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Promising Protection: 911 Call Records as Foundation for Family Violence Intervention

Linda L. Bryant¹ and James G. Dwyer²

I. INTRODUCTION

RECORDINGS of 911 calls can be the best evidence of what occurred in a domestic violence (DV) situation.³ Prosecutors and criminal law scholars have long been aware of the potential for using such recordings at trial in DV prosecutions.⁴ However, the efficacy of 911 call recordings has not been well documented and their full potential not recognized. The reality is that a variety of state and private actors—including victims—could make effective use of 911 calls, in numerous ways, if they were able to obtain copies. Prosecutors can use 911 call recordings not only to present a case at trial but also to avoid trial by securing plea agreements; to determine the true victim in a DV episode when first examining the case; and to motivate victims to accept services, take measures to protect their children, and cooperate with state agencies when it is safe for

¹ Deputy Commonwealth's Attorney, Norfolk, VA. 2010 Virginia Duvall Distinguished Prosecutor, Juvenile and Domestic Violence cases, 2010 Leader in the Law Award, frequent lecturer on the Prosecution of Domestic Violence cases, Implementing Lethality Assessment Protocols for First Responders, and other criminal law topics. I am very grateful for the assistance and input of SGT Mark Heckman, Supervisor, Forensics Division, Norfolk Police Department; Al Steward, Programs Director, Norfolk Department of Human Services; The Honorable Gregory D. Underwood, Norfolk Commonwealth's Attorney; Deborah Collins, Assistant Commonwealth's Attorney, Norfolk Commonwealth's Attorney's Office; Todd Patton, Supervisor, Technical Assistance, Emergency Operations Center, Norfolk Department of Emergency Preparedness and Response; Margaret Kelly, Law Student, William and Mary Law School; LT Matt Spencer, Detective Division, Norfolk Police Department; CPT Wayne McBride, Commanding Officer, Detective Division, Norfolk Police Department; James Redick, Director, Norfolk Emergency Preparedness and Response; Fran Dillard-Moore, Director, Shelters and Outreach, YWCA Southampton Roads; and Betty Wade Coyle, Executive Director, Emeritus at Prevent Child Abuse Hampton Roads. Portions of this article rely on this input as well as on my personal experience prosecuting domestic violence cases.

² Arthur B. Hanson Professor of Law, William & Mary School of Law. This article benefitted greatly from the excellent work of law student Margaret Kelly. I additionally thank my colleagues Jeffrey Bellin, Christopher Griffin, and Paul Marcus for their valuable feedback. I am also grateful for the able research assistance of Law Librarian Paul Hellyer and law students Kylie Madsen, Lily Saffer, and Elizabeth Smith.

³ "Domestic" for the purposes of this article will refer to a relationship between spouses, non-marital intimate partners, parties who have been in such a relationship in the past, and/or parties with children in common. Cf. N.Y. FAM. CT. ACT § 812 (McKinney 2010 & Supp. 2013) (defining "members of the same family or household" as including the foregoing categories plus "persons related by consanguinity or affinity").

⁴ See *People v. Moscat*, 777 N.Y.S.2d 875, 877-78 (N.Y. Crim. Ct. 2004); Margaret A. Rosenbaum, *The Prosecution of Domestic Violence: An Overview*, 68 FLA. B.J. no. 9, Oct. 1994, at 52, 53.

them to do so. They can use 911 calls in these ways, not only in the most severe felony DV cases, but also in routine prosecution of misdemeanors, with the facilitative strategies described in this Article. In addition, if victims themselves obtained copies of these recordings, or were able to request submission of the recordings to courts, they could use these pieces of concrete evidence against their abusers in many situations: to obtain civil protective orders, compensation for injuries, and better outcomes in domestic relations, custody, and visitation disputes. Child Protective Services agencies (CPS) might also use 911 call recordings to substantiate charges of psychological child abuse against DV perpetrators and, if necessary, “failure to protect” charges against custodial parents who are chronic DV victims.

The authors conducted an empirical study comparing use of 911 calls in courts with conviction rates and guilty pleas, and measuring 911 call records against police records, to assess the efficacy of 911 call recordings in prosecutorial efforts and determine the extent to which 911 calls capture information police are unable to obtain or document when they respond to a DV report. The study examined domestic disturbance calls that led to arrests in Norfolk, Virginia, between January 1, 2012, and April 30, 2012.⁵ The remarkable difference in rate of prosecutorial success between cases in which prosecutors used 911 calls and those in which they did not suggests that the calls have tremendous potential for imposing greater accountability on domestic violence perpetrators.⁶

Examining 911 call data incidentally led to our discovery of a great number of DV incidents in which the call recording reveals the presence of children but police reports of the incident do not, presumably because the children left the scene before police arrived or because police were unable to enter the residence where the violence occurred. Our results therefore suggest that the state is unaware of a substantial portion of all incidents in which children witness DV, even when the state is aware that the violence occurred. Coupled with the fact that DV victims do not report the majority of attacks,⁷ this suggests that the rate of DV exposure among children is many times greater than official records reflect. Further, as discussed in Part II, there is reason to suspect that cases in which children’s exposure to DV goes undetected are on average more serious, and this in turn suggests that children might be suffering ill effects from DV exposure to an even greater degree than extant research has shown. This Article thus contributes important new information to scholarly study and policy deliberations about the impact of DV on children and suggests new ideas for CPS use of 911 call recordings to expand and improve child protection efforts.

⁵ This study focused on misdemeanor crimes committed by and against a domestic partner and, primarily, domestic assault and battery.

⁶ This study did not compare the number of cases in which prosecutors chose to use 911 records with the number of cases in which they were available. Such a comparison might reveal what portion of all 911 call records are useful or potentially useful, a fact that could be relevant to policy makers deciding whether to invest resources in making the records more available.

⁷ See *infra* note 9 and accompanying text.

We will also suggest that the recordings might in some cases enable CPS, rather than prosecutors, to lead the effort to prevent recurrence of DV.

This Article thus aims to make four contributions to the literature on domestic violence: (1) documentation of the efficacy of 911 call recordings in DV prosecutions; (2) demonstration that a large percentage of traditional DV case files—in which evidence gathered by police at the DV scene constitutes all or nearly all of the information available to prosecutors—fail to reflect the presence of children during DV episodes; (3) identification of a far broader range of ways in which state and private actors can, in a variety of legal settings, use 911 call recordings to reduce family violence and its detrimental effects; and (4) a description of technology and protocols that can greatly facilitate agencies' access to and use of 911 call recordings, thereby making use of such evidence practicable in both misdemeanor and felony cases.

Part II briefly presents factual background to criminal prosecution and child protection responses to DV, including the frequency and consequences of DV and current limitations on the state's ability to protect adult victims and children. Part III describes potential uses of 911 call recordings to overcome those limitations in criminal prosecutions, civil adult and child protection proceedings, and domestic relations proceedings. Part IV presents the results of our study. Finally, Part V describes a set of protocols for several state agencies to follow in order to exploit the full potential of 911 domestic violence calls.

II. FACTUAL BACKGROUND

Domestic violence threatens the welfare of victims and of children who witness it, yet it is notoriously difficult to stop. This Part presents information on the incidence, consequences, and obstacles to ending domestic violence.

A. Incidence

Surveys have found that as many as 25% of all women suffer physical assault by a current or former partner at some point in their lives.⁸ A large percentage of victims never report the assault,⁹ and so statistics reflecting calls to police and arrests are much lower than the actual incidence of domestic violence.¹⁰

⁸ See ALICIA SUMMERS, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, CHILDREN'S EXPOSURE TO DOMESTIC VIOLENCE: A GUIDE TO RESEARCH AND RESOURCES 8 (2006); Robert L. Casey et al., *Preliminary Results of a Police-Advocate Home-Visit Intervention Project for Victims of Domestic Violence*, 6 J. PSYCHOL. TRAUMA 39, 40 (2007).

⁹ See Alana Dunnigan, Comment, Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence, 37 U.S.F. L. REV. 1031, 1039–40 (2003) (estimating that 90% of victims do not report).

¹⁰ According to one study, arrests for domestic violence “per 1,000 persons ranged from 3.2 in Omaha, [Nebraska] . . . to 12.2 in Wichita, [Kansas].” ANDREW R. KLEIN, U.S. DEP'T. OF JUSTICE, NAT'L INST. OF JUSTICE, SPECIAL REPORT: PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 5 (2009), available at

Even so, of all 911 calls placed, the single largest category is domestic violence; rates vary by jurisdiction from 15% to over 50% of all 911 calls.¹¹ The homicide rate among DV victims has decreased in recent years,¹² suggesting a general overall decline in the incidence of DV, but the numbers remain alarming. In 2007, there were an estimated 1640 female and 700 male victims of intimate partner homicide in the United States.¹³ Among all homicides nationally, 45% of female victims and 5% of male victims were killed by an intimate partner.¹⁴ Of the 345 homicides in Virginia in 2011, more than one-third (134) resulted from domestic violence or involved a dating relationship.¹⁵ Non-fatal DV also appears to occur disproportionately to women, with one national study reporting 552,000 incidents with female victims in 2008, compared to 101,000 with male victims.¹⁶

A substantial percentage of domestic violence victims are repeat victims, either with the same abuser or with a series of abusers. A National Institute of Justice study found that 60% of DV victims suffer revictimization, though only half of them reported the previous assaults.¹⁷ A British Crime Survey found that over two-thirds of female DV victims were victimized again within one year.¹⁸ Evidence suggests that whereas episodic or “situational” DV might occur at roughly equal rates against men and women, DV as an ongoing pattern of domination and subjugation is largely a male-on-female phenomenon.¹⁹

<https://www.ncjrs.gov/pdffiles1/nij/225722.pdf>.

11 *Id.* at 1.

12 Between 1993 and 2007, intimate partner homicide declined by 36% for male victims and 26% for female victims, for a total decline of 29%. SHANNAN CATALANO ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF VIOLENCE 3 (2009), available at <http://www.bjs.gov/content/pub/pdf/fvv.pdf>. In the context of intimate partner homicides, the total number of female victims fell from 2200 in 1993 to 1640 in 2007; for male victims, that number fell from 1100 in 1993 to 700 in 2007. *Id.* at 4.

13 *Id.* at 2, 4.

14 ALEXIA COOPER & ERICA L. SMITH, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008 18 (2011), available at <http://www.bjs.gov/content/pub/pdf/htus8008.pdf>.

15 2012 VA. ATT’Y GEN. ANN. REP. ON DOMESTIC & SEXUAL VIOLENCE IN VIRGINIA 4.

16 CATALANO ET AL., *supra* note 12, at 1.

17 KLEIN, *supra* note 10, at 5; see also 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, 193, 199 (2008) (explaining that domestic violence victims are unreliable as partners in the efforts of judges, law enforcements, and lawmakers to combat domestic violence); Evan Stark, *A Failure to Protect: Unravelling “The Battered Mother’s Dilemma,”* 27 W. ST. U. L. REV. 29, 46 (2000) (explaining the cycle of Battered Women’s Syndrome).

18 Karlijn F. Kuijpers et al., *Risk of Revictimization of Intimate Partner Violence: The Role of Attachment, Anger and Violent Behavior of the Victim*, 27 J. FAM. VIOLENCE 33, 33 (2012) (citing Sylvia Walby & Jonathan Allen, DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING: FINDINGS FROM THE BRITISH CRIME SURVEY, HOME OFFICE RESEARCH STUDY 276, 23–25 (2004), available at <http://www.avaproject.org.uk/media/28384/hors276.pdf>).

19 See Margo Lindauer, *Damned if You Do, Damned if You Don’t: Why Multi-Court-Involved Battered Mothers Just Can’t Win*, 20 AM. U. J. GENDER SOC. POL’Y & L. 797, 803–04 (2012).

DV perpetrators do not confine their abuse to times when children are absent. A great majority of children in households where domestic violence occurs witness it at least once.²⁰ One study estimated that in at least half of DV incidents, children are “present,” meaning directly witnessing it or at least in the home when it occurs.²¹ A study compiling results of national surveys concluded that 3.3% of all children witness domestic violence at some point.²² Another survey found a rate of 6.2%,²³ and still another estimated that “between 2.3 and 10 million children witness domestic violence each year in the United States.”²⁴ As discussed in Part IV, our study revealed that measures based on official records likely substantially underestimate the prevalence of children’s exposure to adult–partner violence. Our study revealed that police records did not reflect the presence of children in DV situations in roughly half of the cases in which their presence was evident in the corresponding 911 call recordings. Thus, any policy or scholarly discussion of children’s exposure to DV that relies on states’ data derived from police, CPS, or court records reflects an incomplete picture.²⁵

Moreover, there is reason to fear that the bulk of incidents in which children witness partner violence in their home but police remain unaware are on average more severe cases. As for cases in which police do not become aware of the DV incident itself because no one reported it, some might have gone unreported because the assault was less violent—for example, a push or a slap. But if fear of retaliation is the main explanation for non-reporting, it might be that most cases of unreported DV involve victims who are the most terrified of abuser retaliation—that is, who have the most violent partners. Reported DV incidents in which children are present but police do not learn this when they

20 H. LIEN BRAGG, U.S. DEP’T OF HEALTH & HUMAN SERVICES, CHILD PROTECTION IN FAMILIES EXPERIENCING DOMESTIC VIOLENCE 9 (2003) (“80 to 90 percent of children in homes where domestic violence occurs can provide detailed accounts of the violence in their homes.”).

21 See, e.g., John W. Fantuzzo & Rachel A. Fusco, *Children’s Direct Exposure to Types of Domestic Violence Crime: A Population-Based Investigation*, 22 J. FAM. VIOLENCE 543, 548–49 (2007) (finding from police records that in roughly half of all DV cases children were present, and that in 81% of those cases the children directly witnessed the violence); cf. CATALANO ET AL., supra note 12, at 4 (estimating based on survey evidence that children are present in 36% of DV incidents).

22 David Finkelhor et al., *Trends in Childhood Violence and Abuse Exposure: Evidence from 2 National Surveys*, 164 ARCHIVES PEDIATRICS & ADOLESCENT MED. 238, 240 (2010).

23 See David Finkelhor et al., *Violence, Abuse, and Crime Exposure in a National Sample of Children and Youth*, 124 PEDIATRICS 1411, 1415 (2009).

24 SUMMERS, supra note 8, at 8. When verbal partner abuse is included, the numerical estimates rise to ten to eighteen million. See Jason M. Lang & Carla Smith Stover, *Symptom Patterns Among Youth Exposed to Intimate Partner Violence*, 23 J. FAM. VIOLENCE 619, 619 (2008). Estimates vary widely because of lack of uniformity in sources and definitions that researchers use. See Jeffrey L. Edleson et al., *Assessing Child Exposure to Adult Domestic Violence*, 29 CHILD. & YOUTH SERVS. REV. 961, 962–63 (2007).

25 See, e.g., Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN’S RTS. L. REP. 107, 115 (2002) (basing his estimation of spillover violence against children on the number of cases in which police discovered children were involved in a DV episode and in which “offenders were charged with risk of injury”).

respond to the report might be especially severe or recurrent incidents. They might primarily be cases in which DV perpetrators or victims acted quickly to conceal the children's involvement from police. It stands to reason that the more serious the impact a DV episode has on a child, the more likely victims and perpetrators would fear the state's response. Especially if there is "spillover" physical harm to a child, victims might fear that CPS will remove the child from their custody, and perpetrators might fear being charged criminally or civilly with child abuse. This suggests the need for further study. The overall impression of the information we now have is that official records of children's exposure to DV substantially understate the problem.

B. Consequences

Understanding of the effects of domestic violence on both adult victims and children exposed to it has grown considerably in the past half century.

1. *Adult victims.*—Fifty percent of female DV victims sustain immediate physical injury, with 4.5% reporting a serious injury.²⁶ Subjection to DV, especially if recurrent, also causes female victims to suffer long-term physical or psychological harm, including "chronic disease and Post-Traumatic Stress Disorder."²⁷ The most debilitating psychological consequences victims experience include depression, severe anxiety, numbing, and flashbacks.²⁸ One condition that has received much judicial and scholarly attention is "learned helplessness"—that is, the mindset that victims in the most violent relationships have in which they believe there is nothing they can do to stop the abuse.²⁹ Many victims engage in substance abuse as a coping mechanism.³⁰ Another disorder some manifest is "impaired cognitive efficacy," which causes difficulties in decision-making, concentration, memory, and judgment.³¹

Physical abuse is often coupled with economic abuse, which usually involves "preventing women from acquiring resources, preventing women from using resources and exploiting women's resources."³² One study found that

²⁶ See KLEIN, *supra* note 10, at 1; Casey et al., *supra* note 8, at 40.

²⁷ Lisa James & Sally Schaeffer, *A New Beginning: Obamacare Helps Prevent Domestic Violence*, 18 DOMESTIC VIOLENCE REP. 17, 17 (2013); see also SUMMERS, *supra* note 8, at 21 (noting two studies finding over half of victims suffer from PTSD); Lang & Stover, *supra* note 24, at 620.

²⁸ See SUMMERS, *supra* note 8, at 9 (noting rates of depression and anxiety in the clinical range among DV victims); Annette M. Gonzalez & Linda M. Rio Reichmann, *Representing Children in Civil Cases Involving Domestic Violence*, 39 FAM. L.Q. 197, 208 (2005); Jerry von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed Toward Women and the Impact on Child Witnesses*, 27 W. ST. U. L. REV. III, 122 (2000).

²⁹ See LENORE E. WALKER, *THE BATTERED WOMAN* 104-05 (1979).

³⁰ SUMMERS, *supra* note 8, at 31.

³¹ Von Talge, *supra* note 28, at 122.

³² Susan L. Pollet, *Economic Abuse: The Unseen Side of Domestic Violence*, N.Y. ST. B. ASS'N J., Feb. 2011, at 40, 41.

“56 percent of domestic violence survivors said abusers prevented them from having money of their own and 59 percent reported money was hidden from them.”³³ In addition, physical abuse often causes economic hardship because of uninsured medical expenses and lost work time.³⁴ All these consequences for mothers adversely affect young children, whether the children witness the violence or not, because they tend to interfere with mothers’ parenting.³⁵

Researchers have devoted much less attention to the effects for male victims.³⁶ DV is less likely to result in physical injury for male victims than for female victims, but a substantial percentage of male victims do incur physical injury.³⁷ One study found a high rate of depression among men subjected to long-term domestic violence.³⁸

2. *Child Witnesses*.—Exposure to DV adversely impacts children in many ways, some quite severe.³⁹ One researcher concluded: “Overall, findings indicate exposure to domestic violence may be as detrimental to children as directly experiencing the violence themselves.”⁴⁰ Seeing one’s mother, typically a child’s primary attachment figure, physically battered is likely to be psychologically traumatic for children because of their identification with the mother and because it makes them fear loss of their caregiver.⁴¹ It creates pronounced

33 *Id.* (quoting Shannon Buggs, *Exploiting Cash Counts as Abuse*, HOUS. CHRON. (July 13, 2009), <http://www.chron.com/business/article/Exploiting-cash-counts-as-abuse-1589659.php>).

34 See James & Schaeffer, *supra* note 27, at 17.

35 See, e.g., SUMMERS, *supra* note 8, at 9 (noting that DV can affect a victim’s child rearing ability by “influencing her parenting style, emotional availability and her possible substance use”); Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 568 (2004) (noting that DV and child abuse coexist in the same household up to 70% of the time); Fantuzzo & Fusco, *supra* note 21, at 550 (noting that substance abuse by victim and/or abuser was detected in 41% of cases in which children were exposed to DV); Lang & Stover, *supra* note 24, at 620–27.

36 Summers, *supra* note 8, at 15 (“[S]tudies examining the effects of domestic violence primarily focus on women.”).

37 See Robert J. Reid et al., *Intimate Partner Violence Among Men: Prevalence, Chronicity, and Health Effects*, 34 AM. J. PREVENTATIVE MED. 478, 478 (2008).

38 *Id.*

39 See also Gonzalez & Reichmann, *supra* note 28, at 207; Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 6–7 (2001). See generally Allen M. Bailey, *Prioritizing Child Safety as the Prime Best-Interest Factor*, 47 FAM. L.Q. 35 (2013) (discussing recent research on the effects of domestic violence on children, including new brain studies); Judith A. Wolfer, Deena Hausner & Sue Brown, *The Kids Are Not All Right: What Happens When Children Witness Domestic Violence*, MD. B.J., Jan.–Feb. 2012, at 4, 6 (citing studies identifying the severe ways in which witnessing DV has adverse effects on children).

40 SUMMERS, *supra* note 8, at 10.

41 See *id.* at 9; Elayne E. Greenberg, *Beyond the Polemics: Realistic Options to Help Divorcing Families Manage Domestic Violence*, 24 ST. JOHN’S J. LEGAL COMMENT. 603, 612 (2010); Roger Kobak & Stephanie Madsen, *Disruptions in Attachment Bonds: Implications for Theory, Research, and Clinical Intervention*, in HANDBOOK OF ATTACHMENT 23, 33–34 (Jude Cassidy & Phillip R. Shaver eds., 2d ed. 2008).

anxiety that interferes with basic life activities such as sleeping and eating, with learning at school, and with peer and family relationships.⁴² Some younger children feel responsible for the violence against their parent and as a result, carry feelings of guilt and helplessness.⁴³ The mental health impact frequently manifests as depression, symptoms of post-traumatic stress disorder, diminished self-esteem, social withdrawal, heightened aggression against peers and family members, misbehavior, illness, poor school performance, and teen pregnancy.⁴⁴

Even after becoming adults, many who saw their mother abused exhibit “depression, lower self-esteem, and lower social adjustment.”⁴⁵ Witnessing domestic violence makes it more likely that children, especially boys, will commit acts of violence as adults, making their own intimate relationships dysfunctional and increasing their risk of incarceration.⁴⁶ Girls who witness it are more likely to become DV victims themselves as adults.⁴⁷ The adverse consequences for children intensify when their mother is a chronic victim of DV, especially when they observe more than one perpetrator’s assault.⁴⁸ As noted above, a substantial portion of DV victims, perhaps most, are chronic victims.

Moreover, children present when their mothers incur domestic violence are at greatly heightened risk of being physically abused themselves at the same time; there is a high rate of “spillover” when a mother’s partner becomes enraged.⁴⁹ Sometimes children incur harm because they come between the

⁴² See SUMMERS, *supra* note 8, at 9 (“Specific assessments measuring depression and anxiety in children of battered women found that 16% met the clinical criteria for depression and 23% were in the clinical range for anxiety.”); Gonzalez & Reichmann, *supra* note 28, at 207 (referring to “insomnia, headaches, stomachaches, diarrhea, asthma, and peptic ulcers”); Emily Israel & Carla Stover, *Intimate Partner Violence: The Role of the Relationship Between Perpetrators and Children Who Witness Violence*, 24 J. INTERPERSONAL VIOLENCE 1755, 1756 (2009).

⁴³ See John H. Grych et al., *Patterns of Adjustment Among Children of Battered Women*, 68 J. CONSULTING & CLINICAL PSYCHOL. 84, 92 (2000); Catherine Humphreys & Audrey Mullender, *Children and Domestic Violence: A Research Overview of the Impact on Children*, RESEARCH IN PRACTICE 15 (1999), available at <http://www.icynet.net/UserFiles/mullender.pdf>.

⁴⁴ BRAGG, *supra* note 20, at 10; SUMMERS, *supra* note 8, at 23 (citing study showing 40% of children who had witnessed domestic violence met the criteria for post-traumatic stress disorder); Susan M. Cunningham, *The Joint Contribution of Experiencing and Witnessing Violence During Childhood on Child Abuse in the Parent Role*, 18 VIOLENCE & VICTIMS 619, 633 (2003); Dunlap, *supra* note 35, at 571; Lang & Stover, *supra* note 24, at 620.

⁴⁵ Gonzalez & Reichmann, *supra* note 28, at 207; see SUMMERS, *supra* note 8, at 9.

⁴⁶ See BRAGG, *supra* note 20, at 10; SUMMERS, *supra* note 8, at 9; Dunlap, *supra* note 35, at 572; Fantuzzo & Fusco, *supra* note 21, at 543.

⁴⁷ See Dunlap, *supra* note 35, at 572.

⁴⁸ See Grych et al., *supra* note 43, at 91; Israel & Stover, *supra* note 42, at 1762; Wolfer et al., *supra* note 39, at 10 (“The cumulative effect of exposure to trauma may be the greatest contributor to negative outcomes for kids.”).

⁴⁹ See BRAGG, *supra* note 20, at 7 (stating that among families in which either domestic violence or child maltreatment is identified, both forms of abuse exist in 30–60%, and that half of men who abuse their wives also abuse their children); EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 42 (2007) (“Domestic violence is the single most common

batterer and the victim, either because (with infants) the victim is holding them or because (with older children) they try to intervene to protect their parent.⁵⁰ Other times the abuser targets the child intentionally, because the child is crying or telling him to stop or because the perpetrator decides to abuse the child as a way of hurting the mother; physical abuse of the child is likely to be especially severe in this highly-charged environment.⁵¹ Indeed, even police feel trepidation about responding to domestic disputes, as these tend to be volatile.⁵² While writing this article, the authors learned of a criminal prosecution in Sussex, Virginia, pending against a man who intentionally caused a car to crash into a tree at seventy miles per hour, with his girlfriend and her seven-year old child in the car. The mother refused to cooperate with the prosecution.

In addition to “spillover” abuse at the time of a DV incident, children in a household where DV occurs are at a greatly heightened risk of incurring physical and psychological abuse or neglect, independent of the abuse their parent suffers.⁵³ As many as 70% of children who live in a household in which DV occurs are themselves victims of physical abuse.⁵⁴ Less well known is that adult victims of domestic violence are more likely than other parents to physically abuse and neglect their children.⁵⁵ This might be a secondary effect of the partner abuse, which can severely impair the victim’s ability to care for a child, “influencing her parenting style, emotional availability and her possible substance use.”⁵⁶ As noted above, many DV victims engage in substance abuse and/or become clinically depressed, which greatly raises the risk that they will abuse or neglect a child.⁵⁷ DV victims are also generally less receptive to, or

context for child abuse and neglect”); SUMMERS, *supra* note 8, at 8 (“[E]stimates indicating that as many as 70% of children exposed to domestic violence are also victims of child maltreatment.”).

50 See T.R. v. Dep’t of Children & Families, 864 So. 2d 1278, 1279 (Fla. Dist. Ct. App. 2004) (describing DV incident in which perpetrator wielded knife at mother while she held baby); BRAGG, *supra* note 20, at 10; Grych et al., *supra* note 43, at 92 (indicating that children in more violent households are more likely to intervene in conflicts); Wolfer et al., *supra* note 39, at 7.

51 BRAGG, *supra* note 20, at 9 (“A review of CPS cases in two States identified domestic violence in approximately 41 to 43 percent of cases resulting in the critical injury or death of a child.”).

52 See Casey et al., *supra* note 8, at 41.

53 See, e.g., Jordan Steffen, *Failed to Death: The Voices of Caseworkers*, DENVER POST (Nov. 12, 2012), http://www.denverpost.com/failedtodeath/ci_21976433/caseworker-voices (relating caseworker views on the danger that violent stepfathers and boyfriends of custodial mothers present for children).

54 See SUMMERS, *supra* note 8, at 9.

55 See *id.* at 15; BRAGG, *supra* note 20, at 9.

56 SUMMERS, *supra* note 8, at 9; see also Cecilia Casanueva et al., *Quality of Maternal Parenting among Intimate-Partner Violence Victims Involved with the Child Welfare System*, 23 J. FAM. VIOLENCE 413, 418 (2008).

57 NORFOLK DOMESTIC VIOLENCE FATALITY REVIEW TEAM, REPORT: REVIEW OF DOMESTIC VIOLENCE FATALITIES 2005–2008, at 7 (2012), <http://www.vdh.state.va.us/medExam/dvfr/documents/2012/pdf/Norfolk2012FinalReport.pdf> (“Over 50% of the victims who sought shelter protection had substance abuse and mental health issues.”); SUMMERS, *supra* note 8, at 9; THE URBAN CHILD INST., *The State of Children in Memphis and Shelby County*, 2012 Data Book no.7 48 (2012),

less likely to be helped by, social services aimed at improving their parenting.⁵⁸ Higher rates of maltreatment by DV victims might also reflect the fact that they disproportionately suffer from mental illnesses independent of the abuse they incur.⁵⁹

Thus, much more than the risk of repeatedly witnessing DV is at stake for children when the state reacts to DV reports. Children in households where DV occurs are at a greatly heightened risk of direct maltreatment because of the potential for physical or psychological abuse from one or both parents, or because mothers are unable to give them proper care, attention, and supervision. Children who both witness partner violence and suffer physical abuse themselves are at greatest risk of serious psychological harm.⁶⁰ Accordingly, child welfare professionals tend to believe that every instance of exposure to domestic violence should be reported to CPS for at least a risk assessment.⁶¹ In response to these reports, CPS caseworkers might, using a research-based protocol, assess the level of danger for a child by taking into account the impact DV has had on a victim parent, that parent's coping strategies, whether DV has spilled over into child abuse, and the child's "protective factors."⁶² Based on that assessment, CPS could make informed judgments about when and what kinds of interventions are necessary to protect a particular child's welfare, ranging from no intervention to assuming custody.⁶³

http://www.urbanchildinstitute.org/sites/all/files/databooks/TUCI_Data_Book_VII_2012.00_complete.pdf ("Maternal depression is a grave threat to children's healthy development."); Ann L. Coker et al., *Psychological, Reproductive and Maternal Health, Behavioral, and Economic Impact of Intimate Partner Violence*, in 1 *VIOLENCE AGAINST WOMEN AND CHILDREN* 265, 268–71 (Jacquelyn W. White et al. eds., 2011) (reporting that 63.8% of victims suffer from PTSD, 47.6% manifest depression, 17.9% manifest suicidality; 18% of victims engage in alcohol abuse and 8.9% in drug abuse). As might be expected, victims' parenting shows some improvement after a period of non-victimization. Casanueva et al., *supra* note 56, at 419.

⁵⁸ See Harriet L. MacMillan et al., *Interventions to Prevent Child Maltreatment and Associated Impairments*, 373 *LANCET* 250, 252 (2009).

⁵⁹ See Coker et al., *supra* note 57, at 268.

⁶⁰ See Grych et al., *supra* note 43, at 91.

⁶¹ See BRAGG, *supra* note 20, at 13.

⁶² See Abigail H. Gewirtz & Jeffrey L. Edleson, *Young Children's Exposure to Intimate Partner Violence: Towards a Developmental Risk and Resilience Framework for Research and Intervention*, 22 *J. FAM. VIOLENCE* 151, 152 (2007) ("Examples of protective factors include individual factors, such as positive temperament, the child's intellectual capacity, and social competence; family or interpersonal factors such as secure attachments to caregivers, caring adults and strong relationships with others, and cultural, ethnic or community factors such as living in a supportive, safe, close-knit community").

⁶³ See SUMMERS, *supra* note 8, at 37–40 (presenting an ABA-created checklist for CPS intervention in DV cases).

C. Impediments to Ending Domestic Violence

Prosecution of domestic abusers aims to reduce the incidence of violence in families by generating punishments or no-contact orders and rehabilitative counseling.⁶⁴ In many jurisdictions, prosecutors automatically seek, or judges automatically issue, a no-contact order when a criminal complaint is filed, while in others, magistrates and judges can issue short-term orders soon after arrest, based on probable cause to believe DV occurred.⁶⁵ Long-term protection via the criminal law process, however, generally depends on conviction.⁶⁶ Naturally, punishment of perpetrators does as well.

Obstacles to securing convictions arise immediately after DV incidents occur. Many victims are already inclined when police arrive to deny that the reported incident occurred, to minimize the severity of the abuser's actions, or to attribute responsibility to themselves.⁶⁷ This is largely why most DV reports do not result in arrests. In Virginia, the Attorney General's 2012 annual report on domestic violence disclosed 64,000 calls to domestic and sexual violence hotlines across the Commonwealth of Virginia in 2011,⁶⁸ but those calls led to arrests for assault and battery against a family or household member in just 22,557 cases, or 35%.⁶⁹ Although mandatory arrest policies give police in most jurisdictions authority to arrest a DV perpetrator even if the victim declines to lodge a complaint or sign a statement,⁷⁰ if the victim is not forthcoming police might not have probable cause for an arrest. Many police departments train officers to gather forensic evidence that prosecutors might use to prove the violence occurred,⁷¹ but often there is little or no evidence other than the victim's statements, or if there is evidence at the site of the violence the police cannot gain access to it because of victim non-cooperation.

64 See, e.g., Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 816 n.61 (2001).

65 In fact, mandatory no-contact orders are the recommendation of the National Council of Juvenile and Family Court Judges, as well as the actual practice in many states. Christopher R. Frank, *Criminal Protection Orders in Domestic Violence Cases: Getting Rid of Rats with Snakes*, 50 U. MIAMI L. REV. 919, 932–33 (1996).

66 See Judith A. Smith, *Battered Non-Wives and Unequal Protection—Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 119–20 (2005). But cf. David A. Ford, *Coercing Victim Participation in Domestic Violence Prosecutions*, 18 J. INTERPERSONAL VIOLENCE 669, 675–76 (2003) (citing studies showing arrests and referrals of cases to prosecutors themselves cause a reduction in violence for six months). There is also the possibility of obtaining protective orders in civil proceedings. See generally *infra* note 171 and accompanying text.

67 See Stark, *supra* note 17, at 46.

68 VA. ATT'Y GEN. ANN. REP., *supra* note 15, at v.

69 *Id.* at A–3, tbls.A3 & A4.

70 See Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 5–10 (2009).

71 *Id.* at 11–12.

Even when police do have sufficient evidence to make an arrest, the conviction rate for those arrested is low. A National Institute of Justice survey of police departments across the United States found that just 43% of DV arrests (or citations) resulted in convictions.⁷² A more recent study found a 56% rate of convictions relative to arrests.⁷³ More consistent with the former study, the Virginia Attorney General's 2012 annual report on domestic violence revealed that a majority of the 22,557 DV arrests—13,908 cases—resulted in not guilty, nolle pross, or dismissal outcomes.⁷⁴ Thus, over 60% of cases in which an arrest did occur ended in a finding of either not guilty or insufficient evidence to proceed.

An acquittal or finding of insufficient evidence does not necessarily mean the assault did not take place, but rather that the state did not have enough evidence of what happened to present to the fact finder on the day of trial. In most DV cases, the victim's testimony is the best evidence, and in many cases it is the only evidence. Even when the victim remains truthful and cooperative through trial, proving guilt beyond a reasonable doubt can be difficult absent corroborating evidence that an assault occurred. Opportunities to secure other evidence are limited.⁷⁵ In particular, the portion of cases in which there are other adult witnesses is fairly small; most acts of domestic violence take place in private.⁷⁶ Thus, the victim's testimony is often crucial to conviction. Yet prosecutors in DV cases cannot rely on victims to remain cooperative and truthful,⁷⁷ even if they were so when police initially responded to the 911 call. Cases of acquittal or "insufficient evidence" include the large percentage of instances in which the victim failed to appear for trial, recanted at trial, or refused to cooperate on the day of trial.⁷⁸

⁷² *Domestic Violence Cases: What Research Shows About Arrest and Dual Arrest Rates*, NAT'L INST. OF JUSTICE, DEP'T OF JUSTICE (July 25, 2008), <http://www.nij.gov/publications/dv-dual-arrest-222679/ch2/findings.htm#four>.

⁷³ N.Y. STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, NATIONAL DATA ON INTIMATE PARTNER VIOLENCE 8 (2011) (footnote omitted), *available at* <http://opdv.state.ny.us/statistics/nationaldvdata/nationaldvdata.pdf> ("Among 3,750 cases of intentional physical violence by an intimate partner that were filed in the state courts of 16 large urban counties in May 2002 . . . 56% of cases resulted in a conviction, 33% were dropped or dismissed, and 9% led to pretrial diversion or deferred adjudication. Fewer than 1% of defendants were acquitted."); *see also* RICHARD R. PETERSON, N.Y.C. CRIMINAL JUSTICE AGENCY, *COMBATING DOMESTIC VIOLENCE IN NEW YORK CITY: A STUDY OF DV CASES IN THE CRIMINAL COURTS* 9 (2003) (concluding that more prosecutions and convictions are occurring than before, but the number of convictions and length of sentences for DV convictions still involve less jail time than other offenses, and listing a number of factors contributing to this trend).

⁷⁴ VA. ATT'Y GEN. ANN. REP., *supra* note 15, at A-3, tbls.A-3 & A-4.

⁷⁵ *See* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 771 (2005).

⁷⁶ *See* Eleanor Simon, *Confrontation and Domestic Violence Post-Davis: Is There and Should There be a Doctrinal Exception?*, 17 MICH. J. GENDER & L. 175, 185 (2011).

⁷⁷ *See* Kohn, *supra* note 17, at 199-205.

⁷⁸ *See* Lininger, *supra* note 75, at 768-69, 772-73.

What explains the lack of victim support for prosecutions? Some victims are incapacitated or murdered by their abusers and unavailable for that reason.⁷⁹ More commonly, victims minimize or recant before or at trial,⁸⁰ and this is the main reason why many perpetrators of domestic violence are never held accountable for their crime.⁸¹ In at least 40% of the 1300 to 1600 domestic violence cases that come through the Norfolk court system each year, victims minimize, recant, or fail to appear in court.⁸² Even if a victim made a statement to the police when they arrived at the scene, if the victim is unwilling to confirm the accuracy of that statement on the stand in court, the court might exclude the evidence from consideration at trial as hearsay or as “testimonial.”⁸³ Under “no-drop” policies now common in the United States, prosecutors will still pursue a conviction even if the victim no longer favors prosecution,⁸⁴ but success is much more difficult without victim participation.

Victims minimize, recant, and refuse to cooperate for a number of reasons. One reason is fear.⁸⁵ Abusers commonly threaten their victims with further harm to them and their children should they involve the state in their private lives.⁸⁶ Even in the absence of threats, female victims often fear prosecution

⁷⁹ See Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 863 (2009).

⁸⁰ See, e.g., T.R. v. Dep’t of Children & Families, 864 So. 2d 1278, 1279 (Fla. Dist. Ct. App. 2004) (noting that the victim told relatives that boyfriend backed her into a corner with a knife, as she held their six-month-old baby, but in court said they had just a small argument and the boyfriend had used the knife to stir her coffee); Ford, *supra* note 66, at 673 (citing San Diego study showing prosecutors dropped one third of cases, largely because of victim non-cooperation, and another one third of cases in which victims recanted or testified in favor of the defense at trial).

⁸¹ See PETERSON, *supra* note 73, at 9 (citation omitted) (“Urban prosecutors in New York State estimate that 80–90% of victims in DV cases refuse to cooperate. Our observations in a specialized Criminal Court DV part support this conclusion.”); Tom Lininger, *Evidentiary Issues in Federal Prosecution of Violence Against Women*, 36 IND. L. REV. 687, 708–12 (2003) (reporting that a few states have created special hearsay exceptions for domestic violence cases because of this problem).

⁸² See NORFOLK DOMESTIC VIOLENCE FATALITY REVIEW TEAM, *supra* note 57, at 13.

⁸³ See *Davis v. Washington*, 547 U.S. 813, 829–34 (2006) (holding that a domestic violence victim’s written statements in an affidavit given to a police officer were testimonial and therefore inadmissible absent the victim’s availability for cross-examination). Many have viewed the hearsay rule as a major obstacle to successful prosecution of DV cases. See, e.g., Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims’ Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 1 (2002) (“When a domestic violence victim fails to appear for trial because of a batterer’s coercion, fear of the batterer, or the potentially drastic consequences of leaving the batterer, the hearsay rule promotes the failure of the criminal case by excluding the initial report of abuse. As the hearsay rule excludes out of court statements of abuse, recantation or no-show by the victim results in no charge, dismissal, or acquittal.”); see also *People v. Moscat*, 777 N.Y.S.2d 875, 876–78 (N.Y.C. Crim. Ct. Bronx County 2004) (holding that a 911 call is not “testimonial” and may be admissible as evidence if a hearsay exception such as the “excited utterance” rule is met).

⁸⁴ See Goodmark, *supra* note 70, at 10–14.

⁸⁵ See, e.g., Rebecca Fialk & Tamara Mitchel, *Jurisprudence: Due Process Concerns for the Underrepresented Domestic Violence Victim*, 13 BUFF. WOMEN’S L.J. 171, 214 n.170 (2005).

⁸⁶ See Beloof & Shapiro, *supra* note 83, at 1 (noting that it is common for victims not to appear

will enrage the perpetrator without producing any protection.⁸⁷ Aversion to speaking publicly about the family's problems is another reason; testifying in court is itself a frightening, daunting, and stressful experience for witnesses in general, and for DV victims the trauma and upheaval associated with domestic violence compound the stress and add an element of humiliation. Some victims might wish to have the prosecution go forward but strongly prefer not to be involved in it. Some scholars assert that female DV victims fear losing custody of their children if CPS learns of their plight and decides the children are in danger.⁸⁸

In addition, disrupting the relationship with their abusers can impose costs on DV victims. Many are dependent on the assailant for practical things such as money, food, shelter, or immigration status.⁸⁹ Having a child in common with the perpetrator makes this dependency more acute and raises concerns about taking any action that would result in separating the child from the other parent because this could trigger further violence.

Additionally, however, many victims recant or minimize their statements because of their own emotional needs. They remain in love with or emotionally dependent on the abuser.⁹⁰ As time passes after an attack, the memory of it recedes and eventually the victim's emotional desires overshadow that memory.⁹¹ Emotional attachments can cloud the lens through which even the most objective and logical people view those to whom they are attached. Thus, most DV victims are conflicted and send mixed signals about the outcome they desire. There is frequently an optimism that resurfaces as memory of an attack becomes less vivid. Many victims act on even a remote and unrealistic

for trial "because of a batterer's coercion, fear of the batterer, or the potentially drastic consequences of leaving the batterer"); Sarah M. Buel, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295, 1306 (2010) (urging greater judicial attention to "offenders who have unlawfully silenced their victims").

87 See Joanne Belknap & Dee L. R. Graham, *Factors Related to Domestic Violence Court Dispositions in a Large Urban Area*, in DOMESTIC VIOLENCE RESEARCH: SUMMARIES FOR JUSTICE PROFESSIONALS II, 13 (Barbara E. Smith ed., 2003), available at <https://www.ncjrs.gov/pdffiles1/nij/202564.pdf> (explaining survey findings that domestic violence victims feared prosecutors would not adequately prepare them and that their abusers would not be found guilty).

88 See Stark, *supra* note 25, at 110.

89 See Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67, 77 (1998) (stating that victims may recant because of "psychological manifestations of abuse, fear of retaliation, or lack of viable housing and financial alternatives").

90 See April L. Few & Karen H. Rosen, *Victims of Chronic Dating Violence: How Women's Vulnerabilities Link to Their Decisions to Stay*, 54 FAM. REL. 265, 275 (2005) (reporting results of study showing that "vulnerable women tend to form a type of addiction to a person as an attempt to gain control over some aspect of their lives").

91 *Id.*; Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence*, 2010 BYU L. REV. 515, 531-32 (identifying the victim's love for the abusive partner, dependence for economic security, and fear of losing custody of children, as reasons that victims do not wish to separate from batterers).

glimmer of hope that the abuse will stop.⁹² And many convince themselves that the attack was less severe than they initially thought or that they are the source of the problem, in which case they believe they can avoid further violence by changing their own behavior.⁹³

Further, some women perceive no better alternative to remaining with the abuser, because they have an intense psycho–emotional need to be with some partner but believe no other partners are available, a phenomenon that appears especially prevalent among black female DV victims in the United States.⁹⁴ Finally, women in some racial or ethnic groups experience pressure from their community not to report violence to outside authorities because of a history of antagonism between those communities and state authorities.⁹⁵ Some religious groups similarly impose pressure on victims to seek help with family problems from church leaders only.⁹⁶

The problem of victim ambivalence impedes child protection efforts as well. As noted above, victims might fear CPS will take their children if they admit the children were present during incidents of violence in the home. In addition to motivating a victim parent to minimize or to deny the incident when police arrive, this worry might encourage them to send their children to another location quickly after the incident and conceal from police that the children witnessed the violence.⁹⁷ Based on the same belief, if CPS does learn of a child’s endangerment and conducts an assessment or investigation, the victim parent might be uncooperative and untruthful with CPS in that instance as well.⁹⁸

III. USES FOR 911 CALL RECORDINGS

In the absence of a cooperative victim, state agencies wishing to prevent further family violence must look to other sources of information to determine what happened when they receive notice of a domestic disturbance and to respond effectively to it. Use of forensic evidence became common for police and prosecutors in the era of “no-drop” policies,⁹⁹ but often there is little

⁹² See Few & Rosen, *supra* note 90, at 275 (“[S]he begins to engage in split-processing—seeing only the good times in the relationship and minimizing the chronic abuse she suffers.”); Stark, *supra* note 17, at 46 (describing the “honeymoon” phase occurring after abuse and the resulting confusion of the battered woman).

⁹³ Few & Rosen, *supra* note 90, at 276.

⁹⁴ See *id.* at 275 (reporting that a “majority of Black women cited the scarcity of eligible Black men as a reason to remain in their chronically abusive dating relationships”).

⁹⁵ *Id.* at 276 (“Black women are expected to focus on racism and to de-emphasize sexism within the Black communities for ‘the greater good.’”).

⁹⁶ See NORFOLK DOMESTIC VIOLENCE FATALITY REVIEW TEAM, *supra* note 57, at 12.

⁹⁷ See generally Stark, *supra* note 25, at 110.

⁹⁸ See *id.*

⁹⁹ See Laurel A. Kent, *Addressing the Impact of Domestic Violence on Children: Alternatives to Laws Criminalizing the Commission of Domestic Violence in the Presence of a Child*, 2001 WIS. L. REV. 1337, 1352.

physical evidence of the violence or of children's presence and also no other adult witness. 911 calls constitute a highly revealing, credible, and reliable source of information for prosecutors and CPS. The 911 call, unlike the victim's testimony, does not change over time. In addition, were state agencies to make 911 call recordings available to DV victims, this concrete evidence of the violence against them might help them secure protection for themselves and their children in settings other than criminal prosecutions. Thus, advocates for DV victims might embrace some of the uses we identify for 911 calls in this Part.

Other uses, however, might exacerbate some of their concerns—in particular, any that take control of DV situations from the adult victims. For the most part, we do not offer here a normative defense of any particular policy positions for state agencies. Our aim is rather to identify possibilities previously overlooked for using 911 calls to reduce violence, recognizing that there might be reasons not to use the calls in every possible way. We will offer some observations, though, about the normative literature on CPS intervention on behalf of children, which is one of the most controversial aspects of state response to violence within the home.

A. Prosecution of Abusers

The idea of using 911 calls in prosecutorial efforts is not novel. Such use, however, has mostly been limited, at least in state courts, to presenting the state's case at trial for serious felonies. We suggest here numerous additional uses in a much broader set of cases. We then discuss evidentiary rules and practical or attitudinal obstacles with which a prosecutor must grapple to realize the potential of 911 call recordings.

1. Ten Ways 911 Calls Can Improve Prosecutorial Performance.—First, a prosecutor can better ascertain what actually happened in a reported DV episode by listening to the audio recording, in addition to reviewing the police report and speaking to the victim. On that basis, the prosecutor can make a better-informed decision on whether to go forward with a case. Post-incident testimonial evidence is often conflicting, creating some uncertainty as to whether there is a “true victim” and who that is. Savvy domestic violence perpetrators commonly make reciprocal DV allegations against their victims, knowing many prosecutors faced with cross-warrants decline to proceed with the case. In some instances a recording reveals that the apparent victim was in fact the initial aggressor or equally culpable,¹⁰⁰ but in other instances the call confirms that the

¹⁰⁰ For example, the person whom police perceive to be the aggressor when they arrive at the scene might have been the person who placed the 911 call, because they were under attack at that time, but then perhaps struck the other in self-defense. Also, statements by the alleged attacker

person who initially reported violence was the “true victim.” The 911 call can thus ameliorate the concern that battered women could face criminal charges themselves if they strike a batterer in self-defense or in an effort to escape, or that victims will fail to receive protection even when they do nothing in their defense, because of false counter-allegations. The 911 call recording might be the only way in many cases to convince a prosecutor and judge or magistrate that a reciprocal charge is a fabrication. Alternatively, listening to a call might confirm a victim’s insistence that the incident was not sufficiently serious to warrant a heavy-handed prosecutorial response.¹⁰¹

Second, 911 calls sometimes reveal the presence and names of additional adult witnesses. It might be a concerned neighbor, close friend, or family member who made the 911 call, reporting a domestic disturbance taking place before them at that time or reporting an incident about which a victim told them after the fact. Other times, a victim who makes the call mentions or calls out to another adult who is present. By reviewing the recording in every case, prosecutors can identify and then attempt to speak to those adult witnesses to collect additional information and solicit their involvement in the prosecution.

Third, playing the call recording for victims can cause some otherwise reluctant victims to cooperate with the prosecution. Hearing the recording takes them back to when the incident happened and reminds them of the reality of the abuse, which can motivate them to testify truthfully. As noted above, as time elapses after an attack, victims’ memory of the terror and pain they felt can weaken and their emotional needs cause them to distort what happened, allowing them to rationalize away their partners’ behavior. Listening to their own terrified voice crying for help counteracts that tendency better than any coaching or counseling. The recording of their call can also remind victims of the dangers their children faced because they were present during episodes of violence.

Fourth, and relatedly, a 911 call can trigger CPS involvement by revealing the presence of a child, and CPS might assist the prosecutor in inducing victim cooperation.¹⁰² CPS can impress on the victim the child’s needs and the potential for civil neglect charges against her if the child is again exposed to violence. In extreme cases, prosecutors could bring criminal neglect charges against a custodial parent who persists in a violent intimate partnership.¹⁰³

while the caller is on the line might substantiate the alleged attacker’s claim of self-defense.

¹⁰¹ Cf. Jeffrey D. Cohen, *The Trend Away from “Cookie Cutter” Domestic Violence Cases*, in STRATEGIES FOR DEFENDING DOMESTIC VIOLENCE CASES: LEADING LAWYERS ON ANALYZING THE EVOLVING DEFINITIONS AND COMPLEX CHALLENGES IN A DOMESTIC DISPUTE DEFENSE 63, 70 (2012) (arguing that the extreme disruption to family life occasioned by arrest and prosecution does more harm than good to victims and children in many less severe cases).

¹⁰² Cf. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 210 (E.D.N.Y. 2002) (“[P]ilot projects that were implemented by ACS demonstrated dramatic drops in removal rates and subsequent abuse and neglect allegations where ACS and the criminal justice resources were cooperating effectively and abusers were being regularly arrested.”).

¹⁰³ See, e.g., N.Y. PENAL LAW § 260.10(2) (McKinney 2010 & Supp. 2013) (“A person is guilty

Fifth, and also related, prosecutors can use 911 call recordings that reveal the presence of children to support a separate criminal charge of child endangerment against the DV perpetrator, in states whose code establishes such an offense.¹⁰⁴ The recording might enable a prosecutor to proceed with such a charge without needing the child to testify, thus sparing the child from further trauma.¹⁰⁵

Sixth, playing a recording of the 911 call in court can have a greater impact on judges and juries than in-court testimony of witnesses. The recording can better convey the victim's emotion, anguish, and outright terror during a frightful assault or during the immediate aftermath of the assault. 911 calls present a vivid and textured depiction of what occurred. Neither a victim's calm description of events in court nor a picture of bruises or bleeding can match the impact of the sound of a human being pleading for help in the midst of an attack. 911 calls that children make can be especially gut-wrenching.

Seventh, 911 calls frequently contain "excited utterances" or "present sense impressions" that can serve to establish in a trial facts as to which there is otherwise no admissible evidence.¹⁰⁶ As discussed below, excited utterances and present sense impressions are admissible in court as exceptions to the hearsay rule, which otherwise precludes admission of out-of-court statements going to the truth of the matter asserted.¹⁰⁷ A 911 call recording could also contain

of endangering the welfare of a child when . . . she fails or refuses to exercise reasonable diligence in the control of such child to prevent him or her from becoming an 'abused child,' a 'neglected child' . . .").

¹⁰⁴ See, e.g., DEL. CODE ANN. tit. II, § 1102(a) (2007) ("A person is guilty of endangering the welfare of a child when . . . (4) The person commits any violent felony, or reckless endangering second degree, assault third degree, terroristic threatening, or unlawful imprisonment second degree against a victim, knowing that such felony or misdemeanor was witnessed, either by sight or sound, by a child less than 18 years of age who is a member of the person's family or the victim's family."); GA. CODE ANN. § 16-5-70(d) (2011) ("Any person commits the offense of cruelty to children in the third degree when: (1) Such person, who is the primary aggressor, intentionally allows a child under the age of 18 to witness the commission of a forcible felony, battery, or family violence battery; or (2) Such person, who is the primary aggressor, having knowledge that a child under the age of 18 is present and sees or hears the act, commits a forcible felony, battery, or family violence battery."); UTAH CODE ANN. §§ 76-5-109.1, 76-3-203.10 (LexisNexis 2012); *People v. Burton*, 49 Cal. Rptr. 3d 334, 340-41 (Ct. App. 2006) (finding criminal child endangerment based on serious domestic violence against mother when her child was at the scene); *People v. Johnson*, 740 N.E.2d 1075, 1077 (N.Y. 2000); see also CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD WITNESSES TO DOMESTIC VIOLENCE: SUMMARY OF STATE LAWS (2009), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/witnessdv.pdf.

¹⁰⁵ Cf. Kent, *supra* note 99, at 1348-53 (expressing this concern in relation to criminal child endangerment charges against DV perpetrators). Kent considers use of 911 calls to obviate the need for a child's testimony, but unjustifiably supposes that this would only be effective in the rare case when the child was the caller. *Id.* at 1352. In all of the many calls in our study that revealed a child's presence, an adult was the caller (unpublished study) (on file with authors).

¹⁰⁶ See *Warren v. State*, 774 A.2d 246, 251-52 (Del. 2001); Myrna S. Raeder, *Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?*, 15 J.L. & POL'Y 759, 760 (2007).

¹⁰⁷ See *infra* notes 112-21 and accompanying text.

a victim's description of her "then existing mental, emotional or physical condition" or "statements against interest" by the perpetrator, which are other bases for avoiding application of the hearsay rule.¹⁰⁸

Eighth, in light of the sixth and seventh points above, prosecutors can use 911 call recordings before trial to secure plea agreements, making prosecutorial efforts both less costly and more effective. By permitting defense attorneys to listen to a recording, those attorneys will have more information with which to advise their clients about whether to plead guilty or not guilty, including the impact the call might have if played in court. 911 calls serve as powerful, persuasive evidence of the acts that transpired. Thus, defense attorneys, who would otherwise expect a dismissal and counsel their client to plead "not guilty" in light of a victim's recantations or in the absence of corroborating witnesses or forensic evidence, might counsel their client much differently after hearing a 911 call that contains a clearly inculpatory and vivid excited utterance ("My husband just stabbed me and I'm bleeding!"). The call recording substantially increases the chances of the fact-finder deeming the defendant guilty, as documented in Part IV. Because a guilty finding can result in significant jail time, especially when a weapon was involved, the prospect of a properly introduced 911 call should make the defendant much more wary of going to trial.

Ninth, 911 calls can also help prosecutors secure a higher sentence or better plea agreement by revealing, when no other admissible evidence does, the presence of a child witness. In a substantial number of states, the presence of a child witness is an aggravating factor that justifies a harsher sentence.¹⁰⁹ In addition, as noted above, in some states it is grounds for an additional criminal charge of child endangerment, and the possibility of being convicted of this additional crime further raises the stakes of going to trial.¹¹⁰

Tenth and finally, collecting and retaining 911 calls from a series of incidents involving the same persons can give prosecutors a fuller picture of the relationship between the parties involved in a particular incident. It can show a pattern or trajectory in a couple's relationship dynamics and that might make clearer how dangerous a home situation is at present. It can provide context for behavior by perpetrator or victim on any given occasion—for example, a victim's reaction to the abuser's threats or actions. This can help prevent (1) prosecution of a true victim; (2) abuse of the court process by a perpetrator who

¹⁰⁸ FED. R. EVID. 803(3); FED. R. EVID. 804(b)(3).

¹⁰⁹ See, e.g., ALASKA STAT. § 12.55.155(18)(C) (2012); ARIZ. REV. STAT. ANN. § 13-701(D)(18) (2010); ARK. CODE ANN. § 5-4-702(a) (2006 & Supp. 2009); CAL. PENAL CODE § 1170.76 (West 2004 & Supp. 2013); FLA. STAT. ANN. § 921.0024 (West 2006 & Supp. 2013); HAW. REV. STAT. § 706-606.4(1)(c) (West 2008); IDAHO CODE ANN. § 18-918(4) (2004); 720 ILL. COMP. STAT. ANN. 5/12-3.2(c) (West 2002 & Supp. 2013); LA. REV. STAT. ANN. § 14:35.3(I) (2007); MISS. CODE ANN. § 97-3-7(3), (4) (West 2011 & Supp. 2012); MONT. CODE ANN. 45-5-206(3)(v) (West 2013); OHIO REV. CODE ANN. §§ 2929.12(B)(9), .17(N) (LexisNexis 2010); OKLA. STAT. ANN. tit. 21, § 644(G) (West 2002 & Supp. 2013); OR. REV. STAT. § 163.160(3)(c) (2011); VT. STAT. ANN. tit. 13, § 1047 (2009); WASH. REV. CODE § 9.94A.535(3)(h)(ii) (2008).

¹¹⁰ See Kent, *supra* note 99, at 1352.

paces to the magistrate and secures a warrant against a true victim by presenting false information or information taken out of context; and (3) abuse of the criminal justice system to gain leverage in a civil divorce or custody proceeding.

2. *Evidentiary Rules.*—Most of the above described prosecutorial uses for 911 call recordings depend on their being admissible as evidence in court. Ordinarily out-of-court statements would be hearsay, inadmissible to prove the truth of what is said.¹¹¹ However, prevailing rules of evidence in the United States allow introduction of some statements a victim or other witness makes on a 911 call recording, even if that person is unavailable for cross-examination at trial, after (a) authenticating the 911 recording as a business record¹¹² and (b) establishing that the statements are “non-testimonial” and fall within one of the exceptions to the hearsay rule, such as those for excited utterances or present sense impressions.¹¹³

An excited utterance is “a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.”¹¹⁴ Courts generally apply a three-factor test to determine if an out-of-court statement is admissible on this basis:

First, there must be an event startling enough to cause nervous excitement. Second, the statement must be made before there is time to contrive or misrepresent. Finally, the statement must be made while the person is under the stress of the excitement caused by the event. More generally, we ask whether the statements at issue were made under the circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous.¹¹⁵ It is much more likely that 911 calls, rather than statements made to responding police officers, will satisfy this test, and courts have applied the test to 911 calls with positive outcomes in DV cases.¹¹⁶

¹¹¹ See *Crawford v. Washington*, 541 U.S. 36, 59 (2004); Jay M. Zitter, Annotation, *When Is Hearsay Statement Made to 911 Operator Admissible as “Excited Utterance” Under Uniform Rules of Evidence 803(2) or Similar State Rule*, 7 A.L.R. 6th 233 (2005).

¹¹² FED. R. EVID. 803(6), (8)(B); *State v. Ross*, 714 P.2d 703, 705 (Wash. Ct. App. 1986).

¹¹³ See FED. R. EVID. 803(1), (2); *Bemis v. Edwards*, 45 F.3d 1369, 1372 (9th Cir. 1995) (citation omitted) (noting that “because citizens who call 911 are not under any ‘duty to report,’ a recorded statement by a citizen must satisfy a separate hearsay exception”); Tom Lininger, *Reconceptualizing Confrontation after Davis*, 85 TEX. L. REV. 271, 332 (2006). The movant must also tie the recording to the incident through either date and time of call or proper identification of the voice on the call. The Supreme Court’s recent decisions have narrowed the category of “testimonial” statements, allowing for admission of victim statements to police in a greater portion of trials. See Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1867–68 (2012).

¹¹⁴ FED. R. EVID. 803(2).

¹¹⁵ *United States v. Hadley*, 431 F.3d 484, 496 (6th Cir. 2005) (citations omitted) (internal quotation marks omitted).

¹¹⁶ See, e.g., *Williams v. State*, 714 So. 2d 462, 463 (Fla. Dist. Ct. App. 1997) (finding tape of 911

The present sense impression exception allows into evidence “statement[s] describing or explaining an event or condition, made while or immediately after the declarant perceived it.”¹¹⁷ Courts have applied this exception to admit 911 call recordings, including in DV incidents.¹¹⁸

Admissions by perpetrators to 911 call operators are also admissible under the admission by a party opponent exception to the hearsay rule,¹¹⁹ but that rarely occurs. Likewise, statements children make in a 911 call or to police might be admissible even if the children are not available to be cross-examined,¹²⁰ but that too is uncommon.

3. Attitudinal and Practical Obstacles.—The greater obstacles to prosecutors’ routine use of 911 call recordings might be its novelty and burdensomeness. Introduction of 911 calls in misdemeanor domestic violence cases is a fairly recent phenomenon that is still not common in many state courts.¹²¹ High-volume jurisdictions are likely to have at least some prosecutors who have used 911 calls in misdemeanor DV cases, so that there are judges who are familiar and accepting of the practice. Judges in lower-volume state courts might be surprised by initiation of the practice and react with skepticism, so prosecutors there will need to be especially well-versed in the supporting evidentiary doctrine.

Regardless of the case volume in a given jurisdiction, practical obstacles to introducing 911 calls can arise. Jurisdictions can vary greatly in terms of the time prosecutors can dedicate to each case, the degree to which prosecutors are trained to obtain and introduce 911 calls in court, and the ease with which

call containing victim’s statement that her boyfriend had forced his way into her apartment and struck her on the forehead admissible as an excited utterance); *State v. Lee*, 657 N.E.2d 604, 609 (Ohio Mun. 1995) (holding that statements of defendant and Ms. Lee recorded on tape of victim’s telephone call to emergency services were admissible).

¹¹⁷ FED. R. EVID. 803(1); see *United States v. Schlesinger*, 372 F. Supp. 2d 711, 721 (E.D.N.Y. 2005) (applying test for present sense impression exception: whether the (1) son observed firsthand condition of factory as he made his way to the second floor, (2) statement was made immediately after son observed condition of factory, (3) son described what he observed firsthand through his senses).

¹¹⁸ See, e.g., *Warren v. State*, 774 A.2d 246, 251–52 (Del. 2001) (upholding admission of DV victim’s 911 calls as present sense impressions upon finding “the declarant must have personally perceived the event described; the declaration must be an explanation or description of the event, rather than a narration; and the declaration and the event described must be contemporaneous”); *People v. Melendez*, 744 N.Y.S.2d 485, 488 (App. Div. 2002) (reversing conviction for killing boyfriend during a domestic violence dispute because the trial court erred in holding the 911 tape recordings could not be admitted as an excited utterance or present sense impression).

¹¹⁹ FED. R. EVID. 801(d)(2).

¹²⁰ See *United States v. DeLeon*, 678 F.3d 317, 328 (4th Cir. 2012) (discussing precedents applying the “residual hearsay exception” to statements by child abuse victims).

¹²¹ See, e.g., Darlene Gavron Stevens, *Victim Testimony Not Needed in Domestic Violence*, CHI. TRIB. (Sept. 23, 1996), http://articles.chicagotribune.com/1996-09-23/news/9609230139_1_domestic-violence-cases-domestic-violence-prosecuting.

prosecutors can access the calls. In large-volume jurisdictions, prosecutor workload might be very high and limit, in any given case, the time prosecutors have to collect and prepare additional information beyond what police give them. In addition, there might be a practice in some jurisdictions of having the most junior prosecutors handle DV cases, especially misdemeanors,¹²² even though these can be the most difficult to handle from an evidentiary perspective precisely because there is often little or no hard evidence at the time of trial. Most entry-level prosecutors struggle for several months learning how to prepare files, subpoena witnesses, conduct a basic direct examination, and conduct an effective cross-examination.¹²³ They typically focus first on sorting through the evidence and information already contained in the numerous case files they receive, and they might not have time or training to seek additional evidence beyond what the file suggests exists. Because the 911 call is not part of the standard misdemeanor domestic assault case file, many prosecutors do not think to get it. Even shooting star prosecutors with the initiative to seek 911 calls must devote extra hours to request the recordings, listen to them, make them accessible to opposing counsel, and plan for their introduction in court.

Even if a prosecutor has the necessary level of initiative, tenacity, commitment, and training, there is yet another hurdle: a great number of requests for recordings could overwhelm the custodian of 911 calls, who is normally the custodian of a city's entire emergency operations center.¹²⁴ Emergency operations centers typically handle hurricanes, floods, calls for assistance throughout the entire city, and dispatch of emergency personnel (ambulances, firefighters, police) to respond to calls for help. 911 records custodians do not exist solely to serve the trial needs of prosecutors—they cannot spend their days searching for records, saving records to disc for use in court, and appearing in court to testify as to the chain of custody.

Despite the above challenges, solid data demonstrating the value of 911 calls to prosecutorial efforts might motivate a change in protocols so that prosecutors can use them in at least a subset of cases. This is what happened in Norfolk, Virginia. Based on the results of the study examining the value of these recordings described below in Part IV, observations prior to conducting the study, and conversations with colleagues, police officials, and directors of the Norfolk operations center, after April 30, 2012 the Norfolk Commonwealth

¹²² *E.g.*, VA. CODE ANN. § 15.2-1627(B) (2012) (requiring the Commonwealth's Attorneys to prosecute felonies). Some offices are able to devote resources to DV misdemeanors only through grant funding from federal and state agencies such as the Office of Violence Against Women, which typically fund an entry-level prosecutor. *See, e.g., Office of Violence Against Women Grant Programs*, U.S. DEP'T OF JUSTICE, <http://ovw.doj.gov/ovwgrantprograms.htm> (last updated Apr. 2012).

¹²³ *See, e.g.*, Jason Dimitris, *Life After Law School: Experience in the Miami-Dade County State Attorney's Office*, 29 STETSON L. REV. 1303, 1311 (2000) (discussing the high caseload and steep learning curve for junior prosecutors).

¹²⁴ *See, e.g., 911 Communications*, BURKE COUNTY EMERGENCY SERVICES, <http://www.bceoc.org/communications.htm> (last visited Oct. 9, 2013) (describing the new "multi agency system linking the Emergency Operations Center (EOC) to the Burke County Sheriff's Department").

Attorney's office successfully encouraged public safety agencies to develop a comprehensive set of procedures for 911 operations centers, police, and prosecutors to follow in DV cases. They are reflected in Part V's presentation of a set of model protocols for a comprehensive inter-agency response to DV.

B. CPS Use of 911 Calls to Protect Children

911 call recordings can also be used to protect children in maltreatment actions against DV perpetrators or parent victims. Inflicting psychological injury on a child constitutes child abuse throughout the United States.¹²⁵ Thus, under general code provisions relating to child abuse, CPS should be able to bring a civil child maltreatment action against a DV perpetrator who is violent in front of a child, on the theory that the perpetrator inflicted mental harm. This would thereby allow CPS to secure a protective order requiring the perpetrator to refrain from violence in front of the child and possibly to stay away from the child's home.¹²⁶ Some states' maltreatment statutes today refer explicitly to exposing a child to domestic violence as a form of abuse.¹²⁷ As a legal matter, DV victims have no control over such civil proceedings against a perpetrator, though in practice their non-cooperation can undermine CPS action against abusers just as much as it undermines prosecutorial action.

Further, there is the potential for maltreatment charges against chronic DV victims when CPS finds such necessary in order to protect a child from further exposure to DV. Failing to report the exposure to CPS could itself trigger action against a victim parent in some states. In fact, some mandatory child maltreatment reporting laws apply to all persons who have knowledge of child abuse or neglect.¹²⁸ More commonly, CPS treats allowing a child to be exposed to a physically or mentally unhealthy or unsafe environment, which can include one in which other persons regularly commit acts of violence, as a form of

¹²⁵ *E.g.*, CAL. WELF. & INST. CODE § 300(c) (West 2008); DEL. CODE ANN. tit. 10, § 901(i) (1999 & Supp. 2012); S.C. CODE ANN. § 63-7-20(4), 14 (2010); 22 VA. ADMIN. CODE 40-705-30(D) (2013).

¹²⁶ *See, e.g., In re Heather A.*, 60 Cal. Rptr. 2d 315, 322 (Ct. App. 1996); *Morcroft v. H.H.*, 935 So. 2d 588, 591-92 (Fla. Dist. Ct. App. 2006) (holding psychological injury to children from witnessing father batter mother sufficient to sustain child abuse charge against him and support a prohibition on his having contact with the children); *In re Lawrence G.*, 948 N.Y.S.2d 412, 413 (App. Div. 2012); *In re Dezerea G.*, 947 N.Y.S.2d 847, 848-49 (App. Div. 2012) (involving neglect proceedings against both mother and father); *In re Jada F.*, 947 N.Y.S.2d 595, 597 (App. Div. 2012) (holding that the mother was neglect in repeatedly beating child's older sibling in front of child).

¹²⁷ *E.g.*, ALASKA STAT. § 47.10.011(8)(B) (2012); *Iris R. v. State*, No. S-14204, 2011 WL 4715212, *4-5 (Alaska Oct. 5, 2011) (holding that mother's repeated acts of violence warrant denial of request to return children to her custody); *T.R. v. Dep't of Children & Families*, 864 So. 2d 1278, 1279 (Fla. Dist. Ct. App. 2004) (applying Florida statute).

¹²⁸ *E.g.*, OKLA. STAT. ANN. tit. 10A, § 1-2-101 (West 2009 & Supp. 2013); *see* CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 3 (2012), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf.

neglect, typically characterized as “failure to protect” or child endangerment.¹²⁹ On rare occasion, the state will terminate parental rights of a victim who fails to end a relationship with an abuser.¹³⁰

State maltreatment statutes generally do not refer explicitly and specifically to a parent’s exposing a child to her own DV victimization, but some statutes that refer to DV exposure are broad enough to encompass a charge against the abused as well as against the abuser.¹³¹ Child protection agencies in some states have charged mothers with neglect for repeatedly returning to an abuser with her children, even in the absence of specific statutory language treating that as child maltreatment, just as they might with a custodial parent who repeatedly brought a child into some other type of dangerous situation, such as a home where drug dealing occurs.¹³² At one time, some agencies had a routine practice of removing children from the custody of victim parents, but court rulings disapproving this practice have forced agencies to be more discriminating and to remove children only when that is necessary to protect their wellbeing.¹³³ In extreme cases, the state can terminate parental rights based on chronic failure to protect a child from DV exposure and from the danger of physical abuse that DV perpetrators pose.¹³⁴

911 call recordings can provide CPS with evidence to substantiate a maltreatment charge against the DV perpetrator or victim in situations where otherwise there would be insufficient evidence. Just as prosecutors often fail to secure a conviction even though DV did occur, CPS agencies are forced to deem a high percentage of valid child maltreatment reports as “unfounded” because they are unable to obtain concrete evidence.¹³⁵ That is undoubtedly common in cases of children’s exposure to DV. As noted above, it is inherently difficult for the state to respond to DV incidents because they typically take place in the home when no other adults are present, and often victims conceal from

¹²⁹ See, e.g., FLA. STAT. ANN. § 39.01(44) (West 2010); MINN. STAT. ANN. § 609.378(b)(1) (West 2009); N.Y. FAM. CT. ACT § 1012(f)(i)(B) (McKinney 2010); see also SUMMERS, *supra* note 8, at 43 (summarizing law on failure to protect from emotional harm).

¹³⁰ E.g., *In re* C.D.C., 455 N.W.2d 801, 807 (Neb. 1990).

¹³¹ See, e.g., ALASKA STAT. § 47.10.011(8)(B) (2012); *State v. M.L.L.*, 61 P.3d 438, 440 (Alaska 2002); cf. KY. REV. STAT. ANN. § 620.023(1)(d) (LexisNexis 2008 & Supp. 2012) (authorizing a court in any maltreatment case to consider domestic violence in making a judgment as to a child’s best interests whenever that is relevant to decision making).

¹³² See, e.g., *Y.G. v. Dep’t of Children & Families*, 830 So. 2d 212, 213–14 (Fla. Dist. Ct. App. 2002); *In re Dezerea G.*, 947 N.Y.S.2d 847, 850 (App. Div. 2012); *In re Joseph RR.*, 927 N.Y.S.2d 428, 430 (App. Div. 2011).

¹³³ E.g., *Nicholson v. Scopetta*, 820 N.E.2d 840, 855 (N.Y. 2004) (holding that New York City’s child protection agency may not presume to be neglectful every DV victim who is a custodial parent and whose child witnesses the DV); *In re Michael WW.*, 798 N.Y.S.2d 222, 224 (App. Div. 2005).

¹³⁴ *N.J. Div. of Youth & Family Servs. v. F.M.*, 48 A.3d 1075, 1093 (N.J. 2012).

¹³⁵ Cf. 22 VA. ADMIN. CODE 40–700–10 (2013) (requiring that for a child maltreatment report to be “founded,” CPS must find by a “preponderance of the evidence” that the abuse occurred).

police that their children were present during DV incidents and are unwilling to support any state attempts to intervene. The recordings can provide the necessary evidence of a child's presence during a domestic assault. The 911 call should be admissible in an adjudication of abuse or neglect on more or less the same grounds as in a criminal trial.¹³⁶ In agency and court proceedings prior to adjudication, there is generally no evidentiary rule that precludes use of caller statements, regardless of whether they are hearsay.¹³⁷ A small number of states have enacted legislation limiting use of 911 calls to "law enforcement," with the intent of preventing public disclosure of family incidents.¹³⁸ However, the state-level department of social services should be able to get those statutes modified to enable CPS access, and in most states there is no such obstacle.

In addition, in the unusual case where a third adult is present, the 911 call recording can establish that fact and help identify the other adults. Informing those witnesses that the call recording reveals their presence might also make them more cooperative. As noted above, in a significant number of states, every person who observes an incident endangering the welfare of a child is a mandatory reporter.¹³⁹ Thus, other adults who were present at the scene and who were aware of the child's exposure to the DV but did not report it might be induced to cooperate with a child maltreatment proceeding by being informed that they violated a legal obligation. Also, playing the 911 call for the mother might enable her to better appreciate the effect of the abuse on her children and more readily accept CPS recommendations for preventing further endangerment of the children.¹⁴⁰

Many legal scholars and DV victim advocates are highly critical of CPS intervention in domestic violence situations. We cannot fully respond to the various criticisms here, but will instead offer a few general observations. First, although critics of CPS response to DV are uniformly concerned only about the victim parent, and (in contrast) typically urge aggressive CPS action against perpetrators,¹⁴¹ some of the bases they rely on for objecting to CPS intervention

¹³⁶ Cf. *In re B.B.*, 735 N.W.2d 855, 861 (N.D. 2007) (admitting a probation officer's testimony about phone call from the minor's parent).

¹³⁷ See Mark Hardin, *Child Protection Cases in a Unified Family Court*, 32 FAM. L.Q. 147, 179 (1998).

¹³⁸ See *State Laws Relating to Confidentiality of 9-1-1 Call Recordings and Photographs of Emergency Scenes*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/telecom/confidentiality-of-911-call-recordings.aspx> (last updated Dec. 28, 2012).

¹³⁹ See sources cited *supra* notes 128–30 and accompanying text.

¹⁴⁰ See Dunlap, *supra* note 35, at 581 (footnote omitted) ("Parents may far underestimate the extent of their children's awareness of the spousal violence. Awareness of the harm to their children may be the impetus mothers need to leave.")

¹⁴¹ See, e.g., Audrey E. Stone & Rebecca J. Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse*, 20 HARV. WOMEN'S L.J. 205, 206 (1997) ("[W]e will outline suggestions for how these cases can be prosecuted successfully, by penalizing the batterers who perpetrate violence rather than by blaming the victims who remain in abusive relationships."); The "Failure to Protect" Working Group, *Charging Battered Mothers with "Failure to Protect": Still Blam-*

would apply equally to actions against the perpetrator. For example, many express the concern that CPS intervention against victim parents will deter them from notifying anyone of their abuse, including police and doctors.¹⁴² This concern lacks substantial research support.¹⁴³ Even assuming it to be valid, this same concern about deterrence could be applied to child abuse charges against DV perpetrators.¹⁴⁴ Victims might fear that any state action, whether by prosecutors or CPS, against their abuser will enrage him and intensify the abuse. Or they might simply not want to separate from their abuser, despite the violence, and anticipate that CPS charges would lead to a protective order that incidentally forces such separation. In addition, CPS action against the DV perpetrator would entail an investigation requiring victim cooperation, and some who express this concern about deterring reports maintain that an investigation alone has that effect. In any event, it seems unlikely CPS practices would deter DV victims from making emergency 911 calls, as opposed to deterring non-emergency calls or making a DV victim uncooperative after the fact. 911 calls typically occur at times when the victim is so focused on her physical safety that other considerations recede temporarily to the background. Deliberate efforts to protect or pacify the abuser by hiding the truth are likely to commence only after the crisis situation has ended.

A second example supporting this first observation, regarding those who object to CPS action against DV victims but advocate an aggressive stance towards perpetrators, is this: opponents of CPS intervention argue that a CPS practice of charging DV victims with neglect will heap a great number of new cases on the plates of already over-burdened agencies, thus diminishing their

ing the Victim, 27 *FORDHAM URB. L.J.* 849, 850 (2000) [hereinafter Working Group] (“Ensuring full accountability of the batterer for his actions is one of the central recommendations of this article.”).

¹⁴² See, e.g., Dunlap, *supra* note 35, at 573–74, 585. Dunlap also claims that charging the victim “deflects efforts to hold the wrongdoer accountable,” but cites no evidence of such conclusion. *Id.* at 577. As Dunlap notes, social workers tend to focus on the mother because the assumption is that the mother, not her abuser, will be the sole custodial parent if the child does not go into foster care. *Id.* Dunlap’s complaint about CPS “focus” on mothers seems to principally be that such “focus” amounts to blaming mothers for the harm. *Id.* at 578. However, such understanding misconstrues the purpose of CPS intervention, which is prevention of recurrence, not blame. Tamara Kuennen, *Recognizing the Right to Petition for Victims of Domestic Violence*, 81 *FORDHAM L. REV.* 837, 837, 841 (2012) (arguing that CPS action that deters victims from reporting DV violates their First Amendment right to petition the government for redress of grievances, but never considers whether children exposed to DV also have such a right, which police and CPS exercise on the children’s behalf by seeking protective intervention); Weithorn, *supra* note 39, at 26–28; Working Group, *supra* note 141, at 857–58, 864–65 (describing the models used by Massachusetts and Orange County, New York); Rachael Yourtz, *Letting the Fox Guard the Hen House: Why the Fourth Amendment Should Not Be Applied to Interviews of Children in Child Abuse Cases*, 40 *HASTINGS CONST. L.Q.* 653, 672–73 (2013).

¹⁴³ See Kuennen, *supra* note 142, at 857 (“[S]ocial scientists have yet to conduct a rigorous exploration of how significant of a role this particular fear plays in battered mothers’ reluctance to report DV to the police . . .”).

¹⁴⁴ *Cf.* Kent, *supra* note 99, at 1356 (citing this worry as a reason not to prosecute batterers for child endangerment).

ability to help any children.¹⁴⁵ The same could be said of a CPS practice of charging DV perpetrators with abuse. In fact, though there are no published statistics to confirm or refute this, one would expect a much higher number of CPS actions against abusers than against victims. Even the first attack in front of a child constitutes child maltreatment on the part of the abuser,¹⁴⁶ whereas a DV victim can be said to be neglectful only if she had reason to expect an assault against her, which is typically not true with the first attack.¹⁴⁷ In any event, CPS directors themselves would probably not be opposed to having 911 call centers report DV exposure on the grounds that this would increase their caseload too much. The authors met with the director of Norfolk's CPS agency and discussed the potential deluge of new cases that could occur if the local 911 call center instituted a practice of reporting to CPS every DV call that revealed the presence of a child. His response was essentially: "Of course we want to know about these instances of child endangerment, and we will do the best we possibly can with the resources we have." Given the persistence of DV and its tendency to spill over into physical abuse of children,¹⁴⁸ children in homes where violence occurs are likely to be subjects of CPS investigations at some point anyway. Presumably, the agencies would prefer to intervene to protect these children sooner rather than later.

A second observation regarding critics of CPS intervention in DV cases is that many of the arguments made by those who oppose CPS action against DV victims could apply equally to other forms of child maltreatment—but no one would give much credence to such arguments in the context of these other forms. The aforementioned concern about CPS workload is one example. It is true of every widespread phenomenon that threatens child welfare that including it in CPS purview could overwhelm caseworkers. But there is no more justification for CPS to turn a deaf ear to 911 calls reporting DV with children present than there is for excluding some other category of cases from CPS purview in an effort to reduce caseload.

Another example of this second observation is the widespread allegation that charging a DV victim with child neglect is unfair to her, like piling another form of abuse upon her.¹⁴⁹ Yet no one who has made this assertion has

¹⁴⁵ See Dunlap, *supra* note 35, at 589–91; Kuennen, *supra* note 142, at 876; Weithorn, *supra* note 39, at 30–31.

¹⁴⁶ See, e.g., *In re Michael WW.*, 798 N.Y.S.2d 222, 222 (App. Div. 2005) (upholding neglect charge against father based on single incident of his committing domestic violence).

¹⁴⁷ See, e.g., *S.S. v. R.S.*, 728 N.E.2d 1165, 1172 (Ill. App. Ct. 2000) (rejecting charge of neglect by mother, against whom there had been only one incident of violence); *In re Lonell J.*, 673 N.Y.S.2d 116, 118 (App. Div. 1998) (upholding a finding of neglect against mother based on a pattern of violence in front of her children); *In re Nina A.M.*, 593 N.Y.S.2d 89, 89 (App. Div. 1993) (holding that mother was not neglectful because she left her abusive husband).

¹⁴⁸ See Weithorn, *supra* note 39, at 36 n.140.

¹⁴⁹ See, e.g., Dunlap, *supra* note 35, at 566, 575, 587–88; Kuennen, *supra* note 142, at 875; Stone & Fialk, *supra* note 141, at 205–06; Working Group, *supra* note 141, at 849; see also SUMMERS, *supra* note 8, at 42 (characterizing this as a "major issue of controversy between child protection workers

demonstrated that failure-to-protect charges are unfair as a general matter—these charges cover exposure to DV as well as situations where a mother is aware of her husband or boyfriend sexually abusing her child, or knows that other adults are leaving drugs or guns within reach of her child, yet does not act to prevent harm to the child.¹⁵⁰ None have argued that DV exposure is morally distinguishable from these situations. In those other situations, too, one could equally argue that mothers are not responsible because they are not engaging in harmful or dangerous behavior themselves and might be deterred from protective action by fear of their partner's reaction. An aspect of the parental role that the legal system confers on people is a legal obligation to protect their children from danger, and regardless of whether a failure to fulfill that obligation is morally blameworthy, the civil child protection system intervenes when persons assigned the parental role prove unwilling or unable to protect their children.¹⁵¹ An underlying assumption of much feminist writing about CPS involvement in DV cases seems to be that no negative consequences should ever follow from being a victim oneself.¹⁵² By that logic, there should be no CPS intervention when parents abuse or neglect their children in other ways because of a partner's terrorizing them, or as a result of their being a victim of mental illness, addiction, or other debilitating condition. Repeatedly subjecting oneself to DV is analogous to repeatedly abusing drugs or alcohol; at some point, one might feel incapable of avoiding the harm such substances inflict, but that hardly supports a normative position that it is wrong for CPS to step in to try to protect a child from the harm or endangerment resulting from that addiction, even to the point of removing the child from the parent's custody if that is on balance best for the child.

The same could be said regarding the allegation that CPS intervention against DV victims produces bad outcomes for children because separation from their mother is traumatic.¹⁵³ This could be true of any other failure-to-protect type of case, yet we generally rely on CPS caseworkers to make a determination, after balancing all the costs and benefits for a child in a given situation, as to whether

and domestic violence advocates”).

¹⁵⁰ Cf. MINN. STAT. ANN. § 609.378(1)(a)(2) (West 2009) (making it a crime when a parent “knowingly permits the continuing physical or sexual abuse of a child”); MINN. STAT. ANN. § 609.378(1)(b)(2) (West 2009) (making it a crime when a parent “knowingly caus[es] or permit[s] the child to be present where any person is selling, manufacturing, . . . or possessing a controlled substance”).

¹⁵¹ In contrast, criminal child abuse charges are, at least in part, about finding a parent blameworthy. For that reason, when the primary explanation for a parent's failure to protect a child is fear that this will endanger the child and the parent even more, the criminal law should not apply. See, e.g., MINN. STAT. ANN. § 609.378(2) (West 2009) (making it a defense to criminal child neglect or endangerment charges that the defendant had a “reasonable apprehension” that “acting to stop or prevent the neglect or endangerment would result in substantial bodily harm to the defendant or the child in retaliation”).

¹⁵² See, e.g., Dunlap, *supra* note 35, at 575, 587–89; Working Group, *supra* note 141, at 854.

¹⁵³ See Dunlap, *supra* note 35, at 573; Weithorn, *supra* note 39, at 27, 32–33.

removal of the child from maternal custody is in the child's best interests. The law throughout the United States requires CPS to make "reasonable efforts" to avoid removal,¹⁵⁴ so caseworkers are expected to make individualized assessments of each child's unique situation. As noted above, in the past CPS workers in some jurisdictions have automatically removed children from their mother's custody if they learned of exposure to DV.¹⁵⁵ CPS agencies today have received feedback from courts, prominent advocacy organizations, and scholars that this practice is unacceptable,¹⁵⁶ so there has likely been a change in social worker attitudes toward a more cautious approach.¹⁵⁷ In any event, the fact that social workers might overreact in some cases cannot suffice to support a policy of keeping CPS in the dark about situations of potential harm to children.

A further illustration of this second observation is the assertion made, in opposing failure-to-protect charges against DV victim parents, that some children appear not to suffer negative effects from DV exposure.¹⁵⁸ It is true of other types of child endangerment reports CPS receives, as well, that sometimes the reported conduct does not appear to have injured the children involved. The same resilience some children display with respect to DV exposure, arising from such things as strong self-esteem, high intellectual functioning, involvement in positive activities outside the home, and a strong relationship with a non-abusing parent,¹⁵⁹ presumably could also insulate them from effects of other potentially harmful parental behavior, such as excessive corporal punishment and more direct forms of emotional abuse. However, a child's resilience does not stop us from attempting to protect her from such harms.

A third observation is that arguments against CPS intervention in DV cases typically lack subtlety or consistency in their treatment of facts. An example is the aforementioned assertion that many children exposed to DV experience no adverse consequences. As discussed in Part II, the weight of empirical evidence leads to the conclusion that most children are adversely impacted by exposure

¹⁵⁴ See James G. Dwyer, *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 435–36 (2008).

¹⁵⁵ This practice in New York City led to litigation, and New York courts ordered CPS to use removal more carefully. See Dunlap, *supra* note 35, at 593–98.

¹⁵⁶ See Weithorn, *supra* note 39, at 33–34.

¹⁵⁷ See, e.g., *id.* at 37 (noting widespread recognition among domestic violence and child protection agencies that cooperation among agencies will achieve the best results for victims and children); TEXAS DEPARTMENT OF FAMILY & PROTECTIVE SERVICES, CHILD PROTECTIVE SERVICES HANDBOOK § 2393.2 (2013), http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_2390.asp#CPS_2393_2 (instructing CPS workers to refer suspected victims of domestic violence to appropriate services, yet saying nothing about removing children from victims' custody).

¹⁵⁸ See, e.g., Melissa A. Trepiccione, Note, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child an Acceptable Solution when Her Child Witnesses Domestic Violence?*, 69 FORDHAM L. REV. 1487, 1522 (2001) (expressing "fierce doubts regarding the harm to child witnesses of domestic violence in each and every situation where removal occurs"). *But see* Kuennen, *supra* note 142, at 870 ("There can be no doubt that children exposed to DV are harmed . . .").

¹⁵⁹ See SUMMERS, *supra* note 8, at 32–34 (discussing research on resilience factors).

to DV. Significantly, many scholars who oppose CPS action against DV victims themselves emphasize the harm DV exposure inflicts on children, in support of a recommendation for more aggressive state action against DV perpetrators.¹⁶⁰ When other scholars try to minimize the impact on children, they undermine that recommendation.¹⁶¹ Moreover, it is likely the case that many adult DV victims also display resilience in the face of adversity,¹⁶² yet their advocates do not appear to consider this relevant when arguing for their protection through the state's response to DV. Finally, that a child does not yet manifest damage from exposure to DV does not mean the child is not at serious risk of harm; the violence could increase in intensity, and the victim parent might become abusive herself or neglectful as the violence continues.¹⁶³ CPS does not have to wait until harm occurs and is visible. CPS intervention is not backward looking, aimed at punishing for past harm the way criminal prosecution is; rather, it is forward looking and aimed at preventing recurrence.

A second example of the third observation, regarding the lack of subtlety in critics' factual analysis, is their tendency to portray DV victims, in the context of child protection interventions, as best suited and highly disposed to make rational decisions to protect their children's wellbeing.¹⁶⁴ The undeniable reality, as discussed above, is that many domestic violence victims are driven in their actions by drug dependency or their own emotional needs. For these reasons, many victims simply place greater value on preserving their adult relationship than on ensuring that their child never again witnesses violence in the home.¹⁶⁵

160 See, e.g., Stone & Fialk, *supra* note 141, at 207–09; Working Group, *supra* note 141, at 855.

161 Cf. T.R. v. Dep't of Children & Families, 864 So. 2d 1278, 1280 (Fla. Dist. Ct. App. 2004) (disregarding DV perpetrator's argument that there was no evidence his children had been emotionally impaired by exposure to the DV).

162 For example, in the course of arguing that there is little cause for CPS concern about children of DV victims, Evan Stark asserts that “fully 84.5% of the domestic violence victims had no mental health problems,” and that battered women who become involved in CPS interventions are “markedly high functioning” and “relatively problem free.” Stark, *supra* note 25, at 112. Stark's account sounds like an argument for less state concern about DV victims as well as about their children.

163 See Dunlap, *supra* note 35, at 569.

164 See, e.g., *id.* at 580 (“A mother's choice to stay is often a calculated decision with the protection of the children at the center of the calculation.”); Amy R. Melner, *Rights of Abused Mothers vs. Best Interest of Abused Children: Courts' Termination of Battered Women's Parental Rights Due to Failure to Protect Their Children From Abuse*, 7 S. CAL. REV. L. & WOMEN'S STUD. 299, 309 (1998) (“Battered women's responses may not be a form of psychological entrapment, but may in fact be a form of reasoned action.”).

165 See, e.g., *In re C.D.C.*, 455 N.W.2d 801, 807 (Neb. 1990) (“Although the mother tried several times to leave the father, she always returned to him. Twice she filed for divorce but, at the time of the termination petition and judgment, had reconciled with the father. The mother told one of the rehabilitation counselors for the Mental Health Center at Immanuel Medical Center that she was aware she was choosing the father over her son. The rehabilitation counselor, who had provided therapy to the mother for 3 years, stated that when the father was absent from the mother's life, the mother was able to recognize the danger involved in the father's abusive behavior but that when the father returned, the mother would delude herself into believing that he was not abusive.”); *In re*

The same problem arises in the context of sexual abuse of children; mom might know that her husband or boyfriend is doing it, but she places highest priority on protecting him and her relationship with him.¹⁶⁶

Moreover, many DV victim parents are not capable of making rational and clear-headed determinations about what is best for their children, even if inclined to make that their top priority. They tend to be overly optimistic about the potential that their abusers will change their behavior.¹⁶⁷ Tension also exists between two competing assertions: First, in connection with child protection, that CPS should trust a custodial mother who is a DV victim to make the proper judgment about how best to protect her child. The second, in connection with demands for more victim services and facilities, more severe penalties for DV perpetrators, and greater tort compensation for victims, is that DV is devastating and debilitating to victims.¹⁶⁸ As described in Part II, DV impacts victims in many ways that interfere with their care, attention to, and decision making for their children, including post-traumatic stress disorder, depression, severe anxiety, learned helplessness, impaired cognitive efficacy, substance abuse, illness, and lack of resources.¹⁶⁹ Further, DV victim parents simply might not know what effects DV exposure can have on children, nor the high correlation between partner abuse and child abuse.

In any event, a formal maltreatment charge against the parent victim is not typically a CPS agency's only strategy for ensuring a child's health and safety. Norfolk CPS, for example, now commonly convenes "family team meetings," bringing in a child's grandparents and other members of the extended family, to talk with the parent victim or with the DV perpetrator and to make plans collectively for care of the child while the perpetrator and victim receive

Dezere G., 947 N.Y.S.2d 847, 849 (App. Div. 2012) (articulating that after mother and father agreed to protective order prohibiting his contact with child, mother allowed father to live with child and involved child in lying about this).

¹⁶⁶ See, e.g., *In re Carlos T.*, 94 Cal. Rptr. 3d 635, 641–42 (Ct. App. 2009) (affirming termination of mother's parental rights on grounds she had known and failed to protect children from sexual abuse by father, even though father was presently incarcerated); *In re C.L.M.*, 19 P.3d 888, 888 (Okla. Civ. App. 2000) (affirming termination of mother's parental rights on grounds she knew of father's "heinous or shocking" sexual abuse and failed to intervene).

¹⁶⁷ See *In re C.D.C.*, 455 N.W.2d at 807 (explaining that mother made herself believe perpetrator was not abusive); Carolyn Snider et al., *Intimate Partner Violence: Development of a Brief Risk Assessment for the Emergency Department*, 16 ACAD. EMERGENCY MED. no. 11 1208, 1214 (2009) (finding that female DV victims "are more likely to underestimate their risk than to overestimate it"); Stark, *supra* note 17, at 46 (stating that a "honeymoon" phase may exist when abuser apologizes and asks for forgiveness, tricking the victim into thinking the abuse will end).

¹⁶⁸ See, e.g., Cecilia Sardenberg, *What Makes Domestic Violence Legislation More Effective?*, PATHWAYS OF WOMEN'S EMPOWERMENT 3, 9 (2011), http://www.pathwaysofempowerment.org/Domestic_Violence_Policy_Paper.pdf (setting out "key policy message" that "[d]omestic violence is multi-faceted, complex and devastating to women," and promoting legislative changes including increased penalties).

¹⁶⁹ See SUMMERS, *supra* note 8, at 21; James & Schaeffer, *supra* note 27, at 17; Lang & Stover, *supra* note 24, at 620.

services. In some circumstances, CPS might be able to use a 911 call recording to promote this process—for example, if the perpetrator’s family is resistant to believing that DV actually occurred. Many states now have “differential response” systems, by which CPS diverts, to an informal resolution, cases in which parents are receptive to assistance.¹⁷⁰ This enables CPS’s initial interaction with a DV victim parent to be an “assessment” rather than an “investigation,” the result of which is to connect that parent with a DV advocate or shelter provider. With the abuser, in contrast, the initial CPS action should be an investigation that leads, if there is sufficient evidence, to a maltreatment charge against the batterer. As noted above, 911 call recordings can make that CPS effort effective in a greater number of cases.

If CPS does initiate court proceedings against a DV perpetrator or victim, the court will generally appoint a guardian ad litem (GAL) to advocate for the child. To fulfill that role most effectively, the GAL should also have access to the 911 call recording, as well as to any police report or CPS investigation summary. In some jurisdictions, a GAL armed with the 911 call recording might be able to petition for a protective order against the DV perpetrator if no other person or agency does so.

C. Victim Parents’ Use of 911 Call Records

All states have laws enabling victims themselves to seek protective orders in civil legal proceedings against an abuser.¹⁷¹ Civil protective orders can give DV victims a broader range of benefits than do typical “stay away” orders in criminal proceedings. In particular, they can include provisions granting a DV victim exclusive possession of the home, custody of any children, and child support.¹⁷² Many victims nevertheless decline to initiate civil proceedings.¹⁷³ For some the main reason might be a feeling of futility; if they have little evidence beyond their own allegations, they might assume they will lose in a “my word against his” contest.¹⁷⁴ Were prosecutors, police, or social service agencies able to supply

¹⁷⁰ See generally Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 630–33 (2012) (explaining “differential response” systems, their informality, and their usefulness).

¹⁷¹ Kohn, *supra* note 17, at 191–92; Kellie K. Player, *Expanding Protective Order Coverage*, 43 ST. MARY’S L.J. 579, 587–88 (2012) (explaining every state has some remedy for domestic violence and civil protective orders can last up to two years).

¹⁷² Smith, *supra* note 66, at 95, 100, 119–25; see Player, *supra* note 171, at 592; see, e.g., IOWA CODE ANN. § 236.5 (West 2008 & Supp. 2013); R.I. GEN. LAWS § 15–15–3 (2003 & Supp. 2012); N.Y. FAM. CT. ACT § 842 (McKinney 2010 & Supp. 2013).

¹⁷³ In some jurisdictions, it might be possible for someone else to initiate a civil proceeding. See, e.g., N.Y. FAM. CT. ACT § 822 (McKinney 2010) (authorizing family members of the perpetrator, police officers, a “duly authorized agency,” and a “person on the court’s own motion” to originate a civil “family offense” proceeding).

¹⁷⁴ See Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1310 (1993) (footnote

victims or their attorneys with 911 call recording, victims could pursue civil orders with greater confidence.¹⁷⁵ As with CPS, victims in a few states might currently encounter difficulty in gaining access to recordings of their 911 calls, because of laws prohibiting release of the recordings to anyone outside of law enforcement. Victims' advocates in those states should consider seeking amendment to those laws.

Victims could use 911 call records to their advantage in many other fora as well, including custody disputes with the abuser in domestic relations courts. State laws treat domestic violence as a basis for denying requests for joint legal custody¹⁷⁶ and for denying primary physical custody to a parent who committed DV against the other, especially if it was in front of the child.¹⁷⁷ Proof of DV also excuses a victim parent for leaving the family home, and so protects her from losing custody based on charges of abandoning the children.¹⁷⁸ Documented history of partner abuse can also support a battered parent's request that a court order supervision of a batterer's visitation with a child or "assisted exchanges" of children for visitation purposes.¹⁷⁹ Further, proof of DV can support a custodial parent's request for court permission to relocate with his or her child.¹⁸⁰

omitted) ("[C]ourts in all kinds of domestic violence cases continue to treat claims of domestic violence with disdain, disbelief and dismissiveness. Courts, police and prosecutors frequently reject claims of violence and pleas for help, on the ground that if the violence were real the woman would have left; if she stayed, it must not be true.").

¹⁷⁵ Cf. Lindauer, *supra* note 19, at 808 (stating that parties to family and juvenile law matters increasingly are proceeding pro se, because free or low-cost legal assistance is not available, which would make the assistance of a social service agency all the more important).

¹⁷⁶ See, e.g., ALA. CODE § 30-3-131 (LexisNexis 2011); ARIZ. REV. STAT. ANN. § 25-403.03(D) (2007 & Supp. 2012); IOWA CODE ANN. § 598.41(1)(b) (West 2001).

¹⁷⁷ See, e.g., ALA. CODE § 30-3-131 (LexisNexis 2011); ARIZ. REV. STAT. ANN. § 25-403.03(B) (2007); 750 ILL. COMP. STAT. ANN. 5/602(a) (West 2009 & Supp. 2013) (footnote omitted) (including among custody factors "(6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person; (7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person..."); LA. REV. STAT. ANN. § 9:364(A) (2009) ("There is created a presumption that no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of children."); N.D. CENT. CODE ANN. § 14-09-06.2 (2009); *Wissink v. Wissink*, 749 N.Y.S.2d 550, 550 (App. Div. 2002) (overturning custody award to father, because trial court had given insufficient weight to evidence of father's repeated abuse of mother); see also Gonzalez and Reichmann, *supra* note 28, at 198 ("For example, twenty-four statutes have a rebuttable presumption that awarding custody to the perpetrator of domestic violence is not in the child's best interests.").

¹⁷⁸ See, e.g., ARIZ. REV. STAT. ANN. § 25-403.03(I) (2007 & Supp. 2012); IOWA CODE ANN. § 598.41(1)(d) (West 2001).

¹⁷⁹ See, e.g., ARIZ. REV. STAT. ANN. § 25-403.03(F) (2007 & Supp. 2012); IND. CODE ANN. § 31-14-14-5 (LexisNexis 2007); LA. REV. STAT. ANN. § 9:364(C) (2009) ("If the court finds that a parent has a history of perpetrating family violence, the court shall allow only supervised child visitation with that parent"); see also Karen Oehme and Kelly O'Rourke, *Protecting Victims and Their Children Through Supervised Visitation: A Study of Domestic Violence Injunctions*, 3 FAULKNER L. REV. 261, 273, 276 (2012) (documenting the need for and effectiveness of supervised visitation programs).

¹⁸⁰ See, e.g., *In re Eddington v. McCabe*, 949 N.Y.S.2d 734, 734-35 (App. Div. 2012).

Violence is factually relevant to a custody or visitation dispute between parents who are abuser and victim, even though the co-parents are presumably no longer together, in several ways: It suggests that it would be unwise to award joint legal custody, insofar as that requires a higher level of interaction. It is evidence that the “friendly co-parent” factor present in most states’ custody statutes cuts against the perpetrator.¹⁸¹ The DV also suggests that the child’s relationship with the abuser is weaker or less positive than it would be otherwise, given the distrust and fear that children who witness DV commonly have toward the abuser, and the tendency of abusers to withdraw from their children.¹⁸² Finally, violence suggests that the abuser is a less nurturing parent, given the demonstrated correlation between abusive behavior toward an intimate partner and being more controlling, manipulative, authoritarian, abusive, and erratic as a parent.¹⁸³

One problem many DV victims face in a custody or visitation dispute is that a judge might discount or entirely disbelieve their allegations of abuse. Some advocates for DV victims assert that judges, as a general matter, accord less credibility to women, and with respect to DV specifically, tend to discredit victims’ testimony.¹⁸⁴ Yet, often the victim’s testimony is the only evidence there is of DV.¹⁸⁵ As a clinical law professor explains:

As we know, domestic violence occurs in private, resulting in little verifiable evidence. Victims are reluctant to contact law enforcement, seek medical treatment or inform others of the physical or emotional injuries they suffer at the hands of their batterers. Unless law enforcement or another intervener is involved at the time of an abusive incident, it is unlikely that proof of the batterer’s misconduct will be available at the time of the custody trial. Law enforcement involvement, however, does not guarantee proper documentation of injuries, property damage, or other evidence. Hospital

¹⁸¹ See LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 46 (2002) (stating that how a batterer treats his partner is “an important predictor of how he is likely to treat children”); Margaret K. Dore, *The “Friendly Parent” Concept: A Flawed Factor for Child Custody*, 6 *LOY. J. PUB. INT. L.* 41, 42 (2004); Lindauer, *supra* note 19, at 808 (noting that abusers frequently charge victims with “parental alienation syndrome” when the victims allege DV).

¹⁸² See *Morcroft v. J.H.*, 935 So. 2d 588, 590 (Fla. Dist. Ct. App. 2006) (describing child’s fear that father who battered mother with hammer would also try to hurt child, even though there had been no past physical child abuse); Grych et al., *supra* note 41, at 91; Lang & Stover, *supra* note 24, at 620.

¹⁸³ See SUMMERS, *supra* note 8, at 9 (“Fathers who are batterers are often authoritarian, neglectful and verbally abusive in their child-rearing.”); Wolfer et al., *supra* note 39, at 11 (“Abusive parents tend to be more narcissistic and self-absorbed than nonviolent parents.”).

¹⁸⁴ See, e.g., Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence against Women*, 17 *AM. U. J. GENDER SOC. POL’Y & L.* 163, 176–78 (2009).

¹⁸⁵ See also Lindauer, *supra* note 19, at 809 (discussing evidentiary obstacle to securing primary physical custody when an abuser co-parent seeks shared or sole custody); cf. *Khaykin v. Kanayeva*, 849 N.Y.S.2d 646, 648 (App. Div. 2008) (rejecting mother’s appeal of trial court decision granting custody to father despite mother’s allegation of DV, stating: “The father denied the mother’s allegations, and the court resolved the conflicting testimony in favor of the father.”).

reports, although incredibly helpful when available, do not exist for clients who are unable or reluctant to seek medical treatment. In some cases, the only other witness to the batterer's behavior is a young child. Many battered mothers and their lawyers, however, are reluctant to subject children to the trauma of trial testimony, given the legal, social, and psychological risks.¹⁸⁶

A related concern is that if a judge discounts a primary caretaker's accusations against the other parent, then the judge will punish her for being unsupportive of the other parent's relationship with the child, applying the "friendly parent" factor against her, so DV victims' attempts to use the violence against the perpetrator could backfire.¹⁸⁷

The 911 call recording could obviate both of those concerns. Having a copy of the recording to play in the domestic relations court should give DV victims much greater confidence making allegations of DV against the perpetrator parent in custody disputes. It should considerably elevate the credibility of their testimony in judges' minds and constitute hard evidence that the alleged assault did in fact occur. Further, if the call recording includes the cries of a child who was present, this should impress on the judge the effect that the perpetrator's actions have likely had on the child's well-being and on the child's disposition toward the abuser.

A further issue that arises when abuser and victim have a child in common is post-separation contact. A pervasive phenomenon in divorce law today is mandatory parenting classes, usually with an expectation that the parents will take the class together.¹⁸⁸ Mandatory mediation in contested custody cases has also become very common.¹⁸⁹ Most state statutes, however, treat domestic violence as a basis for victims' foregoing parenting classes, or at least ensuring that the parents do not have to take the classes together, and for waiving a mediation requirement.¹⁹⁰ Many states also permit tort actions against former spouses or domestic partners to recover compensation for harms such as assault, and victims could use 911 call recordings to prove all the elements of such a cause of action.¹⁹¹

¹⁸⁶ See Conner, *supra* note 184, at 183–84 (footnotes omitted).

¹⁸⁷ See, e.g., IOWA CODE ANN. § 598.41(1)(c) (West 2001) ("The court shall consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement. Just cause may include a determination by the court . . . that a history of domestic abuse exists between the parents."); Dore, *supra* note 181, at 43–56 (2004).

¹⁸⁸ See Tali Schaefer, *Saving Children or Blaming Parents? Lessons from Mandated Parenting Classes*, 19 COLUM. J. GENDER & L. 491, 495 (2010).

¹⁸⁹ See, e.g., *id.* at 495; Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 178–79 (2003).

¹⁹⁰ See MINN. STAT. ANN. § 518.157(3) (West 2006 & Supp. 2012); TEX. FAM. CODE ANN. § 105.009(b) (West 2008); Greenberg, *supra* note 41, at 618; Ver Steegh, *supra* note 189, at 192.

¹⁹¹ See generally Fernanda G. Nicola, *Intimate Liability: Emotional Harm, Family Law, and Stereotyped Narratives in Interspousal Torts*, 19 WM. & MARY J. WOMEN & L. 445, 445 (2013).

Evidence from a 911 call could also be very helpful to victims who are married to their abusers and need to secure a divorce. In those states where an immediate divorce is available only to those spouses who can demonstrate fault by the other,¹⁹² the call record might be the best or only evidence of “cruelty.” Moreover, in states where a spouse’s bad conduct can influence property distribution or alimony, a victim might use the call record to garner more property and ongoing support than she would have otherwise received, which could be especially important for victims whose abuse has prevented them from obtaining or maintaining employment.¹⁹³

Finally, a 911 call recording might enable the victim to secure certain public benefits. There are public compensation funds for DV victims,¹⁹⁴ but a victim might be denied this benefit if the fund administrators do not believe she was a victim or if they suspect that she was the instigator of an altercation.¹⁹⁵ State and private organizations that provide special services and supports to DV victims might be more forthcoming with such assistance if they have this clear and dramatic evidence of an attack. When poor mothers seek welfare benefits for their children, they are presumptively required to assist the child support enforcement office in obtaining a paternity and child support order against the biological father.¹⁹⁶ The law excuses them from that cooperation requirement, however, if they can demonstrate that the biological father has committed DV against them.¹⁹⁷ As to these and all other potential uses of a DV allegation, the 911 call recording can greatly assist the victim parent in persuading decision makers of the truth of the allegation.

¹⁹² In a substantial number of U.S. states, the no-fault basis for divorce is a waiting period. *See* Charts, 43 FAM. L.Q. 972, 972 chart 1, 976 chart 4 (2010).

¹⁹³ *See* Lauren Guidice, *New York and Divorce: Finding Fault in a No Fault System*, 19 J.L. & POL’Y 787, 820–22 (2010).

¹⁹⁴ *See* Njeri Mathis Rutledge, *Looking a Gift Horse in the Mouth—The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims*, 19 DUKE J. GENDER L. & POL’Y 223, 223 (2011) (discussing the Victims of Crime Act of 1984, which provides federal funding to state Crime Victim Compensation (“CVC”) programs that reimburse domestic violence victims for crime-related expenses, such as medical care, counseling, food, and shelter).

¹⁹⁵ *Id.* at 243 (footnotes omitted) (“[T]he issue of contributory misconduct could arise in a domestic violence case ‘as the victim may be viewed as provoking the attacker towards violence.’ Reviewing the police report may be of little assistance. Possible officer bias against domestic violence cases may impact how police reports are drafted. If self-defense is used, and the officer is unable or unwilling to identify the primary aggressor, the victim may be charged under a dual arrest policy.”). Having the record to hand over might also be a way for a victim to satisfy a program requirement that victims cooperate with police. *See id.* at 243–44 (footnote omitted) (“To be eligible for VOCA funds, state CVC programs must promote ‘victim cooperation with the reasonable requests of law enforcement authorities.’ In turn, every state program includes cooperation as an eligibility requirement.”).

¹⁹⁶ *See* Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1045–48 (2007).

¹⁹⁷ *See id.* at 1046–48.

D. Other Parent of a Child Witness

Finally, if prosecutors or CPS are concerned about the welfare of a victim's child and perceive a lack of commitment or capacity on that parent's part to take proper measures to insulate the child from further incidents, they might attempt to involve the child's other parent if that other parent is not the victim's abuser. For example, the DV victim might be a custodial mother living with a boyfriend who is not her child's father and who has repeatedly assaulted her in front of the child. The child's father might be capable of taking custody and caring for the child, or of monitoring the child's welfare while the child remains in the mother's custody. Having the 911 call recording might motivate and enable him to get involved in the situation to protect the child's welfare. It would give him evidence to use in seeking a change in custody, to give him primary custody.¹⁹⁸ In some states, he might have standing to seek a protective order against the mother's abuser.¹⁹⁹ Such action by a parent not involved in the violence might also spare the victim parent from neglect charges. A practice of handing over 911 call tapes to private parties other than the caller and other than the victim could raise legitimate confidentiality concerns, and might conflict with state law or agency policy,²⁰⁰ but there should be no constitutional impediment to giving information and evidence relating to a child's endangerment to another parent of the child.

IV. THE STUDY

Given all the above–enumerated ways in which a 911 call recording might provide more information or produce better outcomes for various actors,

¹⁹⁸ See, e.g., *Assini v. Assini*, 783 N.Y.S.2d 51, 52 (App. Div. 2004) (upholding transfer of custody to father because of child's repeated exposure to DV while in mother's custody); *Yizar v. Sawyer*, 751 N.Y.S.2d 117, 117–19 (App. Div. 2002). *But see* *Lewelling v. Lewelling*, 796 S.W.2d 164, 167 (Tex. 1990) (“A parent should not be denied custody of a child based on the fact that he or she has been battered. We hold that evidence that a parent is a victim of spousal abuse, by itself, is no evidence that awarding custody to that parent would significantly impair the child.”).

¹⁹⁹ See, e.g., ARIZ. REV. STAT. ANN. § 12–1809 (2003 & Supp. 2012) (authorizing any parent to petition on behalf of a child for a civil protective order against “harassment” and defining harassment as “a series of acts over any period of time that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person and serves no legitimate purpose”); OHIO REV. CODE ANN. § 3113.31 (LexisNexis 2008 & Supp. 2013); TEX. FAM. CODE ANN. § 82.002(c) (West 2008 & Supp. 2012) (“Any adult may apply for a protective order to protect a child from family violence.”); see also ARIZ. REV. STAT. ANN. §§ 13–3601, –3602 (2010 & Supp. 2012) (authorizing a parent to initiate on behalf of a child a criminal proceeding to secure a protective order against domestic violence).

²⁰⁰ See Clay Calvert, *A Familial Privacy Right over Death Images: Critiquing the Internet–Propelled Emergence of a Nascent Constitutional Right that Preserves Happy Memories and Emotions*, 40 HASTINGS CONST. L.Q. 475, 503 (2013) (listing eleven states with some restriction on the dissemination of 911 call recordings).

empirical study documenting the usefulness of 911 calls in at least some of those ways could create confidence that exploring new agency procedures is worthwhile. We present such documentation here and urge further study.

For the period January 1, 2012, through April 30, 2012, we collected 911 call records, police incident reports, and court files for all domestic violence cases in the city of Norfolk, Virginia. Norfolk is a city in the Tidewater area of the state with roughly a quarter million people, 17% of whom live in poverty.²⁰¹ William & Mary law student Margaret Kelly reviewed and analyzed these records and documented whether the content of 911 calls could be “useful” to prosecution, or suggested the presence of children when other records did not, and to what extent state agencies made use of the calls.

A. Defining Criteria

There is necessarily some indefiniteness in the concepts we used to identify case characteristics. Whether a 911 call is “useful” to prosecutors is unavoidably subjective. However, we identified some objective criteria, such as whether the recording was admitted into evidence and whether the substance of the recording included certain presumptively useful things. We looked for 911 calls that contained one or more of the following: excited utterances (i.e., did the caller sound excited/agitated), present sense impressions (i.e., was the caller witnessing the incident as they were speaking to 911),²⁰² names of additional witnesses that observed or heard the assault take place, and indications that the domestic disturbance took place in the presence of a child (e.g., sound of child’s voice, adult seemed to be speaking to a child).²⁰³ For the additional purpose of assessing whether 911 calls can be useful to child welfare efforts, we also directed Ms. Kelly to examine the records for notation of a referral to CPS.

One purpose of this study was to determine the degree of correlation between success and use of a 911 call recording in some fashion. “Success,” or a positive outcome, can mean a number of things for prosecutors. If introducing a 911 call recording is instrumental in securing accountability of a guilty party through a conviction, that is obviously a success. But success can also mean strengthening one’s case sufficiently to secure a (better) plea agreement. It can include securing a court order holding a case “under advisement” rather

²⁰¹ See U.S. Census Bureau, *State and County Census Information: Norfolk, Virginia*, QUICKFACTS, <http://quickfacts.census.gov/qfd/states/51/51710.html> (last updated June 27, 2013).

²⁰² See FED. R. EVID. 803(1), (2); *State v. Ross*, 714 P.2d 703, 706 (Wash. 1986); Zitter, *supra* note III, at 14–17 (discussing bases for overcoming the hearsay obstacle to using a 911 call recording in court); see also *United States v. Schlesinger*, 372 F. Supp. 2d 711, 721 (E.D.N.Y. 2005) (finding a present sense impression exception upon the fact that “(1) the [speaker of the hearsay statement] observed firsthand the condition of the factory as he made his way to the second floor, (2) that the statement was made immediately after he observed the condition of the factory, (3) that the statement described what he observed firsthand through his senses”).

²⁰³ See *Kent*, *supra* note 99, at 1352 (discussing potential for an additional charge or sentence enhancement if a child was present).

than dismissing it, meaning the defendant will have a conviction if there is further misbehavior during a specified period but will have the benefit of a dismissal if there is no further misbehavior during that period. In the absence of a complaining victim or forensic evidence, an under-advisement outcome might be better than the alternative without the 911 call.

It is typically difficult to know directly whether the existence or replaying of a 911 call recording influences a judge, the defendant, or defense counsel. For a true demonstration of efficacy, one would want to compare the success rate (as defined above) in DV cases with the success rate in some other appropriate set of cases, although finding such other set of cases is difficult. In particular, the subset of cases in which prosecutors use a 911 call recording might have some other characteristic that better explains the rate of success they achieve. Naturally, prosecutors used only those 911 calls that contained something they believed would be useful, such as an excited utterance. It might be that cases in which 911 callers make excited utterances tend to be ones in which violence rises to a level that causes visible physical injury; therefore it could be the evidence of physical injury that primarily produces a positive outcome. With this caveat in mind, we present a comparison of cases in which a 911 call recording was used with those in which it was not.

B. Methodology

We analyzed data from 482 domestic violence misdemeanor cases arising from incidents between January 1, 2012, and April 30, 2012.²⁰⁴ Arraignments (i.e., initial appearances) for those arrested for assault and battery upon an intimate partner (spouse or cohabiting partner) usually take place the morning following the perpetrator's arrest in the Norfolk Juvenile and Domestic Relations District Court. At the arraignment, judges inform those accused of the nature of the charges and set trial dates. The court opens a file for the case and provides a copy of the warrant of arrest and the criminal complaint to a representative (usually a paralegal) from the Commonwealth's Attorney's Office (CA) as well as to the defendant's attorney. In Norfolk, five to twenty defendants appear in court on a given day for arraignment following domestic assault and battery arrests the previous day. The CA representative takes the information provided by the court and opens the state's internal file. The state's file is then forwarded to the prosecutor handling the case.

The state's file typically contains the police incident report and the defendant's criminal record. The police incident report contains information about the persons involved, location and time of the incident, and any witnesses that the responding officer, or other witnesses, identified. Often officers prepare a supplement to the incident report detailing the location of any injuries on

²⁰⁴ (Data and research findings on file with authors).

the victim's body and any statements from the defendant. Ordinarily, when the prosecutor receives the file, it contains two to six documents, none of which include any information about any 911 call.

Prosecutors in Norfolk wanting to review the 911 call that triggered state involvement in a domestic disturbance traditionally had to take the initiative of sending a request for the recording to the call center custodian. Prior to December 2011, prosecutors acquired the 911 event chronology and recording in only about 1.5% of all criminal cases, principally the most serious felonies. The custodian would have to conduct a search for each call, diverting the custodian from his primary duties—overseeing the successful operation of the 911 emergency operations center. Thus, whereas prosecutors routinely requested 911 call records for murder cases, they generally refrained from doing so in misdemeanor DV cases, which amount to approximately 1,200 each year.

However, in late December 2011 and early January 2012, the Department of Emergency Preparedness and Response (DEPR) provided prosecutors in the Norfolk Commonwealth's Attorney's Office access to a system called "Netviewer." Netviewer is an internet based system through which members of law enforcement with approved access can obtain event chronologies for incidents reported through a 911 call by entering in the date and approximate time of the call. Using Netviewer, prosecutors are now able independently to obtain a summary of 911 calls. DEPR also gave prosecutors access, without charge, to an additional program called "NICE Inform," which is ordinarily available to agencies only upon payment of a licensing fee. It allows those with access to search for and listen to the actual 911 audio recording on their computers, without troubling the records custodian for a physical storage device containing the particular call.

Once the State obtained access to Netviewer and NICE Inform, it quickly became apparent that in a broad spectrum of cases, the 911 calls contain valuable information that is not in the files obtained in court, so much information that the CA's office should obtain at least a transcript of the call in every domestic assault case. A quick look at a call transcript usually suffices to determine whether accessing the audio recording would be useful. The state then went to work creating a system to facilitate receipt of the transcripts and recordings for wider use both as an evidentiary tool in court and as an intervention tool out of court.

To determine whether the new tools and system were cost-effective, the CA's office undertook data collection. Ms. Kelly worked at a terminal with access to both Netviewer and NICE Inform. For the four-month period, from January 1, 2012, to April 30, 2012, she pulled the CAD Event Chronology for all 482 domestic violence 911 calls and listened to every available audio call recording. She then compared the information she gleaned from the calls with the files prosecutors obtained at arraignment for those cases. She created an excel spreadsheet documenting the results of her research for each month.

C. Data Sought

Our research assistant compiled data to assess:

- 1) In what percentage of cases are additional witnesses identified through the 911 event chronology transcript or the call itself?
- 2) In what percentage of cases do 911 calls contain excited utterances or present sense impressions?
- 3) In what percentage of cases was the 911 call helpful in identifying the “true victim”?
- 4) In what percentage of cases in which prosecutors used the 911 call was the perpetrator held accountable, and how does that compare to the accountability rate in cases for which a 911 call was not used?
- 5) In what percentage of cases did the 911 call reveal the presence of one or more children when the police report did not?
- 6) In what percentage of cases was CPS notified of a child’s exposure to DV?

D. Findings

Our study confirmed both the usefulness of 911 calls for misdemeanor prosecutions and the potential for addressing a much greater percentage of situations in which children are repeatedly exposed to domestic violence. Among 310 calls²⁰⁵ reviewed:

- 1) 53 calls (17%) contained information about additional witnesses to the assault.
- 2) 61 calls (20%) contained a very clear excited utterance and/or present sense impression.²⁰⁶
- 3) 23 calls (7%) contained information helpful in determining the “true victim” in cross-warrant situations.
- 4) In determining the value of the 911 recording as an evidentiary tool, the authors looked more closely at one

²⁰⁵ For 172 cases, a 911 call recording did not exist, could not be obtained, or was inaudible (results of study on file with authors).

²⁰⁶ Our research assistant took a conservative approach in coding for these hearsay exceptions. In all likelihood, courts would admit a greater number of calls on the basis of their having an excited utterance or present sense impression. For more information, contact author Linda Bryant at linda.bryant@norfolk.gov.

fourth of the total cases, randomly selecting a start point of March 1, 2012, and proceeding forward in time until 120 cases were reviewed. We compared the outcomes of those cases in which the prosecutor had obtained and planned on using the 911 recording at trial with those cases in which the prosecutor did not have or would not have been able to use the 911 recording at trial. With a usable 911 call, the accountability rate skyrocketed from thirty-two percent to eighty-eight percent:

- a. 911 call available and useful: 49 out of 120 cases.
 - i. Perpetrator held accountable: 43 out of 49 cases (88%).
 - ii. Dismissal or nolle pross: 6 out of 49 cases (12%)
 - b. 911 call unavailable or not useful: 71 out of 120 cases.
 - i. Perpetrator held accountable: 23 out of 71 cases (32%).
 - ii. Dismissal or nolle pross: 48 out of 71 cases (68%).²⁰⁷
- 5) 80 of the 310 call recordings revealed the presence of a child, but in only 44 of those cases did the police report note the presence of a child. There was also a category of cases, numbering 39, in which the police report indicated presence of a child but the 911 call recording did not reveal this. Thus, in 119 cases some record indicated a child's presence during the DV episode, but in 36 cases, or 30%, the 911 call was the only indication. There were undoubtedly also instances in which children were present but neither the 911 call nor the police report reflected that.
- 6) In only 21 of the total 482 cases did CPS receive a report of a child's involvement in a DV situation. This was just eighteen percent of the 119 cases in which a child's exposure was indicated in the 911 call, in the police report, or both.²⁰⁸ CPS did not receive notification in any of the 36 cases in which only the 911 call evidenced a child's presence. CPS received notice in just one fourth of the 83 cases in which the police report noted children were present.

²⁰⁷ This ratio closely mirrors the nolle pross/dismissal ratio of 70.71% reported in the Virginia Domestic Violence Victim Fund Prosecution Grant Report from July 1, 2011, through September 30, 2011, and the 60% non-accountability figure in national studies. *See* VA. ATT'Y GEN. ANN. REP., *supra* note 15, at A-3, tpls.A-3 & A-4.

²⁰⁸ This appears to be an unusually low rate. *See* SUMMERS, *supra* note 8, at 44 (citing ABA study finding that police report to CPS 56% of incidents in which they know a child witnessed DV).

Discussions with police officers suggest that part of the explanation is difficulty getting through to CPS operators in the nighttime hours when most DV incidents occur.

The fourth finding is striking. Naturally, one would want to know more about any other differences in case characteristics between the “call available and usable” versus “call unavailable or unusable” categories in order to verify the impact of the call per se. There is at least observational evidence that the call recordings in and of themselves have a great impact on the various parties to DV prosecutions. Assistant Commonwealth’s Attorney Deborah Collins, who handled the vast majority of domestic violence prosecutions for Norfolk during the study period, offered this insight on the high success rate when prepared with the 911 recording at trial:

A defendant who knows the victim is not cooperative is not likely to plead guilty to a domestic violence charge. Sometimes the victim has convinced herself that it was her fault or reasons away the assault and conveys this to the defendant. Helping the victim remember the seriousness of the assault will make her less likely to forgive the defendant and be uncooperative in the prosecution. Listening to the 911 call can bring the victim back to the assault, which is often several months removed by the time the case goes to trial. When a victim hears her call for help to the 911 dispatcher, it can be a powerful thing. I had a case where an aggressively recanting victim would not cooperate. The father of her child had often been charged with domestic assault, with her as the victim, and his father and mother had frequently been charged with domestic assault with each other as the victims as well as with him as the victim. The family had never been cooperative with the prosecution. The victim was not cooperative in lower court, but a conviction was secured by playing the 911 tape during trial, obviating the need for her to testify to any of the facts of the assault for the Commonwealth. She was present in court as a defense witness and heard her 911 call for the first time. This call was frantic and her voice was full of shock at how badly he had assaulted her, that he had “beat her like a man.” The defendant initially appealed his conviction, but the victim told the defendant he needed to withdraw his appeal, which he did. She told me she “Just didn’t want to hear that tape again.” The 911 call was a sufficient reminder of the seriousness of the assault for her to refuse to lie about the facts, forcing the defendant to accept responsibility for the assault he committed.

Hearing a 911 tape can also have a powerful effect on the judge. Even relatively minor contact can be sufficient for a domestic violence conviction, so it’s the prosecutor’s job to point out the more serious assault cases. A 911 call can help us do that, particularly in the absence of photos of the injuries. The real panic and fear in the victim’s voice is more effective than any sentencing argument a prosecutor could make.²⁰⁹

In total, the 911 call appeared useful and helpful in holding perpetrators accountable in 147 cases (30% of all cases, 47% of cases with a 911 call), most often by triggering an admission of guilt that obviated the need for a trial. Specifically, in 147 of the 482 cases, the call contained one or more of the following probative evidentiary tools: (1) the names of additional witnesses, (2) an admissible excited utterance, or (3) an admissible present sense impression.

²⁰⁹ E-mail from Deborah Collins, former Violence against Women (V-STOP) prosecuting attorney and Virginia Sexual and Domestic Violence Fund grant attorney, author Linda Bryant (Feb. 23, 2013, 18:39 EST) (on file with authors).

An example of how identification of additional witnesses can be crucial to obtaining a conviction is a case in which a man previously convicted of murder stomped on his wife's head and neck area and kicked the right side of her body on a sidewalk next to a busy street. Concerned citizens called 911 and reported the assault while they watched it. Officers responded and spoke with the victim and defendant, who gave conflicting stories. Before the trial date, the prosecutor contacted one of the bystander witnesses, who agreed to testify. At trial, the fearful victim minimized the incident. The prosecutor successfully introduced the 911 tape. Coupled with photographs of the victim that police had taken, which showed shoe-sized bruises on her body, the call supported a finding by the trial court of guilt beyond a reasonable doubt, despite the victim's minimization and despite testimony of two witnesses in support of the defendant. The perpetrator received significant jail time.²¹⁰

The number of cases in which children were exposed to DV but the official file contained no mention of their presence is also striking and troubling, as is the extremely low rate of referrals to CPS. Clearly, the system in place and designed to respond to child endangerment is not catching the great majority of cases in which children experience the trauma of witnessing DV and/or also are in harm's way because of violence occurring in their homes. In addition, as discussed above, any social science research or legal/policy analysis relating to the impact of DV exposure on children that relies on police records or, more narrowly, on CPS case records, must be viewed as resting on a very incomplete picture of this phenomenon, one that fails to reflect its full extent and negative impact.

V. SUGGESTED BEST PRACTICES FOR DOMESTIC VIOLENCE PROSECUTION

This Part describes a set of "best practices" for agencies involved in the state's response to incidents of domestic violence. Though we address each agency separately, one key to successful reduction of violence within homes is collaboration among the agencies that traditionally have dealt with one piece of the DV puzzle.²¹¹ We also emphasize that refinement of the model is an

²¹⁰ Commonwealth v. Gary Walker, Norfolk JDR, JA027257-03-00 (on file with authors). The Commonwealth of Virginia does not publish misdemeanor cases. The case is also on file with Norfolk Commonwealth Attorney's Office.

²¹¹ See Casey et al., *supra* note 8, at 39 (discussing program of cooperation between police and battered women's advocates in New Haven, CT); Christopher N. Osher, Jennifer Brown & Jordan Steffen, *Failed to Death: Law Enforcement & Disorder*, DENV. POST, Nov. 14, 2012, at 1A (portraying the enhanced danger of child fatalities when police and CPS do not share information); CHILD WELFARE INFO. GATEWAY, U.S. DEPT OF HEALTH & HUMAN SERVS., DOMESTIC VIOLENCE AND THE CHILD WELFARE SYSTEM 6-7 (Oct. 2009), available at <http://www.childwelfare.gov/pubs/factsheets/domesticviolence.pdf> ("[C]ommunities can serve families better by allocating resources to build partnerships among domestic violence service providers, child protective service providers, and an array of informal and formal systems within the community, and by offering a continuum of individualized services based on the levels of risk present.").

ongoing process, improved by information feedback gained through experience applying it and by increased devotion of public resources as public officials become aware of its effectiveness.

A. Call Center

Local emergency–response departments can greatly facilitate the work of prosecutors by giving them access to tools like Netviewer and NICE Inform that provide an event chronology, call summary, and audio recording for any incident. The records custodian still must devote time to assisting prosecutors with preparing call records for admission in court, specifically: copying calls onto disks, completing paperwork, and possibly testifying as to authenticity and chain of custody.

With respect to child protection, in spring 2012 the Director of Norfolk DEPR implemented a program to train 911 dispatchers so that now they always take certain steps to determine whether a child is present at the scene. This includes asking callers directly whether any children are present and responding to other voices or crying by asking the caller to identify from whom those sounds are coming. Software that is now available to emergency response centers prompts dispatchers to ask whether children are present in all domestic disturbances. We recommend adding to the call center protocol routine electronic transmission to CPS of information operators receive that gives them reason to believe a child is present at a DV scene.²¹² This should ensure CPS follow–up on children’s safety in a large portion of cases where that has not occurred in the past.

B. Police

Officers are already subject to so many requirements when they respond to a domestic disturbance, and local departments have such limited resources for training, that adding new requirements is very difficult. However, effective changes can take place within investigative units. For example, our research, which confirmed that in many instances victims of domestic assault (and their children) are in deadly situations, helped spur Norfolk’s police department to seek a federal technical assistance grant to implement a city–wide “Lethality Assessment Protocol.” The protocol promotes a first–responder team–intervention approach between responding police officers and local domestic violence shelters. Upon responding to a 911 domestic disturbance call, the officer asks the victim a series of questions using a “Lethality Screen.” From the victim’s answers to the questions, the responding officer can determine whether

²¹² This is consistent with a typical standard for reporting in state laws. *See, e.g.*, MASS. GEN. LAWS ch. 119, § 51A (LexisNexis 2009 & Supp. 2013) (requiring written report by mandated reporters who have “reasonable cause to believe that a child is suffering physical or emotional injury”).

the victim is at risk of death or serious bodily harm. If so, the officer calls a shelter from the scene and connects the victim to the shelter counselor, trained to effectively advise and assist victims of domestic violence who are in crisis. This immediate intervention and outreach helps ensure the victim's safety, while also helping to educate the victim on the dangerousness of her situation, which the victim might not realize.

The department trained nearly 800 officers on proper use of the lethality screen. Implementation began October 1, 2012. As of December 12, 2012, Norfolk police determined over ninety-nine victims were in "high danger" and contacted local shelter counselors. Sixty-seven victims received some type of service or intervention ranging from admission to the local shelter to extensive counseling. This counseling helps educate victims on the dynamics of partner violence and the harmful effects of abuse not just on themselves but also on their children. In December 2012, the Virginia Attorney General's Office recognized Norfolk's efforts with its "Safe in Our Communities: Promising Practices in Domestic Violence Response" award.

Many other U.S. jurisdictions have developed new approaches to police response to DV that include special training for officers and closer collaboration with DV victim advocates and social service agencies.²¹³ However, they generally depend on victim honesty and cooperation about the violence, which means that, in many situations, it will be impossible for anyone to help the victims. If police also have access to the 911 call recordings, they can better detect minimization and concealment of violence and impress upon victims that without their honesty and cooperation the state will have to respond to the incident in some way that does not incorporate their input or involve them in decision making. We therefore recommend that when police identify high lethality risks, they obtain the 911 call recording.

Regarding child welfare concerns, Norfolk Police Department's Family Violence General Order now states: "Documentation of the presence of children can be helpful for prosecution. Even if no abuse or neglect is evident but a child is present at the scene of a domestic disturbance, document the child's presence in the report. Include notation that children reside there even if not present at the time of the incident." Norfolk Police Department Domestic Violence Instructors now teach officers that a child's witnessing domestic violence can constitute neglect sufficient to trigger CPS investigation, and they train officers to call CPS in more serious cases of children's exposure to DV. Ideally, officers would contact CPS in all cases in which children witness domestic violence, but the process of calling is time consuming and sometimes frustrated by limited CPS resources for receiving calls. As with the 911 call center, we recommend that police be given the capability to transmit reports electronically to CPS

²¹³ See SUMMERS, *supra* note 8, at 66–67; Julia Dahl, *A New Model Aims to Catch Domestic Violence That Is Likely to Turn Fatal*, CBS NEWS (Apr. 20, 2012, 12:47 PM), http://www.cbsnews.com/8301-504083_162-57417868-504083/a-new-model-aims-to-catch-domestic-violence-that-is-likely-to-turn-fatal/.

rather than needing to place a call. Alternatively, all CPS reports could be channeled through the call center, with responding officers notifying a call center official when they obtain information indicating a child was present during a DV incident. As noted in Part IV, there is a category of cases in which police reports document children's exposure but this was not evident to the 911 call operator, so it remains necessary for police to communicate their discovery of child exposure, directly or indirectly, to CPS.

C. Prosecutors

Ideally, prosecutors should always obtain and listen to the 911 call in DV cases. The increased success rate when a prosecutor has a usable 911 call before trial is impressive and confirms the need to consider 911 calls a routine evidentiary tool. In fact, given the number of victims who recant and minimize in domestic violence cases, the 911 call is often more important than the victim to prosecutorial success. In jurisdictions with heavy case volume and limited resources, requiring prosecutors themselves to obtain and listen to every call might be impractical, so agencies might employ support personnel, such as paralegals, to conduct initial screenings. Securing direct computer access to call summaries and audio recordings, as with Netviewer and NICE Inform, makes this process much more efficient. If that is not possible, agencies should establish some other protocols to ensure 911 calls are easily available to prosecutors.

Prosecutors should use the 911 calls in as many of the ways we identified in Part III as possible, beginning with the decision whether to pursue any legal action. Even if a judge dismisses a cross-warrant case, awareness of the call and its contents could motivate the judge *sua sponte* to issue a protective order and/or refer the matter to CPS for an investigation. Additionally, prosecutors should receive training on the several ways to react to information in a 911 call or police report in which a child was exposed to DV, including using it as an aggravating factor and bringing an additional criminal charge of child endangerment against the perpetrator.

Prosecutors could also be encouraged and trained to involve CPS caseworkers in their meetings with victims who are parents, along with the police officer who responded to the incident, victims' advocates, and other social services employees.²¹⁴ An interdisciplinary team approach to dealing with parent victims could (a) bolster the victim's confidence that she and her children will receive adequate protection if she cooperates, (b) make clear to victims that the state expects them to put their children's welfare first if they wish to retain custody of the children, and (c) make the state's overall response to DV more efficient and effective, by ensuring that a parent victim is offered all of the assistance and services available and that each agency pursues a course of action consistent with what other agencies are doing. In such meetings, the

²¹⁴ See SUMMERS, *supra* note 8, at 41 (urging CPS cooperation with prosecutors to hold batterers accountable).

911 call recording can help everyone appreciate the reality and dangers of the situation. An example of such inter-agency cooperation is a case in which the defendant battered his wife several times, but on at least two occasions the wife recanted in court and the charge was dismissed. After obtaining the 911 call and learning that on one occasion the perpetrator attempted to pour bleach on the victim while the victim's child was less than a foot way, the prosecutor contacted CPS. CPS investigated and worked with victim advocates to encourage the wife to think more about her child's safety and to make sure her child was out of harm's way. The wife ultimately testified in court to avoid losing custody of her child, and she told the court it was time for her to do what was necessary for the sake of her child. The perpetrator was ultimately convicted.²¹⁵

D. Child Protective Services

This Sub-Part contains our thoughts on the implications of the gap between the number of incidents in which a 911 call reveals the presence of children and cases in which the police report does not document this and/or no subsequent report is made to CPS. As noted above, we recommend that 911 operators begin reporting detection of children at DV scenes directly to CPS. Ideally, both the 911 call center and the police should have a computer-based system for transmitting reports of suspected child maltreatment to CPS that includes exposure of children to DV. Phone communication is cumbersome. Ideally, the computerized reporting system would give CPS immediate access to the event chronology and 911 call recording, so that CPS might not need to speak with the 911 operator or police in some cases, though of course the possibility of a follow-up conversation must exist.

CPS should develop a screening tool that helps channel its resources to the DV exposure cases where children are most at risk of harm. In some situations, there might be no need for CPS intervention or even investigation. For the sake of minimizing the trauma of a DV episode for victims and their children, and to conserve CPS resources, CPS should aim to identify cases in which the actions of the victim parent do not appear negligent in terms of protecting children's welfare and in which CPS action against the DV perpetrator is superfluous, perhaps because the criminal law process is likely to be sufficient to prevent recurrence.²¹⁶ CPS could accomplish this diversion of DV exposure cases by

²¹⁵ *Commonwealth v. Cameron Allen*, TJA106828-04, 07 (Va.) (on file with authors). The Commonwealth of Virginia does not publish misdemeanor cases. The case is also on file with Norfolk Commonwealth Attorney's Office.

²¹⁶ Vermont apparently has police officers conducting such a screening and making a judgment themselves as to whether CPS action is necessary. See SUMMERS, *supra* note 8, at 44. This approach, however, would seem to require costly training that is duplicative of a kind of training CPS workers already have. A potentially less costly approach is to have just a subset of officers

finding reports “invalid” or by placing low–danger cases in the “assessment” category in states with a differential response system.

Obtaining and reviewing the 911 call should help caseworkers to do this. It might reveal whether the children were in harm’s way, how serious the perpetrator’s actions were, the victim’s efforts to shield the children, and other relevant information. Hearing the 911 call might help caseworkers distinguish, for purposes of deciding whether to file neglect charges against a victim parent, among (a) a parent who is indifferent to the potential impact of DV on her children, (b) a parent who is concerned about the welfare of her children but unable to protect them, and (c) a parent who is acting diligently and effectively to guard against harm to her children.²¹⁷

When CPS does treat notification of DV exposure as a valid child maltreatment report, the social worker who conducts the assessment or investigation should also review the 911 call information, as well as any other information in the file the agency receives or compiles. Social workers should receive training on ways to use a 911 call recording in their investigation and subsequent handling of a case. For example, comparing information gleaned from the call with what the victim tells the social worker can aid in assessing the victim’s veracity and inclination to assist CPS in securing her children’s safety. Ideally, each local CPS agency would have at least one specially–trained DV expert, either to handle all the DV exposure cases or to be available to all caseworkers for consultation.²¹⁸ CPS should first attempt to assist a victim parent in achieving safety for herself and her child together, in cooperation with DV victim advocates, while being prepared to take custody of a child whose parent is unwilling or unable to act in a way that will safeguard the child.²¹⁹ In addition, playing the call recording for the victim might help the victim recall what happened and motivate her to be more cooperative with efforts to protect her child. The more cooperative a victim parent is, the less likely that removal of a child from her custody will be necessary.

A CPS caseworker can also use 911 call recordings in court to aid in securing protective orders against DV perpetrators even without victim cooperation. This might be preferable in many cases from a victim advocacy perspective; victims might generally be less likely to incur the wrath of an abuser for a legal response

receive special training on responding to DV calls. *Id.* at 66–68 (indicating that some departments have done this).

²¹⁷ *Cf.* *Nicholson v. Scoppetta*, 820 N.E.2d 840, 846 (N.Y. 2004) (“Whether a particular mother in these circumstances has actually failed to exercise a minimum degree of care is necessarily dependent on facts such as the severity and frequency of the violence, and the resources and options available to her.”).

²¹⁸ *Cf.* Working Group, *supra* note 141, at 862–63 (discussing special Domestic Violence Unit that the Massachusetts Department of Social Services created, with numerous DV specialists spending three days per week in each local CPS office to advise caseworkers and to do some direct service with DV victims).

²¹⁹ *See* SUMMERS, *supra* note 8, at 41 (describing this policy of the CPS agency in Catawba County, North Carolina).

to DV if (1) it is civil rather than criminal, (2) it is not victim-initiated, and (3) she does not participate in the proceedings.

We further recommend that CPS agencies receiving reports of other forms of maltreatment to routinely investigate whether there is partner violence occurring in the child's home. This will enable CPS to not only discover an additional form of maltreatment occurring in the home but also understand more fully the family dynamics underlying the reported form of maltreatment. Domestic violence experts and victim advocacy groups could provide training to CPS caseworkers on how to spot indicators of DV in a family under investigation.

Finally, cooperation between prosecutors and CPS can improve overall state efforts to reduce violence in children's homes. CPS caseworkers might be encouraged and trained to make communication and interaction with prosecutors a regular part of their practice. To the extent that it would not violate any laws or regulations regarding agency practice or confidentiality and would not compromise the efforts of either agency, caseworkers might be directed to share information that they acquire with prosecutors and to solicit case information from prosecutors to assist their own efforts. Some other U.S. jurisdictions have implemented a multi-agency team response approach to DV reports, with CPS as the coordinating unit.²²⁰ However, it appears that all or most have not included a prosecutor, and so the teams might not produce any greater accountability or deterrence for the perpetrator. If prosecutors have the time to attend DV response-team meetings, their own efforts might become more effective, victim parents might perceive law enforcement in a more positive light, and prosecutors' involvement might guard against the CPS process coming under the control of victim advocates to the potential detriment of children. Though advocates for DV victims can provide useful insight and assistance, every DV exposure case contains potential conflicts between the victim's interests and the child's welfare. The child protection process should remain firmly under the direction of the agency charged with making children's welfare its top priority.

E. Judges

Training for judges ideally should include education concerning the special nature of domestic violence cases. They should learn about the impact of DV on children, the admissibility of 911 call recordings, new agency protocols and

²²⁰ See SUMMERS, *supra* note 8, at 65-66; Working Group, *supra* note 141, at 862-63 (describing program in Massachusetts under which "interagency teams comprised of MDSS staff, police officers, battered women's advocates, batterer's intervention providers, court personnel, hospital staff, and supervised visitation providers who meet to discuss difficult cases and design effective case planning" and Jacksonville, Florida's "Domestic Violence and Child Protection Collaboration [which] includes the city's Department of Children and Families ("DCF"), a local domestic violence program called Hubbard House, an area shelter, local schools and neighborhood tenant associations").

interagency cooperative practices, and best practices for responding to DV situations involving children—in particular, for determining when children can safely remain in a victim parent’s custody or instead must be separated from that parent temporarily or permanently.

F. Legislation

Certain amendments to state laws could greatly facilitate use of 911 calls in the ways we have suggested. With respect to criminal prosecution, legislation enabling the 911 Records Custodian to execute an effective written certification of 911 call recordings as business records, instead of appearing in court to testify to that fact, would be very helpful.²²¹ Absent such authorization, the Custodian must devote considerable time to attending court proceedings. This is troublesome in three ways; it is extremely time consuming, limits the number of cases in which prosecutors can use 911 calls, and is unnecessary. Further, in the many states whose criminal statutes are currently silent about children’s DV exposure, legislators should amend sentencing laws to make commission of DV in front of a child an aggravating factor in a DV prosecution and should add exposing a child to DV to its criminal child endangerment statutes. Increasing punishments when perpetrators commit violent acts in front of children might reduce violence overall, as well as violence in children’s presence specifically.

With respect to CPS or parents’ use of call recordings, states that have, for reasons of confidentiality, statutory provisions limiting dissemination of 911 calls should amend or clarify those provisions so that at least CPS, and perhaps also both parents of a child exposed to DV, can hear and use a recording of the call. Legislatures might accomplish this, while also guarding against excessive dissemination of the recordings, by allowing private parties to hear recordings and request their submission to a court but limiting possession of the recordings to state agencies and attorneys. For example, they might authorize 911 call custodians to transmit copies only to police, prosecutors, CPS, courts, and attorneys for DV perpetrators and victims. However, the legislature should also

²²¹ A self-authentication statute could resemble Virginia’s for DMV records, which includes the following:

Whenever any record, including records maintained by electronic media, by photographic processes, or paper, in the office of the Department is admissible in evidence, a copy, a machine-produced transcript, or a photograph of the record or paper attested by the Commissioner or his designee may be admitted as evidence in lieu of the original. In any case in which the records are transmitted by electronic means a machine imprint of the Commissioner’s name purporting to authenticate the record shall be the equivalent of attestation or certification by the Commissioner.

Any copy, transcript, photograph, or any certification purporting to be sealed or sealed and signed by the Commissioner or his designee or imprinted with the Commissioner’s name may be admitted as evidence without any proof of the seal or signature or of the official character of the person whose name is signed thereto. If an issue as to the authenticity of any information transmitted by electronic means is raised, the court shall require that a record attested by the Commissioner or his designee be submitted for admission into evidence.

VA. CODE ANN. § 46.2-215 (2012).

authorize CPS to play recordings for either parent of a child exposed to DV, authorize DV victims to request transmittal of recordings to a court hearing a civil DV proceeding, and authorize either parent of a child exposed to DV to request transmittal to a court addressing a child custody petition.

In addition, states whose current child maltreatment laws and child custody laws are silent about exposure of children to DV could help prevent it by adding provisions to those laws making such exposure an explicit basis for charging abuse (in the case of perpetrators), charging neglect (in the case of victims), and for denying custody or visitation. We further recommend that states that have not already done so insert into their DV and/or child maltreatment statutes explicit authorization for children or their representatives, including non-custodial parents, to seek a civil protective order against persons who commit violence against their custodial parent. Broader availability of 911 call recordings should make such statutory provisions much more effective.

VI. CONCLUSION

State efforts to respond to the widespread problem of violence within intimate relationships have long been hampered by the difficulty of securing hard evidence of its occurrence. Lack of evidence has also hindered victims' efforts to secure protection for themselves and their children. Domestic abuse usually occurs in private settings where the only witnesses are the victim and children, who for various reasons might not be helpful to state agencies charged with responding to such violence. Savvy abusers know how to avoid leaving physical evidence of their violent acts or how to inflict injuries whose cause is difficult to establish. 911 calls hold great promise for increasing the efficacy of both state and private efforts to prevent recurrence of partner violence and children's exposure to violence.

Fulfilling the potential of 911 calls requires overcoming certain obstacles. All involved agencies must come to understand the importance of 911 calls to offender accountability and protection of victims and children. Because of high personnel turnover in prosecutor offices, police departments, and CPS agencies, this understanding must become embedded in formalized policies and protocols. Agencies also need to invest in technology that speeds and simplifies the process of transmitting 911 call summaries and recordings to their employees and to other agencies. Legislatures can enhance the effectiveness of agency efforts by ensuring there are no statutory obstacles to appropriate transfers of 911 calls, to admission of the calls in appropriate legal proceedings, or to treating DV as a substantive basis for issuing orders necessary to protect victims and children. The state's response to DV must be multi-faceted and comprehensive, and many important actors in the overall process need education about the commonness and consequences of domestic violence, and about the great potential of 911 calls to make the response much more effective. The authors intended for this Article, and the study it reports, to contribute to that education.

There is more to learn, of course. Further useful study, ideally in many different jurisdictions, might confirm that the strikingly high rate of prosecutorial success we found in cases where prosecutors use 911 calls actually owes to the existence and admissibility of the calls rather than to some other variable. Correlations between the availability and usefulness of call records, on the one hand, and type or severity of violence, on the other, could be relevant to policy decision-making. Whether a prosecutor's seniority level effects usefulness would also be of interest.

Further, follow up on those cases in which 911 calls were successfully used might establish whether they resulted in improved long-term outcomes for victims and their children. Once a CPS agency starts using 911 calls on a regular basis, it would be important to study how that affects the agency's rate of success protecting children. Additionally, a comparison of the severity of DV cases in which a child's presence becomes known to CPS only because of the 911 call recording with the severity of cases in which a child's presence is reflected in the police report would be useful. If the former are on average more severe, this might suggest a need for all CPS agencies to revise their practices and a need for researchers, scholars, and policy makers to recalibrate their estimates of DV's impact on children.