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# The Community Politics of Domestic Violence

Deborah M. Weissman<sup>†</sup>

## INTRODUCTION

Gender violence has long been identified as a crisis of epidemic proportions that defies facile review.<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 paradigm 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>†</sup> Reef C. Ivey II Distinguished Professor of Law, University of North Carolina School of Law. The author gratefully acknowledges Barbara Fedders, Anne Klinefelter, and Louis Pérez, Jr., for their support and insightful observations and suggestions, and the comments and encouragement of the UNC Faculty Workshop participants, as well as participants at the University of California-Irvine conference on the Politicization of Safety. Thanks also to Karl Krooth and Myrna Melgar for offering important perspectives about the circumstances of the Mirkarimi-López case.

<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 and both terms will be used throughout this article. See Margaret E. Johnson, *Changing Course in the Anti-domestic Violence Legal Movement: From Safety to Security*, 60 VILL. L. REV. 145, 148 (2015).

<sup>2</sup> See Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J.L. & GENDER 53, 54–55 (2017).

<sup>3</sup> See Goldscheid, *supra* note 1, at 310–11.

<sup>4</sup> See JEFFREY FAGAN, NAT’L INST. OF JUSTICE, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 3–5 (1996) (discussing the proliferation of criminal intervention strategies); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 802 (2001).

The field of domestic violence advocacy is itself in somewhat of a crisis, particularly because of its relationship with the criminal justice system, 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 also been adversely affected by the dominant law-and-order responses.<sup>6</sup> Reliance on the criminal justice system has fractured 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 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. The case illuminates the ways in which multiple social justice concerns intersect with the paradigmatic responses to domestic

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<sup>5</sup> See *infra* note 175 and accompanying text; see also MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 105 (2006).

<sup>6</sup> Goodmark, *supra* note 2, at 55 (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 BYU 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 generally MS. FOUND. FOR WOMEN, SAFETY & JUSTICE FOR ALL: EXAMINING THE RELATIONSHIP BETWEEN THE WOMEN'S ANTI-VIOLENCE MOVEMENT AND THE CRIMINAL LEGAL SYSTEM (2003).

<sup>8</sup> See Coker, *supra* note 4, at 852–54; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991); 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).

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

violence and offers a measure of the community's critical assessment of such responses. The case further demonstrates how the linkages between anti-domestic violence advocates and the criminal justice system create opportunities for a manipulation of the narrative of victim and may facilitate responses to harm that have little to do with safety or ending the problem of domestic violence. Finally, the case reveals the increasingly problematic relationship of mainstream anti-domestic violence advocates to broader social justice movements.

In December 2011, Ross Mirkarimi, at the time the Sheriff-elect of San Francisco, while arguing with his wife, Eliana López, grabbed her arm causing a visible bruise.<sup>10</sup> 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 as well as efforts by the mayor to remove him from the office of sheriff.<sup>11</sup> López, a Venezuelan actor 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>12</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 overreliance on criminal justice paradigms as a remedy for domestic violence that—in fact—deployment of law enforcement methods

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<sup>10</sup> See *infra* Part I.

<sup>11</sup> *California: New Sheriff Faces Charges*, N.Y. TIMES (Jan. 13, 2012), <http://www.nytimes.com/2012/01/14/us/california-new-sheriff-faces-charges.html> [<https://perma.cc/4EBL-2UMQ>]; Written Charges of Official Misconduct at 1, *In re Charges Against Ross Mirkarimi* (S.F. Ethics Comm'n Bd. of Supervisors Mar. 21, 2012), [https://sfethics.org/wp-content/uploads/2015/04/charges\\_of\\_official\\_misconduct\\_03.21.12.pdf](https://sfethics.org/wp-content/uploads/2015/04/charges_of_official_misconduct_03.21.12.pdf) [<https://perma.cc/3NHJ-W568>].

<sup>12</sup> Debra J. Saunders, *Ross Mirkarimi Faults Himself, and the System*, SFGATE (Jan. 3, 2015), <http://www.sfgate.com/opinion/saunders/article/Ross-Mirkarimi-faults-himself-and-the-system-5990853.php> [<https://perma.cc/SSD7-97ZF>]; Luke Thomas, *Women Rally for Suspended Sheriff's Reinstatement*, FOG CITY J. (Sept. 11, 2012) <http://www.fogcityjournal.com/wordpress/5036/women-rally-for-suspended-sheriffs-reinstatement/> [<https://perma.cc/F65U-ZQTE>].

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.

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. It then proceeds to offer 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. Part I then 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 suggests 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 seeks to reengage in dialogue about the private-public dichotomy without returning to a point in time where private abuse between intimate partners was considered of little or no sociopolitical or legal import. The article concludes by reiterating the recommendations scholars have offered in recent years, including the need to address economic inequality and racism as

forms of structural violence and the opportunities to work with economic justice groups, organized labor, and other social justice advocates as alternatives to criminal justice remedies. The article demonstrates that there is no dearth of alternatives to the criminal justice response; what is lacking is not prescriptives but rather political will. 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 alternate responses to structural problems that are deeply entangled in a complicated web of larger political-economic crises.

## I. THE PROCEEDINGS: FROM PRIVATE TO PUBLIC CONTRADICTIONS AND TENSIONS

### A. *Ivory Madison Versus 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 two-year-old son, Theo, which then escalated to a full-blown argument related to the possibility of a custody dispute. While quarreling 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>13</sup> Theo, who was present during the argument, started to cry. López, in an effort to provide context for the dispute, subsequently explained that her relationship with Mirkarimi had grown tense over the past several months; he had been busy with his

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<sup>13</sup> Declaration of Eliana López at 2, *In re* Charges Against Ross Mirkarimi (S.F. Ethics Comm'n July 2, 2012), <https://sfethics.org/wp-content/uploads/2015/04/declaration-of-eliana-lopez.7-2-12.pdf> [<https://perma.cc/P5PP-72J9>]; Declaration of Sheriff Ross Mirkarimi at 2, *In re* Charges Against Ross Mirkarimi (S.F. Ethics Comm'n June 13, 2012), [https://sfethics.org/wp-content/uploads/2015/04/DECLARATION\\_OF\\_ROSS\\_MIRKARIMI.pdf](https://sfethics.org/wp-content/uploads/2015/04/DECLARATION_OF_ROSS_MIRKARIMI.pdf) [<https://perma.cc/VH6C-6XQH>].

electoral campaign and she had made several month-long trips to Venezuela with their son.<sup>14</sup>

The next day, López visited with her neighbor, Ivory Madison. The two women shared some common interests but the purpose of the visit was a contested matter and is at the center of all that ensued in this case.<sup>15</sup> At some point, López spoke to Madison about the events of the day before and sought her counsel. López stated 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>16</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>17</sup> She stated 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; 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 stated that Madison advised her as to what to say on camera.<sup>18</sup> In the forty-five-second video, López showed the bruise and made 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>19</sup> She understood that the video and the conversation she had with Madison were confidential and protected by attorney-client privilege.<sup>20</sup>

Madison offered a different account. She provided a description of the December 31 incident that varied significantly

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<sup>14</sup> Interview with Eliana López, in S.F., Cal. (Dec. 14, 2015); see Saunders, *supra* note 12.

<sup>15</sup> Declaration of Ivory S. Madison at 1–2, 5–6, *In re Charges Against Ross Mirkarimi* (S.F. Ethics Comm'n June 15, 2012), [https://sfethics.org/wp-content/uploads/2015/04/declaration\\_of\\_ivory\\_s\\_madison.pdf](https://sfethics.org/wp-content/uploads/2015/04/declaration_of_ivory_s_madison.pdf) [<https://perma.cc/S6Y3-MEDX>].

<sup>16</sup> Declaration of Eliana Lopez, *supra* note 13, Exhibits 1–4. 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, 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 includes that she was trained as an attorney. *Id.*; see also Eliana López, *Ross Mirkarimi's Wife Gives Her Side of Story*, SFGATE (Apr. 6, 2012), <http://www.sfgate.com/opinion/openforum/article/Ross-Mirkarimi-s-wife-gives-her-side-of-story-3463213.php> [<https://perma.cc/Ry3A-YS63>].

<sup>17</sup> Declaration of Eliana López, *supra* note 13, at 2.

<sup>18</sup> *Id.* at 3.

<sup>19</sup> See San Francisco Examiner, *ElianaLopez.mpg*, YOUTUBE (May 31, 2012), [https://www.youtube.com/watch?v=3RqBwhP\\_OyU](https://www.youtube.com/watch?v=3RqBwhP_OyU).

<sup>20</sup> Declaration of Eliana López, *supra* note 13, at 1–2.

from that offered by López, and, if true, provided a more disquieting version of the use of force by Mirkarimi.<sup>21</sup> She also stated 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 Monterey, 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>22</sup> Madison admitted that López stated that she was in no fear of physical abuse, that López reported that the family trip was going well, and that López never mentioned further incidents of abuse or arguments between herself and Mirkarimi.<sup>23</sup> Madison nonetheless claimed that she had growing concerns about the wellbeing of her friend.<sup>24</sup> She stated that after López returned from the vacation, they discussed various options, including calling the police, and acknowledged that López declined to do so.<sup>25</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. López, who was present at the time, made clear that she did not want or need police assistance, asked them to leave, and refused to speak with them.<sup>26</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>27</sup>

The police learned from Madison that she had a videotape of López showing the bruise and obtained a subpoena and confiscated the video.<sup>28</sup> Thereafter, Madison, notwithstanding her claims of concern for López, refused most of López's phone calls while continuing to communicate with police.<sup>29</sup> A San

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<sup>21</sup> Declaration of Ivory S. Madison, *supra* note 15, at 6.

<sup>22</sup> Declaration of Eliana López, *supra* note 13, at 4; Declaration of Ross Mirkarimi, *supra* note 13, at 2.

<sup>23</sup> Declaration of Ivory S. Madison, *supra* note 15, at 9–10.

<sup>24</sup> *See id.*

<sup>25</sup> *Id.* at 13–15.

<sup>26</sup> *Id.* at 15–16.

<sup>27</sup> Declaration of Linnette Peralta Haynes, *In re Charges Against Ross Mirkarimi* (S.F. Ethics Comm'n June 8, 2012), [https://sfethics.org/wp-content/uploads/2015/04/Declaration\\_of\\_Linnette\\_Peralta\\_Haynes.pdf](https://sfethics.org/wp-content/uploads/2015/04/Declaration_of_Linnette_Peralta_Haynes.pdf) [<https://perma.cc/6JAS-X79>]. 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. *See* Declaration of Ivory S. Madison, *supra* note 15.

<sup>28</sup> Declaration of Ivory S. Madison, *supra* note 15, at 16.

<sup>29</sup> *Id.* at 16–17; Declaration of SFPD Inspector Richard Daniele at 3, *In re Charges Against Ross Mirkarimi* (S.F. Ethics Comm'n June 7, 2012), <https://>



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>30</sup>

*B. Criminal Charges: The State Versus the “Victim”*

Mirkarimi was elected sheriff on November 8, 2011, prior to the incident; the incident, however, occurred before he assumed office on January 8, 2012. On January 13, 2012, the San Francisco 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. Lopez,” “willfully and unlawfully causing and 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. Lopez from making a report of the incident to law enforcement.”<sup>31</sup> No one from the district attorney’s office had communicated with López prior to filing the charges. Moreover, at the time of the 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 19, 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>32</sup> Prior to hearing any testimony, Judge Breall stated that she was inclined “to issue a stay away order”:<sup>33</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—

...

That Miss L. has only been in this country a couple of years.

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[sfethics.org/wp-content/uploads/2015/04/Declaration\\_of\\_Richard\\_Daniele.pdf](https://sfethics.org/wp-content/uploads/2015/04/Declaration_of_Richard_Daniele.pdf) [https://perma.cc/4CUF-U7NM].

<sup>30</sup> Declaration of SFPD Inspector Richard Daniele, *supra* note 29, at 5.

<sup>31</sup> Written Charges of Official Misconduct, *supra* note 11, at 5.

<sup>32</sup> Transcript of Arraignment at 5, 10, *People v. Mirkarimi* (Cal. Super. Ct. 2012) (No. 12001311) (on file with the author).

<sup>33</sup> *Id.* at 10.

....

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.

....

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]e’re going to handle this case like every other case and every other defendant, who is charged with these kinds of offenses.”<sup>35</sup> Pointing out that despite the fact that the court was treating López like a victim whether she was one or not, counsel argued that 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, Judge 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’s belief that her entire communication with Madison was privileged and confidential.<sup>38</sup> Judge Breall, however, refused to consider the request.<sup>39</sup> The court rejected any consideration of counsel’s argument that López had asserted the

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<sup>34</sup> *Id.* at 10–12, 14.

<sup>35</sup> *Id.* at 6–7.

<sup>36</sup> *Id.* at 24. “Marsy’s Law” refers to the California Constitution, Article 1, Section 28(b), also known as the California Victim’s Bill of Rights. CAL. CONST. art. 1, § 28(b).

<sup>37</sup> Transcript of Arraignment, *supra* note 32, at 26–27.

<sup>38</sup> *Id.* at 27. For a further analysis of the use of the video, see *infra* Section II.C.

<sup>39</sup> Transcript of Arraignment, *supra* note 32, at 27.

attorney-client privilege and thus denied López any right to provide testimony and to be heard on her claim of privilege. The court 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.<sup>40</sup>

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 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 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.

. . . .

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.

. . . .

This country is trying to pull my family apart. This is the real violence I am living.<sup>41</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>42</sup>

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<sup>40</sup> *Id.* at 27–28.

<sup>41</sup> *Id.* at 29–33.

<sup>42</sup> *Id.* at 35–36.

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. Lopez during the December 31, 2011 incident.”<sup>43</sup> 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 fifty-two weeks of domestic violence counseling, community service, and a fine.<sup>44</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>45</sup>

### C. *San Francisco Ethics Commission and Board of Supervisor Hearings: The Community Speaks*

Two days after Mirkarimi pled guilty, the Mayor of San Francisco suspended Mirkarimi without pay, appointed an acting sheriff, filed charges, and initiated proceedings to remove Mirkarimi from elected office.<sup>46</sup> He accused Mirkarimi of official misconduct as defined in the Charter and stated that Mirkarimi’s conduct and sentence would interfere with his ability to carry out his role as sheriff.<sup>47</sup> The mayor alleged that

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<sup>43</sup> Written Charges of Official Misconduct, *supra* note 11, at 5.

<sup>44</sup> Rachel Gordon, *SF Sheriff Mirkarimi Pleads Guilty to Misdemeanor*, SFGATE (Mar. 12, 2012), <http://www.sfgate.com/crime/article/SF-Sheriff-Mirkarimi-pleads-guilty-to-misdemeanor-3406888.php> [<https://perma.cc/G6GG-UJEZ>]; *San Francisco Sheriff Sentenced to Three Years’ Probation*, L.A. TIMES (Mar. 19, 2012), <http://latimesblogs.latimes.com/lanow/2012/03/san-francisco-sheriff-ross-mirkarimi-sentenced-domestic-violence.html> [<https://perma.cc/NV2X-D47T>].

<sup>45</sup> Interview with Eliana López, *supra* note 14. 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 Lesser Charge of Misdemeanor False Imprisonment*, MERCURY NEWS (Mar. 12, 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) [<http://perma.cc/G6GG-UJEZ>]; see also Jay Barmann, *Gascon Is Not Going to Let Mirkarimi Off Without a Fight*, SFIST (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) [<https://perma.cc/3WHY-8786>].

<sup>46</sup> See generally Written Charges of Official Misconduct, *supra* note 11. The charging document delineated the duties of the office of sheriff, and 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, endangering the welfare of his child, and participating in and dissuading witnesses from reporting his domestic violence. *Id.* at 6–8. In June 2012, the mayor amended his charges to include breach of required conduct. See Amended Charges of Official Misconduct at 10–11, *In re Charges Against Ross Mirkarimi* (S.F. Ethics Comm’n June 1, 2012), [https://sfethics.org/wp-content/uploads/2015/04/Amended\\_Charges\\_of\\_Official\\_Misconduct\\_6.1.2012.pdf](https://sfethics.org/wp-content/uploads/2015/04/Amended_Charges_of_Official_Misconduct_6.1.2012.pdf) [<https://perma.cc/9VUW-M8TS>].

<sup>47</sup> The San Francisco Charter defines “official misconduct” as:

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 of was unrelated to official duties.<sup>48</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, López's attorney was denied the opportunity to represent her client's interests. Mirkarimi argued that the charges amounted to an "unprecedented political abuse of the suspension power . . . without any regard to past practices."<sup>49</sup> He further 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>50</sup>

At the end of each hearing, interested residents of the city provided public commentary. As detailed in Part III below, nearly all of the comments offered were in favor of reinstating Mirkarimi as sheriff.<sup>51</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 December 2011 incident and Mirkarimi's subsequent

[A]ny 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.

ETHICS COMM'N CITY & CTY. OF S.F., SAN FRANCISCO CHARTER PROVISIONS RELATING TO GOVERNMENTAL ETHICS AND THE ETHICS COMMISSION Sec. 15.105, <http://www.sfethics.org/ethics/2011/06/san-francisco-charter-provisions-relating-the-governmental-ethics-and-the-ethics-commission.html> [<https://perma.cc/2LTF-KP55>].

<sup>48</sup> See Written Charges of Official Misconduct, *supra* note 11, at 2.

<sup>49</sup> Sheriff Ross Mirkarimi's Opening Brief at 3–6, *In re Mayor Edwin Lee's Charges of Official Misconduct Against Sheriff Ross Mirkarimi* (S.F. Ethics Comm'n May 7, 2012), [https://sfethics.org/wp-content/uploads/2015/04/sheriff\\_mirkarimis\\_opening\\_brief\\_5.7.2\\_and\\_exhibit\\_1-2.pdf](https://sfethics.org/wp-content/uploads/2015/04/sheriff_mirkarimis_opening_brief_5.7.2_and_exhibit_1-2.pdf) [<https://perma.cc/2VK5-VDL4>].

<sup>50</sup> *Id.* at 9–13. Commission members heard live testimony from Mirkarimi, the mayor, Linnette Peralta Haynes, and Lopez and additional evidence by way of affidavits, including one from an expert in domestic violence. Expert Declaration of Nancy K.D. Lemon, *In re Mayor Edwin Lee's Charges of Official Misconduct Against Sheriff Ross Mirkarimi* (S.F. Ethics Comm'n June 18, 2012), [https://sfethics.org/wp-content/uploads/2015/04/lemon\\_declaration\\_with\\_exhibits.pdf](https://sfethics.org/wp-content/uploads/2015/04/lemon_declaration_with_exhibits.pdf) [<https://perma.cc/AAT7-KGRA>]; Findings of Fact and Recommendation to Board of Supervisors at 3–4, *In re Charges Against Ross Mirkarimi* (S.F. Ethics Comm'n Sept. 6, 2012), [https://sfethics.org/wp-content/uploads/2015/04/2012\\_09\\_06\\_findings\\_and\\_recommendation.pdf](https://sfethics.org/wp-content/uploads/2015/04/2012_09_06_findings_and_recommendation.pdf) [<https://perma.cc/FS44-6PKG>]. 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. Declaration of Eliana López, *supra* note 13, at 5.

<sup>51</sup> See *infra* Section III.D.

conviction.<sup>52</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>53</sup> The matter then went to final decision by the Board of Supervisors that held a nine-hour hearing at which both the mayor and Mirkarimi, through legal counsel, presented their arguments and answered questions. The public commentary at the hearing 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.<sup>54</sup> Mirkarimi was thus reinstated to the office.<sup>55</sup>

#### D. *Postscript to the Process: Reclaiming the Narrative*

In July 2015, López 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 Escándalo?*" 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>56</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>57</sup>

The play provided López with an opportunity to reclaim her narrative and more. The performance illuminated the

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<sup>52</sup> Findings of Fact and Recommendation to Board of Supervisors, *supra* note 50, at 6.

<sup>53</sup> *Id.* The dissenting Commissioner (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.*; see Meeting Minutes, Board of Supervisors, City and County of San Francisco, at 708 (Oct. 9, 2012) (identifying Ben Hur as Chair of the Commission).

<sup>54</sup> Nine out of eleven supervisor votes were required in order to remove Mirkarimi. Heather Knight & John Coté, *Ross Mirkarimi to Keep Job, Supes Decide*, SFGATE (Dec. 31, 2012), <http://www.sfgate.com/bayarea/article/Ross-Mirkarimi-to-keep-job-supes-decide-3934169.php> [<https://perma.cc/Y6BN-MRA6>].

<sup>55</sup> Norimitsu Onishi, *Sheriff Is Reinstated Despite Domestic Violence Plea*, N.Y. TIMES (Oct. 10, 2012), <http://www.nytimes.com/2012/10/11/us/ross-mirkarimi-san-francisco-sheriff-reinstated.html> [<https://perma.cc/JE55-MKD9>].

<sup>56</sup> Rebecca Duran, *Spirited Comedy Unfolds Web of SF Disempowerment*, THE W. EDITION (July 1, 2015), <http://www.thewesternedition.com/?c=117&a=2698> [<https://perma.cc/HWY6-NVN8>]. López performed the play at the University of North Carolina on March 29, 2016. What Is the Scandal? *Cual Es el Escándalo: The Ignored Cry of an Immigrant*, Mar. 29, 2016, <http://isa.unc.edu/event/what-is-the-scandalcual-es-el-escandalo-the-ignored-cry-of-an-immigrant/> [<https://perma.cc/RE7D-V5PM>].

<sup>57</sup> Interview with Eliana López, *supra* note 14.

contradictions inherent in the public-private dichotomy and provided an important counterbalance to the paradigmatic state response to domestic violence characterized by intervention through the criminal justice system. Moreover, the play revealed the ways in which anti-domestic violence advocates contributed to the suffering of the alleged victim and her family and otherwise set themselves apart from social justice groups concerned about the punitive and harmful nature of criminal justice responses. Perhaps most importantly, it illuminated the political construction and manipulation of victimhood along with the loss and recovery of agency.

## II. CONSTRUCTING A VICTIM

The discourse of victimhood has permeated social science and criminology and has been a crucial foundation for the anti-domestic violence movement. To achieve the worthy goal of obtaining public recognition of domestic violence as a serious public matter, advocates early on emphasized the harm caused to battered women who required intervention and support.<sup>58</sup> As a matter of political and strategic consideration, women abused by intimate partners are often “characterized . . . as perpetually helpless, innocent victims.”<sup>59</sup> As a result, victims have lost much of their agency; rather, as Aya Gruber has written, they are “objects of their victimhood . . . and may not act autonomously when it conflicts with the state’s punitive aims.”<sup>60</sup> The Mirkarimi-López case provides insight into the processes and consequences of victimization and about the use of stereotypes to achieve goals that are more in line with the criminal justice system than the needs of individuals.

### 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>61</sup> The process by which one crosses the threshold into the state of victimhood requires first that a person designated as a victim be distinguished from others. There must be a consensus about

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<sup>58</sup> Lynne Henderson, *Co-opting Compassion: The Federal Victim’s Rights Amendment*, 10 ST. THOMAS L. REV. 579, 581–82 (1998).

<sup>59</sup> Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 783 (2007).

<sup>60</sup> *Id.* at 777–78.

<sup>61</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* 35 (1990).

the character of the harm that a person has suffered and that the harm implies a unique “victim” designation. Public wrongs that insist on vindication in the form of punishment are distinguished from private or civil injuries which are remedied through private undertakings.<sup>62</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 is further influenced by political contexts and discursive practices that act to shape the purposes and use of such designation. “As victims are incorporated into broader political campaigns,” as one scholar has observed, “it becomes nearly impossible to separate the victim from the politics.”<sup>63</sup>

A theory of victimhood incorporates several factors: the presence of sufficient harm; harm occasioned by the culpable wrongdoing of another person or institution; and a showing that the person harmed lacks culpability.<sup>64</sup> An understanding of victimhood must further consider the process by which individuals or groups identify themselves as victims, thereupon, to formulate a usable normative-victim identity.<sup>65</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>66</sup>

The connotation of victimization implies an imperative to act.<sup>67</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.”<sup>68</sup> As others have observed, an effective victims’ movement developed during the 1970s, which demanded retributive and punitive

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<sup>62</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*5; Adam J. MacLeod, *All for One: A Review of Victim-Centric Justifications for Criminal Punishment*, 13 BERKELEY J. CRIM. L. 31, 33–34 (2008).

<sup>63</sup> Tami Amanda Jacoby, *A Theory of Victimhood: Politics, Conflict and the Construction of Victim-Based Identity*, 43 J. INT’L. STUD. 511, 512 (2015).

<sup>64</sup> See *Fundamentals of Victims’ Rights: An Overview of the Legal Definition of “Crime Victim” in the United States*, VICTIM L. BULL., Nov. 2011, at 1.

<sup>65</sup> Jacoby, *supra* note 63, at 513 (asking “[h]ow and why do some people transform grievances into collective identity”).

<sup>66</sup> *Id.* at 513.

<sup>67</sup> MacLeod, *supra* note 62, at 31 (which may include “excus[ing] conduct that has historically been understood as criminal on the ground that such conduct best serves a victim’s interest”).

<sup>68</sup> See generally Susan Bandes, Essay, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 FORDHAM URB. L.J. 1599 (2000).



responses to crime.<sup>69</sup> “Victims,” observed Marie Gottschalk, “became a powerful weapon in the arsenal of proponents of the law-and-order agenda.”<sup>70</sup> Courts have expressed concern that the very use of the term “victim” may often contribute decisively to determining guilt or liability of the alleged perpetrator.<sup>71</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>72</sup> The statute was enacted “to make crime victims full participants in the criminal justice system.”<sup>73</sup> Under the Act, a victim has the right to seek a writ of mandamus for a violation of any enumerated right.<sup>74</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>75</sup> California has included a state constitutional provision (Marsy’s Law), which enumerates a number of specific crime-victim rights.<sup>76</sup> These constitutional protections are enforceable by the victim or her attorney.<sup>77</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 without the 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

<sup>69</sup> GOTTSCHALK, *supra* note 5, at 77; Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1414 (1993) (noting that victim status has become “stylish”).

<sup>70</sup> GOTTSCHALK, *supra* note 5, at 77; FATIMA NAQVI, *THE LITERARY AND CULTURAL RHETORIC OF VICTIMHOOD: WESTERN EUROPE, 1970–2005*, at 1 (2007) (observing that the use of victimhood is far more widespread in recent years).

<sup>71</sup> See *Merchs. Distribs., Inc. v. Hutchinson*, 193 S.E.2d 436, 441 (1972) (citing *People v. Williams*, 17 Cal. 142 (Cal. 1860)).

<sup>72</sup> See 18 U.S.C. § 3771 (2012) for a list of crime victims’ rights. See 18 U.S.C. § 3663 (2012) for the order of restitution. See *Fundamentals of Victims’ Rights: A Summary of 12 Common Victims’ Rights*, VICTIM L. BULL., Nov. 2011, at 1.

<sup>73</sup> *Kenna v. U.S. Dist. Ct. for C.D. Cal.*, 435 F.3d 1011, 1016 (9th Cir. 2006).

<sup>74</sup> 18 U.S.C. § 3771(d)(3).

<sup>75</sup> See, e.g., ALA. ADMIN. CODE § 15-23-65 (1975) (prosecuting attorney required to confer with victim before commencement of trial); GA. CODE ANN. § 17-17-8 (1995) (information to be provided to victim by prosecuting attorney; restitution information); TENN. CODE ANN. § 40-38-112 (2000) (prosecuting attorney; information to victim; duty of victim).

<sup>76</sup> CAL. CONST. art. 1, § 28; CAL. PENAL CODE § 679.026 (West 2008); see *About Marsy’s Law: Justice with Compassion*, MARSY’S LAW, <https://marsylaw.us/about-marsys-law> [https://perma.cc/3ATC-E7Z4] (explaining that the California constitutional amendments with regard to victim rights are known as Marsy’s law in commemoration of the murder and aftermath of Marsalee (Marsy) Nicholas).

<sup>77</sup> CAL. CONST. art. 1, § 28(c)(1).

international human rights, where the prototype of the victim is often portrayed as powerless and dependent on a savior.<sup>78</sup> Under these circumstances, the legal system is called upon to protect the victim, prevent additional victimization, and punish the perpetrator.<sup>79</sup>

Both the discourse on victimhood and treatment of victims present 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>80</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 interests.<sup>81</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>82</sup>

A victim's rights may be determined by political institutions and social groups with which she or he is associated, whether voluntarily or not. Although a victim's rights are first and foremost enumerated as a right to dignity, privacy, and to be treated with empathy and compassion,<sup>83</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>84</sup> A victim may thus serve 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

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<sup>78</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>79</sup> *Id.* at 203–04 (describing the paradigmatic response to perceived victims who "protect, vindicate").

<sup>80</sup> MacLeod, *supra* note 62, at 41 (quoting Adil Ahmad Haque, a retributivist).

<sup>81</sup> See Henderson, *supra* note 58, at 581–82 (observing that many proposed Amendments to state constitutions were designed to strengthen the hand of law enforcement).

<sup>82</sup> *Id.* at 582–83.

<sup>83</sup> See *Fundamentals of Victims' Rights: A Summary of 12 Common Victims' Rights*, *supra* note 72, at 1.

<sup>84</sup> Crenshaw, *supra* note 8, at 1271 (observing that "Black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot").

an “irony,” is that victims are “by definition . . . weak and yet they hold tremendous power.”<sup>85</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>86</sup> Domestic violence expanded into the 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 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>87</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 noninterference in domestic abuse.<sup>88</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) and sexuality (heteronormative).<sup>89</sup> Matters of class hover as an

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<sup>85</sup> Laurel E. Fletcher & Harvey M. Weinstein, *Transitional Justice and the ‘Plight’ of Victimhood*, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 244 (Cheryl Lawther et al. eds., 2017).

<sup>86</sup> See, e.g., *State v. Edens*, 95 N.C. 693, 696 (N.C. 1886) (“[O]nly where the battery is so great and excessive as to put life and limb in peril, or where permanent injury to the person is inflicted . . . that the law interposes to punish.”); *State v. Oliver*, 70 N.C. 60, 61–62 (N.C. 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 forgive.”); *State v. Rhodes*, 61 N.C. 453, 454 (N.C. 1868) (“The courts have been loth 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>87</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>88</sup> See Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L. REV. 557, 569–73 (2006).

<sup>89</sup> See, e.g., 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, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147, 162 (2016) (describing the paradigmatic victim of campus sexual assault).

unaddressed concern.<sup>90</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>91</sup> She must be perceived to have made courageous but 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 is usually a woman of color.<sup>92</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>93</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>94</sup> Under these circumstances, however, social responses are predictable if

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<sup>90</sup> 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 for 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>91</sup> Sally Engle Merry, *Rights Talk and the Experience of Law: Implementing Women’s Human Rights to Protection from Violence*, 25 HUM. RIGHTS Q. 343, 353 (2003).

<sup>92</sup> NAQVI, *supra* note 70, at 6–7 (referring to the “victim precipitation argument”); Brief for the United States at \*9, *United States v. Morrison*, 529 U.S. 598, 1999 WL 1037259 (Nov. 12, 1999) (citing S. REP. No. 103-138, at 46 (1993), Congressional findings that women are treated as though their complaints of domestic violence are “trivial, exaggerated or somehow their own fault”); Coker, *supra* note 89, at 162 & n.83 (describing the “paradigm victim of campus sexual assault” (citing Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464 (2015))).

<sup>93</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” (quoting Martin D. Schwartz, *Ain’t Got No Class: Universal Risk Theories of Battering*, 12 CONTEMPORARY CRISES 373, 373 (1988))).

<sup>94</sup> LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 285 (1988).

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>95</sup> The political economy of the daily life of households from which gender violence often originates is deemed irrelevant to legal responses.<sup>96</sup>

Autonomy, agency, and resiliency further complicate the concept of the model victim.<sup>97</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>98</sup> Indeed, women are often victims of gender bias perpetrated by the legal system in ways that are no less traumatic than 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 on her own behalf. The legal discourse is not only constitutive of a deserving versus 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>99</sup> Criminal justice policies, including mandatory arrest and mandatory prosecution, confer on the police and

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<sup>95</sup> See Jacoby, *supra* note 63, at 516.

<sup>96</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>97</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>98</sup> Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between “The Truly National and the Truly Local”*, 42 B.C. L. REV. 1081, 1092 (2001).

<sup>99</sup> See Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA 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”).

prosecutors the authority to determine victimhood.<sup>100</sup> On the one hand, advocacy policies serve to give deference to a victim's claims and respect for her courage in coming forth; evaluation of such claims is discouraged and she is to be believed.<sup>101</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 not to proceed with a legal claim may be deemed disempowered, brainwashed, or suffering from "learned helplessness" or another related mental health deficiency.<sup>102</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>103</sup> It is true, as Leigh Goodmark pointed out, that "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>104</sup> But she noted 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>105</sup> Some may choose to use the legal system as a means to readjust their relationships and renegotiate 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.<sup>106</sup>

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 victims' rights deride those who engage in an analysis of perpetrator conduct outside of the premise of patriarchy and individual choice; to do

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<sup>100</sup> See generally Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 J. GENDER SOC. POL'Y & L. 465 (2003) (discussing the need to reconsider mandatory prosecution policies to incorporate a concern for women's safety).

<sup>101</sup> Minow, *supra* note 69, at 1438.

<sup>102</sup> LENORE E. WALKER, *THE BATTERED WOMAN* 43–54 (1979); see Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-essentialist Proposal*, 31 WASH. U. J. L. & POL'Y 39, 40, 45 (2009).

<sup>103</sup> See, e.g., MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* 150–51 (2003).

<sup>104</sup> Goodmark, *supra* note 97, at 24.

<sup>105</sup> *Id.* at 27.

<sup>106</sup> See Wills, *supra* note 99, at 177.

otherwise implies a dangerous form of justification.<sup>107</sup> 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.<sup>108</sup> The victims' rights movement has endeavored to "recast public sympathies," as Martha Minow has written, that might otherwise exist for criminal defendants who also suffer victimization, that "there can be victims of the victim-protecting process."<sup>109</sup> The anti-domestic violence movement has embraced many of the political strategies, if not principles, of the victims' rights movement, resulting in the stereotyping of women as victims, and the loss of agency and control of those who seek to ameliorate the abuse they suffer. Further, by constructing a paradigmatic domestic violence victim without allowing any consideration of the circumstances of the perpetrator, the anti-domestic violence movement has constrained the development of a collective political consciousness that considers alternative—and perhaps improved—responses to domestic violence.

### 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, by the police, by the mayor, by various officials in city government, by the mainstream domestic violence advocates, and by the media.<sup>110</sup> She was *their* victim of domestic violence and objectified through their intervention. Her "injury" demanded their response. The prosecutor and the

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<sup>107</sup> Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 634–35 (2000) (arguing that succumbing to a victim's objection to prosecution endangers community safety and "breed[s] disrespect for the law").

<sup>108</sup> Minow, *supra* note 69, at 1425–28 (noting the risks to feminists who critique the victims' rights approach to domestic violence).

<sup>109</sup> *Id.* at 1416, 1426.

<sup>110</sup> See Jaxon Van Derbeken, *Earlier Mirkarimi Abuse Alleged in Wife's Video*, SFGATE (Jan. 18, 2012), <http://www.sfgate.com/crime/article/Earlier-Mirkarimi-abuse-alleged-in-wife-s-video-2587021.php> [<https://perma.cc/ZWN8-K6WV>]; Kat Anderson, *Domestic Violence Consortium Calls for Mirkarimi to Resign, Wife Makes Cameo*, FOG CITY J. (Jan. 12, 2012), <http://www.fogcityjournal.com/wordpress/3305/domestic-violence-consortium-calls-for-mirkarimi-resignation-wife-makes-cameo/> [<https://perma.cc/52KM-EAXM>]; Robin Wilkey, *Ross Mirkarimi Tape Released: Eliana Lopez' Tearful Confession of Domestic Violence (Video)*, HUFFINGTON POST (May 31, 2012), [http://www.huffingtonpost.com/2012/05/31/ross-mirkarimi-tape-released\\_n\\_1561038.html](http://www.huffingtonpost.com/2012/05/31/ross-mirkarimi-tape-released_n_1561038.html) [<https://perma.cc/JKA9-DDMV>]; *supra* notes 31, 46.

mayor possessed authority to decide whether and how to proceed; she had none.<sup>111</sup> 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>112</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 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>113</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>114</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.<sup>115</sup> Thus perceived as a vulnerable immigrant, her understanding of her own circumstances was discredited in favor of an institutional response by those who knew better.

Her refusal to forego agency and assume the role of victim made her a threat, if not a criminal. Initially characterized as a 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>116</sup> In his effort to control the use of the video, the mayor characterized her

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<sup>111</sup> See *supra* note 37 and accompanying text.

<sup>112</sup> Myrna Melgar, *Guardian Op-Ed: Domestic Violence, a Latina Feminist Perspective*, 48HILLS (Mar. 27, 2012), <http://48hills.org/sfbgarchive/2012/03/27/guardian-op-ed-domestic-violence-latina-feminist-perspective/> [<https://perma.cc/G8QT-PQCV>].

<sup>113</sup> GOTTSCHALK, *supra* note 5, at 97 (observing that prosecutors have discretionary authority and thus often ignore the wishes of victims).

<sup>114</sup> See Expert Declaration of Nancy K.D. Lemon, *supra* note 50. For sources discussing the repudiation of these theories, see Aya Gruber, *A “Neo-feminist” Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER RACE & JUST. 583, 601 (2012) (critiquing the “reductionist characterization of all abused women” who choose not to prosecute domestic violence claims); Tara Urs, *Coercive Feminism*, 46 COLUM. HUM. RTS. L. REV. 85, 136 (2014) (noting the critique of the so-called “cycle of violence” theory).

<sup>115</sup> See Transcript of Arraignment, *supra* note 32, at 10–13.

<sup>116</sup> Reply of Third-Party Movant City and County of San Francisco to Ms. L’s Opposition to Motion for Release of Court Record at 7–8, *People v. Ross Mirkarimi*, No. 12001311 (Cal. Super. Ct. May 14, 2012), [https://sfethics.org/wp-content/uploads/2015/04/CCSF\\_Reply\\_on\\_Motion\\_for\\_Release-1.pdf](https://sfethics.org/wp-content/uploads/2015/04/CCSF_Reply_on_Motion_for_Release-1.pdf) [<https://perma.cc/D9UY-YYHS>] [hereinafter Motion for Release of Court Record Reply].



challenges to its disclosure and her refutation of the events as described in the criminal proceedings as a waiver of her right and that of her child to privacy and protection from sensationalism.<sup>117</sup> The mayor's efforts to cast himself and other city politicians as victims of López's efforts to claim her own narrative, illuminate the fluidity with which harm may be reconstructed in the realm of realpolitik.<sup>118</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.<sup>119</sup> 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, and accused of encouraging them to destroy the videotape she believed was protected by attorney-client privilege.<sup>120</sup> Indeed, victims who reject the narrative of victimhood constructed by the criminal justice system and seek to opt out are deemed unworthy of sympathy and often face the prospects of prosecution for perjury.<sup>121</sup>

It is not only criminal justice actors who exploit victimhood. Women are also often denied agency by domestic violence advocates.<sup>122</sup> These are the circumstances López experienced. Domestic violence advocates exclaimed in public and on billboards that this was no private matter, no family

<sup>117</sup> *Id.* (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>118</sup> See Minow, *supra* note 69, at 1417.

<sup>119</sup> See *supra* note 117.

<sup>120</sup> Interview with Eliana López, *supra* note 14; Bob Egelko, *Lawyer Denies Lopez Sought Destruction of Evidence*, SFGATE (Mar. 22, 2012), <http://www.sfgate.com/bayarea/article/Lawyer-denies-Lopez-sought-destruction-of-evidence-3425769.php> [https://perma.cc/LY2L-KA83].

<sup>121</sup> Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 160–61 (2009).

<sup>122</sup> Andrea Ritchie et al., Plenary 2—Redefining Gender Violence University of Miami Race & Social Justice Law Review Symposium: Reimagining the Movement to End Gender Violence: Anti-racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice, in 5 U. MIAMI RACE & SOC. JUST. L. REV. 289, 293–94 (2015) (objecting to the way domestic violence service providers attempt to determine how to "empower" women who have been abused and who refer to women who have been raped as "my client"). 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?: Shelters and the Family Violence Option*, 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).

issue.<sup>123</sup> Domestic violence advocates organized a rally at city hall in defense of her interests and in the interests of all victims of domestic violence, and vowed that they would “do everything [they could] to keep her safe.”<sup>124</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>125</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 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>126</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 the values associated with the criminal justice system.

## 2. Privacy and Its Loss: The Video

The imperative of disrupting the private-public dichotomy notwithstanding, the importance of privacy remains critical to the feminist project.<sup>127</sup> Indeed, the right to privacy is a fundamental philosophical principle, albeit one without clear meaning or parameters.<sup>128</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>129</sup> proprietary privacy (pertaining to reputation),<sup>130</sup> privacy of thought and feelings,<sup>131</sup> privacy in

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<sup>123</sup> See Joe Eskenazi, *Ross Mirkarimi’s Wife Attends Anti-Ross Mirkarimi Rally*, SFWEEKLY (Jan. 12, 2012), <http://www.sfwkly.com/thesnitch/2012/01/12/ross-mirkarimis-wife-attends-anti-ross-mirkarimi-rally> [<https://perma.cc/3ENQ-WT93>]. Mirkarimi, at a press conference before criminal charges were filed, referred to the incident as a “private matter, a family matter,” as did López. *Id.*

<sup>124</sup> Anderson, *supra* note 110; Interview with Eliana López, *supra* note 14.

<sup>125</sup> See Eskenazi, *supra* note 123; Interview with Eliana López, *supra* note 14.

<sup>126</sup> Mallika Kaur, *Domestic Violence Survivors and Allies: We Won’t Be Silenced*, MS. BLOG MAGAZINE (Oct. 31, 2012), <http://msmagazine.com/blog/2012/10/31/domestic-violence-survivors-and-allies-we-wont-be-silenced/> [<https://perma.cc/BKL9-MMHD>].

<sup>127</sup> Kim, *supra* note 88, at 577–78.

<sup>128</sup> Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 479–80 (2006).

<sup>129</sup> Bert-Jaap Koops et al., *A Typology of Privacy*, 38 U. PA. J. INT’L L. 483, 514–16, 521–22 (2017).

<sup>130</sup> *Id.* at 501, 567.

<sup>131</sup> *Id.* at 502–03.

communications (including privileged communication with one's attorney),<sup>132</sup> "informational privacy" (preventing information about one's self from being collected and controlling its dissemination),<sup>133</sup> and "protection of personal decision-making (autonomy)."<sup>134</sup>

The right to privacy allows individuals to decide "when, how, and to what extent information about them is communicated to others."<sup>135</sup> Personal decision-making autonomy, as Koops et al. observed, is "the freedom to exercise one's mind," particularly in the context of familial relations, and is considered to "flow[] from the 'penumbras' of rights embedded in the Bill of Rights."<sup>136</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. Constitution, and by courts.<sup>137</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>138</sup>

Over her objections and without having party status in the criminal proceedings, López was declared a victim by the prosecutor's and mayor's offices. California's Marsy's Law, a victims' bill of rights incorporated into the California Constitution, enumerates crime-victim rights and particularized protections including finality in the criminal proceedings,<sup>139</sup> "fairness and respect for . . . privacy,"<sup>140</sup> the prevention of the disclosure of confidential or privileged information,<sup>141</sup> and "prompt return of property when no longer needed as evidence."<sup>142</sup> These constitutional protections are enforceable by

<sup>132</sup> *Id.* at 523–26.

<sup>133</sup> *Id.* at 554–55.

<sup>134</sup> *Id.* at 532–34.

<sup>135</sup> *Id.* at 560–61 (quoting ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967)) (adding that privacy rights include protection from the unwanted access of others).

<sup>136</sup> *Id.* at 533.

<sup>137</sup> Anne S.Y. Cheung, *Revisiting Privacy and Dignity: Online Shaming in the Global E-Village*, 3 *LAWS* 301, 306–09 (2014) (referencing the relationship between dignity and privacy as "protecting one's self-esteem and feelings from being intruded or assaulted by the public").

<sup>138</sup> U.S. CONST. amend IV.

<sup>139</sup> CAL. CONST. art. 1, § 28(a)(6).

<sup>140</sup> *Id.* § 28(b)(1).

<sup>141</sup> *Id.* § 28(b)(4).

<sup>142</sup> *Id.* § 28(b)(14). With regard to the video, Madison acknowledged that it was López's property. Furthermore, as noted, the mayor sought the video after the conclusion of the criminal case. *See generally* Ms. L.'s Opposition to Third Party Movant City and County of San Francisco's Motion for Release of Court Record, *People v. Mirkarimi*, No. 12001311 (Cal. Super. Ct. May 10, 2012), [https://sfethics.org/wp-content/uploads/2015/04/Lopez.Opp\\_to\\_Motion\\_to\\_Release.5-10-12-1.pdf](https://sfethics.org/wp-content/uploads/2015/04/Lopez.Opp_to_Motion_to_Release.5-10-12-1.pdf) [<https://perma.cc/Y5VV-AW9W>] [hereinafter Motion for Release of Court Record].

the victim or her attorney.<sup>143</sup> López, however, obtained none of these statutory rights.

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's 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>144</sup> Perhaps more importantly, the appropriate response to such act is also at issue. For purposes of this article, however, it is the 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.<sup>145</sup> She repeatedly requested that the video not be disclosed in any legal proceeding or to the public.<sup>146</sup> She did so prior to the time that Madison contacted the police.<sup>147</sup> She renewed her requests during the criminal trial and Ethics Commission hearings. She maintained this position while she was in Venezuela with her child—beyond the reach of her husband.<sup>148</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 other concerns. And it was a violation of her request for privacy that constituted the essential means by which she was made a victim.

In the criminal proceedings, the district attorney's office attached photographs of López taken from the video "knowing that they would go viral" before a jury was selected.<sup>149</sup> Despite her efforts to appear *in camera* and prevent introduction of the video into evidence, the court found that the recorded

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<sup>143</sup> CAL. CONST. art. 1, § 28(14)(c)(1).

<sup>144</sup> See *infra* notes 255–259 and accompanying text.

<sup>145</sup> See Laird Harrison, *San Francisco Sheriff Faces Spousal Abuse Trial*, REUTERS (Feb. 4, 2012), <http://www.reuters.com/article/us-crime-sheriff-idUSTRE81NOVF20120224> [<http://perma.cc/46NF-33EF>] (reporting that López told law enforcement that she had not wanted to make the video); Declaration of Eliana López, *supra* note 13, at 2–3 (explaining that she made the video upon the legal advice offered by Madison who told her she would have "great difficulty" in a custody dispute, told her what to say, and that the video would be her property).

<sup>146</sup> Declaration of Eliana López, *supra* note 13, at 5.

<sup>147</sup> *Id.* at 4–5; see Declaration of Ivory S. Madison, *supra* note 15, at 16.

<sup>148</sup> Interview with Eliana López, *supra* note 14; Request for Protective Order from Shepard S. Kopp & David P. Waggoner, Attorneys, to Chairperson Benedict Y. Hur, S.F. Ethics Comm'n (May 15, 2012), [https://sfethics.org/wp-content/uploads/2015/04/email1\\_attach-Request\\_for\\_Protective\\_Order-1.pdf](https://sfethics.org/wp-content/uploads/2015/04/email1_attach-Request_for_Protective_Order-1.pdf) [<https://perma.cc/U98F-VJNR>].

<sup>149</sup> Maria L. La Ganga, *Mirkarimi Trial Is a Real-Life Soap Opera in San Francisco*, L.A. TIMES (Mar. 4, 2012), <http://articles.latimes.com/2012/mar/04/local/la-me-mirkarimi-trial-20120304> [<https://perma.cc/Z7AA-8SUU>].

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>150</sup> The ruling not only violated privacy concerns protected by Marsy’s Law, it strained reasonable interpretation of the rules of evidence.<sup>151</sup> The court further refused to prohibit its use based on López’s claim of attorney-client privilege notwithstanding evidence that Madison held herself out as a lawyer and advertised on 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>152</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,<sup>153</sup> notwithstanding the victim’s right to finality in criminal proceedings.<sup>154</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 videotaped statement.”<sup>155</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>156</sup> 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, my family?”<sup>157</sup>

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<sup>150</sup> Third-Party Movant City and County of San Francisco’s Memorandum of Points and Authorities in Support of Motion for Release of Court Record, *People v. Mirkarimi*, No. 12001311, at 2–3 (Cal. Super. Ct. Apr. 23, 2012), [https://sfethics.org/wp-content/uploads/2015/04/ccsf\\_mot\\_re\\_video-1.pdf](https://sfethics.org/wp-content/uploads/2015/04/ccsf_mot_re_video-1.pdf) [<https://perma.cc/3G2P-KZQX>] [hereinafter Motion to Release Court Record].

<sup>151</sup> See CAL. EVID. CODE § 1240 (West 1967) (defining an exception to the hearsay statement as one made spontaneously while under stress of excitement caused by such perception).

<sup>152</sup> Motion to Release Court Record, *supra* note 150, at 3; Interview with Eliana López, *supra* note 14.

<sup>153</sup> Motion to Release Court Record, *supra* note 150, at 7–8.

<sup>154</sup> See CAL. CONST. art. 1, § 28(b)(1).

<sup>155</sup> Motion for Release of Court Record Reply, *supra* note 116, at 7.

<sup>156</sup> Motion for Release of Court Record, *supra* note 142, at 2, 13.

<sup>157</sup> Rasa Gustaitis, *The Case of the Black and Blue Bruise: Shakespearean Drama in San Francisco*, NEW AM. MEDIA (May 28, 2012), <http://newamericamedia.org/2012/05/the->

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 to prevent the public disclosure of the video.<sup>158</sup> López argued that California's Sunshine Laws, which seek to balance privacy rights and transparency in the transaction of government business, established the criteria by which the Ethics Commission was bound to determine the motion.<sup>159</sup> She noted that the purpose of the video was beyond the scope of the Sunshine Act,<sup>160</sup> that the video was made by "a private citizen, with full expectation of privacy,"<sup>161</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>162</sup> Without rendering its own opinion of the legal issues, or considering the applicability of the Sunshine Ordinance, the Ethics Commission denied López's request on the basis that the criminal court had granted the mayor's motion.<sup>163</sup>

Eliana López's rights to privacy were disregarded and denied in favor of tenets of criminal justice principles often employed for reasons unrelated to victim needs or desires. 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

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case-of-the-black-and-blue-bruise-san-franciscans-gripped-by-shakespearean-drama.php [https://perma.cc/WS6L-CKA8].

<sup>158</sup> See generally Ms. L.'s Request for Protective Order Prohibiting Public Dissemination of Video, *In re* Official Misconduct Proceedings Against Sheriff Ross Mirkarimi (S.F. Ethics Comm'n Bd. of Supervisors May 29, 2012), [https://sfethics.org/wp-content/uploads/2015/04/Canny\\_Request\\_for\\_Protective\\_Order\\_5.29.12.pdf](https://sfethics.org/wp-content/uploads/2015/04/Canny_Request_for_Protective_Order_5.29.12.pdf) [https://perma.cc/6YDR-K822].

<sup>159</sup> *CA Sunshine Ordinances: San Francisco*, FIRST AMENDMENT COAL., <https://firstamendmentcoalition.org/public-records-2/california-sunshine-ordinances/ca-sunshine-ordinances-san-francisco/> [https://perma.cc/QX6L-HCP7].

<sup>160</sup> S.F., CAL., SUNSHINE ORDINANCE § 67.1 (1993) (right to access the government's business).

<sup>161</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/kg0/PDF/Todd%20\\_Roberts\\_Statement.pdf](http://dig.abclocal.go.com/kg0/PDF/Todd%20_Roberts_Statement.pdf) [https://perma.cc/JP6D-2Z78]; Ms. L.'s Request for Protective Order Prohibiting Public Dissemination of Video, *supra* note 158, at 2.

<sup>162</sup> Ms. L.'s Request for Protective Order Prohibiting Public Dissemination of Video, *supra* note 158, at 2.

<sup>163</sup> See generally Order Re: Sheriff's Request for Protective Order at 2, *In re* Charges Against Ross Mirkarimi (S.F. Ethics Comm'n May 16, 2012), [https://sfethics.org/wp-content/uploads/2015/04/order\\_denying\\_sheriffs\\_request\\_for\\_protective\\_order\\_-\\_05.16.2012\\_-\\_redacted.pdf](https://sfethics.org/wp-content/uploads/2015/04/order_denying_sheriffs_request_for_protective_order_-_05.16.2012_-_redacted.pdf) [https://perma.cc/D99Y-8RNK].

important protections for victims in the realm of the family<sup>164</sup> and must be weighed against the obligation to limit such protections in domestic violence matters. Privacy facilitates the opportunity to develop and improve important relationships that require “exclusivity, intimacy, and the sharing of personal information.”<sup>165</sup> Privacy and dignity are inextricably related; these concepts are embedded in victims’ rights statutes.<sup>166</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 underexplored.

### 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. An analysis of the case 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 other 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

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<sup>164</sup> See Koops et al., *supra* note 129, at 511, n.92 (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))); see also *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>165</sup> Koops et al., *supra* note 129, at 550 (citing Benjamin J. Goold, *Surveillance and the Political Value of Privacy*, 1 AMSTERDAM L.F. 3, 4 (2009)).

<sup>166</sup> See *supra* notes 72–77 and accompanying text.

anti-domestic violence initiatives that have served to promote sanctions consistent with the carceral state. The failure of 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 is a static social process. 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>167</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.<sup>168</sup> 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 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>169</sup>

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<sup>167</sup> Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 63 (2001).

<sup>168</sup> This article uses the terms “domestic violence movement” and “anti-domestic violence movement,” and refers generally to advocates who coalesced in the 1970s to move the issue of violence against women fully into the public sphere and sought legal reforms to that end. See David Michael Jaros, *Unfettered Discretion: Criminal Orders of Protection and Their Impact on Parent Defendants*, 85 IND. L.J. 1445, 1451 (2010); Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1098 (2006).

<sup>169</sup> See, e.g., Coker, *supra* note 4, at 802–03; Donna Coker & Ahjané D. Macquoid, *Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-domestic Violence Movement*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 585, 591–93 (2015); Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3217–18 (2015); Goodmark, *supra* note 2, at 60–75; Beth E. Richie, Keynote Address University of Miami Race & Social Justice Law Review Symposium: Rethinking the Movement to End Gender Violence: Anti-racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice, in 5 U. MIAMI RACE & SOC. JUST. L. REV. 257, 268 (2015); see generally Jonathan Simon, *Governing Through Crime*, in THE CRIME CONUNDRUM: ESSAYS ON



Much has been written on the advent of the anti-domestic violence movement that evolved 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>170</sup> In her important book on the carceral state, Gottschalk chronicled 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>171</sup> Gottschalk provided important insights into the ideological underpinnings of the early women’s organizations concerned with gender violence that advanced a further explanation of why the anti-domestic violence movement embraced notions of punishment as the preferred means to address the problem.<sup>172</sup> The women’s movement, Gottschalk argued, emerged out of liberal political traditions with little understanding of, and less appreciation for, the critique of the Left.<sup>173</sup> Anti-gender violence activists were far more concerned with formal “equal rights” for women than with a “wholesale restructuring of societal values and the reorganization of institutions to end the subjugation of women.”<sup>174</sup> Liberal political thought pursued prototypical legislative responses, often without consideration of socioeconomic factors that contribute to gender violence and other forms of oppression; activists thus adopted “single-minded” strategies in their efforts to rely upon the criminal justice system as the antidote to gender violence.<sup>175</sup>

Legislators hostile to welfare programs benefited from the movement’s call for penal responses and embraced

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CRIMINAL JUSTICE 171, 171–73 (Lawrence M. Friedman & George Fisher eds., 1997) (explaining how as a general matter, fear of crime and a turn to criminal justice control mechanisms have become dominant means of addressing social issues); Weissman, *supra* note 6, at 395.

<sup>170</sup> See *supra* notes 69, 86 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 394–96.

<sup>171</sup> GOTTSCHALK, *supra* note 5, at 115, 141–42.

<sup>172</sup> See *id.* at 116.

<sup>173</sup> *Id.* at 121–22. Gottschalk acknowledges that some feminist groups were more disposed to “radical” approaches that did not hold sway. *Id.* at 122; see also Gruber, *supra* note 169, at 3213 (observing that “liberal faith” in the criminal justice system served to bind some theorists and advocacy groups to solutions that favor individualism and neglect the need for institutional change).

<sup>174</sup> GOTTSCHALK, *supra* note 5, at 121.

<sup>175</sup> *Id.* at 124.

domestic violence advocates, many of whom became entwined in the politics of privilege.<sup>176</sup> Public funding for gender-violence related crimes, first through the Law Enforcement Administration Act and subsequently through the Violence Against Women Act (VAWA) further institutionalized a criminal justice approach. VAWA served to align the movement with 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>177</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>178</sup> As others have criticized, advocates have moved into positions of power “rightly identified as central to the apparatus of contemporary governance.”<sup>179</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>180</sup> Indeed, law 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

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<sup>176</sup> *Id.* at 123, 141 (describing the movement as moving within an elite political milieu).

<sup>177</sup> *Id.* at 124–25, 145–46; see Deborah M. Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 DUKE J. GENDER L. & POLY 221, 226–28 (2013).

<sup>178</sup> See 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*, 45 SW. L. REV. 915, 934–37 (2016).

<sup>179</sup> See Kerry Rittich, *Out in the World: Multi-level Governance for Gender Equality*, in *FEMINISMS OF DISCONTENT: GLOBAL CONTESTATIONS* 44–45 (Ashleigh Barnes ed., 2015).

<sup>180</sup> See GOTTSCHALK, *supra* note 5, at 129; Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1423–24 (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) (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); Richie, *supra* note 169; 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, 208–09 (2012) (noting concerns that immigrant victims of domestic violence may be subjected to racial profiling and as a consequence placed in removal proceedings).

used to maintain racial oppression and the exclusion of women of color from leadership positions created divisiveness within the movement.<sup>181</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>182</sup> Women of color objected to the rhetoric, which failed to resonate with the experiences of non-white women and poor women.<sup>183</sup> Women of color challenged mandatory arrest policies promoted by white feminists working in the movement who ignored other recommendations that were removed from the criminal justice system.<sup>184</sup> Just as troubling, the domestic violence movement failed to acknowledge the multiple forms of racial oppression and economic factors that aid in producing gender violence.<sup>185</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>186</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 that 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>187</sup> Moreover, the anti-domestic violence movement has been further constrained by neoliberal responses that function as a “normative order of reason,” pervading all political, economic, and social relationships, and has insinuated itself into an ideological

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<sup>181</sup> See GOTTSCHALK, *supra* note 5, at 129.

<sup>182</sup> Fedders, *supra* note 180, at 296–97.

<sup>183</sup> *Id.*; see GOTTSCHALK, *supra* note 5, at 129.

<sup>184</sup> See generally Fedders, *supra* note 180, at 297–98 (explaining how the domestic violence movement failed to consider concerns that had detrimental consequences for communities of color); see also Morrison, *supra* note 168, at 1112 (recommending the location of courtrooms “in of-color neighborhoods” where civil orders of protection might be issued, and interpreters and child care may be provided).

<sup>185</sup> Fedders, *supra* note 180, at 297–98; see also Weissman, *supra* note 6, at 422–23.

<sup>186</sup> David Garland, *Bars and Stripes*, TIMES LITERARY SUPPLEMENT (Jan. 27, 2016), <http://www.the-tls.co.uk/articles/private/bars-and-stripes/> (reviewing MICHEL FOUCAULT, *THE PUNITIVE SOCIETY*).

<sup>187</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.

substructure which precludes meaningful race and class analysis.<sup>188</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>189</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>190</sup> Marie Gottschalk also observed that the domestic violence movement “converged with the state in ways not seen in other countries.”<sup>191</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>192</sup> Anti-domestic violence advocates supported new funding allocations for anti-crime initiatives in the name of supporting victims while muting critique of the growing carceral state.<sup>193</sup> They merged with agencies embedded within criminal justice system institutions, directed resources toward social services, urged dependency on the police while dampening down on political critiques.<sup>194</sup> Conservative California legislators co-opted the demands of anti-gender violence advocates.<sup>195</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.<sup>196</sup> These developments were a sharp departure from alternative feminist views that sought social welfare policies including housing, economic security, and other measures to

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<sup>188</sup> See generally WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION 9–10 (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 177, at 230–33.

<sup>189</sup> See GOTTSCHALK, *supra* note 5, at 132; Carol Bohmer et al., *Domestic Violence Law Reforms: Reactions from the Trenches*, 29 J. SOC. & SOC. WELFARE 71, 76 (2002) (observing that many domestic violence programs have “adopted the language of prosecution”).

<sup>190</sup> JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 180 (2007).

<sup>191</sup> GOTTSCHALK, *supra* note 5, at 139.

<sup>192</sup> *Id.* at 127.

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

<sup>194</sup> *Id.* at 127, 129.

<sup>195</sup> See *id.* at 131 (describing the naming of rape shield laws so that they were associated with a conservative legislator).

<sup>196</sup> *Id.* at 127–28 (noting that the funding transformed “shoestring” programs into “social service agencies” and further observing the rising support from anti-rape activists for locating sexual assault programs within a criminal justice framework).

reduce the determinants of criminal activity.<sup>197</sup> 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>198</sup> Many anti-gender violence advocates in California “increasingly joined conservative coalitions and played the crime card.”<sup>199</sup> California, of course, is not unique in this regard. As scholars have argued, the domestic violence movement has evolved principally into a legal movement embedded within the criminal justice system.<sup>200</sup>

### *B. The Anti-domestic Violence Movement: Disaffected and Divisive*

The movement’s turn to the carceral state has had troublesome consequences.<sup>201</sup> The focus on criminal justice remedies has limited the capacity of the domestic violence movement to develop alliances with anti-racism groups and other social justice initiatives that work on economic justice.<sup>202</sup> “We have been co-opted and as a result, delegitimized and isolated from people who would be allies,” Beth Richie affirmed.<sup>203</sup> She further observed 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>204</sup> She described 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

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<sup>197</sup> See Fraser, *supra* note 187, at 108 (describing the feminist turn as an abandonment of redistributive concerns); Dianne L. Martin, *Redistribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 OSGOOD HALL L.J. 151, 155–58 (1998) (noting how the feminist reform agenda around domestic violence moved to punitive responses and away from social welfare and economic policies).

<sup>198</sup> GOTTSCHALK, *supra* note 5, at 127 (noting that programs that failed to adhere to the law and order agenda were threatened with closure and loss of funding).

<sup>199</sup> *Id.* at 128.

<sup>200</sup> See generally Coker, *supra* note 4.

<sup>201</sup> Much has been written on the consequences of overincarceration and the carceral state generally. For a review of consequences pertaining to the issue of domestic violence, see generally Coker & Macquoid, *supra* note 169.

<sup>202</sup> BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION 4* (2012); Fedders, *supra* note 180, at 297 (noting that the law and order “agenda forces them to ignore particular types of injustice not within the movement’s theoretical paradigm”).

<sup>203</sup> Richie, *supra* note 169, at 261.

<sup>204</sup> *Id.* at 263.

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>205</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 Asian women established Sakhi after members of their community demanded interventions that did not rely on the involvement of the criminal justice system.<sup>206</sup> Much of their work focuses on transformative justice and political education to challenge the criminal justice response and to situate gender violence as a structural matter rather than individual criminal behavior.<sup>207</sup> As a means of engaging with community concerns, Sakhi advocates have been active in the area of immigrant rights as well as issues concerning “heterosexism and genderism.”<sup>208</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>209</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>210</sup>

Disaffection with mainstream domestic violence strategies has been deepening in recent years. A report in 2003 based on a national community meeting of domestic violence advocates funded by the Ms. Foundation, who describes its mission as “build[ing] women’s collective power to realize a

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<sup>205</sup> *Id.* at 268.

<sup>206</sup> See Soniya Munshi et al., *Building Towards Transformative Justice at Sakhi for South Asian Women*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 421, 423 (2015).

<sup>207</sup> *Id.* at 432.

<sup>208</sup> *Id.*

<sup>209</sup> Kelly Miller et al., Panel on Organizing Campaigns, University of Miami Race & Social Justice Law Review Symposium: Reimagining the Movement to End Gender Violence: Anti-racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice, in 5 U. MIAMI RACE & SOC. JUST. L. REV. 505, 506–07 (2015).

<sup>210</sup> *Id.* at 507 (remarks of Lumarie Orozco, regarding the organization Casa de Esperanza and the National Latino Network for Healthy Families and Communities in St. Paul, Minnesota).

nation of justice for all,” summed up key concerns with regard to the problem of overreliance—or any reliance—on the criminal justice system.<sup>211</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>212</sup> In fact, a number of new community models rely on community interventions exclusively and work with the criminal justice system only on rare occasions.<sup>213</sup>

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>214</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 serves at once to enhance the repressive capacity of the state and alienate further the anti-domestic violence movement from the social justice community. Indeed, in a recent study on Family Justice Centers that function as a one-stop sight for victims’ services, Jane Stoeber warned that women who seek help risk unanticipated criminal justice and governmental involvement,

<sup>211</sup> *Our Mission*, MS. FOUND. FOR WOMEN, <http://forwomen.org/about/our-mission/> [<https://perma.cc/8NHZ-JVXB>]; MS. FOUND. FOR WOMEN, *supra* note 7, at 6.

<sup>212</sup> MS. FOUND. FOR WOMEN, *supra* note 7, at 17.

<sup>213</sup> See, for example, organizations such as Creative Interventions in Oakland, CA. CREATIVE INTERVENTIONS, <http://www.creative-interventions.org/> [<https://perma.cc/B42U-TT89>]; see also *About*, BAY AREA TRANSFORMATIVE JUSTICE COLLABORATIVE, <https://batjc.wordpress.com/> [<https://perma.cc/E9U6-3HK4>]; PROJECT SOUTH, <http://projectsouth.org/atlanta-transformative-justice-collaborative/> [<https://perma.cc/C6K8-MK58>]; GENERATION FIVE, <http://www.generationfive.org/> [<https://perma.cc/HU7B-DCEN>] (now functioning 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. See also Donna Coker et al., *Introduction: CONVERGE! Reimagining the Movement to End Gender Violence*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 249, 254–55 (2015).

<sup>214</sup> See Donna Coker et al., Plenary 3—Harms of Criminalization and Promising Alternatives, University of Miami Race & Social Justice Law Review Symposium: Reimagining the Movement to End Gender Violence: Anti-racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice, in 5 U. MIAMI RACE & SOC. JUST. L. REV. 369, 376, 379 (2015) (remarks by Mimi Kim, referring to the result of domestic violence advocate’s embrace of the criminal justice system). 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*, L.A. TIMES (Dec. 25, 1996), [http://articles.latimes.com/1996-12-25/news/ls-12366\\_1\\_domestic-violence](http://articles.latimes.com/1996-12-25/news/ls-12366_1_domestic-violence) [<https://perma.cc/E5JZ-VKAC>].

monitoring, and control, contrary to the assistance they expect to receive.<sup>215</sup> Her analysis suggested that the dire consequences for women who are unaware of the criminal justice implications that might attach to their seeking services may require that they be “mirandized” and advised that anything they say when seeking help from domestic violence, can and will be used against them.<sup>216</sup> Indeed, without a social analysis that considers the way in which the criminal justice response has become the predominate response to domestic violence, well-meaning social service providers may further endanger victims who seek assistance.

C. *The Anti-domestic Violence Movement: A Blind Eye to Police Abuses?*

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 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 fewer—criminal sanctions.<sup>217</sup> As a result, some advocates, irrespective of their intentions, have not only failed to identify and challenge police abuse affecting poor communities and communities of color, but have neglected the way that police misconduct, including sexual assault, have been effected upon the very victims they seek to protect.

Current law enforcement practices constitute one of the defining features of repression and domination over marginalized people, 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

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<sup>215</sup> Jane K. Stoeber, *Mirandizing Family Justice*, 39 HARV. J.L. & GENDER 189, 191–92, 194 (2016).

<sup>216</sup> *Id.* at 239.

<sup>217</sup> See Goodmark, *supra* note 2, at 57 (observing that the anti-domestic violence movement increasingly embraced criminalization strategies and that discussions about intervention have focused on “arguments for more criminal legal intervention, not less”).



neighborhoods.<sup>218</sup> Community members have expressed that “for generations [it] felt like they’re not being policed but *occupied*.”<sup>219</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>220</sup> Black children are suffering panic attacks and depression as a consequence of police brutality.<sup>221</sup>

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

[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

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<sup>218</sup> See, e.g., POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE 7 (2016), [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) [<https://perma.cc/GJ6Y-K26W>] (“CPD’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.”); U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 15 (2015) (finding that the Ferguson police frequently stop people without reasonable suspicion and arrest without probable cause), [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) [<https://perma.cc/LZZ6-UQWP>]. Various reports have demonstrated unlawful police harassment through racial profiling and unlawful stop and frisk practices in New York City. See, e.g., N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK 2011 (2012), [https://www.nyclu.org/sites/default/files/publications/NYCLU\\_2011\\_Stop-and-Frisk\\_Report.pdf](https://www.nyclu.org/sites/default/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf) [<https://perma.cc/2WNM-75E8>]; CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT (2012), <http://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf> [<https://perma.cc/JY69-F882>].

<sup>219</sup> Alexis C. Madrigal, *How Much Racial Profiling Happens in Ferguson?*, ATLANTIC (Aug. 15, 2014), <http://www.theatlantic.com/technology/archive/2014/08/how-much-racial-profiling-happens-in-ferguson/378606/> [<https://perma.cc/8F58-ZLXT>].

<sup>220</sup> Jack Healy & Nikole Hannah-Jones, *A Struggle for Common Ground, Amid Fears of a National Fracture*, N.Y. TIMES (July 9, 2016), [https://www.nytimes.com/2016/07/10/us/a-struggle-for-common-ground-amid-fears-of-a-national-fracture.html?\\_r=0](https://www.nytimes.com/2016/07/10/us/a-struggle-for-common-ground-amid-fears-of-a-national-fracture.html?_r=0) [<https://perma.cc/W8TV-LS4T>] (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>221</sup> Yamiche Alcindor, *In the Turmoil over Race and Policing, Children Pay a Steep Emotional Price*, N.Y. TIMES (July 9, 2016), <https://www.nytimes.com/2016/07/10/us/in-the-turmoil-over-race-and-policing-children-pay-a-steep-emotional-price.html> [<https://perma.cc/GZ7B-YNZC>].

family. Latinos, including U.S. citizens, lawful permanent residents, and very young children, bore the brunt of these practices.<sup>222</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,<sup>223</sup> stated, “we’re not going to call the cops anyway.”<sup>224</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-domestic violence-criminal justice nexus.<sup>225</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>226</sup> Over eighty percent noted that “police-community relations with marginalized communities influenced survivors’ willingness to call the police.”<sup>227</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>228</sup> Immigrant women, especially undocumented immigrant women, are reluctant to call the police for fear that it will result in deportation.<sup>229</sup> Women often fear that “involving the police will result in the state removing their children.”<sup>230</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

<sup>222</sup> *Aguilar, et al. v. Immigration and Customs Enforcement (ICE), et al. Historic Case*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/home/what-we-do/our-cases/aguilar-et-al-v-immigration-and-customs-enforcement-ice-et-al> [https://perma.cc/99ZA-T8YP].

<sup>223</sup> *About ALP*, THE AUDRE LORD PROJECT, <http://alp.org/about-alp> [https://perma.cc/5SH5-HQ5T] (A “Lesbian, Gay, Bisexual, Two Spirit, Trans and Gender Non Conforming People of Color center for community organizing, focusing on the New York City area.”).

<sup>224</sup> Rick Rojas, *In New York, Gay Marchers Weigh Pride, Prejudice and the Police*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/nyregion/in-new-york-gay-marchers-weigh-pride-prejudice-and-the-police.html> [https://perma.cc/8Q4D-L62H].

<sup>225</sup> ACLU, *RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING 1–2* (2015), [https://www.aclu.org/sites/default/files/field\\_document/2015.10.20\\_report\\_-\\_responses\\_from\\_the\\_field.pdf](https://www.aclu.org/sites/default/files/field_document/2015.10.20_report_-_responses_from_the_field.pdf) [https://perma.cc/W7PZ-MU2A] (stating that more than 900 individuals responded).

<sup>226</sup> *Id.* at 1. (Respondents expressed concern that police were biased against women and that their treatment of members of disfavored communities, such as racial minorities, immigrants, Muslims, LGBTQ people, and poor people.).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 9.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

had not called previously, were afraid to call them in the future.<sup>231</sup> When asked about relevant considerations in deciding whether to report domestic violence, respondents from marginalized communities expressed concerns that police would be biased against them or their community.<sup>232</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>233</sup> Police “stop and frisk” tactics often involve “inappropriate[] touch[ing],” humiliating, or aggressive physical contact experienced by women—especially transgender women—as sexual assault, who, as a result, suffer long-lasting trauma.<sup>234</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>235</sup>

<sup>231</sup> TK LOGAN & ROB VALENTE, NAT’L DOMESTIC VIOLENCE HOTLINE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 4, 8 (2015), <http://www.thehotline.org/wp-content/uploads/2015/09/NDVH-2015-Law-Enforcement-Survey-Report.pdf> [<https://perma.cc/CW7Z-384J>] (stating that those who had previously called the police were “extremely afraid” to call again).

<sup>232</sup> *Id.* at 7.

<sup>233</sup> Black women who were victims of domestic violence are more likely to be arrested because they are perceived as “overly aggressive.” THE HUM. RIGHTS PROJECT AT THE URBAN JUSTICE CTR., RACE REALITIES IN NEW YORK CITY 76–77 (2007), [https://hrp.urbanjustice.org/sites/default/files/HRP.WEB.doc\\_Develop\\_RaceRealities\\_001\\_2014\\_0604.pdf](https://hrp.urbanjustice.org/sites/default/files/HRP.WEB.doc_Develop_RaceRealities_001_2014_0604.pdf) [<https://perma.cc/9M5L-MKGV>]; U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 218, at 81; *see also* RICHIE, *supra* note 202, at 99 (describing the case of Tiawanda Moore who was sexually assaulted by police when the police arrived in response to a report of domestic violence and then subsequently arrested when the officer realized she was using her phone to record his threats).

<sup>234</sup> N.Y. CIVIL LIBERTIES UNION, *supra* note 218, at 12; *see also* AMNESTY INT’L, UNITED STATES OF AMERICA: STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 1, 3 (2005), <https://www.amnesty.org/en/documents/AMR51/122/2005/en/> (describing extreme police brutality suffered by transgender people, particularly low-income transgender people of color).

<sup>235</sup> David Packman, 2010 NPMSRP Police Misconduct Statistical Report—Draft, POLICE MISCONDUCT (Apr. 5, 2011), <http://www.policemisconduct.net/2010-npmsrp-police-misconduct-statistical-report/> [<https://perma.cc/W78Y-VKLX>]; *see also* Steven Yoder, *Officers Who Rape: The Police Brutality Chiefs Ignore*, AL JAZEERA AM. (Jan. 19, 2016), <http://america.aljazeera.com/articles/2016/1/19/sexual-violence-the-brutality-that-police-chiefs-ignore.html> [<https://perma.cc/ZT95-TTSF>]. Notwithstanding the conviction of Daniel Holtzclaw, the former 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 Redden, *Daniel Holtzclaw: Lawsuit Claims Police ‘Covered Up’ Sexual Assault Complaint*, GUARDIAN (Mar. 8, 2016), <https://www.theguardian.com/us-news/2016/mar/08/daniel-holtzclaw-lawsuit-sexual-assault-complaint-police-cover-up> [<https://perma.cc/3U7A-LUDD>]. For additional information on discriminatory treatment of women of color in the context of “driving while black” and “driving while female,” *see* generally SAMUEL WALKER & DAWN IRLBECK, POLICE PROFESSIONALISM INITIATIVE, “DRIVING WHILE FEMALE”: A NATIONAL PROBLEM IN POLICE MISCONDUCT (2002), <http://samuelwalker.net/wp-content/uploads/2010/06/dwf2002.pdf> [<https://perma.cc/2GNH-TGAN>].

Latinas and immigrant women too have experienced sexual assaults by U.S. Border Patrol Agents when coming across the border.<sup>236</sup> Immigrant women and children, especially from Central America, have been subjected to sexual abuse while held in detention centers.<sup>237</sup> Muslim women who wear religious clothing are frequently stopped, physically harassed, and inappropriately searched by Transportation and Security Administration agents.<sup>238</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>239</sup>

The collateral consequences that ensue from involvement with the criminal justice system are devastating for victims and their families.<sup>240</sup> One African American woman whose boyfriend

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<sup>236</sup> See, e.g., Press Release, Dep't of Justice, Former Texas Border Patrol Agent Sentenced for Civil Rights Violations (Nov. 2, 2007), [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) [<https://perma.cc/5LBK-LEZH>] (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.); Ildefonso Ortiz et al., *Border Patrol Agent Identified After Suicide, Kidnapping, Sexual Assault of Immigrants*, MONITOR (Mar. 13, 2014), [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) [<https://perma.cc/8GP8-VKDU>]. Latinas who are U.S. citizens have been subjected to pelvic and rectal searches by border patrol based on wrongful profiling. See, e.g., Jamie Ross, *Woman Sues for 'Inhuman & Degrading' Border Search*, COURTHOUSE NEWS (June 10, 2016), <https://www.courthousenews.com/woman-sues-for-inhuman-degrading-border-search/> [<https://perma.cc/YG2R-D3J5>].

<sup>237</sup> Gretchen Gavett, *GAO to Investigate Sexual Abuse at Immigration Centers*, FRONTLINE (Feb. 3, 2012), <http://www.pbs.org/wgbh/frontline/article/gao-to-investigate-sexual-abuse-at-immigration-detention-centers/> [<https://perma.cc/KY3N-UT9S>] (noting over 170 complaints of sexual abuse of detained immigrants). Marisa Taylor & Saila Huusko, *Immigrant Women Allege Sexual Abuse at Detention Center*, AL JAZEERA AM. (Oct. 19, 2014), <http://america.aljazeera.com/articles/2014/10/9/family-detentioncenterabuse.html> [<https://perma.cc/JL87-6KAK>] (noting that most women are from Central America); *Sexual Abuse in Immigration Detention Facilities*, ACLU, <https://www.aclu.org/map/sexual-abuse-immigration-detention-facilities> [<https://perma.cc/944K-VNGU>].

<sup>238</sup> SAHER SELOD, SCHOLARS STRATEGY NETWORK, TARGETING MUSLIM AMERICANS IN THE NAME OF NATIONAL SECURITY (2014), [http://www.scholarsstrategy-network.org/sites/default/files/ssn\\_key\\_findings\\_selod\\_on\\_surveillance\\_of\\_muslim-americans\\_1.pdf](http://www.scholarsstrategy-network.org/sites/default/files/ssn_key_findings_selod_on_surveillance_of_muslim-americans_1.pdf) [<https://perma.cc/YDG4-AY8D>].

<sup>239</sup> See 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."); AFRICAN AM. POLICY FORUM, SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN (2015), [https://fusiondotnet.files.wordpress.com/2015/07/f3c60-merged\\_document\\_228129.pdf](https://fusiondotnet.files.wordpress.com/2015/07/f3c60-merged_document_228129.pdf) [<https://perma.cc/6X2J-3RTS>]. Black Women's Blueprint, another national initiative also concerned with racial profiling and its effect on women and girls, made a documentary on the topic, titled *Under Siege: The Policing of Women and Girls. Our Initiatives*, BLACK WOMEN'S BLUEPRINT, [http://www.blackwomensblueprint.org/criminal\\_j.html](http://www.blackwomensblueprint.org/criminal_j.html) [<https://perma.cc/6EJJ-7FST>].

<sup>240</sup> See Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1198–99 (2016); Coker & Macquoid, *supra* note 169, at 599–601. For a discussion of the

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>241</sup> More to the point, a 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>242</sup> These circumstances make evident that it is counterintuitive to suggest that the domestic violence movement ought to continue with its law-and-order agenda.

#### D. *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 subordination.”<sup>243</sup>

Reliance on criminal remedies has hindered efforts to consider alternatives to the gender binary of victim politics—binaries 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

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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, 634–36 (2006); *id.* at 636 (voting restrictions); 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., CTR. FOR COMMUNITY ALTERNATIVES, THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS: RECONSIDERED, <http://communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf> [<https://perma.cc/V2AH-AHVC>] (educational benefits).

<sup>241</sup> U.S. Police Shooting: Philando Castile’s Partner Tells BBC She Wants Change, BBC NEWS (July 12, 2016), <http://www.bbc.com/news/world-us-canada-36772039> [<https://perma.cc/6YC7-AKZZ>] (interview with Diamond Reynolds).

<sup>242</sup> See U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 218, at 81.

<sup>243</sup> Aziza Ahmed, *When Men Are Harmed: Feminism, Queer Theory, and Torture at Abu Ghraib*, 11 UCLA J. ISLAMIC & NEAR E.L. 1, 19 (2012).

they are one and the same, is incomplete and evolving.”<sup>244</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>245</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 also “offensive touching.”<sup>246</sup>

[W]hereas 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>247</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.<sup>248</sup> Organizations representing immigrant victims of gender-based violence objected to such a broad

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<sup>244</sup> Vanessa Bettinson & Charlotte Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?*, 66 NILQ 179, 183 (2015).

<sup>245</sup> See Claire Wright, *Torture at Home: Borrowing from the Torture Convention to Define Domestic Violence*, 24 HASTINGS WOMEN'S L.J. 457, 464–65 (2013); Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 514–20 (2008).

<sup>246</sup> *United States v. Castleman*, 134 S. Ct. 1405, 1410–11 (2014) (noting amicus brief positions). For example, immigration advocacy organizations including ASISTA which serves victims of gender violence argued against expanding the misdemeanor definition of domestic violence because of the anticipated harm immigrant victims would suffer. See Brief for Amici Curiae Asista Immigration Assistance et al. in support of respondents, 2013 WL 690772, *United States v. Castleman*, 134 S. Ct. 1405 (2014). On the other hand, national mainstream domestic violence organizations supported an expanded definition of the crime with greater consequences. See Brief Amici Curiae of the National Network to End Domestic Violence et al., in Support of Petitioner, 2013 WL 6228470, *United States v. Castleman*, 134 S. Ct. 1405 (2014). 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 *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>247</sup> *Castleman*, 134 S. Ct. at 1411.

<sup>248</sup> See generally Brief Amici Curiae of the National Network to End Domestic Violence et al., *United States v. Castleman*, 134 S. Ct. (2014) (No. 12-1371) (listing the names of virtually all state domestic violence coalitions whose amici briefs supported the expansive definition and failed to flag or otherwise acknowledge the consequences for immigrants).

definition, arguing that it “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 stifl[e] the vital reporting of domestic abuse.”<sup>249</sup> These groups further explained that “immigrant survivors who depend on financial support from a perpetrator of domestic violence, for example, will face dire circumstances if their family’s livelihood is put at risk by any misdemeanor conviction falling under the government’s broad umbrella definition.”<sup>250</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>251</sup> Recent studies, Tamara Kuennen has observed, have demonstrated the fallacy of zero-tolerance policies and instead have “differentiate[d] among types of physical aggression that occur in intimate partnerships.”<sup>252</sup> Many scholars have acknowledged the variation in the types of incidents that may be classified as “domestic violence,” but are better understood as “fights,” and do not involve the underlying dynamic of “coercive control” worthy of legal intervention.<sup>253</sup> Leigh Goodmark has made a strong case that domestic abuse might best be defined by the victim’s “subjective experience of her partner’s behavior,” further illustrating the flaws of zero-tolerance criminal justice responses.<sup>254</sup> Sociologists have offered

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<sup>249</sup> Brief for Amici Curiae Asista Immigration Assistance et al. in support of respondent, *supra* note 246, at 5–6. The Court, in a footnote, bracketed immigration laws in its decision. *Castleman*, 134 S. Ct. at 1411, n.4.

<sup>250</sup> Brief for Amici Curiae Asista Immigration Assistance et al. in support of respondent, *supra* note 246, at 7.

<sup>251</sup> The Department of Justice’s recently released report on policing in Baltimore “used its most scathing language to date to denounce the zero-tolerance policing approach.” Timothy Williams & Joseph Goldstein, *In Baltimore Report, Justice Dept. Revives Doubt About Zero-Tolerance Policing*, N.Y. TIMES (Aug. 10, 2016), <https://www.nytimes.com/2016/08/11/us/baltimore-police-zero-tolerance-justice-department.html> [<https://perma.cc/N9DX-VSNS>]; see U.S. DEPT OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 24 (2016), <https://www.justice.gov/opa/file/883366/download> [<https://perma.cc/82KW-L62K>].

<sup>252</sup> Tamara L. Kuennen, “*Stuck* on Love, 91 DENV. U. L. REV. 171, 179 (2013); see also Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1313–14 (2008) (observing that researchers differ on the types and nature of domestic violence).

<sup>253</sup> EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 104–06 (2007).

<sup>254</sup> See LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 139 (2012).

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>255</sup> These researchers differentiate between the former, “situational couple violence,”<sup>256</sup> and the latter, coercive control.<sup>257</sup> Some physical violence between intimate partners, however problematic such behavior may be, does not always fall outside of social norms.<sup>258</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>259</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>260</sup>

These theories have provoked controversies often rising fully to the level of “rancorous” exchanges.<sup>261</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>262</sup> As Kuennen argued, “the line [between a non-abusive 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>263</sup>

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<sup>255</sup> See Michael P. Johnson & Janel M. Leone, *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); STARK, *supra* note 253, at 104.

<sup>256</sup> Johnson & Leone, *supra* note 255, at 324.

<sup>257</sup> STARK, *supra* note 253, at 104.

<sup>258</sup> Kuennen, *supra* note 252, at 179–80 (arguing that some aggression between couples “does not fall outside of . . . community norm[s]”).

<sup>259</sup> Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 223–25 (2015); Margo Kaplan, *Rape Beyond Crime*, 66 DUKE L.J. 1045 (2017) (arguing that a public health response would be more appropriate in many instances of rape).

<sup>260</sup> Huntington, *supra* note 252, at 1247–50.

<sup>261</sup> Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379, 1381–1382 (2005) (observing that researchers have produced different theories that describe the types of violence between intimate partners resulting in “silos of information” and a “fractured approach” to the issue).

<sup>262</sup> Tamara L. Kuennen, *Love Matters*, 56 ARIZ. L. REV. 977, 999–1000 (2014); Ver Steegh, *supra* note 261, at 1428 (arguing the need to distinguish between coercive control and situational couple violence in custody matters); see Huntington, *supra* note 252, at 1315 n.292 (noting the importance of distinguishing between types of violence in cases “in which parents potentially stand on more equal ground”); see also Baker, *supra* note 259, at 223–25 (setting forth pragmatic arguments as to why criminalization of sexual assault is not always the best option).

<sup>263</sup> Kuennen, *supra* note 262, at 980.



Anti-domestic violence advocates, however, are loath to consider differentiated concepts of physical violence that would require differentiated responses, including noncriminalizing consequences.<sup>264</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>265</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>266</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>267</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>268</sup>

The reluctance of domestic violence advocates, if not their antipathy to engage in intellectual discourse about the nature of violence between intimate partners, and the unwillingness to recognize the continuum upon which such violence exists, cannot but negate meaningful efforts to most appropriately respond to domestic violence. As experts have noted, some types of violence within families is neither extraordinary nor dangerous, nor should it trigger legal intervention.<sup>269</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

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<sup>264</sup> *Id.* at 995 (describing zero tolerance policies as a “mission” of the anti-domestic violence movement).

<sup>265</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, 159 (2016).

<sup>266</sup> *Id.* at 159.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 163 n.14.

<sup>269</sup> See STARK, *supra* note 253, at 104–06.

typology of [Intimate Partner Violence].”<sup>270</sup> Anti-domestic violence advocates remain committed to policies that call for “zero tolerance” and the accompanying default criminal response.<sup>271</sup> The movement continues to serve as a mechanism of “[p]olitical capture” by which it has sought to stymie change in the legal responses to domestic violence, notwithstanding shifting social science and social norms.<sup>272</sup> It is out of touch with crime victims’ views 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>273</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.

*E. 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>274</sup> The demands for Mirkarimi’s prosecution and

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<sup>270</sup> Sandler et al., *supra* note 265, at 160.

<sup>271</sup> See Zero Tolerance for Domestic Abusers Act, H.R.3130, 114th Cong. (2015). For opinions and discussions about this act, see, for example, *Zero Tolerance for Domestic Violence*, CONTRA COSTA COUNTY, <http://www.contracostazt.org/> [<https://perma.cc/V5NU-Y7TC>]; Dennis Dodd, *Steve Spurrier’s Zero-Tolerance Domestic Violence Rule Worth Copying*, CBS SPORTS (Aug. 7, 2015), <http://www.cbssports.com/college-football/news/steve-spurriers-zero-tolerance-domestic-violence-rule-worth-copying/> [<http://perma.cc/3PKJ-FMVG>]; Ann Killion, *Raiders’ Owner Has Zero Tolerance for Domestic Violence*, S.F. CHRON. (Nov. 16, 2015), <http://www.sfchronicle.com/raiders/article/Raiders-owner-has-zero-tolerance-for-domestic-6636707.php> [<https://perma.cc/AKT6-H7TA>]; *NNEDV Joins Advocates to Launch NO MORE*, NNEDV (Mar. 13, 2013), <http://nnedv.org/news/national/3335-no-more-launch-2013.html> [<https://perma.cc/G79U-FCWZ>] (promoting a zero-tolerance policy).

<sup>272</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>273</sup> See ALL. FOR SAFETY & JUST., CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS’ VIEWS ON SAFETY AND JUSTICE 13–23 (2016), <https://www.allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf> [<https://perma.cc/5W9K-SBLM>].

<sup>274</sup> Each person who waited to provide public commentary was provided no more than two minutes to do so. See, e.g., Transcript of Special Meeting of the Ethics Commission at 4, *In re Charges Against Sheriff Ross Mirkarimi* (S.F. Ethics Comm’n Apr. 23, 2012), <http://www.sfethics.org/ethics/2012/05/transcript-special-meeting-of-the-ethics-commission-april-23-2012.html> [<https://perma.cc/RDX7-TX8P>] [hereinafter Apr. 23, 2012 Transcript]; Transcript of Special Meeting of the Ethics Commission at 319, *In re Charges Against Sheriff Ross Mirkarimi* (May 29, 2012), <https://sfethics.org/ethics/>

punishment and the championing of the city's efforts to remove him from office underscore 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>275</sup> Differences were exacerbated and solidarities were undermined.<sup>276</sup> Indeed, community support of Mirkarimi exposed the limitations of domestic violence movement's default to a zero-tolerance response.

Community supporters included those individuals who were constituents of Mirkarimi while he was their District 5 Supervisor, as well as those in support of programs and policies that he implemented during his political career.<sup>277</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>278</sup> As one news commentator summarizing public commentary stated,

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2012/06/transcript-special-meeting-of-the-ethics-commission-may-29-2012.html [http://perma.cc/79KD-F3V7] [hereinafter May 29, 2012 Transcript]; Transcript of Special Meeting of Ethics Commission at 1420, *In re Charges Against Sheriff Ross Mirkarimi* (Aug. 16, 2012), <https://sfethics.org/ethics/2012/08/transcript-special-meeting-of-the-ethics-commission-august-16-2012.html> [https://perma.cc/933T-A2UP] [hereinafter Aug. 16, 2012 Transcript]. Public commentary for the August 16, 2012 Transcript is separately recorded at Transcript of Public Hearing, *In re Charges Against Sheriff Ross Mirkarimi* (Aug. 16, 2012), [http://sanfrancisco.granicus.com/TranscriptViewer.php?view\\_id=142&clip\\_id=15782](http://sanfrancisco.granicus.com/TranscriptViewer.php?view_id=142&clip_id=15782) [https://perma.cc/M9LS-M2AW] [hereinafter Separately Recorded Aug. 16, 2012 Transcript]; see Transcript of Board of Supervisors Meeting, *In re Charges Against Sheriff Ross Mirkarimi* (Oct. 9, 2012), [http://sanfrancisco.granicus.com/TranscriptViewer.php?view\\_id=10&clip\\_id=16097](http://sanfrancisco.granicus.com/TranscriptViewer.php?view_id=10&clip_id=16097) [https://perma.cc/2G5D-GQXU].

<sup>275</sup> See Transcript of Board of Supervisors Meeting, *supra* note 274, at 3. One commentator stated that the actions of the city, the Ethics Commission and the domestic violence organizations were "disgusting" and "unethical" in their efforts to "destroy a family." *Id.*

<sup>276</sup> *Id.* (expressing concern because of "the division between domestic violence advocates and those on the left").

<sup>277</sup> See Transcript of Public Hearing, *supra* note 274; see Joe Fitzgerald, *Lopez Takes the Stand in Official Misconduct Case Against Suspended Sheriff*, FOG CITY J. (July 19, 2012), <http://www.fogcityjournal.com/wordpress/4871/lopez-takes-the-stand-in-official-misconduct-case-against-suspended-sheriff/> [https://perma.cc/JFD6-FYZR] (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 on behalf of Mirkarimi; some, but not all, are referenced below. One commentator noted the overflow crowds and the unanimous support for Mirkarimi. May 29, 2012 Transcript, *supra* note 274, at 377–78; Transcript of Board of Supervisors Meeting, *supra* note 274, at 31.

<sup>278</sup> Apr. 23, 2012 Transcript, *supra* note 274, at 90 ("[P]eople who are in the jails . . . are going to suffer the most" without Mirkarimi.); *id.* at 112 (noting that Mirkarimi reduced incidence of youth violence and "fought for programs that would

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 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>279</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>280</sup> Religious leaders and social justice groups, including community anti-violence organizations, tenants' organizations, labor unions, LGBT organizations, progressive lawyers organizations, and the Latino Democratic Club similarly expressed support for Mirkarimi.<sup>281</sup> Mirkarimi was credited with creating jobs for disadvantaged neighborhoods and progressive environmental protection legislation.<sup>282</sup> The San

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help serve our community”); *id.* at 113 (crime victim in support of Mirkarimi); May 29, 2012 Transcript, *supra* note 274, at 340, 341, 349, 373 (noting that Mirkarimi was always present to support crime victims, was supportive of people of color, always there for his constituents, and a compassionate person); Transcript of Public Hearing, *supra* note 274; Transcript of Board of Supervisors Meeting, *supra* note 274 (referring to Mirkarimi as a “jewel”; discussing his compassion for prisoners and his support for sheriff for his work with “the ones in and out of prison”); Apr. 23, 2012 Transcript, *supra* note 274, at 89 (commenting that Mirkarimi has been working “in the trenches”).

<sup>279</sup> See Ann Garrison, *Eliana Lopez on Ross, District 5, SF's Ethics Commission, and Looking Forward*, KPFA NEWS (Aug. 21, 2012), <http://www.anngarrison.com/audio/kpfa-news-eliana-lopez-on-ross-district-5-the-ethics-commission-and-looking-forward> [<https://perma.cc/ULQ6-RN6B>].

<sup>280</sup> Apr. 23, 2012 Transcript, *supra* note 274, at 101–02 (representative of Black media referencing Mirkarimi as best for “third world people”); *id.* at 111 (statement of support from former African-American male inmate); May 29, 2012 Transcript, *supra* note 274, at 328 (complaining of bias); *id.* at 341 (noting Mirkarimi's support for “brown and black people [as well as] Chinese”); Transcript of Board of Supervisors Meeting, *supra* note 274 (representative of Latino community at San Francisco state, “he stood for us and we should stand [for him]”); Malika Kaur, *Domestic Violence Survivors and Allies: We Won't Be Silenced*, MS. BLOG MAGAZINE, (Oct. 31, 2012), <http://msmagazine.com/blog/2012/10/31/domestic-violence-survivors-and-allies-we-wont-be-silenced/comment-page-1/#comment-91313> [<https://perma.cc/TYH8-XEMF>] (noting that most of the sheriff's supporters were people of color).

<sup>281</sup> Apr. 23, 2012 Transcript, *supra* note 274, at 92–93, 104–07; May 29, 2012 Transcript, *supra* note 274, at 339–40, 350, 361–62, 374 (noting that a cross section of groups and persons generally considered to be less than powerful were united in accusing the city of “overreach”). Transcript of Board of Supervisors Meeting, *supra* note 274 (support from community based program for Mirkarimi's work with marginalized youth); *id.* at 150 (statement in support of Mirkarimi by the American Immigration Lawyers Association).

<sup>282</sup> Apr. 23, 2012 Transcript, *supra* note 274, at 107; May 29, 2012 Transcript, *supra* note 274, at 353–54; see also John-Marc Chandonia, *Statement on Sheriff Mirkarimi*, S.F. GREEN PARTY, <http://sfgreenparty.org/issues/37-statement-on-sheriff-mirkarimi> [<http://perma.cc/XEX2-9BP8>]; *San Francisco Supervisor Ross Mirkarimi Introduces Expanded Plastic Bag Ban & 5-Cent Paper Bag Fee*, PLASTIC BAG LAWS (Aug. 3, 2010), <http://plasticbaglaws.org/san-francisco-supervisor-mirkarimi-introduces->

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>283</sup> Its members rallied for Mirkarimi due to his strong defense of civil rights and the environment.<sup>284</sup> The American Immigration Lawyers Association emphasized Mirkarimi's importance to San Francisco's immigrant community.<sup>285</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>286</sup> Some supporters criticized the response to the incident as consistent with the predilections of the carceral state.<sup>287</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>288</sup>

Many community members and commentators suspected that the city's efforts to remove Mirkarimi were a political maneuver, a "coup d'état" and a "witch-hunt," a mechanism of voter disenfranchisement targeted at a poor and black district.<sup>289</sup>

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expanded-plastic-bag-ban-paper-bag-fee/ [https://perma.cc/5BYC-T7LT]; *San Francisco Board of Supervisors Unanimously Adopts Comprehensive Single-Use Bag Ordinance*, PLASTIC BAG LAWS (Feb. 7, 2012), <http://plasticbaglaws.org/san-francisco-board-of-supervisors-unanimously-adopts-comprehensive-plastic-bag-ordinance-that-applies-to-all-retailers-and-restaurants/> [https://perma.cc/X9ZH-SEUY].

<sup>283</sup> *Statement on Sheriff Mirkarimi*, *supra* note 282. Other commentators opposed Mirkarimi's ouster, noting that it was contrary to the city's move toward restorative and redemptive justice. *See* Transcript of Public Hearing, *supra* note 274.

<sup>284</sup> Transcript of Public Hearing, *supra* note 274. Other commentators opposed Mirkarimi's ouster noting that it was contrary to the city's move toward restorative and redemptive justice. *Id.*

<sup>285</sup> *See* Transcript of Board of Supervisors Meeting, *supra* note 274.

<sup>286</sup> *Id.*

<sup>287</sup> Transcript of Public Hearing, *supra* note 274 (referencing the problem of overincarceration).

<sup>288</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 more progressive elected official from office." Transcript of Board of Supervisors Meeting, *supra* note 274.

<sup>289</sup> Apr. 23, 2012 Transcript, *supra* note 274, at 84, 87, 90; May 29, 2012 Transcript, *supra* note 274, at 323, 341, 358; Transcript of Public Hearing, *supra* note 274 (referencing the financing of a billboard against Mirkarimi in order to support his political opponents). The billboard referenced in the August 16, 2012 Transcript was paid for by domestic violence advocates. *See* Keith Mizuguchi, *Billboard Campaign Launched Against Sheriff Mirkarimi*, SF STATION (Feb. 14, 2012), <http://www.sfstation.com/2012/02/14/billboard-campaign-launched-against-sheriff-mirkarimi/> [https://perma.cc/5RJB-EV8V]; Transcript of Board of Supervisors Meeting, *supra* note 274, at 30 (former Mayor of San Francisco warning against overreach); *id.* at 116 (construing the city's efforts to use the issue of domestic violence for a "political lynching"); *see also*

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>290</sup> Mirkarimi's supporters argued that the mayor's efforts were hypocritical and exceptional, and identified other city officials guilty of misconduct but never punished.<sup>291</sup> They rejected any explanation offered by city officials, as well as those of 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>292</sup> It appeared evident to Mirkarimi's supporters that his prosecution for domestic violence had little to do with the wellbeing of women. This was "feminism's appropriation for less than feminist purposes."<sup>293</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

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Phil Matier & Andy Ross, *Ross Mirkarimi's Wife to Testify, Her Attorney Says*, SF GATE (Feb. 13, 2012), <http://www.sfgate.com/bayarea/matier-ross/article/Ross-Mirkarimi-s-wife-to-testify-her-attorney-3308663.php> [<https://perma.cc/L5U8-TPFT>] (including statement by López that the charges were politically motivated); Apr. 23, 2012 Transcript, *supra* note 274, at 91 ("I cast my vote."); *id.* at 115 (referencing a vote for Mirkarimi); May 29, 2012 Transcript, *supra* note 274, at 338, 339, 348, 351 (noting the will of the people in electing Mirkarimi); *id.* at 353, 361 ("I want my vote to count."); Transcript of Public Hearing, *supra* note 274 (pointing out that if the people who elected Mirkarimi so desired to remove him from office because of his actions, they could recall him; arguing that removal efforts lacked due process); Transcript of Board of Supervisors Meeting, *supra* note 274 (stating: "[No] authority to take away my vote"; "[I]f we want him out we'll take him out"; and arguing that removing the Sheriff would send a bad message to immigrants about democracy: "Don't substitute your judgment for the citizens of [San F]rancisco. We elected him.").

<sup>290</sup> May 29, 2012 Transcript, *supra* note 274, at 343; Transcript of Board of Supervisors Meeting, *supra* note 274 (expressing concerns that domestic violence advocates were aligned with and took funds from Mirkarimi's political opponents; specifically critiquing San Francisco's mainstream domestic violence program for using the incident and others to enrich the organization rather than helping victims).

<sup>291</sup> Apr. 23, 2012 Transcript, *supra* note 274, at 80, 81 (citizen remarks describing removal efforts as "ridiculous," and a "gross disparity"); May 29, 2012 Transcript, *supra* note 274, at 336 (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., id.* at 320; Transcript of Public Hearing, *supra* note 274; Transcript of Board of Supervisors Meeting, *supra* note 274 (referring again to the fire chief, female and not of color).

<sup>292</sup> Apr. 23, 2012 Transcript, *supra* note 274, at 100 (arguing that those pursuing Mirkarimi "infantilize[d] and marginalize[d] López"); May 29, 2012 Transcript, *supra* note 274, at 332 (arguing that none of the actions taken by officials were genuine efforts to assist López); *id.* at 358 (arguing instead that the case was all about politics); *id.* at 364 (arguing that the Ethics Commission members were being used by the mayor); Separately Recorded Aug. 16, 2012 Transcript, *supra* note 274 (taking offense at domestic violence advocates using the incident for their own agenda).

<sup>293</sup> *See* Brenda Cossman, *Feminism in Hard Times: From Criticism to Critique*, in FEMINISMS OF DISCONTENT: GLOBAL CONTESTATIONS, *supra* note 179, 11, 13–14 (describing Naomi Wolfe's critique of the sexual assault allegations against Julian Assange after his release of WikiLeaks 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>294</sup>

It is important to emphasize that community members addressed the issue of Mirkarimi’s actions toward López in the context of defining and responding to domestic violence. They urged city officials to consider López’s perceptions as to whether she was abused, and suggested that, in fact, women’s voices on the issue were being ignored.<sup>295</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 intervention.<sup>296</sup> They expressed anger at the way in which the incident was portrayed and criticized the city’s attorney for overreaching by claiming that Mirkarimi “beat his wife” or “attacked his wife.”<sup>297</sup> Still others believed that the fact that Mirkarimi had taken responsibility for his actions by apologizing to his wife was sufficient mitigation of the “arm grab.”<sup>298</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>299</sup>

<sup>294</sup> Naomi Wolfe, *J’Accuse: Sweden, Britain, and Interpol Insult Rape Victims Worldwide*, HUFFINGTON POST, [http://www.huffingtonpost.com/naomi-wolff/jaccuse-sweden-britain-an\\_b\\_795899.html](http://www.huffingtonpost.com/naomi-wolff/jaccuse-sweden-britain-an_b_795899.html) [<https://perma.cc/347W-KPGV>] (critiquing the prosecutorial actions against Julian Assange for sexual assaults after his release of documents through WikiLeaks).

<sup>295</sup> Apr. 23, 2012 Transcript, *supra* note 274, at 94–95, 98–99; May 29, 2012 Transcript, *supra* note 274, at 327, 368; Transcript of Public Hearing, *supra* note 274; Transcript of Board of Supervisors Meeting, *supra* note 274 (expressing concern that López’s rights were violated).

<sup>296</sup> Apr. 23, 2012 Transcript, *supra* note 274, at 81, 105, 107, 109; May 29, 2012 Transcript, *supra* note 274, at 167, 333, 337, 352, 364, 373, 376; Transcript of Public Hearing, *supra* note 274; Transcript of Board of Supervisors Meeting, *supra* note 274.

<sup>297</sup> Transcript of Board of Supervisors Meeting, *supra* note 274.

<sup>298</sup> Aug. 16, 2012 Transcript, *supra* note 274, at 1510.

<sup>299</sup> See *supra* note 256; May 29, 2012 Transcript, *supra* note 274, at 351 (arguing for “diversion in lieu of conviction [mechanisms]”); *id.* 359–60 (suggesting domestic violence is not a “black and white” situation but gray); Transcript of Public Hearing, *supra* note 274 (arguing that as a result of this incident, Mirkarimi would be a better sheriff); Transcript of Board of Supervisors Meeting, *supra* note 274 (commenting on “overkill” reaction to the incident and an excessive reaction to the arm grab). 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*, SF GATE (Jan. 3, 2015), <http://www.sfgate.com/opinion/saunders/article/Ross-Mirkarimi-faults-himself-and-the-system-5990853.php> [<https://perma.cc/78T4-KUN3>].

These comments reflected the extent to which the tethering of the mainstream domestic violence movement to systems of punishment were deemed to be discordant with progressive social norms, restorative justice approaches, and particularly at odds with the interests of those who have suffered the racist reach of the carceral state.<sup>300</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 pay.<sup>301</sup> His supporters commented that the consequences were harmful to López—the alleged victim—and their son.<sup>302</sup> They argued that removing him from office was disproportionate to the offense.<sup>303</sup>

Domestic violence advocates urged city officials to remove Mirkarimi.<sup>304</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>305</sup> Otherwise, the chair of the city’s Family Violence Council suggested, abusers the world over would be emboldened.<sup>306</sup> Mirkarimi-López was to be the stand-in for zero tolerance; if Mirkarimi were to remain as sheriff, it would send a “message to perpetrators.”<sup>307</sup> To allow Mirkarimi to assume his position would serve to terrify domestic violence victims.<sup>308</sup> A convicted abuser in charge of domestic violence programs,

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<sup>300</sup> May 29, 2012 Transcript, *supra* note 274, at 352–53, 360; Transcript of Public Hearing, *supra* note 274; Transcript of Board of Supervisors Meeting, *supra* note 274 (arguing that, at most, counseling would have been an appropriate response).

<sup>301</sup> Apr. 23, 2012 Transcript, *supra* note 274 at 84, 92, 95; May 29, 2012 Transcript, *supra* note 274, at 370–73 (concerned that the loss of a job because of domestic violence would continue the “cycle of violence”); Transcript of Public Hearing, *supra* note 274; Transcript of Board of Supervisors Meeting, *supra* note 274.

<sup>302</sup> May 29, 2012 Transcript, *supra* note 274, at 339.

<sup>303</sup> *Id.* at 361 (twenty-seven-year union representative arguing that “the issues in this case simply don’t come close to warranting termination of employment.” *id.* at 366); Transcript of Public Hearing, *supra* note 274; Transcript of Board of Supervisors Meeting, *supra* note 274.

<sup>304</sup> Transcript of Public Hearing, *supra* note 274, at 45, 112; Apr. 23, 2012 Transcript, *supra* note 274, at 118; Transcript of Board of Supervisors Meeting, *supra* note 274.

<sup>305</sup> Transcript of Public Hearing, *supra* note 274, at 45, 112.

<sup>306</sup> Apr. 23, 2012 Transcript, *supra* note 274, at 118 (stating “[t]he world is watching”).

<sup>307</sup> Transcript of Public Hearing, *supra* note 274.

<sup>308</sup> *Id.* (arguing that immigrant victims would be afraid to come forth); Transcript of Board of Supervisors Meeting, *supra* note 274.



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>309</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 from domestic violence perpetrators as a basis for removing Mirkarimi from office.<sup>310</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>311</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>312</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>313</sup> Indeed, the abusive way that López was treated, many feared, would serve to discourage others from reporting domestic violence.<sup>314</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>315</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 as well.<sup>316</sup> The nine months of testimony demonstrate a worrisome

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<sup>309</sup> Transcript of Public Hearing, *supra* note 274 (allowing Mirkarimi to stay in office would "tarnish[ ] the badge" and undermine the domestic violence program in the jail); Transcript of Board of Supervisors Meeting, *supra* note 274, at 42, 82 (arguing that Mirkarimi could not be in charge of protecting victims; and that this would send the wrong message to children who were aware of the controversy through the media).

<sup>310</sup> Separately Recorded Aug. 16, 2012 Transcript, *supra* note 274.

<sup>311</sup> Transcript of Board of Supervisors Meeting, *supra* note 274.

<sup>312</sup> *Id.*

<sup>313</sup> Transcript of Public Hearing, *supra* note 274; Transcript of Board of Supervisors Meeting, *supra* note 274 (suggesting that case was not about domestic violence and challenging domestic violence advocates to seek a recall instead of "hid[ing] behind the mayor; referring to domestic violence advocates as "misguided").

<sup>314</sup> Transcript of Board of Supervisors Meeting, *supra* note 274.

<sup>315</sup> Transcript of Public Hearing, *supra* note 274; Transcript of Board of Supervisors Meeting, *supra* note 274 (woman speaker criticizing women's groups for professing to speak for everyone when they have no contact with most women; arguing that "a moment of family crisis [was] being transformed . . . for illegal and financial gain").

<sup>316</sup> A review of the transcripts and video-recorded hearings demonstrates that over 310 people gave public commentary and that the majority supported Mirkarimi: 94% supported him at the April 2012 Ethics Commission hearing; 100% at the May

breach between the domestic violence movement and community members who represented a range of progressive interests and individual concerns. The commentary suggests that we have yet to arrive at a sufficiently nuanced understanding of domestic violence, and further, that the paradigmatic punitive response has neither mitigated the phenomenon nor benefited its victims.

The community commentary reveals the way that 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. Many residents who offered their views of the Mirkarimi-López case reflect the concerns of new social movement actors such as Black Lives Matter and #SayHerName who have addressed the deep roots of racism, the disenfranchisement of families who have endured economic hardship, and the relationship of the criminal justice system to these injustices.<sup>317</sup>

The lessons from this case are straightforward. 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>318</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.

The Mirkarimi-López case suggests that mainstream domestic violence must shift its 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 advocates 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, and other grassroots organizations that focus on various socioeconomic

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2012 Ethics Commission hearing; 83% at the August 2012 Ethics Commission hearing; and 88% in favor at the October 2012 Board of Supervisor hearing.

<sup>317</sup> See *About the Black Lives Matter Network*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> [<https://perma.cc/X9UN-2TAE>]; #SayHerName, AFRICAN AM. POLICY FORUM, <http://www.aapf.org/sayhername/> [<https://perma.cc/3H9E-AJAD>].

<sup>318</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).

and civil rights. It also requires domestic violence advocates to engage in the movement to end police brutality, both in coalitions and in the courts.<sup>319</sup>

As suggested by community residents, 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 violence.<sup>320</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>321</sup> Collaboration with economic justice groups could contribute to reforms in the welfare system to offer a dignified and sufficient income for families.<sup>322</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 wellbeing of organized labor.<sup>323</sup> Donna Coker and Ahjané Macquoid have described opportunities for domestic violence advocates to act with other social justice advocates to end excessive incarceration.<sup>324</sup> Lawyers who

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<sup>319</sup> See, e.g., COMMUNITIES UNITED FOR POLICE REFORM, [http://changethenypd.org/\[https://perma.cc/D9LR-KPM7\]](http://changethenypd.org/[https://perma.cc/D9LR-KPM7]). Community groups have also joined in litigation against abusive police practices. See generally *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013); *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).

<sup>320</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 “social conditions and structural inequalities that create and deepen gender violence and that make people vulnerable to violence.” See *Reimagining the Movement to End Gender Violence*, MEDIA FOR CHANGE, <http://mediaforchange.org/reimagine> [https://perma.cc/UHH2-NH9P].

<sup>321</sup> See, e.g., Weissman, *supra* note 177, at 251–52 (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>322</sup> NANCY FRASER, *FORTUNES OF FEMINISM: FROM STATE-MANAGED CAPITALISM TO NEOLIBERAL CRISIS* 2 (2013) (urging feminists to reconsider “the struggle[] for redistribution” and to “defend society” from the influence of the markets).

<sup>323</sup> Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819, 1869 (1992); see, e.g., AFSCME, *DOMESTIC VIOLENCE: WHAT UNIONS CAN DO* 4–7, [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) [https://perma.cc/BCB7-QGJB]; IRISH CONGRESS OF TRADE UNIONS, *DOMESTIC VIOLENCE AND THE WORKPLACE*, [http://www.ictu.ie/download/pdf/domestic\\_violence.pdf](http://www.ictu.ie/download/pdf/domestic_violence.pdf) [https://perma.cc/Z69R-4RHY]; see also *About CLUW*, COAL. OF LABOR UNION WOMEN, [http://www.cluw.org/?zone=/unionactive/view\\_page.cfm&page=About20CLUW](http://www.cluw.org/?zone=/unionactive/view_page.cfm&page=About20CLUW) [https://perma.cc/B3WC-57DT] (noting a training program on domestic violence issues).

<sup>324</sup> Coker & Macquoid, *supra* note 169, at 614–15.

comprise the domestic violence bar have been urged to support civil rights litigation to end abusive police practices.<sup>325</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 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>326</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)<sup>327</sup> in an administrative setting have gone too far and may subject students charged with such acts to unfair processes and unwarranted sanctions.<sup>328</sup> They have argued that in attempt 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>329</sup> Indeed, the campus rape controversy is an indication of the crisis facing the domestic violence movement and the perception it has garnered as a facilitator of the law-and-order regime.

There is less of a need for new prescriptions than the obligation to forge the political will to seize opportunities to

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<sup>325</sup> Deborah M. Weissman, *Rethinking a New Domestic Violence Pedagogy*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 635, 638, 655–57 (2015); see *supra* note 319.

<sup>326</sup> Zoë Heller, *Rape on the Campus*, THE N.Y. REVIEW OF BOOKS (Feb. 5, 2015), <http://www.nybooks.com/articles/2015/02/05/rape-campus/#fnr-4> [<https://perma.cc/BEY5-W237>].

<sup>327</sup> Letter from the Assistant Sec., U.S. Dep’t of Educ., Office of Civil Rights, to “Colleague” (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/RC9A-KHJG>] (referred to as “Dear Colleague Letter”).

<sup>328</sup> See Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 U. KAN. L. REV. 915, 916–17 (2016).

<sup>329</sup> Heller, *supra* note 326 (including quotes from Harvard Law professors who wrote to object to the new rules).

engage in dialogue and pursue coalition building. Indeed, shifting strategies and broadening purpose may help align the anti-domestic violence movement with its 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>330</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>331</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 the “battle of ideas” required to produce new forms of understanding and mobilizations to address gender violence and social injustice.<sup>332</sup>

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<sup>330</sup> See STEVE FRASER, *THE AGE OF ACQUIESCENCE: THE LIFE AND DEATH OF AMERICAN RESISTANCE TO ORGANIZED WEALTH AND POWER* 421 (2015).

<sup>331</sup> Marcia Olivo et al., Panel on New Possibilities for Reframing Work to End Gender Based Violence, in 5 U. MIAMI RACE & SOC. JUST. L. REV. 521, 522–23 (2015).

<sup>332</sup> See generally LORETTA PYLES, *PROGRESSIVE COMMUNITY ORGANIZING: REFLECTIVE PRACTICE IN A GLOBALIZING WORLD* 34 (2d ed. 2014) (referencing Antonio Gramsci's “battle of ideas” as a requirement for social transformation).