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## The Aftermath of *Crawford* and *Davis*: Deconstructing the Sound of Silence

Kimberly D. Bailey\*

*Abstract: Victims of domestic violence often do not want to testify in court, and if they do, they often recant and/or testify on behalf of their batterers. To overcome this challenge in prosecuting these types of cases, prosecutors have implemented a practice of victimless prosecutions where the out-of-court statements of victims are used in lieu of their live testimony in court. This practice has been limited, however, by the United States Supreme Court cases *Crawford v. Washington* and *Davis v. Washington*, which limit the use of out-of-court testimonial statements in criminal cases when the defendant has not had an opportunity to cross-examine the witness. For this reason, some out-of-court statements are no longer admissible in domestic violence trials. In evaluating how this change should affect the future prosecutions of domestic violence cases, this Article critiques the practice of victimless prosecutions from the perspective of the victim. Specifically, this Article proposes that scholars consider whether victimless prosecutions have been effective in meeting the goals of victim safety, gender equality, and autonomy. Drawing upon feminist scholarship and literature on the legal silencing of subordinate groups, it explores whether victimless prosecutions may discourage women from speaking, which is an important act of empowerment. More importantly, because victimless prosecutions remove victims from the prosecution process, they no longer interact and engage in a dialogue with the criminal justice system. This legal silence may allow the legal system to ignore victims and to pursue its own agenda of successful prosecutions, may limit the criminal justice system's ability to get direct input from victims on whether domestic violence laws and policies are effective, and may make victims complicit in their subordination as women. While this Article acknowledges that*

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*victimless prosecutions may be appropriate for some victims, given the potential harm of victim silencing and the fact that Crawford and Davis will limit the use of victimless prosecutions in at least some cases, the criminal justice system should evaluate whether there are victims who can and will testify. Directly addressing some of the reasons that victims do not testify may limit victim silence, which may be a better long-term approach to the domestic violence problem.*

#### INTRODUCTION

In 2004, the United States Supreme Court issued a landmark decision, *Crawford v. Washington*,<sup>1</sup> which changed the landscape of the Sixth Amendment's Confrontation Clause jurisprudence. *Crawford* held that out-of-court statements that are "testimonial" cannot be admitted to prove the truth of the matter asserted in a criminal trial unless (1) the declarant is unavailable, and (2) the defendant had a prior opportunity to cross-examine the declarant.<sup>2</sup>

After *Crawford*, it was not clear how this decision might impact domestic violence prosecutions. Specifically, *Crawford* foreshadowed the possible end of what some call *victimless prosecutions*,<sup>3</sup> in which victims' statements from 911 calls and police statements are used in lieu of the victims' live testimony at trial.

After much anticipation, the United States Supreme Court finally spoke on this issue in *Davis v. Washington*.<sup>4</sup> Unfortunately, the language that the Court adopted in *Davis* did not provide the definitive answer that prosecutors, defense counsel, and lower courts anticipated.<sup>5</sup> The Court held that out-of-court statements are nontestimonial when they are "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to

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1. 541 U.S. 36 (2004).

2. *Id.* at 68.

3. These types of prosecutions are also sometimes referred to as "evidence based" prosecutions. *See, e.g.*, National District Attorneys Association, Evidence Based Prosecution of Domestic Violence Cases, [http://www.ndaa.org/education/ndaa/nac\\_evidence\\_based\\_prosecution\\_domestic\\_violence\\_cases.html](http://www.ndaa.org/education/ndaa/nac_evidence_based_prosecution_domestic_violence_cases.html) (last visited Jan. 20, 2009).

4. 547 U.S. 813 (2006).

5. *See id.* at 834 (Thomas, J., concurring in part and dissenting in part) (arguing that the majority's test in *Davis* is unpredictable); Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 20-21 (2006) [hereinafter Tuerkheimer, *Crawford's Triangle*] (arguing that *Davis* offers little guidance to lower courts or predictability to litigants).

meet an ongoing emergency.”<sup>6</sup> These statements are testimonial when “the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>7</sup>

After *Davis*, there is no question that in some circumstances, victimless prosecutions will no longer be a viable option for prosecutors of domestic violence cases. Specifically, if lower courts are true to *Crawford*, many out-of-court statements should no longer be admissible in domestic violence trials because the *Crawford* opinion expressed a specific animus toward the government’s involvement in the production of evidence. In preparation for domestic violence trials, government actors frequently use statements that are produced in a sophisticated manner.

The purpose of this Article is not to provide a critique of the *Davis* and *Crawford* opinions.<sup>8</sup> Instead, given the limitation on the use of victimless prosecutions, this Article attempts to grapple with how prosecutors should handle domestic violence cases post-*Crawford* and post-*Davis*. As part of my analysis, I critique the practice of victimless prosecutions from the perspective of the victim. Specifically, I invite scholars to consider whether victimless prosecutions have actually helped domestic violence victims in the manner that they were originally intended to help them. In addition, scholars should explore whether these types of prosecutions might have negative, although unintended, consequences for domestic violence victims.

Indeed, the term *victimless prosecution* is itself problematic because it suggests that there is no victim in this legal process. Of course, there is a victim, but the victim’s presence, specifically her voice, is limited. The practice of victimless prosecutions actually

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6. *Davis*, 547 U.S. at 822.

7. *Id.*

8. For examples of articles that critique these opinions, see Myrna S. Raeder, *Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?*, 15 J.L. & POL’Y 759 (2007) (arguing that *Davis* is unsatisfactory for both prosecutors and defense lawyers because it still is not clear which out-of-court statements violate the Confrontation Clause in the domestic violence context), Tuerkheimer, *Crawford’s Triangle*, *supra* note 5, at 5 (criticizing the Court’s analysis of the Confrontation Clause in the domestic violence context), and Deborah Tuerkheimer, *Exigency*, 49 ARIZ. L. REV. 801, 825–34 (2007) [hereinafter Tuerkheimer, *Exigency*] (criticizing the Court’s analysis of the Confrontation Clause in the domestic violence context).

arose out of necessity, and I certainly do not want to suggest that prosecutors or other legal actors in the criminal justice system actively seek to limit the voice of domestic violence victims. Indeed, domestic violence victims do not testify for a variety of reasons, many of which have nothing to do with the criminal justice system or its actors.<sup>9</sup>

Yet, the reality is that once the victim's statement is taken from a 911 call or from a police officer, the prosecutor need not hear from her again. We do hear a limited form of the victim's voice at trial, but victimless prosecutions arguably lead to a practice where the victim's voice is not heard throughout most of the prosecution process, nor is it considered in the development of domestic violence policy. In addition, when the prosecution of the batterer is not in the victim's best interest,<sup>10</sup> her wishes may be ignored.

Part I of this Article discusses the history of domestic violence criminal law and the role that the women's movement played in the evolution of the law. Specifically, the issue of domestic violence became more of a public issue rather than just a private one. By focusing on this important issue, the women's movement had two important goals: (1) to keep women physically, mentally, and emotionally safe;<sup>11</sup> and (2) to attack the legal and political structures that subordinate women and that allow domestic violence to exist in the first place. Part I also discusses how this movement led to aggressive arrest and prosecution policies. These policies ultimately led to victimless prosecutions, which allowed prosecutors to aggressively prosecute domestic violence perpetrators without the testimony of victims, who often do not want to testify.

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9. See *infra* Part I.D.

10. See *infra* Part I.C.3 (discussing how some experts and scholars argue that mandatory arrest and prosecution policies may make violence worse for some domestic violence victims).

11. While men can also be victims of domestic violence, eighty-five percent of victimizations by intimate partners in 2001 were against women. Callie Marie Rennison, *Intimate Partner Violence, 1993–2001*, BUREAU JUST. STAT. CRIME DATA BRIEF, Feb. 2003, at 1, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>. In addition, domestic violence occurs in both heterosexual and homosexual relationships. Scholars have discussed the importance of recognizing that domestic violence occurs in circumstances outside of the woman victim/heterosexual relationship dynamic. See, e.g., Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582 (1996); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992). While additional dynamics may be explored in future works, this Article focuses on women victims in heterosexual relationships.

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*Deconstructing the Sound of Silence*

Part II discusses *Crawford* and the sophisticated manner in which statements from 911 calls and police statements are gathered and preserved for use at domestic violence trials. Based on *Crawford's* specific concern with the involvement of government actors in the production of evidence, this Part argues that lower courts should interpret *Davis* to limit this type of sophisticated practice.

Part III then argues that while the original intent of victimless prosecutions may have been to protect women, there is no real evidence that all women are actually safer when they do not testify than when they do testify. In light of this lack of evidence, I draw upon feminist scholarship and literature on the legal silencing of subordinate groups to query whether a nondiscriminatory use of victimless prosecutions is effective in realizing the women's movement's original goals of safety, gender equality, and autonomy. Victimless prosecutions may encourage women to remain silent when speech is an important act of empowerment in and of itself. Most obviously, victims are silent because they are not testifying and speaking out against their batterers. More importantly, because victimless prosecutions remove victims from the prosecution process, victims no longer interact and engage in a dialogue with the criminal justice system.

This legal silence may be problematic for three reasons. First, it may allow the legal system to ignore victims and to pursue its own agenda of successful prosecutions when the needs of these victims should be an important focus of legitimate domestic violence laws and policies. Second, it may limit the criminal justice system's ability to get direct input from victims on whether these laws and policies are effective. Third, it may make victims complicit with their own subordination as women.

Part IV of this Article, therefore, argues that given the legal limitations that *Crawford* and *Davis* place on victimless prosecutions and the possibility that these types of prosecutions might be harmful for some victims, we should develop ways to directly address the reasons that women may hesitate to testify. While one response to *Crawford* and *Davis* could be that prosecutors automatically dismiss most prosecutions because most women recant or refuse to testify,<sup>12</sup>

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12. Tom Lininger conducted surveys that found a substantial drop in domestic violence prosecutions after *Crawford*. Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 749-50 (2005). Specifically, he found that during the summer of 2004 half of the

a better response would be to find more ways to encourage women to participate in the system. I discuss three key reasons why women fail to participate: a lack of material resources, a lack of protection from batterers, and poor interactions with the criminal justice system. I then use Chicago's "Target Abuser Call" ("TAC") program as a potential model of a program that, at this time, seems to be successful in encouraging victim participation by addressing some of these reasons.

I caution, however, that there are two reasons that a systematic implementation of similar programs will be difficult. First, jurisdictions are plagued by limited resources. Second, many domestic violence victims and legal actors may be skeptical that victims can and will testify. For this reason, legal actors may be tempted to fit as many statements as possible under *Davis*' "nontestimonial" category instead of determining whether a victimless prosecution is necessary or desirable in a particular case. To address both of these issues, I apply Dan Kahan's "gentle nudges" approach to "sticky norms" and suggest that jurisdictions might have to implement programs similar to TAC on an incremental basis by first focusing on a small subset of victims of high-risk offenders. Kahan has theorized that small changes over time are the most successful in creating institutional change in the enforcement of laws by legal actors. Incremental changes also put less of a burden on jurisdictions that have limited financial resources.

## I. THE HISTORY OF DOMESTIC VIOLENCE CRIMINAL LAW PRE- *CRAWFORD*

### *A. Domestic Violence: A Private Matter*

Domestic violence is a serious problem in the United States. Between 2001 and 2005, twenty-two percent of nonfatal violent crimes against women involved intimate partner violence.<sup>13</sup> In addition, thirty percent of all female murder victims were killed by an intimate during this time period. It is difficult to know the exact

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domestic violence cases set for trial in Dallas County, Texas, were dismissed because of evidentiary problems. *Id.* In addition, in a survey of over sixty prosecution offices in California, Oregon, and Washington, seventy-six percent indicated that their offices were more likely to drop domestic violence charges when the victims recant or refuse to cooperate post-*Crawford*. *Id.* at 750.

13. SHANNON CATALANO, U.S. DEP'T JUST., INTIMATE PARTNER VIOLENCE IN THE UNITED STATES (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipvus.pdf>.

figures regarding domestic violence, however, because of the likelihood of underreporting.<sup>14</sup>

While domestic violence has always been prevalent in the United States, this country has not always criminally sanctioned it. By 1920, wife beating was illegal in all states.<sup>15</sup> Yet for several decades, law enforcement and prosecutors did little to enforce these laws.<sup>16</sup> The criminal legal system treated disputes between a husband and his wife as a private matter, and if the police did respond to a call, the typical response was to separate the parties involved and to advise the boyfriend or spouse to calm down.<sup>17</sup>

Two important catalysts, however, eventually moved domestic violence away from the private sphere into the public sphere: the women's movement<sup>18</sup> and civil lawsuits against cities that failed to protect battered women.<sup>19</sup>

### *B. Domestic Violence: A Move to the Public Domain*

Participants in the women's movement were concerned about domestic violence for two main reasons. First, they worried about the emotional, physical, and mental safety of women.<sup>20</sup> Second, they viewed domestic violence as a manifestation of women's legal and political subordination both inside and outside of the home.<sup>21</sup> Frustrated that the police minimized or ignored domestic violence, feminists made the crime of domestic violence an important public issue in the 1960s and 1970s. Specifically, they criticized state

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14. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 11 (1991).

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

16. Reva B. Siegel, "The Rule of Love": *Wife Beating As a Prerogative and Privacy*, 105 YALE L.J. 2117, 2170-71 (1996).

17. *Id.*

18. Specifically, members of the movement protested, created shelters where victims could find refuge, and led educational campaigns designed to change attitudes about domestic violence. Linda G. Mills, *Commentary: Killing Her Softly: Intimate Abuse & the Violence of State Intervention*, 113 HARV. L. REV. 550, 557 (1999); see also Siegel, *supra* note 16, at 2171.

19. Mills, *supra* note 18, at 558-59; Siegel, *supra* note 16, at 2171.

20. Mills, *supra* note 18, at 557.

21. Hanna, *supra* note 15, at 1854; see also Schneider, *supra* note 11, at 527; Siegel, *supra* note 16, at 2128-29.



inaction in curbing the problem of domestic violence and advocated the reform of institutional responses in the criminal justice system.<sup>22</sup>

Large civil awards against cities that failed to protect women who were victims of domestic violence also created a sea change in the way that law enforcement reacted to reports of domestic abuse. In *Sorechetti v. City of New York*, the New York Court of Appeals awarded the plaintiff a \$2 million judgment.<sup>23</sup> In this case, the plaintiff's father attacked her with a fork, knife, and screwdriver, and he tried to dismember her leg with a saw.<sup>24</sup> The court found that the police had a special duty to protect a battered woman and her daughter and that this duty was breached when the police failed to investigate a report that the daughter had not returned from a visit with her father.<sup>25</sup>

Similarly, Tracy Thurman received \$2.9 million dollars after suing the city of Torrington, Connecticut.<sup>26</sup> Thurman's estranged husband had been put on probation for smashing the windshield of her car while she was still in it.<sup>27</sup> Yet, even after he repeatedly violated the terms of his probation and restraining order, the police failed to arrest him.<sup>28</sup> On one particular day, Thurman called the police after her estranged husband violated his restraining order.<sup>29</sup> Before the police officer arrived, however, her husband stabbed her repeatedly and severely injured her.<sup>30</sup> The court found that the police had violated the Fourteenth Amendment's Equal Protection Clause by treating violence by male intimates differently from violence committed by strangers.<sup>31</sup>

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22. Mills, *supra* note 18, at 557. It is also worth noting that there was a women's movement in the 1850s that also advocated against domestic violence and in favor of a structural remedy against this problem. Siegel, *supra* note 16, at 2128–29.

23. *Sorechetti v. City of New York*, 482 N.E.2d 70 (N.Y. 1985).

24. *Id.* at 72–74.

25. *Id.* at 76–77.

26. *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984); Mills, *supra* note 18, at 1525–26.

27. *Thurman*, 595 F. Supp. at 1525.

28. *Id.*

29. *Id.* at 1525–26.

30. *Id.*

31. *Id.* at 1527–29.

*C. The Rise of Mandatory Policies*

In response to both the women's movement and civil litigation against police departments, legislators and prosecutors took increased action to curb domestic violence on an institutional level. As discussed below, states adopted mandatory arrest and prosecution policies. These policies, and their results, however, received mixed reactions from advocates of domestic violence victims.

*1. Mandatory and pro-arrest policies*

In an attempt to increase the institutional response of the criminal justice system, Oregon passed the first mandatory arrest statute in the country in 1977.<sup>32</sup> The statute required police to arrest a suspect if there was probable cause that he had committed a misdemeanor domestic violence offense.<sup>33</sup> In the early 1980s, Lawrence Sherman, supported by the National Institute of Justice ("NIJ"), conducted a study of the Minneapolis Police Department.<sup>34</sup> Sherman conducted a field experiment of misdemeanor spousal abuse with three intervention strategies: arrest, ordering the suspect away from the scene for twenty-four hours, and trying to restore order.<sup>35</sup> Based on the results from this experiment, Sherman concluded that arrest was the most effective treatment in reducing the likelihood of renewed violence.<sup>36</sup>

As a result, in 1984, the United States Attorney General recommended that arrest be the standard police response to domestic violence offenses.<sup>37</sup> In 1994, Congress passed the Violence Against Women Act ("VAWA"), which included a provision authorizing the Attorney General to make grants available to state and local governments that implemented mandatory or pro-arrest programs.<sup>38</sup>

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32. Joan Zorza, *Mandatory Arrest for Domestic Violence: Why It May Prove the Best First Step in Curbing Repeat Abuse*, 10 CRIM. JUST. 2, 4 (1995).

33. *Id.*

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

35. *Id.*

36. *Id.*

37. Hanna, *supra* note 15, at 1859.

38. 42 U.S.C.S. § 3796hh (LexisNexis 2008). It is also worth noting that VAWA originally included a civil remedy provision that was intended to provide victims of "gender motivated violence" a federal civil cause of action against their perpetrators. 42 U.S.C.S. §

Sherman and other experts now question some of the results of his original study, however. After Sherman's initial study in Minneapolis, he and other experts conducted replication studies that were funded by the NIJ in six different cities.<sup>39</sup> The results from the experiments in Omaha, Nebraska and Charlotte, North Carolina suggested that arrest was no more of a deterrent than other types of police responses.<sup>40</sup> The results from the experiment in Milwaukee suggested that arrest reduced the likelihood of renewed violence for employed, married, high school graduate, white suspects, but increased the likelihood of renewed violence for unemployed, unmarried, high school dropout African-American suspects.<sup>41</sup> These

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13981 (LexisNexis 2008). The Supreme Court ultimately struck down this provision. *United States v. Morrison*, 529 U.S. 598 (2000).

39. Berk et al., *supra* note 34, at 171, 173-74; Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 168 (1992). Joan Zorza has criticized the validity of the replication studies, however, arguing that none of them fully replicated the original Minneapolis study or each other; each study had its own definition of a domestic relationship, and the type of police responses used in each study differed. Zorza, *supra* note 32, at 4-5. Critics of the NIJ studies also argue that it is incorrect to assume that renewed violence is a retaliatory response to arrest when the NIJ studies showed fewer reoffenses in the short term, and those treating batterers believe any retaliation from arrest would happen shortly after arrest. Frisch, *Commentaries: Research that Succeeds, Policies that Fail*, 83 J. CRIM. L. & CRIMINOLOGY 209, 213 (1992); Zorza, *supra* note 32, at 8; *see also* Cynthia Grant Bowman, *The Arrest Experiments: A Feminist Critique*, 83 J. CRIM. L. & CRIMINOLOGY 201, 204 (1992) (arguing that the lower recidivism rate for employed men may be because their partners do not report future violence out of fear of sacrificing their lifestyle and status); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: Critical Review*, 4 BUFF. CRIM. L. REV. 801, 856 (2001) (citing a study that reviewed the NIJ arrest study data in Milwaukee and concluded that residence in the most marginalized neighborhoods is a stronger predictor of increased violence following arrest than unemployment status). *But see* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1678 (stating that more recent analysis of the NIJ replication studies shows that there is a reduction in recidivism among domestic violence offenders who are arrested).

40. Berk et al., *supra* note 34, at 171-72; J. David Hirschel & Ira W. Hutchinson, III, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 73, 115 (1992).

41. Sherman et al., *supra* note 39, at 168; *see also* Berk et al., *supra* note 34, at 173-74. In the end, only five of the six replication studies were completed. Christopher D. Maxwell, Joel H. Garner & Jeffrey A. Fagan, *The Effects of Arrest on Intimate Partner Violence: New Evidence from the Spouse Assault Replication Program*, NAT'L INST. JUST. RESEARCH BRIEF, July 2001, at 9, *available at* <http://www.ncjrs.gov/pdffiles1/nij/188199.pdf> (reanalyzing data from the replication studies and concluding that there is "good evidence of a consistent and direct, though modest, deterrent effect of arrest on aggression by males against their female intimate partners"). Ultimately, "the published results from the five replication experiments produced inconsistent findings about whether arrest deters intimate partner violence." *Id.* at 1.

replication studies have also been criticized.<sup>42</sup> Nevertheless, all fifty states now allow warrantless arrests in cases where there is probable cause of a misdemeanor domestic violence offense,<sup>43</sup> and most states have enacted preferential or mandatory arrest statutes.<sup>44</sup>

## 2. *No-drop prosecution policies*

Similar to the lax response of police departments before mandatory policies, prosecutors often dismissed cases upon the belief that domestic violence was a private matter or that the victims would eventually drop the charges on their own.<sup>45</sup> Once mandatory arrest policies became more prevalent, however, the police and prosecutors believed that arresting perpetrators of domestic violence would be meaningless unless these individuals were aggressively prosecuted. As a result, no-drop prosecution policies naturally followed mandatory arrest policies.<sup>46</sup>

No-drop policies require prosecutors to prosecute domestic violence cases regardless of the victim's wishes.<sup>47</sup> "Soft" no-drop policies allow victims to make the choice to drop charges under certain specified conditions such as watching a video on domestic

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42. Joan Zorza has criticized the validity of the replication studies, arguing that none of them fully replicated the original Minneapolis study or each other, each study had its own definition of a domestic relationship, and the type of police responses used in each study differed. Zorza, *supra* note 32, at 5–6. Critics of the NIJ studies also argue that it is incorrect to assume that renewed violence is a retaliatory response to arrest when the NIJ studies showed fewer reoffenses in the short term, and those treating batterers believe any retaliation from arrest would happen shortly after arrest. Frisch, *supra* note 39, at 213; Zorza, *supra* note 32, at 8; *see also* Bowman, *supra* note 39, at 204 (arguing that the lower recidivism rate for employed men may be because their partners do not report future violence out of fear of sacrificing their lifestyle and status); Coker, *supra* note 39, at 856 (citing study that reviewed the NIJ arrest study data in Milwaukee and that concluded that residence in the most marginalized neighborhoods is a stronger predictor of increased violence following arrest than unemployment status). *But see* Sack, *supra* note 39, at 1678 (stating that more recent reanalysis of the NIJ replication studies shows that there is a reduction in recidivism among domestic violence offenders who are arrested).

43. Prior to 1984, most police officers could not arrest a suspect without a warrant unless the misdemeanor was committed in the officer's presence. Officers could arrest a suspect without a warrant if they had probable cause to believe that a felony had been committed. Hanna, *supra* note 15, at 1859.

44. *Id.* at 1859–60.

45. Laurence Busching, *Exploring the Future of the Confrontation Clause in Light of Its Past: Rethinking Strategies for Prosecution of Domestic Violence in the Wake of Crawford*, 71 BROOK. L. REV. 391, 392 (2005).

46. Mills, *supra* note 18, at 561.

47. *Id.*

violence, speaking to a counselor, or appearing before a judge to explain reasons for wanting to drop the charges.<sup>48</sup> “Hard” no-drop policies require prosecutors to proceed with a case regardless of the victim’s wishes if there is enough evidence to go forward to trial.<sup>49</sup> Sometimes hard no-drop jurisdictions will even sanction or arrest victims who refuse to voluntarily participate in the prosecution.<sup>50</sup> Most jurisdictions with no-drop policies, however, do not force victims to participate in the prosecution.<sup>51</sup>

### 3. Responses to mandatory policies

Advocates of domestic violence victims have had mixed reactions to mandatory policies. Some commentators, such as Cheryl Hanna, are in favor of mandatory prosecutions, arguing that the choice to prosecute must be taken away from victims if prosecutors are serious about sending a clear message that domestic violence is criminally unacceptable.<sup>52</sup> In addition, Hanna argues that allowing women to choose will give batterers an incentive to intimidate women into not testifying.<sup>53</sup> Hanna also believes that lax prosecution will decrease police officers’ confidence in the value of arrest and will undermine their diligence in policing domestic violence.<sup>54</sup>

Furthermore, Hanna argues that batterers are not just a threat to their partners, but they are also a threat to society.<sup>55</sup> She refers to research that suggests that violent offenders in a family are more likely to assault nonfamily members.<sup>56</sup> She also notes that batterers will continue to be abusive to future partners and that mandatory policies protect children from violence.<sup>57</sup>

Other commentators, such as Linda Mills, argue that mandatory policies contain many of the emotionally abusive elements of a victim’s relationship with a batterer because mandatory policies do not consider the woman’s personal perspective and circumstances.<sup>58</sup>

48. Coker, *supra* note 39, at 843; Hanna, *supra* note 15, at 1863–63.

49. Hanna, *supra* note 15, at 1863.

50. *Id.*

51. *Id.*

52. *See id.* at 1850.

53. *Id.* at 1892.

54. *Id.* at 1893.

55. *Id.* at 1889.

56. *Id.* at 1889.

57. *Id.* at 1895–96.

58. Mills, *supra* note 18, at 568–69.

Mills argues, “[W]e should be charged with hearing her story on her terms and in ways that take into account her particular circumstances. Only after we attend to this clinical task should we consider the larger feminist interest.”<sup>59</sup> In support, Mills refers to the replica study conducted by Lawrence Sherman in 1992 that suggested that violence may increase after the arrest of unemployed, unmarried, high school dropout African-Americans, and argues that mandatory policies might actually increase the level of violence certain women experience.<sup>60</sup>

Others have noted other potential risks under mandatory policies. First, there has been some evidence of an increase in dual arrests during which victims are arrested along with the perpetrator because the police claim that they cannot determine who was the aggressor in the attack.<sup>61</sup> Donna Coker notes that women who are arrested risk losing custody of their children, may be barred for life from receiving welfare benefits, and may have student financial aid compromised.<sup>62</sup> She also notes that arrests of immigrant women also have disastrous effects because, not having proper legal counsel, they often plea bargain in order to avoid jail time, which can result in deportation.<sup>63</sup> Coker thus argues that mandatory policies might deter these women from seeking help from police at all.<sup>64</sup>

Regardless of the possible shortcomings of mandatory policies, however, it seems clear that they created a tangible shift in the criminal justice system’s response to domestic violence.<sup>65</sup> Specifically,

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59. *Id.* at 569.

60. *Id.* at 565–68; *see also* Coker, *supra* note 39, at 820 (arguing that more research is needed to determine how arrest policies specifically affect poor women, women of color, and immigrant women).

61. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1184–86 (2002) (noting that many statutes have “primary aggressor” language that required the police to determine who was the most significant aggressor). *But see* David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIMINOLOGY 255, 296 (2007) (finding that overall dual arrest rates are low in domestic violence cases, but also noting that there are considerable variations in dual arrest rates both among and within states).

62. Coker, *supra* note 39, at 830.

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

64. *Id.*

65. Indeed, between 1993 and 2001, the number of incidents of nonfatal intimate violence against women in the United States decreased by half. Myrna Raeder, *Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 326 (2005). Whether mandatory policies effected this decrease remains to be seen, but Myrna Raeder cautions that some of this decrease may be illusory and that the

the criminal justice system now treats domestic violence as more of a public issue, not a private one.

*D. The Use of Out-of-Court Statements*

One of the impediments prosecutors face in trying to implement no-drop prosecution policies is the fact that many victims of domestic violence do not want to testify in court, and if they do, they often recant or testify on behalf of their batterers.<sup>66</sup> Prosecutors estimate that approximately eighty percent of domestic violence victims are uncooperative.<sup>67</sup> The reasons for this non-cooperation may include financial dependence, fear, poor interactions with actors in the criminal justice system, low self-esteem, and sympathy for the assailant.<sup>68</sup> As a result, during trial, prosecutors often use the out-of-court statements of these victims, instead of their live testimony.<sup>69</sup>

Two United States Supreme Court cases made the use of out-of-court statements at trial possible: *Ohio v. Roberts*<sup>70</sup> and *White v. Illinois*.<sup>71</sup> In *Roberts*, the state offered a transcript of a witness's testimony from a preliminary hearing as evidence at trial.<sup>72</sup> Roberts objected and argued that the admission violated the Sixth Amendment's Confrontation Clause.<sup>73</sup> The Supreme Court determined that in order for out-of-court statements to be admissible under the restrictions of the Confrontation Clause, the prosecution usually must either produce the declarant or demonstrate the declarant's unavailability.<sup>74</sup> The Court determined that even if the prosecution can show that the witness is unavailable, the prosecution must also show that the evidence bears "indicia of reliability."<sup>75</sup> The Court stated that when evidence falls within a

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"one-size-fits-all" approach of mandatory policies "clearly disadvantaged some women, disempowered others and did not uniformly lead to lesser risks of violence." *Id.* at 330.

66. Lininger, *supra* note 12, at 751.

67. *Id.*

68. *Id.*; see also David Jaros, *The Lessons of People v. Moscat: Confronting Judicial Bias in Domestic Violence Cases Interpreting Crawford v. Washington*, 42 AM. CRIM. L. REV. 995, 1002 (2005); *infra* Part IV.

69. Lininger, *supra* note 12, at 751–52.

70. 448 U.S. 56 (1980).

71. 502 U.S. 346 (1991).

72. *Roberts*, 448 U.S. at 59.

73. *Id.* at 59.

74. *Id.* at 65. The Court noted that unavailability is not required when the utility of confrontation is remote. *Id.* at 65 n.7.

75. *Id.* at 65.

firmly rooted hearsay exception or when there is a showing of “particularized guarantees of trustworthiness,” reliability can be inferred.<sup>76</sup> In *Roberts*, the Court determined that the witness was unavailable.<sup>77</sup> In addition, the Court held that the preliminary hearing transcript bore sufficient “indicia of reliability” for Confrontation Clause purposes because (1) the defendant had adequate opportunity to cross examine the witness during the preliminary hearing and (2) his counsel availed himself of his opportunity to do so.<sup>78</sup>

In *White*, the Court was asked to determine whether the Confrontation Clause required the prosecution to produce a declarant or to show the declarant’s unavailability before introducing testimony under the “spontaneous declaration” and “medical examination” hearsay exceptions.<sup>79</sup> Noting that aspects of spontaneous declarations and statements made during medical diagnosis could not be recaptured during in-court testimony and that there was a threat of losing the evidentiary value of these statements during in-court testimony, the Court refused to extend the unavailability requirement to these types of statements.<sup>80</sup>

Although the specific issue of whether spontaneous declarations and medical diagnosis statements were “firmly rooted” hearsay exceptions for Confrontation Clause purposes was not before the Court in *White*, prosecutors and lower courts inferred from that decision that they were. As a result, prosecutors began to rely on the use of these types of hearsay statements to prove their cases in domestic violence cases.<sup>81</sup>

At first glance, the use of these out-of-court statements in lieu of live testimony seems to be a proper solution to the problem of reluctant domestic violence witnesses. When allowed to utilize such statements, prosecutors are no longer faced with the dilemma of having to choose to either drop cases against batterers or force victims to testify. If prosecutors drop cases, batterers get away with their crimes. Moreover, by dropping cases, prosecutors arguably

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76. *Id.* at 66.

77. *Id.* at 75.

78. *Id.* at 73–75.

79. *See White v. Illinois*, 502 U.S. 346, 348–49 (1991).

80. *Id.* at 354–57.

81. Lininger, *supra* note 12, at 771.



allow batterers to control the prosecution process; all batterers have to do is threaten their victims, and the charges will be dropped.<sup>82</sup>

Equally problematic is the practice of forcing victims to testify against their will. If one of the purposes of prosecuting batterers is to limit the amount of violence that women experience, we certainly do not want to put women at risk of retaliatory violence by forcing them to testify. In addition, it seems cruel to threaten these women with the prospect of imprisonment if they refuse to testify when they have already been victimized in their homes.

Arguably, the use of out-of-court statements in domestic violence cases simultaneously allows prosecutors to prosecute batterers, to keep victims safe from retaliatory violence, and to lessen the burdens on women to testify. Part II, however, explains how the *Crawford* and *Davis* opinions probably limit the feasibility of this practice in many domestic violence cases.

## II. *CRAWFORD V. WASHINGTON*, *DAVIS V. WASHINGTON* AND THEIR AFTERMATH

### A. *Crawford v. Washington*

Although prosecutors partially relied on *White* in introducing the out-of-court statements of domestic violence victims at trial, Justice Thomas' concurrence in that opinion, to which Justice Scalia joined, began to express some doubt regarding the path that the Court's jurisprudence took with respect to the Confrontation Clause.<sup>83</sup> Specifically, Justice Thomas expressed concern that the Court had unnecessarily "complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence."<sup>84</sup> He suggested that the Court interpret the Confrontation Clause in a way that was more "faithful to both the provision's text and history."<sup>85</sup> Justice Thomas' concurrence, therefore, seemed to foreshadow part of Justice Scalia's analysis in *Crawford v. Washington*.

In *Crawford*, police arrested Crawford for the stabbing death of Kenneth Lee.<sup>86</sup> After providing *Miranda* warnings, police questioned

82. See Hanna, *supra* note 15, at 1850–52.

83. See *White*, 502 U.S. at 358.

84. *Id.*

85. *Id.* at 365.

86. See *Crawford v. Washington*, 541 U.S. 36, 38 (2004).

Crawford and his wife twice. Crawford ultimately confessed that he and his wife went to look for Lee after Crawford learned that Lee had allegedly attempted to rape Crawford's wife, Sylvia. After the Crawfords found Lee in his apartment, a fight ensued, Lee was stabbed in the torso, and Crawford's hand was cut.<sup>87</sup> During his account of the fight, Crawford stated that he believed that Lee had something in his hand, Crawford grabbed for it, and Crawford's hand got cut.<sup>88</sup> Crawford's wife's statements to the police during her interrogation, however, were arguably different with respect to whether Lee had a weapon.<sup>89</sup>

Crawford was charged with assault and attempted murder.<sup>90</sup> At trial, Crawford claimed self-defense, and his wife did not testify because of a state marital privilege.<sup>91</sup> Because this privilege did not extend to out-of-court statements admissible under a hearsay exception, the state introduced Crawford's wife's police interrogation as a statement against penal interest.<sup>92</sup> Crawford objected on the ground that the introduction of this statement violated his Sixth Amendment confrontation rights.<sup>93</sup> Applying *Roberts*, the trial court admitted the statement, finding that it had a

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87. *Id.*

88. *Id.* at 38–39.

89. During her interrogation, Sylvia stated the following:

Q: Did Kenny do anything to fight back from this assault?

A: (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what.

Q: After he was stabbed?

A: He saw Michael coming up. He lifted his hand . . . his chest open, he might [have] went to go strike his hand out or something and then (inaudible).

Q: Okay, you, you gotta speak up.

A: Okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant).

Q: Okay, when he's standing there with his open hands, you're talking about Kenny, correct?

A: Yeah, after, after the fact, yes.

Q: Did you see anything in hands at that point?

A: (pausing) um um (no).

*Id.* at 39–40.

90. *Id.* at 40.

91. *Id.*

92. *Id.*

93. *Id.*

“particularized guarantee[] of trustworthiness.”<sup>94</sup> The Washington Court of Appeals, however, reversed and applied a nine-factor test to determine that the statement was not trustworthy.<sup>95</sup> The Washington Supreme Court reinstated the conviction after determining that Crawford’s wife’s statement bore guarantees of trustworthiness because it was “virtually identical” to Crawford’s statement.<sup>96</sup>

The United States Supreme Court held that the admission of his wife’s statement was a violation of Crawford’s confrontation rights.<sup>97</sup> Justice Scalia, writing the majority opinion, rejected the reliability test in *Roberts*, performed a historical analysis of the Confrontation Clause,<sup>98</sup> and introduced a new rule: when an out-of-court statement is “testimonial,” the Sixth Amendment requires that it cannot be introduced at a criminal trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.<sup>99</sup>

Justice Scalia noted that although the right of confrontation dates back to Roman times, the founding generation’s source of the concept was the common law.<sup>100</sup> He contrasted the English common law practice of live in-court testimony subject to adversarial testing and the continental civil law practice of private examination by judicial officers.<sup>101</sup> Justice Scalia pointed out, however, that English courts sometimes adopted this civil law practice. The “Marian bail

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94. *Id.* (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). Specifically, the trial court found the statement trustworthy because Sylvia was not shifting blame, but was corroborating her husband’s story that he was acting in self-defense. *Id.* In addition, the trial court determined that Sylvia had direct knowledge of the events, was describing recent events, and “was being questioned by a ‘neutral’ law enforcement officer.” *Id.*

95. *Id.* at 41. Some facts that the Court of Appeals relied upon in its determination that the statement was not trustworthy were that the statement contradicted one that Sylvia had already given, it was made in response to specific questions, and at one point, Sylvia admitted that she had shut her eyes during the stabbing. *Id.* Furthermore, the court rejected the state’s argument that Sylvia and Michael’s statements “interlocked” given the fact that they differed on an issue critical to Michael’s self-defense claim. *Id.*

96. *Id.* (quoting *Washington v. Crawford*, 54 P.3d 656, 663 (Wash. 2002), *rev’d*, 541 U.S. 36 (2004) ).

97. *Id.* at 68.

98. For critiques regarding the accuracy of Scalia’s version of legal history, see generally Thomas Y. Davies, *What Did the Framers Know and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005); Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35 (2005).

99. *Crawford*, 541 U.S. at 68.

100. *Id.* at 43.

101. *Id.*

and committal statutes,” two statutes passed during Queen Mary’s reign in the Sixteenth Century, made it a routine practice for justices of the peace and other officials to examine suspects and witnesses before trial and to read these examinations at trial in lieu of live testimony.<sup>102</sup> Justice Scalia expressed doubt as to whether the original purpose of the justice of the peace examinations was to produce evidence admissible at trial, but noted that that was the ultimate result.<sup>103</sup>

Justice Scalia determined that this history “supports two inferences about the meaning of the Sixth Amendment.”<sup>104</sup> “First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”<sup>105</sup> Second, testimonial statements are not admissible if the witness does not appear at trial “unless he [is] unavailable . . . and the defendant [has] had a prior opportunity for cross-examination.”<sup>106</sup>

Justice Scalia determined that “[s]tatements taken by police officers in the course of [an] interrogation[] are . . . testimonial . . . .”<sup>107</sup> He reasoned that “[p]olice interrogations bear a striking resemblance to examinations by justices of the peace,” who had both investigatory and prosecutorial functions.<sup>108</sup> Justice Scalia stated that “[t]he involvement of government officers in the production of testimonial evidence presents the same risk whether the officers are police or justices of the peace.”<sup>109</sup> Justice Scalia then explained that he was using the term “interrogation” in its colloquial sense, but his definition included any statement “knowingly given in response to structured police questioning.”<sup>110</sup> Later in the opinion, Justice Scalia stated, “[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar.”<sup>111</sup>

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102. *Id.* at 43–44.

103. *Id.* at 44.

104. *Id.* at 50.

105. *Id.* at 49–51.

106. *Id.* at 53–54.

107. *Id.* at 52.

108. *Id.* at 52–53.

109. *Id.* at 53.

110. *Id.*

111. *Id.* at 56 n.7.

Justice Scalia left “for another day,” however, a complete definition of “testimonial,” but stated that “it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial and to police interrogations.”<sup>112</sup> Chief Justice Rehnquist predicted in his concurrence, however, that this lack of definition would create uncertainty in future criminal trials.<sup>113</sup> His prediction was correct, particularly with respect to domestic violence cases.<sup>114</sup>

*B. State v. Davis and Hammon v. State*

After all of the confusion in the lower courts after *Crawford*, the Supreme Court granted certiorari on two paradigmatic domestic violence cases to determine whether 911 calls and police statements can be admitted as evidence under the Confrontation Clause. In *Hammon v. State*, two officers arrived at the Hammon home in response to a reported domestic disturbance.<sup>115</sup> When the officers arrived at the scene, the alleged victim, Hammon’s wife, was sitting on the front porch.<sup>116</sup> The police asked her whether there was a problem, and she responded, “No . . . .”<sup>117</sup>

After obtaining permission from Hammon’s wife to enter the house, the officers found a broken gas-heating unit with fragments of glass on the floor and flames emerging from the unit.<sup>118</sup> Hammon was in the kitchen.<sup>119</sup> In response to the officers’ inquiry, he stated that there had been an argument, the argument never became physical, and everything was now fine.<sup>120</sup> One officer remained in the kitchen while the other went outside to Hammon’s wife.<sup>121</sup>

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112. *Id.* at 68.

113. *See id.* at 69 (Rehnquist, J., concurring).

114. After *Crawford*, some courts categorically decided that excited utterances or spontaneous statements can never be testimonial. *See, e.g.*, *People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004); *People v. Corella*, 18 Cal. Rptr. 3d 770, 772 (Cal. Ct. App. 2004). The majority of courts opted to apply a case-by-case approach to determine whether 911 calls and police statements are testimonial. *See, e.g.*, *State v. Wright*, 701 N.W.2d 802, 811 (Minn. 2005), *vacated*, 548 U.S. 923 (2006).

115. *Hammon v. State*, 829 N.E.2d 444, 446–47 (Ind. 2005), *rev’d sub nom. Davis v. Washington*, 547 U.S. 813 (2006).

116. *Id.*

117. *Id.* at 446–47.

118. *Id.* at 447.

119. *Id.*

120. *Id.*

121. *Id.*

The second officer approached Hammon's wife and asked her again what had happened.<sup>122</sup> He later testified that she said that she and her husband had gotten into an argument, her husband had broken many things, and her husband had gotten physical with her, including pushing her into the ground and shoving her face in the heater glass.<sup>123</sup> Hammon's wife then, at the officer's request, filled out a battery affidavit and included her allegations of abuse.<sup>124</sup>

The state charged Hammon with domestic battery and violation of probation.<sup>125</sup> His wife was not present for the hearing, but the trial court admitted her statements to the police as an excited utterance, and the court admitted her affidavit as a statement of present sense impression.<sup>126</sup> Hammon was convicted.<sup>127</sup> His wife wrote a letter to the court with respect to Hammon's sentencing and stated that she wanted him to receive counseling and to attend Alcoholics Anonymous.<sup>128</sup> She also requested that the court place Hammon on probation so that he could continue to work and help the family financially and so that he could continue to help with the care of the children.<sup>129</sup> Hammon's wife claimed that she did not feel threatened by Hammon's presence; she just wanted him to get help with his drinking.<sup>130</sup> The court sentenced Hammon to one year in jail, with all but twenty days suspended.<sup>131</sup> Applying *Crawford*, the state court of appeals affirmed the conviction.<sup>132</sup> The Supreme Court of Indiana determined that the oral statements Hammon's wife made to the police were admissible,<sup>133</sup> but rejected the court of appeals' determination that a statement that qualifies as an excited utterance is necessarily non-testimonial.<sup>134</sup>

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122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* The trial court's determination was made pre-*Crawford*.

127. *Id.*

128. *Id.* at 448 n.3.

129. *Id.*

130. *Id.*

131. *Id.* at 447.

132. *Id.* at 448.

133. In contrast, the court determined that Amy's affidavit was testimonial and inadmissible, although its admission by the lower court was harmless error. *Id.* at 458.

134. *Id.* at 453.

In *State v. Davis*, Michelle McCottry called 911 and then hung up.<sup>135</sup> The 911 operator called McCottry back, and McCottry informed her, “He’s here jumpin’ on me again.”<sup>136</sup> The operator then asked to whom McCottry was referring, what his relationship was to McCottry, and whether the alleged perpetrator had been drinking.<sup>137</sup> McCottry identified her ex-boyfriend, Davis, as the perpetrator, accused him of beating her, and stated that Davis had left the scene and that she had a protective order against him.<sup>138</sup> Police officers arrived at McCottry’s home shortly thereafter and noted that she was upset and that she had fresh injuries on her forearm and face.<sup>139</sup>

The police officers were the state’s only witnesses at trial.<sup>140</sup> McCottry did not testify.<sup>141</sup> Because the officers could not testify regarding the cause of McCottry’s injuries, the only evidence linking the injuries to Davis were the statements from McCottry’s 911 call.<sup>142</sup> The tape was admitted as an excited utterance, despite the defendant’s Confrontation Clause objection.<sup>143</sup> Davis was found guilty.<sup>144</sup> Applying *Roberts*, the state court of appeals affirmed the guilty verdict, determining that the trial court properly classified the call as an excited utterance, a firmly rooted hearsay exception.<sup>145</sup> Applying *Crawford* and using a case-by-case analysis, the Washington Supreme Court determined that while portions of McCottry’s 911 call may have been testimonial, the portion identifying Davis as the perpetrator was non-testimonial and, therefore, had been properly admitted.<sup>146</sup>

The facts in both *Hammon* and *Davis* are extremely compelling. Without knowing the whole story, one could interpret *Hammon* as a case involving a woman who is involved in a violent relationship, but

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135. *State v. Davis*, 111 P.3d 844, 846 (Wash. 2005), *aff’d*, 547 U.S. 813 (2006).

136. *Id.*

137. *Id.* at 846.

138. *Id.* at 846–47.

139. *Id.* at 847.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* This decision took place pre-*Crawford*.

144. *Id.*

145. *Id.*

146. *Id.* at 851. The court further stated that any error in admitting the testimonial portions of the 911 call were harmless beyond a reasonable doubt. *Id.*

who is afraid to involve the authorities in her situation. Part of her fear may be that her husband will subject her to further violence. Part of her may also fear that her family will become destitute should her husband go to jail.<sup>147</sup> Regardless of the reason, Hammon's wife may have initially felt reticent to tell the police about the abuse, and, having finally made a statement, she may later have refused to testify at trial because she was nervous about the possible consequences for herself and her family. The reality is that many women feel trapped in violent relationships because they fear for their physical safety and because they have limited economic resources.<sup>148</sup>

One could interpret *Davis*, on the other hand, as the common story of the woman who does try to leave, but who is continually harassed by her batterer. Although she went through the steps of obtaining a protective order, her ex-boyfriend ignored it and subjected her to further violence.<sup>149</sup> Out of fear of further physical repercussions, she packed up her things and fled the jurisdiction, unable to help prosecutors.<sup>150</sup> This scenario rings true for many women trying to escape the dangers of a violent relationship.<sup>151</sup>

The compelling nature of these stories explains why courts are reluctant to exclude out-of-court statements that seem essential to prosecuting domestic violence perpetrators. Yet despite this understandable reaction, *Davis v. Washington* limited the use of these statements in future domestic violence cases.<sup>152</sup>

As in *Crawford*, Justice Scalia delivered the opinion of the Court. Although *Crawford* stated that police interrogations are testimonial, the Court in *Davis* intended to determine "more precisely which police interrogations produce testimony."<sup>153</sup> First, the Court determined that the Confrontation Clause applies only to testimonial statements.<sup>154</sup> The Court then held that "[s]tatements are

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147. See *Hammon v. State*, 829 N.E.2d 444, 448 n.3 (Ind. 2005), *rev'd sub nom.* *Davis v. Washington*, 547 U.S. 813 (2006).

148. See *infra* Part IV.

149. See *Davis*, 111 P.3d at 846-47.

150. See Brief of Petitioner at 8, *State v. Davis*, 111 P.3d 844, No. 05-5224 (Wash. 2005), 2006 U.S. S. Ct. Briefs LEXIS 202.

151. See *infra* Part IV.

152. *Davis*, 547 U.S. 813. *Hammon v. Indiana*, 829 N.E.2d 444, was included in this decision.

153. *Davis*, 547 U.S. at 822.

154. *Id.* at 825-26. Specifically, the Court was not aware of any early American case that involved the Confrontation Clause and testimonial evidence was not involved. *Id.* at 824. It also noted that with the exception of *White v. Illinois*, cases applying *Roberts* "never in practice



nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”<sup>155</sup> In contrast, statements are testimonial when “the circumstances indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>156</sup>

Applying this test to the facts, the Court determined that McCottry’s identification of Davis was nontestimonial.<sup>157</sup> Justice Scalia stated, “A 911 call . . . and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to ‘establish or prove’ some past fact, but to describe current circumstances requiring police assistance.”<sup>158</sup> He determined that rather than describing past events, McCottry spoke about events as they occurred.<sup>159</sup> In addition, he noted that she called for help against a “bona fide physical threat” and that the “nature of what was asked and answered” objectively showed that the statements elicited were necessary to resolve an ongoing emergency, not to learn about past events.<sup>160</sup> McCottry’s tone was frantic, and Justice Scalia stated that Davis’ identity was necessary to help the police determine whether they were dealing with a violent felon.<sup>161</sup> Thus, Justice Scalia determined that unlike Sylvia Crawford’s *ex parte* statements, which “aligned perfectly with their courtroom analogues . . . [n]o ‘witness’ goes into court to proclaim an emergency and seek help.”<sup>162</sup>

In contrast, Justice Scalia determined that in *Hammon* it was clear from the circumstances that the interrogation was part of an investigation into possible criminal conduct.<sup>163</sup> He found that the interrogation took place in somewhat formal circumstances that bore

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dispensed with the Confrontation Clause requirements of unavailability and prior cross-examination in cases that involved testimonial hearsay.” *Id.*

155. *Id.* at 822.

156. *Id.*

157. *Id.* at 819.

158. *Id.* at 827.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 828. Justice Scalia noted that a statement can start off as a cry for help and then become testimonial. For example, after Davis left the scene, McCottry’s statements arguably became testimonial. *Id.* at 828–29.

163. *Id.* at 829.

“striking resemblance” to civil law *ex parte* examinations.<sup>164</sup> Specifically, the police officer questioned Amy Hammon in a separate room, away from her husband who tried to intervene in the conversation.<sup>165</sup> In addition, Amy recounted past events, and her statement took place sometime after the events in question.<sup>166</sup> In other words, as far as Justice Scalia was concerned, her statement was a substitute for live testimony.<sup>167</sup> For these reasons, her statements were testimonial.<sup>168</sup>

Justice Thomas concurred in the judgment in *Davis* and dissented from the Court’s resolution of *Hammon* on the ground that neither involved the type of evidence that was historically targeted by the Confrontation Clause.<sup>169</sup> Specifically, the Confrontation Clause was intended to target *ex parte* questioning under English bail and committal statutes under Queen Mary, and he stressed the requirement of solemnity such as in affidavits, depositions, prior testimony, or confessions.<sup>170</sup>

Justice Thomas also criticized *Davis* for being unpredictable.<sup>171</sup> He specifically criticized the dichotomy created between responding to emergency situations and gathering evidence since the police often have multiple motives for questioning an individual.<sup>172</sup> Thus, it may be difficult to determine the primary purpose of an interrogation.<sup>173</sup> For example, it is possible that the primary purpose of the police officer in *Hammon* was to determine whether Amy was in danger of further abuse.<sup>174</sup>

Justice Thomas’ analysis is apt in that the dichotomy between cries for help and bearing witness in contemplation of legal proceedings is somewhat arbitrary and false. Where does one end and the other begin? In the real world, these two events often happen simultaneously. As Deborah Tuerkheimer explains:

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164. *Id.* at 830.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 834 (Thomas, J., concurring in part and dissenting in part).

170. *Id.* at 836–37.

171. *Id.* at 834.

172. *Id.* at 839.

173. *Id.* at 834.

174. *Id.* at 841.

A domestic violence victim's safety may be wholly contingent on her communication with police her "narration of events" linked inexorably to resolving—however temporarily—the danger posed by her batterer . . . . The "cry for help" may sound, then, much like a narration of events because it is; a victim is describing battering that will, in all likelihood, continue in the absence of some action by law enforcement . . . . The exigency the victim experiences requires a narration of past events in order to resolve the immediate danger they precipitated. In short, the meaning of 'exigency' to a victim of domestic violence is different than it is to victims of other types of crime. This reality fatally undermines judicial reasoning predicated on the "crying for help" versus "providing information to law enforcement" rubric.<sup>175</sup>

In the case of McCottry, she called the police in order to seek immediate protection from Davis.<sup>176</sup> At the same time, however, after Davis left, she informed the 911 operator that he was in violation of his protective order.<sup>177</sup> Thus, in addition to seeking immediate protection from the police, one could assume that McCottry also was seeking legal proceedings with respect to Davis' violation of the protective order. If Davis was arrested and prosecuted for this violation, she presumably would have temporary safety from future abuse.

Similarly, as Justice Thomas noted, it is highly likely that the police officer in *Hammon* was just as concerned about Amy's immediate safety as he was about gathering evidence for trial.<sup>178</sup> In addition, it is possible that Amy still felt in danger of her husband even after the police arrived, and, therefore, the emergency remained ongoing.<sup>179</sup>

The most glaring omission in *Davis'* analysis, however, is a discussion about the government producing evidence in domestic violence trials. In *Crawford*, Justice Scalia seemed to be particularly concerned about this potential for prosecutorial abuse.<sup>180</sup> Because of

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175. Tuerkheimer, *Crawford's Triangle*, *supra* note 5, at 23–25; *see also* Tuerkheimer, *Exigency*, *supra* note 8 (critiquing the Court's analysis of exigency in the domestic violence context).

176. *Davis*, 547 U.S. at 831.

177. *State v. Davis*, 111 P.3d 844, 846 (Wash. 2005), *aff'd*, 547 U.S. 813 (2006).

178. *Id.* at 839 (Thomas, J., concurring in part and dissenting in part).

179. Tuerkheimer, *Crawford's Triangle*, *supra* note 5.

180. *Crawford v. Washington*, 541 U.S. 36, 56 (2004); *see also* Kenneth Graham, *The Revolution Revised: A Guided Tour of Davis v. Washington*, 2006 UCLA PUB. L. SERIES, Paper 6-07, at 21–22; Michael H. Graham, *Special Report: Crawford v. Washington*, 541 U.S. 36, 124

the widespread institution of mandatory arrest and mandatory prosecution policies, it is safe to assume that once police respond to a potential domestic violence incident, they immediately begin collecting evidence for trial, even from the initial inquiry at the scene. The police in most jurisdictions begin this investigation assuming that the victim will not testify at trial.<sup>181</sup> Thus, the police take greater care to both document the demeanor of the victim at the scene and record court-admissible statements.<sup>182</sup>

Post-*Crawford*, the American Prosecutor's Research Institute created a list of predicate questions for the express purpose of enlisting the police in gathering statements that would survive *Crawford*.<sup>183</sup> These questions purported to help the police avoid the appearance that the statements were the product of an interrogation.<sup>184</sup> Thus, as Myrna Raeder states: "It is fairly disingenuous to claim that the officer doesn't know a prosecution is likely to occur when the jurisdiction has a pro or mandatory arrest policy in domestic violence cases."<sup>185</sup>

There is no reason to believe that this sophisticated preparation of domestic violence cases will not continue post-*Davis*. It is true that this practice is well intended to increase the number of convicted perpetrators. Nevertheless, this practice involves the type of "evil" that Scalia was most concerned about regarding confrontation rights: the government's involvement in producing evidence for trial. For lower courts to stay true to the spirit of *Crawford*, and presumably *Davis*, many out-of-court statements

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*S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*, 42 CRIM. L. BULL. 4, n.10-11 (2006); Michael L. Seigel & Daniel Weisman, *The Admissibility of Co-Conspirator Statements in a Post-Crawford World*, 34 FLA. ST. U. L. REV. 877, 890 (2007).

181. Friedman & McCormack, *supra* note 61, at 1187.

182. *Id.* (citing various jurisdictions where police are trained to gather evidence so that a case can be tried without the victim). In fact, the police officers in *Hammon* followed standard protocols that prosecutors recommend for preparing domestic violence cases. See Tracy Bahm, *DV 101*, [http://www.ndaa.org/apri/programs/vawa/dv\\_101.html#preparecase](http://www.ndaa.org/apri/programs/vawa/dv_101.html#preparecase) (suggesting that law enforcement officers and prosecutors prepare a case as though the victim will not testify). They separated the parties involved and conducted the interviews separately. See Bahm, *supra*; see also Luisa Bigornia, *Domestic Violence: Alternatives to Traditional Criminal Prosecution of Spousal Abuse*, 11 J. CONTEMP. LEGAL ISSUES 57, 58-59 (2000) (noting that prosecutors in San Diego routinely prosecute cases from evidence obtained from the police and that they have a special form for recording the victim's demeanor and statements).

183. See *Sample Crawford Predicate Questions*, 1 THE VOICE 8 (2004), available at [http://www.ndaa.org/pdf/the\\_voice\\_vol\\_1\\_issue\\_1.pdf](http://www.ndaa.org/pdf/the_voice_vol_1_issue_1.pdf).

184. See *id.*

185. Raeder, *supra* note 65, at 340.

made to police officers at the scene of domestic violence incidents should not be admissible at trial unless the victim has been subject to cross-examination. Furthermore, it is possible that many 911 statements also should not be admissible if 911 operators have been trained to gather evidence for trial.

### III. RECONSIDERING THE USE OF VICTIMLESS PROSECUTIONS

An honest reading of *Crawford* suggests that many out-of-court statements should no longer be admissible in domestic violence trials because of the sophisticated manner in which this evidence is produced. Yet, a limitation on victimless prosecutions is not necessarily a setback in the development of effective domestic violence laws and policy. Indeed, a nondiscriminatory use of victimless prosecutions may not be in the best interest of all domestic violence victims. While the purpose of these types of prosecutions is clearly to protect women, a nondiscriminatory use of these prosecutions may also disempower women in ways that undermine the original reasons that participants of the women's movement desired the involvement of the criminal justice system in domestic violence in the first place. In other words, the goal of successful prosecutions may have eclipsed the original goals of the women's movement.

As previously discussed, there has been a great deal of scholarship on the effectiveness of mandatory arrest and mandatory prosecution policies.<sup>186</sup> There has been little discussion, however, about the

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186. See *supra* Part I. For further discussion of these policies, see generally Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3 (1999) [hereinafter Epstein, *Effective Intervention*] (suggesting that prosecutors, judges, and courts consider their role in improving the criminal justice response to domestic violence), Deborah Epstein et al., *Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465 (2003) (advocating "prosecution in context" to maximize the government's responsiveness to an individual's context in order to improve her long-time safety without jeopardizing existing efforts under mandatory policies to keep batterers accountable), Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843 (2002) (arguing that current domestic violence policies, including mandatory policies, should be reassessed to consider procedural justice with respect to defendants), G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 Hous. L. REV. 237 (2005) (discussing how proponents of mandatory policies have conservatized the battered women's movement and dislocated them from their feminist origin), Sack, *supra* note 39, at 1657 (arguing that we should acknowledge and correct the shortcomings in the criminal justice system's response to domestic violence without abandoning its achievements), and

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*Deconstructing the Sound of Silence*

effectiveness of victimless prosecutions in the domestic violence context. It is my hope that this Article will encourage this dialogue. Specifically, scholars need to reevaluate whether a nondiscriminatory use of victimless prosecutions furthers or hinders the goals of keeping women physically, emotionally, and mentally safe and of deconstructing certain legal and political structures that encourage the subordination of women.

To be clear, there are occasions when prosecuting a case without the victim is not only helpful, but necessary. The most obvious example of this type of circumstance is the prosecution of homicide cases. In all homicide cases, the victim is not available to participate in the murderer's prosecution. Yet, prosecutors must proceed with their prosecutions using evidence other than the victim's live testimony. In addition, some commentators argue that victimless prosecutions may be necessary in cases where children are victims of sexual assault, because the prosecution process may be too traumatic for those children.<sup>187</sup>

A discussion on the merits of victimless prosecutions in every type of criminal case is beyond the scope of this Article. I want to acknowledge, however, that there are occasions when these types of prosecutions are necessary and useful and that there may even be some occasions when they are necessary and useful in certain domestic violence cases.<sup>188</sup> For example, as I will discuss further in Section A, if a woman chooses not to testify because she has been threatened with retaliatory violence, the forfeiture doctrine probably allows her out-of-court statements to be admissible at trial.<sup>189</sup> Victimless prosecutions in this context make sense.

Nevertheless, there are reasons other than just fear of retaliation that domestic violence victims choose not to testify, including a lack of material resources, lack of adequate protection from the legal system when they do testify, and lack of quality interactions with

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Donna Wills, *Mandatory Prosecution in Domestic Violence Cases: Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173 (1997) (arguing that "no drop" policies are an enlightened approach to domestic violence prosecutions).

187. See Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1280-85 (2003); Richard D. Friedman, *Grappling With the Meaning of "Testimonial"*, 71 BROOK. L. REV. 241, 272 (2005).

188. Indeed the forfeiture doctrine may apply to certain domestic violence cases. For further discussion of the forfeiture doctrine, see *infra* Part III.A.

189. See *infra* Part III.A.

actors in the criminal justice system.<sup>190</sup> For this reason, I caution against the nondiscriminatory use of this practice in the domestic violence context. There is no empirical evidence that women who do not testify are physically safer<sup>191</sup> than women who do. Given this fact, a nondiscriminatory use of victimless prosecutions is particularly problematic if it is indeed true that victimless prosecutions encourage the systematic silence and disempowerment of women.

*A. Are Women Really Safer When They Do Not Testify?*

The potential silencing of women encouraged by victimless prosecutions is particularly disturbing because it is not clear that women are always safer when they do not testify. I do not question whether one of the original intentions of victimless prosecutions was to keep women safe. As has already been discussed, there are those who believe that prosecuting batterers makes women safer.<sup>192</sup> Moreover, some commentators and scholars believe that victimless prosecutions allow these prosecutions to continue, while protecting women from violence in retaliation for their testimony.<sup>193</sup>

Women who choose not to testify because they have been threatened with retaliation from their batterers, however, already have protection under the forfeiture doctrine. Justice Scalia made it clear in both *Crawford* and *Davis* that this exception to the Confrontation Clause still exists.<sup>194</sup> The forfeiture doctrine is an equitable doctrine under which a defendant is deemed to waive his or her confrontation rights if the declarant is unavailable because of the defendant's wrongdoing.<sup>195</sup> Consequently, some commentators

190. See *infra* Part IV.A.

191. One might argue that the victim's emotional safety is also an important consideration in domestic violence cases. As is the case for most victims who must confront the perpetrators of their crimes at trial, there will be a certain level of anxiety created by having to confront one's batterer. Improving the victim's interactions with actors in the criminal justice system, however, could potentially decrease this anxiety to a manageable level. For further discussion, see *infra* Part IV.A.3.

192. See *supra* Part I.

193. Lininger, *supra* note 12, at 771.

194. *Davis v. Washington*, 547 U.S. 813, 832 (2006); *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

195. See *Reynolds v. United States*, 98 U.S. 145, 158–61 (1878) (allowing the out-of-court testimony of the defendant's alleged second wife in a bigamy trial where there was evidence that the defendant had attempted to hide her during the trial). For cases that discuss the forfeiture doctrine in the domestic violence context, see *State v. Wright*, 726 N.W.2d 464, 479–82 (Minn. 2007) (remanding the case for a determination of whether the forfeiture doctrine applied where there were allegations that the victim did not testify because she was

argue that the forfeiture doctrine almost always applies in domestic violence cases because the abuse itself prevents women from testifying.<sup>196</sup>

Scholars should carefully analyze domestic violence cases, however, before they determine that it is always the case that victims do not testify because of the batterers' wrongdoing.<sup>197</sup> As loathsome as domestic abuse is, there is still a constitutional obligation to protect the confrontation rights of all defendants.

Moreover, it is not clear that women are always safer in the long-term when they do not testify or participate in prosecutions. In order for victimless prosecutions to be successful in promoting the long-term safety of women, one must make one of two assumptions. One assumption is that arrest and prosecution deter batterers from future violence, and therefore, when the batterer returns to the victim's home, he will no longer abuse her. The other assumption is that the arrest and conviction of her batterer allows a victim time to extricate herself from a violent relationship and to become permanently safe.

With respect to the first assumption, as was discussed earlier, the evidence is inconclusive on whether arrest deters future violence from batterers.<sup>198</sup> While some statistics suggest that no-drop prosecution policies decrease the level of violence against women,<sup>199</sup>

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concerned for her safety and because the defendant threatened her from jail), *State v. Tyler*, 155 P.3d 1002, 1007 (Wash. Ct. App. 2007) (refusing to apply the forfeiture doctrine in a domestic violence case because the state failed to preserve the error for appeal), and *State v. Mechling*, 633 S.E.2d 311, 325–26 (W. Va. 2006) (remanding for a determination of whether the forfeiture doctrine applied in a domestic violence case).

196. See Tuerkheimer, Crawford's *Triangle*, *supra* note 5, at 9 (stating that "in most abusive relationships, 'tampering' conduct is inexorably bound up in the violent exercise of power that is itself criminal"). But see Joan Comparet-Cassani, 42 SAN DIEGO L. REV. 1185, 1211 (2005) (arguing that the wrongful act must have been committed with the intention of making the witness unavailable to testify at the defendant's trial).

197. Of course, but for the batterer's actions, there would be no prosecution and no need for the victim to testify in the first place. But beyond this causal connection, there may be other more direct reasons why a victim does not testify. For example, evidence suggests that some victims do not testify because of poor interactions with actors in the criminal justice system. For more discussion regarding reasons why domestic violence victims do not testify, see *infra* Part IV.

198. See *supra* Part I. But see Tuerkheimer, *Exigency*, *supra* note 8, at 801 (arguing that the investigation of a domestic violence crime and the ensuing arrest are the only way to prevent injury to the victim in the midst of a violent act).

199. The level of nonfatal violent crimes against women dropped from 1.1 million in 1993 to 588,490 in 2001. Rennison, *supra* note 11. Proponents of no-drop policies in San Diego credit the policy for decreasing the number of homicides from thirty in 1985 to seven in 1994. Gina L. Durham, *The Domestic Violence Dilemma: How Our Ineffective and Varied Responses Reflect Our Conflicted Views of the Problem*, 71 S. CAL. L. REV. 641, 651 (1998).



other evidence suggests that, while no-drop policies may lower dismissal rates and increase the number of domestic violence cases that are prosecuted, prosecution does not necessarily reduce recidivism.<sup>200</sup> Moreover, because domestic violence incidents are underreported, it is unclear how much violence women actually experience under mandatory policies.<sup>201</sup>

With respect to the latter assumption, most women must make several attempts to leave a relationship before they succeed.<sup>202</sup> Thus, even if a woman wants to leave a violent relationship, it is often very difficult. First, batterers are most often punished with nothing more than probation or short jail time.<sup>203</sup> For this reason, women have very little time to escape before their batterers are back on the street or back in their homes.

Furthermore, separation may increase the instigation of violence.<sup>204</sup> According to Martha Mahoney, “[a]t least half of women who leave their abusers are followed and harassed or further attacked. In one study of interspousal homicide, more than half of the men who killed their spouses did so when the partners were separated.”<sup>205</sup>

In addition, many domestic violence victims do not have the economic resources to live on their own, and therefore, must rely on their batterers for their basic needs.<sup>206</sup> Many women cannot afford to leave their batterers.

Finally, there is no empirical evidence that shows that prosecuting these cases without the victims’ involvement or testimony makes women safer from further abuse. Further research

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200. See Coker, *supra* note 39, at 817–18 (“[O]f those studies [analyzing prosecution’s effects on recidivism] that exist, several find that no particular outcome of prosecution is significantly related to recidivism.”); Mills, *supra* note 18, at 567–68 (“A recent study on the effects of prosecution on recidivism presented striking results[—]that prosecution had no effect on the likelihood of re-arrest of the batterer within a six-month period.”); Sack, *supra* note 39, at 1681.

201. Mahoney, *supra* note 14, at 11.

202. *Id.* at 63.

203. Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1508, 1521–22 (1998) (“Of those cases that are prosecuted, many are charged or pled down to misdemeanors despite facts that suggest the conduct constituted a felony.”). “[G]ender bias task force reports indicate that judges impose lighter sentences on defendants convicted of domestic violence crimes than [on] those [who commit violence] against strangers.” Epstein, *Effective Intervention*, *supra* note 186, at 43.

204. Mahoney, *supra* note 14, at 65.

205. *Id.* at 64–65.

206. See *infra* Part IV.A.

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*Deconstructing the Sound of Silence*

needs to be conducted on this issue, and specifically, scholars should research whether the victims' participation in the prosecution process may actually improve their level of safety in the long term.

*B. Are Victimless Prosecutions Encouraging the Systematic Silence of Women?*

Under current practice, many domestic violence victims need not speak at all within the criminal justice system, other than through the statements they make in a 911 call or in a police statement. Without further communication with these women, however, the context of their experiences remains unknown. For example, how often has the woman been battered by this perpetrator? Does she have the resources to remove herself from the violence? Is the woman separated from the perpetrator, or has she attempted to leave the perpetrator in the past? Is the woman an immigrant or a woman of color? All of these questions are potentially relevant in determining the amount of danger the woman faces, the likelihood she has of gaining safety in the future, and the reasons she has become a victim of domestic abuse in the first place.<sup>207</sup>

Because these statements lack context, therefore, one might argue that victimless prosecutions encourage the legal silence of women. First, they are most obviously silent by not testifying and speaking out against their batterers. But even more importantly, it increases their silence within the discourse on the domestic violence laws and policies that are supposed to help them.<sup>208</sup>

My concern about silencing is obviously not relevant in the victimless prosecutions of homicide cases. In addition, there may be other contexts where the benefits of victimless prosecutions outweigh any harm that is caused by the silence of the victim. For example, assuming that there are no Confrontation Clause violations, any potential harm caused by the silence of child victims

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207. See *supra* Part I.D and *infra* Part IV.A.

208. Of course, the legal process is not the only forum where domestic violence victims' voices may be heard. Victims also can engage in policy discourse through the political process. For example, they can host rallies, write their legislators, and lobby Congress. The political and legal processes are not mutually exclusive, however, and both are important in creating change. In addition, one wonders how willing victims will be to engage in the political process if their initial interactions with legal actors during the investigative and prosecution process are negative. See *infra* note 209. Finally, it seems unlikely that women will be willing to participate in the political process if they are not first willing to speak out against their batterer in a public setting like a trial.

of sexual assaults may be outweighed by the potential emotional harms that these children might suffer if they testify.

The systematic silence of domestic violence victims, however, is troubling because most of these victims are women, and women historically have been politically and legally subordinate and silent in our society. As discussed in greater detail in this Section, the legal silencing of subordinated groups is especially significant because it reinforces the disempowerment and marginalization that these groups already experience.

Some commentators might argue that, as is the case with child victims of sexual assault, the traumatic experience and possible dangerous repercussions of testifying outweigh any potential harm caused by silence. While this might be the case for some victims of domestic violence, particularly for women who are in extreme danger of physical retaliation, there are still women who do not necessarily require this type of protection.<sup>209</sup> As adults, women do not require the same type of protection as children. Indeed, equating women to children undermines their goal of social, political, and legal equality with men. For this reason, we need to closely examine when victimless prosecutions are necessary and when victim participation can plausibly be encouraged.

Focusing on the silencing of defendants in the criminal legal system, Alexandra Natapoff notes that there is a phenomenon of legal silencing of subordinated groups.<sup>210</sup> This phenomenon is problematic because being heard within the legal process can be an important part of the larger power struggle of social meaning.<sup>211</sup> “Discourse—the way things are talked about—is an exercise in

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209. According to experts, many domestic violence victims do not testify because of a lack of material resources and a lack of quality interactions with actors in the criminal justice system, not simply fear of retaliation from the batterer. *See infra* Part IV. In addition, it may be that certain changes within the criminal justice system could provide better protection for victims. *See infra* Part IV.A.3.

210. Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1452–53 (2005); *see also* Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) (discussing how poverty law clients are often silenced within the attorney-client relationship); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992) (discussing how the poor are silenced in Baltimore's rent courts); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (arguing that accent discrimination is a form of racial subordination).

211. Natapoff, *supra* note 210, at 1453.

power.”<sup>212</sup> As Catharine MacKinnon has stated, “the less speech you have, the more the speech of those who have it keeps you unequal.”<sup>213</sup>

Speaking, therefore, has value as a form of self-expression, recognition, and participation.<sup>214</sup> When individuals do not have speech, they are ignored, which leads to their disempowerment. Furthermore, when certain viewpoints are not heard, we cannot be sure that the legal system is truly effective. For these reasons, encouraging the silence of domestic violence victims encourages their complicity in their subordination not only by their batterers, but also by the legal system. With respect to victimless prosecutions, three important issues need to be explored: whether domestic violence victims are ignored by the criminal legal system, whether more speech could lead to more effective domestic violence laws and policy, and whether silent domestic violence victims are complicit with their subordination.

### *1. Are domestic violence victims ignored?*

In her discussion on defendant silencing, Natapoff refers to classic themes of free speech.<sup>215</sup> One of these classic themes is that free speech is a prerequisite for participatory democracy and self-governance.<sup>216</sup> In order to be responsive to the will of the people, the government must allow for “free political discussion.”<sup>217</sup> Free speech allows individuals “to participate in and shape the public debate.”<sup>218</sup>

Another scholar, Kimberle Crenshaw, specifically discusses how women of color are left out of the public debate within the domestic violence context.<sup>219</sup> According to Crenshaw, the needs of women of color are ignored because their experiences are silenced within the discourse of domestic violence law and policy.<sup>220</sup> She notes that antiracist politics suppress discussion of domestic violence within

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212. *Id.* at 1490–91.

213. CATHARINE A. MACKINNON, ONLY WORDS 72 (1993).

214. Natapoff, *supra* note 210, at 1475.

215. *Id.* at 1487–91.

216. *Id.* at 1488.

217. *Id.* at 1488–89 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

218. *Id.* at 1489.

219. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

220. *Id.*

nonwhite communities.<sup>221</sup> For example, some African-Americans suppress discussion of domestic violence within their own community out of fears of perpetuating the stereotype that African-American men are violent.<sup>222</sup> Likewise, in an attempt to stress the fact that domestic violence occurs in white middle-class and upper-class communities, commentators focus on these women's experiences and silence the needs and experiences of women of color.<sup>223</sup> As a result, women of color are marginalized and disempowered.<sup>224</sup> In other words, when individuals are silenced, they are ignored.

While Crenshaw focuses on the silencing of women of color in the domestic violence context, it is possible that the practice of victimless prosecutions encourages the silence of all women who do not testify. It is easy to see how domestic violence victims may be ignored (whether intentionally or not) within victimless prosecutions. Once the prosecutor has the victim's statement, she is no longer needed to complete the prosecution, and the process can continue without her. Indeed, some prosecutors might prefer it that way because it can be difficult for prosecutors to get domestic violence victims to cooperate fully and easily in the prosecution of their batterers.<sup>225</sup> In addition, some prosecutors may believe that the prosecution will be more successful without the victim because juries may find a victim less credible if she does not fit their mental stereotypes of a domestic violence victim.<sup>226</sup> Thus, a nondiscriminatory use of victimless prosecutions in the domestic violence context is quite tempting to the prosecutor because it arguably makes prosecutions of batterers more attainable.

The problem with the wholesale use of victimless prosecutions, however, is that the victim is literally removed from the criminal justice process, and her needs and experiences become irrelevant to

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221. *Id.* at 1256.

222. *Id.*

223. *Id.* at 1258–62.

224. *Id.* at 1241–45.

225. *See infra* Part IV.A.3.

226. *See* Busching, *supra* note 45, at 396 n.17; Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733, 743–44 (2003) (noting how domestic violence victims are multi-faceted individuals who may not fit the stereotype of being helpless, passive, and fearful). Ironically, limiting the "type" of domestic violence victim that makes it to the stand perpetuates jurors' stereotypical images of domestic violence victims.

the goal of prosecuting the batterer. Whether prosecution is in the victim's best interest and what effect the prosecution might have on the victim are no longer the concern of the legal system.

It is true that prosecutors have always had the discretion to prosecute a case regardless of the wishes of the victim. Indeed, prosecutors represent the state's interests, not necessarily just those of the victim.<sup>227</sup> The consideration of the victims' wishes in domestic violence cases seems most urgent, however. A victim of domestic violence is in more danger than the typical assault victim because she is in an ongoing relationship with her assailant. Therefore, she is at greater risk of future violence by this assailant.<sup>228</sup> For this reason, it makes sense to consider the opinions of domestic violence victims in determining the best ways to keep them safe, even if this opinion is not always determinative.

In addition, from a self-governance perspective, a legitimate legal system should want to hear from these women.<sup>229</sup> Not only should these women have a voice in how domestic violence laws and policies benefit and protect them, but they should also have a voice in determining when prosecution is in their best interest. Otherwise, these women are disempowered from participating in a legal system that is supposed to help them, and they are subordinated by a legal system that ignores them.

## 2. *Does speech lead to effective policy?*

Another classic theme of free speech is that free speech leads to truth in the "marketplace of ideas."<sup>230</sup> In other words, free speech "plays an important role in permitting social truths to emerge . . . silencing voices within that 'marketplace' impedes rigorous inquiry into truth. By extension, when viewpoints are excluded from the public debate, it undermines confidence in the conclusions."<sup>231</sup>

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227. See the discussion of Cheryl Hanna's views on mandatory policies *supra* Part I.C.3 for a description of the state's interests in domestic violence cases.

228. See *supra* Part II.A.

229. Cf. Natapoff, *supra* note 210, at 1480–90 (arguing that a legitimate criminal system would include an opportunity for expressive participation from defendants).

230. In discussing the First Amendment, Justice Holmes said that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

231. Natapoff, *supra* note 210, at 1487.

The silence of domestic violence victims' voices within the criminal justice system, encouraged by victimless prosecutions, is problematic because we need these women's experiences to test and improve upon the effectiveness of our laws and policies. Elizabeth Schneider argues that feminist theory rests on the "notion that women's experience is the central starting point of theory."<sup>232</sup> "[T]heory flows from experience in the world, and then theory refines and modifies that experience."<sup>233</sup> Schneider emphasizes "the need for close attention to the interrelationship between theory and practice in our experience of the complexity of women's lives and in the articulation of women's experiences into legal claims."<sup>234</sup> She also stresses that feminist theoretical work must be both particular in documenting women's experiences and general in "linking violence against women to women's subordination in society and to more general social problems of abuse of power and control."<sup>235</sup> She warns that the theoretical framework must be expanded to avoid essentialist thinking because in reality "battered women are not similarly situated."<sup>236</sup>

In this same vein, Martha Mahoney discusses the interrelationship between women's lives, culture, and law:

This relationship is not linear (moving from women's lives to law, or from law to life) but interactive: cultural assumptions about domestic violence affect substantive law and methods of litigation in ways that in turn affect society's perceptions of women; both law and societal perceptions affect women's understanding of our own lives, relationships, and options; our lives are part of the culture that affects legal interpretation and within which further legal moves are made. Serious harm to women results from the ways in which law and culture distort our experience.<sup>237</sup>

In other words, to be effective, domestic laws and policies need to be in constant interaction and dialogue with the real life experiences of women. This dialogue will provide more information about what women need from these laws and policies in order to keep them safe. We also are better able to see which current policies

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232. Schneider, *supra* note 11, at 521.

233. *Id.*

234. *Id.*

235. *Id.* at 527.

236. *Id.* at 532.

237. Mahoney, *supra* note 14, at 2.

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*Deconstructing the Sound of Silence*

are working and which policies are actually perpetuating gender subordination and violence. Moreover, we may find that some policies might be good for some women, but not good for others. By changing these laws and policies to better reflect the experiences of all women, we can change how domestic violence victims and women are generally perceived. We can stop seeing domestic violence victims as a faceless stereotype and begin understanding the complexities of domestic violence that affect women from all races, cultures, and income levels. Victimless prosecutions limit the likelihood that this dialogue takes place because they remove victims from the process and they encourage silence.<sup>238</sup> This silence limits the effectiveness of domestic violence policy because it responds to a potentially limited view of the real experiences of women.

*3. Are silent domestic violence victims complicit with their subordination?*

Dorothy Roberts argues that silence can make one complicit with one's subordination.<sup>239</sup> As an example, she discusses how the legal system silences African-American welfare mothers as a "part of a ritual of humiliation by the bureaucrats who supervise them."<sup>240</sup> If a woman tries to defend her spending habits during a hearing, she risks being cut off from benefits.<sup>241</sup> This system punishes these women when they speak; thus, they must assume a submissive stance in order not to offend those who have power over them.<sup>242</sup> This silence is undoubtedly an act of survival. Yet because it also perpetuates the welfare mothers' submissiveness to government bureaucrats, this silence makes these women complicit with their subordination.

Similarly, women of color who refuse medical treatment are often ignored by judges and doctors because they do not use the

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238. Cf. Bezdek, *supra* note 210, at 533–42 (arguing that Baltimore rent courts fail the poor because they are institutionally silenced); Natapoff, *supra* note 210, at 1488 (arguing that criminal defendants' voices are significant in determining the efficiencies and inefficiencies of the criminal process as well as its claims of fairness).

239. Dorothy E. Roberts, *The Paradox of Silence: Some Questions About Silence as Resistance*, 33 U. MICH. J.L. REFORM 343, 355–56 (2000) (responding to Professor Margaret Montoya's *Silence and Silencing: Their Centripetal & Centrifugal Forces in Legal Communication, Pedagogy, and Resources*, 33 U. MICH. J.L. REFORM 263 (2000)).

240. Roberts, *supra* note 239, at 347–49.

241. *Id.* at 348.

242. *See id.*



dominant medical language.<sup>243</sup> Roberts cites Rayna Rapp's study that described African-American women who declined amniocentesis. They often explained their decisions in "terms of nonmedical systems of interpreting their pregnancies, including religion, visions, and folk healing."<sup>244</sup> Another study cited by Roberts examined cases where court orders for involuntary cesareans were sought.<sup>245</sup> Eighty-one percent of the cases studied involved women of color.<sup>246</sup> Like the women in Rapp's study, some of these women explained their reasons for not wanting the surgery in nonmedical terms.<sup>247</sup> Yet "[j]udges and doctors often dismiss these explanations not expressed in the dominant medical language as illegitimate."<sup>248</sup> Although these women actually did use their voices, the doctors effectively silenced them by subordinating the patients' wishes to those of the doctors.<sup>249</sup> Roberts explains, "They describe pregnant women of color who refuse medical treatment as angry, irrational, fearful, stubborn, selfish, and uncooperative. The medical model of childbirth interprets these women's words in a way that justifies the doctors' control."<sup>250</sup>

Finally, Roberts argues that the silence of students of color in the classroom may be a form of accommodation of the dominant discourse.<sup>251</sup> She concludes,

[S]ilence is often the very objective of subordinating forces. Remaining silent in the face of injustice may even turn people into accomplices in injustice. Black women's experience in welfare and doctors' offices shows that silencing is a powerful tool to reinforce subordination, while language can be a powerful tool to resist the dominant mindset.<sup>252</sup>

While the originators of mandatory policies and victimless prosecutions did not intend to oppress women, such policies and procedures may be subordinating women by encouraging silence. As

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243. *Id.* at 351.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 351-52.

250. *Id.*

251. *Id.* at 355.

252. *Id.* at 356-57.

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*Deconstructing the Sound of Silence*

has already been discussed, participants in the women's movement originally intended mandatory policies to respond to women, and specifically to the issue of domestic violence, which the law had historically ignored. Yet the frustrations that some legal actors express about domestic violence victims being "noncooperative" or "irrational" when it comes to the prosecution of their batterers sound eerily similar to the criticisms that Roberts cites from physicians about the medical wishes of some women of color. This striking similarity raises the concern that the silence of women via victimless prosecutions will subordinate their needs and experiences to the will of the legal system. As a result, the goal of increasing the number of arrests and prosecutions of batterers may overpower the goals of safety, gender equality, and autonomy.

Since victimless prosecutions encourage the silence of domestic violence victims, we should ask whether this practice encourages women to be complicit with their subordination by both their batterers and the legal system. By not testifying and speaking out against violence, victims arguably are complicit with their batterers' abuse. In addition, by not engaging in an active dialogue with the legal system about what they need from domestic violence laws and policies, victims arguably are complicit with a legal and political system that historically has ignored women in pursuit of its own agenda.

With respect to domestic violence victims of color, Kimberle Crenshaw has stated:

Within communities of color, efforts to stem the politicization of domestic violence are often grounded in attempts to maintain the integrity of the community. The articulation of this perspective takes different forms. Some critics allege that feminism has no place within communities of color, that the issues are internally divisive, and that they represent the migration of white women's concerns into a context in which they are not only irrelevant but also harmful. At its most extreme, this rhetoric denies that gender violence is a problem in the community and characterizes any effort to politicize gender subordination as itself a community problem.<sup>253</sup>

In other words, out of respect for their racial communities, women of color are expected to keep silent in the face of domestic

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253. Crenshaw, *supra* note 219, at 1253.

violence. They “must weigh their interests in avoiding issues that might reinforce distorted public perceptions against the need to acknowledge and address intracommunity problems.”<sup>254</sup> Many African-American women may feel pressure to conceal the violence they experience because they want to limit racial stereotyping against African-American men.<sup>255</sup> Similarly, some Asian women hide the violence they experience at home because “saving the honor of the family from shame is a priority.”<sup>256</sup> Crenshaw points out, however, that “this priority tends to be interpreted as obliging women not to scream rather than obliging men not to hit.”<sup>257</sup>

Women of color also may be hesitant to call the police because they do not want to “subject their private lives to the scrutiny and control of a police force that is frequently hostile” to people of color.<sup>258</sup> Crenshaw argues that for members of racially subordinated groups, the home may “function as a safe haven from the indignities of life in a racist society . . . but for this ‘safe haven,’ in many cases, women of color victimized by violence might otherwise seek help.”<sup>259</sup>

Instead, while women of color stay silent in order to maintain the integrity of their respective racial groups, the violence continues. By not speaking out against this violence and by not effectively using legal remedies to end this violence, these women are being complicit in the violence against them. Crenshaw aptly argues that the silencing of domestic violence in communities of color must end if we are going to adequately address this issue.<sup>260</sup> This Article contends that complicity through silence occurs among all races of women who are victims of domestic violence.

In order to end the complicity of women in domestic violence, criminal laws and policies need to discourage their silence. By participating in the prosecution of her batterer, the victim literally and symbolically stands up against her batterer, which may enable her to gain the confidence she needs to build a life without abuse. As Alafair S. Burke has argued, “participating in the prosecution of a

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254. *Id.* at 1256.

255. *Id.*

256. *Id.* at 1257.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 1299.

batterer can be a kind of ‘coming out,’ providing confirmation of [the victim’s] experiences.”<sup>261</sup> In addition, participating in the prosecution informs the batterer that he can no longer control the victim. Abusers control their victims mentally, not just physically.<sup>262</sup> As long as the abuser mentally controls the victim, the abuse will continue.<sup>263</sup> Speaking out against the abuse and participating in the prosecution of one’s batterer may be an important step in gaining control of one’s life.

Finally, limiting the use of victimless prosecutions forces more interaction between the victim and the criminal justice system; this interaction limits the system’s ability to subordinate the victim’s needs to its own agenda.

#### IV. A MORE INCLUSIVE APPROACH

As stated previously, this Article does not contend that prosecution is the right course of action for all domestic violence victims. It also does not contend that we should automatically accept a substantial reduction in domestic violence prosecutions because of *Crawford* and *Davis*.<sup>264</sup> Instead, if participation in the prosecution process can be empowering for victims, perhaps we should look for ways to encourage more participation when possible.

##### *A. Why Don’t Women Testify?*

Evidence suggests that many domestic violence victims are silent because the legal system is inadequate in dealing with their cases. While fear of retaliation may be one of the reasons that victims do

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261. Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 576 (2007). Burke argues that the criminal law itself limits the willingness of victims to testify because it focuses on individual instances of physical violence within an abusive relationship and because it ignores prior violence in evaluating whether a crime has been committed, and thus victims are hindered in their ability to tell the complete story of their abuse. *Id.* at 575. For further discussion of this argument, see *infra* Part IV.A.3.

262. Mills, *supra* note 18, at 586–94; see also <http://www.domesticviolence.org/violence-wheel> (last visited Jan.20, 2009) (explaining how physical abuse is just one aspect of domestic violence and how batterers mainly control their victims through mental, emotional, and financial abuse).

263. Mills, *supra* note 18, at 586–94.

264. Tom Lininger has cited a survey that found a substantial drop in domestic violence cases since *Crawford*. See Lininger, *supra* note 12, at 750 (citing a survey done by the University of Oregon between 2004 and 2005 evaluating sixty-four counties in California, Oregon, and Washington).

not testify against their batterers,<sup>265</sup> other key reasons that they do not testify are a lack of material resources, a lack of protection from the criminal justice system when they do testify, and a lack of quality interactions with the criminal justice system.<sup>266</sup> This section discusses these reasons in detail and uses Chicago's TAC program as a model for encouraging victim participation. While some may doubt whether victim participation in domestic violence prosecutions is realistic, Chicago's TAC program suggests that under the right circumstances, victims will be willing to testify against their batterers.

*1. Battered women lack material resources*

Donna Coker argues that women are more vulnerable to violence, more accessible to batterers, and do not separate from their batterers because of inadequate material resources.<sup>267</sup> This lack of resources also explains why women do not want to testify in court or often recant and testify on behalf of their batterers in court. "Women's decisions whether or not to support criminal intervention are often related to whether or not they can afford to prioritize prosecution over other more immediate concerns such as food, employment, and childcare."<sup>268</sup> When a woman walks away from a violent relationship, she faces a fifty percent chance that her standard of living will drop below the poverty line.<sup>269</sup> Moreover, nearly half of all homeless women and children have fled violence in the home.<sup>270</sup>

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265. As has already been discussed, out-of-court statements from women who are in real danger of retaliation are probably still admissible under the forfeiture doctrine. *See supra* Part II.A.

266. Of course, there may be other reasons that women might not want to testify against their batterers, including an emotional attachment to the batterer and a desire to make the marriage work. *See Coker, supra* note 63, at 1015. A lack of material resources, safety, and positive interactions with the criminal justice system, however, seem to be the chief reasons. *See Elaine Chiu, Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1253 (2001) (arguing that the main reasons that women stay in violent relationships derive from the political, social, and financial inequalities between the sexes rather than from a purely emotional desire to work through an abusive relationship).

267. Donna Coker, *Addressing Domestic Violence Through a Strategy of Economic Rights*, 24 WOMEN'S RTS. L. REP. 187, 188 (2003); *see also Sack, supra* note 39, at 1734 (arguing that the number one reason women stay with batterers is economic dependence and that "[t]he most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the economic resources to survive without him").

268. Coker, *supra* note 39, at 823; *see also Mahoney, supra* note 14, at 62 (noting a lack of resources for women who separate from their batterers).

269. Lininger, *supra* note 12, at 769.

270. Epstein, *Effective Intervention, supra* note 186, at 8.

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*Deconstructing the Sound of Silence*

Remember that Amy Hammon asked the court not to incarcerate her husband so that he could continue to provide for their family. For many women, the reality is that incarceration of their spouses means destitution and homelessness for their families.<sup>271</sup>

*2. Battered women are not adequately protected*

While the criminal justice system's response to battered women has vastly improved over the years, women still are not necessarily safe after they seek its assistance. One of the most common misconceptions about domestic violence, and one of the important premises of victimless prosecutions, is that separation from an abuser equates to safety.<sup>272</sup> An attempt to separate from one's batterer, however, can be very dangerous.<sup>273</sup> Linda Mills argues that women are safest when they willingly partner with state actors to investigate and prosecute domestic violence cases.<sup>274</sup> Unfortunately, however, the criminal justice system sometimes fails to protect these women even when they are willing participants.

This failure is evident in the story of Evette Cade. After several years of abuse from her husband, Cade finally separated from him.<sup>275</sup> Although she filed a protection order, her estranged husband still continued to harass and to intimidate Cade, her daughter, and her family, and he vandalized her family members' property.<sup>276</sup> Then, one day Cade's husband filed a motion to have the protective order removed, claiming that he wanted to save his marriage through counseling.<sup>277</sup>

On the day of the hearing on Cade's husband's motion, Cade showed up, but her husband did not.<sup>278</sup> Nevertheless, the judge decided to continue with the hearing.<sup>279</sup> Cade attempted to explain how her husband had been violating the protective order and how

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271. *Id.*; see also Coker, *supra* note 267, at 188 ("Abusive men cause women to lose jobs, educational opportunities, careers, homes, savings, their health, [and] their ability to enter the workplace.").

272. Coker, *supra* note 267, at 190.

273. Mahoney, *supra* note 14, at 80.

274. Mills, *supra* note 18, at 551.

275. *The Oprah Winfrey Show: A Mother Burned Alive By Her Husband* (ABC television broadcast May 3, 2006).

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

she felt in danger.<sup>280</sup> She also tried to show the judge pictures that evidenced his vandalism.<sup>281</sup> The judge would not listen to her, however, and when Cade expressed that she wanted to get an immediate divorce, he replied, sarcastically, “Well, I’d like to be 6-foot-5, but that’s not what we do here. You have to go to the divorce court for that.”<sup>282</sup> Cade continued to try to explain how her husband was violating the protective order.<sup>283</sup> The judge cut her off, removed the protective order, and perfunctorily stated, “This case is dismissed at the request of the petitioner.”<sup>284</sup> Three weeks later, Cade’s estranged husband arrived at Cade’s workplace, doused her with gasoline, and set her on fire.<sup>285</sup> Cade suffered severe burns all over her body and endured eighteen operations.<sup>286</sup> Cade will be recovering from her physical and emotional injuries for life. When later asked about his decision to remove the protective order, the judge remarked that it was a “clerical error.”<sup>287</sup>

Stories like Cade’s underscore the importance of protecting women who are trying to use the system to end the violence in their lives. When a batterer violates his protective order, he needs to be immediately punished. If a batterer is let out on bail, his victim needs to be contacted immediately so that she can prepare and make a safety plan.<sup>288</sup> In the courthouse, measures need to be in place so that women do not have to sit in unsecured rooms with their batterers for hours.<sup>289</sup> If the criminal justice system provides more protection for these women, they will be more willing and better able to participate in the prosecution process.

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280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. Ninety percent of jurisdictions surveyed by Tom Lininger reported that the majority of defendants accused of domestic violence are released from jail pending trial. Lininger, *supra* note 12, at 814.

289. Many jurisdictions have reported that victims are at risk of abuse in the courthouse because there are no separate waiting areas for victims and defendants and there are no security services. See Epstein, *Effective Intervention*, *supra* note 186, at 34.

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*Deconstructing the Sound of Silence**3. The criminal justice system's negative response toward battered women*

In addition to a lack of material resources and physical safety, the quality of victims' interactions with actors in the criminal justice system affects their willingness to participate in the prosecution of their batterers.<sup>290</sup> One survey found that women "were more afraid of the courts and the law than they were of harming their relationship with" their partner or retaliation from their partner.<sup>291</sup> Women were most concerned that prosecutors would not prepare them for trial and that the defendant would not be found guilty.<sup>292</sup>

Prosecutors need to make sure that they communicate with victims and that they inform victims of what to expect during the prosecution process. Prosecutors also need to reassure them about the process. Deborah Epstein cites an example of a woman in Washington D.C. who failed to appear as a witness in the criminal prosecution of her batterer.<sup>293</sup> When asked why, she explained that during her civil protective order hearing, she had pled with the judge to jail her perpetrator.<sup>294</sup> He told her that he did not have the power to do so.<sup>295</sup> For that reason, she thought it was futile to attend the criminal cases; no one had explained to her the difference between the two proceedings.<sup>296</sup> Eve and Carl Buzawa have also documented how ill informed domestic violence victims are about the prosecution process, which can lead to high rates of victim attrition.<sup>297</sup>

In addition to a lack of communication and information, some actors in the criminal justice system sometimes exhibit a negative response to battered women. As previously discussed in Part III, women of color are often hesitant to contact the police because

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290. Coker, *supra* note 39, at 840; *see also* Mills, *supra* note 18, at 595 (citing studies that suggest that when a battered woman has a negative interaction with the state, she is less likely to rely on government assistance in the future).

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

292. *Id.* at 13.

293. Epstein, *Effective Intervention*, *supra* note 186, at 26–27.

294. *Id.*

295. *Id.*

296. *Id.*

297. EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 189 (3d ed. 2003).



historically their communities have had negative interactions with law enforcement. More generally, prosecutors often do not understand why victims refuse to leave abusive partners or to help with the prosecution of their batterers.<sup>298</sup> This misunderstanding can make some prosecutors indifferent and cynical.<sup>299</sup> Prosecutors also may erect barriers that “test” the commitment of victims to prosecute.<sup>300</sup> This attitude can lead more victims to drop charges or not to appear in court.<sup>301</sup> The victims’ actions then continue to reinforce the beliefs of prosecutors, police, and other staff that becoming involved in domestic violence cases is futile.<sup>302</sup> Thus, there is a vicious cycle between the lack of cooperation of victims and the negative attitudes among legal actors that result from this lack of cooperation.

Another study found that court clerks, who were supposed to help women file protective orders, provided little assistance to women with special needs such as literacy barriers and language translation.<sup>303</sup> In addition, some clerks actively discouraged women from filing protective orders.<sup>304</sup>

Finally, Deborah Tuerkheimer and Alafair S. Burke have argued that the criminal law itself also may limit the willingness of victims to participate in the prosecution of their batterers.<sup>305</sup> The law focuses on individual instances of physical violence within an abusive relationship, and it ignores prior violence in evaluating whether a crime has been committed.<sup>306</sup> Yet, prior abuse is quite relevant in understanding the batterer’s “continuing effort to control his victim.”<sup>307</sup> The law restricts the victim’s ability to explain this dynamic as part of her personal narrative. Alafair explains,

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298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

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

304. *Id.*

305. Burke, *supra* note 261, at 575 (citing Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 991–98 (2004)).

306. *Id.*

307. *Id.*

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*Deconstructing the Sound of Silence*

Cognizant of the statutory elements of the offense that must be proven, police and prosecutors hone in on only the severity of the physical contact involved in the discrete incident. They do not ask her about the ways in which he tried to limit her agency, restrict her options, and make her feel small. If she offers these anecdotes anyway, no one will make note of them because the current law renders them unimportant. If she tells her story the way she perceives it, and continues to talk about legally irrelevant aspects of her relationship, she might be reprimanded as a bad witness.<sup>308</sup>

Tuerkheimer and Alafair argue that this incongruity between the law and the actual experiences of domestic violence victims limits the victims' satisfaction with the criminal justice system and their willingness to participate in the prosecution of their batterers.<sup>309</sup>

For all of these reasons, it is important that actors in the criminal justice system become better educated about domestic violence and about the reasons why victims may be hesitant to cooperate in the prosecution of their batterers. An increased understanding about the dynamics of domestic violence may lead legal actors to become more sensitive to these women when they seek assistance. These actors then will be better able to provide adequate information about the criminal and civil process. Furthermore, communities specifically need to address and remedy the causes of poor relations between legal actors and people of color. Cooperation on the part of these actors is essential if women are going to take an active role in prosecutions. Finally, laws that reflect the ongoing nature of the abusive relationship may allow victims to accurately tell their narratives, which may increase their satisfaction with the criminal justice system and their willingness to participate in the prosecution of their batterers.

*B. Chicago's TAC Model*

Cook County, Illinois, has successfully implemented a prosecution-based collaborative approach in which service providers, community advocacy groups, civil attorneys, and prosecutors work together in one unit.<sup>310</sup> The County's program, known as TAC

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308. *Id.* at 577.

309. *Id.* at 575–78. As a result, both Tuerkheimer and Alafair argue that criminal law needs to move away from a “transaction-based” approach. *Id.* at 555–56.

310. Richard Devine, *Targeting High Risk Domestic Violence Cases: The Cook County, Chicago Experience*, 34 PROSECUTOR, Mar.–Apr. 2000, at 30; *see also* Cook County State's

(“Target Abuser Call”), encourages victim participation by directly addressing the reasons that women do not testify. TAC provides victims with a variety of services to address their immediate problems and helps them to prepare for the future.<sup>311</sup>

Cook County’s State Attorney Richard Devine has found that when services are not immediately accessible to the victim, she often does not follow through on seeking out these services and stays trapped in a violent situation.<sup>312</sup> For that reason, TAC provides on-site services to address economic and other concerns.<sup>313</sup> When adequately funded, as many as eighty percent of TAC victims have appeared and participated in the prosecution process, and TAC has had an eighty to ninety percent conviction rate.<sup>314</sup>

TAC focuses on high-risk misdemeanor cases.<sup>315</sup> It looks for repeat offenders at the misdemeanor level in order to stem violence before it escalates.<sup>316</sup> A focus group of lethality experts came up with a list of high risk factors for escalating violence: strangulation, resisting arrest, violation of orders of protection, status of the relationship (for example, has the victim indicated to the offender that the relationship is terminated?), public incidents of violence, and stressors, such as the offender’s job status and his response to the relationship’s termination.<sup>317</sup> The most important factor is whether the victim has indicated to the offender that she wants to end the relationship.<sup>318</sup>

The TAC unit has prosecutors with felony experience.<sup>319</sup> Seasoned prosecutors “send a message to the judiciary that [domestic violence] cases should be taken seriously.”<sup>320</sup> The unit also

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Attorney’s Office, <http://www.statesattorney.org/dvtac.htm> (last visited Jan. 20, 2009). While this Article focuses on TAC, it should be noted that there are other cities that have also implemented programs that use a coordinated community response type of model. *See, e.g.*, Family Justice Center, <http://www.familyjusticecenter.org> (last visited Jan. 20, 2009).

311. Devine, *supra* note 310.

312. *Id.* at 31.

313. *Id.*

314. *Id.* at 31; *see also* Liam Ford, *A Domestic Violence Program that Works*, CHI. TRIB., Oct. 10, 2008, <http://www.chicagotribune.com/news/local/chi-domestic-target-abuser-sideoct10,0,6455136.story>.

315. Devine, *supra* note 310.

316. *Id.* at 31.

317. *Id.* at 31–32.

318. *Id.* at 32.

319. *Id.*

320. *Id.*

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*Deconstructing the Sound of Silence*

has a victim specialist who makes sure that victims understand court proceedings, completes order of protection paperwork for the victim, and makes telephone calls reminding the victim of court dates and assisting in securing evidence.<sup>321</sup>

A few days after the violent incident, an investigator from TAC will begin building a relationship with the victim. The investigator serves a subpoena during this visit, but she also takes the time to explain the prosecution process to the victim, reassures her that she will receive assistance throughout this process, gives the victim the names of everyone on the TAC team, answers questions, and conducts a follow-up investigation.<sup>322</sup>

To ensure that the victim is safe and that her non-court needs are met, the independent advocate provides access to shelter and counseling and helps the victim create a safety plan.<sup>323</sup> Her files are confidential and cannot be released to anyone without the victim's written consent.<sup>324</sup> In addition, the independent advocate assists with obtaining resources after the victim's case is over.<sup>325</sup>

The civil law attorney helps the victim with family law, child support, custody, and visitation issues and with orders of protection.<sup>326</sup> The victim's civil cases continue regardless of the disposition of her criminal case.<sup>327</sup> TAC also monitors offenders for sentence and probation violations.<sup>328</sup> Once a violation is detected, the defendant's case is immediately set for hearing within a few days, and the victim is notified immediately of the violation.<sup>329</sup> In addition, the investigator assists in securing the victim's safety.<sup>330</sup>

Thus, TAC includes the victim in the prosecution process by directly addressing the economic and safety needs that often make her reluctant to seek the prosecution of her batterer. It also provides a supportive, cooperative environment that takes away any sense of alienation she might feel in the typical prosecution scenario.

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321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.* at 34.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

*C. Challenges to the Systematic Implementation of the TAC Model*

While the TAC program is encouraging because it demonstrates that there are contexts where domestic violence victims will testify against their batterers, it will take some time before testifying domestic violence victims will become the rule rather than the exception. First, domestic violence victims and legal actors are going to have to be convinced that victims can and will testify before it can be expected that they will not view such programs as futile. Second, most jurisdictions have limited resources that curb their ability to create a program similar to TAC.<sup>331</sup> For these reasons, just as TAC has done, jurisdictions may have to limit the TAC model to a small subset of “high risk” batterers to overcome the “sticky norm” and limited resources problems.

The problem of “sticky norms” exists when the “prevalence of a social norm makes decisionmakers reluctant to carry out a law intended to change that norm.”<sup>332</sup> In other words, if a law condemns a norm that is socially acceptable, the police are going to be reluctant to arrest individuals who break that law, and prosecutors are going to be reluctant to charge the individuals with crimes.<sup>333</sup> As a result, the law is not enforced, and the social norm does not change.<sup>334</sup> In addition, making the law harsher only exacerbates the reluctance of legal actors.<sup>335</sup>

In order to change social norms through the law, Dan Kahan advocates for “gentle nudges.”<sup>336</sup> He argues that if the law condemns behavior only slightly, the typical decisionmaker will want to discharge her civic duty, will override her reluctance to condemn the law, and will ultimately enforce the law.<sup>337</sup> Following her

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331. In 2003, it was reported that TAC only took about 1920 cases per year. JANE M. SADUSKY, BATTERED WOMEN’S JUST. PROJECT CRIM. JUST. CENTER, COMMUNITY POLICING & DOMESTIC VIOLENCE: FIVE PROMISING PRACTICES 31 (2003), <http://data.ipharos.com/bwjp/documents/COPS%20DV%20Monograph%20Rev%20Aug04.pdf>. This number was far below the almost 70,000 cases of domestic violence cases reported in Chicago that year. *Id.* It should be noted that funding from government grants for TAC has been reduced since the program’s inception. Ford, *supra* note 314.

332. Dan M. Kahan, *Gentle Nudges v. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000).

333. *Id.* at 607–08.

334. *Id.* at 608.

335. *Id.*

336. *Id.* at 608. See also RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, & HAPPINESS (Caravan 2008).

337. *Id.*

example, other decisionmakers will also enforce the law.<sup>338</sup> Once this enforcement becomes common practice, lawmakers can then increase the degree of condemnation by a little more.<sup>339</sup>

Within the domestic violence context, Kahan notes that domestic violence laws condemn the social norm of occasional violence.<sup>340</sup> He suggests shaming and civil and contempt remedies as initial gentle nudges to encourage decisionmakers to enforce domestic violence laws.<sup>341</sup> He also discusses the use of specialized departments that will enforce domestic violence laws; these departments can be comprised of decisionmakers who specifically believe in enforcing these laws.<sup>342</sup>

The social norm of occasional violence may be waning due to the mandatory policies that have been in place over the last several years. Victimless prosecutions, however, have become common practice, and there may be the sticky norm or belief that domestic violence victims cannot and will not testify. Domestic violence victims believe this norm and so do legal actors. Legal actors, therefore, will be resistant to a program that they may view as futile and as a waste of limited time and resources. For this reason, I realize that many legal actors are going to try to fit as many out-of-court statements as possible under *Davis*' definition of a testimonial statement.

Related to the "sticky norm" problem is the fact that jurisdictions have limited resources. Although VAWA 2005 reauthorized more funding for grants that may be able to support programs similar to TAC,<sup>343</sup> the Act did not actually fund these grants; it is up to Congress to appropriate funding in its budget each year for similar state-run programs. Furthermore, it is doubtful that the amount authorized under VAWA 2005 will be enough. In addition, state and local funding will be limited in most jurisdictions. For these reasons, it cannot be overemphasized how limited resources are likely to still be an obstacle to creating inclusive programs like TAC within the foreseeable future. In addition, it may be the case that not all cases can or should be handled by the criminal justice system because of limited resources and because it may not in the best interest of every victim to pursue a resolution

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338. *Id.*

339. *Id.*

340. *Id.* at 628–29.

341. *Id.* at 630.

342. *Id.* at 629–30.

343. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, 119 Stat. 2960.

through prosecution. Jurisdictions might have to determine which cases are most appropriately handled through prosecution and allocate their resources accordingly.

For these reasons, the gentle nudge that this Article proposes in response to these sticky norm and limited resource problems is, just as TAC has done, limiting the use of this model to a small subset of victims of “high risk” batterers. In cases where victims are in greater danger, perhaps legal actors will have an incentive to keep in more constant contact with them, to provide them with more protection, and to press forward with prosecution to make sure that the batterer gets off of the street. Limiting the caseload to “high risk” offenders may also make more individualized attention to the victims less taxing on the prosecutor’s time and resources. Finally, jurisdictions that are able to create a specialized department like TAC may be able to hand pick individuals who are committed to creating more of a partnership between domestic violence victims and the criminal justice system. If this limited model is successful in encouraging more victim participation, legal actors may themselves advocate for more resources to expand the model to more victims. Yet, even if jurisdictions do not expand this model to more victims, increasing the participation of at least some domestic violence victims is a significant step away from victim silence.

#### CONCLUSION

Participants in the women’s movement originally were concerned about domestic violence because its proponents wanted women to be physically, mentally, and emotionally safe and because they believed that domestic violence was a symptom of the legal and political subordination women suffered both inside and outside of the home. Frustrated that the criminal justice system was largely ignoring this problem, they lobbied for an institutional response. As a result of these efforts, states have made significant changes in domestic violence criminal laws and policies.

Under mandatory arrest and prosecution policies, however, there is a danger that the criminal justice system will focus on increasing the number of arrests and prosecutions of domestic violence perpetrators and not on the goals of safety, gender equality, and autonomy. While victimless prosecutions empower prosecutors to increase the number of perpetrators prosecuted, it is questionable as to whether a nondiscriminatory use of this practice is effective in

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*Deconstructing the Sound of Silence*

meeting the original goals of the women's movement. It is not clear that all women are safer when they do not testify or participate in the prosecution of their batterers. Given this fact, victimless prosecutions may be problematic because they encourage the silence of women, and speech is an important tool of political and legal empowerment.

Given the potential harm of some victimless prosecutions and the effects of *Crawford* and *Davis* on this practice, it seems wise to consider the benefits of increased victim participation. While there may be circumstances where victimless prosecutions are necessary in the domestic violence context, there are many circumstances where victims can and should participate in the prosecution process. Chicago's TAC program is one model that suggests that victim participation is possible.

Because of limited resources and the skepticism that many victims and legal actors may have that victims can and will testify, many jurisdictions may have to take small steps in implementing this type of model. One such step could be focusing on the victims of high-risk offenders. In jurisdictions that do implement this model, there will, of course, still be those women who will not want to participate in the prosecution of their batterers. Indeed, there may be victims who will never contact the criminal justice system at all because they are afraid of testifying. There will also be women whose best interest is not served by testifying or by following through with the prosecution. For these reasons, my proposal for a more inclusive approach is not a panacea for domestic violence, and other solutions both inside and outside of the criminal justice system are also necessary in stemming this problem. Nevertheless, with respect to the criminal justice system, I encourage scholars to consider whether increased victim participation is a better long-term solution to domestic violence than silence.



