveness of mandatory arrest laws arrive at inconsistent results because of errors in classification of the statutes).
149. *See* discussion *supra* Part III.

concerning the appropriate response of society in general, and the criminal justice system in particular, to domestic violence."[150] The legal system has historically focused on addressing only the obvious, physical manifestations of abuse by arresting batterers who commit acts of physical violence against their victims or by protecting victims who have experienced physical violence vis-à-vis the issuance of orders of protection. The dichotomous assessment of the criminal law often leaves out two very relevant dimensions of domestic violence related to who is actually affected by the laws.

First, many victims of domestic violence never even interact with the law. This is a massively under-reported crime. And, if domestic abuse does not rise to the level of physical violence, there may be no mechanism by which the law could intervene. Donna Coker explains that "[t]he current orthodoxy relies too heavily on crime control interventions despite the fact that many battered women have no contact with the criminal justice system."[151] Existing interventions, then, often do not have a chance of being effective.

Second, even among those victims who do engage with the legal system, they rarely get all of their needs met by the criminal law response and are often left facing difficult barriers that impede their ability to leave the abuser or move on with their lives. Goodmark reminds us that "[w]hile many abused women are victims of physical violence, the daily reality of their abuse is so much more than physical violence, a reality not reflected in the narrow range of behaviors that the legal system can reach."[152] Even beyond this dichotomy, many become frustrated when they expect that all victims will respond similarly and this does not occur. The experiences of victims of interpersonal violence could not be more varied. "[M]any system actors who expect or even hope for all victims to have the same level of unambiguous commitment to intervention by the justice system are repeatedly disappointed by the population they seek to protect."[153]

Yet, until recently, most legislation that addresses domestic violence has ignored the realities of victims, focused primarily on the

150. BUZAWA & BUZAWA, *supra* note 60, at 3.

151. Coker, *supra* note 14, at 1348 (agreeing with Linda Mills's assessment about the over-reliance on criminal law generally for addressing domestic violence, but suggesting that Mills goes too far by focusing only on the psychological dimensions; her "reform proposal ultimately falls short in addressing the reality of women's lives").

152. Goodmark, *supra* note 44, at 29 (explaining how the legal system is often not a useful resource for victims of domestic violence for whom physical abuse is not the primary way in which they are harmed because of its narrow definition of domestic violence).

153. Kohn, *supra* note 56, at 193.

criminal law, and ultimately furthered a "one size fits all" approach to the problem.[154] To this point, criminal justice Professor Eve Buzawa and attorney Carl Buzawa describe four categories into which state laws surrounding domestic violence typically fall: "(a) the police response to domestic violence, (b) the handling of cases by prosecutors and the judiciary, (c) the increased availability and enforcement of civil restraining orders, and (d) the development of efforts to educate the public and victims about the problem, as well as its prevention and possible solutions."[155] These four categories illustrate the limitations surrounding the existing statutory provisions. Although each category is different, revealing that some legislation exists outside the criminal realm with its focus, for example, on public education, there remains a problematic "one size fits all" thread that omits laws that reflect the varying needs of victims. While mandatory arrest and aggressive prosecution are likely an important part of the solution, it is not realistic to envision that one legal strategy will singularly respond to a particular victim's needs. In fact, interventions that work in one situation often have opposite, harmful effects in another.[156] These four categories are useful in illuminating the paucity of laws that are both responsive to victims' needs and exist outside the criminal sphere.

The importance of laws that address both the nonuniformity of violence and the unique needs of victims is highlighted by legal scholar Thomas Hafemeister, who explains that society's "response can be counterproductive if it fails to adequately distinguish among various types of IPV or does not provide sufficient latitude, flexibility, and nuance for responding to the different needs, desires, and circumstances of the victims."[157] In his view, it is important not only to be responsive to the variance among victims' needs, but also to the fact that IPV can manifest in very different ways.[158] An exclusive criminal approach "without also empowering the victim, can diminish the victim's feelings of self-worth and increase the victim's isolation, dependence, and vulnerability."[159] All of these negative effects can lead to future victimization.

These glaring limitations, however, present rich opportunities for legislative innovations to help victims of domestic violence that fall outside the scope of arrest and prosecution and that complement,

154. *Id.* at 211.
155. BUZAWA & BUZAWA, *supra* note 60, at 109.
156. Goodman & Epstein, *supra* note 53, at 481.
157. Hafemeister, *supra* note 16, at 1000.
158. *Id.*
159. *Id.*

rather than replace, the criminal law.[160] Indeed, the law can be an effective tool in meeting the needs of victims in ways that transcend the boundaries of mandatory police intervention and aggressive courtroom prosecution. Although not widely accepted, "a small body of research has emerged indicating that responding flexibly to victims' needs and providing them with advocacy and broad social support could be a more successful strategy for eliminating domestic violence."[161] Many scholars tend to agree that a focus on the needs of victims is critical, especially in the context of increased attention to intersectionality.[162] Professor Schneider explains, "[i]f feminists are to engage with the state, it must be to ensure that the interrelationships among violence and gender, work and violence, economic resources, homelessness, and the material constraints of gender are central to both theory and practice in domestic violence legal reform efforts."[163]

Although on a practical level it makes sense to collectively define the experience of all victims under the label of domestic violence, this broad categorization sometimes serves to presuppose that all victims live a common, shared experience when in fact there are very real, very relevant differences. Instead, "[d]omestic violence advocacy should fully engage particularity by accounting for difference[s] between individual victims."[164] Responding otherwise can, unfortunately, essentialize the experience of victims and further inhibit the accessibility of and effective provision of services.[165] Violence cuts

160. For a comprehensive discussion of the limitations inherent in the current legal mechanisms for protecting victims of domestic violence, see Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 FAM. L.Q. 353, 357, 358 (2008). "There are major problems with the two primary legal vehicles for protection that have been developed—civil protective orders and criminal sanctions—both of which are problematic, unsatisfactory, and limited." *Id.*

161. Goodman & Epstein, *supra* note 53, at 480.

162. *See, e.g.*, Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 44, 47 (2009) ("The experience with mandatory policies should serve as a cautionary tale, though, prompting advocates and policy makers to think carefully before enacting laws and policies that bind all women who have been battered, notwithstanding those women's own goals, beliefs, choices, and situations.").

163. SCHNEIDER, *supra* note 40, at 198.

164. Camille Carey, *Correcting Myopia in Domestic Violence Advocacy: Moving Forward in Lawyer and Law School Clinics*, 21 COLUM. J. GENDER & L. 220, 250 (2011) (explaining how each victim brings unique experiences and is an individual: "One victim may be, for example, a woman, an immigrant, an undocumented person, low-income, Chinese, a Christian, and monolingual. These realms of experience will affect her experience of abuse and her needs.").

165. Conference, *supra* note 22, at 60–61 (quoting Jenny Rivera). Rivera explains that:

> [C]urrent legal remedies and institutional services do not fully respond to the needs of all women. In particular, women who are otherwise marginalized

across lines of class, race, ethnicity, education and more. To assume that experiences and needs are similar regardless of one's standpoint is problematic.

To counter the assumption that all victims experience the same dynamics and have identical needs, some scholars have begun to pay attention to the divergent needs of victims of domestic abuse.[166] I am certainly not the first scholar to consider alternative or complementary approaches.[167] "Responses to domestic violence will always depend on a range of strategies, including the criminal justice system."[168] Donna Coker is well known for her innovative strategy, the "material resources" test, which she suggests should be applied to any initiative

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> within society remain on the outside with respect to these services and remedies. As members of outsider communities, women of color, immigrant women, disabled women, and poor women continue to face tremendous obstacles accessing services and particularly legal strategies.

Id.; *see also* Hand & Koelsch, *supra* note 33, at 186.

166. Legal scholar Jenny Rivera focuses specifically on the needs of Latina women survivors of domestic violence: "Unless anti-intimate partner violence strategies respond to economic and social inequalities, any strategy will perpetuate and exacerbate those inequalities." Conference, *supra* note 22, at 62 (quoting Jenny Rivera). Rivera identifies numerous challenges that Latina women face specifically, in their access to domestic violence services. Examples include: language barriers with a lack of bilingual service providers, and preferences to seek services from other Latinas. *Id.* at 62–63 (quoting Jenny Rivera). Professors Goodman and Epstein similarly point to the unique needs of women whose cultural or ethnic backgrounds predispose them to rejecting help from law enforcement in the first place. Goodman & Epstein, *supra* note 53, at 483–84.

167. *See, e.g.*, Kohn, *supra* note 56, at 191. Kohn articulates that "we find ourselves at a key moment in time to reassess our systemic response to domestic violence. In developing those responses, system actors and judges must recognize the value of victim participation and recalibrate their policies and decision-making protocols to encourage and incorporate victim perspectives." *Id.* at 244. Although I agree with Kohn's conclusion about the necessity of new responses to domestic violence, we differ markedly in our approach. *See also* Goodmark, *supra* note 44, at 40–45. Goodmark's approach looks outside of the law to address the shortcomings of the legal system. *Id.* at 44–45. She also argues that it does not follow that just because the legal system is the primary resource for dealing with domestic violence that victims, especially those in immigrant and other outside communities, will automatically access its array of options. *Id.* at 36. "[T]here are a number of promising initiatives for addressing domestic violence that bypass the legal system altogether, focusing on prevention rather than reacting to violence that has already occurred, the legal system's typical posture." *Id.* at 41. *See also* Carey, *supra* note 164, at 221–22 (suggesting a shift away from the traditional ways in which lawyers (and law school legal clinics) have addressed this issue and embracing a more holistic approach). "Domestic violence practitioners should move away from overly-specialized family law practices, and individual assistance should include advocacy on behalf of victims in a breadth of cases, including but not limited to public benefits, immigration, housing, mortgage foreclosure, tort, and financial matters." *Id.* at 221.

168. Deborah M. Weissman, *Domestic Violence and the Postindustrial Household*, *in* VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS 121, 125 (Evan Stark & Eve Buzawa eds., 2009) ("A paradigm shift from the criminal justice system—which relocates domestic violence from a single site of human interaction—to the multiple realms of political economy would offer a number of promising analytical possibilities.").

connected to domestic violence, including "anti-domestic violence law, policy, funding priority, [and] administrative rule."[169] This test inquires, "[w]hat is the impact, what is the effect of this law, policy, regulation, et cetera, on the material resources of the women who are likely to come in contact with this law, policy, regulation, et cetera?"[170] In her view, if there are no measurable goals for battered women inherent in a particular law, it should be treated with suspicion. "[L]aw that diminishes battered women's material resources should be eliminated."[171] Deborah Epstein calls for improvement in the existing system by directing reform efforts at three parts of the justice system: in police and prosecutors' response, in judicial system information sharing, and in judges' attitudes toward victims of domestic violence.[172] Emily Sack explains how strategies can be created to further the existing successes of the movement.[173] Such development recognizes that the criminal procedures and policies "can be maintained and improved, while broadening our response to involve diverse community organizations and members, to listen to the concerns of battered women, and to include and strengthen services that we know are critical to assisting domestic violence victims in the long term."[174]

Other scholars have recognized the need for innovation, particularly in light of recent cases whose holdings restrict the rights of victims.[175] Citing the Supreme Court's opinions in *Morrison* and *Castle Rock*, effectively striking down the right to be free from gender-motivated violence and the right to compel enforcement of an order of protection from domestic violence, one scholar acknowledges that "[t]he probability that these decisions will be reversed in the near future is low. If we wish to right the current imbalance, we need to look for new approaches."[176]

Law professor Camille Cary, in advocating for a shift toward a more holistic law practice surrounding domestic violence, concedes that "[t]here is a well-established and thoughtful debate about domestic violence priorities in the criminal context. Surprisingly there

169. Donna Coker, *Addressing Domestic Violence Through a Strategy of Economic Rights*, 24 WOMEN'S RTS. L. REP. 187, 189 (2003).
170. *Id.*
171. *Id.* at 190.
172. Epstein, *supra* note 50, at 13.
173. Sack, *supra* note 67, at 1740.
174. *Id.*
175. *See, e.g.*, Castle Rock v. Gonzales, 545 U.S. 965 (2005); United States v. Morrison, 529 U.S. 598, 627 (2000).
176. Rosenfeld, *supra* note 82, at 260.

is not a fully developed parallel body of scholarship about priorities in the civil context."[177]

New state laws and policies offer one such possibility. This void that permeates the civil realm offers a window of opportunity for meaningful change to be promulgated. "The tension that exists between the goals of battered women's advocates and the state will never be fully resolved. But, the choice, in practical terms, between state intervention and listening to victims may not be as stark as it once seemed."[178] Policy shapers and creators must listen to the victims and their advocates while creating a criminal justice response to create solutions that will ultimately be inclusive and effective.[179]

A. Recent Innovations in State Lawmaking & Policies that Are Responsive to Victims' Needs

Over the past few years, some states have passed increasingly innovative legislation that falls outside of the traditional criminal realm. This legislation represents a departure from the narrow conception of how to best address needs of victims. The innovations and related potential inherent in these new state laws are reminiscent of words expressed by Justice Brandeis in 1932, in his dissent in *New State Ice Co. v. Liebman*: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[180] Some states have, indeed, responded to the crisis of domestic violence by creating new, innovative legislative solutions. The success of these solutions in one state can provide inspiration and guidance to others.

My observation is that some of the most promising of these new laws fall into two broad categories: housing and orders of protection. Although disparate in terms of their content, both categories share the characteristic of responding directly to the needs of victims outside of the criminal realm. In the housing arena, laws have been passed that prohibit discrimination by landlords against victims of domestic violence, giving victims certain rights that move beyond the narrow criminal framework. The effectiveness of orders of protection is constantly questioned by lawyers, social scientists, advocates, and even victims; an array of new laws and policies that provide for electronic monitoring of batterers and improve service

177. Carey, *supra* note 164, at 240–41.
178. Sack, *supra* note 67, at 1738.
179. *See id.* at 1727.
180. New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932).

of process of protective orders are all attempts to fill the gaps inherent in these limitations.

By presenting a range of new options for victims, these steps suggest at least the tentative conclusion that state lawmakers have an increased understanding of the dynamics of domestic violence.[181] They also beg the creation of a fifth additional category, the Buzawa law classification scheme,[182] one that exists alongside the criminal law and reflects realities that are indicative of victims' needs more broadly.

1. State Housing Laws

Despite increased understanding of domestic violence among actors in the legal system and the broader community, individuals who are battered still face significant bias, stigma, and often very real discrimination based on their status as victims. One place in which this discrimination is felt strongly is in the area of housing.

One of the unique characteristics of domestic violence that differentiates it from other crimes is the existence of an intimate relationship between victim and perpetrator. Although not all abuse occurs between two cohabitating partners, the interconnectedness inherent in an intimate relationship contributes to an already complex web of issues that often prevent victims from leaving their abusers or moving on with their lives.[183] "Most people experience home as a safe haven and refuge from the outside world. This experience of home is shattered when a woman suffers domestic violence from an intimate partner and tries to end the relationship."[184]

Sharing a home, and a lease, can also add a level of practical complication that interferes with a victim's decision to leave the relationship, and fuels a perpetrator's ability to control her. Being stuck with legal obligations to fulfill the terms of a lease also can tie the victim to the batterer in a very real way. Without adequate financial resources, what may appear as a logistical housing complication can actually have the effect of serving as a very real, tangible, often insurmountable barrier to leaving an abusive relationship. "While battered women may have several reasons for ambivalence

181. Other scholars have similarly noted this trend, albeit in different, narrow, contexts. *See, e.g.*, Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 FLA. ST. U. L. REV. 669 (2008) (exploring a trend of state-based domestic violence legislation that focuses in an employment law context).

182. BUZAWA & BUZAWA, *supra* note 60, at 109.

183. For a comprehensive list of some of the reasons why victims stay with their abusers, see Buel, *supra* note 43.

184. Bergquist, *supra* note 48, at 46.

about leaving an abusive relationship, economic dependency is repeatedly cited as a primary reason for staying with their batterers."[185]

There is a strong correlation between homelessness and domestic violence. Research reflects this reality.[186] A survey conducted by the National Conference of Mayors revealed that twelve cities surveyed identified domestic violence as "a primary cause of homelessness."[187] Congress acknowledged the connection in its reauthorization of the Violence Against Women and Department of Justice Reauthorization Act of 2005.[188]

While victims of domestic violence often end up homeless as a consequence of the abuse, demonstrating one example of the far-reaching impact of this problem, it is also true that many homeless women are victims of domestic and sexual violence. As many as ninety-two percent of homeless women are the victims of sexual or domestic abuse at some point during their lifetime.[189]

Domestic violence has a significant effect on victims who live in poverty for a number of reasons. According to Donna Coker,"poor women are more vulnerable to repeat violence; yet, relatively few dollars are allocated for measures that would render them less vulnerable, such as transportation or education or job training."[190] The economics of domestic violence has been studied and measured by scholars Amy Farmer and Jill Tiefenthaler.[191] Their research reveals that income is correlated to levels of violence: "The comparative stati[stics] derived from the noncooperative model provide some clear predictions on the determinants of violence in an abusive relationship. An increase in the woman's income is predicted to decrease the amount of violence."[192]

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185. Sack, *supra* note 67, at 1734; *see also* Lapidus, *supra* note 47, at 389.

186. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, LOST HOUSING, LOST SAFETY: SURVIVORS OF DOMESTIC VIOLENCE EXPERIENCE HOUSING DENIALS AND EVICTIONS ACROSS THE COUNTRY 2 (2007), *available at* http://www.nlchp.org/content/pubs/NNEDV-NLCHP_Joint_Stories%20_February_20072.pdf ("Domestic violence is a leading cause of homelessness nationally.").

187. THE U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 64 (2005), *available at* http://www.usmayors.org/hungersurvey/2005/HH2005FINAL.pdf.

188. H.R. 3402, 109th Cong. § 41401 (2005) ("There is a strong link between domestic violence and homelessness . . . . Of all homeless women and children, 60 percent had been abused by age 12, and 63 percent have been victims of intimate partner violence as adults.").

189. *Id.*

190. Coker, *supra* note 169, at 188.

191. Amy Farmer & Jill Tiefenthaler, *An Economic Analysis of Domestic Violence*, 55 REV. SOC. ECON. 337, 337 (1997).

192. *Id.* at 352. "Increased opportunities outside the marriage made available through services provided by the government, charities, and family members and large divorce

Poverty also cuts across lines of race and ethnicity. Research on the impact of domestic violence on American Indian women, for example, suggests that while an increase in criminal prosecutions and jurisdiction resolutions may be useful, the crux of the problem lies more with extreme poverty and isolation.[193] Any reforms designed to address interpersonal violence must "defy any generic approaches to domestic violence" because of the "[j]urisdictional complexities and economic and social realities particular to Indian country."[194] The unique challenges faced by American Indian women, as well as by other minorities, require careful consideration of how to effectively craft the legal response.

Although emotional, financial, and legal ties frequently function to force a victim to share her home with the batterer or to face escape without a home at all, two additional factors complicate housing for victims of domestic violence: discrimination perpetuated against victims by landlords in various contexts, and the inability to break away from a housing arrangement because of the legal requirements imposed by a lease. "In addition to the harms battered women suffer at the hands of their abusers, victims of domestic violence also face discrimination from third parties[, like landlords and housing authorities,] as a result of the battering."[195] Many landlords refuse to rent property to victims of domestic violence in the first place: "The inability of victims of domestic violence to secure new housing is . . . a national problem."[196] It is not uncommon for a victim's name to appear, for example, in a criminal background check conducted by a landlord as a prerequisite to renting property.[197] These background checks often reveal the names of both parties to an action, and can include the victim's name.[198] In such contexts, it is not uncommon for landlords or those who run housing companies to deny rental applications from victims of domestic violence.[199] Additionally, some landlords refuse to rent to someone whose last known address is a domestic violence shelter.[200] In this way, many of the remedies

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settlements for women are also expected to decrease the level of violence in the household thereby improving the woman's marital utility." *Id.* at 353.

193. Sumayyah Waheed, *Domestic Violence on the Reservation: Imperfect Laws, Imperfect Solution*, 19 BERKELEY WOMEN'S L.J. 287, 294 (2004).

194. *Id.* at 296.

195. Lapidus, *supra* note 47, at 377–78.

196. Bergquist, *supra* note 48, at 46.

197. Lapidus, *supra* note 47, at 384–85.

198. *Id.*

199. *Id.*

200. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 186, at 9–11. Other reasons that motivate landlords to refuse to rent to domestic violence victims include when the police have been called to former residences, or learning from previous landlords that the prospective tenant was in an abusive relationship. *Id.* at 9.

available to victims actually have the unintended consequence of preventing them from moving on.

It is an unfortunate reality that many victims who try to leave abusive relationships end up returning to their abusers because they are unable to find housing.[201] Victims of domestic violence also face the risk of eviction. It is not an uncommon practice for landlords to evict victims when they learn of their involvement in a violent relationship.[202] "[A]t the very moment when the need for a safe, stable home is the greatest, a female victim of domestic violence is most likely to be evicted *and* unable to secure new housing because she is a victim."[203] This phenomenon illustrates the all too common experience of re-victimization by the state or other societal factors.

Many victims also find themselves legally entrapped in a violent relationship because of a shared lease, or a lease tying them to an unsafe place. Practically speaking, victims who face socioeconomic challenges may not be able to leave. The fear of legal and financial repercussions from a landlord who may enforce a lease agreement serves as an additional barrier for many victims to break away from the abuse and seek safety for themselves and, in some cases, their children.

Congress's reauthorization of the Violence Against Women Act in 2005 addressed the housing crisis facing victims of domestic violence in limited ways. The legislation included two new protections for individuals who live in government subsidized housing. VAWA addressed some of these needs by specifically forbidding discrimination against victims living in public housing,[204] and allowing for early lease termination upon proof of a domestic violence crime.[205] While these provisions are critical, they reach only a small number of battered individuals in very limited contexts. In 2012, recognizing some of these limitations, the proposed reauthorization of VAWA expands, in part, these protections for victims in the housing context by widening the applicability of these two provisions to rural, low-income housing tax credit programs and other federally supported housing initiatives.[206]

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201. H.R. 3402, 109th Cong. § 41401(7) (2005).

202. Lapidus, *supra* note 47, at 390. Lapidus explains further that "[e]victions of battered women also demonstrate the ways in which women's economic and other forms of dependency on their batterers exacerbate their vulnerability." *Id.* at 389.

203. Bergquist, *supra* note 48, at 46.

204. 42 U.S.C. § 1437d(c)(3) (2006); *id.* § 1437d(1)(5).

205. *Id.* § 1437d(1)(6).

206. S. 1925, 112th Cong. (2nd Sess. 2012).

Increasingly, some states have recognized that these protections allowing for lease termination for all tenants, not just for those living in government-subsidized housing, is reflective of good public policy and can be a useful tool in combating the problem of domestic violence within their borders. These states have enacted laws that appear to be inspired by and in fact mirror the terms of the federal VAWA provisions. Others have taken a varied approach by enacting *either* an anti-discrimination law *or* a lease termination provision.[207] In 2004, prior to federal recognition of the problem through VAWA, Colorado became the first state to pass a lease termination law; since then, an additional seventeen states (including the District of Columbia) have enacted landlord-tenant laws that provide a mechanism for victims of domestic violence to terminate a lease early, without penalty, upon a showing of violence.[208] Of the states with one or both of these housing laws, a majority passed legislation the same year as or in a subsequent year to the reauthorization of the VAWA in 2005, suggesting that attention was paid to what was happening federally.[209]

To date, a total of twenty-two states and the District of Columbia have passed some sort of housing-related law that is connected to domestic abuse.[210] Nine states and the District of Columbia have passed anti-discrimination in housing statutes, and seventeen states and the District of Columbia have passed lease termination laws; only four of these states (California, Delaware, North Carolina, and Washington) and the District of Columbia have in place a combination of the two kinds of statutes.[211] The states that have both kinds of provisions offer the most comprehensive protections for victims of domestic violence. The problem with states that have only lease termination statutes in place was highlighted by the State of Michigan in its analysis of a prospective lease termination bill—namely, the possibility of a backlash against victims: "The duty that the bill would impose on landlords could make them leery of renting to potential domestic violence, stalking, or sexual assault victims. If that happened, the bill actually could make it more difficult for victims to find safe, secure living arrangements."[212] Despite this acknowledgement,

207. *See infra* Table 1.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. MICH. SENATE FISCAL AGENCY, BILL ANALYSIS, S.B. 185, at 3 (2010), *available at* http://www.legislature.mi.gov/documents/2009-2010/billanalysis/Senate/pdf/2009-SFA-0185-E.pdf.

Michigan does not have an anti-discrimination statute in place for domestic violence in the housing context.

To be sure, one of the well-founded criticisms of these housing laws may be that they remain out of reach for a large number of victims. It is indeed questionable whether individuals who are unlikely to interact with the criminal justice system will have access to information about their legal rights under state law. Here, there could very well be a disconnect between legislative innovations and the people whom the laws are designed to protect. The relationships among lawmakers, domestic violence advocates, clergy, social workers, and others is therefore paramount in helping disseminate information and educating communities.

TABLE 1: STATE DOMESTIC VIOLENCE HOUSING LAWS

State	**Type***	**Statute Citation & Date Effective**
Arizona	LT	ARIZ. REV. STAT. ANN. § 33-1318 (2007)
Arkansas	AD	ARK. CODE ANN. § 18-16-112(b) (West 2007)
California	LT, AD	CAL. CIV. PROC. CODE § 1161.3 (West 2011); CAL. CIV. CODE § 1946.7 (West 2008)
Colorado	LT	COLO. REV. STAT. ANN. § 38-12-402 (West 2004)
Delaware	LT, AD	DEL. CODE ANN. tit. 25, § 5314 (West 2006); DEL. CODE ANN. tit. 25, § 5316 (West 2008)
D.C.	LT, AD	D.C. CODE § 42-3505.07 (2009); D.C. CODE § 2-1402.21 (2009); D.C. CODE § 42-3505.01 (2012)
Illinois	AD	735 ILL. COMP. STAT. ANN. 5/9-106.2 (West 2010)
Indiana	LT	IND. CODE ANN. § 32-31-9-12 (West 2007)
Louisiana	AD	LA. REV. STAT. ANN. § 40:506 (2004)
Maryland	LT	MD. CODE ANN., REAL PROP. § 8-5A-02 (West 2010)
Michigan	LT	MICH. COMP. LAWS ANN. § 554.601b (West 2010)
Minnesota	LT	MINN. STAT. ANN. § 504B.206 (West 2007)
New Hampshire	AD	N.H. REV. STAT. ANN. § 540:2 (VII) (2010)
New Jersey	LT	N.J. STAT. ANN. § 46:8-9.4 (West 2008)

State	Type*	Statute Citation & Date Effective
New York	LT	N.Y. REAL PROP. LAW § 227-c (McKinney 2007)
North Carolina	LT, AD	N.C. GEN. STAT. ANN. § 42-45.1 (West 2005); N.C. GEN. STAT. ANN. § 42-42.2 (West 2005)
North Dakota	LT	N.D. CENT. CODE ANN. § 47-16-17.1 (West 2009)
Oregon	LT	OR. REV. STAT. ANN. § 90.453 (West 2008)
Rhode Island	AD	R.I. GEN. LAWS ANN. § 34-37-2.4 (West 2002)
Texas	LT	TEX. PROP. CODE ANN. § 92.016 (West 2006)
Utah	LT	UTAH CODE ANN. § 57-22-5.1 (West 2005)
Washington	LT, AD	WASH. REV. CODE ANN. § 59.18.575 (West 2009); WASH. REV. CODE ANN. § 59.18.580 (West 2004)
Wisconsin	LT	WIS. STAT. ANN. § 704.16 (West 2008)

*AD=Anti-Discrimination, LT=Lease Termination. States with both statutes have LT listed first, followed by AD.

2. Addressing Victim Safety Through Improving the Effectiveness of Orders of Protection

Once someone has been harmed by an intimate partner, whether or not there has been intervention by the criminal justice system, that individual may receive judicial protection vis-à-vis an order of protection. These orders are in some ways a cornerstone of the movement to address domestic violence.[213] An order of protection is a "court order that imposes legally binding restrictions on an offender's future conduct" and is used in both civil and criminal contexts.[214] Although the specific way in which a victim of domestic violence comes to be protected by such an order may differ,[215] challenges with enforcement are basically the same and present very real threats to

213. See discussion *supra* Part II.A (covering contemporary response through protection orders).

214. Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1506, 1508 (2008).

215. In the civil context, a victim of domestic violence can approach the court for an order of protection in a proceeding that does not attach to a criminal charge or divorce. The criminal law, by contrast, empowers prosecutors to ask for and judges to impose orders of protection as a component of sentencing.

one's personal safety. While it is difficult to ascertain an exact figure, we know anecdotally and from the local and state statistics that are available that it is not an uncommon practice for orders of protection to never be served on batterers, a required step which is essential for their subsequent enforcement.[216] Even when service of process has occurred, a victim must notify law enforcement of a violation by the batterer, and law enforcement must, in turn, respond. Finally, and as a related matter, victims are sometimes unaware that an abuser is about to or has violated an order. Batterers frequently use this lack of knowledge as a way to further wield control over and perpetuate fear in their victims.

The story of Marie Moses Irons, a technology director at a public school, is illustrative.[217] Christopher Walter Howard Irons killed Marie, his estranged wife, on December 28, 2002.[218] He entered her home while she was sleeping next to her two-year-old son, and, using an ax, killed her.[219] Her twelve-year-old son was also present in the home at the time.[220] Marie had obtained an order of protection from the court just five days before she was killed.[221] This tragedy illustrates the limitations of protection orders, which often amount to little more than a piece of paper.[222] Whether Marie's knowledge of her estranged husband's whereabouts would have prevented this outcome is difficult to predict, but had she been alerted to his close proximity to her home, she might have had the opportunity to escape harm.

Despite the legal system's heavy reliance on orders of protection, it is widely recognized that they are an inadequate mechanism

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216. *See, e.g.*, Alan Feuer, *Case Revives Debate Over Protection Orders*, N.Y. TIMES, Feb. 26, 2010, http://www.nytimes.com/2010/02/27/nyregion/27orders.html?ref=nyregion.

217. L.L. Brasier & John Masson, *Estranged Wife Killed with Ax; Son Was at Her Side; Husband Stands Accused*, DETROIT FREE PRESS, Dec. 31, 2002, at B1, *available at* LEXIS.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. What happened to Marie Irons is but one in a litany of similar stories. *See, e.g.*, John Ingold, *Warning Signs Go for Naught in Domestic Homicides*, DENVER POST, June 27, 2004, at C-01, *available at* LEXIS. On May 14, 2004, Tina Esparza was shot to death by her husband as she walked to her car in a municipal parking garage, with her keys in her hand. *Id.* She was a mother of four and had filed complaints because of her husband's restraining order violations before her death. *Id. See also* Katelyn Tivnan, *Tragic End to Domestic Violence Case in Worcester, Mass.*, NEW ENG. CABLE NEWS (Feb. 7, 2012), http://www.necn.com/02/07/12/Tragic-end-to-domestic-violence-case-in-/landing_newengland.html?blockID=646996. Jose Soto, forty-year-old Belinda Torres's ex-boyfriend, shot Torres in the head twice after she came out of a grocery store. She died from her injuries. She had a restraining order against Soto. *Id.*

to keep victims safe.[223] Their frequent use, coupled with their inherent limitations, suggests that as a policy matter, attention ought to be focused on how to improve their effectiveness. Yet, for many years, this has not been the case. Recently, to this end, states have made efforts to address the disconnect, both through the creation of electronic monitoring provisions for batterers, and by increasing service of process on batterers.

a. Electronic Monitoring of Batterers

As the story of Marie Irons illustrates, it is often not enough for a victim to simply possess a valid order of protection. The order itself does not guarantee a victim's safety and may even bring with it a false sense of security. Some states have responded to the challenges inherent in orders of protection by passing legislation allowing for the use of Global Positioning System (GPS) technology to track batterers and, in many cases, warn victims of impending violations of their orders.[224] In the case of Ms. Irons, the outcome may have been markedly different had her estranged husband been required to wear a GPS tracking device that notified her of his presence within close proximity to her home.

It is, of course, hard to know with any degree of certainty whether the use of such technology accompanying Marie Irons's order of protection would have at least given her the opportunity to have sought the assistance of law enforcement or better protected herself from the final fatal abuse perpetrated against her by her abuser. But, as a practical matter, as Diane Rosenfeld explains, "[t]his technology offers a way to enforce the terms of an order of protection, holding both the offender and the state accountable for making the order offer the protection it claims to provide."[225] Regardless, electronic monitoring of batterers "has the potential to disrupt the cycle of domestic violence and give meaning to an order of protection."[226]

Today, a total of fourteen states have enacted provisions for using GPS or electronic monitoring of batterers against whom

223. *See, e.g.*, Schneider, *supra* note 160, at 357 (discussing the "intractable problems concerning protection of abused women" and identifying the "problematic, unsatisfactory and limited" nature of orders of protection in relation to victim safety).

224. See *infra* Table 2 for a list of states that have passed GPS legislation. For an example of model GPS legislation, see Rosenfeld, *supra* note 82, at 266.

225. Rosenfeld, *supra* note 82, at 261.

226. *Id.* at 262.

courts have issued victim protection orders, or in other contexts.[227] All of the statutes are permissive, not mandatory, giving the courts authority to require electronic monitoring under certain conditions and contexts.[228]

In the state of Connecticut, which implemented a pilot project to test the effectiveness of such electronic monitoring, the results were profound. Over a one-year period, expending only $140,000, the state monitored 119 high-risk batterers electronically.[229] None of these 119 batterers re-injured their victims during this period.[230] The state recently allocated additional funding to run the program for an additional year.[231] Moving forward, states should partner with social scientists, victim advocates, and others to continue to monitor and assess the effectiveness of these statutes.[232]

Further, when a victim is equipped with a substantial amount of certainty about the location of the person who abused her, it potentially enables her to stay in her home, "thus reversing the injustices in the current system."[233] This illustrates a situation in which multiple issues that victims of domestic violence face, like housing and physical safety, intersect.

These statutes, which reflect the development of new technology and its application to the criminal context, vary in how they allow courts to implement the electronic monitoring in conjunction with a protection order, either in the context of granting bail or after someone has been charged with a crime of domestic violence.[234] They also provide varying degrees of access to the information about a

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227. *See infra* Table 2.

228. *See, e.g.*, ARK. CODE ANN. § 9-15-217 (West 2009) (using the permissive language "may be ordered"); IND. CODE ANN. § 35-33-8-11 (West 2012) (using the permissive language "may require").

229. Josh Kovner, *Domestic-Violence Offenders to Be Tracked Again*, HARTFORD COURANT, June 13, 2012, http://articles.courant.com/2012-06-13/news/hc-domestic-violence-gps-0614-20120613_1_gps-device-alvin-notice-tiana-notice.

230. *Id.*

231. *Id.*

232. As an example, the State of Maine recently began to study electronic monitoring of domestic violence offenders. Over a two-year period, half of the homicides committed in that state involved intimate partners. Alex Barber, *LePage Matches $18,000 Donation to Study Electronic Monitoring of Domestic Violence Offenders*, BANGOR DAILY NEWS, July 13, 2012, *available at* 2012 WLNR 14713405. A measure introduced in the Maine legislature last session which would have imposed an electronic monitoring law failed to make it out of committee. *Id.*

233. Rosenfeld, *supra* note 82, at 263.

234. *Compare* ARK. CODE ANN. § 9-15-217 (West 2009) (ordering, permissively, an individual in violation of an ex parte order of protection to wear a GPS monitoring system), *with* IND. CODE ANN. § 35-33-8-11 (West 2012) (requiring, permissively, that as a condition of bail, an individual charged with domestic violence wear a GPS monitoring system).

batterer's whereabouts.[235] Oklahoma, for example, recently changed its law from simply allowing GPS tracking for the benefit of law enforcement personnel, to making the information about a batterer's whereabouts directly available to victims.[236] As a practical matter, many of the statutes do not provide much in the way of guidance on implementation to the courts.[237] The state of Washington enacted the first statute nineteen years ago in 1994, followed by a statute passed in 2002, in Utah. The remaining statutes have been passed in the last few years.

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235. *See, e.g.*, MICH. COMP. LAWS ANN. § 765.6b (West 2008) (allowing the victim to be notified via a GPS monitoring system that the defendant is located within a certain proximity); OKLA. STAT. tit. 22, § 60.17 (West 2008) (allowing the victim to monitor the defendant's location and to receive notice via computer or phone if the defendant is within a certain distance).

236. Oklahoma's law reads, in part,

> In conjunction with any protective order or restraining order authorized by this section, the court may order the defendant to use an active, real-time, twenty-four-hour Global Positioning System (GPS) monitoring device for such term as the court deems appropriate. Upon application of the victim, the court may authorize the victim to monitor the location of the defendant. Such monitoring by the victim shall be limited to the ability of the victim to make computer or cellular inquiries to determine if the defendant is within a specified distance of locations, excluding the residence or workplace of the defendant, or to receive a computer- or a cellular-generated signal if the defendant comes within a specified distance of the victim.

OKLA. STAT. tit. 22, § 60.17 (2008).

237. Indiana's electronic monitoring statute was recently passed by the legislature and made effective July 1, 2012. IND. CODE ANN. § 35-33-8-11 (West 2012). The law is exceedingly simple: "A court may require a person who has been charged with a crime of domestic violence . . . to wear a GPS tracking device as a condition of bail." *Id.* The statute also assigns the cost of the monitoring to the batterer but gives no guidance on who has access to the information about a batterer's whereabouts. *Id.* It is also unclear whether it is reserved for purposes of law enforcement monitoring or whether it extends to victims affected by the violence. *Id. But see* MICH. COMP. LAWS ANN. § 765.6b (West 2008). The State of Michigan has enacted comprehensive legislation on point. It provides for a variety of issues that might arise in the context of electronic monitoring. *Id.* If the court orders a defendant to wear an electronic monitoring device, the law provides that the victim may specifically have access to a device which alerts her to the presence of the batterer and also that she have telephone access to local law enforcement to enforce the order should a violation occur. *Id.* § 765b(6). In the event of a violation, the local authorities would also be notified. *Id.* Some states give general guidance to the courts about when ordering a defendant to wear such a device would be appropriate. In Michigan, however, the law is quite clear: "In determining whether to order a defendant to participate in global positioning system monitoring, the court shall consider the likelihood that the defendant's participation in global positioning system monitoring will deter the defendant from seeking to kill, physically injure, stalk, or otherwise threaten the victim prior to trial." *Id.* Michigan also specifically imposes the cost of the GPS device on the defendant, and provides that a victim shall not be subject to sanctions for refusing to participate in the monitoring program—a component of the law which gives deference to a victim's autonomy and agency. *Id.*

TABLE 2: STATE LAWS PROVIDING FOR ELECTRONIC MONITORING OF BATTERERS

State	**Statute Citation & Original Date Effective**
Arkansas	ARK. CODE ANN. § 9-15-217 (West 2009)
Illinois	730 ILL. COMP. STAT. ANN. 5/5-8A-7 (West 2009)
Indiana	IND. CODE ANN. § 35-33-8-11 (West 2012)
Kentucky	KY. REV. STAT. ANN. § 403.761 (LexisNexis 2010)
Louisiana	LA. REV. STAT. ANN. § 46:2143 (2003)
Maryland	MD. CODE ANN., CRIM. PROC. § 5-202 (West 2010)
Massachusetts	MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 2007)
Michigan	MICH. COMP. LAWS ANN. § 765.6b (West 2008)
Mississippi	MISS. CODE ANN. § 99-5-38 (West 2011)
North Dakota	N.D. CENT. CODE ANN. § 14-07.1-19 (West 2009)
Oklahoma	OKLA. STAT. ANN. tit. 22 § 60.17 (West 2008)
Tennessee	TENN. CODE ANN. § 40-11-150 (West 2011)
Utah	UTAH CODE ANN. § 77-36-5 (West 2002)
Washington	WASH. REV. CODE ANN. § 26.50.060 (West 1994)

b. Increased Service of Process

Court imposed orders of protection are not legally binding until they are served on the batterer.[238] Nationwide statistics on the number of protection orders that go unserved and thereby offer no legal protection to victims seeking help are unfortunately largely unavailable. Of the communities that do report such statistics, the percentages of protection orders actually served are small. In 2007, for example, the Seattle police stated forty percent of their protection orders went unserved the previous year primarily because the offender is evasive.[239] One court administrator believed that about one-third of protection orders are not served during their two week valid period.[240] Although the state of New York does not officially keep track of the number of unserved orders of protection, advocates who work with victims of violence there say they encounter this frequently.[241] In St. Louis, domestic abuse orders of protection are served

238. Feuer, *supra* note 216.

239. Ruth Teichroeb, *UW Shut Case Days Before Shooting: Campus Police Tried to Find Abuser, Gave Up When He Couldn't Be Located*, SEATTLE POST-INTELLIGENCER, May 17, 2007, at A1, *available at* 2007 WLNR 9419133.

240. *Id.*

241. Feuer, *supra* note 216.

only at a rate of about forty-seven percent.[242] According to a national report produced by the National Council of Juvenile and Family Court Judges and designed to provide best practices for all of the system actors who work with domestic violence victims, "[d]espite the fact that protection orders work to empower the victim and stop the violence for many, the ability of the system to protect victims can be impeded by barriers in both service and enforcement."[243] Although there is general agreement that this presents a significant problem, little has been done.

The State of Illinois proved to be an exception in 2009. It was reported that over twenty percent of batterers against whom courts had initiated orders of protection had not been served.[244] Attorney General Lisa Madigan responded by creating an initiative called "Serve to Protect."[245] The program was designed to address the gap in service of the orders and included the creation of an innovative "Order of Protection Enforcement Group," comprised of "the Cook County Sheriff, the Cook County State's Attorney, the Illinois Department of Corrections, the Illinois State Police, the Illinois Sheriffs Association, and advocates for domestic violence survivors throughout the State . . . ."[246] This collaboration among system actors in and of itself is innovative, allowing all of those affected by the widespread problem of domestic violence generally, and service of process of orders of protection specifically, to work together to address these problems.

The innovations on service of process that originated from Attorney General Madigan's office differ from the other state-based initiatives discussed in this paper in that they are not legislatively derived. They illustrate, however, how various state actors can play a critical role in addressing the problem of domestic violence outside the legislative realm and provide an alternative model that other jurisdictions might consider. Although it is not clear what percentage of orders of protection go unserved, there is widespread agreement that this issue is one that is common among states and communities across the country. The actions of Illinois State Attorney General

242. *Take Wrist, Slap Lightly*, ST. LOUIS POST-DISPATCH, July 21, 2003, at B6, *available at* 2003 WLNR 16161059.

243. SHEERAN & MEYER, *supra* note 81, at 4.

244. Press Release, Ill. Attorney Gen., Attorney General Madigan Announces "Serve to Protect" Initiative to Tackle State's Unserved Orders of Protection on Behalf of Victims of Domestic Violence (Oct. 23, 2009), *available at* http://illinoisattorneygeneral.gov/pressroom/2009_10/20091023.html.

245. *Id.*

246. *Id.*

Madigan could serve as a model for other state attorneys general and others in their efforts to combat domestic violence. Making improvements in terms of the number of protection orders actually served will have a marked impact on the lives of victims who depend on the orders as a tool to combat the violence.

B. The Economics of Domestic Violence Innovations

> *We cannot afford to continue to overlook the costs of this national tragedy.*[247]

As a nation, we pay an incredibly high price for the problem of domestic violence. The Centers for Disease Control estimate the price tag at over $5.8 billion annually.[248] This amount reflects costs like health care and mental health services. Violence perpetrated by current or former husbands, boyfriends, and dates costs victims of domestic violence almost eight million days of paid work.[249] This equates to more than 32,000 full-time jobs and almost 5.6 million days of household productivity lost as a result of domestic violence.[250] There are 16,800 homicides and $2.2 million in medically treated injuries due to intimate partner violence each year, which costs somewhere in the realm of $37 billion.[251] This economic reality alone demands attention.

With any proposed legislative measures, one of the primary inquiries relates to the costs associated with implementation. Interventions that carry a high price tag may not be taken seriously, particularly when the economy generally is weak. These costs, however, ought to be considered against the backdrop of the extraordinarily high societal costs of dealing with the effects of domestic violence.

In some contexts, adding additional legislatively derived options for victims costs very little. In considering the ramifications of the early lease termination law in Michigan, for example, the House Fiscal Agency's Legislative Analysis concluded that "[t]he bill would have no

247. Roberta Cooper Ramo, *ABA President-Elect Announces Domestic Violence Initiative*, 29 FAM. L.Q. xi, xi (1995) (discussing the far-reaching impact, economic and otherwise, of domestic violence, as background to the creation of a new national campaign).

248. JULIE L. GERBERDING ET AL., DEP'T OF HEALTH & HUMAN SERV., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 2 (2003), *available at* http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf.

249. *Id.* at 1.

250. *Id.*

251. *Domestic Violence: Effects on the Community*, BATTERED WOMEN'S SHELTER OF SUMMIT & MEDINA CNTYS, http://www.scmcbws.org/effects_on_the_community.asp (last visited Jan. 18, 2013).

fiscal impact on state or local government."[252] That said, there are other potentially hidden costs to consider. In a state that implements an early lease termination statute without an anti-discrimination provision, which is currently the trend in most states,[253] it is likely that landlords may refuse to rent to victims of domestic violence altogether, akin to a sort of preventive measure to avoid suffering negative economic consequences by losing tenants. This has the potential to ultimately make housing less available to victims. Alternatively, landlords may, in anticipating costs associated with the requirement to terminate leases, decide to increase the rent that they charge on the front end of all lease transactions. Such practices are not reflected in the cost analyses of state and local governments, but they are nonetheless potentially significant. Nonetheless, such statutes have the potential to reduce violence by giving victims tangible benefits that can help them leave abusive relationships.

In other contexts, however, like GPS monitoring of batterers, the up front costs of implementation can be quite high. In Connecticut, a state that has piloted a program to evaluate the effectiveness of a monitoring program, officials have determined that the program would carry a $2 million price tag annually.[254] In fact, after running the initial project, which spanned three court districts in the state for a year, the state ran out of funds.[255] Only recently were they able to allocate another $510,000 to facilitate another year of the project.[256] These expenses, however, must be viewed alongside the outcomes of the pilot program. In its first year, there was not one additional injury to a victim by a batterer who was being monitored, leading one to at least tentatively conclude that this can be an effective strategy to reduce domestic abuse.[257] It is, of course, impossible to know with any degree of certainty what recidivism rates among this group of high-risk offenders might have been without the monitoring. The economic impact of innovations is something to be considered, but should be evaluated against the backdrop of the overwhelming societal costs.

C. Impact of State-Based Solutions

The potential impact of individual state-based solutions has been criticized by some scholars and may not appear to have great

252. MICH. HOUSE FISCAL AGENCY, LEGISLATIVE ANALYSIS: DOMESTIC VIOLENCE EARLY LEASE TERMINATION, S.B. 185 (2010), *available at* http://www.legislature.mi.gov/documents/2009-2010/billanalysis/House/pdf/2009-HLA-0185-3.pdf.

253. *See supra* Table 1.

254. Kovner, *supra* note 229.

255. *Id.*

256. *Id.*

257. *Id.*

significance because of their relative isolation and novelty.[258] To be sure, when one takes a closer look at two recent legislative innovations discussed in this paper in tandem, for example housing laws and electronic monitoring provisions, there is overlap in only four of the states.[259] That is, only four states and the District of Columbia have enacted both kinds of legislation. Ideally, states would create a myriad of legislative and policy provisions to provide victims with the broadest array of options as they maneuver through the process of dealing with violence perpetrated against them and the related issues that invariably arise.

Scholars like Judith Resnik, whose work reconceptualizes notions of federalism, offer a somewhat optimistic lens through which to view the various ways in which domestic violence policy can proliferate.[260] Specifically, she examines the way in which all levels of government interact and intersect: horizontally, vertically, and diagonally.[261] She writes:

> [T]he relevant public-sector based participants in policy debates extend beyond the three branches of the national government and the states, acting alone or coordinated through Congress. Translocal organizations like the National League of Cities, the U.S. Conference of Mayors, and the collectives of state attorneys general, governors, and state legislators are all exemplary of the multiplication of "national" players, rooted in states and localities yet reaching across them. . . . [T]hat multiplicity is part of the federalism vision, which seeks solace in the knowledge that competition about ideas and responses exists at the national level and enlivens debates about the shape of regulation.[262]

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258. *See* Hafemeister, *supra* note 16, at 944 ("Because most legislative action on IPV in recent years has occurred at the state level, where differences readily propagate, these divergent views have resulted in a patchwork of laws and policies aimed at addressing IPV, with little uniformity in the employed approaches."). Many are still reeling from the decision in *Morrison*, in which the Court overturned a federal civil rights remedy for victims of gender-motivated violence, a provision created in the first place to address the widespread inconsistencies and limitations among states. *Id.* at 933–34.

259. Louisiana, Michigan, North Dakota, and Utah are the only four states that have passed both permissive electronic monitoring provisions and have an anti-discrimination housing law or early lease termination law. *See supra* Table 1; *see also supra* Table 2. No states have passed all 3 laws. *See supra* Table 1; *see also supra* Table 2.

260. *See, e.g.*, Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAS)*, 50 ARIZ. L. REV. 709, 766 (2008) (explaining the virtues of federalism in achieving political objectives).

261. Judith Resnik, *What's Federalism For?*, *in* THE CONSTITUTION IN 2020, 269, 271 (Jack M. Balkin & Reva B. Siegel eds., 2009); Resnik et al., *supra* note 260, at 763.

262. Resnik et al., *supra* note 260, at 784–85. In this article Resnik and her co-authors apply their framework to the issue of climate change, focusing specifically on how the failure of the U.S. to ratify the Kyoto Protocol on climate change does not mean an end to the

Resnik is persuasive in her argument that we need not be limited by a narrow vision of what laws have the capacity to create far-reaching impact.[263] Federal laws certainly *can* function to universalize rights for victims. Desiring such universalization, however, does not require a universal or "one size fits all" approach to domestic violence. Rather, it allows for a broad, widely available array of options that victims can avail themselves of. Decisions rendered by the Supreme Court, as was the case with *United States v. Morrison*,[264] even though effectively limiting federally based rights, can still inspire states to act.[265] In reaction to the Court's decision in *Morrison*, in fact, some states passed laws extending a private tort cause of action to victims of gender-based violence, reacting to the majority's holding which effectively denied victims of gender-based violence a federal private cause of action, and reinforced the idea that such legal tools should be left to the states to legislate.[266] To Resnik's point, states themselves frequently look vertically, and diagonally, across their borders, in their lawmaking.[267] As a result, a state-based movement, even in the absence of federal legislation, and under a regime of existing Supreme Court holdings that severely restrict protections for victims, does not necessarily lack the power to change domestic violence policy on a broader scale.[268] "States and localities have been and are important

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proliferation of climate change policy. *Id.* at 765. Although the issue of domestic violence is substantively distinct from climate change, Resnik's framework is nonetheless useful.

263. Resnik, *supra* note 261, at 269. States look not just in the traditional vertical orientation, but horizontally and diagonally as well. Resnik uses the example of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as a point of illustration. Resnik et al., *supra* note 260, at 722. Although the United States has failed to ratify CEDAW, several cities across the United States have adopted aspects of it as local law. Resnik, *supra* note 261, at 275. Resnik sees the adoption of CEDAW measures by these cities, such as San Francisco, as more than just something done at the whim of progressives. *Id.* "Rather, San Francisco's provisions are the outgrowth of a social movement that has formed around CEDAW." *Id.*

264. 529 U.S. 598 (2000).

265. Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down but Not Ruled Out*, 39 FAM. L.Q. 157, 165 (2005) (explaining that after the Supreme Court struck down the federal civil rights remedy for victims of violence, many states responded by passing their own state-based laws (referred to sometimes as mini-VAWA laws) that would extend similar rights to victims). "Although the civil rights remedy no longer is available, new initiatives pick up on the aspirations that underlay the civil rights remedy's enactment and chart new courses for advancing women's equality rights and helping those who have survived domestic violence and sexual assault move to safety and independence." *Id.* at 180.

266. *Id.* at 165.

267. Resnik, *supra* note 261, at 271.

268. *See, e.g.*, Castle Rock v. Gonzales, 545 U.S. 965, 965 (2005); United States v. Morrison, 529 U.S. 598, 598 (2000).

sites of social change."[269] An innovation, then, in domestic violence law reform in one state, has increasing potential to influence lawmaking in another.

The desire for more states to implement similar statutes providing for victim protections does not call for the "one size fits all" criminal law response to be replaced with a "one size fits all" civil law response. Indeed, the goal of identifying a myriad of victims' needs invites the passage of an array of laws that will ultimately provide a multiplicity of choices to which victims may avail themselves, and which will ultimately compliment the existing response.

Finally, it is important to note how the reach of legislation goes far beyond the obvious mandate of specific state actions and the resulting protections. The process of creating new laws and their resulting impact can also have a profound effect on public opinion, make more people aware of the problem in the first place, help cultivate an understanding of the complex dynamics of domestic violence, and send a societal message that domestic violence is something to be taken most seriously. Regardless of one's stance on the effectiveness of mandatory arrest, for example, as a result of the widespread passage of these laws there are unintended consequences, perhaps the most significant of which is that the general public is at least now more aware of the prevalence of domestic violence.[270]

CONCLUSION: LOOKING FORWARD

Domestic violence remains a problem of epidemic proportions in the United States. Significant progress has been made in shifting attitudes, laws, and policies away from a historic tradition of nonresponse and non-intervention. Today, most actors in the legal system and individuals in the broader community have an appreciation of the problem and its far-reaching effects and have crafted remedies that largely involve intervention by the criminal justice system. Scholars remain divided about the effectiveness and desirability of the criminal law response.

The next phase of the domestic violence movement ought to resist the tendency to essentialize the experience of victims and

269. Resnik, *supra* note 261, at 274 (encouraging a rethinking of the federalist "narrative that assumes that national leadership alone has produced the rereading of the Constitution to embrace rights-holding by women and men of all colors").

270. SCHNEIDER, *supra* note 40, at 199. Professor Schneider emphasizes that "[l]awmaking can be a form of public education that shapes public perceptions and social attitudes; education can open new ways of seeing the world that can spark and shape new ways of thinking about law." *Id.*

instead recognize that their needs vary widely. The criminal law response plays an important role in the movement, but does not inherently meet the needs of all victims, or all of a particular victim's needs. Legislative and policy innovations, like those concerning housing issues and the safety of victims, illustrate one way of complementing the traditional criminal law approach to domestic violence, and underscores the importance of lawmakers working together with social workers, psychologists, researchers, lawyers, victims, and others to craft effective responses. These actors should continue their efforts to create a broad policy agenda that includes the creation of far-reaching laws and policies outside the criminal law that provide victims with more choices and options that are responsive to their varying needs, and depart from the problematic "one size fits all" model.