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CONSTRAINED CHOICE: MOTHERS, THE STATE, AND DOMESTIC VIOLENCE

by RONA KAUFMAN KITCHEN*

INTRODUCTION

Seeking to keep her children and herself safe, Jessica Lenahan leaves her abusive husband and acquires a protective order prohibiting him from approaching her or their children. Her ex-husband violates the order and murders their three daughters.¹

Jill Burella, the wife of a police officer informs the department of her husband's violent abuse. She acquires multiple protective orders and calls for police assistance on many occasions. The department is well aware of the abuse and danger she faces. The officer husband violates the protective order, arrives at the family home, shoots his wife in the chest, and commits suicide.²

Rachel S., mother of two sets of twins ages two and three, reports her husband's violent abuse against herself and her children to the police. Thereafter, a neglect petition is filed against both mother and father, the children are removed from both parents, and, ultimately, parental rights of both mother and father are terminated.³

After a long history of abuse, including sexual assault, mother of two, Yelena R., flees with her children. In response, the court grants sole legal and physical custody of the children to her abusive ex-husband.⁴

Rahsa P.'s abusive husband beats her in front of their four-year old son when she is 8 months pregnant. During the beating, which caused a miscarriage, the father injures the four-year old for trying to protect his mother. While the mother is hospitalized for her injuries, the father leaves the child home alone. County Protective Services removes the child from the home. Despite a no-contact order, Rasha complies with Father's request and has their son send his father drawings

* Assistant Professor of Law, Duquesne University School of Law. I am thankful for the opportunity to present earlier versions of this article at Duquesne University School of Law's 20th Anniversary Celebration of the Violence Against Women Act, and the Temple Political & Civil Rights Law Review's Violence Against Women Act Symposium. I also wish to express my gratitude to Alexandra Bott for her research assistance, Bridget Praskovich for her editing suggestions, and the staff of the Temple Political & Civil Rights Law Review for their hard work. Writing about family violence makes me especially appreciative of the men in my life. My father and husband would never hurt anyone they love. It also reminds me of my profound responsibility as the mother of sons, Joseph and Benjamin, to instill in them a respect for women and children and an understanding that love never means violence.

1. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 753-54 (2005).

2. *Burella v. City of Philadelphia*, 501 F.3d 134, 136 (3d Cir. 2007).

3. *In re Autumn F.*, No. K09CP09011835A, 2013 WL 2132091, at *1 (Conn. Supr. Ct. 2013).

4. *Yelena R. v. George R.*, 326 P.3d 989, 992 (Alaska 2014).

and speak with him on the phone. Consequently, the state terminates the mother's parental rights.⁵

As these cases illustrate, the legal response system for private family violence is broken. Under the current regime, mothers with violent partners have great difficulty escaping their abusers and attaining safety for themselves and their children. When, like Jessica Lenahan, Jill Burella, and Rachel S., they take state-sanctioned action by reporting the abuse their safety is not guaranteed. Abusers often violate protective orders and victims are left with little recourse. When mothers, like Yelena R. and Rasha P., take unsanctioned action, such as fleeing with their children or staying in an abusive relationship, they risk losing custody of their children to their abuser or the state.

In part, battered mothers have difficulty attaining safety because the legal response to domestic violence is guided by myths about how safety can be attained. The foundational myth that a victim of abuse has the power, on her own, to attain safety appears to ground domestic violence law. The derivative myth that a victim can attain safety by leaving an abusive relationship is particularly prevalent. Consistent with these myths, the state provides support to victims who seek to exit abusive relationships. This support is largely unhelpful to mothers however, because it ignores the realities of their lives and relationships. Adherence to these myths has contributed to the development of a legal regime that puts all responsibility for attaining safety on the victim while simultaneously constraining her choices by forcing her to respond to abuse in specific state-sanctioned manners.

Therefore, mothers who are victims of abuse face an inhospitable legal regime in their quest for safety. The resulting problem is twofold. Where mothers take action consistent with their own judgment,⁶ but *not* sanctioned by the state, they risk punishment in the form of loss of child custody or criminal prosecution.⁷ On the other hand, if they respond to abuse in a state-sanctioned manner, they are often unable to attain lasting safety. This reality is a direct result of the law's misguided reliance on myths and its failure to defer to maternal judgment.

In addition to the practical problems mothers face as a result of the legal response to domestic violence, there are theoretical concerns as well. Domestic violence laws and policies constrain maternal choice⁸ by failing to provide mothers

5. In re T.B.-W., No. 27544, 2015 WL 1227823, at *1, 2 (Ohio Ct. App. Mar. 18, 2015).

6. See Margaret E. Johnson, *Changing Course in the Anti-Domestic Violence Legal Movement: From Safety to Security*, 60 VILL. L. REV. 145, 152 (2015) ("[R]esearch shows women are best able to predict their own risk . . . [Nevertheless,] the state and institutions construct a 'haven' based on their view of the problem, thereby prioritizing their ideas of how best to save women from the violence, while not prioritizing women's own perception of what is 'safe' for themselves today, tomorrow, and in the future.").

7. See V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229 (1996) (arguing that courts should abandon a strict liability test for finding mothers culpable for violence against their children and instead should adopt an objective test that will hold mother-abusers responsible, but will release mother-victims from liability).

8. See Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1229-40 (2001) (exploring how policies and laws deal differently with the choices of battered women); Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88

with broader support to escape abusive relationships and attain safety.⁹ Rather than being guided by maternal judgment for how best to attain safety,¹⁰ the legal response to domestic violence is based on the myth that mothers can attain safety by simply reporting the abuse and leaving the relationship.¹¹ It is a myth that victims of domestic violence have the power, on their own, to become safe. Nevertheless, it remains staunchly adhered to by legal actors. The reality is that no matter what a mother does to keep herself and her children safe, without broader state support, her actions are often in vain. In addition to encouraging mothers to take action that is unlikely to increase their safety, reliance on these myths justifies punishing mothers who stay in abusive relationships.

The purpose of this Article is to critique the state-based response to domestic violence for its role in constraining maternal choice. I look to statutory initiatives as well as judicial decisions and provide a description of the landscape for mothers who are the victims of domestic violence. Several questions guide this inquiry. What legal options are available to mothers when they seek to escape a violent relationship? How does the state support mothers when they use available legal tools to facilitate their escape? How can mothers keep their children safe from a violent father? What recourse is available to them when they remain threatened even after utilizing the existing legal machinery? How do mothers fare when they take unsanctioned action to attain safety? And, how does the state response to domestic violence support maternal decision making?

In this Article, I demonstrate that the legal response to domestic violence fails mothers and argue that it should be reformed to provide support for a broader range of maternal decisions. Under the current legal regime, mothers are likely to face violence or punishment regardless of the course of action they choose. When a mother follows the legal rules, her safety and the safety of her children often remain threatened. When a mother acts consistent with her own judgment, but outside of state-sanctioned conduct, she faces retribution by the state. I argue that the solution to this problem lies in rejection of the myths that have guided the

GEO. L.J. 605, 609 (2000) (“[W]hen a battered woman is so controlled that she has lost her autonomy, . . . resources [such as restraining orders, shelters, and support groups] are not genuine options.”).

9. See Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims’ Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U.J. GENDER SOC. POL’Y & L. 465, 472 (2003) (“Victims of intimate partner violence use a wide variety of strategies to stop or escape from the violence, ranging from attempts to reason with an abuser to fighting back, calling police, seeking help from a shelter, or cooperating with a criminal prosecution. Battered women’s strategies—including their actions and wishes with respect to the criminal justice system—are likely to shift over time as other factors in their life situation change.”).

10. See generally Rona Kaufman Kitchen, *Holistic Pregnancy: Rejecting the Theory of the Adversarial Mother*, 26 HASTINGS WOMEN’S L.J. 207 (2015) (discussing State intervention in pregnancy and the law’s failure to defer to maternal judgment and decision making).

11. See Carolyn B. Ramsey, *The Exit Myth: Family Law, Gender Roles, and Changing Attitudes Toward Female Victims of Domestic Violence*, 20 MICH. J. GENDER & L. 1, 28 (2013) (“The real and perceived changes in women’s economic independence and ability to obtain a divorce . . . [combined with] the popularization of psychological theories linking intimate-partner abuse to female masochism . . . contributed to a new era of assigning blame to victims both for the domestic violence they suffered and for failing to separate from their abusers.”).

state's response to domestic violence and the development of a legal framework that would, instead, provide support for a wider range of maternal choice and conduct.

This Article proceeds in two parts with a conclusion. In Part I, I provide a brief history of domestic violence and the state's efforts to combat it. In Part II, I describe the legal labyrinth abused mothers face, showing that regardless of their actions, mothers are unable to guarantee their safety and the safety of their children.

I. HISTORY

Domestic violence, generally, is defined in the dictionary as “the inflicting of physical injury by one family or household member on another.”¹² More specifically, the Department of Justice defines domestic violence as “a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner.”¹³ Domestic violence takes many forms and may include physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person.¹⁴ This includes “behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.”¹⁵

In the late 1970s and early 1980s when the battered women movement began to gain momentum, public officials openly declared that the federal government played no role in domestic violence issues,¹⁶ describing the issue of battling domestic violence as a “private family matter.”¹⁷ Members of Congress viewed federal intervention in domestic violence disputes as an interference and as “antifamily.”¹⁸ Indeed, society accepted these views and often saw the victim's behavior as a reason the abuse was warranted.¹⁹ Due to these views, many violent

12. *Domestic Violence*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/domestic%20violence> (last visited Mar. 17, 2015).

13. *Domestic Violence*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/ovw/domestic-violence#dv> (last updated July 23, 2014).

14. *Id.*

15. *Id.*

16. OFFICE OF THE VICE PRESIDENT, THE WHITE HOUSE, *1 IS 2 MANY: TWENTY YEARS FIGHTING VIOLENCE AGAINST WOMEN AND GIRLS 5* (2014), available at http://www.whitehouse.gov/sites/default/files/2014_vawa_report.pdf; see also Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2171 (1996) (stating that during the 1960s, police officers were directed to treat domestic violence disputes as personal matters that did not require direct police action). As it gained momentum, the battered women's movement began to contest the appropriation of women's bodies, challenged previous conceptions of male supremacy, and promoted women's right to bodily integrity and autonomy. G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservativization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 248-50 (2005).

17. OFFICE OF THE VICE PRESIDENT, *supra* note 16, at 5.

18. *Id.*

19. See Amy M. Zelcer, *Battling Domestic Violence: Replacing Mandatory Arrest Laws with a Trifecta of Preferential Arrest, Officer Education, and Batterer Treatment*, 51 AM. CRIM. L. REV. 541, 544 (2014) (explaining a study conducted during the early 1970s revealed that men arrested for domestic violence were given lenient treatment, which was attributed to the “court's belief that the men were merely ‘responding to marital stress’ or to their wives’ incendiary conduct. Women were ‘agents

situations were acknowledged, but ignored.²⁰

In 1990, then-Senator Joe Biden brought the Violence Against Women Act to fruition.²¹ He explained that there were three main goals of the bill: “to make streets safer for women; to make homes safer for women; and to protect women’s civil rights.”²² As a result of recognizing the extent of violence faced by women and the specific impacts on interstate commerce due to that violence, Congress enacted the Violence Against Women Act (“VAWA”).²³ On September 13, 1994 President Clinton signed VAWA into law.²⁴ At the time, law enforcement had a rather weak protocol in place for dealing with domestic violence issues. Police would often deal with domestic violence calls by walking the abuser around the block to let him cool down.²⁵ Usually, no further state action was taken.²⁶ Police were not properly trained to handle domestic violence cases. As a result, police often doubted the victim, and criticized her response to her partner’s actions.²⁷

VAWA was an important step toward enhancing the safety of domestic violence victims, including mothers and their children, through improved law enforcement responses and state-based processes. In enacting VAWA, Congress responded to increased awareness of violence against women.²⁸ Awareness concerning the prevalence of violence against women continued to grow and in 1991 the United States District Court for the Southern District of New York noted in *Ericson v. Syracuse University*²⁹ that gender-motivated violence was the leading cause of injuries to women ages fifteen to forty-four, more common than automobile accidents, muggings, and cancer deaths combined.³⁰ Furthermore, the

provocateurs’ in their own thrashings.” (citing Miccio, *supra* note 16, at 255)).

20. *Id.* at 5, 5 n.3 (citing ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 185 (2004) (“Rape and wife beating were often compared; each was a taboo subject, rarely discussed in public, except as a joking matter.”)); Michelle J. Anderson, *Diminishing The Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 658 (2010)).

21. *Id.* at 10.

22. *Id.* (citation omitted).

23. Darold W. Kilmer & Mari Newman, *VAWA: A Civil Rights Tool for Victims of Gender-Motivated Violence*, COLO. LAW., Sept. 1999, at 77.

24. Lyn Rosenthal, *18th Anniversary of the Violence Against Women Act*, THE WHITE HOUSE 1 IS 2 MANY BLOG (Sept. 17, 2012, 2:18 PM), <https://www.whitehouse.gov/blog/2012/09/17/18th-anniversary-violence-against-women-act>.

25. OFFICE OF THE VICE PRESIDENT, *supra* note 16, at 32.

26. *Id.*

27. See, e.g., Charlotte Libov, *Domestic Violence Focus of Training*, N.Y. TIMES (Oct. 27, 1985), <http://www.nytimes.com/1985/10/27/nyregion/domestic-violence-focus-of-training.html> (discussing the enactment of a Connecticut law requiring domestic violence training for all police officers in response to the case of Tracey Thurman, who successfully sued her local police force for negligently handling her domestic violence complaints).

28. See, e.g., LISA N. SACCO, CONG. RESEARCH SERV., R42499, THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING 1 (2014) (“Congressional passage of VAWA was ultimately spurred on by decades of growing unease over the rising violent crime rate and a focus on women as crime victims.”).

29. 45 F. Supp. 2d 344 (S.D.N.Y. 1999).

30. *Ericson v. Syracuse Univ.*, 45 F. Supp. 2d 344, 345 (S.D.N.Y. 1999) (quoting S. Rep. No. 103-138, at 38 (1993)).

court explained that as many as four million women a year were the victims of domestic violence and three out of four women were predicted to be the victim of a violent crime sometime during their life.³¹

Today, VAWA is situated at the center of much of the governmental response to domestic violence. VAWA provides grants to law enforcement to develop and implement better programs to prevent and respond to domestic violence.³² It encourages states to adopt pro-arrest policies to better deal with domestic violence.³³ Along with training officers and professionals to handle the unique dynamics that come along with domestic violence cases, cities now have investigators and prosecutors who have specialized skills in order to competently handle domestic and sexual abuse cases that were previously overlooked.³⁴ Beneficial changes within law enforcement in relation to domestic violence cases include the “vertical” model of prosecution, in which the same investigators and prosecutors handle a given case from beginning to end, so that survivors of abuse are not passed through multiple sets of officers and lawyers.³⁵ Some offices have created “rapid response models” whereby a “survivor’s safety is immediately assessed and addressed, a charging decision quickly made, and the case put on an accelerated docket.”³⁶ Additionally, some police departments and prosecutor’s offices have taken on domestic violence or sexual assault advocates as part of their teams, so that victims have a reliable source to confide in throughout the ordeal.³⁷

Other states have enacted individual programs that supplement VAWA with the assistance of federal grants. One example is the STOP (Services, Training, Officers, and Prosecutors) VAWA Formula Grant Program.³⁸ The purpose of providing this grant is to support and encourage the “development and strengthening of effective law enforcement and prosecution strategies to address violent crimes against women and the development and strengthening of victim services in cases involving violent crimes against women.”³⁹ State agencies, units of general local governments, Indian tribal governments, public or private nonprofit

31. *Id.*

32. 42 U.S.C. §§ 3796gg(b)(1), (3) (2013) (providing grants for “training law enforcement officers . . . and prosecutors to more effectively identify and respond to violent crimes against women, including the crimes of sexual assault, domestic violence, [and] dating violence” and for “developing and implementing more effective police, court, and prosecution policies, protocols, orders, and services specifically devoted to preventing, identifying, and responding to violent crimes against women”).

33. *Id.* §§ 3796gg(a)-(b)(1) (“The purpose of this subchapter is to encourage States, Indian tribal governments, State and local courts (including juvenile courts), tribal courts, and units of local government to treat domestic violence, dating violence, sexual assault, and stalking as serious violations of criminal law [G]rants [may be made available] . . . [t]o implement proarrest programs and policies in police departments, including policies for protection order violations and enforcement of protection orders across State and tribal lines.”).

34. OFFICE OF THE VICE PRESIDENT, *supra* note 16, at 32.

35. *Id.*

36. *Id.*

37. *Id.*

38. *STOP Violence Against Women Act Grant*, MO. DEP’T OF PUB. SAFETY, <http://www.dps.mo.gov/dir/programs/cvsu/stopvawa.php> [hereinafter *STOP Violence*] (last visited Apr. 3, 2015).

39. *Id.*

organizations (including faith-based organizations), and non-governmental or tribal victim services programs are all eligible to apply for funding.⁴⁰ The funds provided by the Office on Violence Against Women are allocated as follows: 25% for prosecution, 25% for law enforcement, 5% for the courts, 15% for discretionary matters, and 30% for victim services, at least 10% of which must be allocated for community-based culturally specific victim services.⁴¹ Some of the focus areas of the STOP Program include training law enforcement officers, judges, other court personnel, and prosecutors to more effectively prevent, identify, and respond to violent crimes against women, including the crimes of domestic violence, dating violence, sexual assault and stalking.⁴²

In addition to using federal funding to improve programs that help combat domestic violence, states have enacted various laws to help protect those who fall victim to domestic violence and abuse. Twenty-one states currently have mandatory arrest laws.⁴³ Mandatory arrest laws provide that an officer is required to arrest an alleged abuser if there is probable cause to believe domestic violence has been committed, despite the wishes of the victim.⁴⁴ A number of states have pro-arrest laws that favor arresting an alleged abuser, but do not require it.⁴⁵ The remaining states leave the decision of whether to arrest an abuser up to the discretion of the officer handling the domestic violence case.⁴⁶

Since VAWA's passage, awareness about domestic violence has risen among governmental actors. No one can doubt that the public response to domestic violence has improved significantly. Government initiatives are aimed at reducing the rate of family violence and improving law enforcement responses when it does occur.⁴⁷ Among state actors, there now seems to be virtually universal recognition

40. *Id.*

41. *Grant Programs*, OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/ovw/grant-programs#svaw> (last visited Mar. 19, 2015).

42. *STOP Violence*, *supra* note 38.

43. See AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, DOMESTIC VIOLENCE ARREST POLICIES (2014) [hereinafter ABA COMM'N], available at http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/statutorysummarycharts/2014%20Domestic%20Violence%20Arrest%20Policy%20Chart.authcheckdam.pdf (providing arrest policy details for U.S. states and territories).

44. See, e.g., CONN GEN. STAT. § 46b-38b(a) (2014) ("Whenever a peace officer determines upon speedy information that a family violence crime has been committed within such officer's jurisdiction, such officer shall arrest the person or persons suspected of its commission and charge such person or persons with the appropriate crime."); Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 15, 31 (2004) (asserting that the adoption of mandatory arrest policies wrongfully deprives battered women the choice of deciding whether or not to have her abuser arrested and prosecuted).

45. ABA COMM'N, *supra* note 43; Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1150 (1994) (stating that pro-arrest laws recommend that arrests be made in certain instances of domestic violence, but reserve police discretion in determining whether a particular case fits within those circumstances).

46. ABA COMM'N, *supra* note 43.

47. See, e.g., Press Release, The White House, Vice President Biden and Attorney General Holder Announce Grants to Help Reduce Domestic Violence Homicides (Mar. 13, 2013), available at <https://www.whitehouse.gov/the-press-office/2013/03/13/vice-president-biden-and-attorney-general-holder-announc-grants-help-re>.

that domestic violence is intolerable.⁴⁸

Nevertheless, domestic violence remains prevalent. In the post-VAWA United States, more than forty-two million women are victimized by intimate partner violence sometime in their lives.⁴⁹ Approximately seven million women experience intimate partner violence in a given year.⁵⁰ In the last decade alone, almost twelve thousand women were murdered by their current or former male partner.⁵¹ Federal Bureau of Investigation figures show that between 2001 and 2012, more American lives were lost to domestic violence than to terrorism, the war in Iraq, and the war in Afghanistan combined.⁵² In 2013, in Pennsylvania alone, domestic violence claimed the lives of 107 victims.⁵³

Although government action to address domestic violence has improved, domestic violence persists. In addition to continuing to implement measures that will prevent domestic violence, it is also important to revisit and reevaluate the progress that has been made. Legislative and judicial responses to domestic violence must be reexamined to ensure that they provide victims with consistent and effective relief.

II. THE LEGAL LABYRINTH

Despite their prevalence, when acts of domestic violence become public, society responds with outrage and disbelief. Historically, victims garnered more public sympathy than they do today.⁵⁴ As social norms evolved and women came to be viewed as equal participants in society, much of the sympathy that was once felt toward victims dissipated.⁵⁵ Today, the public's response to domestic violence includes both concern and frustration. Generally, the public calls upon victims to take protective action.⁵⁶ Victims are generally urged to report the abuse⁵⁷ and leave

48. *See id.* (citing municipalities across a number of states that will undertake initiatives to combat domestic violence homicides).

49. *See, e.g.*, NAT'L CTR. FOR INJURY PREVENTION AND CONTROL OF THE CTRS. FOR DISEASE CONTROL AND PREVENTION, THE NAT'L INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2010 SUMMARY REPORT 39 (2011), available at http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf (stating that women of color are more likely to experience intimate partner violence than white women).

50. *Id.*

51. Alanna Vagianos, *30 Shocking Domestic Violence Statistics That Remind Us It's an Epidemic*, HUFF. POST (Oct. 23, 2014, 9:25 AM), http://www.huffingtonpost.com/2014/10/23/domestic-violence-statistics_n_5959776.html.

52. Mansur Gidfar, *Don't Believe in the War on Women?*, UPWORTHY, <http://www.upworthy.com/dont-believe-in-the-war-on-women-would-a-body-count-change-your-mind> (last visited Apr. 3, 2015).

53. PA. COAL. AGAINST DOMESTIC VIOLENCE, 2013 FATALITY REPORT—NO MORE: TOGETHER WE CAN END DOMESTIC VIOLENCE AND SEXUAL ASSAULT, available at <http://www.pcadv.org/Learn-More/Domestic-Violence-Topics/Fatalities/>.

54. *See generally* Ramsay, *supra* note 11 (explaining the decrease in sympathy for victims of domestic violence throughout history).

55. *Id.* at 28-32.

56. *See id.* at 8-9 (describing the decrease in sympathy and examples of victim's requests for protection); *Path to Safety*, NAT'L DOMESTIC VIOLENCE HOTLINE, <http://www.th hotline.org/help/path-to-safety/> (last visited May 17, 2015) (providing a list of multiple tools that domestic violence victims

the relationship.⁵⁸ Outsiders are quick to judge victims who fail to take one of these approved courses of action.⁵⁹ The public cannot understand a woman who stays in an abusive relationship and “allows” her abuser to inflict injury upon her or her children.⁶⁰ Some even believe that women who stay deserve to be abused.⁶¹

The state has endorsed the view that victims should take action to become safe.⁶² State-based responses to domestic violence have mirrored the public’s position that women should report⁶³ and leave.⁶⁴ States have passed laws that encourage women to take these sanctioned courses of action.⁶⁵ In addition, states

can use to take protective action against abusive partners).

57. See *Path to Safety*, *supra* note 56 (stating that victims of domestic violence should report abuse to obtain protective orders or restraining orders, and also file criminal charges against their abuser).

58. 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, 557-58 (1992) (“The immediate question for most people when they first hear about the problems of battered women is ‘why don’t they leave?’ This question reflects a tendency to want battered women to take control, to act as agents and reject completely their victimization. However, many battered women cannot leave. They have no money, no child care, no employment; they are financially and emotionally dependent on the men who batter them; they think that it is better to stay with the men because of children; or they don’t want to leave, because they love the men and want to maintain whatever intimacy and sense of connection they can.”); *Compelling Reasons Women Stay*, DOMESTIC ABUSE PROJECT, <http://www.domesticabuseproject.com/get-educated/compelling-reasons-women-stay/> (last visited May 17, 2015) (stating that one of the most common questions our culture asks victims and survivors of domestic abuse is “why do/did you stay in an abusive relationship?” or “why doesn’t she just leave?”).

59. See Ramsey, *supra* note 11, at 5 (stating that the criminal justice system has become less sympathetic toward women trapped in violent intimate relationships).

60. See *id.* at 28 (explaining how many have no sympathy for women in abusive relationships in light of the perception that women have attained social and legal equality and, therefore, have the resources to leave an abusive relationship).

61. See Aya Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense*, 52 BUFF. L. REV. 433, 433 (2004) (“[T]he most strategic defense attorneys and the most chauvinist traditionalists blame women for domestic violence and rape.”).

62. See Ramsey, *supra* note 11, at 6-20 (detailing the government’s view towards victims of domestic violence).

63. 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, 810-11 (1993) (affirming that all fifty states have made civil protection orders available for victims of domestic violence and have enacted laws in the area of criminal and family law to address and penalize domestic violence).

64. See Kristen M. Driskell, *Identity Confidentiality for Women Fleeing Domestic Violence*, 20 HASTINGS WOMEN’S L.J. 129, 130-31 (2009) (stating that fleeing to escape domestic violence may be the only way for victims to break free from the cycle of abuse and noting the existence of confidential, federally-funded domestic violence clinics).

65. *Id.* All states have protection from abuse orders available for victims of domestic violence. See, e.g., ME. REV. STAT. ANN. 19-A, § 4007 (2014) (stating that upon finding that a defendant committed the alleged abusive conduct, the court may grant a protective order, directing the abuser to refrain from threatening, assaulting or otherwise abusing the victim and any minor children residing in the victim’s household); 23 PA. STAT. ANN. § 6108 (2014) (stating that protection from abuse court orders may direct the abuser to refrain from abusing the victim or minor children, grant sole possession of the shared residence to the victim, and award sole custody of any minor children to the victim). Many states have also passed laws providing for the mandatory arrest of persons that police officers know or reasonably suspect committed acts of domestic violence. See, e.g., COLO. REV. STAT. § 18-6-803.6 (2015) (stating that peace officers must arrest any person whom they have probable cause to suspect was involved in committing an act of domestic violence); WIS. STAT. ANN. § 968.075 (2014) (stating that a law

have passed laws that punish women if they fail to leave an abusive relationship through state-sanctioned routes.⁶⁶ Meanwhile, other areas of law, especially family law, place conflicting pressures on mothers who are victims of abuse. Family law codes and courts prefer co-parenting, an often impossible reality for women and children escaping a dangerously abusive father.⁶⁷ Family courts punish parents,

enforcement officer must arrest and take into custody any person he reasonably believes is committing or has committed domestic abuse). In addition, some jurisdictions have adopted “no-drop” policies, whereby the prosecution of an abuser continues even if the victim wishes to drop the charges or refuses to testify. See Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 *FORDHAM L. REV.* 853, 858, 860-62 (1994) (pointing out that the following jurisdictions have no-drop prosecution policies: Jefferson County, Kentucky; Marion County, Indiana; Duluth, Minnesota; and San Francisco, California). Victims that ultimately decide to divorce their abusive spouses may even file for divorce on fault-based grounds. See, e.g., *LA. CIV. CODE ANN.* art. 103 (2014) (stating that a divorce may be granted upon proof that the offending spouse has physically or sexually abused the spouse seeking divorce, or a child of either party); *S.C. CODE ANN.* § 20-3-10 (2014) (stating that a divorce may be granted for physical cruelty).

66. A mother could have her children taken away by the juvenile courts for being in an abusive relationship and thereby endangering her child. See, e.g., *N.M. STAT. ANN.* §§ 32A-4-2, 32A-4-6 (2014) (stating that a child may be held or taken into custody when a law enforcement officer reasonably believes the child was abused, including situations where a parent knowingly, intentionally or negligently places the child in a situation that may endanger the child’s life or health); *W. VA. CODE* §§ 48-27-202, 49-1-3, 49-6-3 (2014) (stating that a child may, upon petition, be placed into the custody of the state department when harmed or threatened by domestic violence); see also *In re Michael G.*, 752 *N.Y.S.2d* 772, 772 (N.Y. App. Div. 2002) (finding that a child was neglected by his mother under New York law following evidence of domestic violence in the home, the mother’s failure to obtain a protective order against the abusive father, and the mother’s failure to seek refuge for herself or her child). A mother may also face criminal charges for neglecting her children by failing to leave an abusive relationship. See, e.g., 720 *ILL. COMP. STAT. ANN.* 5/12C-5 (2014) (stating that a person commits the crime of child endangerment by knowingly causing or permitting a child to be placed in circumstances that endanger the child’s life or health); *WYO. STAT. ANN.* § 6-4-403 (2014) (stating that a parent is guilty of criminal child endangerment for knowingly or with criminal negligence causing, permitting, or contributing to the endangerment of the child’s life or health by violating a duty of care, protection, or support); see also Deane Williams-Harris, *Mother Held On \$250K After Boyfriend Charged In Beating Death of Her Toddler Son*, *CHI. TRIBUNE* (Jan. 26, 2015, 4:30 PM), <http://www.chicagotribune.com/news/local/breaking/chi-mother-held-on-250k-in-beating-death-of-her-toddler-son-20150126-story.html> (mother charged with the crime of child endangerment after her boyfriend beat her child to death, when the mother had actual knowledge that her boyfriend physically abused her child on previous occasions, but still left her child in his care).

67. See Ramsey, *supra* note 11, at 19 (explaining states’ use of joint custody provisions). Many states have adopted laws that encourage co-parenting in custody arrangements, which prevents victims from being able to escape their abusive partners. See, e.g., *ARK. CODE ANN.* § 9-13-101 (2014) (stating that an award of joint custody is favored in Arkansas and that custody shall be awarded in such a way to assure the frequent and continuing contact of the child with both parents, but the court will consider other factors, including whether one parent attempted to disrupt an existing or pending custody arrangement); 23 *PA. STAT. ANN.* § 5328 (2014) (stating that when making custody determinations, one of the factors a court considers is which parent is more likely to encourage and permit frequent and continuing contact between the child and the other parent); see also Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 *N. ILL. U. L. REV.* 403, 404 (2005) (discussing the dangers of joint custody presumptions for victims of spousal abuse and their children); Beverly Webster Ferreiro, *Presumption of Joint Custody: A Family Policy Dilemma*, 39 *FAM. RELATIONS* 420, 420 (1990) (discussing strong preference for both parents to have continuing contact with the child); Sara Shoener, Op-Ed, *Two-Parent Households Can Be Lethal*, *N.Y. TIMES*, June 21, 2014, <http://www.nytimes.com/2014/06/22/opinion/sunday/domestic-violence-and-two-parent->

including abused mothers, who fail to facilitate the abuser's relationship with his children.⁶⁸ Sometimes, mothers even lose custody of their children to the abusive parent.⁶⁹ As a result, women seeking to escape violent relationships often find themselves navigating an inhospitable legal labyrinth that constrains their choices and prevents them from attaining lasting safety.⁷⁰

Research studies of intimate partner violence actually show that the most dangerous time for a victim is after she leaves her abuser.⁷¹ Nevertheless, the state encourages victims to leave abusive relationships. This encouragement is aligned with the public view that women should leave their abusers. The *New York Times* articulated this popular sentiment in an article covering Ray Rice's very public attack against his girlfriend Janay Palmer: "A man strikes a woman with such force that she collapses, unconscious. He appears to spit on her body. Why would she then exchange wedding vows with him and, after a video surfaces showing the world the violence, stand by him?"⁷²

Through specific statutory provisions, the law encourages women, especially mothers, to leave abusive relationships. There are two distinct routes through which the law encourages mothers to leave their abusers. First, the law provides support to mothers who leave an abusive relationship through the issuance of protective orders, the adoption of mandatory-arrest laws, and the implementation of no-drop prosecution policies.⁷³ Second, the law provides an incentive for mothers to leave

households.html?_r=0 ("[P]rioritizing two-parent families tethers victims of violence to their assailants, sacrifices safety in the name of parental rights and helps batterers maintain control. Sweeping rhetoric about the value of marriage and father involvement is not just incomplete. For victims of domestic violence, it's dangerous.").

68. See Greenberg, *supra* note 67, at 418-27 (explaining that courts tend to misunderstand the importance of domestic violence when awarding joint custody).

69. See *id.* at 425-26 (discussing court custody determinations that favor the abusive father over the battered mother); Schneider, *supra* note 58, at 557 (recounting the stories of mothers who lost custody of their children to abusive fathers because the court perceived that the mother had abandoned her children).

70. See Epstein et al., *supra* note 9, at 467-73 (arguing that the legal response to domestic violence favors short-term victim safety over long-term victim safety); Johnson, *supra* note 6, at 154-72 (arguing that the legal system overemphasizes victims' short-term security over their long-term security including economic, housing, and health security).

71. See Catherine F. Klein et al., *Border Crossings: Understanding the Civil, Criminal, and Immigration Implications for Battered Women Fleeing Across State Lines with their Children*, 39 FAM. L.Q. 109, 109 (2005) (noting that the period immediately following a victim's decision to leave her abusive partner is accompanied by a significant escalation in danger to her safety and welfare and that of her children); see also Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW. 19, 19 (1999) (stating that the chances of a woman being killed by her abuser increases by seventy-five percent if she leaves or attempts to leave the relationship; Epstein et al., *supra* note 9, at 476 ("[B]attered women are most likely to be killed while taking steps to end the relationship with the abuser or while seeking help from the legal system and at least [thirty percent] of all battered women who pursue legal action are reassaulted during the process of prosecution.")).

72. Jodi Kantor, *Seeing Abuse, and Pattern Too Familiar*, N.Y. TIMES, (Sept. 9, 2014), http://www.nytimes.com/2014/09/10/us/seeing-abuse-and-a-pattern-too-familiar.html?_r=2.

73. For examples of state protection from abuse laws, see ME. REV. STAT. ANN. 19-A, § 4007 (2014); 23 PA. STAT. ANN. § 6108 (2014). For examples of state laws adopting mandatory arrest policies, see COLO. REV. STAT. § 18-6-803.6 (2014); WIS. STAT. ANN. 968.075 (2014). Various jurisdictions throughout the country have adopted "no-drop" prosecution policies, such as Jefferson

their abusers by threatening them with the loss of their children and freedom if they fail to do so.⁷⁴ I will consider each of these in turn.

A victim may seek support from the state in two manners: she may file for a protective order or she may call for police intervention. In response, the state may issue a protective order, arrest her abuser, and/or file charges against him for domestic violence. Where a civil protection order is issued, the victim is not necessarily safer. In fact, separation puts many victims at increased risk of abuse.⁷⁵ Abusers are well aware that a protective order is, ultimately, no more than a piece of paper.⁷⁶ In addition, a victim's acquisition of a protective order may prompt her abuser to take legal action against her.⁷⁷ Where the victim and abuser share children, an abuser will often file a claim for custody in order to maintain access to both the woman and the children despite the protective order.⁷⁸

Similarly, where the police make arrests or file charges in response to a 911 call, the abuse victim is not necessarily protected. Often, victims are arrested instead of, or along with, their abusers.⁷⁹ A victim may be arrested for disorderly conduct when she argues with an officer.⁸⁰ Mandatory-arrest policies, which were intended to improve law enforcement's response to domestic violence, have increased the likelihood that a victim will be arrested when the police respond to a

County, Kentucky; Marion County, Indiana; Duluth, Minnesota; and San Francisco, California. See Corsilles, *supra* note 65, at 860-62; see also Robert E. Davis & Barbara E. Smith, *Evaluation of Efforts to Implement No-Drop Policies: Two Central Values in Conflict, Final Report*, U.S. DEPT. OF JUST. 1, 3 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/187772.pdf> (stating that many victims' advocates are pleased by the law's changing response to domestic violence such as through the adoption of presumptive and mandatory arrest laws, and the adoption of no-drop prosecution policies).

74. For examples of state laws that will remove children from their mothers when there is domestic violence in the household, see N.M. STAT. ANN. §§ 32A-4-2, 32A-4-6 (2014); W. VA. CODE §§ 48-27-202, 49-1-3, 49-6-3 (2014); *In re Michael G.*, 752 N.Y.S.2d 772 (N.Y. App. Div. 2002). For examples of state laws that charge mothers criminally for failing to remove their children from domestic violence in the home, see 720 ILL. COMP. STAT. ANN. 5/12C-5 (2014); WYO. STAT. ANN. § 6-4-403 (2014); Williams-Harris, *supra* note 66.

75. "The incidence and severity of domestic violence increase at the time of separation, and women are at an even higher risk of being murdered following separation than they are while sharing their households with violent men." Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529, 541-42 (2004) (citations omitted); see also Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 71-93 (1991) (discussing the danger to women at separation).

76. See *Castle Rock*, 545 U.S. at 553-54 (discussing a husband kidnapping and killing his three daughters after his wife acquired a protective order); *Burella*, 501 F.3d at 136 (discussing a husband shooting his wife after she acquired a protective order).

77. Margo Lindauer, *Damned If You Do, Damned If You Don't: Why Multi-Court-Involved Battered Mothers Just Can't Win*, 20 AM. U. J. GENDER SOC. POL.'Y & L. 797, 799 (2012).

78. *Id.*; see Greenberg, *supra* note 67, at 411-12 (explaining that batterers often use their custody rights to continue to abuse their former partner); PHYLLIS CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* 115 (2011) (discussing the story of battered mother of five, Margaret, who after finally leaving her abusive husband had to defend against his campaign for custody).

79. See Daniel G. Saunders, *The Tendency to Arrest Victims of Domestic Violence: A Preliminary Analysis of Officer Characteristics*, 10 J. INTERPERSONAL VIOLENCE 147, 149 (1995) (reporting the results of a qualitative empirical analysis of police officer responses to domestic violence calls).

80. *Id.* at 147.

call for help.⁸¹ Mothers face other risks when they call for police intervention in domestic violence.⁸² Specifically, the consequences of calling 911 may include loss of child custody, financial support, housing, health care, childcare, transportation, community, social support, and the emotional benefits of the relationship with the abusive partner.⁸³

Even when the police arrest the abuser alone and file charges against him, a victim's rights and safety are not necessarily protected. Usually, abusers are only charged with a misdemeanor and are unlikely to get more than a minimal sentence.⁸⁴ Additionally, no-drop prosecution policies can be problematic for victims who do not want to cooperate with the prosecution.⁸⁵ There are many self-protective reasons why a victim would not want to cooperate with the prosecution of her abuser⁸⁶ including: (1) psychological trauma, (2) self-motivated objectives, and (3) external pressure or coercion.⁸⁷ As a result, victims will often recant their testimony, refuse to testify, or fail to appear in court.⁸⁸ In these instances, victims may face arrest, imprisonment, or contempt proceedings.⁸⁹

Many advocates for domestic violence victims have criticized these policies for "punishing or 'revictimizing' the victim for the actions of the abuser by forcing the victim into a process over which she has no control."⁹⁰ Moreover, such experiences with the criminal justice system may discourage victims from calling for help at all.⁹¹ Additionally, there is evidence that prosecution of abusers puts

81. *Id.* at 148 (stating that in Minnesota County, victims comprised thirteen percent of the arrests in the first year after adoption of the mandatory-arrest policy and in Wisconsin the rate of referring women to abuser programs increased twelve-fold after the State adopted a mandatory-arrest policy).

82. See Epstein et al., *supra* note 9, at 480 (explaining battered women often fear contact with the state because they fear losing custody of their children); Shima Baradaran-Robison, *Tipping the Balance in Favor of Justice: Due Process and the Thirteenth and Nineteenth Amendments in Child Removal from Battered Mothers*, 2003 B.Y.U. L. REV. 227, 233-34 (2003) (discussing reasons why mothers may fear state intervention in cases of domestic violence).

83. Epstein et al., *supra* note 9, at 476-85.

84. Goodmark, *supra* note 44, at 34-35.

85. Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 178-80 (2009); but see generally Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996) (arguing in favor of a prosecutorial model for domestic violence cases that would balance state accountability and victim autonomy).

86. See *id.* at 165 (explaining that external pressures on a victim can be her desire to have an intact family to raise her children, financial hardship, or fear of retaliation by her abuser); see also Buel, *supra* note 71, at 19-26 (discussing reasons why victims of domestic abuse find it difficult to leave their abusers).

87. See Rutledge, *supra* note 85, at 149, 164 (stating that the most common reasons a domestic violence victim recants include psychological issues, coercion from batterers, financial concerns, concern for children, and various other issues).

88. *Id.* at 150 (stating that noncooperation of domestic violence victims by recanting or failing to appear at trial has become an epidemic in domestic violence cases).

89. Goodmark, *supra* note 44, at 17 (stating that in certain jurisdictions, prosecutors will subpoena reluctant domestic violence victims to testify and arrest or request imprisonment of victims who refuse to appear).

90. Hanna, *supra* note 85, at 1865.

91. See generally Tamara L. Kuennen, *Recognizing the Right to Petition for Victims of Domestic Violence*, 81 FORDHAM L. REV. 837 (2012) (arguing that the state-based response to domestic violence

victims at increased long-term risk of harm:

Because the victim and perpetrator have been involved in a relationship, their contact may well continue beyond the perpetrator's incarceration. Indeed, domestic violence offenders typically receive shorter sentences than do defendants prosecuted for violence against a stranger, increasing even further the risk that a batterer will sustain a connection to the victim during his imprisonment and attempt to resume the relationship upon his release. Even if the relationship does not resume, the violence is likely to worsen, as the natural course of violent partnerships is often one of escalation, both in terms of the severity and frequency of abuse. Finally, the possibility of long-term, repeat abuse in domestic violence cases is heightened by the fact that many batterers blame the victim for their incarceration and seek retribution by committing further violence.⁹²

Therefore, though the law encourages mothers to attain safety by reporting abuse and leaving abusive relationships, these state-sanctioned courses of action often prove unable to protect mothers from abuse and may lead to further victimization of the mother by the state. By leaving the relationship and acquiring a civil protective order victims are not always able to attain safety.⁹³ Abusers, prompted by victim action, may become more violent against their victims or misuse the legal process to gain access to their victims and their children despite the issuance of a protective order.⁹⁴ Moreover, prosecution policies may coerce mothers to participate in the prosecution of their abusers or result in the arrest or prosecution of the mothers themselves.⁹⁵ Finally, using state support to escape a violent relationship can lead to a host of devastating consequences for the victim, including the possible loss of her children.⁹⁶ Thus, state support to leave abusive relationships not only fails to guarantee victim safety, it may lead to potential re-victimization of the victim by the state.

In addition to encouraging victims to leave abusive relationships through issuance of civil protection orders, mandatory arrest laws, and no-drop prosecution policies, the law also encourages mothers to leave by threatening their freedom and

violates victims' First Amendment right to petition the Government for redress of grievances by, ultimately, discouraging victims from reporting domestic abuse).

92. Epstein et al., *supra* note 9, at 467-68.

93. "The risk of abuse increases after separation, making attention to the safety issues imperative: The risk of domestic violence directed both towards the child and the battered parent is frequently greater after separation than during cohabitation; this elevated risk often continues after legal intervention." Merle H. Weincr, *Domestic Violence and Custody: Importing the American Law Institute's Principles of the Law of Family Dissolution into Oregon Law*, 35 WILLAMETTE L. REV. 643, 665 (1999) (citation and internal quotation marks omitted); see also Mahoney, *supra* note 75, at 71-93 (discussing cases of post-separation violence).

94. Lindauer, *supra* note 77, at 799; Greenberg, *supra* note 67, at 411-12.

95. Saunders, *supra* note 79, at 147-49.

96. Epstein et al., *supra* note 9, at 476-85.

maternal rights.⁹⁷ Punitive child welfare laws threaten to remove children from their mother's care where the mother remains with her abuser.⁹⁸ Mothers are often charged for "failure to protect" their children for staying in abusive relationships.⁹⁹ Many states will bring child neglect and abuse proceedings against a mother who fails to leave or report an abusive relationship.¹⁰⁰ As a result, mothers risk losing their children for failing to stop the abuse in their homes, even when the "sole charge is violence *against the mother*."¹⁰¹

Legal theorists have criticized the state for holding mothers accountable for protecting their children from private family violence.¹⁰² In her article, *Motherhood and Crime*, professor and feminist legal theorist Dorothy E. Roberts critiques the law's prosecution of women for failing to protect their children from another's abuse.¹⁰³ The prosecution, conviction, and life imprisonment of a mother for first degree murder of her two-year old son where her boyfriend had beaten the toddler to death while the mother was at work, is one example of the law's harsh punishment of a mother for staying in an abusive relationship.¹⁰⁴ Roberts argues

97. Women who fail to remove their children from domestic violence can have their parental rights terminated for neglecting their children. See N.M. STAT. ANN. §§ 32A-4-2; 32A-4-6 (2014); W. VA. CODE §§ 48-27-202, 49-1-3, 49-6-3 (2014); In re Michael G., 752 N.Y.S.2d 772 (N.Y. App. Div. 2002). In addition, mothers who fail to remove their children from domestic violence in the home may be criminally charged for neglecting their children. See 720 ILL. COMP. STAT. ANN. 5/12C-5 (2014); WYO. STAT. ANN. § 6-4-403 (2014); see also Williams-Harris, *supra* note 66.

98. See Goodmark, *supra* note 44, at 22 (stating that in many jurisdictions social workers may institute child abuse proceedings against the mother for failing to get a protection from abuse order); Lindauer, *supra* note 77, at 805 (stating that many states bring charges against domestic violence victims, usually mothers, for failing to protect her children from domestic abuse); see generally Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557 (discussing the theoretical, public policy, and empirical critique of *Nicholson v. Williams* and theorizing the proper role of privacy in regulating the family).

99. G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89, 91 (1999).

100. Goodmark, *supra* note 44, at 22.

101. Miccio, *supra* note 99, at 92 (emphasis added); see *Nicholson v. Scopetta*, 820 N.E.2d 840, 844 (N.Y. 2004) (holding that evidence that the mother is a victim of domestic violence and that the child was exposed to that violence, without more, is insufficient to find that the child is neglected under New York law and therefore insufficient to justify the forcible removal of the child from the mother).

102. Professor Elizabeth Schneider articulates the sentiment well: "Responsibility for children does highlight the need for safety, but we do not want to place that responsibility exclusively on the mother. It is difficult to determine the contours of maternal responsibility in a culture that blames mothers for all problems relating to children and absolves fathers of all responsibility." Schneider, *supra* note 58, at 553.

103. See Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 96 (1993) ("[C]riminal law is more likely to impose an affirmative duty on mothers than other classes of people.").

104. *Id.* at 109-10 (citing *Tennessee v. Maupin*, No. 272, 1991 Tenn. Crim. App. LEXIS 818, at *1 (Oct. 7, 1991)); see In re T.B.-W., No. 27544., 2015 WL 1227823, at *1-2 (Ohio Ct. App. Mar. 18, 2015) (deciding that a mother's parental rights were properly terminated after she permitted son to have telephone and mail contact with his imprisoned father who had violently abused mother and son prior to his imprisonment); *Lindley v. State*, No. 08-08-00149-CR, 2010 WL 1076138, at *1 (Tex. Crim. App. March 24, 2010) (affirming a forty-five year prison sentence to a mother following her son's murder by her abusive boyfriend, finding that the mother did not adequately protect her son from the injuries that resulted in his death by failing to immediately contact the authorities and seek medical attention after her son suffered a particularly vicious beating); see also Evan Stark, *A Failure to Protect: Unravelling "The*

that punishment of mothers when another harms their children is consistent with the social view that mothers, alone, are responsible for protecting their children.¹⁰⁵ Professor Kristian Miccio further claims that holding mothers solely responsible for the safety of their children is conceptually related to the refusal to hold the state accountable for private family violence:

While political discourse locates intimate violence within the sphere of state accountability, such conceptions remain outside the lexicon of legal discourse—particularly as the discourse pertains to battered mothers, their children and conceptions of a maternal duty to protect. State and federal courts protect a social contract where the state is not accountable for contributing to woman battering within the family. Because intra-familial violence is viewed as ‘private,’ the state is shielded from accountability. Under this conception of state accountability, there is no need to examine how state nonfeasance constructs and perpetuates the harm to battered mothers and to witnessing children.¹⁰⁶

Thus, the state’s punishment of mothers who fail to protect their children has important theoretical ties to the state’s refusal to take any responsibility for private family violence.¹⁰⁷ The view that mothers, not the state, are responsible for preventing violence against children is prevalent not only under this punitive regime, wherein the state threatens to remove a mother’s children from her custody or prosecute her for failure to protect, but also in cases where mothers have brought constitutional claims against the state for failing to help them protect their children from an abusive father.¹⁰⁸ The Supreme Court arguably sanctioned the view that mothers, not the state, are responsible for the protection of children in *DeShaney v.*

Battered Mother’s Dilemma”, 27 W. ST. U. L. REV. 29, 29-31 (2000) (proposing a narrative framework for cases where a battered mother is alleged to have caused or contributed to her child’s abuse or neglect and discussing the case of Hedda Nussbaum who was condemned for failing to protect Lisa Steinberg from being killed by her adoptive father despite the fact that Hedda, herself, had never abused the child and, at the time of her arraignment for murder, she “was hospitalized with ‘nine broken ribs, a broken jaw, a broken nose and numerous bruises’”); Schneider, *supra* note 58, at 553 (discussing how Hedda Nussbaum was treated by the feminist community).

105. Roberts, *supra* note 103, at 110-11.

106. Miccio, *supra* note 99, at 91 (citations omitted).

107. In *Castle Rock*, the Supreme Court refused to hold that law enforcement has any duty to protect individuals from private family violence. See *Castle Rock*, 545 U.S. at 760 (“We do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*. A well-established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.”). Some theorists also discuss the failure to put responsibility to stop battering on the batterer himself: “Many commentators have noted the troubling result of the focus on why the woman does not leave. Asking this question places responsibility on the woman, and puts her conduct under scrutiny, rather than placing the responsibility on the battering man. Instead of asking ‘why doesn’t the woman leave,’ we should ask ‘why do men batter,’ or perhaps, more significantly, ‘why does society tolerate men who batter?’” Schneider, *supra* note 58, at 558.

108. See *Castle Rock*, 545 U.S. at 768 (holding that mother’s procedural due process rights were not violated where police failed to respond to father’s taking of children in violation of mandatory-arrest protective order).

*Winnebago Cnty. Dep't of Soc. Servs.*¹⁰⁹ and *Town of Castle Rock, Colorado v. Gonzales*,¹¹⁰ wherein it held that victims of private family violence have not suffered a deprivation of their procedural or substantive due process rights where the state failed to protect them.¹¹¹ These holdings were extended by the Third Circuit, in *Burella v. City of Philadelphia*,¹¹² to private family violence perpetrated by an officer of the state.¹¹³ A discussion of these cases is illustrative.

On May 21, 1999, Jessica Gonzales, nee Lenahan, divorced her abusive husband Simon.¹¹⁴ The court issued a restraining order against Simon in conjunction with the couple's divorce decree.¹¹⁵ On June 4, 1999, the terms of the restraining order were modified and it was made permanent.¹¹⁶ The restraining order allowed Simon limited visitation with the couple's three daughters, Rebecca (ten years old), Katherine (nine years old), and Leslie (seven years old).¹¹⁷ Specifically, Simon had the right to spend time with the girls "on alternate weekends, for two weeks during the summer, and 'upon reasonable notice,' for a midweek dinner visit 'arranged by the parties.'"¹¹⁸

On Tuesday, June 22, 1999, Simon took Rebecca, Katherine, and Leslie when they were playing outside of their home.¹¹⁹ In taking the girls, Simon violated the restraining order issued against him.¹²⁰ Upon discovering that the girls were missing, Jessica called the Castle Rock Police Department.¹²¹ The department dispatched two officers to her location.¹²² Upon their arrival, Jessica showed the officers the restraining order.¹²³ She requested that the officers enforce the restraining order and that they return her children to her immediately.¹²⁴ The officers responded that they could do nothing about the restraining order and suggested that she wait until 10:00 p.m. and call the police if the children did not return home by then.¹²⁵

At 8:30 p.m., Jessica spoke to Simon on his cell.¹²⁶ He told her that he took the girls to an amusement park in Denver.¹²⁷ Jessica called the police department following her conversation with Simon and requested that the police department "have someone check for' her husband or his vehicle at the amusement park and

109. 489 U.S. 189 (1989).

110. 545 U.S. 748 (2005).

111. *Castle Rock*, 545 U.S. at 768-69; *Deshaney*, 489 U.S. at 195.

112. 501 F.3d 134 (3d Cir. 2007).

113. *Id.* at 149-50.

114. *Castle Rock*, 545 U.S. at 751.

115. *Id.* at 751-52.

116. *Id.* at 752.

117. *Id.*

118. *Id.*

119. *Id.* at 753.

120. *Castle Rock*, 545 U.S. at 752 (stating the visitation rights of the father).

121. *Id.* at 753.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Castle Rock*, 545 U.S. at 753.

127. *Id.*

'put out an [all points bulletin]' for her husband . . .'¹²⁸ The officer refused Jessica's request and, again, told her to wait until 10:00 p.m.¹²⁹

At 10:10 p.m., Jessica reported to the police department that her daughters were still missing.¹³⁰ She was then told to wait until midnight.¹³¹ At midnight, Jessica called the police department and told them her daughters were still missing.¹³² Jessica went to her ex-husband's apartment but found no one there.¹³³ At 12:10 a.m., Jessica called the police.¹³⁴ She was told to wait for the police to arrive.¹³⁵ No police officer ever came.¹³⁶ At 12:50 a.m., Jessica arrived at the police department and filed an incident report.¹³⁷ The officer at the station made no effort to find her daughters.¹³⁸

At 3:20 a.m., Simon went to the Castle Rock Police Department and opened fire on the station with a semiautomatic handgun he purchased earlier that evening.¹³⁹ The police returned fire, killing Simon.¹⁴⁰ In the cab of his truck, the lifeless bodies of Jessica's three daughters were found.¹⁴¹ Forensic investigators determined that the girls were murdered by their father earlier that evening.¹⁴²

Jessica filed suit in federal district court against the Town of Castle Rock and several police officers for violation of her substantive and procedural due process rights.¹⁴³ The district court granted the defendant's motion to dismiss, finding that Jessica failed to state either a substantive or procedural due process claim.¹⁴⁴ Jessica appealed the case to the Tenth Circuit Court of Appeals.¹⁴⁵ There, the district court's dismissal with regard to Jessica's substantive due process claim was affirmed, but the dismissal of her procedural due process claim was reversed.¹⁴⁶ In affirming that Jessica had failed to state a claim that her substantive due process rights had been violated, the Tenth Circuit relied on the Supreme Court's 1989 *DeShaney* decision.¹⁴⁷

128. *Id.* (alteration in original).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Castle Rock*, 545 U.S. at 753.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 753-54.

138. *Castle Rock*, 545 U.S. at 754.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* A factual dispute remains as to whether the girls were murdered by their father earlier that evening, or as a result of the police fire. *Jessica Lenahan (Gonzales) v. U.S.*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 2, 33, 181-95 (2011), available at <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/gonzales%20decision.pdf>.

143. *Castle Rock*, 545 U.S. at 754.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Gonzales v. City of Castle Rock*, 307 F.3d 1258, 1262 (10th Cir. 2002).

In *DeShaney*, the Supreme Court considered whether the state violates an individual's due process rights when it fails to protect that individual from private violence.¹⁴⁸ Specifically, the Court considered whether the state's failure to protect Joshua DeShaney from his violent father, Randy DeShaney, was actionable.¹⁴⁹ Joshua was only four years old when Randy's abuse left him severely brain damaged and significantly paralyzed.¹⁵⁰ Joshua's injuries occurred after Randy's violence had been reported and after more than a year of intervention by the Winnebago County Department of Social Services.¹⁵¹ By the time Joshua was four years old, the State had accumulated significant knowledge of his situation.¹⁵² In the year preceding his final beating, Joshua had been treated in hospital emergency rooms multiple times, his home had been visited by Social Services numerous times, and the police had been called to his home to intervene in domestic violence on several occasions.¹⁵³ Attorneys for Joshua unsuccessfully argued to the courts that the history of state knowledge and interaction in Joshua's life had created a special relationship between him and the state that entitled him to protection from his father's private violence.¹⁵⁴

Due to the Supreme Court's decision in *DeShaney*, a person's ability to bring a substantive due process claim for private violence is significantly restricted. By finding that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," *DeShaney* established that individuals have no legal recourse when the state fails to protect them from family violence.¹⁵⁵ Therefore, *DeShaney's* holding that "a State's failure to protect an individual against private violence simply does not constitute violation of the Due Process Clause," led to the dismissal of Jessica's substantive due process claim in *Castle Rock*.¹⁵⁶

The implications of the *DeShaney* decision for victims of family violence are significant. Legal scholars have criticized this holding from both a theoretical and practical perspective.¹⁵⁷ Theoretically, many have found cause with the state's distinction between public and private violence and the premise that the state's role

148. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 191 (1989).

149. *Id.*

150. LYNNE CURRY, *THE DESHANEY CASE: CHILD ABUSE, FAMILY RIGHTS, AND THE DILEMMA OF STATE INTERVENTION I* (Peter Charles Hoffer & N. E. H. Hull eds., 2007).

151. *Id.*

152. *Id.*

153. *Id.*

154. *DeShaney*, 489 U.S. at 193.

155. *Id.* at 195.

156. *Id.* at 197.

157. See, e.g., Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078, 1079 (arguing that with the increased dependence on administrative agencies, judicial review is more important and necessary than ever before); Phillip M. Kannan, *But Who Will Protect Poor Joshua DeShaney, A Four-year-old Child with No Positive Due Process Rights?*, 39 U. MEM. L. REV. 543, 544 (2009) (arguing that the Court's opinion is legally invalid because it relies on "unsupported factual, legal, and psychological assumptions"); Lauren Oren, *The State's Failure to Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C. L. REV. 659, 665 (1990) (arguing that the Court was incorrect to analyze *DeShaney* outside of the context of family violence and child protection).

is limited to protecting citizens from state-created danger.¹⁵⁸ This premise assumes that citizens are independent, autonomous, individuals capable of protecting themselves against private danger; that is, danger posed by other citizens.¹⁵⁹ This assumption has been attacked by feminist legal theorists for being inherently androcentric, and for failing to appreciate that private actors often victimize women and the state's refusal to protect them from private aggression contributes to their oppression and subordination.¹⁶⁰ Nevertheless, the distinction between public and private violence remains determinative and the Supreme Court affirmed this view in *DeShaney* by refusing to hold the state responsible for protecting citizens from private violence.¹⁶¹

It was against this backdrop that Jessica filed her suit against the Castle Rock Police Department. Jessica's claim argued that her *procedural* due process rights were violated when the Castle Rock Police Department failed to enforce her protective order.¹⁶² On June 27, 2005, the Supreme Court issued its decision, ultimately holding that any property right Jessica might have had in her protective order did not give rise to a legal entitlement for which she was entitled to due process.¹⁶³ Essentially, the Court held that the police did not violate any duty owed to Jessica or her daughters when it exercised its discretion to not enforce her protective order.¹⁶⁴ Therefore, following *Castle Rock*, where the state refuses to protect a mother and her children from their violent husband/father, even when the mother has a court-issued, mandatory-arrest protective order and has called the police for enforcement, there is no constitutional due process violation.

Approximately two years after the Supreme Court's *Castle Rock* decision, the Third Circuit issued its decision in *Burella*.¹⁶⁵ There, Jill Burella filed suit against the City of Philadelphia for violation of her due process and equal protection rights when the City failed to enforce her restraining orders and protect her from her abusive husband.¹⁶⁶ In 1999, Jill's husband George Burella, a ten-year veteran of the Philadelphia police department, shot her in the chest and committed suicide.¹⁶⁷ Despite her serious injuries, Jill survived the shooting.¹⁶⁸ The shooting followed years of severe domestic violence in response to which Jill made reports to the

158. See Laura Rac Dove, *A Constitutional Right to Police Protection and Classical Liberal Theory: Compliment, Not Conflict*, 4 AKRON J. CONST. L. & POL'Y 37, 40 (2013) ("[A]ll citizens have a constitutional right to police protection from criminal acts by other private citizens.").

159. Marina Angl, *Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and a Sleeping Man*, 16 BUFF. WOMEN'S L.J. 65, 66-67 (2008) ("The prevailing belief is that individuals are independent, autonomous beings, and therefore, free to leave, to exit, any situation at any time. . . . Abused women find it difficult to leave their abusers for many . . . reasons . . .").

160. Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 42 (1992).

161. *Castle Rock*, 545 U.S. at 755, n. 13.

162. *Id.* at 754.

163. See *id.* at 766 ("Even if we were to think otherwise concerning the creation of an entitlement by Colorado, it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a 'property' interest for purposes of the Due Process Clause.").

164. *Castle Rock*, 545 U.S. at 760, 766.

165. *Burella*, 501 F.3d 134.

166. *Id.* at 136.

167. *Id.* at 138.

168. *Id.* at 138.

Philadelphia Police Department and acquired orders of protection.¹⁶⁹

During one incident, George “phoned his wife and threatened to shoot their son Nicholas if she did not immediately return to the house.”¹⁷⁰ After she called 911, Jill rushed home.¹⁷¹ Upon her arrival, George, who was armed with a gun, threatened to shoot her.¹⁷² When police arrived George initially refused to surrender, but he did so once the officers agreed to charge him with a domestic incident disturbance instead of a more serious offense.¹⁷³ George’s abuse continued despite Jill’s repeated pleas for official intervention.¹⁷⁴

In 2000, Jill filed suit against three named police officers, the City of Philadelphia, and the city psychiatrist who treated George Burella for violation of her due process and equal protection rights.¹⁷⁵ The District Court held that *DeShaney* foreclosed Jill’s substantive due process claim.¹⁷⁶ However, it also held that Jill had a procedural due process right to police protection based on Pennsylvania’s protection from abuse law and the protection from abuse orders that were issued by the Pennsylvania courts.¹⁷⁷ On appeal, the Third Circuit affirmed the District Court’s denial of Jill’s substantive due process claim.¹⁷⁸ With regard to Jill’s procedural due process claim, however, it reversed, due in large part to the then-recently decided *Castle Rock* case.¹⁷⁹ Finally, the Third Circuit rejected Jill’s state-created danger claim because, as a matter of law, the Court found that she failed to “show that the officers *affirmatively* exercised their authority in a way that rendered her more vulnerable to her husband’s abuse.”¹⁸⁰ Therefore, even where the perpetrator of private family violence is an officer of the state and his position with the state appears to garner him additional favor with law enforcement officers, the state’s failure to protect his wife and children from his violent acts does not violate their due process or equal protection rights.

The cases of Jessica Lenahan and Jill Burella illustrate an especially troubling aspect of domestic violence law.¹⁸¹ States adopt mandatory arrest and no-drop

169. *Id.* at 136-39.

170. *Id.* at 137.

171. *Burella*, 501 F.3d at 137.

172. *Id.*

173. *Id.*

174. *Id.* at 136-39.

175. *Id.* at 138.

176. *Id.* at 140.

177. *Burella*, 501 F.3d at 140.

178. *Id.*

179. *Id.* at 146.

180. *Id.* at 147.

181. The Supreme Court’s holding in *Castle Rock*, that a mother and her children have no procedural due process right to protection from the police where they have a mandatory-arrest protective order, has been widely criticized. See, e.g., G. Kristian Miccio, *If Not Now, When? Individual and Collective Responsibility for Male Intimate Violence*, 15 WASH. LEE J. CIV. RTS. & SOC. JUST. 405, 406 (2009) (critiquing the “systemic denial of collective responsibility” reflected in the Supreme Court’s *Castle Rock* decision and the Third Circuit *Burella* decision); Zanita E. Fenton, *State Enabled Violence: The Story of Town of Castle Rock v. Gonzales*, in *WOMEN AND THE LAW STORIES* (Elizabeth M. Schneider & Stephanie M. Wildman ed., 2011) (“[P]rotective orders, administratively designed to ensure quick investigation and response, are [now] meaningless.”); Ethan Kate, *A “Supreme” Court?: How an*

prosecution policies to encourage and support women who report abuse and leave their abusers.¹⁸² These policies communicate to victims that the state is invested in their safety and concerned about domestic violence.¹⁸³ However, failure to arrest an abuser, even in a mandatory-arrest jurisdiction where it is clear that a protective order was violated, is not a legally cognizable harm.¹⁸⁴ As the Court of Appeals explained in *Castle Rock*, such a result, “render[s] domestic abuse restraining orders utterly valueless.”¹⁸⁵

Moreover, these cases demonstrate that the state does not take responsibility for preventing or effectively responding to private family violence.¹⁸⁶ Rather, the abused mother, alone, is responsible for ensuring her safety and the safety of her children. Moreover, they can only do so through state-sanctioned courses of conduct. Under the circumstances, it should not be surprising that many mothers stay in abusive relationships rather than risk the consequences of leaving.

The realities of abusive relationships and custody determinations often lead mothers to stay in abusive relationships, despite express social and legal support for leaving. Mothers report that, among other reasons, they stay in abusive relationships because they fear losing custody of their children and they believe they are better able to protect their children from the abuser if the family remains intact.¹⁸⁷ As the above cases demonstrate, leaving an abusive relationship is no guarantee of safety. It therefore seems reasonable that some mothers will stay with their abusers so that they can better protect their children. Staying in an abusive

Unfavorable Ruling in the Inter-American Commission on Human Rights Should Impact United States Domestic Violence Jurisprudence, 28 WISC. INT'L L. J. 430, 430 (2010) (arguing that U.S. courts should follow a model similar to that used in evaluating cruel and unusual punishment with regards to domestic violence prevention); Helen Gugel, *Remaking the Mold: Pursuing Failure-To-Protect Claims Under State Constitutions Via Analogous Bivens Actions*, 110 COLUM. L. REV. 1294, 1294 (2010) (arguing that state constitutions may better support government accountability in failure-to-protect suits); Dove, *supra* note 158, at 40-41 (criticizing the Supreme Court's holdings in *DeShaney* and *Castle Rock* as contradictory and resulting from a logical flaw in the Court's reasoning).

182. Jane Campbell Moriarty, “*While Dangers Gather*”: *The Bush Preemption Doctrine, Battered Women, Imminence, and Anticipatory Self-Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 1, 18-19 (2005) (noting that over the last few decades many states have adopted mandatory arrest and no-drop policies, demonstrating law enforcements' willingness to intervene and prosecute cases of domestic violence).

183. See Tamara L. Kucnncn, “*No-Drop*” *Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN'S L.J. 39, 69 (2007) (“Without making an independent finding based on the objective evidence, a court does not meet the public policy dictates of the Act that victims of domestic violence must be assured the maximum protection from abuse the law can provide; that the official response to domestic violence, including that of the courts, shall communicate the attitude that domestic violence behavior will not be excused or tolerated; and that it is the responsibility of the courts to protect victims of domestic violence by ordering those remedies and sanctions that are available to assure the safety of the victims and the public.” (emphasis added)).

184. *Castle Rock*, 545 U.S. at 768-69.

185. *Gonzales*, 366 F.3d at 1109.

186. See Nancy Chi Cantalupo, Jessica Lenahan (Gonzales) v. United States & Collective Entity Responsibility for Gender-Based Violence, 21 J. GENDER, SOC. POL'Y & L. (2012) (exploring the implications of the Inter-American Commission on Human Rights decision in *Lenahan* in the context of a broader project considering how theories of collective entity responsibility for gender-based violence could be integrated into the U.S. tort and criminal justice law).

187. Buel, *supra* note 71, at 20.

relationship, however, may result in a mother's loss of custody¹⁸⁸ or her incarceration.¹⁸⁹ Mothers may also remain in abusive relationship out of fear that family courts will award custody of the children to the abusive partner. Despite language in family codes to the contrary, family courts often trivialize the significance of abuse in custody determinations.¹⁹⁰ Moreover, "friendly parenting statutes," which favor the parent who will facilitate a relationship between the children and the non-custodial parent, often weigh against awarding custody to victims.¹⁹¹ Often the victim will appear to be uncooperative for attempting to deny the abuser access to the children.¹⁹²

Mothers are further discouraged from leaving abusive relationships by state kidnapping statutes. If a mother flees with her children in contravention of a custody order, she may face severe criminal penalties.¹⁹³ Violations of state kidnapping statutes are usually felonies that can mandate imprisonment of over one year.¹⁹⁴ In addition, mothers who refuse to allow visitation to an abuser or who run away with their children may face civil penalties such as adverse custody decisions, including the possible loss of all custody.¹⁹⁵ Some states allow mothers to use a "necessity" defense. However, this defense is risky and only available in limited circumstances.¹⁹⁶ When women flee the country to escape an abusive home, they risk being charged under the Hague Convention.¹⁹⁷

188. See *T.B-W*, No. 27544, 2015 WL 1227823, at *1-2 (deciding that a mother's parental rights were properly terminated after she acquiesced to incarcerated abusive father's request to have son send him drawings and talk to him on the phone).

189. See *Lindley*, No. 08-08-11249-CR, 2010 WL 1076138, at *1-3 (affirming a forty-five year prison sentence of a mother following her son's murder by her abuser, finding that mother did not adequately protect her son from the injuries that resulted in his death by failing to immediately contact the authorities and seek medical attention, even though mother was not in the home at the time the child sustained injuries); see Alex Campbell, *These Mothers Were Sentenced to at Least 10 Years for Failing to Protect Their Children From a Violent Partner*, BUZZFEED NEWS (Oct. 2, 2014, 9:51 PM), <http://www.buzzfeed.com/alexcampbell/these-mothers-were-sentenced-to-at-least-10-years-for-failing-to-protect-their-children-from-a-violent-partner> (listing and describing the cases of 28 battered mothers in 11 states who have been imprisoned since 2004 for failing to protect their children from their partner's abuse).

190. Goodmark, *supra* note 44, at 11-12 (stating that mothers frequently find that domestic violence committed against them and their children was considered unimportant or irrelevant in permanent custody disputes); Greenberg, *supra* note 67, at 418-419 (discussing how courts minimize or ignore domestic violence in making custody determinations).

191. See *id.* at 28 (stating that courts can find that a battered mother's unwillingness to foster continuing contact is more relevant to the custody determination than the father's history of violence).

192. See Klein et al., *supra* note 71, at 132 (stating that battered women who intentionally flee from their abusers to protect themselves and their children from further harm are vulnerable to a finding of non-cooperativeness in custody proceedings); Goodmark, *supra* note 44, at 28 (stating that courts can find that a battered mother's unwillingness to foster continued contact between her children and her abuser is more relevant to the custody determination than the history of violence).

193. Klein et al., *supra* note 71, at 110-11.

194. *Id.* at 125.

195. *Id.* at 131-32.

196. *Id.* at 122.

197. See Brief of the Domestic Violence Legal Empowerment & Appeals Project et al. as Amici Curiae Supporting Respondent at 4-5, *Abbot v. Abbot*, 130 S. Ct. 1983 (2010) (No. 08-645), 2009 WL 4271310 (arguing that many mothers charged under the Convention were fleeing an abusive relationship); see also Hague Convention on the Civil Aspects of International Child Abduction, Oct.

Despite the risks, there are many cases of mothers who flee with their children. This phenomenon was explained in the amicus brief filed by domestic violence advocates in a Supreme Court case interpreting the convention:

While courts and observers often assume abduction is unnecessary because safety can and should be achieved through the legal process, the realities of domestic violence suggest there are no legal panaceas for abuse. The painful reality is that often the only way to ensure the safety of oneself and one's children is to get completely away – and in most cases women seek to do so by returning home.¹⁹⁸

An Alaskan case, decided in 2014, illustrates the potential custodial consequences for a mother who flees an abusive relationship with her children stateside. In *Yelena R. v. George R.*,¹⁹⁹ the court removed children from their mother and placed them with their abusive father to punish the mother for fleeing with the children.²⁰⁰ The case concerned a husband and wife with a significant history of domestic violence.²⁰¹ Despite divorcing, the two continued their relationship off-and-on until 2011.²⁰² Their first child was born during the marriage and the wife gave birth to their second child after the divorce, in 2006.²⁰³ The relationship remained plagued by violence and the husband was arrested for abusing the wife.²⁰⁴ When the two were living in Alaska in 2011, the wife obtained a protective order against her husband after he sexually assaulted her.²⁰⁵ After the judge denied the wife's application for a long-term protective order and dissolved the temporary one, she fled with the children to Massachusetts without the husband's consent.²⁰⁶ The court granted sole legal and physical custody to the father.²⁰⁷

25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at http://www.hcch.nct/index_cn.php?act=conventions.text&cid=24 (providing the text of the international convention on child abduction); Julia Alanen, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 U. MIAMI INTER-AM. L. REV. 49, 72-79 (2008) (broadly discussing the ramifications of parental kidnapping and raising the domestic violence defense).

198. Brief of the Domestic Violence Legal Empowerment & Appeals Project et al., as Amici Curiae Supporting Respondent at 12, *Abbot v. Abbot*, 130 S. Ct. 1983 (2010).

199. 326 P.3d 989 (Alaska 2014).

200. *Yelena R.*, 326 P.3d at 999; see generally *Hanke v. Hankc*, 615 A.2d 1205 (Md. Ct. Spec. App. 1992) (reversing and reprimanding trial court judge's order which granted overnight visitation with the parties' four-year-old daughter where father had sexually abused his stepchild in the past; after daughter reported being sexually molested by father, mother refused to allow father visitation; and the trial court judge was found to have ordered the overnight visitation to "punish" the mother for refusing to abide by the visitation order).

201. *Yelena R.*, 326 P.3d at 993.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 994.

206. *Id.* at 995.

207. *Yelena R.*, 326 P.3d at 995.

State punishment of mothers who flee abusive relationships has been considered by legal theorists. Professor Leigh Goodmark explains that a mother may face punishment regardless of whether she flees with or without her children.²⁰⁸ If she flees with her children, “without the consent of the other parent . . . [she] may face serious criminal penalties under state parental kidnapping statutes . . . [or] restrictive state civil statutes on child custody as well as related case law that encourage adverse custody decisions to penalize parents who deprive the other parent of access to or contact with their children.”²⁰⁹ If a mother flees without her children, she may similarly face retribution by the state. Goodmark explains that “[t]he mother who flees without her child could be disadvantaged by that decision in the custody context as well; the court could find that the mother abandoned the child and use that abandonment to justify a grant of custody to the abuser.”²¹⁰

CONCLUSION

Mothers who are the victims of domestic violence face unique challenges in their quest for safety. The legal response to domestic violence requires that mothers respond to abuse in specific state-sanctioned manners. However, when mothers respond accordingly, such as by reporting abuse and leaving the abusive relationship, their safety and the safety of their children is not guaranteed. Moreover, by responding in state-sanctioned manners, mothers risk a host of negative consequences including increased threat to their immediate and long-term safety, the loss of their children, undesired financial, health, and social consequences, and criminal prosecution. On the other hand, when mothers respond to abuse in *unsanctioned* manners, such as by staying in abusive relationships, they face similarly hostile consequences including continued abuse, the loss of their children, and criminal prosecution. Thus, regardless of how mothers respond to domestic violence, they risk being harmed by their abuser and the state. As a result battered mothers’ choices are significantly constrained.

Though the legal response to domestic violence has improved dramatically over the past few decades, reforms are still needed. The state should sanction a broader range of maternal responses to domestic violence and accept greater responsibility for preventing and responding to private family violence. In addition to increasing victim safety, implementation of these reforms would increase respect for maternal autonomy and demonstrate the state’s true commitment to protecting women and children from domestic violence.

208. Leigh Goodmark, *Going Underground: The Ethics of Advising a Battered Woman Fleeing an Abusive Relationship*, 75 UMKC L. REV. 999, 1004-05 (2007).

209. *Id.* at 1004.

210. *Id.* at 1005; Schneider, *supra* note 58, at 557.

