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### Against Domestic Violence: Public and Private Prosecution of Batters

Carolyn B. Ramsey

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# Against Domestic Violence: Public and Private Prosecution of Batterers

Carolyn B. Ramsey\*

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## INTRODUCTION

In *Against Prosecutors*, Professor Bennett Capers discusses domestic violence, among other crimes, to propose reforming our current system of public prosecution in favor of a model in which the victim could decide whether to pursue a criminal case and what punishment (if any) her assailant would receive.<sup>1</sup> He invokes the spirit of private prosecution, including the imposition of peace bonds on wife-beaters in the eighteenth and nineteenth centuries,<sup>2</sup> not to “idealize or romanticize the past,” but “to show that the public prosecutor, a

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\* Professor of Law, University of Colorado Law School. Thanks to Ben Levin to helping conceive and organize this Symposium, my fellow contributors for sharing their ideas, and Bennett Capers for writing an interesting and thought-provoking article that challenged the rest of us to write in response.

1. I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1587 (2020). Capers also discusses giving greater sentencing discretion to juries. *See id.* at 1607

2. *Id.* at 1573-76. *See id.* 1592 & n.173 (mentioning “peace warrants,” which required the accused to post bond to refrain from certain misconduct, such as wife abuse, in the future).

‘historical latecomer,’ is not inevitable.”<sup>3</sup> In Capers’ view, restoring power to victims might reduce or eliminate the prosecution of victimless offenses and the punitive emphasis on incarceration, while facilitating justice for crimes like rape that District Attorney’s offices too often fail to pursue.<sup>4</sup>

My Essay focuses on domestic violence and concurs with Capers that modern approaches to prosecuting the perpetrators of intimate-partner assault and homicide are unsound. State actors tend to ignore the reasons victims do not cooperate with the criminal legal system, as well as to impose one-size-fits-all sentences that are ill-suited to some victim-offender relationships and detrimental to marginalized communities. Capers also notes insightfully that victims may find validation *without* retributive punishment of the offender, or they may prefer *less* punishment than the state would impose. The assumption that the state knows best actually leads to the erasure of the victim.<sup>5</sup> Despite Capers’ sensitivity to racial issues, however, he pays insufficient attention to the social context and relationship dynamics constraining the decisions of intimate-partner abuse survivors, which leads him to place too much faith in private prosecution as a remedy.

Capers’ appeal to the past also oversimplifies it in a risky way. First, the old model of private prosecution was imperfect and could never be grafted onto the modern criminal legal system, for it had its origins in a time before the rise of defense counsel, complex evidence rules, the accused’s right to silence, and professional police.<sup>6</sup> To his credit, Capers acknowledges this limitation, but it makes his project more of a thought experiment than a concrete proposal. Second, with specific regard to domestic violence, private prosecution did not differ as radically as one might expect from the public model that replaced it in the second half of the nineteenth century and the early decades of the twentieth. Lack of scholarly attention to the history of domestic violence sustains the misperception that the state swung from tolerance to mandatory intervention without any intermediate stance. In fact, both the Victorians and the Progressives tried to punish and prevent wife-beating during a period that I call “the long nineteenth century.” These efforts continued into the 1930s and 1940s, and their ineffectiveness is instructive.

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3. *Id.* at 1573 n.72. *See id.* at 1573 (“The goal is not to pay obeisance or offer blind fealty to our forebears by suggesting we adopt whole cloth their system of private prosecution.”).

4. *See id.* at 1588-1604.

5. *See id.* at 1583-84, 1587, 1591-92, 1596-99, 1603 n.227, 1608 & n.262.

6. *See* JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 2-4, 10-66, 253 (2003) [*hereinafter* LANGBEIN, *ORIGINS*] (describing English criminal procedure from the sixteenth century to the early eighteenth century); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086 (1994). Moglen states that “a small cadre of lawyers” managed a large number of prosecutions in colonial America, but he refers primarily to major public order offenses, such as riots. Moglen at 1110. Victims prosecuted run-of-the-mill cases like assault and battery in British North America. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912 (2006).

Women's use of the criminal law to interrupt violence without the goal of imprisoning their abusers shaped both private prosecution in the early days of the republic and state intervention during the long nineteenth century. Even after public prosecutors began to argue that the People, not the victim, charged the abusive husband with assault,<sup>7</sup> beaten wives routinely got their assailants detained and reprimanded; then, they often sought to have their cases dismissed. Yet the reasons survivors wanted to avoid the severe punishment of the men who assaulted them reveal a central fact that the mechanics of prosecution obscure: the social context of domestic violence constrains victims' choices.

Because domestic violence is a social problem, it needs a multifaceted solution in which the identity of the prosecutor plays a relatively small role. While creative approaches, including restorative justice and revamped batterer intervention programs, have the potential to foster healing and acceptance of responsibility without contributing to mass incarceration, there is danger in encouraging victims to navigate their own cases. At best, private prosecution would promote survivor autonomy. But, at worst, it might leave vulnerable individuals to their own devices in a complex legal system. Anticipating this objection, Capers responds that "prosecutor-advocates" provided by the state or funded by NGOs could help victims with their cases.<sup>8</sup>

His proposed reform might nevertheless return domestic violence policy to the bad old days when the government reluctantly accepted the woman's decision "to let the matter go" without doing anything further to protect her or foster her independence.<sup>9</sup> Putting the burden to prosecute on domestic violence victims, or even allowing them to veto public prosecutorial decisions, individualizes the harm they experience in a way that allows society and the state to avoid responsibility for devising structural remedies.<sup>10</sup> In my view, socioeconomic programs offering job training, housing, child care, and other services that help those subject to intimate-partner abuse get on their feet,

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7. For example, the public prosecutor of a domestic assault case in Los Angeles, California, during the 1880s stated that the victim "is not here, prosecuting, but simply as a witness for the People, and she was compelled to attend, by process of law." Reporter Transcript, Preliminary Examination, *People v. Toal*, No. 4211, at 84-5, L.A. City Justice's Court, June 1, 9, and 23-25, 1885, Los Angeles Area Court Records, 1850-1910, Huntington Library. The *Toal* case will be discussed in detail in my book, *HOUSES OF PAIN: DOMESTIC VIOLENCE AND LEGAL INTERVENTION IN THE UNITED STATES, 1870-1994* (Cambridge Univ. Press, forthcoming).

8. Capers, *supra* note 1, at 1588-89.

9. *Id.* at 1589. For discussion of dismissals due to the victim's refusal to prosecute in the nineteenth and twentieth centuries, see *infra* notes 12-18, 49, and accompanying text. See also Laurie S. Kohn, *What's So Funny about Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 549 (2010) ("The creation of a separate, less-formal system for domestic violence cases seems eerily similar to the diversion of cases from the criminal justice system that preceded the current system.").

10. See Ben Levin, *Victims' Rights Revisited*, 13 CALIF. L. REV. ONLINE 30, 37-38 (2022). See also Jenia I. Turner, *Victims as a Check on Prosecutors: A Comparative Assessment*, 13 CALIF. L. REV. ONLINE 72, 75 (2022) (stating that European countries that give crime victims' veto power over prosecution confine it "to offenses that are believed to offend particularly private interests").

whether they separate or remain in the intimate relationship, have more to offer than returning to a model of private prosecution that was deeply flawed in its own time. One might respond that socioeconomic programs and private prosecution need not be mutually exclusive. However, this Essay contends that a variety of concerns—including batterers' recidivism and ability to turn private prosecution into a malicious tool of coercion and control over resource-poor victims—make the continued involvement of the public criminal legal system advisable.

Even if private prosecution were established for some offenses without a complete dismantling of the public approach, devils lurk in the details of how this hybrid would work in the context of domestic violence. Capers suggests, for example, that there are some types of domestic violence cases for which the state should remain the primary decision-maker,<sup>11</sup> yet drawing the line between those best served by private versus public prosecution is no easy task. Intimate-partner homicide victims clearly cannot prosecute their own murders. Aside from that obvious distinction, though, who would determine which offenses warrant public prosecution—and on what basis? Are some domestic violence crimes such grievous offenses against the public that they require the state to assume a stronger expressive and deterrent posture? Or would public prosecutors simply take cases from victims who want to delegate them?

Although I embrace the importance of listening to the experiences and preferences of intimate-partner abuse survivors, I believe that caution would be imperative—in both theory and practice—when designing a more victim-centric criminal legal system. This Essay ultimately concludes that offering restorative justice programs backed by criminal justice resources and consequences for non-completion or recidivism might achieve the right balance.

## I.

### A BRIEF, UNEXPECTED HISTORY OF DOMESTIC VIOLENCE PROSECUTION

Consider these four moments in the prosecution of domestic violence in American legal history:

- (A) George Ausby, a habitual wife-beater, spent a short time in jail in antebellum Philadelphia when his wife made an assault-and-battery complaint to a city alderman. Ausby had been ordered to pay \$300 to keep the peace against her, but he could not afford to post bond, so he was jailed instead. The carceral punishment in this case, which occurred in the informal world of “primary justice” before the rise of full-time public prosecutors, was somewhat unusual because “most women only wanted to scare their husbands not to put them in prison.” Hence, domestic violence prosecutions initiated by private citizens in Philadelphia commonly resulted in peace bonds paid

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11. Capers, *supra* note 1, at 1589, 1591.

by the abusive husband.<sup>12</sup>

- (B) In Los Angeles County, California, during the 1920s, Vernon La Clear fired multiple bullets at his estranged wife Alysse. She had left him because “he was brutal to [her] and constantly upbraided [her] for things” she had not done. Fortunately, the gunshot wounds he inflicted were superficial.<sup>13</sup> Reluctant to see Vernon incarcerated, Alysse went to jail three times to avoid giving evidence against him. Her refusal to cooperate with the public prosecutor led to multiple continuances of the preliminary hearing and efforts by the District Attorney’s office to depose her as a material witness before she could flee the jurisdiction.<sup>14</sup> Alysse apparently preferred to divorce Vernon (with cruelty as the asserted grounds) than see him convicted.<sup>15</sup> He ultimately pleaded guilty to assault with a deadly weapon, instead of assault with intent to commit murder, and was sentenced to eight months in county jail—a milder punishment than he might have received if Alysse had cooperated with prosecutors.<sup>16</sup> Although her refusal to assist the state was typical of domestic violence victims in the late 1800s and early

12. ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1860*, at 46-47, 69 (1989). By contrast to Philadelphia, early nineteenth-century New York courts often ordered the incarceration of physically abusive husbands. Samuel Chipman reported in the 1830s that three out of four inmates in one jail were wife-beaters. In Albany, the fraction was smaller, but nearly one-quarter of the prisoners had been convicted of some kind of family abuse. See Jerome Nadelhaft, *Wife Torture: A Known Phenomena in Nineteenth Century America*, 10 J. AM. CULTURE 39, 55 (1987) (citing SAMUEL CHIPMAN, *REPORT OF AN EXAMINATION OF POOR HOUSES, JAILS, &C, IN THE STATE OF NEW YORK, AND IN THE COUNTIES OF BERKSHIRE, MASSACHUSETTS, LITCHFIELD, CONNECTICUT, AND BENNINGTON, VERMONT, &C 76-77* (4<sup>th</sup> ed.1836)).

13. *Shoots Wife and Himself*, L.A. TIMES, March 4, 1922, at III. The *La Clear* case and the next example, involving defendant Richard King, will be discussed in my book, *HOUSES OF PAIN*, *supra* note 7.

14. *Loyal Wife Could Not Block Case: Woman Who Was Shot Refuses to Testify, but Husband is Held*, L.A. TIMES, May 2, 1922, at II10; *Wife Sticks by Husband; Goes to Jail*, L.A. TIMES, April 26, 1922, at III2. See Notice of Application to Take Testimony, May 12, 1922, and Application to Examine Witness Conditionally, May 16, 1922, with supporting Affidavits of Deputy District Attorneys John J. Hill, Jr., and Otto Eigholz, *People v. La Clear*, CR 18268 (1922), Superior Court of Los Angeles County, Cal., L.A. County Records Archive (on file with author). See also *Wife Shot, Now Asks for Divorce*, L.A. TIMES, May 13, 1922, at III (reporting contempt sanctions).

15. *Family Turmoil is Ended: Mrs. La Clear, Whose Love Survived Five Bullets, Is Granted Decree of Divorce*, L.A. TIMES, Feb. 28, 1923, at III3; *Wife Shot, Now Asks for Divorce*, L.A. TIMES, May 13, 1922, at III. See Affidavit of Alysse La Clear in Behalf of Defendant, July 6, 1922, at 3-4, *People v. La Clear*, CR 18268, Superior Court of Los Angeles County, Cal., L.A. County Records Archive (stating, in an effort to get probation for her husband, that she had provoked him very much” and that he “had always been kind and considerate” to her) (on file with the author).

16. Register of Actions (recording guilty plea on July 7, 1922, and sentencing on July 21, 1922), Complaint, March 6, 1922, and Information (recording charge), *People v. La Clear*, CR 18268, Superior Court of Los Angeles County, Cal., L.A. County Records Archive (on file with author). News reporting indicates that he only served four months of his eight-month sentence. *Family Turmoil is Ended*, L.A. TIMES, *supra* note 15.

1900s, the government coercion she experienced was rarer.

- (C) West Los Angeles architect Richard King avoided prosecution for beating and kicking his spouse Janice in 1955. Fifteen months earlier, Richard had shot Janice in the shoulder when she filed for divorce. She obtained a restraining order after the shooting but subsequently dropped her divorce petition and returned to her husband. When that reconciliation failed, she suffered another brutal assault and death threats that landed Richard in criminal court.<sup>17</sup> The new charges were also dropped, though, because Janice said she did not want to prosecute.<sup>18</sup> The attitudes of police and prosecutors in the 1950s and 1960s were markedly less condemnatory of batterers than they had been in the past. An era of conciliation and victim-blaming that preceded feminist calls for mandatory state intervention in domestic violence had begun.
- (D) In 2002, Adrian Spraggins allegedly pushed and threatened his girlfriend, Meredith Bell, who was scheduled to testify against him in another domestic violence case. He then forced her and her child into his car, and when she escaped in the parking lot of her workplace, he chased and threatened to hit her. Bystanders called the police, and Adrian was arrested and charged with myriad crimes, including witness tampering, under the mandatory arrest law and no-drop prosecution policy in place in Cuyahoga County, Ohio. Despite Meredith's efforts to get the charges against Adrian dismissed, she was forced to give testimony at his witness-tampering trial. She recanted on the stand, telling the court that she loved Adrian and "did not want him to get into trouble." He was convicted, even though she claimed that her prior accusations were lies.<sup>19</sup>

Of these cases, only Example D—the twenty-first century case of Adrian Spraggins and Meredith Bell—illustrates the system of mandatory interventions in domestic violence that many progressive scholars criticize for ignoring the priorities of abuse survivors, contributing to mass incarceration, and further destabilizing poor, minority communities from which many batterers and their victims come.<sup>20</sup> No-drop prosecution constituted a reaction to the familiar

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17. See *Architect Accused of Beating Wife: Brentwood Man Was on Leave from Hospital after Wounding Mate and Self Last Year*, L.A. TIMES, July 10, 1955, at 31.

18. See *Architect Freed of Wife Beating Charge*, L.A. TIMES, July 15, 1955, at 5.

19. LEIGH GOODMARK, A TROUBLED MARRIAGE; DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 126-27 (2012) [hereinafter GOODMARK, A TROUBLED MARRIAGE]. See *People v. Spraggins*, 2003 WL 22971050 (Ohio Ct. App. 2003) (affirming Spraggins' conviction).

20. See, e.g., Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases* 37 FLA. ST. U. L. REV. 1, 1 (2009) [hereinafter Goodmark, *Autonomy Feminism*]; Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 748 (2007); Holly Maguigan, *Wading into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 427, 443-44 (2003).

scenario of state apathy and ignorance about the cycle of violence shown in the 1950s case (Example C).<sup>21</sup> By contrast, Example B reveals a little-known aspect of the history of public prosecution between the bygone days of private prosecution (Example A) and the mandatory interventions that re-traumatized Meredith Bell in 2002. The *La Clear* case in 1922 exemplifies frustrated government efforts to curb domestic violence, including the occasional use of contempt sanctions against reluctant complainants, during the late nineteenth century and the first half of the twentieth.

#### A. Private Prosecution

Although private prosecution persisted into the antebellum era of U.S. history, it was most typical of England and colonial America.<sup>22</sup> Scholars differ over whether the criminal law benefitted poor people during the early modern period, but the most positive view holds that the ability of ordinary folk to bring charges and exercise discretion over case outcomes—often reaching settlement without a formal verdict—ensured that a wide range of social groups could use the criminal law to protect their interests.<sup>23</sup> Lay private prosecution occurred both as part of “the accused-speaks” felony trial, in which neither side had lawyers, and in the non-jury adjudication of minor offenses by nonprofessional justices of the peace (JPs).<sup>24</sup> Although English courts did not provide financial assistance for victims to bring assault cases, the poor “were still extensively involved in litigating these prosecutions.”<sup>25</sup>

Ordinary people could decide which charges to bring and whether to drop the case, but it would be naïve to assume that their discretion was unaffected by myriad pressures. Poverty and fear of retaliation by either the offender or the community numbered among their concerns. The prosperity of a private

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21. See Goodmark, *Autonomy Feminism*, *supra* note 20, at 11-12; G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservativization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 265-66 (2005).

22. See JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 6-8, 13 (1980); Carolyn B. Ramsey, *The Discretionary Power of 'Public' Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1325-26 (2001) [*hereinafter* Ramsey, *Discretionary Power*]. Pennsylvania, which followed a slightly different course due to the influence of Dutch and Quaker settlers, had a colonial tradition of settling minor disputes through arbitration and the posting of peace bonds or sureties. See STEINBERG, *supra* note 12, at 7 (noting that Pennsylvania colonists were supposedly happy because “they have no lawyers. Everyone is to tell his own case, or some friend for him.”).

23. PETER KING, *CRIME, JUSTICE, AND DISCRETION IN ENGLAND, 1740-1820*, at 354-61 (2000); STEINBERG, *supra* note 12, at 231; John H. Langbein, *Albion's Fatal Flaws*, 98 PAST AND PRESENT 96, 101, 105 (1983). *But see* Douglas Hay, *Property, Authority, and the Criminal Law*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17, 26, 34-37, 41-42, 48-49 (Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, and Cal Winslow, eds., 1975) (arguing that English criminal law overwhelmingly served as an “ideological instrument” of the ruling class, even though the poor could also prosecute cases).

24. LANGBEIN, *ORIGINS*, *supra* note 6 at 11, 42, 99. See Moglen, *supra* note 6, at 1099, 1106-08, 1110

25. KING, *supra* note 23, at 41.



prosecutor made it more likely that a criminal case would go to trial;<sup>26</sup> poor victims often abandoned their prosecutions due to the money and time required to gather evidence and appear in court. They might settle for the pre-trial detention of the accused as an informal punishment or use completely extra-legal alternatives—such as physical violence, social ostracism, and economic sanctions—because they could not afford a full prosecution of the offense.<sup>27</sup>

The formal law provided authority to coerce private prosecutors into appearing at trial. JPs could bind the victim by recognizance to continue the prosecution or forfeit a sum of money, although in practice, judges tended to take a lenient view of private prosecutors who failed to turn up in court or who asked to drop their cases.<sup>28</sup> Under English law, victims of property crime could actually be convicted and punished for the offense of “compounding,” if they reclaimed their goods or obtained other material satisfaction from the perpetrator to settle the case.<sup>29</sup> Hence, the early modern system of private prosecution was not free from government coercion.

While the accused-speaks trial gradually began to disappear from ordinary felony cases in the late eighteenth century, private citizens continued to prosecute some criminal cases in the antebellum United States and even later.<sup>30</sup> Indeed, private and public prosecution coexisted for much of the nineteenth century.<sup>31</sup> One of the most carefully-researched jurisdictions to retain a system of “primary justice” was Philadelphia, which historian Allen Steinberg has described in detail. His discussion of how battered wives charged their husbands with assault provides useful information to support the arguments in this Essay.<sup>32</sup>

Private prosecution of domestic assault in Philadelphia during the early nineteenth century was little more than fee-based arbitration. Victims or other private citizens, such as neighbors who witnessed a husband beating his wife, could bring cases to city aldermen.<sup>33</sup> Philadelphia aldermen often settled cases without a jury, even the indictable offenses that formal criminal procedure required them to transfer to courts of record. Indeed, crimes against the person

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26. *Id.* at 36-37, 44-45. Nevertheless, King emphasizes that criminal justice was not reserved for the gentry, clergy, or other elites. *See id.* at 357.

27. *Id.* at 22-30, 44-45.

28. *Id.* at 43-44. In antebellum Philadelphia, Grand Juries often dismissed cases “for unwillingness of persons to prosecute.” This led to an effort to curb weak or malicious cases and lack of follow-through by charging private prosecutors a fee if the Grand Jury did not return a true bill. STEINBERG, *supra* note 12, at 84-85. Roger Fairfax and Jenia Turner both note the potentially positive role of Grand Juries in curbing overzealous public prosecution and suggest the superiority of that approach to a private model. *See* Roger Fairfax, *For Grand Juries*, 13 CALIF. L. REV. ONLINE 20, 26-27 (2022); Turner, *supra* note 10, at 83.

29. KING, *supra* note 23, at 24.

30. *See* STEINBERG, *supra* note 12, at 1-2, 38 (1989). *See also* Moglen, *supra* note 6, at 1124-35 (stating that many aspects of English criminal procedure persisted after the Founding).

31. Ramsey, *Discretionary Power*, *supra* note 22, at 1325-31.

32. *See* STEINBERG, *supra* note 12, at 46-47, 68-69.

33. *Id.* at 46.

were more likely to be resolved out of court than property offenses were.<sup>34</sup> Battered women who pursued their complaints in courts of record, rather than settling for a peace bond, seem to have desired the conviction of their abusers, which they obtained in more than 70 percent of cases resulting in indictment. Victims of the most serious assaults and those who had already separated from their abusive husbands were “usually willing to let the law take its course and have the man sentenced to prison.” However, many others stopped short of seeking carceral punishment and begged the judge for leniency instead.<sup>35</sup>

Steinberg believes that primary justice offered “a source of individual power with state backing that was employed by one citizen against another, not a source of state power that was extended over the citizenry in general by an external . . . authority.”<sup>36</sup> Ordinary working-class people could usually afford the small fees associated with this system; it was accessible, and it lent their cases seriousness and legitimacy.<sup>37</sup>

However, corruption and malicious prosecution sometimes occurred. Most relevant to problem of domestic violence, primary aggressors could easily lodge cross-complaints to manipulate and harass their victims. Critics of private prosecution in Philadelphia pointed out that this arrangement meant “a quarrelsome drunkard, having beaten his wife, proceeds at once to the magistrate and charges her, on oath with assault and battery, or with assault and threats, and the poor woman comes down to the prison with her head bruised, her eyes blackened . . .”<sup>38</sup> Primary justice, then, did not avoid the problem of dual arrests that persists today, and if private prosecution were reinstated, fear of retaliation might constitute an even greater impediment to justice for domestic violence survivors than it currently does.<sup>39</sup>

Moreover, the relief that battered women accepted when they brought their own cases in the past—an interruption of the violence, combined with a reprimand to the abusive man and an order that he provide a peace bond, pay a fine, or serve a brief jail term—was satisfactory only within these survivors’ socially-constrained circumstances. Historically, women lacked the ability to obtain well-paying jobs and affordable childcare; they could divorce only at considerable expense for limited reasons and faced social stigma for doing so. Safely leaving a formal marriage or common-law relationship and providing for their children on their own was very difficult.<sup>40</sup> Further, abused women often

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34. *Id.* at 41, 54, 61

35. *See id.* at 55, 69, 262 n.42.

36. *Id.* at 55.

37. *Id.*

38. *Id.* at 53.

39. Corey Rayburn Yung raises a similar objection to the private prosecution of rape in his contribution to this Symposium. *See* Corey Rayburn Yung, *Private Prosecution of Rape*, 13 CALIF. L. REV. ONLINE 86, 89-90 (2022).

40. Carolyn B. Ramsey, *The Exit Myth: Family Law, Gender Roles, and Changing Attitudes Toward Female Victims of Domestic Violence*, 20 MICH. J. GENDER & L. 1, 12-14, 20-25 (2013)

blamed excessive drinking and averred that their spouses were good men when sober because they faced retaliatory violence for invoking the full power of the criminal law.<sup>41</sup> Their routine pleas for leniency and non-custodial sentences for their assailants must be seen in this light.

### B. Public Prosecution

Change occurred at different times in various American cities and counties, but beginning around the middle of the nineteenth century, an apparatus composed of District Attorneys, salaried police magistrates, police departments, and multiple tiers of correctional institutions replaced informal, fee-based justice. Public and private prosecution coexisted in some states after the advent of elected District Attorneys and professional police forces.<sup>42</sup> And police-initiated cases were still guided to some extent by the victim's enthusiasm (or lack thereof) for obtaining a conviction. The practice of requiring women to swear out a complaint against their batterers—which persisted into the twentieth century and has been sharply criticized in stock feminist discussions of domestic violence<sup>43</sup>—constituted a holdover from the informal justice of the past and also applied to other misdemeanors that had no police eyewitnesses.<sup>44</sup>

The new criminal legal system did not turn a blind eye to domestic violence, however. Men's abuse of women appeared in criminal court dockets and led to the punishment of men of all races and social classes in the second half of the

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[*hereinafter* Ramsey, *The Exit Myth*]; Carolyn B. Ramsey, *Domestic Violence and State Intervention in the American West and Australia*, 86 INDIANA L.J. 185, 214-18 & nn.160, 163, 165, 166-67, 172 (2011) [*hereinafter* Ramsey, DOMESTIC VIOLENCE AND STATE INTERVENTION]. See STEINBERG, *supra* note 12, at 69 (stating that “[b]ecause of their economic dependency,” battered women in early Philadelphia sought to avoid the imprisonment of their abusive husbands).

41. Ramsey, *Domestic Violence and State Intervention*, *supra* note 40, at 215 & nn.164-65.

42. See STEINBERG, *supra* note 12, at 41, 54-55, 61. The office of an elected District Attorney was established in New York in 1846, slightly earlier than in Pennsylvania, and New Yorkers made firmer and more successful efforts to end private prosecution than critics in other states did. After the organization of the Metropolitan Police, New York City officers exercised unofficial discretion to discharge prisoners, and police magistrates could decline to hold a suspect to answer in the trial court. Hence, police and prosecutors supplanted the victim's role in pressing or dropping charges. Ramsey, *Discretionary Power*, *supra* note 22, at 1327-31 & n.109. See STEINBERG, *supra* note 12, at 83 (stating that the elected District Attorney became a public official in Philadelphia in 1850 but that private prosecution survived past the mid-century mark).

43. A student comment from the 1990s favoring mandatory arrest raised the typical objection that requiring a battered woman to make a sworn complaint to get her abuser arrested put her in further danger. Michaela M. Hoctor, *Comment: Domestic Violence as a Crime against the State: The Need for Mandatory Arrest in California*, 85 CALIF. L. REV. 643, 674-75 (1997).

44. Historically, a police officer could make a warrantless arrest for a misdemeanor that he witnessed and for a felony if he had probable cause, even if he had not seen the crime occur. However, the victim or an eyewitness needed to swear out a complaint about less serious offenses that the police did not observe, so the alleged offender could be summoned to court or arrested on a warrant. The origins of this procedure were not unique to domestic violence. Rather, they stemmed from a time, before the advent of salaried police, when “people went to court to get warrants against others who had stolen from or injured them, bringing constables or sheriffs along, for a fee. . . .” ROGER LANE, *MURDER IN AMERICA* 103 (1997).

nineteenth century and the first half of the twentieth.<sup>45</sup> It was openly discussed in newspapers, as well as in the courtroom.<sup>46</sup> Although the government intervened in intimate relationships, the strength of its condemnation of batterers and its willingness to defer to victim preferences fluctuated. Punishments for men who assaulted their female intimate partners in the late 1800s and early 1900s showed continuity with the past: fines and short jail terms predominated.<sup>47</sup> As probation systems developed, suspended sentences accompanied by such conditions as the avoidance of liquor largely supplanted the old practice of requiring the defendant to post a peace bond.<sup>48</sup>

The refusal of women to assist with the prosecution of their abusers frustrated government efforts to hold these offenders accountable. Contempt sanctions against reluctant complainants constituted the exception, not the rule. Society denounced men's violence against women, but prosecutors and courts often deferred to battered wives' expressed desire for the dismissal of charges—letting the accused men go with only a reprimand or suspended sentence.<sup>49</sup> Despite the efforts of criminal law personnel, abusive husbands not infrequently reoffended—sometimes beating their wives within days of their release.<sup>50</sup> Men who murdered their wives had sometimes been charged with violence against these same women repeatedly in the past.<sup>51</sup> Hence, we must be wary of claims

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45. Ramsey, *Domestic Violence and State Intervention*, *supra* note 40, at 201 & n.85. See Elizabeth Katz, *Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative*, 21 WM. & MARY J. WOMEN & L. 379, 408 (2015).

46. Ramsey, *Domestic Violence and State Intervention*, *supra* note 40, at 202-203 & nn.93, 94, 96, 97. See Katz, *supra* note 45, at 381, 384, 387 (describing newspaper coverage of cases around the U.S during the 1910s).

47. Ramsey, *Domestic Violence and State Intervention*, *supra* note 40, at 206-213. See Katz, *supra* note 45, at 405-20 (discussing the prosecution and punishment of wife-beaters during in a more limited time period).

48. Ramsey, *Domestic Violence and State Intervention*, *supra* note 40, at 202 & n.90, 215 n.165, 217 & n.178. See Katz, *supra* note 45, at 412 (noting the imposition of pledges to abstain from liquor on wife-beaters); Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention*, 120 PENN. ST. L. REV. 337, 352-53 & n.62 (2015) [*hereinafter* Ramsey, *The Stereotyped Offender*] (describing similar conditions on the release of wife-beaters in the late 1800s and early 1900s). Some courts continued to use peace bonds in wife-beating cases in the twentieth century. See DEL MARTIN, *BATTERED WIVES* 102 (1976).

49. See, e.g., *The Inferior Courts: Wife-Beater on Probation*, L.A. TIMES, Dec. 31, 1909, at II2 (probation); *T.J. Williams Vents the Fumes of His Liquor Upon His Family—Indignant Wife is Merciful*, L.A. HERALD, Nov. 29, 1898, at 9 (suspended sentence); *Police Court Cases: What Was Done by City Justices Yesterday*, L.A. HERALD, April 21, 1898, at 12 (suspended sentence); *Beating His Wife*, L.A. TIMES, Dec. 31, 1889, at 4 (“[T]he woman put in an appearance and begged that her husband be allowed to go home. [He] promised to behave himself and was dismissed.”).

50. For twentieth-century examples from my forthcoming book, see *Wife-Beating Habit of Mexican Broken*, L.A. TIMES, April 19, 1930, at 6 (reporting a 90-day jail term for a Hispanic repeat offender who violated the conditions of his suspended sentence by beating his wife again); *Wife Beater Serves Term; Beats Her Again; Is Jailed*, CHICAGO DAILY TRIB., March 18, 1928, at 1 (stating that a repeat offender would spend 100 days in the workhouse because he beat his wife immediately after serving a sentence of the same length for a past beating).

51. For examples of the escalation of domestic violence to homicide in several eras of American history, see *Police Wait to Query Wife-Killer Suspect*, BOSTON GLOBE, April 11, 1963, at 5 (reporting

that history demonstrates the success of *either* public or private prosecution in handling gender-based violence.<sup>52</sup>

Defendants found guilty of murdering their female intimates during the late 1800s and early 1900s typically received life sentences or the death penalty.<sup>53</sup> Severe sentencing was, to some extent, state theater designed to keep transgressive men in check and announce that the domestic ideology of respectable, white Americans would be strictly enforced. Murderers ordered to prison for life might be paroled after relatively little time, and some death sentences were commuted.<sup>54</sup> However, unlike today, wife murderers often went to the gallows or the electric chair.<sup>55</sup>

The overriding concern to control violent men, rather than to transform the social conditions that trapped women in abusive relationships, constituted the greatest failing of government intervention in domestic violence before the Battered Women's Movement of the late twentieth century. Wealthy, white batterers, as well as racial minorities and the poor, numbered among the defendants convicted and punished for wife-beating,<sup>56</sup> but all these prosecutions

a husband was suspected of killing his wife in the 1960s after an assault complaint that she filed “was settled without court action”); *Slaying of Wife Denied: Groves Guarded in Hospital*, L.A. TIMES, Oct. 3, 1934, at A1 (stating that a domestic murder victim in the 1930s called the police when her husband threatened her with a gun but then persuaded the officers not to arrest him); *Guilty Plea Entered in Death Case: Whittier Man Who Slew Wife Will Be Sentenced to Life Imprisonment*, L.A. TIMES, Oct. 3, 1925, at A6 (reporting that a murder victim in the 1920s feared her husband so much that she “appealed to the police for protection and had a police guard for a time.”); *Doomed to Death Says “Thank You.”* L.A. HERALD, April 30, 1910, at 9 (noting that a death-sentenced California wife killer in 1910 had a long history of prior arrests for domestic violence); *Wife Murder: Startling Domestic Tragedy in South San Francisco*, S.F. CHRON., Nov. 9, 1874, at 3 (reporting that a nineteenth-century California wife murderer had been punished previously by the police court for “brutality” that left “physical marks” on his spouse’s body).

52. *But see* Capers, *supra* note 1, at (arguing that concerns about “lawlessness and criminals run amok” are refuted by what “history suggests”).

53. Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880-1920*, 77 UNIV. COLO. L. REV. 101, 141-56 (2006) [*hereinafter* Ramsey, *Intimate Homicide*]. For similarly severe outcomes for male defendants who killed their female intimate partners in other common-law countries during the 1800s and early 1900s, see MARTIN J. WIENER, *MEN OF BLOOD: VIOLENCE, MANLINESS AND CRIMINAL JUSTICE IN VICTORIAN ENGLAND* 164, 210 (2004); Carolyn Strange, *Masculinities, Intimate Femicide, and the Death Penalty in Australia, 1890-1920*, 43 BRIT. J. CRIMINOLOGY 310, 311-16 (2003).

54. It was not uncommon for state governors to commute life sentences to a shorter range and for those same prisoners to be released before they had served the lower end of the new sentence. Ramsey, *Intimate Homicide*, *supra* note 53, at 187 App. F (providing data for Denver and Arapaho Counties in Colorado). See JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990*, at 45, 47-48 (1993) (discussing the evolution of parole from essentially a mode of pardoning prisoners to a system authorized by indeterminate sentence laws).

55. See e.g., *Four Murderers Hanged*, N.Y. DAILY TRIB., Aug. 24, 1889 (reporting the execution of four wife murderers in one day in New York County, NY). At the end of the twentieth century, less than 12 percent of the men sentenced to death were convicted of murdering an intimate partner. Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Murder in the Post-Furman Era*, 49 SMU L. REV. 1507, 1510 (1986).

56. Examples of affluent men prosecuted for domestic violence in Los Angeles County, California, during the long nineteenth century include: *Infelicity: Wife Beating Cases*, Sept. 25, 1915,

aimed at social control. Indeed, the arrest and prosecution of husbands who failed to uphold their duties toward their families under prevailing standards of social responsibility formed one piece of a larger state effort, beginning in the mid-1800s, to mobilize the criminal law against the so-called “dangerous classes”<sup>57</sup> and reinforce the power of the elites by punishing affluent men whose conduct threatened the ideology that supposedly legitimized their privilege.<sup>58</sup>

Arrest avoidance and non-prosecution policies did not become widespread until the middle of the twentieth century when a Cold War version of domesticity and psychological theories blaming women for provoking domestic violence and excusing men for perpetrating it suffused American culture. In the 1950s and 1960s, battered women were encouraged to reconcile with their husbands, not to divorce them and certainly not to get them charged with crimes.<sup>59</sup> The prevalent view expressed optimism that family violence could be cured, and harmony restored. The language of medicine—specifically, psychology and psychiatry—that permeated the rhetoric and practices of family courts also affected the criminal legal system’s handling of domestic violence in mid-century America.

Police officers developed their own methods of responding to “domestic dispute” calls. A Los Angeles Police Department veteran interviewed in 1967 said he had learned to separate the couple, commiserate with the man, remind the beaten wife that her husband was the breadwinner, and discourage her from pursuing a course of action that would land him in jail.<sup>60</sup> Officers believed that

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L.A. TIMES, at III (insurance agent and “descendant of a family distinguished in railroad and military affairs”); *Doctor Takes Arrest Coolly*, L.A. TIMES, Dec. 30, 1909, at II2 (retired physician); *Forceful Plea for Temperance: Says Husband Beat Her for Wetting Whistle*, L.A. TIMES, June 24, 1909, at II2 (partner in engineering firm); *Lawyer Shaw Guilty of Wife-Beating*, L.A. TIMES, Oct. 25, 1901, at 10 (attorney); *It Cost Him \$50—Attorney Hayford’s Fine for Beating His Wife*, L.A. HERALD, July 9, 1893, at 7 (attorney); *Brutal Assault Made By James Velsir on His Ex-Wife*, L.A. TIMES, Aug. 24, 1889, at 3 (former City Councilman). See also Ramsey, *Domestic Violence and State Intervention*, *supra* note 40 at 201 & nn.85-86; Katz, *supra* note 45, at 408.

57. See STEINBERG, *supra* note 12, at 219-20, 222-23; Mike McConville & Chester Mirsky, *The Rise of Guilty Pleas: New York, 1800-1865*, 22 J.L. & SOC’Y 443, 460 (1995); Ramsey, *Discretionary Power*, *supra* note 22, at 1374 & n.355; Reva Siegel, “*The Rule of Love: Wife Beating as Prerogative and Privacy*,” 105 YALE L. J. 2117, 2134, 2137-38 (1996) (1996).

58. Victorian values are often associated with top-down efforts by the middle class to correct and control their supposed inferiors. Nevertheless, people from a variety of social positions and education levels embraced and were subject to expectations about proper gender roles. Hence, respectability and un-respectability crossed class lines, and affluent men were punished for their transgressions, too. See ROBERT L. GRISWOLD, *FAMILY AND DIVORCE IN CALIFORNIA, 1850-1890: VICTORIAN ILLUSIONS AND EVERYDAY REALITIES* 39, 45, 65, 97 (1983); LANE, *supra* note 45, at 124; Ramsey, *Domestic Violence and State Intervention*, *supra* note 40, at 201-02.

59. See J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 113-20, 129-37 (1997) (describing efforts of family courts after World War II to heal “sick” marriages and curb divorce). The Cold War domestic ideology, psychological theories of wife-beating, and the involvement of courts in marital reconciliation in the mid-twentieth century will be analyzed in detail in my forthcoming book. HOUSES OF PAIN, *supra* note 7. See also Ramsey, *The Exit Myth*, *supra* note 40, at 14-15, 28-31.

60. *Family Fights Tough and Messy, Say Police*, L.A. TIMES, Feb. 12, 1967, at SF\_C2, 4 (describing the tactics of Officer Garland Poe).

alcohol almost always played a role and that “some trivial incident” ignited tensions between “people [who] love each other sincerely.” Officially, they had to “advise the man that if he hits the woman it’s a felony, and the woman can be guilty of a misdemeanor if she hits the man.” However, they saw themselves performing a role more akin to a chaplain than a law enforcer.<sup>61</sup>

During the last three decades of the twentieth century, public responses to domestic violence again changed course. Feminist leaders who excoriated the patriarchal state for condoning men’s abuse of their intimate partners eventually succeeded in galvanizing the criminal legal system to adopt mandatory interventions. Recent analyses posit that, even then, state action was motivated by a law-and-order agenda that supplanted gender equality, anti-racism, anti-authoritarianism, and other grassroots feminist principles.<sup>62</sup> Yet, somewhat paradoxically, it took the efforts of racially diverse coalitions of leftist advocates to spur the government to mandate the arrest and prosecution of batterers, whether individual victims favored this punitive approach or not.<sup>63</sup>

## II.

### ADDRESSING DOMESTIC VIOLENCE IN THE TWENTY-FIRST CENTURY

To be sure, women’s position in society has improved, though I show in my forthcoming book that demands for gender equality slowly eroded the paternalistic solicitude that provided at least minimal protection for the so-called “weaker sex” until the mid-twentieth century.<sup>64</sup> Anxiety about gender roles contributed both to the policies of non-intervention in wife abuse against which the Battered Women’s Movement campaigned and to increased willingness to convict female defendants for responding to such abuse with force.<sup>65</sup> The popularization of feminist ideas and the spread of knowledge, rather than myths, about domestic violence has corrected some of these deleterious trends over the past 50 years. But many domestic violence victims, especially poor victims of color, still face significant challenges and inequalities.

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61. *Id.*

62. MARIE GOTTSALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 139, 144-53, 159-60, 163-64 (2006). See AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION* 16-17, 59-66 (2020); Miccio, *supra* note 21, at 282-94.

63. See Mimi Kim, *Dancing the Carceral Creep: The Anti-Domestic Violence Movement and the Paradoxical Pursuit of Criminalization, 1973-1986*, at 9-12 (unpublished ISSI Graduate Fellows Working Paper Series 2013-14.70, School of Social Welfare, Univ. Cal. Berkeley, 2015) (on file with the author).

64. RAMSEY, *HOUSES OF PAIN*, *supra* note 7.

65. Ramsey, *The Exit Myth*, *supra* note 40, at 4-6. This shift, which occurred in the middle of the twentieth century, will be explored in detail in my forthcoming book. See Ramsey, *HOUSES OF PAIN*, *supra* note 7.

A. *Mass Incarceration and Calls to End the Public Prosecution of Batterers*

A chorus of voices now criticizes the “legal feminists” or “dominance feminists” who transformed the Battered Women’s Movement by allying with state power and urging the criminal punishment of batterers.<sup>66</sup> Nevertheless, restoring private prosecution would be a strange panacea. To be sure, public prosecution strips power from relatively powerless individuals; there is substantial value in fostering the autonomy of abuse survivors. But, before we ask public prosecutors (especially feminist Deputy District Attorneys who genuinely want to end gender-based violence) to step away, we need to make sure there is an adequate, fully-funded support system to step in. And before we advocate “returning decision-making authority to victims of crime,”<sup>67</sup> we need to address the pressures that still shape domestic violence victims’ reluctance to prosecute.

Concerns about racialized “mass incarceration” may deter some victims of color from involving the criminal legal system, given a history of oppressive law-enforcement interactions with their families and communities.<sup>68</sup> However, individuals serving sentences for domestic violence crimes do not comprise one of the largest sectors of the prison population. In fact, dismissals and non-custodial sentences are still the most common outcomes for misdemeanor domestic violence charges.<sup>69</sup> Nor do racial-minority women speak with one voice about how they want their cases to be handled. More than half of the African American women in one study from the early 2000s favored the prosecution of their batterers. Having suffered serious injury or being separated from the alleged perpetrator increased their desire to see him convicted.<sup>70</sup> Yet,

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66. GOODMARK, A TROUBLED MARRIAGE, *supra* note 19, at 2-4; GRUBER, *supra* note 63, at 45-46; Kimberle Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1456-57 (2012); Miccio, *supra* note 21, at 241-44, 293-94.

67. Capers, *supra* note 1, at 1593.

68. See, e.g., LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE 7, 21 (2018) [*hereinafter* GOODMARK, DECRIMINALIZING]; Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1042-43 (2000) [*hereinafter* Coker, *Shifting Power*]. See also BETH E. RICHIE, COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN 103 (1996) (attributing battered black women’s reluctance to turn to the criminal legal system their isolation, which was exacerbated by police indifference, and to their fear of being punished for law-breaking).

69. See Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 55 n.232 (“Only about a third of convicted DV defendants get jail sentences; most get conditional discharges, which may include requirements such as batterer intervention programs”). It is worth noting, though, that probation is a “stepping stone” to incarceration if offenders violate their probation conditions. GOODMARK, DECRIMINALIZING, *supra* note 68, at 149.

70. Arlene N. Weisz, *Prosecution of Batterers: Views of African-American Women*, 17 VIOLENCE & VICTIMS 19 (2002). Negative experiences with law enforcement and the popularization of arguments made by Michelle Alexander in THE NEW JIM CROW: MASS INCARCERATION IN THE AGE



because black women face “the stereotype of being strong, angry, and more masculine than White women” and because sociological research suggests they do tend to use physical force to resist abuse, especially if they were exposed to violence during childhood, they remain vulnerable to arrest and prosecution themselves.<sup>71</sup>

Other factors besides racism have, for centuries, affected the attitudes of domestic violence victims toward the criminal conviction of their tormentors. These include economic dependence on the perpetrator, fear of his retaliation, the challenges of raising children in common, and the belief that substance abuse, mental illness, or past trauma lie at the heart of his violence.<sup>72</sup> Many of these factors still disproportionately disadvantage racial groups that are among the poorest in the United States; undocumented immigrants face the additional fear of being deported.<sup>73</sup> Despite the dedication of feminist advocates, or perhaps in some instances *because of* the priority they placed on criminal prosecution,<sup>74</sup> we still have much work to do on these issues.

Legal scholars Donna Coker and Leigh Goodmark have suggested a potential solution in community-based, transformative justice for abuse victims and their families. Beyond seeking avenues outside the criminal legal system to hold perpetrators accountable, they propose using the law to eliminate such corollary harms as job loss, eviction from housing, and deportation that people subject to intimate-partner abuse often suffer. Job training and other economic programs would also help survivors leave violent relationships or gain autonomy without separation.<sup>75</sup> Coker argues that testing proposed laws and policies to ensure they support victims with the fewest material resources would result in superior reforms across the board.<sup>76</sup>

My goal here is not to revisit these proposals, which ambitiously envision stabilizing poor communities of color by ending the vicious cycle whereby mass-

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OF COLORBLINDNESS (revised ed., 2012) may have changed the attitudes of racial minority victims since the publication of the Weisz study, however.

71. HILLARY POTTER, BATTLE CRIES: BLACK WOMEN AND INTIMATE PARTNER ABUSE 136 (2008) (naming the “dynamic resistance” of black women subject to intimate-partner abuse). Thirty-three of the 40 black female survivors of domestic violence in Potter’s study had been exposed to some type of abuse during their childhoods. Of these 33, all but four “regularly fought back” against their batterers as adults. *Id.* at 9, 126. *See id.* at 128-35 (recounting her interviewees’ stories about “fighting back”).

72. *See Ramsey, Domestic Violence and State Intervention, supra* note 40, at 213-18.

73. *See Coker, Shifting Power, supra* note 68, at 1015-32; Zanita Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 50 (1998).

74. *See, e.g., Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996) (“[P]rosecutors must consistently mandate participation, including testimony at trial, when necessary to proceed with a case. The societal benefits gained through this criminal justice response to domestic violence far outweigh any short-term costs to women’s autonomy and collective safety.”)

75. *See GOODMARK, DECRIMINALIZING, supra* note 68, at 41-47, 123-30.

76. *See generally Coker, Shifting Power, supra* note 68.

or “hyper-incarceration” continuously reproduces contributors to gendered violence: poverty, mental illness, substance abuse, toxic masculinities, and racism.<sup>77</sup> Unlike Coker, Goodmark, and an increasing number of progressive scholars today, I do not favor the decriminalization of domestic violence. Instead, I believe the energy of activists and academics is better directed toward the *reform* of the criminal legal system in tandem with cultural and socioeconomic initiatives to support victims and reintegrate offenders. Setting aside the title of his article, *Against Prosecutors*, Capers and I seem to take a similar view of this broader issue.

Disengagement from criminal justice approaches would be a mistake for pragmatic reasons: the criminal law as an institution of governance is likely to endure, whether legal academics and domestic violence experts turn away from it or not.<sup>78</sup> Rethinking—rather than abandoning—the criminal justice system is the right approach with particular regard to domestic violence. While the mandatory response of police and prosecutors has wrought more trouble than it has alleviated,<sup>79</sup> these actors still have important work to do. Their involvement signals that the state strongly disapproves of the batterer’s behavior. The criminal legal system can also continue to play a backup role to ensure compliance with alternative processes like restorative justice (RJ).

I take as a given that mandatory arrest laws and “hard” no-drop prosecution policies should be rescinded to allow greater discretion and victim input. Although these measures seemed necessary in the late twentieth century to force jaded police and prosecutors to take action even if abuse victims did not cooperate, they have proven unsuccessful and overly rigid.<sup>80</sup> Criminal law personnel could better assist the abuse survivor by directing her to support services and listening empathetically to her experiences and priorities when making discretionary decisions about how to handle the case.<sup>81</sup> Nevertheless, evidence-based (also known as “victimless” or “soft no-drop”) prosecutions likely will remain necessary in the foreseeable future for repeat offenders and extreme violence.<sup>82</sup>

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77. See Donna Coker & Ahjane Macquoid, *Why Opposing Hyper-Incarceration Should be Central to the Work of the Anti-Domestic Violence Movement*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 585, 586-87, 597-98, 610-18 (2015).

78. Deborah Tuerkheimer, *Criminal Justice for All*, 66 J. LEGAL ED. 24, 27 (2016).

79. See Kohn, *supra* note 9 at 526-27 & nn. 32-33 (citing studies indicating that mandatory arrest and no-drop prosecution increase victims’ vulnerability to re-abuse).

80. See GOODMARK, A TROUBLED MARRIAGE, *supra* note 19, at 126-35; Maguigan, *supra* note 20, at 435.

81. See Bruce A. Green & Brandon P. Ruben, *Should Victims’ Views Influence Prosecutors’ Decisions?*, 87 BROOKLYN L. REV. 4, 35 (forthcoming 2022) (arguing that prosecutors generally should consider “victims’ informed and reasoned preferences for non-prosecution and noncarceral resolutions” in misdemeanor cases, not just with regard to domestic violence).

82. See GOODMARK, A TROUBLED MARRIAGE, *supra* note 19, at 112 (defining “soft no-drop”). Prosecutors would also continue to handle intimate-partner homicide cases.

In the remainder of this essay, I focus on one potential improvement that stops short of radically curtailing or eliminating public prosecution: using RJ *within* the criminal legal system.

### B. Restorative Justice

I have been a reluctant convert to the idea that RJ has the potential to succeed in domestic violence cases where traditional criminal law interventions have failed. Domestic violence differs from most situations in which RJ has led to documented victim satisfaction and low rates of offender recidivism: juvenile offenses and stranger crimes, such as robbery and burglary, perpetrated by adults.<sup>83</sup> Put simply, those subject to intimate-partner abuse may find themselves pressured to participate in a process that is easily manipulated by batterers because it centers on contrition—a recognized phase in the cycle of violence.<sup>84</sup> Moreover, because domestic violence occurs in a social context, the assumption that community-based initiatives are inherently superior to the criminal legal system does not bear scrutiny.

Community-based programs may inappropriately privilege culture, race, family loyalties, and other factors over gender.<sup>85</sup> While scholars often assert that the criminal legal system embodies racism,<sup>86</sup> social control imposed by the community (however defined) may not transcend various forms of bias, including sexism. Pressure not to betray their racial identity, family, or sexual orientation could dissuade victims from favoring the custodial punishment of batterers or even the rigorous monitoring and enforcement of restitution agreements that emerge from some RJ processes.<sup>87</sup> Community participants might turn the tables on the victim by suggesting her behavior provoked her partner's violence. Further, since coercive and controlling batterers often isolate

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83. See Judge Bennett Burkemper & Nina Balsam, *Examining the Use of Restorative Justice Practices in Domestic Violence Cases*, ST. LOUIS UNIV. PUB. L. REV. 121, 125-26 & n.33, 127 (2007).

84. See C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Practices to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence*, 35 HARV. J. L. & GENDER 311, 317 (2012); Julie Stubbs, *Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 42, 58, 60 (Heather Strang & John Braithwaite, eds., 2002). See also Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 85-88 (1999) [*hereinafter* Coker, *Enhancing Autonomy*] (discussing the risk that apology may be a form of "cheap justice" victims are pressured to accept)

85. Stubbs, *supra* note 84, at 49, 53-54. See Coker, *Enhancing Autonomy*, *supra* note 84, at 44 ("Families cannot always be counted on to confront an abusive family member, however. Family members may deny, minimize, and blame the victim for the batterer's violence.")

86. See GOODMARK, *DECRIMINALIZING*, *supra* note 68, at 99 (arguing that RJ should be kept independent of the criminal legal system because "the racism endemic in the criminal legal system could similarly infect restorative practices housed there").

87. Roger Fairfax notes a comparable problem with a return to private prosecution. See Fairfax, *supra* note 28, at 22-25. For a discussion of how abusive African-American men sometimes use "their overrepresentation in the criminal justice system and other racial rhetoric" to excuse domestic violence and even to persuade their intimate partners to commit crimes for them, see RICHIE, *supra* note 68, at 121, 129.

victims from friends, family, and others who can help, the offender might find group conferencing and other RJ methods more comfortable and supportive than the abuse survivor does.<sup>88</sup> In short, we must avoid assuming that an ideal “community” for community-based interventions exists.

Still, the manifest shortcomings of criminal justice approaches to intimate-partner violence (and the potential for these interventions to exacerbate mass incarceration if domestic violence offenders actually bore the full brunt of potential penalties for their misconduct)<sup>89</sup> make reconsideration of RJ appealing. Several forms of RJ share the potential to validate victims’ experiences and needs by allowing them to speak. Victims can describe the multifaceted nature of harm they suffered and ask for resources.<sup>90</sup> Although scholars often discuss RJ as an alternative to the criminal legal system,<sup>91</sup> many forms of RJ can exist *in tandem* with it. This hybridity would alleviate legitimate concerns about RJ’s weaknesses in keeping victims safe and holding offenders accountable in more than a superficial way. Processes such as victim-offender dialogues and group conferencing can play a role in pre- or post-conviction diversion, for example.

### 1. *Pre-conviction Diversion to Restorative Justice*

In pre-conviction diversion, the District Attorney’s office suspends prosecution while the alleged abuser undergoes RJ. If he does not get convicted or plead guilty, he will not have a criminal record for the offense. But, if he fails to complete the program, his case will be referred back to the prosecutor. The RESTORE program, described in detail below, provides community conferencing for rape and sexual assault victims along these lines.<sup>92</sup> Similarly, the Truth and Reconciliation Commission in South Africa required court-approval of written agreements reached through victim-offender conferencing; non-compliance with terms of the agreement led to refileing of the criminal case by the prosecutor.<sup>93</sup>

American prosecutors tend to disfavor pre-conviction diversion because they worry that, by the time an offender’s failure to complete the required RJ process, counseling, or substance abuse treatment is recognized, the statute of limitations will bar prosecution for the offense.<sup>94</sup> Another concern relates to how self-incriminating statements made during RJ will be handled in a subsequent

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88. See Kohn, *supra* note 9, at 547.

89. For example, although domestic violence gun bans continue to be enforced haphazardly, more aggressive arrest and prosecution of weapons offenders would result in a large uptick in imprisonment, disproportionately affecting black and Hispanic men. See Carolyn B. Ramsey, *Firearms in the Family*, 79 OHIO ST. L. J. 1257, 1263-65, 1340-542 (2017).

90. See GOODMARK, *DECRIMINALIZING*, *supra* note 68, at 94-95; Burkemper & Balsam, *supra* note 84, at 123-24; Coker, *Enhancing Autonomy*, *supra* note 84, at 101-02.

91. See, e.g., GOODMARK, *DECRIMINALIZING*, *supra* note 68, at 98-99.

92. See *infra* notes 99-110 and accompanying text.

93. Kohn, *supra* note 9, at 591.

94. Hopkins, *supra* note 84, at 351-52.

criminal proceeding. (Because RJ processes serve as a “safe space” for offenders to apologize, their words should not be admissible against them.<sup>95</sup>) Opposition to RJ and diversion has led to the enactment of statutes forbidding these alternatives to the prosecution and punishment of domestic violence in several states.<sup>96</sup>

But resistance can be overcome with persuasive arguments. Broadly speaking, commentators associate the implementation of diversion programs with “Progressive Prosecution.”<sup>97</sup> Changing the culture and performance evaluation criteria in District Attorney’s offices offers a key to getting line prosecutors to adopt new approaches to intimate-partner abuse cases. Success ought to be measured less by courtroom “wins” and “losses” than by how the attorneys craft plea bargains, exercise discretion, show respect for the Constitution, and evaluate the victim’s interests in relation to the public interest.<sup>98</sup>

Prosecutors in some jurisdictions have already embraced the benefits of RJ, in lieu of dropping cases with reluctant complainants. One of the most cited pre-conviction programs for adult offenders is RESTORE, which addressed sexual assault on acquaintances—the type of case in which rape survivors often experience “humiliation reminiscent of the original crime” if traditional processes are used.<sup>99</sup> RESTORE functioned in Pima County, Arizona, from 2003-2007 and was comprised of four stages: (1) referral and intake, (2) preparation, (3) face-to-face conferencing, and (4) accountability and reintegration.<sup>100</sup> Referral to this federally-funded RJ program came only from prosecutors; no self-referrals were allowed, but the “survivor victim” had to provide informed consent before the “responsible person” was invited to participate. Defendants who were offered a choice between RJ and “standard

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95. See Donna Coker, *Crime Logic, Campus Sexual Assault and Restorative Justice*, 49 TEXAS TECH. L. REV. 147, 204 (2016) (discussing MOUs between universities and prosecutors barring the use of statements made during RJ from future use in criminal cases); Carrie Leonetti, *A New Solution to an Old Problem: Limited Use Immunity as a Better Alternative to Miranda’s Procedural Safeguard*, 10 FED. CTS. L. REV. 127, 153 (2018) (arguing for the inadmissibility of soul-purging confessions).

96. Hopkins, *supra* note 84, at 344, 348, and n.182. See GOODMARK, *DECRIMINALIZING*, *supra* note 69, at 92. The role of legislatures in prohibiting diversion in domestic violence cases supports Jeffrey Bellin’s argument that prosecutors are just one type of actor (and not even the most powerful one) in the criminal legal system. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 172-72, 175, 212 (2019).

97. See, e.g., EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* xxiv, 30 (2019); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUSTICE L. REV. 1, 14, 22 (2019).

98. See David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 30 (2017).

99. Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1627-32 (2013) (quoting J.L. Herman, *Justice from the victim’s perspective*, 11 VIOLENCE AGAINST WOMEN 571, 574 (2005)). See Hopkins, *supra* note 84, at 351 n.197 (confirming that RESTORE was not limited to post-conviction diversion).

100. See Koss, *supra* note 99, at 1627-32.

criminal justice,” contingent on forensic assessment, might otherwise have faced felony or misdemeanor charges.<sup>101</sup>

The conferencing stage of the RESTORE program involved a dialogue between the survivor victim, the responsible person, and friends and family of both parties, overseen by trained facilitators. All participants in the conference, which took place in a “secure location,” had an opportunity to speak, and the responsible person was asked to summarize the impact of the offense on others.<sup>102</sup> The conference culminated in the finalization of a redress plan requiring sex-offender therapy and interventions, such as anger management, that forensic assessment deemed appropriate for the responsible person. The survivor victim could also request that community service, the payment of financial restitution, and other activities be performed. Follow-up consisted of regular meetings with a case manager and a Community Accountability and Reintegration Board. The survivor victim was to be notified about the responsible person’s progress and any reoffending.<sup>103</sup>

A peer-reviewed report on RESTORE found high levels of completion and satisfaction. Nearly all cases in which both parties consented made it to the conferencing stage, and among felony and misdemeanor defendants whose conferences took place, 80 percent completed the program. Two felony defendants were terminated for non-compliance arising from alcoholism, homelessness, or financial problems, and another felony defendant recanted his acceptance of responsibility and withdrew. There was only one re-arrest.<sup>104</sup> The preparation stage, conference, and redress plan proved satisfactory to more than 90 percent of participants. Survivor victims who attended their conferences reported the most positive experiences (100 percent were satisfied with multiple aspects of the program), and almost 80 percent of responsible persons were also satisfied with RESTORE.<sup>105</sup>

Experts nevertheless caution that pre-conviction RJ may not be well-suited to situations where the offense constitutes part of a pattern of domestic violence. For this reason, RESTORE addressed only a narrow category of first-time sexual assaults and excluded cases showing patterned abuse.<sup>106</sup> The interests of safety also required numerous modifications of standard RJ conferencing models. In addition to being confined to prosecutor-referred cases, RESTORE incorporated clinical risk assessment, the use of police stations for conferencing, stay-away

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101. *Id.* at 1626-27, 1632.

102. *Id.* at 1630, Fig. 1 (Stage 3).

103. *Id.* at 1630, Fig. 1 (Stages 3-4).

104. *Id.* at 1647.

105. *Id.*

106. See C. Quince Hopkins, Mary P. Koss & Karen J. Bachar, *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 301-02 (2004).

orders, and 12 months of supervision to assist responsible persons with the completion of their redress plans.<sup>107</sup>

While some progressive scholars might decry the amount of state involvement in RJ programs like RESTORE,<sup>108</sup> “diversion” remains a bad word among so-called legal feminists and battered women’s advocates for a different reason: the presumption that it lets offenders off the hook without punitive consequences.<sup>109</sup> Reforms that give RJ teeth by pairing it with the possibility of criminal punishment if the offender drops out of the program or reoffends have a greater likelihood of converting RJ skeptics than the total decriminalization of domestic violence. RESTORE took this approach to sexual assault by referring cases back to prosecutors when responsible parties did not complete the conferencing stage or failed to fulfill their redress agreement.<sup>110</sup>

As Quince Hopkins contends, “One can support the potential benefits of diversion for first-time offenders and still support . . . enhanced penalties for repeat offenders.”<sup>111</sup> Moreover, since defendants must be screened for amenability to participate in RJ, including assessment of their dangerousness and their willingness to accept responsibility, criminal prosecution will remain necessary for the most dangerous offenders, as well as those who claim innocence.

## 2. *Post-conviction Restorative Justice*

Diversion to RJ increasingly requires not only oral acceptance of responsibility, but also a formal guilty plea.<sup>112</sup> Post-conviction diversion makes it possible for individuals who plead guilty or are convicted to undergo an RJ process as a probation condition or to determine their sentence.<sup>113</sup> In a sentencing circle, the victim, community members, and sometimes even the judge and prosecutor, each have an opportunity to speak and determine the consequences for the offender. The underlying principle is an agreed-upon outcome, rather than

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107. Koss, *supra* note 99, at 1651.

108. See, e.g., Sarah Deer & Abigail Blackfoot, *The Limits of the State: Feminist Perspectives on Carceral Logic, Restorative Justice, and Sexual Violence*, 28 KANSAS J.L. & PUB. POL’Y 505, 525 (Summer 2019) (“Perhaps the real problem is not RJ itself, but its connection to state power and control that render it problematic.”)

109. Hopkins, *supra* note 84, at 316. See also Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1527 (1998) (discussing opposition to pre-trial diversion to batterer treatment programs).

110. See GOODMARK, A TROUBLED MARRIAGE, *supra* note 19, at 171.

111. See Hopkins, *supra* note 84, at 340.

112. See *id.*, at 344.

113. See Burkemper & Balsam, *supra* note 83, at 129-32 (describing surrogate victim-offender dialogue and circle sentencing programs that occur post-conviction as “constructs that work”).

the retributive concept of desert.<sup>114</sup> Sentencing circles share with batterer treatment the objective of changing the batterer's behavior.<sup>115</sup>

Many battered women's advocates have given up on batterer intervention programs (BIPs) as a tool for combatting violence against women, even though the completion of such programs continues to be a standard component of criminal sentences for domestic violence crimes.<sup>116</sup> To my mind, BIPs' lack of success arises from failure to envision how accountability and empathy can coexist.<sup>117</sup> Marrying the principles of RJ and "therapeutic justice" with the concept of batterer intervention might constitute an improvement. I suggest a coordinated model with the ability to address substance abuse, mental illness, past trauma, and cultural or racial background as contributors to—but not excuses for—intimate-partner abuse.<sup>118</sup> The remedies a sentencing circle envisions might include multi-faceted interventions to change, rather than restore, the status quo and give offenders a sense of being supported, rather than merely confronted with their wrongdoing.

Judges could also sentence convicted offenders to participate in a "peace circle" in lieu of incarceration or a conventional BIP. For example, in the predominantly Hispanic community of Nogales, Arizona, judges and prosecutors supported the establishment of the court-referred Circles of Peace program for domestic violence misdemeanants.<sup>119</sup> This path-breaking RJ approach—one of the first used for domestic violence treatment and prevention—eschews punishment or shaming in favor of repairing harm.<sup>120</sup> Victim participation in the circle is voluntary, which proponents of RJ contend it must be to avoid creating a dangerous, coercive environment.<sup>121</sup>

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114. *Id.* at 124; Margo Kaplan, *Restorative Justice and Campus Sexual Assault*, 89 *TEMPLE L. REV.* 701, 714 (2017).

115. While repair and healing constitute classic RJ goals, sentencing circles can also agree upon forward-looking measures aimed at behavioral change. *See* Burkemper & Balsam, *supra* note 83, at 132.

116. *See* EDWARD W. GONDOLF, *THE FUTURE OF BATTERER PROGRAMS* 1 (2012).

117. *See* Ramsey, *The Stereotyped Offender*, *supra* note 48, at 338, 363-69, 378-84, 415 (discussing the curriculum and shortcomings of the leading feminist model of batterer intervention, the Duluth Domestic Abuse Intervention Project, and arguing that stereotyping all offenders as misogynistic, heterosexual men obscures contextual factors that BIPs need to address).

118. *See* Ramsey, *The Stereotyped Offender*, *supra* note 48, at 384-414. *See also* John O. Haley, *Introduction: Beyond Retribution: An Integrated Approach to Restorative Justice*, 36 *WASH. UNIV. J.L. & POL'Y* 1, 6 (2011) (discussing therapeutic justice, especially the drug court model, and its relationship to RJ). Hybrids that combine RJ circles and Duluth-style BIPs have already halved recidivism compared to BIPs alone in one randomized study. *See* Linda G. Mills, Briana Barocas B, Robert P. Butters & Barak Ariel, *A randomized controlled trial of restorative justice-informed treatment for domestic violence crimes*, 3 *NAT. HUM. BEHAV.* 1284, 1290 (2019).

119. Linda G. Mills, Mary Helen Maley, & Yael Shy, *Circulos de Paz and the Promise of Peace, Restorative Justice Meets Intimate Violence*, 33 *N.Y.U. REV. L. & SOC. CHANGE* 127, 136, 145, 147 (2009).

120. "Circle Model Process" and "Frequently Asked Questions," Circles of Peace: A Restorative Justice Approach, *available at* [https://www.circlesofpeace.us/?page\\_id=58](https://www.circlesofpeace.us/?page_id=58) and <https://perma.cc/4EDR-B8UD> (last visited July 27, 2022).

121. *See* Burkemper & Balsam, *supra* note 83, at 125; Mills, Maley, & Shy, *supra* note 119, at 149. In a randomized controlled trial of Circles of Peace in Nogales, Arizona, 62 percent of victims



From its inception in 2004, Circles of Peace remained “closely connected to the criminal justice system and to the state” and involved substantial oversight by a judge.<sup>122</sup> Not only does this model call for offenders, euphemistically known as “applicants,” to be screened for safety, but those who “are non-compliant with the program—or . . . do not meet drug treatment or service requirements that are part of the social compact—[receive] an ‘Order to Show Cause’ to appear in court to tell the judge why they have not complied with the treatment. If they fail to appear, a new charge of ‘Failure to Obey’ is lodged by the prosecutor and a warrant is issued.”<sup>123</sup> In other words, the criminal justice system plays a back-up role to ensure offender accountability in this form of post-conviction diversion.

Data on the efficacy of Circles of Peace remains sparse. Reports of satisfaction by members of the pilot circles in 2005 helped the program expand, become a non-profit organization, and obtain a license from the state of Arizona to provide batterer treatment.<sup>124</sup> Yet a randomized clinical trial comparing Circles of Peace in Nogales to a local BIP found no statistically significant difference in terms of arrest recidivism for domestic violence.<sup>125</sup> A subsequent trial in Salt Lake City, Utah, produced more impressive data on the success of the Circles of Peace model. This study, like the one in Arizona, involved participants who had been convicted of domestic violence crimes. Under Utah’s state standards, all offenders had to complete an 18-week BIP; in addition, the experimental group participated in 6 weeks of circle sessions. The Utah study found “statistically significant and meaningful reductions of recidivism for all crimes, including DV” for offenders assigned to a hybrid “BIP-plus-CP” in contrast to those assigned only to a BIP. These results supported the conclusion that “BIP-plus-CP” reduced the incidence and severity of new crimes.<sup>126</sup>

Another promising model of RJ that can be implemented after the offender’s conviction—the surrogate victim-offender dialogue (SVOD)—is well-designed to avoid the manipulation of abuse survivors by their assailants. The SVOD requires a convicted person to converse with individuals who suffered similar crimes to those he committed without risking interaction with his actual victim.<sup>127</sup> SVODs, circles, and other RJ processes can be paired with a variety of criminal penalties, including imprisonment, and have even been used

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participated in at least one treatment session with offenders. Linda G. Mills, Briana Barocas & Barak Ariel. *The next generation of court-mandated domestic violence treatment: a comparison study of Batterer Intervention and Restorative Justice Programs*, 9 J. EXP. CRIMINOLOGY. 65, 78 (2013).

122. Mills, Maley & Shy, *supra* note 119, at 147.

123. *Id.* at 149-50.

124. *Id.* at 148.

125. Mills, Barocas & Ariel, *supra* note 121, at 83-84.

126. *Id.* at 1290.

127. See Burkemper & Balsam, *supra* note 83, at 129-30. The RESTORE program for sexual assault cases also offered survivors the option of designating a surrogate victim to attend conferences as their spokesperson, give an impact statement, and participate in drafting the redress agreement. Koss, *supra* note 99, at 1632.

127. See Burkemper & Balsam, *supra* note 83, at 129.

in prison settings to help homicide offenders understand the impact of the victim's violent death on surviving family members.<sup>128</sup> In a recent New York case, acceptance of responsibility and participation in an RJ circle by a robber whose victim died trying to resist him allowed the assailant to serve a shorter prison term than he otherwise would have faced.<sup>129</sup> Even more important to the goal of reducing the system's reliance on imprisonment, first-time offenders in non-fatal domestic violence cases can undergo RJ methods designed to induce empathy and healing *in lieu of* carceral outcomes. The use of surrogates makes this possible without lifting restraining orders, which promotes both survivor safety and the avoidance of imprisonment as a go-to penalty for the batterer.

RJ programs like these have shown success in terms of domestic violence victims' satisfaction, batterers' understanding of the harm, and a reduction in minimizing or transferring responsibility for violence to the victim. Though hard data is sparse, the effect on recidivism also seems promising.<sup>130</sup> But what if an offender doesn't comply and even escalates the abuse in a life-threatening manner? Concerns about enforcement make me skeptical of community-based transformative justice proposals that completely eschew police, prosecutors, and punishment for violent crime.

#### CONCLUSION

Serving the interests of domestic violence survivors, including their personal autonomy, need not eclipse safety and accountability as valid and achievable goals. Nor does the use of RJ within the criminal legal system require the "reprivatization" of domestic violence—if, by that term, we refer to the supposed refusal of the patriarchal state to address abuse occurring behind a veil of privacy.<sup>131</sup> As my forthcoming book will show,<sup>132</sup> both the veil of marital

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128. See Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFFALO L. REV. 635, 650-51 (2021).

129. See Sabrina Margret Bierer, *Bettering Prosecutorial Engagement to Reduce Crime, Prosecutions, and the Criminal Justice Footprint*, 32 FED. SENTENCING R. 212, 216 (2020) (discussing the use of an RJ circle with the family of a deceased doctor as part of the criminal sentence for the offender who caused his death).

130. See Burkemper & Balsam, *supra* note 83, at 130-33.

131. See GOODMARK, A TROUBLED MARRIAGE, *supra* note 19, at 170-71 (discussing the reasons, including concern about re-privatization, that the Battered Women's Movement has overwhelmingly opposed RJ in domestic violence cases); GOODMARK, DECRIMINALIZING, *supra* note 68, at 192-94 (similar). For a much-cited argument that, in the late 1800s, a veil of marital privacy shielded perpetrators, especially affluent white men, from prosecution for domestic violence, see Siegel, *supra* note 57, at 2118-19, 2151-63, 2206. Other scholars who have relied on Siegel's article or made similar claims of their own include ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 13, 233 n.4 (2000); JEANNIE SUK, AT HOME IN THE LAW 13 (2009); Kimberly D. Bailey, *It's Complicated: Privacy and Domestic Violence*, 49 AM. CRIM. L. REV. 1777, 1778 (2012); Beverly Balos, *A Man's Home is His Castle: How the Law Shelters Domestic Violence and Sexual Harassment*, 23 ST. LOUIS UNIV. PUBLIC L. REV. 77, 87-90 (2004); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1662, 1662 n.15, 1666 (2004).

132. RAMSEY, HOUSES OF PAIN, *supra* note 7.

privacy and the unwillingness of the criminal legal system to address domestic violence have been exaggerated to the level of myth.

Besides the inter-spousal immunity doctrine in tort and the marital rape exemption in criminal law,<sup>133</sup> there have been few moments during the last 150 years of American history in which the state saw domestic violence as a purely private matter. Only in the middle decades of the twentieth century did criminal law personnel widely deem counseling and reconciliation preferable to the prosecution of batterers. Arrest avoidance and non-prosecution were a phase to which second-wave feminists reacted, but not a centuries-old practice of the patriarchal state. To be sure, judges and prosecutors in the 1800s and early 1900s often deferred to the constrained choice of abused women to drop their cases. But wife-beating was widely denounced, and criminal convictions resulted in fines and jail sentences.

My objective is not to endorse the old *ad hoc* approach to public prosecution of batterers—simply to point out that it had a long history and that there are costs to oversimplifying the complexities of the past. Indeed, the criminal legal system's intervention in domestic violence both before and after the Battered Women's Movement was ineffective because its punishments failed to deter and because it did not offer adequate support for abuse victims. To the extent that Capers' proposal is inspired instead by the private prosecutions common in colonial America and the early republic, he encourages lively debate. His invitation to imagine how justice might be achieved without public prosecutors may spark creative ideas for reform. In the context of domestic violence, it is a welcome suggestion—but not one for which the eighteenth and nineteenth centuries offer easy answers.

The key to the state's ineffective response to domestic violence in the past lay in structural barriers to women's independence from abusive men. As long as those barriers persisted, no effort by criminal justice personnel to end domestic violence had much likelihood of success. Giving abused women the choice to pursue an assault and battery case or decline to prosecute the alleged offender when they lacked meaningful ability to end their intimate relationship, or leverage better treatment within it, meant that many simply asked for the criminal charges to be dismissed.

Even today, deciding whether and how to prosecute batterers comprises only a small part of the puzzle of addressing the wrong of domestic violence without further harming its victims. Survivors of abuse should be offered more input in the criminal process, including RJ options, as well as tools to find safety and socioeconomic stability outside it. But, in my view, eliminating public prosecution of domestic violence holds little promise to remedy this grave

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133. See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1375-78 (2000); Katz, *supra* note 45 at 385-85.

societal harm, end the abuse of individual victims, or substantially curb mass incarceration.