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# The Community Politics of Domestic Violence.docx

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The Community Politics of Domestic Violence  
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### Abstract

Gender violence has long been identified as a crisis of epidemic proportions that defies facile solution. Despite decades of law reform, and notwithstanding increased social services and public health interventions, the rates of gender violence have not appreciably declined. The field of domestic violence advocacy is itself in a crisis, and it has been difficult to discern the best way forward. Despite its intellectual and practical engagement, the domestic violence movement seems unable to shift from the neoliberal paradigm that emphasize the features associated with the carceral state while appearing indifferent to the structural sources of domestic violence as a social problem. Reliance on the criminal justice system has tended to fracture the domestic violence movement even as it marginalized itself from disenfranchised populations.

This Article offers a case study of an incident that occurred between the Sheriff of San Francisco and his wife in December 2011 that resulted in domestic-violence related criminal proceedings and additional charges of official misconduct and efforts by the Mayor to remove him from the office of Sheriff. The Sheriff had been recently elected largely as a result of a coalition of marginalized communities, immigrant rights advocates, environmental justice organizations, labor groups, and other progressive organizations. The case reached beyond the courts and city hall into neighborhoods and households, and community meeting places throughout the city. The legal and public citizen commentary offered throughout nine months of proceedings against the Sheriff set in relief the contradictions and tensions emblematic of the crisis that confronts the domestic violence movement. The case provide a unique opportunity to consider the problems of domestic violence anew, a way to interrogate old premises and presumptions, examine prevailing practices, and reconsider responses.

This Article addresses the perils attending over-reliance on criminal justice paradigms as remedy for domestic violence, that—in fact—deployment of law enforcement methods has acted not only to diminish the efficacy of domestic violence strategies but also to diminish the relevance of domestic violence advocacy to the social justice movement. To rely on models of victimhood as the means to obtain the intervention of criminal justice remedies implies loss of voice and agency, whereby the interests of the “victim” are preempted in discharge of larger logic of the criminal justice system. That domestic violence advocates

identify with criminal justice remedies, moreover, at a time when law enforcement practices are under scrutiny and suspicion within marginalized communities, has acted to deepen the breach between domestic violence advocates and the social justice movement.

The Article offers an opportunity to reconsider the definition of domestic violence as well as the criminal justice and community response to this problem. It seeks to re-engage in dialogue about the private/public dichotomy without returning to a point in time where private abuse between intimate partners can be considered of little or no socio-political or legal import. Domestic violence persists as a manifestation of gender and other forms of inequality and social norms that oppress and repress its victims. But the mainstream responses often accomplish little to eliminate or repair the damage caused by intimate partner violence. The Article reiterates the recommendations scholars have offered in recent years as alternatives to criminal justice remedies and suggests that what is lacking is not prescriptives but rather political will.

## Introduction

Gender violence has long been identified as a crisis of epidemic proportions that defies facile solution.<sup>1</sup> Despite decades of law reform, and notwithstanding increased social services and public health interventions, the rates of gender violence have not appreciably declined. Domestic violence rates have fallen at a significantly lower rate than other categories of crime.<sup>2</sup> Within the realm of gender violence law, domestic violence, often referred to as intimate partner violence—most frequently characterized by the phenomenon of a male perpetrator and female victim—has received the greatest attention.<sup>3</sup> In this context, the most significant developments have been in the realm of criminalization and punishment,<sup>4</sup> circumstances about which there has been much scholarly attention and activist debate.

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<sup>1</sup> The terms gender violence, domestic violence, and intimate violence may be used throughout this article as a means to designate violent acts between intimate partners, including sexual assault, and stalking.. For a useful discussion of terms and framing, see Julie Goldscheid, *Gender Neutrality and the "Violence Against Women" Frame*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 307, 310 (2015). The social movement to end domestic violence is referred to as the domestic violence or anti-domestic violence movement.

<sup>2</sup> See Leigh Goodmark, *Decriminalizing Domestic Violence* (forthcoming) 1-2 (2016).

<sup>3</sup> See Goldscheid, *supra* note 1, at 310-311 (Reframing article Gender Violence)

<sup>4</sup> See Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits*, in SERIES: NIJ RESEARCH REPORT, Washington, D.C. (1996) (discussing the proliferation of criminal intervention strategies); Donna Coker,

The field of domestic violence advocacy is itself in somewhat of a crisis, and it has been difficult to discern the best way forward. Despite its intellectual and practical engagement, the domestic violence movement seems unable to shift from the paradigmatic neoliberal responses that emphasize the features associated with the carceral state while appearing indifferent to the structural sources of domestic violence as a social problem.<sup>5</sup> Criminal justice interventions have not only failed to alleviate domestic violence, but particular social groups have been adversely affected by the dominant law and order responses.<sup>6</sup> Reliance on the criminal justice system has tended to fracture the domestic violence movement even as it marginalized itself from disenfranchised populations.<sup>7</sup> Critical race theorists and many community activists view the penchant of mainstream domestic violence advocates to rely on law enforcement with suspicion. Such reliance, they argue, serves to disempower poor communities and communities of color, increase the rate of incarceration, and impair the ability of communities to develop internal means of social control.<sup>8</sup> Efforts to aid domestic violence victims through arrests and prosecution have failed to account for racism and abusive practices characteristic of the criminal justice system.<sup>9</sup> Notwithstanding increasing mainstream support for the eradication of domestic violence, little progress can be measured.

This Article offers a case study of an incident that occurred between the Sheriff of San

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*Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM L. REV. 801 (2001).

<sup>5</sup> See *infra* 165 and accompanying text. See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS, THE POLITICS OF MASS INCARCERATION IN AMERICA* 105 (2006).

<sup>6</sup> Goodmark, *supra* note 2, at 2 (noting the absence of data that ties criminalization to decreased rates of domestic violence); Deborah M. Weissman, *The Personal is Political—And Economic: Rethinking Domestic Violence*, 2007 B.Y.U. L. REV. 387, 401 (2007). See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev'd ed., 2012).

<sup>7</sup> See MS. FOUNDATION FOR WOMEN, *SAFETY AND JUSTICE FOR ALL: EXAMINING THE RELATIONSHIP BETWEEN THE WOMEN'S ANTI-VIOLENCE MOVEMENT AND THE CRIMINAL LEGAL SYSTEM* (2003);

<sup>8</sup> See Holly Maguigan, *Wading into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 427, 432 (2003); See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991); Coker, *supra* note 4, at 852-854.

<sup>9</sup> Weissman, *supra* note 6, at 402.

Francisco and his wife in December 2011. The legal and community response that ensued serves to set in relief the contradictions and tensions emblematic of the crisis that confronts the domestic violence movement. In December 2011, Ross Mirkarimi, at the time the Sheriff-elect of the city of San Francisco, while arguing with his wife, Eliana López, grabbed her arm causing a visible bruise. Mirkarimi had been recently elected sheriff largely as a result of a coalition of marginalized communities, immigrant rights advocates, environmental justice organizations, labor groups, and other progressive organizations. Mirkarimi was charged with domestic-violence related crimes, and faced additional charges of official misconduct and efforts by the Mayor to remove him from the office of Sheriff.<sup>10</sup> López, a Venezuelan actress with immigrant status at the time, did not seek and indeed opposed criminal justice intervention, rejected the characterization of the incident as an instance of domestic violence, and contested all efforts by the mayor to depose Mirkarimi as sheriff.<sup>11</sup> The legal case spilled from the courts and city hall into neighborhoods and households, and community meeting places throughout the city. Both the legal and public citizen commentary offered throughout nine months of proceedings against Mirkarimi provide a unique opportunity to consider the problems of domestic violence anew, a way to interrogate old premises and presumptions, examine prevailing practices, and reconsider responses.

This Article addresses the perils attending over-reliance on criminal justice paradigms as remedy for domestic violence, that—in fact—deployment of law enforcement methods has acted not only to diminish the efficacy of domestic violence strategies but also to diminish the relevance of domestic violence advocacy to the social justice movement. To rely on models of

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<sup>10</sup> *California: New Sheriff Faces Charges*, N.Y. Times, Jan. 14, 2012; Written Charges of Official Misconduct, Mar. 21, 2012, at [http://www.sfethics.org/files/charges\\_of\\_official\\_misconduct\\_03.21.12.pdf](http://www.sfethics.org/files/charges_of_official_misconduct_03.21.12.pdf)

<sup>11</sup> Debra J. Saunders, *Ross Mirkarimi Faults Himself, And the System*, San Francisco Chron, Jan. 3, 2015 at <http://www.sfgate.com/opinion/saunders/article/Ross-Mirkarimi-faults-himself-and-the-system-5990853.php>.

victimhood as the means to obtain the intervention of criminal justice remedies implies loss of voice and agency, whereby the interests of the “victim” are preempted in discharge of larger logic of the criminal justice system. That domestic violence advocates identify with criminal justice remedies, moreover, at a time when law enforcement practices are under scrutiny and suspicion within marginalized communities, has acted to deepen the breach between domestic violence advocates and the social justice movement.

Part I of this Article begins with an examination of the Mirkarimi case. It includes a description of the incident that gave rise to the criminal charges and city ethics proceedings, an explanation of how the matter moved from an argument that occurred in a private space between a husband and wife to the courts, commissions and board hearings, as well as the meeting halls of labor unions and community organizations and sets forth the various legal arguments and positions taken by the parties involved. Part II examines the theories of victimhood generally and as applied in the context of domestic violence. It relies on the experience of Eliana López, a Venezuelan immigrant, to illuminate the broader issues of victim essentialism, voice, privacy, and agency. Part III considers the politics of domestic violence writ large through the lens of its historical development, social movement theory, and public debate during nine months of public proceedings. It analyzes the ways in which the paradigm of domestic violence-as-criminal-act may be used for political aims unrelated, if not indifferent, to the harms occasioned by this social problem. More importantly, Part III analyzes how the domestic violence movement has positioned itself – and how it has been positioned – within the realm of a broad range of social justice concerns. The Article concludes by suggesting that the Mirkarimi-López case serves as a cautionary tale for the anti-domestic violence movement which may find itself further marginalized from social justice groups absent a shift in strategies and purpose. It reiterates the

recommendations scholars have offered in recent years as alternatives to criminal justice remedies and suggests that what is lacking is not prescriptives but rather political will.

The Mirkarimi-López case offers an opportunity to reconsider the definition of domestic violence as well as the criminal justice and community response to this problem. The Article seeks to re-engage in dialogue about the private/public dichotomy without returning to a point in time where private abuse between intimate partners can be considered of little or no socio-political or legal import. Domestic violence persists as a manifestation of gender and other forms of inequality and social norms that oppress and repress its victims. But the mainstream responses often accomplish little to eliminate or repair the damage caused by intimate partner violence. Moreover, they often serve to undermine alternative responses to structural problems that are deeply entangled in a complicated web of larger political economic crises.

#### Part I: The Proceedings

##### A. Ivory Madison vs. Eliana López

On December 31, 2011, Ross Mirkarimi and Eliana López, husband and wife, had an argument. Mirkarimi was a well-known San Francisco politician who had been recently elected as Sheriff of San Francisco. López was (and is) a successful actor whose theater and television performances were best known in her home country of Venezuela. The specifics of what ensued during that argument are uncontested as recounted by both Mirkarimi and López. While on a family outing, they disagreed about whether López would take a trip to Venezuela with their then two-year old son, Theo, which then escalated to a full blown argument related to the possibility of a custody dispute. During the course of the quarrel that ensued in the family van on the way to lunch, Mirkarimi refused to stop the vehicle at the restaurant, and instead turned around and headed home. On arrival, when López attempted to get out of the van, Mirkarimi grabbed her

arm to keep her from exiting, leaving a visible bruise.<sup>12</sup> Theo, who was present during the argument, started to cry. López explained that her relationship with Mirkarimi had grown tense over the past several months; he had been busy with his electoral campaign and she had made several month-long trips to Venezuela with their son.<sup>13</sup>

The next day, López visited with her neighbor, Ivory Madison. The two women shared some common interests but the purpose of the visit is a contested matter.<sup>14</sup> At some point, López spoke to Madison about the events of the day before and sought her counsel. What transpired between López and Madison is very much in dispute and is at the center of all that ensued in this matter. López states that she sought legal advice about custody concerns from Madison who she understood was an attorney, recounted the prior day's argument, and showed Madison the bruise.<sup>15</sup> She explained that Madison suggested that in a custody suit, López would be at a disadvantage because she was an immigrant, a fact López understood to be true from media accounts about custody determinations adverse to immigrant parents.<sup>16</sup> She states that Madison advised her to record a video to document the bruise on her arm so that she could use it in the eventuality of a custody battle, and it was for this purpose that she agreed to make such a recording to be used only at such time if she feared losing custody of her son. López further states that Madison advised her as to what to say on camera.<sup>17</sup> In the 45 second video, López

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<sup>12</sup> Declaration of Eliana López, July 2, 2012, at 2 at <http://www.sfethics.org/files/declaration-of-eliana-lopez.7-2-12.pdf>; Declaration of Ross Mirkarimi, June 13, 2012, at 2, at [http://www.sfethics.org/files/DECLARATION\\_OF\\_ROSS\\_MIRKARIMI.pdf](http://www.sfethics.org/files/DECLARATION_OF_ROSS_MIRKARIMI.pdf).

<sup>13</sup> Saunders, *supra* note 11.

<sup>14</sup> Declaration of Ivory Madison, June 15, 2012, at 2, at [http://www.sfethics.org/files/declaration\\_of\\_ivory\\_s\\_madison.pdf](http://www.sfethics.org/files/declaration_of_ivory_s_madison.pdf).

<sup>15</sup> Declaration of Eliana López, *supra* note 12, exhibits. López understood Madison was an attorney because she had shared with López and advertised on her website that she was an attorney, had graduated from law school and had been Editor-in-Chief of her law school's law review, had worked at the California Supreme Court, and that her husband was also an attorney. Madison's own biography where she includes that she was trained as an attorney. *Id.* Ross Mirkarimi's Wife Gives Her Side of the Story, April, 6, 2012, <http://www.sfgate.com/opinion/openforum/article/Ross-Mirkarimi-s-wife-gives-her-side-of-story-3463213.php>.

<sup>16</sup> Declaration of Eliana López, *supra* note 12, at 2

<sup>17</sup> *Id.* at 3.



shows the bruise, and makes a statement that “this is the second time this happened” and that because Mirkarimi said he could prevail in a custody matter (“he says that he is very powerful”), she wanted to make the video “just in case.”<sup>18</sup> She understood that the video and the conversation she had with Madison were confidential and protected by attorney-client privilege.<sup>19</sup>

Madison offers a different account. She provided a description of the December 31<sup>st</sup> incident that varied significantly from that offered by López, and if true, provided a more disquieting version of the use of force by Mirkarimi.<sup>20</sup> She also said that although she was an attorney, she was not licensed to practice law and never held herself out as such to López.

The sequence of events following the making of the video is also in dispute. López, Mirkarimi, and their son subsequently vacationed in Monterrey, during which time Mirkarimi agreed to seek counseling to strengthen their marriage and to deal with what López described as issues pertaining to his fear of abandonment.<sup>21</sup> Madison admits that López stated that she was in no fear of physical abuse, that López reported that the family trip was going well, and that she was never advised of further incidents of abuse or arguments between López and Mirkarimi.<sup>22</sup> She nonetheless claims that she had growing concerns about the well-being of her friend.<sup>23</sup> She states that after López returned from the vacation, they discussed various options including calling the police, and acknowledges that López declined to do so.<sup>24</sup>

What is not in dispute is that four days after making the video, without permission from López, Madison contacted the San Francisco police. The police arrived shortly thereafter.

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<sup>18</sup> Video link of Eliana López, [https://www.youtube.com/watch?v=3RqBwhP\\_OyU](https://www.youtube.com/watch?v=3RqBwhP_OyU).

<sup>19</sup> Declaration of Eliana López, *supra* note 12, at 2.

<sup>20</sup> Declaration of Ivory Madison, *supra* note 14, at 6.

<sup>21</sup> Declaration of Eliana López, *supra* note 12, at 4. Declaration of Ross Mirkarimi, *supra* note 12, at 2.

<sup>22</sup> Declaration of Ivory, *supra* note 14, at 9.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* At 13-15.

López, who was present at the time, made clear that did not want or need their assistance, asked them to leave, and refused to speak with them.<sup>25</sup> At no time did Madison contact any domestic violence counselor or service provider on behalf of López or seek to obtain any information about assistance for López.<sup>26</sup>

The police learned from Madison that she had a video tape of López showing the bruise, and obtained a subpoena and confiscated the video.<sup>27</sup> Thereafter, Madison, notwithstanding her claims of concern for López, refused most of López' phone calls while continuing to communicate with police.<sup>28</sup> A San Francisco police officer confirmed that López repeatedly denied any need for law enforcement assistance, expressed to him that she was doing well, and that the video was taken out of context.<sup>29</sup>

#### B. Criminal Charges

Mirkarimi was elected Sheriff on November 8, 2011 prior to the incident, but which occurred before he assumed office on January 8, 2012. On January 13, 2012, the city District Attorney's office brought criminal charges against Mirkarimi, and accused him of "unlawfully inflicting a corporal injury resulting in a traumatic physical condition upon Ms. López," "willfully and unlawfully permitting the person and the health of his two year old child to be endangered," and "willfully and unlawfully attempting to prevent and dissuade Ms. López from making a report of the incident to law enforcement."<sup>30</sup> No one from the District Attorney's office had communicated with López prior to filing the charges. Moreover, at the time of the

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<sup>25</sup> *Id* at 16.

<sup>26</sup> Declaration of Linnette Peralta Haynes, June 8, 2012 at [http://www.sfethics.org/files/Declaration\\_of\\_Linnette\\_Peralta\\_Haynes.pdf](http://www.sfethics.org/files/Declaration_of_Linnette_Peralta_Haynes.pdf). Madison's declaration which alleges the actions she took on behalf of López also lacks any reference to contact with or efforts to contact domestic violence experts.

<sup>27</sup> Declaration of Ivory Madison, *supra* note 14 at 16.

<sup>28</sup> *Id.* at 16, 17, Declaration of Officer Richard Daniele, June 7, 2012, at 3, at [http://www.sfethics.org/files/Declaration\\_of\\_Richard\\_Daniele.pdf](http://www.sfethics.org/files/Declaration_of_Richard_Daniele.pdf).

<sup>29</sup> *Id.* at 5 June 7, 2012.

<sup>30</sup> Written Charges of Official Misconduct, *supra* note 10 at 5, 6.

lodging of the criminal complaint. and without any request by López, prosecutors sought and obtained an emergency protective order (EPO) barring Mirkarimi from any and all contact with López or their son.

At the arraignment in criminal court on January 2012 before Judge Susan Breall, the prosecutor's office sought to extend the "stay away order." López appeared for the purpose of requesting that the EPO be dissolved, to explain that she did not consider herself to be a victim of domestic violence, had no fear of her husband, was not in any danger, and wanted no further order separating her husband from herself or her child to be entered.<sup>31</sup> Prior to hearing any testimony, Breall stated that she was inclined to issue a "stay away order":<sup>32</sup>

I understand that Miss L. is in an extremely difficult position. I understand, from what I read in the newspaper, and that is how I get a lot of my information--.... [t]hat Miss L. has only been in this country a couple of years."....What I am saying is that Miss L. is in a very difficult situation. She hasn't been in this country very long, although maybe my information is wrong about that.... She hasn't been in this country very long. She is an immigrant to this country. She came here without the support of a father or a mother or a brother or sister or family member.<sup>33</sup>

....

I [ ] think she is in a very difficult position.... I think it's difficult when you come here only two years out and not fluent in English, you are not fluent in the culture and the laws of this community, you are in a difficult position.<sup>34</sup>

Concerned with her privacy and the impact that the case would have on her son, López requested that the court proceed by way of affidavit under seal or in an *in camera* hearing. Judge Breall denied the request, stating "[w]here going to handle this case like every other case and every other defendant, who is charged with these kinds of events."<sup>35</sup> Pointing out that on the one hand, the court was treating López like a victim whether she was one or not, counsel argued that

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<sup>31</sup> Transcript of Arraignment of Ross Mirkarimi, Jan. 19, 2012, p. 5, 10 on file with the author.

<sup>32</sup> *Id.* at 10.

<sup>33</sup> *Id.* at 11,12

<sup>34</sup> *Id.* at 14

<sup>35</sup> *Id.* at 6, 7.

in fact López was being treated differently with respect to her status as a victim, that her full name had been used in open court, and that she was being denied a victim's right to "fairness and respect for her privacy and dignity" under California's Marsy's law.<sup>36</sup> Referring to López as the "complaining witness," although she was not, Breall nonetheless refused to allow López to provide testimony except in open court.<sup>37</sup>

Counsel for López also sought to preclude further use of the video based on López' belief that her entire communication with Madison was privileged and confidential.<sup>38</sup> Breall however, refused to consider the request.<sup>39</sup> She rejected any consideration of counsel's argument that López had asserted the attorney-client privilege and thus López had to be a right to be heard on it. She further denied any request to have a quotation from the video stricken from the arrest warrant, thereby assuring that it would be in the public record and that any subsequent ruling on the matter of confidentiality would be moot and useless.

When finally provided the opportunity to speak for herself, López stated:

...I am happy to answer any questions you have. [ ] I want to say that this picture, that the little poor immigrant, is a little insulting. I feel that. And I feel that in a city like San Francisco, highly diversity, is a little racism. I feel that way. So I was really angry listening that comments because... like the little poor immigrant. It's too hard. I came here because of the support of my family. I want to request, I want to say that I am 36 years old. I am being independent since I am 20 years old. I have been living in Mexico for one year working, I was living in London, I have been traveling—I was in Tibet for two months. I was in Europe traveling for two months. I have been traveling all around Latin America.... I can explain myself. I can express myself in Spanish. Maybe I don't have a lot of vocabulary in English like in Spanish, but I am able to speak and understand everything is happening here.<sup>40</sup>

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<sup>36</sup> *Id.* at 24. Marsy's Law refers to the California Constitution, Article 1, Sec. 28(b), also known as the California Victim's Bill of Rights.

<sup>37</sup> Tr. Arraignment, 26.

<sup>38</sup> Tr. Arraignment, 27. For a further analysis of the use of the video, *see* Part II *infra*.

<sup>39</sup> Tr. Arraignment, 27.

<sup>40</sup> *Id.* at 29, 30

...And yes, I think the violence against me is that I, I don't have my family together...I am not afraid of my husband at all. I am not in danger.<sup>41</sup>

...This country is trying to pull my family apart. This is the real violence I am living.<sup>42</sup>

The prosecutor declined to examine López at any time before or during the proceedings. She acknowledged that López indicated she did not want the stay away order and was not in fear. Yet she argued that López was a “reluctant or minimizing victim.”<sup>43</sup>

Following a pretrial hearing that included testimony from a domestic violence expert who had never spoken with López, on March 12, 2012, the initial charges were dismissed and a subsequent charge was added: “willfully and unlawfully violating the personal liberty of Ms. López during the December 31, 2011 incident.”<sup>44</sup> And on that date, Mirkarimi pled guilty to the charge of false imprisonment; he was then sentenced to one day in jail, three years of probation, and 52 weeks of domestic violence counseling, community service and a fine.<sup>45</sup> López (who was never consulted about the plea agreement) and Mirkarimi have suggested that the plea was the only way the family would be reunited and that the pressure of their legally mandated separation, including spiraling legal costs, was more than they could bear.<sup>46</sup>

### C. San Francisco Ethics Commission and Board of Supervisor Hearings

Two days after Mirkarimi pled guilty, the Mayor of San Francisco suspended Mirkarimi without pay, appointed an acting Sheriff, filed charges pursuant to Section 15.501 of the city

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<sup>41</sup> *Id.* at 32

<sup>42</sup> *Id.* at 33

<sup>43</sup> *Id.* at 35, 36.

<sup>44</sup> Written Charges of Official Misconduct, *supra* note 10, at 6.

<sup>45</sup> Rachel Gordon, *SF Sheriff Mirkarimi Pleads Guilty To Misdemeanor*, SF Gate, Mar. 12, 2012, at <http://www.sfgate.com/crime/article/SF-Sheriff-Mirkarimi-pleads-guilty-to-misdemeanor-3406888.php>

<sup>46</sup> Interview with Eliana López, Dec. 14, 2015, San Francisco, CA. The stay away order was not to be vacated until such time as there was an outcome to the criminal matter. Julia Prodis Sulek, *S.F. Sheriff Pleads Guilty to the Lesser Charges of False Imprisonment*, San Jose Mercury, Mar. 13, 2012, [http://www.mercurynews.com/ci\\_20156088/san-francisco-sheriff-pleads-guilty-false-imprisonment-domestic](http://www.mercurynews.com/ci_20156088/san-francisco-sheriff-pleads-guilty-false-imprisonment-domestic). See Jay Barmann, *Gascon Is Not Going to Let Mirkarimi Off Without a Fight*, Mar 16, 2012, [http://sfist.com/2012/03/16/gascon\\_is\\_not\\_going\\_to\\_let\\_mirkarim.php](http://sfist.com/2012/03/16/gascon_is_not_going_to_let_mirkarim.php).

charter and initiated proceedings to remove Mirkarimi from elective office.<sup>47</sup> He accused

Mirkarimi of official misconduct, defined in the Charter as:

any wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character, including any failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law, or conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers and including any violation of a specific conflict of interest or governmental ethics law.<sup>48</sup>

The Mayor alleged that the Charter did not require the wrongful conduct to have occurred while the official occupied the office from which his removal was sought, nor was it relevant if the conduct complained was unrelated to official duties.<sup>49</sup>

The charges were heard in public hearings before the city's Ethics Commission over the course of some eight months. López had counsel present; however, she was denied the opportunity to represent her client's interests. It would be impractical to provide a detailed description of the matters that arose during the eight months of Ethics Commission Hearings. Thus, what follows is a summary of substantive legal arguments and issues that dominated the hearings. The charging document delineated the duties of the office of the Sheriff and further specified Mirkarimi's alleged wrongful conduct which included conduct falling below a requisite standard of decency by false imprisonment, domestic violence, threatening to use his authority to gain benefit in a custody matter and endangering the welfare of his child, participating in and dissuading witnesses from reporting his domestic violence.<sup>50</sup> In June 2012, the Mayor amended

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<sup>47</sup> Written Charges of Official Misconduct, *supra* note 10.

<sup>48</sup> *San Francisco Charter*, at <http://www.sfethics.org/ethics/2011/06/san-francisco-charter-provisions-relating-the-governmental-ethics-and-the-ethics-commission.html>, last visited March 17, 2016.

<sup>49</sup> *See supra* note 47, at 2.

<sup>50</sup> *Id.* at 6.

his charges to include breach of required conduct.<sup>51</sup> According to the Mayor, Mirkarimi's conduct and sentence would interfere with his ability to carry out the functions of the Sheriff.

Mirkarimi's counsel raised issues concerning what he considered to be "the unprecedented political abuse of the suspension power" and demonstrated through records and documents a selective and inconsistent use of the Charter provision "without any regard to past practices."<sup>52</sup> Mirkarimi argued that a sheriff cannot engage in official misconduct prior to the time he or she held office, and further, that any misconduct must relate to his or her duties.<sup>53</sup>

At the end of each hearing, public commentary was provided by interested residents of the city. As detailed in Part III below, nearly all of the comments offered were in favor of reinstating Mirkarimi to the office of the Sheriff.<sup>54</sup>

At the conclusion of the hearings, the Ethics Commission, with one dissenting vote, recommended to the Board of Supervisors that it sustain the charges of Official Misconduct based on the incident of December 2011 and Mirkarimi's subsequent conviction.<sup>55</sup> The Commission stated that Mirkarimi's conduct "'fell below the standard of decency, good faith, and right action impliedly required of all public officers' ... and did relate to the duties of his office."<sup>56</sup> The matter then went to final decision by the Board of Supervisors which held a nine hour hearing at which both the Mayor and Mirkarimi, through legal counsel, presented their

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<sup>51</sup> See Amended Charges of Official Misconduct, June 1, 2012, at [http://www.sfethics.org/files/Amended\\_Charges\\_of\\_Official\\_Misconduct\\_6.1.2012.pdf](http://www.sfethics.org/files/Amended_Charges_of_Official_Misconduct_6.1.2012.pdf).

<sup>52</sup> Sheriff Ross Mirkarimi Opening Brief, 3-5, May 7, 2012 at [http://www.sfethics.org/files/sheriff\\_mirkarimis\\_opening\\_brief\\_5.7.2\\_and\\_exhibit\\_1-2.pdf](http://www.sfethics.org/files/sheriff_mirkarimis_opening_brief_5.7.2_and_exhibit_1-2.pdf).

<sup>53</sup> *Id.* at 9-13. Commission members heard live testimony from Mirkarimi, the Mayor, Linnette Peralta Haynes, and López and additional evidence by way of affidavits, including one from an expert in domestic violence. F of F, 3-4. Haynes was a campaign staff member for Mirkarimi. López who knew that Haynes had a background in domestic violence work, called her for help after learning that Madison contacted the police for assistance in avoiding police involvement.

<sup>54</sup> See *infra* Part III.

<sup>55</sup> Findings of Fact and Recommendation to the Board of Supervisors, Sept. 6, 2012, at 6, at [http://www.sfethics.org/files/2012\\_09\\_06\\_findings\\_and\\_recommendation.pdf](http://www.sfethics.org/files/2012_09_06_findings_and_recommendation.pdf)

<sup>56</sup> *Id.* The dissenting Commission (the Chair) found that while there was misconduct, it was not "'official' misconduct because it was not committed in 'relation to the duties of his or her office.'" *Id.*

arguments and answered questions and public commentary was had which was overwhelmingly in favor of Mirkarimi and opposed to his ouster. Although the majority of the Board voted to sustain the charges and oust Mirkarimi from taking office, the Mayor failed to gain the requisite number of votes. Mirkarimi was thus reinstated to the office.<sup>57</sup>

In July 2015, Lopez used her theater and performing arts skills to write and perform a one-woman, bilingual play about her ordeal entitled, “What is the Scandal, *¿Cuál es el Escándolo?*” As noted in a media story about the play, “[a]fter being silenced by the people who were never willing to listen to her story, especially people she said she thought were supposed to support and empower her — such as feminists — Lopez was very happy to give this performance.”<sup>58</sup> López sent out invitations to leaders of the mainstream domestic violence agencies to attend the play. They did not respond and to the best of her knowledge have not been present for any of the performances.<sup>59</sup>

## II. Constructing a Victim

### A. Theories of Victimhood

The condition of victimhood looms large in the culture of the criminal justice system and figures prominently in social narratives about public wrongs, harm, and repair.<sup>60</sup> The process by which one crosses the threshold into the state of victimhood requires first that a person designated as victim be distinguished from others. There must be a consensus about the character of the harm that a person has suffered and that the harm implies a unique “victim” designation. Public wrongs which insist on vindication in the form of punishment are

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<sup>57</sup> Norimitsu Oshi, *Ross Mirkarimi, San Francisco Sheriff, Reinstated*, N.Y. Times, Oct 11, 2012, at A20.

<sup>58</sup> Spirited Comedy Unfolds Web of SF Disempowerment, Wed, 01 Jul 2015 <http://www.thewesternedition.com/?c=117&a=2698>. López performed the play at the University of North Carolina on Mar.29, 2016.

<sup>59</sup> Interview with Eliana López, *supra* note 46.

<sup>60</sup> The term “victim” is a “passive notion” derived from the Latin word for a sacrificial animal. See JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 34 (1990).



distinguished from private or civil injuries which are remedied through private undertakings.<sup>61</sup>

This is neither a simple nor fixed distinction. Private acts once considered permissible may become intolerable public crimes as normative understandings about the collective burdens and spillover effects of such conduct evolve and are reinterpreted. The designation of victimhood of is further influenced by political contexts and discursive practices that act to shape the purposes and use of such designation. “[A]s victims are incorporated into broader political campaigns,” as one scholar has observed, “it becomes nearly impossible to separate the victim from the politics.”<sup>62</sup>

A theory of victimhood incorporates several factors: the presence of sufficient harm; harm occasioned by the culpable wrong-doing of another person or institution; and the person harmed lacks culpability.<sup>63</sup> An understanding of victimhood must further consider the process by which individuals and/or groups identify themselves as victims, thereupon to formulate a usable normative victim identity.<sup>64</sup> Indeed, just as important as categorizing the harm that constitutes victimization, the process by which victimhood as a social status is constructed is critical to understanding the political power of identity politics.<sup>65</sup>

The connotation of victimization implies an imperative to act.<sup>66</sup> The victim must be rescued and repaired. Perhaps more importantly, the perpetrator must be punished. The needs of victims are said to demand retribution “to bring closure.” As others have observed, an effective victims’ movement developed during the 1970s demanding retributive and punitive responses to

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<sup>61</sup> Adam J. MacLeod, *All for One: A Review of Victim-Centric Justifications for Criminal Punishment*, 13 BERKELEY J. CRIM. L. 31, 34 (2008) ( WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAW OF ENGLAND)

<sup>62</sup> Tami Amanda Jacoby, *A Theory of Victimhood, Politics, Conflict and the Construction of Victim Based Identity*, 43 J. of Int’l. Studies 511(2015).

<sup>63</sup> Fundamentals of Victims’ Rights: An Overview of the Legal Definition of “Crime Victim” in the United States. Victim Law Bulletin, November 2008

<sup>64</sup> Jacoby, *supra* note 62, at 513 (2015) (asking “how and why people transform grievances into collective identity”).

<sup>65</sup> *Id* at 513.

<sup>66</sup> MacLeod, *supra* note 61 at 31 (which may include excuse conduct that has historically been understood as criminal on the ground that such conduct best serves a victim's interest.).

crime.<sup>67</sup> “Victims,” observed Marie Gottschalk, “became a powerful weapon in the arsenal of proponents of the law-and-order agenda.”<sup>68</sup> Courts have expressed concern that the very use of term “victim” may often contribute decisively to determining guilt or liability of the alleged perpetrator.<sup>69</sup>

Pursuant to the Federal Crime Victims’ Rights Act, the status of “victim” implies certain rights including a right to privacy and dignity, notice, the right to be heard and related rights to participate in the criminal case, including consultation about plea bargaining and deferred prosecution.<sup>70</sup> The statute was enacted “to make crime victims full participants in the criminal justice system.”<sup>71</sup> Under the Act a victim has the right to seek a writ of mandamus for a violation of any enumerated rights.<sup>72</sup> State statutes often provide the victim with a full range of rights, including the authority to consult with the prosecutor’s office and to be informed of all stages of the proceedings.<sup>73</sup> California has included a state constitutional provision (Marsy’s Rights)<sup>74</sup> which enumerates crime victim rights and particularized protections including the right to finality in the criminal proceedings,<sup>75</sup> fairness and respect for privacy,<sup>76</sup> the prevention of the

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<sup>67</sup> GOTTSCHALK, *supra* note 5, at 77; Martha Minow, *Surviving Victim Talk*, 40 UCLA L Rev. 1411, 1411 (1993) (noting that victim status has become “stylish”).

<sup>68</sup> GOTTSCHALK, *supra* note 5, at 77; FATIMA NAQVI, LITERARY AND CULTURAL RHETORIC OF VICTIMHOOD: WESTERN EUROPE 1970-2005 1 (2007) (observing that the use of victimhood is far more widespread in recent years).

<sup>69</sup> *See Merchants Distributors, Inc. v. Hutchinson*, 16 N.C.App. 655, 663 (1982), citing *People v. Williams*, 17 Cal. 142 (1860).

<sup>70</sup> 18 U.S.C. §3771. Crime victims' right 18 U.S.C. § 3663. Order of restitution. *See Fundamentals of Victims' Rights: A Summary of 12 Victim Rights*, Victim Law Bulletin, November 2011

<sup>71</sup> *Kenna v. U.S. Dist. Ct. for C.D. Cal.*, 435 F.3d 1011 (2006), citing 18 U.S.C. §3771.

<sup>72</sup> 8 U.S.C. § 3771, *See Attorney General Guidelines for Victim and Witness Assistance*

<sup>73</sup> *See e.g.*, Ala.Code 1975 § 15-23-65, Prosecuting attorney required to confer with victim before commencement of trial Ga. Code Ann., § 17-17-8; Information to be provided to victim by prosecuting attorney; restitution information; Tennessee Code Ann., § 40-38-112. Prosecuting attorney; information to victim; duty of victim;

<sup>74</sup> California Constitution, art. 1, §28; Cal. Code Ann., § 679.026. Informing crime victims of their rights; implementation.

<sup>75</sup> *See supra* note 36 and accompanying text. California Constitution, Article 1, Sec. 28(b)(a)(6).

<sup>76</sup> California Constitution, Article 1, Sec. 28(b)(1).

disclosure of confidential or privileged information,<sup>77</sup> and prompt return of property when no longer needed as evidence.<sup>78</sup> These constitutional protections are enforceable by the victim or her attorney.<sup>79</sup>

But the status of victimhood is not without anomalies. Despite efforts to empower victims through enhanced rights of participation in the criminal justice system, the aggrieved parties are also expected to assume the demeanor of helplessness, and without capacity to exercise their new rights independently. Their needs are determined by those who presume to know or share their circumstances. This is especially evident in realms of international human rights where the prototype of the victim is often portrayed as powerless and dependent on a savior.<sup>80</sup> Under these circumstances, the legal system is called upon to protect, prevent additional victimization, and punish the perpetrator.<sup>81</sup>

Both the discourse on victimhood and treatment of victims presents a paradox. In criminal proceedings, it is the victim—as a stand-in for the state—to whom the duty of prosecution is owed.<sup>82</sup> It is the public wrong inflicted upon the victim that necessitates state intervention. The initiatives advanced by the victims' rights movement of the 1980s however, designed to strengthen victim rights, including a proposed constitutional amendment, were unrelated to the needs of those harmed by criminal conduct and often failed to reflect their

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<sup>77</sup> California Constitution, Article 1, Sec. 28(b)(4).

<sup>78</sup> (b)(14). With regard to the video, Madison acknowledged that it was López property. Furthermore, as noted, the Mayor sought the video after the conclusion of the criminal case.

<sup>79</sup> California Constitution, Article 1, Sec. 28 (c)(1).

<sup>80</sup> Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 203 (2001) (describing the human rights structure as embodied by the “west” acting as “both anti-catastrophic and reconstructive” in order to save the victim from the savage).

<sup>81</sup> *Id.* at 203.

<sup>82</sup> MacLeod, *supra* note 61 at 11 (quoting Adil Ahmil Haque).

interests.<sup>83</sup> The call for greater victims' rights has often served to undermine the rights of defendants to the detriment of constitutional processes that give fundamental meaning to the rule of law.<sup>84</sup>

A victim's rights may be determined by political institutions and social groups with which she or he is associated, whether voluntary or not. Although a victim's rights are first and foremost enumerated as a right to dignity and privacy and to be treated with empathy and compassion,<sup>85</sup> the stories of victims have been fashioned into narratives that act to essentialize victims in ways that are often inaccurate, demeaning, and pathologizing.<sup>86</sup> A victim may thus serve for symbolical purposes; her individuality, will, and strength are effaced as she becomes the stand-in for the weak and subordinated, or for a group with which she is deemed to have affinity and identity although she may have none. This paradox, described by Laurel Fletcher as an "irony," is that victims are "by definition ... weak and yet they hold tremendous power."<sup>87</sup>

#### B. The Domestic Violence Victim

The modern domestic violence movement grew out of feminist determination to move the problem of domestic violence from the periphery of social concerns into the center of public awareness. As a historical matter, the courts have given scant attention to domestic violence, rarely to condemn violence by men against women.<sup>88</sup> Domestic violence expanded into the

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<sup>83</sup> Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 581-582 (1998) (observing that the proposed Amendment was designed to strengthen the hand of law enforcement).

<sup>84</sup> *Id.* at 582-583.

<sup>85</sup> Victim Law Bulletin 1 (Nov 2011) at <https://law.lclark.edu/live/files/11823-fundamentals-of-victims-rights-a-summary-of-12>.

<sup>86</sup> Crenshaw, *supra* note 8, at 1275-1280.

<sup>87</sup> Laurel E. Fletcher and Harvey M. Weinstein, Transitional Justice and the "Plight" of Victimhood, IN RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE (Dov Jacobs ed., Edward Elgar, forthcoming 2016) 1 (need permission to cite).

<sup>88</sup> See e.g., *State v. Eden*, 95 N.C. 693, 696 (1886) ("[O]nly where the battery is so great and excessive as to put life and limb in peril, or where permanent injury to person is inflicted... that the law interposes to punish."); *State v. Oliver*, 70 N.C. 60 (1874) ("If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and

realms of public awareness and legal consciousness during the civil rights and women's rights movements of the 1960s and 1970s. The courts, and by extension, the criminal justice system seemed to offer the most immediate and the most efficacious remedy to a historic condition of abuse.

These developments had far-reaching implications for advocacy and policy reform and seemed to bring domestic violence to public attention as a social problem worthy of moral condemnation and legal sanctions.<sup>89</sup> At the heart of these developments were the efforts to disrupt the private-public dichotomy, a gendered construction that provided the principal justification for non-interference in domestic abuse.<sup>90</sup>

To rely on the criminal justice paradigm required the construction of a model of victimhood. Scholars have observed that domestic violence victimhood presumes race (white), sexuality (heteronormative); matters of class hover as an unaddressed concern.<sup>91</sup> A victim is perceived to be in need of protection from an abusive male partner and thereupon “needs” legal intervention to maintain her victimhood status. She is the ideal victim if she “follows through, leaves the batterer, cooperates with prosecuting the case, and does not provoke violence, take drugs or drink, or abuse children.”<sup>92</sup> She must be perceived to have made courageous but

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forgive.”); *State v. Rhodes*, 61 N.C. (Phil.) 453, 454 (1868) (“The courts have been loath to take cognizance of trivial complaints arising out of the domestic relations ... such as master and apprentice, teacher and pupil, parent and child, husband and wife.”).

<sup>89</sup> See Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 8-9 (2004) (noting that a majority of Americans believe that perpetrators of domestic violence should be punished and that victims should be supported).

<sup>90</sup> See Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L. REV. 57, 569-573 (2006).

<sup>91</sup> Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 91 (2008); Donna Coker, *Restorative Justice Responses to Sexual Assault on Campus* 12, 17 (forthcoming, Texas Tech L. Rev) (describing the paradigm victim of campus sexual assault). See Jody Raphael, *Battering Through the Lens of Class*, 11 AM. U. J. GENDER SOC. POL'Y & L. 367, 368 (2003). Nina W. Tarr, *Civil Orders of Protection: Freedom or Entrapment*, 11 WASH. U. J.L. & POL'Y 157, 182 (2003) (observing that such a position that denies the relationship between poverty and domestic violence “appeals to both policy makers and society as a whole”).

<sup>92</sup> Sally Engle Merry, *Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence*, 25 HUMAN RIGHTS QUARTERLY 343, 353 (2003).

unsuccessful efforts to resist. The paradigmatic white victim stands in contrast to the battered woman who may be portrayed as culpable and deemed responsible for or has otherwise encouraged the abuse she has endured, and usually a woman of color.<sup>93</sup>

The political use of the woman-as-victim paradigm conforms to feminist goals of identity politics and has served as the core organizing trope within the domestic violence movement. Group cohesiveness is promoted through the premise that all women are at “universal risk” of domestic violence by virtue of being women in a male-privileged society.<sup>94</sup> The particular experiences of a victim are often elements of a larger narrative about women’s inequality and patriarchy maintained through male violence. There is, to be sure, a rationale for the efforts to understand domestic violence as an experience that transcends individual relationships. “One assault does not make a battered woman” Linda Gordon has written; “she becomes that because of her socially determined inability to resist or escape: her lack of economic independence, law enforcement services, and quite likely, self- confidence.”<sup>95</sup> Under these circumstances, however, social responses are predictable if not prescriptive. Sympathy is summoned for the individual woman; punishment is demanded for the individual perpetrator. Her victimhood is deemed to be a product of male oppression while other intersectional categories of her life are unacknowledged.<sup>96</sup> The political economy of the daily life of

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<sup>93</sup> Naqvi, *supra* note 68, at 6-7 (referring to the “victim precipitation argument”). Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary, 102d Cong. (1991) (Congressional findings that women are treated as though their complaints of domestic violence are “trivial, exaggerated or somehow their own fault”) Coker, *supra* note 91, at 5, citing Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464 (2015).

<sup>94</sup> Jeffrey Fagan *et al.*, Social and Ecological Risks of Domestic and Non-domestic Violence Against Women in New York City 5, Final Report, Grant 1999-WTVW-0005, National Institute of Justice, U.S. Department of Justice (2003) (reviewing the literature that posited that “all women are equally situated within a patriarchal society, and thus equally likely to be victimized”).

<sup>95</sup> LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 285 (1988).

<sup>96</sup> See Jacoby, *supra* note 62, at 516.

households from which gender violence often originates is deemed irrelevant to legal responses.<sup>97</sup>

Autonomy, agency, and resiliency further complicate the concept of the model victim.<sup>98</sup> The decision to forego legal remedies to avoid the violence that women experience in the legal system is given little weight in determining her worth as a victim. As demonstrated throughout the Congressional hearings on the Violence Against Women Act, witnesses before Congressional hearings testified about the psychological distress endured during the criminal justice process, described by one woman as “far more traumatizing than the attack on the street” in which her face was repeatedly slashed.<sup>99</sup> Indeed, women are often victims of gender bias perpetrated by the legal system in ways that are no less traumatic as the violence they experienced in their relationships. While legal institutions contribute to defining victimhood, they may replicate the role of perpetrator. A woman who rejected victimhood based on the dynamics of her relationship might easily claim such status based on her experiences with the legal system.

If a victim chooses to forego criminal intervention, she forfeits her “status” as a victim, and is often disparaged as pathological without the capacity to act in her own behalf. The legal discourse is not only constitutive of a deserving vs. undeserving victim, but no less perniciously it serves to deny a woman agency to self-identify as victim or reject such category based on her own assessment of her circumstances and interests.<sup>100</sup> Criminal justice policies including mandatory arrest and mandatory prosecution confer on the police and prosecutors the authority

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<sup>97</sup> For a full discussion of the need to consider global economic conditions as contributing to violence against women, see generally Weissman, *supra* note 6.

<sup>98</sup> For a discussion of the concepts of agency and autonomy, see Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases* 37 FLA. ST. U. L. REV. 1, 23-28 (2009).

<sup>99</sup> Deborah N. Weissman, *Gender Based Violence as Judicial Anomaly: “Between the Truly National and the Truly Local”* 42 B.C. L. REV. 1081, 1092 (2001).

<sup>100</sup> See Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 U.C.L.A. WOMEN’S L. J. 173, 177 (1997) (stating that most domestic violence victims “have neither the will nor the courage to assist prosecutors in holding the abusers criminally responsible”).

to determine victimhood.<sup>101</sup> On the one hand, advocacy policies serve to give deference to victim claims and respect for her courage in coming forth; evaluation of such claims is discouraged and she is to be believed.<sup>102</sup> On the other, women who fashion an alternative narrative and reject the mantle of victim receive little credibility. Certainly, many women have been so badly abused as to be denied agency by the very trauma of domestic violence. But it is true there is little by way of nuanced assessment. Women who have experienced some form of violence who choose to not to proceed with a legal claim may be deemed disempowered, brain-washed, or suffer from “learned helplessness” or other related mental health deficiency.<sup>103</sup>

Some argue that it may be more beneficial to deny battered women autonomy in the expectation that the criminal justice system will provide her with greater agency by saving her from her persecutor.<sup>104</sup> It is true, as Leigh Goodmark points out, “the law disadvantages women who, by virtue of their subordinated status as victims of a patriarchal system, are rarely able to exercise the sort of autonomy contemplated by philosophers.”<sup>105</sup> But she notes that women who have been victims of domestic violence are very often capable of “rely[ing] on their own knowledge of their abusers and their innate abilities to survive.”<sup>106</sup> Some may choose to use the legal system as a means to readjust their relationships and re-negotiate power and balance. But women who opt for another course of action deemed to be in their best interests are often denied credibility or respect.

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<sup>101</sup> 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 (2002) (discussing the need to reconsider mandatory prosecution policies to incorporate a concern for women's safety);

<sup>102</sup> Minow, *supra* note 67, at 1438.

<sup>103</sup> LENORE E. WALKER, *THE BATTERED WOMAN* 43-54 (1979). Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal*, 31 WASH. U. J.L. & POL'Y 39, 45 (2009)

<sup>104</sup> MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* 150-151 (2003)

<sup>105</sup> Goodmark, *supra* note 98, at 24.

<sup>106</sup> *Id.* at 27



The paradigm of domestic violence victimhood may also affect collective agency. The designation of an individual as a victim often influences group emotions, constrains compassion for the perpetrator, and serves to deny important truths about the sources of criminal conduct. Proponents of victim rights deride those who engage in an analysis of perpetrator conduct outside of the premise of patriarchy and individual choice; to do otherwise implies a dangerous form of justification. Sympathy for a defendant whose own circumstances and personal histories of violence or deprivations might otherwise warrant a semblance of compassion is inadmissible, if not blasphemous. The victims' rights movement has endeavored to "recast public sympathies," Martha Minow writes, that might otherwise exist for criminal defendants who also suffer victimization, adding that "there can be victims of the victim-protecting process."<sup>107</sup>

C. The Political Construction of a Domestic Violence Victim: Eliana López

1. Agency and its Loss

Eliana López was proclaimed a victim of domestic violence: by a neighbor, the police, the Mayor, various officials in city government, the mainstream domestic violence advocates, and media. She was *their* victim of domestic violence and objectified through their intervention. Her "injury" demanded their response. The prosecutor and the Mayor possessed authority to decide whether and how to proceed; she had none. As one Latina community activist wrote, "no one in the entire chain of people who made decisions on Eliana's behalf offered her any help—besides prosecuting her husband."<sup>108</sup>

The construction of her victimhood reveals the complexities and contradictions of such status. Ignoring her capacity to represent her own interests, the criminal justice system

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<sup>107</sup> Minow, *supra* note 67, at 1416, 1426.

<sup>108</sup> Myrna Melgar, Guardian Op-Ed: *Domestic Violence, a Latina Feminist Perspective*, Mar. 27, 2012, <http://www.hechoencalifornia1010.com/blogs/isabel-gutierrez/2266-guardian-op-ed-domestic-violence-a-latina-feminist-perspective-.html>

determined that she was a victim. Her own explanation of the circumstances was deemed to be irrelevant. In fact, the prosecutor possessed the authority to craft the victim narrative in order to establish the elements of a crime.<sup>109</sup> Victimhood was “established” by an expert who had never spoken with her, lacked firsthand knowledge of events, relied on a “one-size-fits-all” profile of the victim and the perpetrator, and invoked theories about domestic violence, many of which have been repudiated.<sup>110</sup> Her victimhood was embellished through racialized assumptions. The court declared that her immigrant status and her lack of English-language proficiency were evidence of her helplessness and excused her inability to recognize her own victimhood. Thus perceived as a vulnerable immigrant, her understanding of her own circumstances was discredited in favor of an institutional response by those who know better.

Her refusal to forego agency and assume the role of victim made her a threat, if not a criminal. Initially characterized as vulnerable immigrant without command of the English language or family support, López was subsequently recast by the Mayor as a powerful “public figure” who could control and manipulate the public opinion.<sup>111</sup> The Mayor’s efforts to cast himself and other city politicians as victims of López efforts to claim her own narrative illuminates the fluidity with which harm may be reconstructed in the realm of *realpolitik*.<sup>112</sup> Her requests of Madison to call off the police, to refrain from speaking with them, and her desire that the video not be made public were characterized as criminal deeds. By refusing to fulfill her designated role, and choosing instead to offer her own narrative of events, she was subjected to threats of criminal charges and punishment for attempting to dissuade and intimidate witnesses

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<sup>109</sup> GOTTSCALK, *supra* note 5, at 97 (observing that prosecutors have discretionary authority and thus often ignore the wishes of victims).

<sup>110</sup> Expert Declaration of Nancy K.D. Lemon, June 18, 2012 at [http://www.sfethics.org/files/lemon\\_declaration\\_with\\_exhibits.pdf](http://www.sfethics.org/files/lemon_declaration_with_exhibits.pdf)

<sup>111</sup> Motion for Release of Court Record Reply 7, 8. The Mayor additionally made reference to an unrelated defamation case with little relevancy to the facts at hand involving a “well known actress” with her own media publicist” and cited a case involving allegations against the actress for improper sexual relations and drug abuse).

<sup>112</sup> *See Minow*, *supra* note 67 at 1417.

and accused of encouraging them to destroy the video tape she believed was protected by attorney-client privilege.<sup>113</sup>

It is not only criminal justice actors who exploit victimhood. Women are also denied agency by domestic violence advocates.<sup>114</sup> These are the circumstances López experienced. This was no private matter, no family issue, domestic violence advocates exclaimed in public and on billboards.<sup>115</sup> Domestic violence advocates organized a rally at City Hall in defense of her interests and in interests of all victims of domestic violence, and vowed that they “would do everything they could to keep her safe.”<sup>116</sup> The organizer of the rally, the executive director of the Domestic Violence Consortium, introduced members of the domestic violence community who were present. Ironically, she failed to acknowledge the presence of López because neither she nor other members of the domestic violence alliance knew who she was and did not recognize her.<sup>117</sup>

But that seemed not to matter. If López declined the offer of assistance, her “victimhood” was no longer important. A new narrative emerged. “The Mirkarimi case is an anomaly,” as one domestic violence advocate noted after referring to López as a survivor, “one

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<sup>113</sup> Interview with Eliana López, *supra* note 46. Bob Egelko, *Lawyer Denies Lopez Sought Destruction of Evidence*, Mar. 22, 2012 <http://www.sfgate.com/bayarea/article/Lawyer-denies-Lopez-sought-destruction-of-evidence-3425769.php>.

<sup>114</sup> Leigh Goodmark (moderator) *et al.*, *Plenary 2- Redistributing Gender Violence*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 289, 294(2105). There are other contexts where domestic violence programs have been accused of undermining victim agency, particularly in compelling women to apply for welfare benefits so that they can contribute to shelter costs. See Judy L. Postmus, *Valuable Assistance or Missed Opportunities?*, 9 VIOLENCE AGAINST WOMEN 1278, 1282, 1285-86 (2003) (describing programs that force women to apply for welfare benefits in order to remain in shelters regardless of their need or desire for welfare assistance, and the failure or refusal of programs to provide referrals to other community services).

<sup>115</sup> Joe Eskenazi, *Ross Mirkarimi's Wife Attends Anti-Ross Mirkarimi Rally*, Jan. 12, 2012, <http://www.sfweekly.com/thesnitch/2012/01/12/ross-mirkarimis-wife-attends-anti-ross-mirkarimi-rally>. Mirkarimi at a press conference before criminal charges were filed, referred to the incident as a private matter, a family matter as did López.

<sup>116</sup> *Id.* Interview with Eliana López, *supra* note 46.

<sup>117</sup> *Id.* Kat Anderson, *Domestic Violence Consortium Calls for Mirkarimi to Resign, Wife Makes Cameo*, <http://www.fogcityjournal.com/wordpress/3305/domestic-violence-consortium-calls-for-mirkarimi-resignation-wife-makes-cameo/>

in which domestic violence advocates are involved not on behalf of the survivor—usually our only priority—but rather as caretakers of system-wide protections on behalf of the entire community’s safety.”<sup>118</sup> López served as the means by which the domestic violence movement would make its claim to keep the community safe according to its norms and values associated with the criminal justice system.

## 2. Privacy and its Loss: The Video

The video made at the home of Ivory Madison complicates an otherwise straightforward account by López of her husband’s aggressive act. The visuals and López’ words provide evidence that Mirkarimi grabbed her arm and left a bruise. Whether that act, with or without the context that López provided, constituted legally actionable domestic violence is a matter of debate.<sup>119</sup> Perhaps more importantly, the appropriate response to such act is also at issue. For purposes of this Article, however, it is manner in which the authorities used the video that illuminates the contradictions and concerns in constructing victimhood that bear on the issues of privacy.

López made the video reluctantly. She repeatedly requested that the video not be disclosed in any legal proceeding or to the public. She did so prior to the time that Madison contacted the police.<sup>120</sup> She renewed her requests during the criminal and Ethics Commission hearings. She maintained this position while she was in Venezuela with her child, and beyond the reach of her husband.<sup>121</sup> She never authorized its release to any person or entity. Her wishes were not honored. Her desire for privacy and dignity in the matter was paramount to all of her

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<sup>118</sup> Mallina Kaur, *Domestic Violence Survivors and Allies: We Won’t be Silenced*, Ms. Magazine Blog, Oct. 31, 2012, at <http://msmagazine.com/blog/2012/10/31/domestic-violence-survivors-and-allies-we-wont-be-silenced/>

<sup>119</sup> See *infra* notes 228–232 and accompanying text.

<sup>120</sup> See Declaration of Eliana López, *supra* note 12; Declaration of Ivory Madison *supra* note 14.

<sup>121</sup> Interview with Eliana López, *supra* note 46; Request for Protective Order, May 15, 2012 at [http://www.sfethics.org/files/email1\\_attach-Request\\_for\\_Protective\\_Order-1.pdf](http://www.sfethics.org/files/email1_attach-Request_for_Protective_Order-1.pdf)

other concerns. And it was a violation of her request for privacy that constituted the essential means by which she was made a victim.

The imperative of disrupting the private-public dichotomy notwithstanding, the importance of privacy remains critical to the feminist project.<sup>122</sup> Indeed, the right to privacy is a fundamental philosophical principle, albeit one without clear meaning or parameters.<sup>123</sup> In a thorough examination of the typology of privacy, several authors identify a range of important privacy interests, including privacy within the home and familial relations,<sup>124</sup> proprietary privacy (pertaining to reputation),<sup>125</sup> privacy of thought and feelings,<sup>126</sup> privacy in communications (including privileged communication with one's attorney),<sup>127</sup> informational privacy (preventing information about one's self to be collected and controlling its dissemination)<sup>128</sup> and protection of personal decision making (autonomy).<sup>129</sup>

The right to privacy allows individuals to decide "when, how, and to what extent information about them is communicated to others."<sup>130</sup> Personal decision-making autonomy, as Koops *et al.* observe, is "the freedom to exercise one's mind," particularly in the context of familial relations, and considered to "flow [ ] from the 'penumbras' of rights embedded in the Bill of Rights."<sup>131</sup> Indeed, privacy is not only a philosophical concept, it is a celebrated legal principle in international and domestic law, and has been broadly recognized in treaties, the U.S.

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<sup>122</sup> Kim, *supra* note 90, at 577-578.

<sup>123</sup> Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Pa. L. Rev 477, 479-480 (2006).

<sup>124</sup> Bert-Jaap Koops, *et al.*, *A Typology of Privacy*, forthcoming 38 U. Pa. J. of Int'l Law (2016).

<sup>125</sup> *Id.* at 15

<sup>126</sup> *Id.* at 24.

<sup>127</sup> *Id.* at 37.

<sup>128</sup> *Id.* at 70

<sup>129</sup> *Id.* at 41

<sup>130</sup> *Id.* at 63-64 (adding that privacy rights include protection from the unwanted access of others).

<sup>131</sup> *Id.* at 41.

Constitution and by courts.<sup>132</sup> Even in the context of criminal proceedings, a defendant does not lose claims to privacy and enjoys certain constitutional protections to that end.<sup>133</sup>

Over her objections and without having party status in the criminal proceedings, López was declared a victim by the prosecutor and Mayor's office. California's Marsy's Law, per the California Constitution, art. 1, §28 enumerates crime victim rights and particularized protections including finality in the criminal proceedings,<sup>134</sup> fairness and respect for privacy,<sup>135</sup> the prevention of the disclosure of confidential or privileged information,<sup>136</sup> and prompt return of property when no longer needed as evidence.<sup>137</sup> These constitutional protections are enforceable by the victim or her attorney.<sup>138</sup> López obtained none of these rights.

In the criminal proceedings, the district attorney's office attached photographs of López taken from the video "knowing it would go viral" before a jury was selected.<sup>139</sup> Despite her efforts to appear *in camera* and prevent introduction of the video into evidence, the court found that the recorded statement, admittedly planned, scripted, and orchestrated for testimonial purposes, made a day after the incident, after an opportunity to reflect on events, and arguably self-serving, was a "spontaneous declaration" and thus admissible.<sup>140</sup> The ruling not only violated privacy concerns protected by law, it strained reasonable interpretation of the rules of evidence. The court further refused to prohibit its use based on López' claim of attorney-client privilege notwithstanding evidence that Madison held herself out as a lawyer and advertised on

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<sup>132</sup> Anne S.Y. Cheung, *Revisiting Privacy and Dignity: Online Shaming in the Global E-Village* 3 Laws 301, 307 (2014).

<sup>133</sup> U.S. Const. Fourth Am.

<sup>134</sup> California Constitution, Article 1, Sec. 28 (a)(6).

<sup>135</sup> California Constitution, Article 1, Sec. 28(b)(1).

<sup>136</sup> California Constitution, Article 1, Sec. (b)(4).

<sup>137</sup> (California Constitution, Article 1, Sec. (b)(14). With regard to the video, Madison acknowledged that it was López property. Furthermore, as noted, the Mayor sought the video after the conclusion of the criminal case.

<sup>138</sup> (California Constitution, Article 1, Sec. c)(1).

<sup>139</sup> Maria L. La Ganga, *Mirkarimi Trial Is A Real-Life Soap Opera In San Francisco*, Los Angeles Times, Mar. 4, 2012, available at <http://articles.latimes.com/2012/mar/04/local/la-me-mirkarimi-trial-20120304>.

<sup>140</sup> Motion to Release Court Record 2, April 23, 2012 [http://www.sfethics.org/files/ccsf\\_mot\\_re\\_video-1.pdf](http://www.sfethics.org/files/ccsf_mot_re_video-1.pdf)

various social networking sites that she had graduated from law school, that she was Editor-in-Chief of her law school's law review, and that she worked at the California Supreme Court.<sup>141</sup>

After the termination of the criminal proceedings, the Mayor in his capacity as a third party to such proceedings, sought a court order from the criminal court to release the video, claiming its release was in the public interest, notwithstanding a victim's right to finality in criminal proceedings.<sup>142</sup> In his effort to persuade the court to release the video, the Mayor focused his attacks less on Mirkarimi—the alleged perpetrator—than on López, the presumed victim. Portraying her efforts to provide context and purpose for the making of the video, he accused her of “selectively” asserting her privacy rights and characterized her efforts to keep the video from public view as “attack[ing] the credibility of her own video-taped statement.”<sup>143</sup> López opposed the Mayor's motion, citing privacy interests and grave concerns for her young son who would be subjected to the consequences of the video and its internet existence in perpetuity.<sup>144</sup> The criminal proceedings had ended; the Sheriff had pled guilty, a fact which could and would be admitted in the Ethics Commission hearing. López, distraught over the possibility of the video being publicly aired over and over stated: “Is this right? Is this really right? Don't they think of my son? My career, my life, or my family? Looks like it's right for them.”<sup>145</sup>

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<sup>141</sup> *Id.* Interview with Eliana López, *supra* note 46; Motion to Release Court Record 2.

<sup>142</sup> Motion to Release Court Record, *supra* note 140. *See supra* note 75.

<sup>143</sup> Motion for Release of Court Record Reply 7, May 14, 2012, at n:\mayor1\as2012\1200392\00773414.

<sup>144</sup> Ms. L's Opposition to Third Party Movant for Release of Court Record 17, May 10, 2012, at [http://www.sfethics.org/files/Lopez.Opp to Motion to Release.5-10-12-1.pdf](http://www.sfethics.org/files/Lopez.Opp%20to%20Motion%20to%20Release.5-10-12-1.pdf).

<sup>145</sup> Rasa Gustaitis, *The Case of the Black and Blue Bruise: Shakespearean Drama in San Francisco*, New American Media, <http://newamericamedia.org/2012/05/the-case-of-the-black-and-blue-bruise-san-franciscans-gripped-by-shakespearean-drama.php> May 28, 2012

Having failed to persuade the criminal court to deny the Mayor's request, López next filed a motion for a protective order with the Ethics Commission.<sup>146</sup> López argued that California's Sunshine Laws established the criteria by which Ethics Commission was bound to determine the motion.<sup>147</sup> She noted that the purpose of the video was beyond the scope of the Sunshine Act,<sup>148</sup> that the video was made by "a private citizen with full expectation of privacy,"<sup>149</sup> was "not a record of any official act of a public official," "... does not relate to the official acts of any public official." .... "is not a reflection or recording of any public act.... [and] has nothing to do with the normal workings of local government."<sup>150</sup> Without rendering its own opinion of the legal issues, or considering the applicability of the Sunshine Ordinance, the Ethics Commission denied López' request on the basis that the criminal court had granted the Mayor's motion.<sup>151</sup>

The López case underscores the complexities raised by the public-private dichotomy and the goals of the feminist project that challenged the sanctity of the private as a means to condemn domestic violence. The legal recognition of privacy provides important protections for victims in the realm of the family, and must be weighed against the obligation to limit such protections in domestic violence matters.<sup>152</sup> Privacy facilitates the opportunity to develop and improve important relationships that require "exclusivity, intimacy, and the sharing of personal

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<sup>146</sup> Ms. L's Request for Protective Order Prohibiting Public Dissemination of Video, May 29, 2012. [http://www.sfethics.org/files/Canny\\_Request\\_for\\_Protective\\_Order\\_5.29.12.pdf](http://www.sfethics.org/files/Canny_Request_for_Protective_Order_5.29.12.pdf).

<sup>147</sup> Sunshine Ordinance, Section 67 *et seq.* <https://firstamendmentcoalition.org/public-records-2/california-sunshine-ordinances/ca-sunshine-ordinances-san-francisco/>

<sup>148</sup> Sunshine Ordinance, Section 67.1 (right to access the government's business).

<sup>149</sup> Madison herself stated to police that the video was of a very private nature. See Statement of Todd A. Roberts, counsel for Ivory Madison, [http://dig.abclocal.go.com/kgo/PDF/Todd%20Roberts\\_Statement.pdf](http://dig.abclocal.go.com/kgo/PDF/Todd%20Roberts_Statement.pdf).

<sup>150</sup> Ms. L's Request for Protective Order Prohibiting Public Dissemination of Video, *supra* note 1462-3, May 29, 2012.

<sup>151</sup> Order Denying Sheriff's Request for a Protective Order, May 16, 2012. At [http://www.sfethics.org/files/order\\_denying\\_sheriffs\\_request\\_for\\_protective\\_order\\_-\\_05.16.2012\\_-\\_redacted.pdf](http://www.sfethics.org/files/order_denying_sheriffs_request_for_protective_order_-_05.16.2012_-_redacted.pdf).

<sup>152</sup> See Koops *et al.* *supra* note 124, at 25, n. 89 (observing that U.S. case law with regard to family privacy is both "substantial and settled in many respects" citing *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003)).



information.”<sup>153</sup> Privacy and dignity are inextricably related; these concepts are embedded in victim rights statutes.<sup>154</sup> Privacy, too, bears on agency and autonomy.

This is not to suggest a return to the practice of domestic violence as a private matter beyond the public purview. But it does imply the need to avoid a totalizing negation of family privacy and to reconsider an approach that analyzes whether and under what circumstances privacy rights might be relevant and enforceable for victims of domestic violence. As long as the domestic violence movement is held captive to the criminal justice system, the public-private dichotomy dilemma may be used for political purposes unrelated to the very needs of those who suffer such violence. These circumstances serve to limit consideration of other mechanisms of addressing the issue, including restorative justice or alternative community-driven solutions that will remain under-explored.

### III. Community Politics and Social Movements: Domestic Violence and the Rest

An examination of the Mirkarimi-López incident offers an opportunity to interrogate the deeply personal experiences of intimate partners that provides insight into domestic violence as a social disorder and its relationship to other structural issues, and specifically to assess the norms that inform the definition of and dominant legal responses to domestic violence. On a larger scale, Mirkarimi-López serves to set in relief the anomalous relationship between the anti-domestic violence movement and social justice movements.

This Part first examines the paradigm of the domestic violence movement that has become deeply embedded within the criminal justice system as a result of its ideological and political antecedents. It then considers the consequences of anti-domestic violence initiatives that have served to promote sanctions consistent with the carceral state. The failure of

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<sup>153</sup> *Id.*, at 56, (citing Benjamin J Goold, “Surveillance and the Political Value of Privacy,” 1 AMSTERDAM LAW FORUM 3, 4 (2009)).

<sup>154</sup> See *supra* notes 70-79.

mainstream advocates to approach domestic violence in the context of political economic structures has resulted in a schism between the anti-domestic violence movement and other forms of social justice activism. This Part demonstrates both as a theoretical matter and as a factual analysis based on the public commentary recorded throughout the Mirkarimi-López case that neither defining nor responding to any type of violence are static social processes. It employs a social movement theory approach which relies upon “the descriptive enterprise” to assess how other forms of social violence including police abuse, environmental degradation, and xenophobia affect the ways in which domestic violence is understood and ameliorated.<sup>155</sup>

#### A. Situating the Domestic Violence Movement

Part II demonstrates that the anti-domestic violence movement’s reliance on criminal justice policies has implications in the realm of “victim” agency and privacy. But there are consequences for the movement itself. The persistence of criminal justice remedies has acted to set domestic violence advocacy apart from other social justice movements. In order to appreciate the genesis of this fissure, it is important to provide a brief overview of the evolution of the anti-domestic violence movement and the political context in which interventionist strategies have developed. Indeed, there has been a significant literature devoted to the history of the domestic violence movement and its efforts to claim criminal justice responses as the moral high ground of legal intervention.<sup>156</sup>

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<sup>155</sup> Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 63 (2001)

<sup>156</sup> Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 802-803 (2001); Beth E. Richie, *Keynote: Reimagining the Movement to End Gender violence: Anti-Racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 257, 268 (2015); Aya Gruber *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3217-3218 (2015) Donna Coker & Ahjané D. Macquoid, *Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement*, UNIV. OF MIAMI RACE & SOCIAL JUSTICE REVIEW 585, 591-593 (2015), Goodmark, *supra* note 2; Jonathan Simon, *Governing Through Crime*, in THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE 171, 171-73 (Lawrence M. Friedman & George Fisher eds., 1997); Weissman, *supra* note 6, at 395.

Much has been written on the advent of the anti-domestic violence movement during the 1970s and 1980s. During this period criminal justice remedies emerged as the principal response to domestic violence as a way to correct a legacy of judicial indifference to violence in the “private” matters of the home and the norms that sanctioned the prerogative of punishment to husbands over wives.<sup>157</sup> In her important book on the carceral state, Marie Gottschalk chronicles the contemporary anti-gender violence movement to explain how feminists in the United States contributed to the harsh penal system that currently characterizes U.S. responses to criminal behavior.<sup>158</sup> Gottschalk provides important insights into the ideological underpinnings of the early women’s organizations concerned with gender violence that provides a further explanation of why the anti-domestic violence movement embraced notions of punishment as the preferred means to address the problem.<sup>159</sup> The women’s movement, Gottschalk argues, emerged out of liberal political traditions with little understanding of and less appreciation for the critique of the Left.<sup>160</sup> Anti-gender violence activists were far more concerned with formal “equal rights” for women than with a “wholesale restructuring of social values and reorganization of institutions to end the subjugation of women.”<sup>161</sup> Liberal political thought pursued prototype legislative responses, often without consideration of socio-economic factors that contribute to gender violence and other forms of oppression; activists thus adopted “single-minded” strategies in their

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<sup>157</sup> See *supra* notes 67, 88 and accompanying text. See generally, Reva B. Siegel, *"The Rule of Love": Wife Beating As Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996). For a further description of the domestic violence movement’s demand for “parity” with regard to the treatment of assaults on women and other criminal matters, see Weissman, *supra* note 6, at 394-396.

<sup>158</sup> Gottschalk, *supra* note 5 at 115, 141-142.

<sup>159</sup> *Id.* at 116.

<sup>160</sup> *Id.* at 121-122. Gottschalk acknowledges that some feminist groups were more disposed to “radical” approaches but did not hold sway. *Id.* at 122. See also Gruber, *supra* note 156, at 3213 (2015) (observing that liberal faith in the criminal justice system served to bind some theorists and advocacy groups to solutions that favors individualism and neglects the need for institutional change).

<sup>161</sup> Gottschalk, *supra* note 5, at 121.

efforts to rely upon the criminal justice system as the antidote to gender violence.<sup>162</sup>

Legislators hostile to welfare programs benefited from the movement's call for penal responses and embraced domestic violence advocates, many of whom became entwined in the politics of privilege.<sup>163</sup> Public funding for gender-violence related crimes, first through the Law Enforcement Administration Act and subsequently through the Violence Against Women Act, further institutionalized a criminal justice approach, thereby aligning the movement to the criminal justice system as eligibility for such funding was often contingent on the willingness of anti-gender-violence programs to shift their messaging from feminist concerns to overt law-and-order remedies.<sup>164</sup> As governing through crime control evolved as the preferred response to social ills, moreover, the U.S. welfare state became increasingly parsimonious and punitive, a circumstance to which the domestic violence movement has largely acquiesced.<sup>165</sup> As others have criticized, advocates have moved into positions of power "rightly identified as central to the apparatus of contemporary governance."<sup>166</sup>

Gottschalk and others have examined the problematic use of criminal justice funds to build anti-domestic violence programs and the impact of the law and order narratives on issues pertaining to race, ethnicity, immigrant status, and gender/sex identities.<sup>167</sup> Indeed, law

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<sup>162</sup> *Id.* at 124

<sup>163</sup> *Id.* at 123, 141 (describing the movement as moving within an elite political milieu).

<sup>164</sup> *Id.* at 124-125, 145-146. See Deborah M. Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 DUKE J. GENDER LAW & POL'Y 221, 226-228 (2013).

<sup>165</sup> Bernard E. Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* 204 (2011) (observing that law and order initiatives increase as government assistance elsewhere diminishes). Deborah M. Weissman, *Countering Neoliberalism and Aligning Solidarities: Rethinking Domestic Violence Advocacy* forthcoming 2016.

<sup>166</sup> See Kerry Rittich, *Out in the World: Multi-Level Governance for Gender Equality* 44, 45 in *FEMINISMS OF DISCONTENT* (Ashleigh Barnes, ed. 2015).

<sup>167</sup> Gottschalk, *supra* note 5 at 129; Richie, *supra* note 156, at 257; Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1423-1424 (2012); Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 287 (1997) (describing the process of essentializing battered women across race and class lines); Alexandra Grant, *Intersectional Discrimination in U Visa Certification Denials: An Irremediable Violation of Equal Protection?* 3 COLUM. J. RACE & L. 253, 262 (2013)

enforcement funding was instrumental in establishing some programs in communities of color. At the same time, the failure of mainstream anti-gender violence advocates to acknowledge how the specter of rape was used to maintain racial oppression and the exclusion of women of color from leadership positions created divisiveness within the movement.<sup>168</sup> Barbara Fedders observed that the 1994 Violence Against Women Act focused on white women as the face of victimhood and included provisions that lacked support from communities of color.<sup>169</sup> Working class families and households from marginalized communities have long experienced the criminal justice system as a relay of power “that subjected the working population to intensified scrutiny” with punishment as a means to “moralize compliant subjects and shunt recalcitrant ones off to prison.”<sup>170</sup>

The anti-domestic violence movement has faced difficulty in expanding into an all-encompassing social justice movement due to its adherence to identity politics which served as a central feature for feminists engaged in the domestic violence movement. In an effort to create group cohesiveness based on the proposition that all women were at “universal risk” of domestic violence by virtue of being women in a male-privileged society, the movement paid insufficient attention to class economics thus undermining class solidarities.<sup>171</sup> Moreover, the anti-domestic violence movement has been further constrained by neoliberal responses which function as a “normative order of reason” pervading all political, economic, and social relationships, and has

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(noting how immigrant women suffer a number of abusive police practices, from racial profiling to refusal to treat domestic violence seriously in the first place); see also Radha Vishnuvajjala, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent*, 32 B.C. J.L. & SOC. JUST. 185, 209 (2012) (noting concerns that immigrant victims of domestic violence may be subjected to racial profiling and as a consequence placed in removal proceedings). See Garrine P. Laney, *Violence Against Women Act: History and Federal Funding* 5 (2005), available at <http://www.ilw.com/immigrationdaily/news/2005.0802-crs.pdf>.

<sup>168</sup> *Id.* at 129.

<sup>169</sup> Fedders, *supra* note 167, at 296-297.

<sup>170</sup> David Garland, *Bars and Stripes*, Times Literary Supplement 3 (Jan. 29, 2016) (reviewing Michel Foucault, *The Punitive Society*).

<sup>171</sup> For a fuller discussion of the critique of feminism’s identity politics, see Nancy Fraser, *Feminism, Capitalism and the Cunning of History*, New Left Rev., Mar.-Apr. 2009, at 97, 97, 101.

insinuated itself into an ideological substructure which precludes meaningful race and class analysis.<sup>172</sup> Indeed, as a result of having adopted a law-and-order approach to domestic violence, the anti-domestic violence movement appeared to have opted for the politics of the personal, and not the social. It should come as no surprise that the movement has been critiqued for being “profoundly co-opted.”<sup>173</sup> As Jonathan Simon has correctly observed, “domestic violence has emerged over the last three decades as one of the clearest cases where a civil rights movement has turned to criminalization as a primary tool of social justice.”<sup>174</sup> Marie Gottschalk also observed that the domestic violence movement “converged with the state in ways not seen in other countries.”<sup>175</sup>

As a matter of context to understand the Mirkarimi-López incident, California was one state where the zeal for penal sanctions to remedy gender-based violence eclipsed other domestic violence initiatives.<sup>176</sup> Conservative California legislators coopted the demands of anti-gender violence advocates.<sup>177</sup> California’s Office of Criminal Justice Planning, with the encouragement of anti-rape activists, assumed control of nearly all of the funding related to gender violence. This control transformed what were once feminist projects to apolitical social service agencies obliged to abandon any critical political stance in favor of a law and order agenda.<sup>178</sup> Many anti-

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<sup>172</sup> WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION 9 (2015). For a more in depth analysis of how identity politics and neoliberalism have hampered the development of the domestic violence movement, see Weissman, *supra* note 164, at 230-23.

<sup>173</sup> Gottschalk, *supra* note 5 at 132; Carol Bohmer, *et al.* *Domestic Violence Law Reforms: Reactions from the Trenches* 29 J. OF SOCIOLOGY AND SOCIAL WELFARE 71, 76 (2002).

<sup>174</sup> Jonathan Simon, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 159 (2007).

<sup>175</sup> Gottschalk, *supra* note 5 at 139.

<sup>176</sup> *Id.* at 127.

<sup>177</sup> *Id.* at 131 (describing the naming of rape shield laws so that they were associated with a conservative legislator).

<sup>178</sup> *Id.* at 127 (noting that programs that failed to adhere to the law and order agenda were threatened with closure and loss of funding).

gender violence advocates in California “increasingly joined conservative coalitions and played the crime card.”<sup>179</sup>

B. The Anti-Domestic Violence Movement: Disaffected and Divisive

The movement’s turn to the carceral state has had troublesome consequences.<sup>180</sup> The focus on criminal justice remedies has limited the capacity of the domestic violence movement to develop alliances.<sup>181</sup> “We have been co-opted and as a result, delegitimized and isolated from people who would be allies,” Beth Richie affirmed.<sup>182</sup> She further observes that women of color who joined the anti-domestic violence movement “found then...what we still find now: a pernicious form of racism in the movement to end gender violence.”<sup>183</sup> She describes the ease with which a punitive prison-industrial complex used the movement’s call for criminal responses:

Right alongside of our evolution as an anti-violence movement came the conservative apparatus that was deeply committed to building a prison nation. That buildup fell right into the open arms, as if we were waiting for it, of the anti-violence movement that had aligned itself with the criminal legal system.... [W]e were ripe for being taken advantage of by the forces that were building up a prison nation. In other words, they used us. They took our words, they took our work, they took our people, they took our money and said, “You girls doing your anti-violence work are right, it is a crime, and we have got something for that.” There was really a moment where we said “cool, take it.” Some of us said, “don’t go there,” but the train had already left the station.<sup>184</sup>

Advocates who organize around racial and ethnic identity have been discouraged by the collaboration between domestic violence programs and the criminal justice system to separate from mainstream domestic violence programs to form their own groups. In New York, South

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<sup>179</sup> *Id.* at 128.

<sup>180</sup> Much has been written on the consequences of over-incarceration and the carceral state generally. For a review of consequences pertaining to the issue of domestic violence, *see* generally Coker & Macquoid, *supra* note 156.

<sup>181</sup> Fedders, *supra* note 167, at 297 (noting that the law and order “agenda forces them to ignore particular types of injustice not within the movement’s theoretical paradigm”). BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* 99 (2012)

<sup>182</sup> Richie, *supra* note 156, at 261.

<sup>183</sup> *Id.* at 263.

<sup>184</sup> *Id.* at 268.

Asian women established Sakhi after members of their community demanded interventions that did not rely on the involvement of the criminal justice system.<sup>185</sup> Latinas in St. Paul, Minnesota, persuaded that existing domestic violence programs failed to meet their needs, established a new delivery service model that rejected a focus on criminal justice sanctions.<sup>186</sup> Domestic violence victims, a Latina community organizer explained, were “looking for access to education, they were looking for opportunities for informal and formal education, and they wanted us to start doing work with men. We heard that they also wanted us to work with their husbands and with sons.”<sup>187</sup>

Disaffection with mainstream domestic violence strategies has been deepening in recent years. A report in 2003 based upon a national community meeting of domestic violence advocates funded by the Ms. Foundation, summed up key concerns with regard to the problem of over-reliance—or any reliance—on the criminal justice system.<sup>188</sup> Some advocates have encouraged divesting from the criminal justice system which “involves disengaging from partnership with the criminal legal system, abandoning the use of mandatory legal practices such as mandatory reporting, arrest, and prosecution policies.”<sup>189</sup> In fact, a number of new community models that rely on community interventions exclusively and work with the criminal justice system only on rare occasions.<sup>190</sup>

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<sup>185</sup> Soniya Munshi, Bhavana Nancherla, Tiloma Jayasinghe, *Building Towards Transformative Justice at Sakhi for South Asian Women*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 421, 423 (2015).

<sup>186</sup> Kelly Miller (moderator) *et. al.*, *Panel on Organizing Campaigns University of Miami School of Law*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 505, 506-07 (2015).

<sup>187</sup> *Id.* (Remarks of Lumarie Orozco regarding the organization Casa de Esperanza and the National Latino Network for Healthy Families and Communities in St. Paul).

<sup>188</sup> Safety and Justice, *supra* note 7,

<sup>189</sup> *Id.* at 17.

<sup>190</sup> Among others, these include organizations including Creative Interventions in Oakland, CA., <http://www.creative-interventions.org/>; Bay Area Transformative Justice Collaborative, <https://batjc.wordpress.com/>; Atlanta Transformative Justice Collaborative, <http://projectsouth.org/atlanta-transformative-justice-collaborative/>; and Generation Five, <http://www.generationfive.org/> which now functions nationally through training and support. Some community-based organizations no longer advise victims of domestic violence to call 911 if they are in immediate danger. Donna Coker, Leigh Goodmark, Marcia Olivo, *Introduction:*



The criminal justice response also acted to preempt and preclude other forms of assistance and support. The “carceral creep” has influenced social services and health care providers who may now be obligated to report suspicions of domestic violence to law enforcement agencies thus creating additional systems of surveillance and monitoring likely to prevent victims from seeking much-needed assistance.<sup>191</sup> The intent cannot be gainsaid, to be sure. This is not to call into question well-meaning motives. But the absence of a social analysis transforms good intentions into bad outcomes and serve at once to enhance the repressive capacity of the state and alienate further the anti-domestic violence movement from the social justice community. Indeed, a recent study on Family Justice Centers that function as a one-stop cite for victim services warns that women who seek help risk unanticipated criminal justice and governmental involvement, monitoring, and control, contrary to the assistance they expect to receive.<sup>192</sup> The study recommends that women be “mirandized” before seeking any social services and health-related assistance, that is, that they be advised that anything they say when seeking help from domestic violence, can and will be used against them.<sup>193</sup>

The critiques and debates about the ways in which the domestic violence movement has contributed to the carceral state may not be new. Recent developments, however, further frame the problematic nature of this relationship and deepen the schism between domestic violence programs and other social justice advocates. Notwithstanding recent heightened attention to

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*Converge! Reimagining the Movement to End Gender Violence*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 249, 254-55 (2015).

<sup>191</sup> Remarks by Mimi Kim, referring to the result of domestic violence advocate’s embrace of the criminal justice system. See *Plenary 3-Harms of Criminalization and Promising Alternatives of Miami School of Law*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 369, 379 (2015). California is one state where doctors are required by law to report domestic violence to police. See Shari Roan, *Law Against Domestic Abuse May Be Backfiring Crime: Health professionals Are Required to Report Suspected Cases*, L.A. Times, Dec. 25, 1996, at E1. Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT’L J. HEALTH SERVS. 97, 105-08 (1988).

<sup>192</sup> Jane K. Stoeber, *Mirandizing Family Justice*, 39 HARV. J. L. & GENDER 189, 191-192, 194 (2016).

<sup>193</sup> *Id.* at 239.

police abuse, including racial profiling, unconstitutional stop and frisk practices, and the murders of people of color, many mainstream domestic violence advocates continue to argue for more—not less—criminal sanctions.<sup>194</sup>

Current law enforcement practices constitute one of the defining features of repression and domination over marginalized people, and particularly people of color and immigrants. Recent reports, including those promulgated by law enforcement and the Department of Justice in response to police killings and other unlawful law enforcement practices, demonstrate that criminal justice tactics have wrought havoc on families, households, and neighborhoods.<sup>195</sup> Community members have expressed that “for generations felt like they're not being policed but *occupied*.”<sup>196</sup> Recent police killings of Black men and women have created a sense of distrust, if not terror, of the police. Indeed, Black women who are mothers describe being “terrified” for their sons as they go about in the world.<sup>197</sup> Black children are suffering panic attacks and depression as a consequence of police brutality.<sup>198</sup>

Immigrant families have also been subject to unlawful law enforcement raids described in a report by the Center on Constitutional Rights:

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<sup>194</sup> See Goodmark, *supra* note 2.

<sup>195</sup> Chicago Police Accountability Task Force, April 2016 (“C.P.D.’s own data gives validity to the widely held belief the police have no regard for the sanctity of life when it comes to people of color.”) at [https://chicagopatf.org/wp-content/uploads/2016/04/PATF\\_Final\\_Report\\_4\\_13\\_16-1.pdf](https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf). U.S. Department of Justice Investigation of the Ferguson Police Department 15, March 2015 (finding that the Ferguson police frequently stop people without reasonable suspicion and arrest without probable cause) at [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report\\_1.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf). Various reports have demonstrated unlawful police harassment through racial profiling and unlawful stop and frisk practices in New York City. See N.Y. Civil Liberties Union, Stop and Frisk Report, 2012 at [http://www.nyclu.org/files/publications/2012\\_Report\\_NYCLU\\_0.pdf](http://www.nyclu.org/files/publications/2012_Report_NYCLU_0.pdf); Center on Constitutional Rights, Stop and Frisk, The Human Impact, July 2012, at <http://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf>.

<sup>196</sup> Alexis C. Madrigal, *How Much Racial Profiling Happens in Ferguson?* The Atlantic, Aug. 14, 2015, at <http://www.theatlantic.com/technology/archive/2014/08/how-much-racial-profiling-happens-in-ferguson/378606/>.

<sup>197</sup> Jack Healey and Nikole Hannah-Jones, *A Struggle for Common Ground, Amid Fears of a National Fracture*, N.Y. Times July 10, 2016 at A1. (quoting a mother about her son’s coming of age for a driver’s license, saying, “This is something we should be celebrating,” ..., “but I am terrified.”).

<sup>198</sup> Yamiche Alcindor, *In the Turmoil Over Race and Policing, Children Pay a Steep Emotional Price*, N.Y. Times, July 10, 2016, at A14.

“[M]ultiple teams of heavily armed [Immigration and Customs Enforcement] agents would surround a home in the pre-dawn hours, and pound on the doors and windows, demanding or forcing entry. Once inside, ICE teams swept through the homes, corralled all those present in a central location and interrogated residents about their immigration status. ICE did not possess judicial warrants for these operations. Although purportedly seeking specific targets, ICE did little to no background research to determine whether targets actually occupied the homes, even raiding the home of a family of Latino citizens twice in an effort to find a man unknown to the family. Latinos, including U.S. citizens, lawful permanent residents, and very young children, bore the brunt of these practices.”<sup>199</sup>

Many in the LGBTQ community have expressed comparable sentiments with regard to law enforcement. “In a lot of neighborhoods,” Cara Page, executive director of the Audre Lord project stated, “we’re not going to call the cops anyway.”<sup>200</sup>

The anti-domestic violence movement has failed to appreciate that police misconduct extends beyond “generic” police abuse and is often manifested in ways that specifically harm women, including during domestic violence calls.<sup>201</sup> Police “stop and frisk” tactics often involve “inappropriate touching,” humiliating, or aggressive physical contact experienced by women, and especially transgender women, as sexual assault, who, as a result, suffer long-lasting trauma.<sup>202</sup> Sexual assault and misconduct was the second most frequently reported form of police misconduct after excessive force; such acts are rarely punished even when reported.<sup>203</sup>

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<sup>199</sup> Aguilar, et al. v. Immigration and Customs Enforcement (ICE), *et al.*, last viewed on July 9, 2016, at <http://ccrjustice.org/home/what-we-do/our-cases/aguilar-et-al-v-immigration-and-customs-enforcement-ice-et-al>.

<sup>200</sup> Nick Rojas, In New York, Gay Marchers Weigh Pride, Prejudice and the Police, N.Y. Times, June 24, 2016 at A20.

<sup>201</sup> Black women who were victims of domestic violence are more likely to be arrested because they are perceived as “overly-aggressive.” Urban Justice Center, Race Realities in New York City 76-77, (2007) at [https://hrp.urbanjustice.org/sites/default/files/HRP.WEB.doc\\_Develop\\_RaceRealities\\_001\\_20140604.pdf](https://hrp.urbanjustice.org/sites/default/files/HRP.WEB.doc_Develop_RaceRealities_001_20140604.pdf)

U.S. Department of Justice Investigation, *supra* note 195 at 81, Richie, *supra* note 181 at 99, (describing the case of Tiawanda Moore who was sexually assaulted by police who arrived when she called to report a domestic violence incident and then subsequently arrested when the officer realized she was using her phone to record his threats).

<sup>202</sup> *Stop and Frisk, The Human Impact*, *supra* note 195, at 12. See also Amnesty International, *Stonewalled*, 3 (describing extreme police brutality suffered by transgender people, particularly low-income transgender people of color), at <https://www.amnesty.org/en/documents/AMR51/122/2005/en/>.

<sup>203</sup> *The 2010 CATO Institute’s National Police Misconduct Statistics and Reporting Project* <http://www.policemisconduct.net/2010-npmsrp-police-misconduct-statistical-report/>. Steven Yoder, Officers Who Rape: The Police Brutality Chiefs Ignore, Jan. 19, 2016 <http://america.aljazeera.com/articles/2016/1/19/sexual-violence-the-brutality-that-police-chiefs-ignore.html>. Notwithstanding the conviction of Daniel Holtclaw, the former

Latinas and immigrant women too have experienced sexual assaults by U.S Border Patrol Agents when coming across the border.<sup>204</sup> Immigrant women and children, especially from Central America, have been subjected to sexual abuse while held in detention centers.<sup>205</sup> Muslim women who wear religious clothing are frequently stopped, physically harassed, and inappropriately searched by Transportation and Security Administration agents.<sup>206</sup> These circumstances have given rise to national campaigns to respond to increasing calls for attention to police violence against women but they seem to fall outside the demands for justice as articulated by mainstream domestic violence groups.<sup>207</sup>

A nationwide survey of advocates, survivors, attorneys, and other members of anti-gender violence advocacy organizations points to the troubling consequences of the anti-

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Oklahoma police officer, evidence offered in a civil suit by his victims suggest that efforts to cover up his crimes were orchestrated by the police department. See Molly Reden, Daniel Holzclaw, *Law Suit Claims Police ‘Covered Up’ Sexual Assault Complaint*, <https://www.theguardian.com/us-news/2016/mar/08/daniel-holtzclaw-lawsuit-sexual-assault-complaint-police-cover-up>. For additional information on sexual harassment of women of color, see Dawn Irlbeck & Samuel Walker. “Driving While Female: A National Problem in Police Misconduct.” University of Nebraska at Omaha, Department of Criminal Justice, Police Professionalism Initiative. (March 2002), available at <http://samuelwalker.net/wp-content/uploads/2010/06/dwf2002.pdf>.

<sup>204</sup> U.S. v. Rosario, (U.S. Border Patrol while stationed at the border at El Paso apprehended two women, a mother and her fifteen-year-old daughter and fondled the victims’ breasts and genitals during the course of a search incident to their arrests) at [https://www.justice.gov/archive/opa/pr/2007/November/07\\_crt\\_883.html](https://www.justice.gov/archive/opa/pr/2007/November/07_crt_883.html). Ildefonso Ortiz, Karen Antonacci and Jared Taylor, *Border Patrol Agent Identified After Suicide, Kidnapping, Sexual Assault of Immigrants*, The Monitor, Mar. 13, 2014, at [http://www.themonitor.com/news/local/border-patrol-agent-identified-after-suicide-kidnapping-sexual-assault-of/article\\_c92ea728-aac1-11e3-8d91-0017a43b2370.html](http://www.themonitor.com/news/local/border-patrol-agent-identified-after-suicide-kidnapping-sexual-assault-of/article_c92ea728-aac1-11e3-8d91-0017a43b2370.html)

Latinas who are U.S. citizens have been subjected to pelvic and rectal searches by border patrol based on wrongful profiling. See Jamie Ross, *Woman Sues For ‘Inhuman & Degrading’ Border Search*, June 10, 2016 at <http://www.courthousenews.com/2016/06/10/woman-sues-for-inhuman-degrading-border-search.htm>.

<sup>205</sup> Gretchen Gavett, *GAO to Investigate Sexual Abuse at Immigration Centers*, Feb. 3, 2012 (noting over 170 complaints of sexual abuse of detained immigrants) at <http://www.pbs.org/wgbh/frontline/article/gao-to-investigate-sexual-abuse-at-immigration-detention-centers/>; Sexual Abuse in Immigration Detention Facilities, <https://www.aclu.org/map/sexual-abuse-immigration-detention-facilities>.

<sup>206</sup> Saher Salod, *Targeting Muslim Americans in the Name of National Security*, November 2014 at [http://www.scholarsstrategynetwork.org/sites/default/files/ssn\\_key\\_findings\\_selod\\_on\\_surveillance\\_of\\_muslim\\_americans\\_1.pdf](http://www.scholarsstrategynetwork.org/sites/default/files/ssn_key_findings_selod_on_surveillance_of_muslim_americans_1.pdf).

<sup>207</sup> Teri A. McMurtry-Chubb, *#SayHerName#BlackWomensLivesMatter: State Violence in Policing the Black Female Body*, 67 MERCER L. REV. 651, 653(2016) (“Black female bodies are regularly policed and eventually sorted in United States prisons”) *Say Her Name, Resisting Police Brutality Against Black Women*, [https://fusiondotnet.files.wordpress.com/2015/07/f3c60-merged\\_document\\_228129.pdf](https://fusiondotnet.files.wordpress.com/2015/07/f3c60-merged_document_228129.pdf). Black Women’s Blueprint, another national initiative also concerned with racial profiling and its effect on women and girls made a documentary Under Siege: The Policing of Women and Girls. See Black Women’s Blueprint, [http://www.blackwomensblueprint.org/criminal\\_j.html](http://www.blackwomensblueprint.org/criminal_j.html).

domestic violence-criminal justice nexus.<sup>208</sup> A majority of respondents indicated that police bias against particular groups of people or with regard to gender violence created problems for their community.<sup>209</sup> Over 80 percent noted that the perception of police bias disinclined survivors' willingness to call the police or to cooperate with the criminal justice system.<sup>210</sup> The survey also found that fear of the police is ubiquitous in marginalized communities. "African-American women," the survey affirmed, "may have particularly strong fears that the police will treat them or their abusive partner unfairly, perhaps even brutally."<sup>211</sup> Immigrant women, especially undocumented immigrant women are reluctant to call the police for fear that it will result in deportation.<sup>212</sup> Women fear that involving the police will result in the state removing their children.<sup>213</sup>

Another study by the National Domestic Violence Hotline found that two out of three hotline callers with previous experience with the police and four out of five who had not called previously were afraid to call them in the future.<sup>214</sup> When asked about relevant considerations whether to report domestic violence, respondents from marginalized communities expressed concerns that police would be biased against them and/or their community.<sup>215</sup>

It is counter-intuitive to suggest that the domestic violence movement ought to continue with its law and order agenda. The collateral consequences that ensue from

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<sup>208</sup> Coker, *et al.*, *Responses from the Field: Sexual Assault, Domestic Violence, and Policing* (2015) (more than 900 individuals responded) [www.aclu.org/responsesfromthefield](http://www.aclu.org/responsesfromthefield).

<sup>209</sup> *Id.* at 8. (Respondents expressed concern that police were biased against women or that their treatment of members of disfavored communities, such as racial minorities, immigrants, Muslims, LGBTQ people, and poor people).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 9.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Who Will Help Me? Domestic Violence Survivors Speak Out About Law Enforcement Responses* 4, 8 (2015) at <http://www.thehotline.org/wp-content/uploads/2015/09/NDVH-2015-Law-Enforcement-Survey-Report.pdf>. (Those who had previously called the police were "extremely" afraid to call again). *Id.*

<sup>215</sup> *Id.* at 7.

involvement with the criminal justice system are devastating for victims and their families.<sup>216</sup>

One African American woman whose boyfriend was murdered by police in St. Paul Minnesota put it starkly when she noted that the police who “are supposed to be protecting us, are the ones that are assassinating us.”<sup>217</sup> More to the point, the Department of Justice study on police abuse reported that an African-American domestic violence victim who experienced harassment by the Ferguson police after calling for assistance stated that she would never call the police again, “even if she were being killed.”<sup>218</sup>

### C. Constricting Vision

The collaboration between the anti-domestic violence movement and the criminal justice system has resulted in additional consequences, that is, an orthodoxy—a rigid “zero tolerance” policy—that has reduced the efficacy of mainstream feminism, and all but abandoned critical thinking about approaches to gender violence. Others have noted mainstream feminism’s analytical limitations with regard to gender violence and its inability to step outside of a construction that “is relentless in its impulse to keep women victims and everyone else a prop in her constant and ongoing insubordination.”<sup>219</sup>

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<sup>216</sup> Eisha Jain, *Prosecuting Collateral Consequences* 104 GEORGETOWN L. J. 1197, 1198-1199 (2016); Coker & Macquoid, *supra* note 156, at 599-601. For a discussion of the collateral consequences of the criminal justice system generally, see Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. Rev. 623, 634-636 (2006); voting restrictions, *id.* at 256. See Sandra S. Park, *Equal Protection for Survivors of Gender-Based Violence: From Criminalization to Law Enforcement Accountability*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 401, 406-07 (2015) (housing concerns). Hon. Bernice B. Donald, *Effectively Addressing Collateral Consequences of Criminal Convictions on Individuals and Communities*, CRIM. JUST., Winter 2016, at 1, 33 (social services, economic and health benefits); MARSHA WEISSMAN ET AL., THE USE OF CRIMINAL RECORDS IN COLLEGE ADMISSIONS: RECONSIDERED (2015) (educational benefits), available at <http://communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf>.

<sup>217</sup> *U.S. Police Shooting: Philando Castile’s Partner Tells BBC She Wants Change*, July 12, 2016 (Interview with Diamond Reynolds) at <http://www.bbc.com/news/world-us-canada-36772039>.

<sup>218</sup> See Department of Justice Report, Ferguson, *supra* note 195, at 81.

<sup>219</sup> Aziza Ahmed, *When Men Are Harmed: Feminism, Queer Theory, and Torture at Abu Ghraib* 194, 195, 212, in FEMINISMS OF DISCONTENT, *supra* note 166.

Reliance on criminal remedies alliance has hindered efforts to consider alternatives to the gender binary of victim politics that act to reify the definition of domestic violence. Scholars have observed that the “the history of naming domestic violence and/or abuse illustrates that, as a society, our understanding of what these concepts are, and whether they are one and the same, is incomplete and evolving.”<sup>220</sup> State statutes—the principal means of defining domestic violence—vary. Yet much of the advocacy commentary regarding the definition has focused more on whether laws privilege certain types of intimate relationships over others than whether they are too broad or too punitive.<sup>221</sup>

The U.S. Supreme Court has dealt with the criminal definition, and at the urging of national domestic violence networks expanded the definition to include not only violent force but “offensive touching.”<sup>222</sup>

...whereas the word “violent” or “violence” standing alone “connotes a substantial degree of force,” (citation omitted) that is not true of “domestic violence.” “Domestic violence” is not merely a type of “violence”; it is a term of art encompassing acts that one might not characterize as “violent” in a nondomestic context.<sup>223</sup>

Mainstream groups, however, have been slow to acknowledge the impact of such an expansive definition on immigrants, including immigrant survivors of domestic violence who may be wrongfully convicted of misdemeanor domestic violence crimes and who would face an increased risk of deportation as a result. Organizations representing immigrant victims of

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<sup>220</sup> Vanessa Bettinson and Charlotte Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?* 66 NORTHERN IRELAND LEGAL QUARTERLY 179, 183 (2015).

<sup>221</sup> See Claire Wright, *Torture at Home: Borrowing from the Torture Convention to Define Domestic Violence*, 24 HASTINGS WOMEN'S L.J. 457, 464 (2013); Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 514-520 (2008).

<sup>222</sup> U.S. v. Castleman, 134 S.Ct. 1405, 1410, 1411 (2014) (noting amicus brief positions). Federal courts have also examined the definition of domestic violence for purposes of determining whether firearm restrictions and/or immigration consequences apply to those convicted of domestic violence See also United States v. Hayes, 555 U.S. 415(2009); United States v. Hays, 526 F.3d 674 (10th Cir. 2008); United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006); United States v. Belless, 338 F.3d 1063 (9th Cir. 2003); United States v. Nason, 269 F.3d 10 (1st Cir. 2001); United States v. Smith, 171 F.3d 617 (8th Cir. 1999) .

<sup>223</sup> U.S. v. Castleman, 134 S.Ct. at 1411.

gender-based violence objected to such a broad definition, arguing that “could have profound effects on immigration law” and would “hurt immigrant domestic violence survivors who get swept into the criminal justice system, as well as their family members, and stifle the vital reporting of domestic abuse.”<sup>224</sup>

Beyond an expansive definition of domestic violence, the movement’s alliance with the criminal justice system has produced an uncompromising set of legal interventions that fail to consider or correspond to the differentiated circumstances of intimate relationship dysfunction. Zero-tolerance policies have recently come under criticism in police practices generally and the critique has particular resonance in domestic violence circumstances.<sup>225</sup> Recent studies, Tamara Kuennen has observed, have demonstrated the fallacy of zero-tolerance policies and instead have “differentiat[ed] among types of physical aggression that occur in intimate partnerships.”<sup>226</sup> Leigh Goodmark has made a strong case that domestic abuse might best be defined by the “victim’s subjective experience with her partner’s behavior,” further illustrating the flaws of zero tolerance criminal justice responses.<sup>227</sup> Sociologists have offered more nuanced definitions of domestic abuse that recognize that some forms of violence in relationships are neither abusive nor warrant legal intervention while others may be so destructive as to warrant criminal sanctions.<sup>228</sup> These researchers differentiate between the former, “situational couple violence”<sup>229</sup>

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<sup>224</sup> Brief for ASISTA Immigration Assistance et al., as Amici Curiae Supporting Respondent at 5, 6, *United States v. Castleman*, 134 S. Ct. 1405 (2014). The Court, in a footnote, bracketed immigration laws in its decision. *Id.* at 1411, n.4.

<sup>225</sup> The Department of Justice’s recently released report on policing in Baltimore and “used its most scathing language to date to denounce the zero-tolerance policing approach.” Timothy Williams and Joseph Goldstein, *In Baltimore Report, Justice Dept. Revives Doubt About Zero Tolerance Policing*, N.Y. Times, Aug. 11, 2016 at A1. See Investigation of the Baltimore City Police Department 24 (Aug. 10, 2016) at <https://www.justice.gov/opa/file/883366/download>.

<sup>226</sup> Tamara L. Kuennen, *Stuck on Love*, 91 DENV. U. L. REV. 171, 179 (2013); Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1313-14 (2008).

<sup>227</sup> See Leigh Goodmark, A TROUBLED MARRIAGE, DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 139 (2012).

<sup>228</sup> Michael P. Johnson and Janet L. Leome, *The Differential Effects of Intimate Terrorism and Situational Couple Violence Findings From the National Violence Against Women Survey* 26 J. FAM ISSUES 322, 324 (2005); Evan Stark, *COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE* (2007)



and the latter, coercive control.<sup>230</sup> Some physical violence between intimate partners, however problematic such behavior may be, does not always fall outside of social norms.<sup>231</sup> Some scholars have explored the complexity of gendered violence and suggest that the default criminal response is unjust given the circumstantial entanglements between victim and perpetrator and point out that such responses are often ineffectual in addressing the issue in the first place.<sup>232</sup> Still others have argued for a shift from the “Love-Hate” binary that characterizes family law generally to a model that considers guilt and a desire for repair and reparation.<sup>233</sup>

These theories have provoked controversies often rising fully to the level of “rancorous” exchanges.<sup>234</sup> While it may be difficult to differentiate between types of assaults and the degree to which they constitute “physical aggression” that do not warrant criminal sanctions, it is nonetheless important to determine appropriate intervention strategies.<sup>235</sup> As Kuennen argues, “the line [between a nonabusive relationship and an abusive one] cannot remain where the law places it, currently making any use of physical force the litmus test for abuse.”<sup>236</sup>

Anti-domestic violence advocates, however, are loathe to consider differentiated concepts of physical violence that would require differentiated responses, including non-criminalizing

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<sup>229</sup> Johnson and Leome, *supra* note 228

<sup>230</sup> Stark, *supra* note 228.

<sup>231</sup> Kuennen, *supra* note 228, at 179, 180 (arguing that some aggression between couples do not fall outside of community norms).

<sup>232</sup> Baker, *supra* note 235; Margo Kaplan, *Rape Beyond Crime* (2016) (arguing that a public health response would be more appropriate in many instances of rape) available at: <http://ssrn.com/abstract=2736565>.

<sup>233</sup> Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1247 (2008).

<sup>234</sup> Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379, 1382 (2005).

<sup>235</sup> Tamara L. Kuennen, *Love Matters*, 56 ARIZ. L. REV. 977, 999-1000 (2014). Ver Steegh, *supra* note 234, at 1428 (arguing the need to distinguish between coercive control and situational couple violence in custody matters). See Huntington, *supra* note 233, at 1315 n 292 (2008) (noting the importance of distinguishing between types of violence in cases “in which parents potentially stand on more equal ground”). See also Katharine K. Baker, *Why Rape Should Not (Always) Be A Crime*, 100 MINN. L. REV. 221, 223-225 (2015) (setting forth pragmatic arguments as to why criminalization of sexual assault is not always the best option).

<sup>236</sup> Kuennen, *supra* note 235, at 980.

consequences.<sup>237</sup> They have been reluctant to consider social science research findings related to typologies of intimate partner violence in formulating advocacy strategies, legal intervention, and public policy, out of concern that classifications of violence would undermine their efforts to engage law enforcement and the courts on the issue.<sup>238</sup> One study demonstrating advocacy bias found that anti-domestic violence advocates “derided” typology authors through the use of biased and unsound attempts to undermine those researchers who offered arguments about differentiation of violence.<sup>239</sup> These efforts included the introduction of “fictitious content to suggest more sinister intent and dangerous dynamics,” making unfounded claims about typology researchers attitudes toward gender equality and endeavoring to narrow the parameters of permissible debate.<sup>240</sup>

[B]oycotts and public protests were organized against the lead researcher’s presentations (even some on unrelated topics). Several keynote addresses were canceled. More extremist advocates resorted to *character assassination*: they circulated hate mail and the researcher’s name was “blacklisted,” linked on an Internet blog with other thoroughly discredited researchers “who had confused the field with bad data.”<sup>241</sup>

Little has changed over time. Certainly a measure of civility has characterized recent debates, but anti-domestic violence advocates have “stopped short of endorsing the concept of a typology of IPV.”<sup>242</sup> Anti-domestic violence advocates remain committed to policies that call for “zero

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<sup>237</sup> *Id.* at 995 (describing zero tolerance policies as a “mission” of the anti-domestic violence movement).

<sup>238</sup> Irwin Sandler, *et. al.*, *Convenient and Inconvenient Truths in Family Law: Preventing Scholar-Advocacy Bias in the Use of Social Science Research for Public Policy*, 54 FAM. CT. REV. 150, 157 (2016).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 159 n. 14

<sup>242</sup> *Id.* at 160.

tolerance” and the accompanying default criminal response.<sup>243</sup> The movement continues to serve as a mechanism of “political capture” by which it has sought to stymie change in the legal responses to domestic violence, notwithstanding shifting social science and social norms.<sup>244</sup> It is out of touch with crime victims view on safety and justice, the majority of whom have not obtained relief or remedy from the criminal justice system and who prefer rehabilitation and prevention to punishment.<sup>245</sup> The task at hand is to demonstrate that the anti-domestic violence movement can remain politically and normatively committed to ending gender violence without uncritical reliance on the apparatus of the carceral state. The moral imperative of ending domestic violence need not be validated by way of the punishing power of the state.

D. Community Responses to Efforts to Remove Mirkarimi: The Manifestations of Disaffection

The record of public commentary in the Mirkarimi case offers insight into the consequences of the mainstream anti-domestic violence advocates reliance on law enforcement strategies to address gender violence and reflects the scholarly critique.<sup>246</sup> The demands for

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<sup>243</sup> See e.g., H.R.3130 - Zero Tolerance for Domestic Abusers Act, at <https://www.congress.gov/bill/114th-congress/house-bill/3130/text>; Zero Tolerance for Domestic Violence, Contra Costa, <http://www.contracostazt.org/>; Dennis Dodd, Steve Spurrier's zero-tolerance domestic violence rule worth copying, Aug. 7, 2015 at <http://www.cbssports.com/college-football/news/steve-spurriers-zero-tolerance-domestic-violence-rule-worth-copying/>; Ann Killlison, Raiders' owner has zero tolerance for domestic violence, Nov. 16, 2015, NNEDV Joins Advocates to Launch NO MORE, March 13, 2013 (promoting a zero-tolerance policy) at <http://nnedv.org/news/national/3335-no-more-launch-2013.html?highlight=WyJ6ZXJvIiwidG9sZXJhbmNlIiwieWVbyB0b2xlcmlFuY2UiXQ==>

<sup>244</sup> See Mark A. Edwards, *The Alignment of Law and Norms: Of Mirrors, Bulwarks, and Pressure Valves*, 10 FIU L. REV. 19, 19-20 (2014).

<sup>245</sup> Alliance for Safety and Justice, *Crime Survivors Speak*, (2016) <https://www.allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf>.

<sup>246</sup> Each person who waited to provide public commentary was provided no more than two minutes to do so. See e.g., Transcript, Ethics Commission Meeting—Sheriff Ross Mirkarimi, April 23, 2012 at 5 (*hereinafter*, TR Apr. 23 2012) available at <http://www.sfethics.org/ethics/2012/05/transcript-special-meeting-of-the-ethics-commission-april-23-2012.html>; Transcript, Ethics Commission Meeting—Sheriff Ross Mirkarimi, May 29, 2012 at 319, (*hereinafter* TR May 29, 2012) available at [http://www.sfethics.org/files/transcript\\_-\\_may\\_29\\_2012\\_ec\\_meeting.pdf](http://www.sfethics.org/files/transcript_-_may_29_2012_ec_meeting.pdf); Transcript, Ethics Commission Meeting- Sheriff Ross Mirkarimi, Aug. 16, 2012 at 1421 (*hereinafter* TR Aug. 16, 2012) at [http://www.sfethics.org/files/transcript\\_-\\_august\\_16\\_2012\\_ec\\_meeting.pdf](http://www.sfethics.org/files/transcript_-_august_16_2012_ec_meeting.pdf). Public commentary for the August 16, 2012 is separately recorded at [http://sanfrancisco.granicus.com/TranscriptViewer.php?view\\_id=142&clip\\_id=15782](http://sanfrancisco.granicus.com/TranscriptViewer.php?view_id=142&clip_id=15782) (*hereinafter* TR Aug 16, 2012). (Original online transcript not paginated; pages refers to downloaded version on file with author). See Transcript of Board of Supervisors Meeting, Oct. 9, 2012 (*hereinafter* TR BOS) at 30 (Original

Mirkarimi's prosecution and punishment and the championing of the city's efforts to remove him from office underscores the way the movement has become implicated in the political agenda hostile to marginalized San Francisco communities and social justice groups. The politics of domestic violence diminished opportunities for domestic violence advocates to dialogue with San Francisco's residents who have suffered from crime and punishment and seemingly lacked the power and resources of the domestic violence movement.<sup>247</sup> Differences were exacerbated and solidarities were undermined.<sup>248</sup> Indeed, community support of Mirkarimi exposed the limitations of domestic violence movement's default to the response of zero tolerance.

Community supporters represented individual constituent experiences with Mirkarimi while he was their District 5 Supervisor as well as in support of his programs and policies that he implemented during his political career.<sup>249</sup> Individuals praised Mirkarimi for his enlightened view of state responses to crime, his belief in second chances, restorative justice, and alternatives to incarceration and his compassion and care for families who were crime victims.<sup>250</sup> As one news commentator summarizing public commentary stated,

one person after another from District #5 which he represented as a Supervisor, stood up to testify to how much he'd done to reduce violent crime, especially gang

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online transcript not paginated; pages refers to downloaded version on file with author).

[http://sanfrancisco.granicus.com/TranscriptViewer.php?view\\_id=10&clip\\_id=16097](http://sanfrancisco.granicus.com/TranscriptViewer.php?view_id=10&clip_id=16097).

<sup>247</sup> TR Apr. 29, 2012. One commentator stated that the actions of the city, the ethics commission and the domestic violence organizations were "disgusting" "unethical" in their efforts to "destroy a family."

<sup>248</sup> TR BOS (at 111); (expressing concern because of "the division between domestic violence advocates and those on the left") (at 145) *See infra* notes .

<sup>249</sup> TR. Aug. 16, 2012 (at 87) *See* Joe Fitzgerald, *Lopez Takes the Stand in Official Misconduct Case Against Suspended Sheriff*, July 19, 2012 <http://www.fogcityjournal.com/wordpress/4871/lopez-takes-the-stand-in-official-misconduct-case-against-suspended-sheriff/> (describing overflow crowds at Ethics Commission hearings by supporters of Mirkarimi). Space limitations make it impossible to reference in footnotes the many supportive comments made by San Francisco residents in behalf of Mirkarimi; some, but not all, are referenced below. One commentator noted the overflow crowds and the unanimous support for Mirkarimi , TR May 29, 2012 at 378-379. TR BOS at 31.

<sup>250</sup> TR Apr. 23, 2012, at 91 ("people who are in the jails will be going to suffer the most" without Mirkarimi). *Id.* at 99 (noting that Mirkarimi reduced incidence of youth violence and "fought for programs that would help serve our community"). *Id.* at 114 (crime victim in support of Mirkarimi). TR May 29, 2012 at 340, 341, 349, 373; TR Aug. 16, 2012 (at 119-120, 144, 175, 180). TR BOS at 33 (referring to Mirkarimi as a "jewel") (compassion for prisoners) (at 36) (support for sheriff for his work with "the ones in and out of prison") (at 38). TR Apr. 23, 2012, at 89 (commenting that Mirkarimi has been working "in the trenches"); TR May 29, 2012 at 368. TR BOS at 32.

violence, in their neighborhood. They said that he was there when their children were bleeding in the streets, even that he had intervened at his own risk to prevent violence.<sup>251</sup>

The explicit and implicit message, particularly given the racial and ethnic identity of those who praised Mirkarimi's progressive stance on crime was that notwithstanding the "arm grab," Mirkarimi earned their vote and their defense because of his support for people of color, immigrants, and the poor in San Francisco.<sup>252</sup> Religious leaders and social justice groups, including community anti-violence organizations, tenant's organizations, labor unions, LGBT organizations, progressive lawyers organizations, and the Latino Democratic Club similarly expressed support for Mirkarimi.<sup>253</sup> Mirkarimi was credited with creating jobs for disadvantaged neighborhoods and progressive environmental protection legislation.<sup>254</sup> The San Francisco Green Party, for example, acknowledged the importance of domestic violence issues, but opposed efforts to oust Mirkarimi noting the wrong-headedness of the city's punitive approach and urged support for "redemptive" responses.<sup>255</sup> Its members rallied for Mirkarimi due to his strong defense of civil rights and the environment.<sup>256</sup> The American Immigration Lawyers Association

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<sup>251</sup> See Ann Garrison, *Eliana Lopez on Ross, District 5, SF's Ethics Commission*, Aug 21, 2012.

<sup>252</sup> TR Apr. 23, 2012 at 103 (representative of Black media referencing Mirkarimi as best for "third world people"); TR Apr. 23, 2012 at 112 (statement of support from former African-American male inmate); TR May 29, 2012, 328, 329 (complaining of bias), 342 (noting Mirkarimi's support for brown and black people as well as Chinese). TR BOS (representative of Latino community at San Francisco state, "he stood for us and we should stand for [him]) (at 37) Myrna Melgar, November 2, 2012 (noting that most of the Sheriff's supporters were people of color).

<sup>253</sup> TR Apr. 23, 2012 at 85, 93-94, 105-107. TR May 29, 2012 at 340, 351, 362, 375 (noting that a cross section of groups and persons generally considered to be less than powerful were united in accusing the city of "overreach"). TR BOS at 33 (support from community based program for Mirkarimi's work with marginalized youth) TR BOS (statement in support of Mirkarimi by the American Immigration Lawyers Association) (at 150).

<sup>254</sup> TR Apr. 23, 2012 at 108, TR May 29, 2012 at 354-355; San Francisco Green Party: Statement in Support of Sheriff Ross Mirkarimi, Alameda Co and SF Green Party <http://sfgreenparty.org/issues/37-statement-on-sheriff-mirkarimi> San Francisco Supervisor Ross Mirkarimi Introduces Expanded Plastic Bag Ban & 5-Cent Paper Bag Fee, August 3, 2010, at <http://plasticbaglaws.org/san-francisco-supervisor-mirkarimi-introduces-expanded-plastic-bag-ban-paper-bag-fee/> San Francisco Board of Supervisors Unanimously Adopts Comprehensive Single-Use Bag Ordinance, Feb. 7, 2012, at <http://plasticbaglaws.org/san-francisco-board-of-supervisors-unanimously-adopts-comprehensive-plastic-bag-ordinance-that-applies-to-all-retailers-and-restaurants/>.

<sup>255</sup> San Francisco Green Party, *supra* note 254. Other commentators opposed Mirkarimi's ouster noting that it was contrary to the city's move toward restorative and redemptive justice. TR Aug 16, 2012 (at 147).

<sup>256</sup> *Id.* Other commentators opposed Mirkarimi's ouster noting that it was contrary to the city's move toward restorative and redemptive justice. TR Aug 16, 2012 (at 147).

emphasized Mirkarimi's importance to San Francisco's immigrant community.<sup>257</sup> Labor representatives indicated that their organization had grappled with the issue of domestic violence and relied on their women union members to provide leadership on the issue and were opposed to the city's efforts to remove the sheriff.<sup>258</sup> Some supporters criticized the response to the incident as consistent with the predilections of the carceral state.<sup>259</sup> These issues outweighed community concerns about gender violence due to the fact that the latter was presented as a matter of strict criminal liability without any progressive bona fides.<sup>260</sup>

Many community members and commentators suspected that the city's efforts to remove Mirkarimi was a political maneuver, a "coup d'état," and a "witch-hunt," a mechanism of voter disenfranchisement targeted at a poor and black district.<sup>261</sup> It was a political power play to which domestic violence advocates lent their credibility. As a result, advocates were viewed as manipulative, self-serving, and allied with the powerful.<sup>262</sup> Mirkarimi's supporters argued that

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<sup>257</sup> TR BOS (at 151).

<sup>258</sup> TR BOS at 129

<sup>259</sup> TR Aug. 16, 2012 (at 85) (referencing the problem of over incarceration).

<sup>260</sup> For example, community groups acknowledged the importance of domestic violence as an issue but rejected the punitive response touted in the Mirkarimi case. *Id.* One labor union representative noted that the issue of domestic violence was an important one, but that this case was about the city's efforts to remove a "progressive elected official from office." TR BOS (at 93-93).

<sup>261</sup> TR April 23, 2012 at 85, 87 91 (referring to the case against Mirkarimi as a "witch-hunt"); TR May 29, 2012, at 324, 342, 359, 376; TR Aug. 16, 2012 (at 64, 78-79, 170) (referencing the financing of a billboard against Mirkarimi in order to support his political opponents). The billboard in question was paid for by domestic violence advocates. See Keith Mizuguchi, *Billboard Campaign Launched Against Sheriff Mirkarimi*, Feb. 4, 2012, at <http://www.sfstation.com/2012/02/14/billboard-campaign-launched-against-sheriff-mirkarimi/>; (at 70). TR BOS, at 30 (former Mayor of San Francisco warning against over-reach) (construing the city's efforts to use the issue of domestic violence for a "political lynching") (at 116). See Maiter & Ross, *Mirkarimi's Wife To Testify, Her Attorney Says*, Feb 13, 2012, at <http://www.sfgate.com/bayarea/matier-ross/article/Ross-Mirkarimi-s-wife-to-testify-her-attorney-3308663.php>. TR April 23, 2012 at 87, 92 ("I cast my vote"), 115. TR May 29, 2012 at 338, 339, 348, 351 (noting the will of the people in electing Mirkarimi), 353, 361 ("I want my vote to count"), TR Aug. 16, 2012 (17, 156) (pointing out that if the people who elected Mirkarimi so desired to remove him from office because of his actions, they could recall him) (at 24) (arguing that removal efforts lacked due process) (at 65) TR BOS (no authority to "take away my vote) (at 34, 35) ("if we want him out we'll take him out) (at 36) (arguing that removing the Sheriff would send a bad message to immigrants about democracy) (at 43) ("Don't substitute your judgement for the citizens of San Francisco. We elected him.") (at 87).

<sup>262</sup> TR May 29, 2012 at 343. TR BOS (at 35) (expressing concerns that domestic violence advocates were aligned with and took funds from Mirkarimi's political opponents) (at 39) (specifically critiquing San Francisco's mainstream domestic violence program for using the incident and others to enrich the organization rather than helping victims) (at 40).

the mayor's efforts were hypocritical and exceptional, and identified other city officials guilty of misconduct but never punished.<sup>263</sup> They rejected any explanation offered by city officials as well as those domestic violence advocates who spoke against Mirkarimi that the matter was evidence of the city's policies by which domestic violence or the needs of women were taken seriously.<sup>264</sup> It appeared evident to Mirkarimi's supporters that his prosecution for domestic violence had little to do with the well-being of women. This was "feminism's appropriation for less than feminist purposes."<sup>265</sup> To borrow from Naomi Wolfe's analysis in her critique of prosecutorial actions against Julian Assange for sexual assaults after his release of documents through WikiLeaks, the community remarks reflected the view that "[t]hat is not the State embracing feminism. That is the State pimping feminism."<sup>266</sup>

It is important to emphasize that community members addressed the issue of Mirkarimi's actions towards López in the context of defining and responding to domestic violence. They urged city officials to consider López' perceptions as to whether she was abused and suggested that in fact women's voices on the issue were being ignored.<sup>267</sup> Many argued that the arm grab did not constitute domestic violence and represented nothing exceptional in the realm of family arguments; that it was a commonplace event that took place during a heated dispute between a husband and wife and with which most individuals could identify and did not warrant any

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<sup>263</sup> TR April 23, 2012 at 81, 82, 88-89. (citizen remarks describing removal efforts as "ridiculous," and a "gross disparity"). TR May 29, 2012 at 337 (pointing to the previous mayor's adulterous relationship while in office and alleged illegal drug use). A number of speakers identified the case of the city's female fire chief who physically assaulted her estranged husband with a weapon but had no charges brought against her. *See e.g.*, TR May 29, 2012 at 330, TR Aug. 16, 2012 (9, 139). TR BOS at 33, 34 (referring again to the fire chief, female and not of color).

<sup>264</sup> TR May 29, 2012 at 340.

<sup>265</sup> *See* Brenda Cossman, *Feminism in Hard Times: From Criticism to Critique* 3, 14 in FEMINISMS OF DISCONTENT *supra* note 166 (describing Naomi Wolfe's critique of the sexual assault allegations against Julian Assange after his release of WikiLeaks documents).

<sup>266</sup> Naomi Wolfe, *J'accuse: Sweden, Britain, and Interpol Insult Rape Victims Worldwide*, Huffington Post Dec. 13, 2010 (critiquing the prosecutorial actions against Julian Assange for sexual assaults after his release of documents through WikiLeaks) [http://www.huffingtonpost.com/naomi-wolf/jaccuse-sweden-britain-an\\_b\\_795899.html](http://www.huffingtonpost.com/naomi-wolf/jaccuse-sweden-britain-an_b_795899.html).

<sup>267</sup> TR Apr. 23, 2012 at 96, 99-100; TR May 29, 2012, at 327, 369, TR Aug. 16, 2012 (at 34, 53); TR BOS (at 108, 137) (expressing concern that López' rights were violated) (at 166).



intervention.<sup>268</sup> They expressed anger at the way in which the incident was portrayed and criticized the city’s attorney for over-reaching by claiming that Mirkarimi “beat his wife” or “attacked his wife.”<sup>269</sup> Still others believed that the fact that Mirkarimi had taken responsibility for his actions by his apology to his wife was sufficient mitigation of the “arm grab.”<sup>270</sup> Most firmly rejected the usefulness of “zero tolerance” by which to address domestic violence and called for a more nuanced approach with an emphasis on redemption and restorative justice consistent with the parameters of situational couple violence.<sup>271</sup>

These comments reflected the extent to which the tethering of mainstream domestic violence movement to systems of punishment were deemed to be discordant with progressive social norms, restorative justice approaches, and were particularly at odds with the interests of those who have suffered the racist reach of the carceral state.<sup>272</sup> Much of the critique of the domestic violence movement was from a place of concern for poor communities and the politics of social justice. Community members objected to the nature of the consequences that Mirkarimi suffered as a result of having been charged with domestic violence, and despaired over the fact that Mirkarimi was not allowed to see his wife and child and was deprived of his

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<sup>268</sup> TR Apr. 23, 2012 at 81, 105, 109. TR May 29, 2012 at 352, 373; TR Aug. 16, 2012 (at 95, 119, 161, 166); TR BOS (at 75, 98). TR May 29, 2012 at 331, 334, 335, 337, 364. TR Aug 16, 2012 (at 14, 26, 51, 77, 198); TR BOS (at 79).

<sup>269</sup> TR BOS (at 112)

<sup>270</sup> TR May 29, 2012 at 330.

<sup>271</sup> See *supra* note 229. TR May 29, 2012, 352 (arguing for diversion in lieu of conviction mechanisms), 360-361 (suggesting domestic violence not a black and white situation but gray), 370. TR Aug. 16, 2012 (at 27), arguing that as a result of this incident, Mirkarimi would be a better sheriff (at 36). TR BOS at 33 (commenting on “overkill” reaction to the incident) (excessive reaction to the arm grab) (at 37). One commentator pointed out the absurd result of domestic violence sanctions, observing that Mirkarimi was prohibited from having any contact with his wife for six months while individuals convicted of murder are entitled to conjugal visits. See Debra J. Saunders, *Ross Mirkarimi Faults Himself, and the System* Jan. 3, 2015 at <http://www.sfgate.com/opinion/saunders/article/Ross-Mirkarimi-faults-himself-and-the-system-5990853.php>.

<sup>272</sup> TR May 29, 2012 at 352, 360; TR Aug. 16, 2012 (at 42, 96); TR BOS (arguing that at most, counseling would have been an appropriate response) (at 54).



pay.<sup>273</sup> His supporters commented that the consequences were harmful to López—the alleged victim—and her son.<sup>274</sup> They argued that removing him from office was disproportionate to the offense.<sup>275</sup>

Domestic violence advocates urged city officials to remove Mirkarimi.<sup>276</sup> The paradigm of domestic violence allowed little nuance. What had occurred between López and Mirkarimi, domestic violence advocates insisted, was an act of domestic violence to which the criminal justice system was perforce obliged to respond.<sup>277</sup> Otherwise, the chair of the city’s Family Violence Council suggested, abusers the world over would be emboldened.<sup>278</sup> Mirkarimi-López was to be the stand-in for zero tolerance for if Mirkarimi were to remain as sheriff, it would send a “message” to perpetrators.<sup>279</sup> To allow Mirkarimi to assume his position would serve to terrify domestic violence victims.<sup>280</sup> A convicted abuser in charge of domestic violence programs, moreover, would undermine the city’s commitment against gender violence, particularly because Mirkarimi would be under a sentence of probation for acts related to domestic abuse.<sup>281</sup> One individual who identified with the city’s Commission on the Status of Women pointed approvingly to the punitive practice of removing various licenses of domestic violence

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<sup>273</sup> TR April 23, 2012 at 85, 93, 96. TR May 29, 2012 at 372-373 (concerned that the loss of a job because of domestic violence would continue the cycle of violence), TR Aug 16, 2012 (24). TR BOS (at 95, 124).

<sup>274</sup> TR May 29, 2012 at 339.

<sup>275</sup> TR May 29, 2012, at 362 (27-year union representative arguing that “the issues in this case simply don’t come close to warranting termination of employment”), 367; TR Aug. 16, 2012 (at 32); TR BOS (at 131).

<sup>276</sup> TR Aug. 16, 2012 (at 45, 112). April 23, 2012 at 119; TR Aug. 16, 2012 (at 29, 30, 43, 73, 104, 109, 106, 114, 117, 121, 122, 123, 185, 130). TR BOS (at 80).

<sup>277</sup> TR Aug. 16, 2012 (at 45, 112).

<sup>278</sup> TR April 23, 2012 at 119 (stating “the world is watching”).

<sup>279</sup> TR Aug. 16, 2012 (at 29, 106).

<sup>280</sup> TR Aug. 16, 2012 (at 117, 122, 130) (arguing that immigrant victims would be afraid to come forth) (at 121) TR BOS (at 49).

<sup>281</sup> TR Aug. 16, 2012 (at 30, 43, 73, 104, 109) (allowing Mirkarimi to stay in office would “tarnish[ ] the badge” and undermine the domestic violence program in the jail) (at 114) (at 123, 125, 185). TR BOS (at 42, 82) (arguing that Mirkarimi could not be in charge of protecting victims) (at 84) (would send the wrong message to children who were aware of the controversy through the media) (at 142).

perpetrators as a basis for removing Mirkarimi from office.<sup>282</sup> Insisting that domestic violence could not return to the privacy of the home, advocates demanded that state intervention was needed to prove the commitment to protect women and children.<sup>283</sup>

But for most members of the public who offered commentary, including those who identified themselves as victims of domestic violence, Mirkarimi-López was about a political agenda unrelated to domestic violence.<sup>284</sup> They rejected the characterization of the arm grab as an incident of domestic violence and repudiated the punitive response that followed. They objected to the way in which López was treated and observed that those domestic violence advocates who spoke in favor of removing Mirkarimi were financially dependent on those city officials seeking to oust him.<sup>285</sup> Indeed the abusive way that López was treated, many feared, would serve to discourage others from reporting domestic violence.<sup>286</sup> “I feel offended by the domestic violence [advocates] exploiting a family crisis for their own agenda,” stated one woman commentator, “which is nothing to do with protecting victims.”<sup>287</sup> All in all, over ninety percent of those who offered public commentary at three Ethics Commission hearings and the Board of Supervisor hearing supported Mirkarimi, and it should be added, López.<sup>288</sup>

### Conclusion

This Article has sought to examine the consequences of reliance on victim politics, criminalization, and punishment as the default remedy to domestic violence as a way to

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<sup>282</sup> TR Aug. 16, 2012 (at 12).

<sup>283</sup> TR BOS (at 80).

<sup>284</sup> TR BOS (at 97).

<sup>285</sup> TR Aug. 16, 2012 (at 190). TR BOS (suggesting that case was not about domestic violence and challenging domestic violence advocates to seek a recall instead of “hid[ing] behind the mayor) (at 55) (referring to domestic violence advocates as “misguided”) (at 59).

<sup>286</sup> TR BOS at 62.

<sup>287</sup> TR Aug. 16, 2012 (at 98). TR BOS (woman speaker criticizing women’s groups for professing to speak for everyone when they have no contact with most women) (at 51-52), (arguing that “a moment of family crisis was being transformed... for illegal and financial gain”) (at 168).

<sup>288</sup> Over 310 people gave public commentary; in support of Mirkarimi: 94 % at April 2012 Ethics Commission hearing; 100% at May 2012 Ethics Commission hearing, 83% at August 2012 Ethics Commission hearing, and 88% in favor at October 2012 Board of Supervisor hearing.

encourage the incorporation of domestic violence advocates into a broader social justice community. The Mirkarimi-López case is one of many controversies to expose the fissure between those who work in the field of gender violence advocates and those concerned with the overreach of the carceral state. Recent controversies about efforts to address campus rape raise concerns related to matters addressed in this Article. On the one hand, a number of sexual assault organizations have articulated their preference for the exclusive use of the criminal justice system with its retributive features and ability to exact punishment as the sole option by which campuses may respond to sexual assault crimes.<sup>289</sup> On the other hand, a group of scholars have argued that recent campus sexual assault reforms mandated by the Department of Education’s Office of Civil Rights (OCR) in an administrative setting have gone too far and may subject students charged with such acts to unfair processes and unwarranted sanctions.<sup>290</sup> They have argued that in attempts to address gender violence, feminist supporters of the new OCR rules have made a “moral and strategic error” by their support for a zero tolerance mentality that interferes with “individual relationship autonomy,” “jettison[s] balance and fairness,” and tramples legitimate rights.<sup>291</sup> Indeed, the campus rape controversy is an indication of the crisis facing the domestic violence movement and of the perception it has garnered as a facilitator of the law-and-order regime.

The current politics of race and police abuse creates an imperative for change and should serve to instill political will among domestic violence advocates to shift both strategy and purpose. New social movement actors such as Black Lives Matter and #SayHerName have

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<sup>289</sup> Zoë Heller, *Rape on Campus*, New York Rev. of Books, Feb. 15, 2015 at <http://www.nybooks.com/articles/2015/02/05/rape-campus/#fnr-4>.

<sup>290</sup> U.S. Dept. of Educ., Office of Civil Rights, to Title IX Coordinators (Apr. 4, 2011) (referred to as Dear Colleague Letter), at <http://www2ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. See Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 Kansas Law Rev. 913, 915 (2016).

<sup>291</sup> Heller, *supra* note 289 (including quotes from Harvard Law professors who wrote to object to the new rules).

addressed the deep roots of racism, the disenfranchisement of families who have endured economic hardship, and the relationship of criminal justice system to these injustices. For the anti-domestic violence movement to continue to favor the criminal justice system as the preferred response, Bernard Harcourt has observed, would be to communicate a “political, cultural, racial, and ideological message[ ]...about who is in control and about who gets controlled.”<sup>292</sup> It would all but assure that the movement will remain at the margins of social justice work. Such an outcome would be detrimental to the efforts to end gender-based violence for it would signal the loss of the knowledge, experience, and dedication that domestic violence advocates possess.

These circumstances require a shift in approach to find common ground with other social justice movements, particularly those most affected by the apparatus of the carceral state and police abuse. The interests of domestic violence advocate would be well-served through policy prescriptions in broad terms that have at the center solidarity with other marginalized groups. A new approach implies a new set of community partners from police and prosecutors, including anti-racism groups, grassroots organizations that focus on economic and social rights, health, and civil and human rights. It requires also domestic violence advocates to engage in the movement to end police brutality both in coalitions and in the courts.<sup>293</sup>

There is no dearth of alternatives to the criminal justice response. In recent years, scholars have offered recommendations and identified strategies to address the social conditions and structural inequalities that contribute to all forms of violence, including gender based

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<sup>292</sup> Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between the Moral Limits of the Criminal Law and the Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 168 (2001).

<sup>293</sup> See e.g., COMMUNITIES UNITED FOR POLICE REFORM, at <http://changethenypd.org/>. Community groups have also joined in litigation against abusive police practices. See *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013) (No. 12 Civ. 2274); *Floyd v. City of New York*, 283 F.R.D. 153, 159 (S.D.N.Y. 2012); *Davis v. City of New York*, 902 F. Supp.2d 405 (S.D.N.Y.2012).

violence.<sup>294</sup> Economic inequality is not only a source of gender violence. More insidiously, it undermines the possibilities of developing a politics of solidarity required for social change. Coalitions of these types allow domestic violence advocates to address structural concerns and at the same time attend to issues pertaining to domestic violence.<sup>295</sup> Collaboration with economic justice groups could contribute to reforms in the welfare system to offer a dignified and sufficient income for families.<sup>296</sup> Labor and union issues provide opportunities to establish “a link among class, race, and gender movements” particularly as some unions have identified domestic violence as an issue central to the well-being of organized labor.<sup>297</sup> Donna Coker and Ahjané Macquoid have described opportunities for domestic violence advocates to act with other social justice advocates to end hyper-incarceration.<sup>298</sup> Lawyers who comprise the domestic violence bar have been urged to support civil rights litigation to end abusive police practices.<sup>299</sup>

There is less of a need for new prescriptions than the obligation to forge the political will to seize opportunities to engage in dialogue and pursue coalition building. Indeed, shifting strategies and broadening purpose may help align the anti-domestic violence movement with its

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<sup>294</sup> In February 2014, a group of scholars and advocates held a conference, Converge- Reimagining the Movement to End Gender Violence, at which a number of alternative responses were identified that focused on attention to structural inequalities, immigration reform, and strengthening the capacity of communities to respond to gender violence. See <http://mediaforchange.org/reimagine>.

<sup>295</sup> Weissman, *supra* note 164, at 251-252 (describing community benefits agreement as a community process that allows social justice stakeholders to work together while raising individual interests for attention and remedy).

<sup>296</sup> NANCY FRASER, FORTUNES OF FEMINISM: FROM STATE-MANAGED CAPITALISM TO NEOLIBERAL CRISIS, 2 (2013).

<sup>297</sup> Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819, 1869 (1992). See e.g., *Domestic Violence: What Unions Can Do- AFSCME*, available at [http://www.afscme.org/news-publications/publications/for-leaders/pdf/Domestic\\_Violence\\_What\\_Unions\\_Can\\_Do.pdf](http://www.afscme.org/news-publications/publications/for-leaders/pdf/Domestic_Violence_What_Unions_Can_Do.pdf); Irish Congress of Trade Unions, *Domestic Violence and the Workplace: A Guide for Negotiators*, [http://www.ictu.ie/download/pdf/domestic\\_violence.pdf](http://www.ictu.ie/download/pdf/domestic_violence.pdf). See also Coalition for Labor Union Women, (noting a training program on domestic violence issues) (2016) available at [http://www.cluw.org/?zone=/unionactive/view\\_page.cfm&page=About20CLUW](http://www.cluw.org/?zone=/unionactive/view_page.cfm&page=About20CLUW).

<sup>298</sup> Coker and Macquoid, *supra* note 156, at 614.

<sup>299</sup> Deborah M. Weissman, *Rethinking a New Domestic Violence Pedagogy*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 635, 655-657 (2015). See *supra* note 293.

good intentions. Steve Fraser has suggested that organizing with others responds to the “ineffable yearnings to redefine what it means to be human together.”<sup>300</sup>

There are, of course, challenges. As one advocate stated,

People in the field are working themselves and their organizations absolutely to the bone to try to meet the needs of survivors. There is a scarcity of resources; there are only enough resources to meet a small percentage of the need.... The second challenge was the limited funding for advocacy which is the result of a heavy reliance on government money. There is very little money from other sources and almost no money for organizing or social change. People talked about being in a siloed, isolated and competitive field. A lot of folks talked about an abusive environment in which we are at each other’s throats. Many expressed uncertainty about whether they are even part of a “movement” or are they just part of a field, and they were trying to figure out what the difference is and if it matters. Many expressed concern that our movement has moved away from our social change roots. Our field has increasingly become professionalized and we have a lack of experience now in organizing and social change and we have a feeling that we are not getting at the root causes of violence against girls and women. In fact, many organizations do not have a mission to end violence against women. A number of people said, “We are a movement of no”; they expressed a sense of feeling stuck.<sup>301</sup>

The public discourse throughout the Mirkarimi-López case reflects a “life-as-lived” critique of the domestic violence paradigm. The opinions expressed by community members, most of whom were Black, Latino/a or otherwise had previous experience with the criminal justice system, confirmed recent surveys and empirical evidence about the inadequacy of criminal justice remedies. Hopefully, these public hearings provide a framework and dignify grievances, transform consciousness, and constitute a “battle of ideas” required to produce new forms of understanding and mobilizations to address gender violence and social injustice.<sup>302</sup>

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<sup>300</sup> See STEVE FRASER, *THE AGE OF ACQUIESCENCE: THE LIFE AND DEATH OF AMERICAN RESISTANCE TO ORGANIZED WEALTH AND POWER* 397 (2015).

<sup>301</sup> Monique Hoeflinger (moderator) *et. al.*, *Panel on New Possibilities for Reframing Work to End Gender-Based Violence* University of Miami School of Law, 5 U. MIAMI RACE & SOC. JUST. L. REV. 521, 522–23 (2015).

<sup>302</sup> LORETTA PYLES, *PROGRESSIVE COMMUNITY ORGANIZING* 27(2009) (referencing Antonio Gramsci’s “battle of ideas” as a requirement for social transformation).