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Domestic Violence No-Contact Orders and the Autonomy Rights of Victims

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DOMESTIC VIOLENCE NO-CONTACT ORDERS AND THE AUTONOMY RIGHTS OF VICTIMS

She sat in the first row, her children by her side. She was easy to pick out of the crowded courtroom. In part, because the regulars—the probation officers, the interpreters, the victims' advocates, the daily courtroom watchers—of the Rhode Island Superior Court are easily recognizable. Also, although she wasn't keeping an eye out for her lawyer—she didn't have a lawyer—she nervously watched everything and everyone, sure that someone would ask her to leave. She wore her best outfit and kept the kids quiet and still, showing proper respect. When her name was read there was the moment of hesitation seen time and again in the courtroom. Should she stand up? Go through the gate, into the inner sanctum where the judge sat? As she half-stood, looking for a signal from someone—a uniform, a suit, a robe—who knew what she was supposed to do, she heard the judge ask the prosecutor for a recommendation. Without looking up, the prosecutor indicated that the Attorney General's office would recommend denial. She didn't know the woman speaking, had never met her.

Before she had managed to straighten her skirt, the judge announced, "Motion dismissed," and turned to the next file. She looked around the room for a clue, for someone to tell her what had just happened. The sheriff approached her, knowing, as the regulars did, why she was there. He explained that her application to withdraw the no-contact order issued against her husband had been denied. "Maybe you should try again in three months?"

"But I didn't get to talk, I didn't get to tell them . . . who is she to decide . . . they never asked me why."

Scenes such as this can be witnessed several times a week in many courtrooms of the United States. In Rhode Island, the state decided what was best for this woman and her family without giving her an opportunity to be heard. Rhode Island is not alone in this approach; many other states, in the wake of growing public awareness, have developed similar statutes and policies to prosecute domestic violence offenses. It has taken more than twenty years to criminalize conduct that the criminal justice system has traditionally treated as an untouchable, "private" family matter. Today, strong anti-domestic violence laws and policies are in place and functioning, albeit to varying degrees, throughout the country. These laws are primarily intended to protect

individuals and society as a whole from the effects of domestic violence. Unfortunately, they have also tended to remove the victim from participating in essential decisions concerning her family, its structure and the prospects for resolution within the family. It may now be time to give the victim back her voice. In order to explore ways to reintroduce the victim's preferences into domestic violence jurisprudence, Part I of this Note will review the development of modern domestic violence law.[1] Part II will examine the personal and private autonomy rights at stake in domestic violence cases, as well as the constitutional decisions and tests that protect these rights.[2] Part III will propose a first step towards reinstating the victim and her wishes into the process.[3] To this end, the Note will focus on the current use of criminal protection orders—known as no-contact orders—by prosecutors and courts. Moreover, it will examine how the victim's wishes can be integrated into these decisions in the future.[4] The procedural hearing in which the no-contact order is typically imposed, pre-trial release, provides an ideal setting in which to balance the State's interest in addressing crimes of domestic violence and the private autonomy interests of the victim.

I. The Development of Domestic Violence Law

Until relatively recently, the criminal justice system had not aggressively pursued violence between domestic partners.[5] Not until the 1970s did the public perception of battered women and their abusive partners begin to change significantly.[6] With heightened public awareness, pressure to change the criminal justice system increased and the system began to respond.[7] As domestic violence became recognized as a societal and public safety issue, the need for legal intervention be-

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[1] *See infra* notes 5–100 and accompanying text.

[2] *See infra* notes 101–55 and accompanying text.

[3] *See infra* notes 156–228 and accompanying text.

[4] *See infra* notes 211–28 and accompanying text.

[5] *See generally* Pamela Blass Bracher, *Mandatory Arrest for Domestic Violence: The City of Cincinnati's Simple Solution to a Complex Problem*, 65 U. Cin. L. Rev. 155, 160–63 (1996); Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 Fordham L. Rev. 853, 853–55 (1994); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849, 1857–58 (1996) [hereinafter *No Right to Choose*]; Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 Wash. L. Rev. 267, 267–68 (1985).

[6] *See* Waits, *supra* note 5, at 267–68.

[7] *See id.* at 268.

came apparent, resulting in domestic violence legislation on both the state and federal levels.[8]

Both English and American law historically condoned wife beating.[9] The earliest reported case of a woman charging her husband in court for domestic violence is a fourteenth-century English case, *Neffeld v. Neffeld*.[10] The court, yielding to English common law—which treated married women as adjuncts of their husbands with no independent legal identity or status—denied the woman relief and sent her back to her marital home.[11] Following the English tradition, American women were denied independent legal identities until the early part of the twentieth century.[12] State laws legalizing wife beating were prevalent throughout the United States.[13] Not until 1920 did all states remove laws permitting, or enact laws prohibiting, wife beating.[14] Another fifty years would pass, however, before the criminal justice system would abandon nonintervention policies, such as non-arrest policies, and begin treating domestic violence as a serious crime.[15]

Historically, both social norms and limits to legal authority typically resulted in nonintervention and non-arrest policies in police departments throughout the country.[16] Domestic violence calls were assigned a low response priority, and mediation attempts by responding officers were encouraged while actual arrests were discouraged.[17]

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[8] *See generally* Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1516 (1998) [hereinafter *Paradox of Hope*]; *No Right to Choose*, *supra* note 5, at 1859–60.

[9] *See* Bracher, *supra* note 5, at 160.

[10] *See* Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171, 184 (1994).

[11] *See* Del Martin, *The Historical Roots of Domestic Violence*, *in* DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 3, 6 (Daniel J. Sonkin, ed., 1987) (attributing to William Blackstone "[b]y marriage the husband and wife are one person in law; that the very being or legal existence of woman is suspended in marriage.").

[12] *See id.* at 6.

[13] *See id.* The Mississippi Supreme Court, in 1824, ruled that a husband can beat his wife in "cases of emergency." *See id.* at 6. Laws allowing husbands to hit their wives with "a switch no bigger than his thumb" were enacted in most states during the seventeenth and eighteenth centuries. *See id.* Even as the North Carolina Court, in 1874, held that a husband could never chastise his wife, it went on to say that unless permanent injury had been inflicted upon the wife, the matter was not of public concern. *See id.*

[14] *See No Right to Choose*, *supra* note 5, at 1857.

[15] *See id.*

[16] *See id.* at 1859; Bracher, *supra* note 5, at 161.

[17] *See* Bracher, *supra* note 5, at 161; *see also Response from the Criminal Justice System* (visited Nov. 7, 1998) <http://home.cybergirl.com/dv/stat/statcrim.html>, *citing* U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, *Violence Against Women: A National Crime Victimization Survey Report*, 9 (1994) (finding that police were more likely to respond within five minutes if the offender was a stranger than if an offender was known to the female victim).

Separating the parties was often the extent of police intervention. This included removing either the abuser or the victim from the home and informing the victim of the ramifications of arrest—loss of income, court costs and public testimony.[18]

Successful court challenges and the accompanying publicity instigated changes in police policies and led to legislative responses on both the state and federal level.[19] In 1977, in *Bruno v. Codd*, one of the earliest challenges was launched in a suit against the New York City Police Department and the New York Family Court.[20] The plaintiffs claimed that police officers had failed to take action against abusive spouses even when evidence of assault was unmistakable.[21] Instead, the officers would advise a victim that she could not act when her abuser was her spouse and that her only remedy was to obtain an order of protection from the Family Court.[22] The Family Court failed to advise the battered wives of their statutory right to petition immediately for such orders, instead assigning the women conference dates often weeks or months in the future.[23] The New York Supreme Court found that the police failed to perform their duty to protect battered wives as they would any other similarly situated citizen by pursuing a discriminatory police policy.[24] The court also found that the Family Court failed to fulfill its statutory duties and responsibilities, showing a callous disregard for women in need of immediate protection from their abusive husbands.[25] The trial court, in denying the police department's motion to dismiss, stated:

> [f]or too long, Anglo-American law treated a man's physical abuse of his wife as different from any other assault, and,

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[18] *See* Bracher, *supra* note 5, at 161.

[19] *See id.* at 163–65, *citing* Scott v. Hart, No. C-762395 (N.D. Cal., filed Oct. 28, 1976). In a class action suit against the Chief of Police of Oakland, California for failure to respond or ineffectual response to domestic violence calls which was settled out of court, the settlement gave the plaintiffs most of the relief they sought including an agreement to: (1) quicken response to domestic violence calls; (2) arrest whenever probable cause was found; and (3) prohibit the use of adverse consequences to pressure victims to drop charges. *See id.*

[20] *See* Bruno v. Codd, 396 N.Y.S.2d 974, 976 (N.Y. Sup. Ct. 1977), *rev'd*, 393 N.E.2d 976 (N.Y. 1979).

[21] *See id.* at 976. In one case, the police arrived after a husband had beaten his wife and "brandished a straight razor . . . tore [the victim's] blouse off [her] body and gouged [her] face, neck, shoulders and hands with his nails, in full public view." *Id.* The police advised the woman that they could do nothing since it was a family matter. *See id.*

[22] *See id.*

[23] *See Bruno*, 396 N.Y.S. at 976, 978.

[24] *See id.* at 977.

[25] *See id.* at 979.

> indeed, as an acceptable practice. If the allegations of the instant complaint—buttressed by hundreds of pages of affidavits—are true, only the written law has changed; in reality, a wife beating is still condoned, if not approved, by some of those charged with protecting its victims.[26]

Following the denial of its motion to dismiss, the New York Police Department entered into a consent decree with the plaintiffs.[27] The consent decree provided for changes in police policies to improve response time and arrest rates of domestic violence complaints.[28] The New York Court of Appeals dismissed the charges against the New York Family Court after procedural changes were announced.[29] These changes, later backed by a legislative amendment to the Family Court Act, required court clerks to advise battered women of their rights to an immediate protective order hearing before a judge.[30]

In 1984, in *Thurman v. City of Torrington*, a federal jury in the United States District Court for the District of Connecticut awarded the plaintiff, a battered wife, $2.3 million on the grounds that the Torrington police were negligent in their failure to protect her from her abusive spouse.[31] The court held the police department liable for its non-arrest policy in domestic violence cases, reasoning that the policy was, in effect, sexual discrimination. As a result, police departments and legislatures throughout the United States, concerned about similar lawsuits and liabilities, began to replace non-arrest and nonintervention policies with more aggressive policies.[32] The first step for many jurisdictions was to provide police officers with the legal authority

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[26] *Id.* at 975–76 (internal citations omitted).

[27] *See* Joan Zorza, *The Criminal Law of Misdemeanor Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 58–59 (1992).

[28] *See id.*

[29] *See id.* at 58.

[30] *See id.*

[31] *See* 595 F. Supp. 1521 (D. Conn. 1984); Zorza, *supra* note 27, at 60. The plaintiff, Tracey Thurman, alleging that her constitutional rights had been violated when police failed to act on reported threats and assaults by her husband, filed a civil action against the City of Torrington and its police officials. *See Thurman*, 595 F. Supp. at 1524. Ms. Thurman notified the police of repeated threats made by her husband. *See id.* When, on June 10, 1983, Ms. Thurman contacted police again, it took over 25 minutes for a single officer to arrive. *See id.* at 1525. She had been stabbed in the neck, chest and throat. *See id.* Her husband continued to beat her in spite of the presence of the police officer; the officer did not intervene. *See id.* at 1526. More officers arrived on the scene yet no attempt was made to prevent Mr. Thurman from his continued abuse. *See Thurman*, 595 F. Supp. at 1524. Police arrested Mr. Thurman only after he threateningly approached his wife while she was laying on a stretcher. *See id.*

[32] *See* Bracher, *supra* note 5, at 165; *No Right to Choose, supra* note 5, at 1858.

to arrest at the scene of a domestic assault.[33] Previously, unless a misdemeanor occurred in the officer's presence or the officer could establish probable cause that a felony had taken place, the officer legally could not make a warrantless arrest.[34] When, in 1984, the United States Attorney General recommended arrest as the standard police policy for domestic violence cases, legal reform efforts were initiated nationwide.[35] Based on this recommendation, all fifty states now provide for warrantless arrests, by making an exception to the in-presence requirement when an officer has probable cause to believe that a misdemeanor has been committed or a restraining order has been violated.[36] These statutes can vary in the amount of discretion accorded to the police officer: (1) permissive arrest statutes afford police officers considerable discretion; (2) preferential arrest statutes limit police discretion; and (3) mandatory arrest statutes completely restrict police discretion.[37] Currently, most states have implemented either preferential or mandatory arrest statutes.[38] Although the underlying aim of these statutes is to remove institutional resistance to arrest by the police, the statutes also remove the victim as the decisionmaker.

With stronger arrest policies in place, anti-domestic violence advocates next turned their attention to reform of prosecution practices.[39] Like other members of the criminal justice system, prosecutors historically considered domestic violence a private crime and thus, for the most part, failed to initiate or follow through on charges.[40] In addition, victim noncooperation and reluctance or refusal to participate were cited as reasons for not pursuing charges.[41] If victims made their reluctance known, prosecutors were likely to dispose of the cases

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[33] *See No Right to Choose, supra* note 5, at 1859.

[34] *See id.*

[35] *See id.* at 1859 n.32, *citing* ATTORNEY GEN.'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 22–23 (1984).

[36] *See No Right to Choose, supra* note 5, at 1859.

[37] *See* Bracher, *supra* note 5, at 166, 168–69, 170; *Paradox of Hope, supra* note 8, at 1518–19, 1520.

[38] *See Paradox of Hope, supra* note 8, at 1519 & n.47. Preferred arrest statutes are generally worded "should arrest," encouraging but not requiring officers to arrest when probable cause is encountered. *See id.* at 1519 n.47. In contrast, jurisdictions following mandatory arrest policies have "shall arrest" within the statutory language. *See id.*

[39] *See No Right to Choose, supra* note 5, at 1860.

[40] *See* Corsilles, *supra* note 5, at 866. Although prosecutors are given "great latitude and little accountability" in deciding whether to forgo or proceed in domestic violence cases, they remain reluctant to proceed with domestic violence cases. *See id.* at 866–67. Prosecutors remain hampered by a complex set of motivations (such as maintaining conviction rates) and beliefs that the violence is inconsequential, victims are to blame or that harm does not reach societal proportions. *See id.* at 867.

[41] *See No Right to Choose, supra* note 5, at 1860. Sometimes charges were dropped solely on

by dropping the charges.[42] Approximately fifty to eighty percent of cases, depending on the jurisdiction, were thus disposed.[43] Many jurisdictions responded to this situation by limiting or removing the prosecutor's discretion when deciding whether to proceed with a case.[44]

The most aggressive prosecution policies are those of mandatory prosecution. Mandatory prosecution policies, also referred to as no-drop policies, are intended to check prosecutorial discretion. Under a no-drop policy, a prosecutor cannot routinely dismiss charges at the victim's request, but rather must pursue the case and elicit the victim's cooperation.[45] These policies represent both the intent of the state to pursue domestic violence cases and the protocol by which to do so, despite nonparticipation by the victim.[46] No-drop policies underscore that the state, and not the victim, is the party to the prosecution.[47] For example, Rhode Island state law imposes a duty on the court to "make clear to the defendant and the victim that the prosecution of the domestic violence action is determined by the prosecutor and not the victim."[48] If after charges have been filed the victim indicates that she will not support the prosecution, the no-drop policy directs prosecutors to: (1) continue, notwithstanding the victim's reluctance; (2) convey to the victim that the state controls the case; and (3) facilitate victim participation in the prosecution.[49] Several perceived benefits have been

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the prosecutor's expectation that the victim would ultimately change her mind. *See* Corsilles, *supra* note 5, at 867. It continues to be difficult to determine the extent to which victims are influenced by the prosecutor's reluctance to move forward. *See id.* Prosecutors have discouraged victims by: (1) conveying disbelief; (2) actively outlining the disadvantages of pursuing the charges; (3) delaying the institution of charges; and (4) abdicating control for dismissing the case to the victim. *See id.* at 868–69. Many victims, discouraged by the legal process, may then decide that the cost of proceeding with the prosecution outweighs the potential benefits. *See id.* at 870; *see also* Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 173–74 (1997) (stating that, because the victim will often decline to press charges, prosecutors cannot rely on the victim of domestic violence to vindicate the State's interests in domestic violence cases).

[42] *See* Corsilles, *supra* note 5, at 857.

[43] *See id.*

[44] *See id.* at 874; *No Right to Choose*, *supra* note 5, at 1861–62.

[45] *See* Corsilles, *supra* note 5, at 859; *No Right to Choose*, *supra* note 5, at 1862.

[46] *See* Corsilles, *supra* note 5, at 858; *No Right to Choose*, *supra* note 5, at 1862–63.

[47] *See* Corsilles, *supra* note 5, at 858; *see also* Wills, *supra* note 41, at 173 (asserting that the prosecutor's client is the State, not the victim).

[48] R.I. GEN. LAWS § 12–29–4(b)(4) (1997).

[49] *See* Corsilles, *supra* note 5, at 859. Viewing mandated participation as a better choice than dismissal when encountering an uncooperative witness, Professor Hanna acknowledges that a woman's sense of autonomy is threatened by the compromise. *See No Right to Choose*, *supra* note 5, at 1856. Forcing the witness to take the stand may be avoided if the prosecutors gather enough outside evidence. *See id.* at 1867. Participation must be mandated, however, if necessary to proceed with the case. *See id.* at 1857. Professor Hanna states that "the societal benefits gained

attributed to proceeding with the prosecution with or without the victim's cooperation. Among these are reductions in the dismissal rates, increased victim cooperation and minimization of the victim's value to the batterer as an ally in no-drop jurisdictions.[50] There are also recognized drawbacks to these policies. When compelled against her will to participate in a proceeding, the victim's right to self-determination is yet again subjugated—this time to the prosecutor.[51] The decision whether to prosecute could be the victim's opportunity to take a proactive step toward removing violence in her life and taking control in a relationship in which she previously was powerless.[52] A policy which mandates the removal of this opportunity and instead replaces one domination with another may drive the reluctant victim to side with her battering partner, further entrenching her in the abusive relationship.[53]

Pro-prosecution policies, whether they are no-drop policies or less stringent approaches to limiting prosecutorial discretion, vary greatly among jurisdictions.[54] At the federal level, the Violence Against Women Act of 1994 ("VAWA") attempts to provide a multifaceted national response to the issues of domestic violence, including extensive funding to states establishing pro-prosecution policies.[55] Recently the United States Court of Appeals for the Fourth Circuit, in *Brzonkala v. Virginia Polytechnic Institute*, found one provision of VAWA, which provided for a private cause of action against perpetrators of violence motivated by gender, to exceed Congress' Commerce Clause authority.[56] The court did not examine any other provision of the act.[57] Provisions authorizing

through this criminal justice response to domestic violence far outweighs short-term costs to women's autonomy and collective safety." *Id.* When aggressive policies mandate prosecution, the incentive for the batterer to manipulate or coerce the victim is minimized since she no longer controls the process. *See id.* at 1865. Suggesting that mandated participation continue through the life of the case, Professor Hanna would require the woman to sign statements, be photographed to document injuries, produce her children if subpoenaed, appear in court and, if necessary, be forced to testify. *See No Right to Choose, supra* note 5, at 1867. Since 90% to 95% of cases end in plea bargains, instances of forced testimony would be rare. *See id.*

[50] *See* Corsilles, *supra* note 5, at 873–74; Wills, *supra* note 41, at 180.

[51] *See No Right to Choose, supra* note 5, at 1865–66; Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183, 191 (1997).

[52] *See* Mills, *supra* note 51, at 191.

[53] *See id.* at 190–91.

[54] *See* Corsilles, *supra* note 5, at 859–60; *No Right to Choose, supra* note 5, at 1864.

[55] *See* 42 U.S.C. § 10410(a)(2)(E) (1998).

[56] *See* Brzonkala v. Virginia Polytechnic Inst., Nos. 96–1814, 96–2316, 1999 WL 111891, at *2 (4th Cir. 1999); *see also* 42 U.S.C. § 13981 (establishing a federal substantive right "to be free from crimes of violence motivated by gender" and a tort action allowing compensatory and/or punitive damages and injunctive, declaratory or other appropriate relief).

[57] *See Brzonkala*, 1999 WL 111891, at *2.

federal grants to fund state domestic violence coalitions, which further the purpose of domestic violence intervention and prevention through activities such as "the adoption of aggressive and vertical prosecution policies," have not been challenged and remain in effect.[58] Furthermore, the federal government continues to make available "model state leadership grants" to ten states with statewide policies that "authorize and encourage prosecutors to pursue cases where a criminal case can be proved, including proceeding without the active involvement of the victim if necessary; and . . . implement model projects that include . . . a 'no-drop' prosecution policy."[59]

In addition, four states have passed legislation favoring either pro-prosecution or mandatory prosecution policies in domestic violence cases, but the nuances of these laws vary by state.[60] Florida law mandates criminal prosecution as the "favored method" for enforcing domestic violence injunctions and requires each circuit to "adopt a pro-prosecution policy for acts of domestic violence."[61] Utah law also encourages the adoption of no-drop policies and specifically disallows dismissal by the prosecutor or judge at the victim's request, unless there is "reasonable cause" to think that the victim would "benefit."[62] Wisconsin's statute directs all district attorneys' offices to "develop, adopt and implement written policies" that are not based on the victim's consent to prosecute.[63] Minnesota, adopting a different approach, requires city and county attorneys to develop and implement a plan to expedite and improve the efficiency of domestic abuse cases, including methods for gathering evidence exclusive of the victim's testimony.[64]

Furthermore, some municipalities have implemented pro-prosecution policies, either as written protocols or through unwritten office

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[58] *See id.*; 42 U.S.C. § 10410(a)(2)(E) (1998).

[59] 42 U.S.C. § 10415(b)(3)(A)–(B) (1998). States that have implemented a "vertical prosecution" policy may also qualify for the grants. *See id.* Under vertical prosecution policies, a specialized prosecutor or prosecution unit is assigned the case after arraignment and stays with the case through its completion. *See No Right to Choose, supra* note 5, at 1910.

[60] *See, e.g.*, FLA. STAT. ch. 741.2901(2) (1997); MINN. STAT. § 611A.0311(b)(4) (1997); UTAH CODE ANN. § 77–36–2.7 (1998); WIS. STAT. § 968.075(7) (1997).

[61] FLA. STAT. ch. 741.2901(2). In addition, the statute requires each state attorney to develop specialized units or prosecutors for domestic violence cases. *See id.* ch. 741.2901(1).

[62] *See* UTAH CODE ANN. § 77–36–2.7(1)(e)(1998).

[63] *See* WIS. STAT. § 968.075(7) (1997). In addition, the prosecutor cannot decide against prosecution because of an absence of visible injury or because of the relationship of the persons involved in the incident. *See id.* § 968.075(7)(a)(1, 3). The statute also calls for an annual report indicating the number of arrests, prosecutions and convictions by each district attorney. *See id.* § 968.075(9).

[64] *See* MINN. STAT. § 611A.0311(1)(b) (1997). The plan must also address the following: early

practices.[65] These policies tend to focus on obtaining victim participation, often resorting to issuing subpoenas to victims.[66] Although some municipal policies allow victims to drop charges after meeting certain criteria,[67] others are more stringent, with some even approaching mandated victim participation.[68] Both San Diego, California and Duluth, Minnesota city attorneys issue subpoenas to elicit victim participation.[69] Similarly, in 1983, under an Anchorage, Alaska no-drop policy, a victim who had filed a complaint and then changed her mind was jailed overnight for refusal to cooperate.[70] The victim was released when her husband agreed to probation and counseling.[71] Mandated participation policies such as those above have been criticized as being invasive and substantially infringing upon the victim's autonomy.[72] Advocates of mandatory participation, however, believe that it is a better choice than dismissal when encountering an uncooperative witness.[73] They argue that the societal benefits of prosecuting abusers outweigh the short-term costs to women's autonomy and collective safety.[74]

A substantially less invasive tactic for confronting domestic violence is the mandatory no-contact order. In most jurisdictions, a criminal protection order, also known as a criminal no-contact order, is issued as a condition of a pretrial release or sentencing when a domes-

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assignment of trial prosecutor; procedures to facilitate early contact between the prosecutor and victim in order to acquaint the victim with the process, including her role as a witness for the prosecution; procedures to encourage the prosecution of all domestic abuse cases where a crime can be proven; and the use of subpoenas to victims. *See id.* § 611A.0311(1)(b)(1, 2, 4, 7).

[65] *See* Corsilles, *supra* note 5, at 859–62.

[66] *See id.* at 860.

[67] *See No Right to Choose, supra* note 5, at 1863–64. In Alexandria, Virginia, a victim can drop charges after appearing before a judge to explain her refusal. *See id.* Although the charges will not be automatically dismissed when a victim changes her mind, the no-drop policy of Jefferson County, Kentucky, allows the prosecution to dismiss, with the county's domestic violence unit's consent, once the prosecutor has obtained a sworn statement from the victim explaining her reasons for withdrawing. *See* Corsilles, *supra* note 5, at 860. A victim will be allowed to sign a "drop form" in Marion County, Indiana, as long as she has contacted her legal advocate and has been advised of the risk of being revictimized if the charges are dropped. *See id.* at 861.

[68] *See* Corsilles, *supra* note 5, at 860, 862; *No Right to Choose, supra* note 5, at 1866.

[69] *See* Corsilles, *supra* note 5, at 860, 862. The official policy of the San Diego City Attorney is to issue an arrest warrant, at the request of a specially trained domestic violence prosecutor, if a subpoenaed victim fails to show and the case cannot proceed without her. *See id.* at 860. All victims, irrespective of their willingness to testify, are subpoenaed in Duluth in an effort to shield the victim from the appearance of responsibility. *See id.* at 862.

[70] *See No Right to Choose, supra* note 5, at 1866 & n.76, *citing* John Riley, *Spouse-Abuse Victim Jailed After No-Drop Policy Invoked*, NAT'L L.J., Aug. 22, 1983, at 4.

[71] *See id.*

[72] *See id.* at 1856, 1870.

[73] *See id.* at 1856.

[74] *See id.* at 1857.

tic violence arrest has been made.[75] A court issues a criminal no-contact order as part of another criminal proceeding, such as bail determination, with the state acting as a party.[76] No-contact orders typically prohibit the defendant from directly or indirectly contacting the victim and from returning to or approaching the home or any other location where the victim is likely to be found.[77] The discretion accorded to the court with respect to the issuance of a criminal protection order, including which conditions to stipulate, varies by jurisdiction.[78]

The governing statutes of several states require that a no-contact order be issued as a condition of pretrial release, thus limiting the opportunity for victim input.[79] For example, the Rhode Island statute mandates that the court impose a no-contact order, providing that:

> [b]ecause of the likelihood of repeated violence directed at those who have been victims of domestic violence in the past, when a person is charged with or arrested for a crime involving domestic violence, that person may not be released from custody on bail . . . without first appearing before the court . . . [t]he court . . . shall issue a no-contact order prohibiting the person charged or arrested from having contact with the victim.[80]

By the same token, Colorado, in mandating the issuance of restraining orders against domestic violence defendants, requires that the order be issued immediately, upon first appearance before the court, and continue until final disposition of the action.[81] Similarly, both South Dakota and Utah also mandate a no-contact order whenever bond is set in domestic violence cases.[82] Although these statutes are meant to protect victims from ongoing battering, they

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[75] *See* Christopher R. Frank, *Criminal Protection Orders in Domestic Violence Cases: Getting Rid of Rats with Snakes*, 50 U. MIAMI L. REV. 919, 922 (1996).

[76] *See id.* at 922.

[77] *See, e.g.*, ALASKA STAT. § 18.66.100(c)(2, 3) (Michie 1997); COLO. REV. STAT. ANN. § 18–1–1001(3)(a, b) (West 1998); N.C. GEN. STAT. § 15A-534.1(a)(2) (1997).

[78] *See* Frank, *supra* note 75, at 922.

[79] *See, e.g.*, ALASKA STAT. § 12.30.027 (Michie 1997); COLO. REV. STAT. ANN. § 18–1–1001 (West 1998); R.I. GEN. LAWS § 12–29–4(a)(1) (1997); S. D. CODIFIED LAWS § 25–10–23 (Michie 1998); UTAH CODE ANN. § 77–36–2.5(1) (1998).

[80] R.I. GEN. LAWS § 12–29–4(a)(1) (1997). The statute further states that the court shall determine, at time of arraignment, whether the no-contact order shall be extended. *See id.* § 12–29–4(a)(2).

[81] *See* COLO. REV. STAT. ANN. § 18–1–1001(1) (West 1998).

[82] *See* S. D. CODIFIED LAWS § 25–10–23 (Michie 1998); UTAH CODE ANN. § 77–36–2.5(1) (1998). In addition, some municipalities have also instituted, either through local legislation or practice, a mandatory no-contact order policy. *See* Frank, *supra* note 75, at 933. One such example

also impose upon the victim the same "no contact" condition, causing a split in her family without consideration of, or in opposition to, her wishes.[83]

In contrast, other jurisdictions require the court to evaluate factors such as past conduct by the defendant, drug or alcohol abuse and access to weapons before determining whether a no-contact order is appropriate.[84] The Florida statute requires the State Attorney's office to investigate the defendant's history, including prior arrests for domestic violence, prior arrests for non-domestic charges and prior injunctions for protection filed against the defendant.[85] This provision allows the court to consider properly the safety of the victim when determining pretrial release conditions.[86] New York requires a similar review of the defendant's history by requiring the courts to make a considered determination before directing the defendant to stay away from the home.[87] When a statute requires the court to consider factors such as those above before determining whether a no-contact order should be issued, the opportunity exists for the victim to express her wishes.[88] Of those states that have statutorily instituted criminal protection orders in domestic violence cases, none have expressly required courts to solicit or consider the victim's concerns.[89] Wisconsin, however, does allow the victim to waive the requirement for a temporary restraining order within the first seventy-two hours of the arrest, thereby restricting the court's discretion in imposing conditions upon the defendant's release.[90]

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is the city of San Francisco, where prosecutors automatically request no-contact orders at the defendant's first appearance, unless the victim specifically indicates she does not want one. *See id.* In Washington state, some municipal courts have extended the state law permitting no-contact orders, requiring that the orders be issued. *See* LAKEWOOD MUN. CT. R. 9(1) ("in all cases where an individual is arrested on a domestic violence or domestic violence related charge, . . . there shall be imposed a No Contact Order as a condition of release."); *see also* YAKIMA MUN. CT. R. 3.2 ("except at the time of arraignment, bail shall not be set for persons arrested for more than one count involving domestic violence or a new offense involving domestic violence when the person has been convicted of domestic violence or is awaiting trial or other disposition of any other charge involving domestic violence.")

[83] *See* Frank, *supra* note 75, at 931–32.

[84] *See, e.g.*, FLA. STAT. § 741.2901 (1997); N.Y. CRIM. PROC. LAW § 530.12 (McKinney 1997); 18 PA. CONS. STAT. ANN. § 2711 (West 1997).

[85] *See* FLA. STAT. § 741.2901(3) (1997).

[86] *See id.*

[87] *See* N.Y. CRIM. PROC. Law § 530.12(1)(a) (McKinney 1997).

[88] *See* Frank, *supra* note 75, at 941.

[89] *See, e.g.*, ALASKA STAT. § 12.30.027 (Michie 1997); COLO. REV. STAT. ANN. § 18–1–1001 (West 1998); FLA. STAT. ANN. § 741.2901 (West 1997); N.Y. CRIM. PROC. LAW § 530.12 (McKinney 1997); 18 PA. CONS. STAT. ANN. § 2711 (West 1997); R.I. Gen. Laws § 12–29–4(a)(1) (1997); S. D. CODIFIED LAWS § 25–10–23 (Michie 1998); UTAH CODE ANN. § 77–36–2.5(1) (1998).

[90] *See* WIS. STAT. § 968.075(5)(c)–(6) (1999).

Unlike the civil protection order, which is always sought by a specific petitioner, usually the victim, a criminal protection order does not require a specific petitioner.[91] Civil protection orders require a petitioner as a procedural safeguard, assuring that only interested parties who have made proper showing of need can restrict the rights of another.[92] In contrast, most criminal protection orders do not require that a specific petitioner be named.[93] In some states, the victim's name will appear as the petitioner only because statutory requirements allow members of the criminal justice system to file in the victim's name.[94] The court may even be able to issue, sua sponte, a temporary protection order.[95] By removing the victim as the petitioner, the system quells the victim's input, leaving the court without the information it needs to weigh the victim's wishes properly.[96]

Aggressive policies were needed to address the pervasiveness of domestic violence in American society and the institutionalized non-interventionist approach of the criminal justice system.[97] The introduction of mandatory arrest, prosecutorial mandates such as no-drop and participation policies and mandatory no-contact orders heightened the awareness of and response to domestic violence crimes within the justice system.[98] Each of these policies, however, progressively removed the victim from the decisionmaking process.[99] In doing so, the state's

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[91] *See* Frank, *supra* note 75, at 930. A victim of domestic violence can obtain an order of protection by first petitioning the court ex parte for a temporary order providing emergency relief. *See id.; see also* David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1191 (1995). Once the temporary order has been served on the batterer, the victim must attend a hearing and request that the civil protection order be made semi-permanent. *See* Zlotnick, *supra* at 1191–92.

[92] *See* Frank, *supra* note 75, at 922, 931.

[93] *See id.* at 930.

[94] *See* 725 ILL. COMP. STAT. 5/112A-2(a)(ii) (West 1998) (statute requires State Attorney to file the petition in the name of crime victim(s)); OHIO REV. CODE ANN. § 2919.26(A)(1) (Anderson 1998) (statute allows the arresting officer, if the victim is unable, to file a motion requesting a temporary protection order as a condition of pretrial release).

[95] *See* OHIO REV. CODE ANN. § 2919.26(D) (Anderson 1998). This aspect of the Ohio law was challenged in *Ohio ex rel. Mormile v. Garfield Heights Mun. Court. See* 607 N.E.2d 890, 890–91 (Ohio Ct. App. 1992), *appeal dismissed*, 602 N.E.2d 249 (Ohio 1992). Although neither the wife nor the arresting officer requested a no-contact order as a condition on release, the appeals court upheld the trial court's refusal to remove the condition requiring the husband to vacate the couple's home. *See Mormile*, 607 N.E.2d at 891. The couple had repeatedly petitioned, over an eight-month period, to have the order lifted. *See id.*

[96] *See* Frank, *supra* note 75, at 931–32.

[97] *See generally No Right to Choose, supra* note 5, at 1859–60; *Paradox of Hope, supra* note 8, at 1516; Waits, *supra* note 5, at 267–68.

[98] *See supra* notes 16–96 and accompanying text.

[99] *See* Frank, *supra* note 75, at 922; *No Right to Choose, supra* note 5, at 1862; *Paradox of Hope, supra* note 8, at 1519.

interest in addressing crimes of domestic violence was enhanced while the victim's deliberative and decisional autonomy was overlooked.[100]

II. Autonomy Rights of Domestic Violence Victims

Almost simultaneously with the development of modern domestic violence statutory and common law, the United States Supreme Court actively advanced the personal autonomy and privacy rights of individuals.[101] At the core of individual autonomy is the fundamental right to make decisions important to one's destiny.[102] The Supreme Court has found decisions such as whom to marry, whether to conceive a child, whether to terminate a pregnancy and whether to refuse life-sustaining medical treatment to be constitutionally protected liberty interests.[103] Deliberative autonomy, as established by the Court's substantive due process decisions, safeguards the privacy of individuals when deciding matters central to family structure.[104] The victim of domestic violence must confront issues and make decisions pivotal to the survival of her family; these decisions fall within the scope of guarantees provided by the Court's substantive due process decisions.[105]

A series of United States Supreme Court decisions beginning in 1965 defines deliberative autonomy jurisprudence.[106] In 1965, in *Griswold v. Connecticut*, the Supreme Court struck down a state law forbidding the use and distribution of contraceptives to married couples.[107] The Court focused on the impact on the marriage relationship rather than the autonomy of individuals, finding that the sanctity of marriage lies within a "zone of privacy."[108] In 1972, the Court broadened this

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[100] *See infra* notes 174–86 and accompanying text.

[101] *See generally* Planned Parenthood v. Casey, 505 U.S. 833, 849, 851 (1992); Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990); Whalen v. Roe, 429 U.S. 589, 599–600 (1977); Roe v. Wade, 410 U.S. 113, 153 (1973).

[102] *See* Christopher J. Keller, *Divining the Priest: A Case Comment on* Baehr v. Lewin, 12 Law & Ineq. J. 483, 486–87 (1994); *see also Whalen*, 429 U.S. at 600; *Wade*, 410 U.S. at 153.

[103] *See Cruzan*, 497 U.S. at 278–79; *Wade*, 410 U.S. at 153; Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[104] *See* Keller, *supra* note 102, at 487; *see generally* James E. Fleming, *Securing Deliberative Autonomy*, 48 Stan. L. Rev. 1, 10–14 (1995); *see also Casey*, 505 U.S. at 851 (looking to precedents which put limits on the state's right to interfere with personal decisions about family life, the Court found "matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . [to be] central to the liberty protected by the Fourteenth Amendment.").

[105] *See* Keller, *supra* note 102, at 486–87; *see also Whalen*, 429 U.S. at 600; *Wade*, 410 U.S. at 153; *Griswold*, 381 U.S. at 485–86.

[106] *See, e.g., Cruzan*, 497 U.S. at 278–79; *Wade*, 410 U.S. at 153; *Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 485–86.

[107] *See Griswold*, 381 U.S. at 485.

[108] *See id.* at 485–86.

holding in *Eisenstadt v. Baird*, finding that prohibiting the distribution of contraceptives to unmarried as well as married persons interfered with the individual right to privacy.[109] In *Griswold*, the Supreme Court focused on the marriage relationship and the privacy it should be accorded, while in *Eisenstadt* the focus was upon individual rights and deliberative autonomy.[110] The Court in *Eisenstadt* explained, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[111] Because of the historic treatment of privacy rights within families, this shift in focus from marital privacy rights to the rights of individuals to make autonomous decisions is particularly important when considering the autonomy rights of domestic violence victims.[112] A tradition of allowing violence against women, under the guise of family privacy, has required advocates of domestic violence reform to dismantle the "zone of privacy" in order to force the issue into the public sphere.[113] The "zone of privacy" concept was, however, a limited idea of privacy, one focused on the right to keep matters private rather than the view of privacy which is derived from an affirmative concept of liberty—a right to independent decisionmak-

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[109] *See Eisenstadt*, 405 U.S. 438, 453 (1972).

[110] *See id.* at 453–54; *Griswold*, 381 U.S. at 485; *see also Loving*, 388 U.S. at 10, 12. The Court invalidated a state ban on interracial marriages as a violation of the Fourteenth Amendment equal protection and due process clauses, describing marriage as "one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving*, 388 U.S. at 12, *quoting* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Recognizing the freedom to marry as "one of the vital personal rights essential to the orderly pursuit of happiness by free men," the Court disallowed interference by the state in a constitutionally protected personal decision. *Id.* Thus, the Court encompassed personal decisionmaking within the vital personal rights protected through substantive due process. *See id.*; *but see* Bowers v. Hardwick, 478 U.S. 186 (1986), *reh'g denied*, 478 U.S. 1039 (1986) (majority limiting right to privacy to traditional family sphere which does not extend to homosexual activity). In a challenge to a Georgia statute criminalizing sodomy, the Court held that the statute did not violate the fundamental rights of homosexuals. *See Bowers*, 478 U.S. at 189–90. Stating that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated," the court refused to extend the deliberative autonomy of previous cases to the present issue. *See id.* at 191. The majority defined constitutional privacy solely in terms of keeping the state out of the traditional sphere of family privacy, protecting only privacy interests. *See id.* Justice Blackmun's dissenting opinion, however, demonstrated a very different understanding of the constitutional right to privacy, specifically rejecting Justice White's historically-oriented theory. *See id.* at 203–04 (Blackmun, J., dissenting). Instead, Justice Blackmun viewed the privacy right as the right of individuals to autonomy over the most intimate aspects of their lives. *See id.* at 199–200.

[111] *Eisenstadt*, 405 U.S. at 453. The Court described the marital couple as "an association of two individuals, each with a separate intellectual and emotional makeup." *Id.*

[112] *See id.* at 453–54; *Loving*, 388 U.S. at 12; *No Right to Choose*, *supra* note 5, at 1869.

[113] *See No Right to Choose*, *supra* note 5, at 1869.

ing with respect to personal and intimate aspects of life.[114] The Court first articulated this second concept of privacy in 1977 in *Whalen v. Roe.*

In *Whalen*, the United States Supreme Court upheld a New York statute requiring state notification of all prescriptions written for certain drugs.[115] The Court found that the release of patients' names to the state did not violate a constitutionally protected "zone of privacy" between doctor and patient.[116] Justice Stevens, writing for a unanimous Court in *Whalen*, distinguished between the different forms of privacy recognized by the Supreme Court: "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."[117] This distinction between spacial and decisional aspects of privacy is a recognition that the issues of privacy go beyond mere bodily integrity to include a moral and intellectual autonomy expressed through personal choice.[118] Thus, although the domestic violence victim, due to the criminal nature of the offense committed against her, may not be able to claim a privacy interest in avoiding public disclosure, her interest in private decision-making is still protected.[119]

In 1973, the Supreme Court further expanded personal and deliberative autonomy rights in *Roe v. Wade.*[120] The Court found that a right to privacy is inherent in the liberty interest of the Fourteenth Amendment.[121] This right "encompass[ed] a woman's decision whether or not to terminate her pregnancy" and restricted state intru-

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[114] *See id.* at 1870–71.

[115] *See Whalen*, 429 U.S. at 591, 606.

[116] *See id.* at 603–04.

[117] *See id.* at 598–600 (internal citations omitted).

[118] *See* Lisa C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 204, 232 (1995).

[119] *See Whalen*, 429 U.S. at 598–600.

[120] *See* 410 U.S. at 153. The Court examined a Texas statute which prohibited procuring an abortion except when necessary to save the mother's life. *See id.* at 117–18. Finding that the statute violated the Fourteenth Amendment and privacy rights, the Court also recognized a legitimate state interest in the mother's health and the protection of viable life. *See id.* at 164–65. The Court established a trimester system for determining the extent of the state's interest in the developing life and the expectant mother's health. *See id.* The Court determined that prior to the end of the first trimester, the abortion decision must be left solely to the mother and her physician. *See id.* During the second trimester, the state's interest in promoting the mother's health could be manifested in regulations of abortion procedures. *See id.* After viability of the unborn child, somewhere near the end of the second trimester, the state's interest in potential life justifies proscribing abortion except where the life or health of the mother is at stake. *See id.*

[121] *See Roe*, 410 U.S. at 164–65.

sion upon that right.[122] The Court, however, limited the right of deliberative privacy with regard to abortions, stating that "at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant."[123] The Court ruled that a woman's right to privacy when considering an abortion must be measured against the state's interests, which grows in substantiality and becomes more compelling as the woman's pregnancy progresses to term.[124] Thus, the Court recognized a constitutional right of decisional privacy, yet not an absolute right; this right must be balanced against the opposing interests of the state.[125]

In 1992, in *Planned Parenthood v. Casey*, the Supreme Court revisited these issues.[126] The Court examined amendments to Pennsylvania's abortion statute, reaffirming the essential holding of *Roe* yet substituting an undue burden test to evaluate the viability of the fetus for the trimester scheme introduced in *Roe*.[127] Using the undue burden test, the Court affirmed the principle of *Roe*, stating that the "constitutional protection [of] personal decisions relating to marriage, procreation, contraception, [and] family relationships" had already been determined under the law.[128] Looking to precedent, the Court found that "matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . central to the liberty protected by the Fourteenth Amendment," limit the state's right to interfere with personal decisions about family life.[129] Justice Stevens, writing separately, focused on the rights of deliberative autonomy.[130] Stating that "[d]ecisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best . . . it must respect the individual's freedom to make such judgments," Justice Stevens found that freedom to decide matters of a personal and private nature was a constitutional liberty interest.[131] In spite of the recognition of decisional autonomy rights, *Casey* enhanced the state's power to regulate abortions, estab-

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[122] *See id.*

[123] *See id.* at 154, 155.

[124] *See id.* at 159, 162–63. The Court fixed the end of the first trimester as the point in time from which the state may regulate abortions. *See id.* at 163.

[125] *See Roe*, 410 U.S. at 163.

[126] 505 U.S. 833 (1992).

[127] *See id.* at 844, 874.

[128] *Id.* at 851.

[129] *Id.*

[130] *See id.* at 916 (Stevens, J., concurring in part and dissenting in part).

[131] *See Casey*, 505 U.S. at 915–16.

lishing an undue burden test as the standard for balancing the state's interest and the privacy interest of the woman.[132] Thus, the test for determining whether autonomy rights are violated requires balancing the liberty interests at stake against the relevant state interests that are inconsistent with the individual interest.[133] Therefore, in a domestic violence case, the state should not interfere with the deliberative autonomy of the victim unless the state's interest outweighs that of the victim.[134]

In 1976, in *Mathews v. Eldridge*, the United States Supreme Court enunciated the balancing test used to resolve competing individual and state interests.[135] The *Mathews* case questioned whether due process required a hearing before the termination of federal disability benefits.[136] The Fourteenth Amendment of the U.S. Constitution provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law."[137] The Fifth Amendment states that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law . . . ."[138] Thus, the Fourteenth and Fifth Amendments prohibit any state from arbitrarily depriving any person of liberty and impose upon the courts a duty to balance the conflicting interests.[139] The Court, looking to the Constitution's due process clauses, set out a test now employed by most courts to determine whether a deprivation imposed by a state comports with due process guarantees.[140] The court first must determine whether the private interest that will be affected by the state's action is constitutionally protected.[141] If the private interest does not meet this threshold requirement, procedural concerns are not implicated.[142] If the court deems the private interest at issue to be

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[132] *See id.* at 874 ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

[133] *See id.* at 877; *Cruzan*, 497 U.S. at 279. In deciding whether Missouri state law, requiring clear and convincing evidence of an incompetent's wishes to withdraw life-sustaining support, violated liberty rights guaranteed by the U.S. Constitution, the Court balanced the personal interest with the interests of the state. *See Cruzan*, 497 U.S. at 280. The Court found that "a State has more particular interests at stake. The choice between life and death is a deeply personal decision . . . [the State] may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements." *Id.* at 281.

[134] *See Casey*, 505 U.S. at 874; *Cruzan*, 497 U.S. at 280.

[135] *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

[136] *See id.* at 323.

[137] U.S. CONST. amend. XIV, § 1.

[138] U.S. CONST. amend. V.

[139] *See Mathews*, 424 U.S. at 332, 334–35.

[140] *See id.* at 334–35.

[141] *See id.*

[142] *See id.*; Frank, *supra* note 75, at 939.

constitutionally protected, the court then must balance the remaining factors: the risk of erroneous deprivation, the probable value of additional safeguards and the interest of the state government.[143] Courts have employed this test in domestic violence cases when balancing a personal liberty interest—the property interests of defendants and the deprivation of those interests when a defendant is ordered to stay away from his property—with the interests of the state.[144] One such case was *Blazel v. Bradley.*

In 1988, in *Blazel,* the United States District Court for the Western District of Wisconsin employed the *Mathews* test to analyze the respective rights at issue in a domestic violence case where an ex parte civil protection order had been issued.[145] The court recognized that depriving the defendant of his enjoyment of property, through the use of civil protection orders, directly implicates a constitutional question.[146] Both the property interests of the defendant and the privacy interests of the victim are protected under the Constitution, and the criminal justice system is obligated to provide mechanisms to assess properly these interests against the state's interests.[147] Where no-contact orders are statutorily mandated, deprivation of these rights occurs without case-by-case consideration by the very terms of the statute.[148] In jurisdictions that do not mandate no-contact orders, consideration of the apparent property and liberty interests of the defendant in a domestic violence case may occur, yet the deliberative autonomy of the victim is often overlooked.[149]

An increasing public perception that the rights of crime victims generally have been overlooked has caused Congress and many state legislatures to examine the issue of victim's rights.[150] In 1982, a Victim's Rights Amendment (VRA) to the U.S. Constitution was first proposed. Although the VRA has changed dramatically since then, it is expected to be brought before the current Congress for a vote this year.[151] The VRA, under its current name, the Victims' Bill of Rights Amendment,

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[143] *See* Frank, *supra* note 75, at 939.

[144] *See* Blazel v. Bradley, 698 F. Supp. 756, 763 (W.D. Wis. 1988).

[145] *See id.*

[146] *See id.* The federal district court expressed concern that although *Mathews* provided a mechanism for identifying and weighing rights, the case was silent on what specific procedural protections best addressed those rights.

[147] *See Mathews,* 424 U.S. at 332, 334–35.

[148] *See supra* notes 72–93 and accompanying text.

[149] *See id.*; Frank, *supra* note 75, at 940–41.

[150] *See* Jennie L. Caissie, Note, *Passing the Victims' Rights Amendment: A Nation's March Toward a More Perfect Union,* 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 647, 647, 663 (1998).

[151] *See id.* at 647 n.2, *citing* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT

seeks to balance the status of the victim with the constitutionally protected status of the accused by providing the following protections to the victim: (1) the right to be informed of the proceedings; (2) the right to be heard at crucial stages in the process; (3) the right to notification upon the release or escape of the defendant; (4) the right to a final disposition free from unreasonable delay; (5) the right to an order of restitution from the convicted offender; and (6) the right to have the victim's safety considered when determining a release from custody.[152] Many states have already amended their constitutions to provide similar protections.[153] Although such constitutional provisions would seem to accord the domestic violence victim with an opportunity to speak at bail and sentencing hearings, many of the states that have amended their constitutions also mandate no-contact orders in domestic violence cases.[154] Statutorily mandatory no-contact orders do not provide a mechanism or procedure for incorporating the concerns or wishes of the victim.[155] Thus, it is uncertain to what extent these constitutional provisions will assist domestic violence victims in the future.

III. Analysis

It remains unclear whether the efforts of the last twenty years have effectively reduced either the pervasiveness or the intractability of domestic violence within the American family.[156] Data regarding domestic violence is sparse, and the statistics that do exist are difficult to compare since methodology and definitions vary by jurisdiction.[157] Some of the available data indicate that progress has been made: intimate violence incidents against women dropped from 1.1 million

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(1982); *see also* S.J. Res. 44, 105th Cong., 2d Sess. (1998) (on July 7, 1998, the Senate Judiciary Committee approved and voted to report to the full Senate a victims' rights amendment embodied in this joint resolution).

[152] *See* S.J. Res. 44, 105th Cong., 2d Sess. (1998); Caissie, *supra* note 150, at 656 & n.63.

[153] *See, e.g.*, Alaska Const. art. I, § 24; Cal. Const. art. I, § 28; N.J. Const. art. I, ¶ 22; R.I. Const. art. I, § 23; *see also* Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 St. Mary's L.J. 1053, 1055 & n.9 (1998) (stating that twenty-nine states amended their constitutions by the end of 1996).

[154] *Compare, e.g.*, Alaska Const. art. I, § 24 (according victims with the right to speak at hearings), *and* Colo. Const. art. II, § 16a (providing for victim participation in hearings), *with* Alaska Stat. § 12.30.027 (1997) (providing for the issuance of mandatory no-contact orders), *and* Colo. Rev. Stat. § 18–1–1001 (1998) (providing for mandatory no-contact orders in domestic violence cases).

[155] *See supra* notes 72–93 and accompanying text.

[156] *See generally Paradox of Hope*, *supra* note 8, at 1517–18; Mills, *supra* note 51, at 190; Zlotnick, *supra* note 91, at 1158–59.

[157] *See Paradox of Hope*, *supra* note 8, at 1517–18; *No Right to Choose*, *supra* note 5, at 1864.

in 1993 to 840,000 in 1996.[158] Although several possible causes for this decrease have been suggested—the reform of domestic violence intervention, the general decline in violent crime or possibly the generational effect of heightened public awareness on the attitudes of younger women—the cause cannot be determined via empirical data since the data collection methods used today do not support this type of analysis.[159] Although it is clear that reformers have successfully heightened public awareness of the pervasiveness and severity of domestic violence within our society, one thing remains certain: intimate violence continues to pose a serious risk to women.[160]

Furthermore, scholars, practitioners and advocates still do not agree on the cause of violent behavior in batterers or how best to treat the problem of domestic violence.[161] Efforts to change institutional actors and their behavior through mandatory arrest and prosecution policies have not achieved the desired results.[162] Other reformers advocate psychological and behavioral approaches and support court mandated treatment of batterers.[163] The effectiveness of these approaches, as opposed to the traditional approaches of incarceration and proba-

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[158] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Characteristics of Crime* (visited on Nov. 17, 1998) <http://www.ojp.usdoj.gov/bjs/cvict_c.html>. Crimes of rape, sexual assault, robbery, aggravated assault and simple assault are included in these statistics. *See id.* Intimate violence against men did not vary significantly from 1992 to 1996. *See id.* From 1976–1996, on average, the murder rate of women by intimates dropped by 1%. *See id.*

[159] *See Paradox of Hope, supra* note 8, at 1517 n.43, 1524–25 (current national collection methods and resulting studies do not reflect the disposition of the case or the effects of mandated treatment).

[160] *See id.* at 1517 n.43; *see also Response from the Criminal Justice System,* (visited Nov. 17, 1998) http://home.cybergirl.com/dv/stat/starcrim.html> (based on a 1990 report of the National Institute of Justice, U.S. Dep't of Justice, stating that if all domestic violence were reported, one-third of the incidents would be classified as felony rapes, robberies or aggravated assaults).

[161] *See Paradox of Hope, supra* note 8, at 1511–12, 1513–15; *see also* Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships,* 15 HAMLINE L. REV. 115, 136 (1991) (reporting that victim advocates in Duluth felt that compelling victims to testify had the effect of punishing the victim for the abuse); Mills, *supra* note 51, at 183–84 (advocating a more flexible prosecution strategy, incorporating the victim's needs and personal experiences); Zlotnick, *supra* note 91, at 1177–78 (proposing an approach geared at keeping victims of domestic violence engaged in the criminal justice and social support systems by empowering, rather than disempowering, the victim).

[162] *See* Zlotnick, *supra* note 91, at 1173 (referencing studies which concluded that short-term arrests have little deterrent effect on batterers who have too much invested in their abusive relationship and could provoke additional assaults after release). Mandatory arrests, if not followed by swift and certain penalties, only serve to crowd dockets, causing further delay, with weak cases rather than achieving the desired deterrent effect. *See id.* at 1175. The available data also suggests that even in jurisdictions supporting mandatory prosecution, most cases still end with arrest. *See Paradox of Hope, supra* note 8, at 1520.

[163] *See Paradox of Hope, supra* note 8, at 1526, *citing* William L. Hart et al., U.S. Dep't of

tion, also remains unclear.[164] While practitioners and advocates wait for the availability of more empirical data, allowing for the proper evaluation of the various policies developed over the last twenty years, the autonomy rights of the victim should not be ignored. Working within the existing framework for domestic violence prosecution, steps can be taken to protect the victim's substantive due process rights.

One of the first steps is to recognize the domestic violence victim as an individual affected by unique circumstances and family relationships.[165] Domestic violence crosses socioeconomic boundaries; women of all classes and races are abused and men of all classes and races batter.[166] The impact of state intervention, however, can differ by race and culture particularly where past government action has resulted in justifiable wariness.[167] Preserving cultural identity often requires strong allegiance to the community as a whole, causing women to choose between fear of rejection or continued violence.[168] For instance, Afri-

Justice, Attorney General's Task Force on Family Violence: Final Report 22–23 (1984) (stating that "the most successful treatment occurs when mandated by the criminal justice system," the report encouraged the establishment of treatment programs to address batterers in cases where the injury to the victim was not serious). The Violence Against Women Act of 1994 also endorsed treatment programs as a punishment. *See* 18 U.S.C. § 3563(a) (1998) ("The court shall provide, as an explicit condition of a sentence of probation . . . for a domestic violence crime . . . by a defendant convicted of such an offense for the first time that the defendant attend a public, private, or private nonprofit offender rehabilitation program . . . .").

[164] *See Paradox of Hope, supra* note 8, at 1532–33, 1536. Studies monitoring the effectiveness of treatment programs provide inconclusive and varied results. *See id.* at 1533. Results suggesting that recidivism rates are not significantly different between men receiving treatment and those that have not or have dropped out of treatment programs. *See id; see also* Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2167 (1995) (stating that there is no evidence that counseling reduces the propensity for repeated violence). In addition, victims are more likely to remain with a batterer receiving counseling thereby increasing the likelihood of further abuse. *See id.*

[165] Throughout this Note I use feminine references for victims and masculine references for batterers. Although these references reflect the majority of domestic violence situations, men and women both have suffered as victims of batterers. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Characteristics of Crime* (visited on Nov. 17, 1998) <http://www.ojp.usdoj.gov/bjs/cvict_c.html> (reporting that in 1996 females were victims in three out of four instances of intimate murders and 85% of all non-lethal intimate violence). It must also be noted that domestic violence is not uniquely an issue for heterosexual couples; reported violence in gay and lesbian relationships occurs with the same statistical frequency found in heterosexual relationships. *See* Nancy E. Murphy, Note, *Queer Justice: Equal Protection for Victims of Same-sex Domestic Violence*, 30 VAL. U. L. REV. 335, 340 (1995). According to studies, 25% of lesbians and 27% of heterosexual women are abused by their partners. *See id.* at 340 n.34. Experts report that the level of violence within the gay community is the same as that in society at large. *See id.*

[166] *See* Ruttenberg, *supra* note 10, at 185; *see also* Zlotnick, *supra* note 91, at 1174 n.110 (stating that although domestic abuse is not bound by social or economic definitions, the deterrence effect of arrest is different on unemployed batterers than on employed batterers).

[167] *See* Ruttenberg, *supra* note 10, at 186; *see also* Mills, *supra* note 51, at 184 (finding that women may stay in abusive relationships because of cultural pressures).

[168] *See* Mills, *supra* note 51, at 184.

can-American women express greater reluctance to solicit intervention from the state.[169] In the African-American culture, where experience with the criminal justice system has created a mindset presupposing governmental coercion, family privacy is highly valued for the shelter it provides from the state.[170] In addition, African-American women and Latinas may be ostracized by their communities for contributing to racial stereotypes when exposing violence suffered at the hands of their partners.[171] Likewise, Asian-Pacific women also face cultural pressures to maintain silence in the face of violence.[172] Similiarly, Orthodox Jewish women may choose to accept violence rather than offend Jewish law by seeking a divorce from an abusive spouse.[173] In addition, there are the cultural norms of American society, those which cross racial and ethnic divisions, such as preservation of family, forgiveness and an innate trust that the future will produce positive change.

Even though it is impossible to profile the domestic violence victim, in the rush to criminalize abusive behavior, the criminal justice system has portrayed domestic violence victims as perpetually battered women.[174] Much media attention has been paid to the Battered Woman Syndrome defense that depicts domestic violence victims as "a collection of mental symptoms, motivational deficits, and behavior abnormalities."[175] This "dysfunctional portrait of battered women" has created a stereotype accepted by the general public and the legal community, each failing to discern the subtlety rooted in the victim's

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[169] *See* Ruttenberg, *supra* note 10, at 185.

[170] *See id.* For African-American women, attempts at resolving domestic violence solely through the criminal justice system typically ignores their concerns about racial oppression historically experienced through that system. *See id.* at 178. When race and gender are analyzed in the context of domestic violence, white women see gender as the principal source of oppression while African-American women point to race as the principal source of oppression. *See id.* at 183.

[171] *See* Mills, *supra* note 51, at 184. Women from ethnic minorities are reluctant to report abuse by men of like cultures because they are aware of the continued oppression of their race, the racist perception that is reinforced by violent incidents and the readiness of the outside society to label or blame these acts of violence as racially predictable. *See id.*

[172] *See id.*

[173] *See* Beverly Horsborough, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 HARV. WOMEN'S L.J. 171, 177–78 (1995).

[174] *See* Mills, *supra* note 51, at 185 (stating that mandatory arrest and prosecution policies are designed to fit a stereotypical battered woman); *No Right to Choose, supra* note 5, at 1879 (acknowledging the stereotype of battered women as incapable of self-control, emotionally fragile and less rational than men); Wills, *supra* note 41, at 179 (describing battered women as naive subjects of "master manipulators" as justification for pursuing strong mandatory prosecution policies, without regard to the concerns of the victim).

[175] *See* Anne M. Couglin, *Excusing Women*, 82 CAL. L. REV. 1, 7 (1994) (discussing the Battered Woman Syndrome defense and finding the defense itself fundamentally premised on women's psychological incapacity to extricate themselves from abusive mates through lawful means).

ambivalence toward leaving or prosecuting her batterer—presuming her ambivalence to be a function of her individual weakness and pathology rather than the ambivalence inherent in her predicament.[176] This commonly held notion of battered women as weak, passive or even pathological for staying with abusive men has fueled a societal disbelief and distrust of the victim and her perspicacity.[177] As an illustration, it has been suggested that a battered woman's testimony "should be accorded great deference when [the victim] wants the law to take action against the batterer, but should be given less weight when [the victim] says she wants to protect him."[178] Adoption of such a standard is the antithesis of sound judicial inquiry into the facts of each case, yet it illustrates the perception of battered women—as weak, helpless and unstable—in the criminal justice system.[179] Arguably, some battered women, particularly those who routinely have been subjected to violence, may fit within the battered woman stereotype. The stereotype, however, fails to capture the woman at the other end of the spectrum, the woman who solicits help the first time she encounters violence. This woman is not suffering from "learned helplessness,"[180] yet her concerns are not differentiated from those of women who have suffered long-term abuse. Mandatory criminal intervention policies are most concerned with providing safety through punishment of perpetrators, and therefore are less attentive to differentiating the needs of individual domestic violence victims.[181] The presumption that all situations involve recurring violence precludes an examination of the factual conditions of each case and thus is inconsistent with the constitutional requirements compelling the courts to make case-by-case determinations.[182] Although the criminal justice system may be better prepared to provide state intervention for perpetually abused

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[176] *See* Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 556 (1992).

[177] *See* Naomi Cahn & Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L. J. 339, 344 (1995) (finding that commonly held stereotypes of battered women contributed to negative outcomes in battered women's cases).

[178] *See* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 307 (1985).

[179] *See* Frank, *supra* note 75, at 931.

[180] *See* Waits, *supra* note 178, at 307.

[181] *See* Mills, *supra* note 51, at 185.

[182] *See* Frank, *supra* note 75, at 924–25; *see also* Zorza, *supra* note 27, at 67 (reporting that 53% of women plan to reconcile with a batterer-in-treatment but only 19% plan to do so if no treatment is provided). In addition, the victim is more likely to turn to the criminal justice system in the future if the system has acted to support her in the past. *See id.*

women than it was twenty years ago, it is less able to accommodate the woman who takes a proactive stance against violence at its onset.

As domestic violence policies have endeavored to remove discretion from the various institutional actors, the victim's control over the process has been removed. There are several compelling reasons for shifting the control from the victim to the criminal justice system: separating the victim from the responsibilities inherent in opting to pursue the case; reminding the batterer and the public at large that domestic violence is a crime for which offenders will be held accountable; and creating an opportunity to educate the victim in her legal options and other avenues of support.[183] The effect of mandatory policies, however, may be to strip the victim of any sense of control and to foster a sense of disempowerment. Excessive use of state power, particularly forcing the victim to participate in the prosecution, can result in the revictimization of the victim for the actions of the abuser.[184] In taking control of the victim's life, the state substitutes itself for the abuser as a coercive entity in the victim's life.[185] This in turn may force the victim to align herself with her batterer, because she prefers a known adversary to an unknown one.[186]

Some feminists have noted that state intervention into the lives of women does not necessarily promote women's equality, safety or well-being.[187] One group of researchers studying the effects of mandatory prosecution hypothesized that victims who chose not to drop the charges in a drop-permitted jurisdiction were the most likely to experience increased safety due to the victim's "personal power."[188] The victim, in making choices regarding prosecution or asserting her right to be heard, takes an affirmative step toward stopping the violence in her life.[189]

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[183] *See* Mills, *supra* note 51, at 173, 174, 181.

[184] *See No Right to Choose*, *supra* note 5, at 1865; *see also* Asmus et al., *supra* note 161, at 136 (noting that domestic violence advocates in Minnesota felt that compelling victims to testify had the effect of punishing the victim for the abuse).

[185] *See No Right to Choose*, *supra* note 5, at 1865–66; Mills, *supra* note 51, at 191.

[186] *See* Mills, *supra* note 51, at 190–91.

[187] *See No Right to Choose*, *supra* note 5, at 1871; *see also* Nadine Strossen, *A Feminist Critique of 'The' Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1140–41 (1993) (arguing that censoring pornography with the rationale that such censorship protects women is paternalistic, sexist and disempowering).

[188] David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems and Effects*, *in* LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATIONS 127, 157 (N. Zoe Hilton ed., 1993). They suggest that the power is derived from three sources: using the prosecution as a bargaining chip with the batterer, providing women with a means of allying with others including the police, prosecutors, and judges, and providing women a voice in determining sanctions against batterers. *See id.*

[189] *See* Mills, *supra* note 51, at 191.

State intervention, particularly policies that mandate victim participation or no-contact orders, is premised upon a presumption that the state knows what is right for all women.[190] These policies effectively tell the victim that her input is unnecessary, or even unworthy of consideration, in determining what has occurred and what is best for her family. If state controls over family relations are increased without a counterbalancing policy to preserve autonomy interests, the patriarchy from which feminists struggle to free themselves only becomes stronger.[191] The paternalistic attitudes with which the courts have traditionally approached domestic violence victims is an impediment to the free choice and empowerment of women.

In addition, as evidenced by the pursuit of a Victim's Rights Amendment to the Constitution and the adoption of similar amendments by more than half of the states, tolerance for the usurpation of the victim's voice in criminal proceedings is diminishing.[192] The supporters of these amendments see the rights at issue—those of the crime victim to be protected from further victimization by the criminal justice process—as basic human rights that any civilized system of justice should protect.[193] The violation of these rights is not at the hands of the accused, but rather at the hands of the government authorities charged with the duty to prosecute.[194] This is particularly true when the system is predisposed to consider the victim, such as the domestic violence victim, because of the nature of the crime and stereotypes associated with the crime, to be irrational and incapable of making a reasoned decision regarding the accused's release.

It is important to bear in mind that the victim of crime is not a party to the criminal prosecution—only the state and the accused stand as parties. As an alienated third party to the criminal proceedings, the victim and her rights are easily overlooked.[195] The Constitution does not specifically guarantee crime victims particular rights.[196] At the time of the Constitution's creation, private prosecution was the means of

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[190] *See No Right to Choose, supra* note 5, at 1855–56; *see also* Ruttenberg, *supra* note 10, at 188 (suggesting that mandatory arrest policies benefit white women while imposing negative consequences on the African-American community).

[191] *See generally No Right to Choose, supra* note 5, at 1868–82.

[192] *See generally* Mosteller, *supra* note 153, at 1053; Caissie, *supra* note 150, at 647; Laurence Tribe, *The Amendment Could Protect Basic Human Rights*, HARV. LAW BULL., Summer 1997, at 19.

[193] *See* Tribe, *supra* note 192, at 20 (stating that "[p]ursuing and punishing criminals makes little sense unless society does so in a manner that fully respects the rights of their victims to be accorded dignity and respect, to be treated fairly in all relevant proceedings, and to be assured a meaningful opportunity to observe, and take part in, all such proceedings.").

[194] *See id.*

[195] *See* Caissie, *supra* note 150, at 655.

[196] *See generally* U.S. CONST. amends. I-XXVI.

enforcing the criminal law, with the victim typically serving as both prosecutor and punisher.[197] Thus, the Framers likely presumed that victim's rights would be protected by the role the victim played in the prosecutorial scheme.[198] Public prosecutors replaced victims as the initiator of criminal investigation, providing a neutral participant, distant from the parties and facts of the particular case.[199] Gradually displacing the belief that the wrong was done first to the victim and then to the state, public prosecution on behalf of the state became the norm and victim's rights, formerly secured by the victim's role in the prosecution, were left unprotected.[200] Under the VRA, victims would be guaranteed a right to be heard at the bail and sentencing hearings.[201] No-contact orders could not be considered without the victim expressing her needs. The domestic violence victim, however, does not need to wait for a constitutional amendment because, unlike other crime victims and their families where the motivation lies primarily in retribution, the domestic violence victim can assert rights already constitutionally recognized—the right to decisional autonomy regarding her family structure.

Another step in protecting the victim's autonomy rights is re-examining the concept of "privacy" in relation to domestic violence. Making public what was traditionally considered a private crime was an essential step in addressing domestic violence.[202] Family privacy myths, previously used to support nonintervention into "family matters" and ignoring domestic violence, also disregarded the societal harms caused by such violence.[203] The criminalization of domestic violence has been the predominant device for correcting the historical, legal and moral disparities in the legal protections afforded to women.[204] The resultant policies, particularly those mandating arrest, no-contact orders and prosecution, however, do not provide an opportunity to evaluate the legitimate privacy interests of the victim. Having successfully criminalized the behavior of batterers, it is time to recognize that the "privacy" arguments which sheltered this behavior are distinct from the privacy issues of victims, particularly their deliberative

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[197] *See* Caissie, *supra* note 150, at 651, 661.

[198] *See id.; see also* Tribe, *supra* note 192, at 20 (noting that the Framers undoubtedly assumed victim's rights would be protected).

[199] *See* Caissie, *supra* note 150, at 652–53.

[200] *See id.* at 662.

[201] *See* S.J. Res. 44, 105th Cong., 2d Sess. (1998); Caissie, *supra* note 150, at 657.

[202] *See No Right to Choose, supra* note 5, at 1869.

[203] *See* Wills, *supra* note 41, at 174.

[204] *See No Right to Choose, supra* note 5, at 1869–70.

autonomy in determining the future of their family structure and their role in criminal proceedings.[205] While the "zone of privacy" articulated in *Griswold* stemmed from the concept that private matters within a marriage should be left undisclosed and unexamined—thereby serving to protect a domestic abuser—the modern view of privacy is derived from an affirmative concept of liberty, one which focuses on moral and intellectual autonomy.[206]

Privacy, if not confined to its historical concept—a domestic sphere where men are left alone to oppress women—can further women's equality and freedom.[207] Some feminist work on domestic violence argues that protecting the privacy of the family structure is not a justification for nonintervention in domestic violence cases.[208] The issue, however, is not whether there should be intervention but rather to what extent the conflicting interests of the victim should be balanced against the state's interest in implementing a particular choice of intervention. Constitutional privacy doctrine does not protect autonomy absolutely; it does not protect a person's right to make *any* choice.[209] It does, however, protect individuals from government interference with things that "are so important to [our] identity as persons—as human beings—that they must remain inviolable, at least as against the state."[210] Therefore, if the state's choice of intervention by its very definition precludes examination of the factual conditions—mandatory no-contact policies as opposed to more discretionary policies—thereby precluding the protected privacy interests of the victim, the chosen intervention is inconsistent with the constitutional balancing requirement.

Perhaps the best place to begin the task of reintroducing the domestic violence victim's voice to the criminal justice process is in the realm of the criminal no-contact order. Undoubtedly, the victim is intensely concerned with and should be intricately involved with any decision determining the release of her domestic partner. For some

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[205] *See generally* Planned Parenthood v. Casey, 505 U.S. 833, 849, 851 (1992); Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990); Whalen v. Roe, 429 U.S. 589, 599–600 (1977); Roe v. Wade, 410 U.S. 113, 153 (1973).

[206] *See Whalen*, 429 U.S. at 598–600 (citations omitted); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[207] *See* Laura W. Stein, *Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 MINN. L. REV. 1153, 1173–74 (1993).

[208] *See No Right to Choose*, *supra* note 5, at 1869.

[209] *See Casey*, 505 U.S. at 874–75; Stein, *supra* note 207, at 1173–74; *see also Cruzan*, 497 U.S. at 279.

[210] *See* Stein, *supra* note 207, at 1173 (quoting Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 753 (1989)).

women, the imminent release of their abuser signals a return to violence, perhaps even retaliatory violence for calling the police in the first place.[211] For others, an always tenuous peace may ensue with the woman managing the violence through persuasion.[212] For the more fortunate, the abuse will end either because a single incident is enough for the victim to abandon the relationship or for the batterer to seek the help he needs to control his abusive behavior. Regardless, any of these women have a significant interest in being heard. Some women will demand that their abusers be held while many others will argue for release.[213] In either case, the decision is not made lightly. Women typically consider the needs of their children, their financial prospects for surviving without their partners, whether they can safely separate from violent partners and their need to maintain a relationship with the men they love.[214] Whatever decision a woman makes is a constitutionally protected decision which must be weighed against the interests of the state.

At the time when a no-contact order is issued, the state's interest appears to be less significant than at any other point in the criminal process. The state is prepared to release the accused batterer back into the community,[215] presumably after some period of detention.[216] The prosecutor and, in many states, social services or victims' advocates, may have had an opportunity to counsel the victim on the risks of repeated violence. The state's interest in arrest has been satisfied and its interest in prosecution is also protected.[217] Thus, if one applies the *Mathews* balancing test, the interests of the state when compared to the autonomy interests of the victim appear to be less substantial at the time of issuance of a no-contact order than at other points along the prosecution timeline.[218] Moreover, the court considering the issuance

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[211] *See* Wills, *supra* note 41, at 180.

[212] *See id.*

[213] *See id.* at 177 (noting that a domestic violence victim's refusal to press charges is the norm in domestic violence prosecutions).

[214] *See* Schneider, *supra* note 176, at 558. Most battered women want the relationship to continue but the battering to stop. *See id.*

[215] *See* Frank, *supra* note 75, at 924–25. The power of the criminal courts to set bail is well established. *See id.* at 925. The general right to bail, except in the most serious cases, is derived from the Eighth Amendment. *See id.* at 928. Moreover, most states have codified the right to bail within their constitutions. *See id.*

[216] *See* Schulhofer, *supra* note 164, at 2166 (citing a study of mandatory arrest policies, Schulhofer points out that the average time in custody varied from two to twenty-four hours).

[217] *See generally* Frank, *supra* note 75. The no-contact order is issued as a condition upon pretrial release, which in turn is provided only upon assurance of the accused, in the form of bail, that he will be available upon demand of the court. *See id.*

[218] *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

of a criminal protection order should remain attentive to the protected liberties at stake—the property interests of the criminal defendant and autonomy interests of the victim.[219] Inquiry into the constitutionally protected rights at stake, particularly before the batterer is excluded from his residence, is best ensured by requiring a factual investigation and balancing of interests.[220] This, of course, is impossible in states where the statutes governing pretrial release of domestic violence defendants mandate or fail to require meaningful review.[221]

Procedural protection, designed to facilitate the informed consideration of the rights at stake in a particular case, is often dispensed with when statutes mandate the issuance of criminal no-contact orders.[222] In these situations, courts may fail to make factual inquiries into the concerns of the domestic violence victim—financial, property, emotional—and thus, effectively silence her voice.[223] Therefore, in order for the autonomy rights of the victim and, for that matter, the liberty and property rights of the accused to be properly considered, legislation should be amended to require adherence to procedural due process. Such procedural requirements facilitate the judicial consideration of the rights at stake in each case.[224] Lawmakers can provide for procedures that allow all interests to be heard—the victim's, the defendant's and the State's—thus ensuring a reasoned decision on a case-by-case basis.[225]

Finally, because all states and the District of Columbia provide means for a domestic violence victim to petition the court for protection, the civil protection order must be recognized as an alternative approach to criminal protection orders.[226] Many of the same protections imposed by criminal protection orders are available through the civil protection order process.[227] Since relief is already universally avail-

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[219] *See* U.S. CONST. amend. XIV, § 1; *Mathews*, 424 U.S. at 334–35.

[220] *See* Blazel v. Bradley, 698 F. Supp. 756, 763 (W.D. Wis. 1988) (finding that restrictions on access to personal property and residence, due to the issuance of a civil protection order, implicate constitutional concerns). Applying *Mathews*, the court found that substantial procedural protections were mandated based on the accused's interest in his home. *See id.*

[221] *See, e.g.*, ALASKA STAT. § 12.30.027 (1997); COLO. REV. STAT. ANN. § 18–1–1001 (West 1998); R.I. GEN. LAWS § 12–29–4(a)(1) (1997); S.D. CODIFIED LAWS § 25–10–23 (Michie 1998); UTAH CODE ANN. § 77–36–2.5(1) (1998).

[222] *See* Frank, *supra* note 75, at 939–40.

[223] *See id.*

[224] *See id.*

[225] *See id.* at 941.

[226] *See* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 842–43 (1993).

[227] *See* Frank, *supra* note 75, at 922.

able, the state's interests in imposing criminal no-contact orders should not be given great weight.[228]

CONCLUSION

The victim of domestic violence deserves the protection of the criminal justice system without sacrificing her autonomy rights. Although privacy doctrine has in the past led institutional actors to ignore domestic violence as a societal concern, public awareness and reform in the managing of domestic violence cases successfully has dismantled this misapplication of privacy rights. With this done, it is time to set aside fears regarding the application of privacy rights in the domestic violence context in order to allow victims to enjoy their constitutionally protected rights to decisional autonomy.

The issuance of a criminal no-contact order, in essence, separates a family, forcing one member out of the home. The emotional and financial hardships inherent in such an action should not be ignored. In addition to these concerns, the history of violence, or the lack thereof, within the relationship needs to be considered. In failing to allow for victim input in the process of defining the conditions of a pretrial release, courts ignore the victim's right to determine the structure of her family. Legislation that mandates no-contact orders by definition prohibits meaningful review of all of the factors and interests involved, including the history of the relationship and the wishes of the victim.

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[228] *See id.* at 923.