8

Criminalization as a Solution to Abuse

A Cautionary Tale

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8.1 INTRODUCTION

The Battered Women's Movement and I were born in the late 1960s. In its infancy, the movement coalesced around the grassroots goals of sheltering women and raising political consciousness about the connection between domestic violence and gender subordination. Later, it looked to law as a tool to effect the social change it envisioned – gender equality. Activists first lobbied for civil legal relief in the form of civil restraining orders, then turned to enforcement of the criminal law. Between 1984 and 2000, the criminal law of domestic violence exploded.[1]

Amid this explosion, in 1992, I worked in a domestic violence shelter. It was my first real job after college. I worked all my hours for the week in a single shift, living in the shelter from Friday at 5:00 p.m. through Sunday at 5:00 p.m. On these weekends, I heard from residents about their appointments during the week with the local legal aid attorney, who promised safety and freedom through civil protection orders and cooperation with aggressive prosecutors. Feeling the same sense of optimism that many residents felt about law, and the same growing sense of pessimism about shelters in creating meaningful social change, I decided to go to law school. Sending the message to would-be batterers that they could be arrested, prosecuted and court-ordered to move out of their own homes (rather than victims needing to do so) seemed a much more proactive, empowering, and effective solution than providing victims a place to stay, after the fact of abuse.

It may not come as a shock to the reader to learn that I am a middle-class white woman. This chapter reflects on the hopefulness with which I and other, largely white, activists in the anti–domestic violence (DV) movement imbued law – a hopefulness that is not uncommon in social movement work and is a product of

[1] Leigh Goodmark, A Troubled Marriage: Domestic Violence and the Legal System 16–28 (2012) (providing a comprehensive overview of the development of the legal response to DV in the United States from the 1970s to 2012).

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white privilege. Because leaders of the animal rights movement are overwhelmingly white[2] and because the trajectory of the animal rights movement appears, at least currently, to track the same reliance on criminal law to effect social change, it is my hope that the reflections offered in this chapter provide reasons for pause.

As a solution to the problem of DV, we (activists) placed most of our chips in the pot of criminal law. Then we went all in, on this criminalization strategy, also known as "crime logics"[3] and "carceral feminism,"[4] with mandates: mandatory reporting of DV to law enforcement by professionals in the community; mandatory arrest of DV perpetrators at the scene of a crime; and mandatory prosecution of charges involving DV. As this chapter will discuss, the mandatory (versus discretionary) arrest of suspected perpetrators, tough-on-crime "no-drop" prosecution policies, and "zero-tolerance" attitudes did *not* create the meaningful social change hoped for. By some accounts, the criminalization strategy has made but a dent in the prevalence or acceptability of DV, and in many ways (discussed herein) it has harmed rather than helped those it was intended to protect. Worse, these policies have contributed to the disproportionate incarceration of people of color and other marginalized individuals. Indeed, a critical and shameful mistake in the anti-DV movement has been its racist indifference to the treatment of people of color by law enforcement. Starting from the position that any expectation of a reliable, protective response by police is a product of not merely white, but also heteronormative, privilege, it is clear that privilege must be reckoned with. This reckoning is particularly critical for movements centered on equality and dignity, as are both the anti-DV and animal rights movements.

The chapter begins with a thumbnail sketch of laws promulgated to protect victims of domestic violence, pointing out parallel law reform efforts in the animal rights movement. Although there were many unintended consequences of an overly optimistic reliance on law to combat DV, I focus on four: the crowding out of other potential solutions; the increased arrest of women and other problems with mandating arrest at the scene of a domestic disturbance; the problem of police as perpetrators of both partner and animal abuse; and the loss of activists' initial vision and goals. The chapter concludes with personal reflections. For twenty-five years, I have represented people who experience abuse to obtain civil protection orders, child custody, divorce, and lawful immigrant status. I went to law school because I thought that enforcing the law, rather than providing services like shelter, was a more effective way to address DV. Now I wish that the millions of federal dollars spent each year on policing and prosecuting could instead be funneled into housing, childcare, and other resources that the victims we are trying to help

[2] Justin Marceau, Beyond Cages: Animal Law and Criminal Punishment 159 (2019).

[3] Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 Tex. Tech. L. Rev. 147, 155–61 (2016).

[4] Elizabeth Bernstein, Brokered Subjects: Sex, Trafficking, and the Politics of Freedom 37 (2019).

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actually need. Ironically, the shelter I worked at before attending law school provided precisely these resources.

8.2 THUMBNAIL SKETCH OF CRIMINAL AND CIVIL REMEDIES FOR DOMESTIC VIOLENCE

Fifty years ago, there was no criminal or civil justice system response to the problem of DV. In fact, the concept of "domestic violence" as opposed to stranger violence, at least as far as the law was concerned, did not exist. Today, sending a harassing text message to an ex who lives across state lines is punishable as a federal crime, a state crime (potentially a couple of different state crimes), and often contempt of court.[5]

The seriousness with which the justice system now treats DV is the result of a number of reforms anti-DV activists lobbied for in response to, in their view, the state's history of indifference.[6] Much like animal rights activists,[7] anti-DV activists in the 1970s and 1980s believed that laws on the books were underenforced, or simply not applied, in cases of abuse.[8] They observed that police avoided responding to calls for help from victims of DV, and when they did respond, it was with reluctance to interfere in a "private family matter" and might end with (if the "squabble" was sufficiently serious) a walk around the block for the perpetrator to cool down.[9] To address this problem with police discretion, feminist activists and victim advocates fought for reform of the law to *require* police to arrest alleged perpetrators at the scene of a DV disturbance. These are referred to as "mandatory arrest" policies. Advocates for animal rights have urged similar mandatory arrest laws for animal cruelty and have done so for similar reasons.[10] Indeed, all fifty states have adopted a felony animal abuse statute.[11]

It is important to note that not all anti-DV activists agreed with the criminalization strategy. In fact, activists of color were – and remain – deeply skeptical.[12] For communities of color, increased police presence had never been a means of achieving

[5] 18 U.S.C. § 2262(a)(1), (2) (federal crime of interstate stalking). In most states, harassment when aimed at an intimate or formerly intimate partner qualifies as domestic violence, and in most states, contempt of court for such conduct is a remedy available to victims who have civil or criminal protection orders, in addition to, in most states, a separate crime of violating such an order.

[6] *Cf.* Aya Gruber, The Feminist War on Crime 72 (2020) (noting that this was the "conventional feminist narrative" of police responsiveness and arguing that this was revisionist history).

[7] Marceau, *supra* note 2, at 111.

[8] Leigh Goodmark, Decriminalizing Domestic Violence 4 (Claire M. Renzetti ed., 2018).

[9] *See* Deborah Epstein, *Procedural Justice: Tempering the State's Response to DV*, 43 Wm. & Mary L. Rev. 1843, 1851–53 (2002).

[10] Marceau, *supra* note 2, at 111.

[11] *Id.* at 102.

[12] Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, 25 Signs 1133, 1136 (2000).

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safety. Activists of color therefore warned against partnering with the state and particularly the criminal justice system. Their protests were unheeded.[13]

Interestingly, mandatory arrest laws proliferated in the 1980s, around the time of the alleged murder of a white woman by her ex-husband, who is Black: the murder of Nicole Brown Simpson by O. J. Simpson. As noted by Professor G. Kristian Miccio,

> Soon after [the murder of Nicole Brown Simpson], New York joined a majority of states in passing mandatory arrest laws in cases involving DV. Most of the legislation passed that day had languished for years in state legislatures. With the death of Nicole Brown, politicians raced to the state house to invoke DV laws, jumping on the "zero tolerance" bandwagon.[14]

Rates of arrest increased dramatically. To be certain that arrests paid off, activists advocated that states and municipalities require district attorneys to prosecute DV aggressively, with "no drop" prosecution policies aimed at curtailing prosecutor discretion to dismiss criminal charges in DV cases.[15] By 1996, two-thirds of prosecutors' offices had adopted some variation of a "no-drop" prosecution policy.[16] Advocates for animal rights have urged similar mandatory arrest laws and aggressive prosecution policies for animal cruelty, and have done so for similar reasons.[17]

At about the same time as states engaged in criminalization tactics, Congress passed in 1994 the first federal law prohibiting DV, the Violence Against Women Act ("VAWA"). VAWA made it a federal crime to cross state lines to abuse or stalk an intimate partner or to possess a gun if convicted of even a misdemeanor crime of DV. Women's advocates and activists played a major role in crafting the VAWA and in shaping federal funding priorities under that act. "Their priority was using federal funds to reinvent the legal system to make police, prosecutors and judges more responsive."[18] The first iteration of VAWA required states to pass mandatory arrest laws to receive federal funding, and the single largest pool of money under VAWA was the Services for Training Officers and Prosecutors grant, specifically intended to increase the apprehension, prosecution, and adjudication of persons perpetrating

[13] Goodmark, *supra* note 8, at 4; Gruber, *supra* note 6, at 87.

[14] G. Kristian Miccio, *A House Divided: Mandatory Arrest, DV, and the Conservatization of the Battered Women's Movement*, 42 Hous. L. Rev. 237, 238 (2005).

[15] *See generally* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in DV Prosecutions*, 109 Harv. L. Rev. 1849 (1996) (describing, and supporting, aggressive prosecution policies in DV cases). For a compilation of representative aggressive or "no-drop" prosecution policies, *see* Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to DV*, 2010 BYU L. Rev. 515, 592–95 (documenting local policies in thirty-five states).

[16] Goodmark, *supra* note 8, at 15.

[17] Marceau, *supra* note 2, at 111.

[18] Goodmark, *supra* note 1, at 19.

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violent crimes against women.[19] Advocates for animal rights have urged similar federal legislation.[20]

On the civil side of domestic violence rulemaking, civil protection orders (or restraining orders) became available to victims in the late 1970s and throughout the 1980s. By 1989, every state provided for this emergency civil remedy that restrains the perpetrator from coming near or contacting the victim, amongst other forms of relief.[21] The VAWA provided an array of protections in the civil justice system as well. These range from remedies for immigrant victims to gain lawful immigrant status to prohibitions on landlords for discriminating against victims who apply for housing.[22] Advocates for animal rights have urged similar federal policy and legislation.[23]

In short, in the last half century, US law and policy reforms have caused a sea change in how the civil and criminal justice systems respond to DV. While there have been benefits for those victims who are able and who desire to use the justice systems for help, feminist activists who advocated for these landmark reforms, on reflection, have questioned their effectiveness in ending DV and meaningfully advancing the rights and safety of victims.[24] Their questions flow from several of the unforeseen consequences of the reforms, discussed below.

[19] Garrine P. Laney, Cong. Rsch. Serv., RL30871, Violence against Women Act: History and Federal Funding 4 (2005).

[20] Marceau, *supra* note 2, at 205 ("Legislators are contemplating animal abuse registries, and the FBI recently announced that it will track statistics for animal abuse, just as it does with other serious crimes. All of these reforms are endorsed by the animal protection community").

[21] Goodmark, *supra* note 1, at 17.

[22] Violence against Women and Department of Justice Reauthorization Act of 2005 (VAWA III), Pub. L. No. 109-162, 119 Stat. 2960 (2005).

[23] Marceau, *supra* note 2, at 205 (discussing how the FBI is tracking statistics for animal abuse akin to other serious crimes).

[24] Gruber, *supra* note 6, at 88; Elizabeth M. Schneider, Battered Women & Feminist Lawmaking 52 (2000).

> The promise of "legal liberalism" is disconnected from the realities of women's lives. Legal intervention alone cannot do the job. Legal intervention may provide women certain protection from battering, but it does not provide women housing, support, childcare, employment, community acceptance, or love…The contradiction is profound.

See also Goodmark, *supra* note 1, at 28.

> [T]he movement fought for and won legislative victories that allowed it to reconstruct the legal landscape, creating criminal and civil justice remedies and funding the development of those systems. But those victories came at a price. The movement went from being woman-centered to victim-centered, from self-help to saving, from working with women to generate the options that best met their needs to preferring one option, separation, facilitated by the intervention of the legal system, from being suspicious of and cautious about state intervention to mandating such intervention. The question is whether, for women subjected to abuse, that price has been worth paying.

8.3 PROBLEMS WITH OVERRELIANCE ON THE CRIMINAL JUSTICE SYSTEM

8.3.1 *Crowding Out of Other Solutions*

Massive federal funding continues to be diverted to the enforcement of the criminal law as a primary solution to the problem of DV.[25] The problem, stated succinctly by Professor Leigh Goodmark, is that "in the zero-sum game of funding, monies spent on law enforcement are not spent on other crucial services like housing, job training, education or economic development."[26] Housing is the number-one need of people experiencing abuse.[27] Unemployment and poverty have for years been known to be not merely risk factors associated with increased danger and lethality, but structural causes of DV.[28] One study showed that women who experience abuse have benefited as much from having help with child care, laundry, and errands as from legal advocacy.[29] Outsourcing the problem of DV to the justice system has precluded community-driven solutions and drained commitment to social and mental health services for both those who perpetrate and those who experience abuse. It has also decreased the available emergency shelter beds for women, children and their pets, which is important not only practically but symbolically, given that the battered women's movement began as a shelter movement.

The continued faith in the efficacy of law, and particularly criminal law, to redress DV is therefore puzzling for several reasons. First, it ignores the explicitly stated needs of people who experience abuse – this, despite that the concept of listening to women's voices and to their lived experience is a central tenet of the battered women's movement. Second, it comes at the high price of racial injustice, not merely in the overincarceration of Black men and the deportation of brown men, though these phenomena are well documented. But with the funneling of money toward punitive criminal and immigration law enforcement, and the decrease in funding for housing, there has been an increase in the eviction of women of color from their homes. As Mathew Desmond succinctly observed in his Pulitzer Prize–winning book, *Evicted: Poverty and Profit in the American City*, "If incarceration had come to define the lives of men from impoverished Black

[25] GOODMARK, *supra* note 8, at 3.
[26] GOODMARK, *supra* note 1, at 22.
[27] GOODMARK, *supra* note 8, at 3.
[28] *Intimate Partner Violence: Risk and Protective Factors for Perpetration*, CDC: VIOLENCE PREVENTION, www.cdc.gov/violenceprevention/intimatepartnerviolence/riskprotectivefactors.html (last updated Oct. 9, 2020).
[29] LISA GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN, A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH AND JUSTICE 24-25 (AMERICAN PSYCHOLOGICAL ASSOCIATION 2008).

neighborhoods, eviction was shaping the lives of women. Poor Black men were locked up. Poor Black women were locked out."[30]

What is worse is that increased criminalization has not made the impact hoped for by activists regarding the prevalence of DV. Although there has been some evidence of a decrease in rates of DV beginning about a decade after the VAWA first passed, this decline has not been substantial. Between 2004 and 2010, rates of DV fell, but they fell less than the overall crime rate.[31] Between 2012 and 2019, rates of DV have not fallen, but stagnated.[32] Given the hundreds of millions of dollars specifically directed to criminal law enforcement since 1994, this trend is deeply problematic.[33] Worse, though, is that funding for criminal law enforcement has increased – and funding for housing and social services decreased – in *every* reauthorization of the Violence Against Women Act since 1994.[34]

8.3.2 *Detrimental Consequences of Mandating Arrest*

Most striking is that in states with mandatory arrest laws, there has been evidence of an *increase* in serious violence against women; for example, a 2005 study found a 54 percent increase in intimate partner *homicides*.[35] Dialing back mandatory arrest, even without other changes, may benefit women, especially women in low-income communities of color.[36] The increase in homicide rates, combined with victims' increasing reluctance – since the promulgation of aggressive arrest and prosecution policies – to call the police for help should give animal rights activists pause.[37]

[30] Matthew Desmond, Evicted: Poverty and Profit in the American City 98 (2016).

[31] *See* Shannan Catalano, Intimate Partner Violence 1993–2010, Bureau of Justice Statistics, U.S. Dep't of Justice 1 (Nov. 2012), www.bjs.gov/content/pub/pdf/ipvus.pdf.

[32] Number of Violent Victimizations by Victim-Offender Relationship and Sex, 1993–2019, Bureau of Justice Statistics, U.S. Dep't of Justice. (Generated using the NCVS Victimization Analysis Tool, www.bjs.gov, Dec. 16, 2020.).

[33] Professor Leigh Goodmark has repeatedly argued this point. Most recently, *see* Alisha Haridasani Gupta, *Is the Legal System an Effective Solution to Domestic Violence?* N.Y. Times (Dec. 16, 2020), www.nytimes.com/2020/12/15/us/domestic-violence-fka-twigs-shia-labeouf.html.

[34] As of this writing, the Violence Against Women Act is on the cusp of being reauthorized for the fifth time; there is reason to hope that it *may* provide funding to noncriminal solutions such as community education regarding cultural messages about the acceptability of DV. *See* H.R. 1620, 117th Cong. (as passed by House, March 17, 2021), /www.congress.gov/bill/117th-congress/house-bill/1620/text.

[35] Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws*, 93 J. of Pub. Econ. 85, 89 (2009).

[36] Aya Gruber, *How Police Became the Go-to Response to Domestic Violence*, SLATE (July 07, 2020), https://slate.com/news-and-politics/2020/07/policing-domestic-violence-history.html.

[37] *See* Donna Coker et al., *Responses from the Field: Sexual Assault, Domestic Violence and Policing*, ACLU 1, 1 (Oct. 20, 2015) (An overwhelming majority of the respondents, 88 percent, reported that police "sometimes" or "often" do not believe victims or blamed victims for the violence); T.K. Logan & Rob Valente, *Who Will Help Me? Domestic Violence Survivors Speak Out about Law Enforcement Responses*, The Nat'l Domestic Violence Hotline 1, 2 (2015)

Another unforeseen consequence of mandatory arrest has been the increased arrest of women for abusing their male partners.[38] Though more women are being arrested, there has been no empirical data suggesting that women's use of violence in their relationships has dramatically increased.[39] As a result, it is difficult not to wonder whether the increase in arrest of women is directly attributable to the implementation of mandatory arrest laws. Mandatory arrest laws compel police to make *an* arrest, one way or another, if they have probable cause to believe that DV occurred. Perhaps for this reason, and in hindsight, it makes sense that arrest rates of women increased with the promulgation of mandates; after all, it is beyond empirical doubt that women can, and do, use physical violence in their relationships, whether they be relationships with other women or with men.[40]

But "[w]omen typically do not control, intimidate, or cause fear in their partner when they use violence, which is the opposite of the goals that most male abusers try to accomplish through their use of force against their female partners."[41] The question then is whether the police can, or should, at the scene of a domestic disturbance, attempt to understand the context and history of the parties. Given that police are resistant even to determining who physically attacked whom first (or who was the primary aggressor), asking police to complete a contextual analysis is unrealistic. More problematic generally, though, is that many police do not appreciate that their discretion to arrest has been taken away with "bullshit laws" like mandatory arrest laws.[42]

Another type of violence in intimate relationships is "violent resistance."[43] This occurs when people who've been systematically abused anticipate an incident of physical abuse and so they, the victims, provoke it by attacking first. This type of violence in intimate partnerships is different in kind from the type that anti-DV advocates wanted to prevent; they wanted to prevent the ongoing pattern of coercion and/or physical violence for the specific purpose of controlling a partner. Violent

(More than half of the participants said calling the police would make things worse, and two-thirds or more said they were afraid police would not believe them or do nothing).

[38] *See, e.g.*, Shamita Das Dasgupta, A *Framework for Understanding Women's Use of Nonlethal Violence in Intimate Heterosexual Relationships*, 8 Violence against Women 1364, 1365 (2002); Lisa Y. Larance et al., *When She Hits Him: Why the Institutional Response Deserves Reconsideration*, 5 Violence against Women Newsletter, 2005, at 10–18; Martha McMahon & Ellen Pence, *Making Social Change, Reflections on Individual and Institutional Advocacy with Women Arrested for Domestic Violence*, 9 Violence against Women 47, 47–74 (Jan. 2003).

[39] Alesha Durfee, *Situational Ambiguity and Gendered Patterns of Arrest for Intimate Partner Violence*, 18 Violence against Women 64, 75 (2012).

[40] Susan L. Miller, Victims as Offenders: The Paradox of Women's Violence in Relationships ix (2005).

[41] *Id.* at x.

[42] *Id.* at 58–59.

[43] This term was coined by sociologist Michael Johnson. *See* Joan B. Kelly & Michael P. Johnson, *Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 Fam. Ct. Rev. 476, 479 (2008).

resistance is nonetheless "domestic violence" under many states' criminal laws. Or it could be that at the scene of a domestic disturbance, it is simply too difficult to determine whether an act of violence is one of self-defense versus proactive aggression.

For all these reasons, given no, or little, discretion about making *an* arrest at the scene of a domestic disturbance, police may err on the side of being safe rather than sorry by arresting both parties at the scene, a phenomenon known as dual arrest. Whatever the cause, mandatory arrest laws that take away police discretion have proven not to be as effective as anti-DV activists had hoped and, in fact, have in many cases hurt the people that they were intended to protect. Why should any of this matter to animal rights activists? Put simply, if criminal law hurts rather than helps, it may not be easy to amend, let alone repeal. Particularly in this day and age, when laws that ratchet up, rather than down, carceral solutions are sticky.

8.3.3 *Police as Perpetrators of DV*

One group of people who have never borne the risk of overarrest are police themselves. Yet rates of DV are higher amongst police than in the general population.[44] Little attention has been paid to this issue by anti-DV and by animal rights activists.

In his 2014 article in the *Atlantic*, entitled *Police Have a Much Bigger Domestic-Abuse Problem Than the NFL Does*, journalist Connor Friedersdorf noted the dearth of empirical data available. He relied upon the only sources he could find: a fact sheet created by the National Center for Women and Policing,[45] finding that "[t]wo studies have found that at least forty percent of police officer families experience DV, in contrast to ten percent of families in the general population. A third study of older and more experienced officers found a rate of twenty-four percent, indicating that DV is two to four times more common among police families than American families in general."[46]

Friedersdorf also cited a 2013 investigative article in the *New York Times*, finding "In some cases, researchers have resorted to asking officers to confess how often they had committed abuse. One such study, published in 2000, said one in 10 officers at seven police agencies admitted that they had 'slapped, punched or otherwise

[44] *See generally* Leigh Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 2015 BYU L. Rev. 118 (2015).

[45] When I started research for this chapter in July 2020, I visited the National Center for Women and Policing website and found the fact sheet to which Friedersdorf refers, which I copied and pasted into a word document. The link no longer works but the fact sheet is on file with the author.

[46] Conor Friedersdorf, *Police Have a Much Bigger Domestic-Abuse Problem Than the NFL Does*, The Atl. (Sept. 19, 2014), www.theatlantic.com/national/archive/2014/09/police-officers-who-hit-their-wives-or-girlfriends/380329/.

injured' a spouse or domestic partner."[47] After reporting requirements were tightened in 2007, requiring fingerprints of arrested officers to be automatically reported to the agency that licenses them, the number of domestic abuse cases more than doubled – from 293 in the previous five years to 775 over the next five.

Advocates for animal rights should care about higher rates of abuse amongst police because of the correlation between the abuse of intimate partners and the abuse of the partner's animals.[48] In domestic violence cases, perpetrators often threaten to, or actually do, cause harm to animals as a means of coercing or causing psychological injury to their intimate partners. If police are more likely than people in the general population to abuse their partners, and a form of abuse of partners is harming that partner's animals, police may as a group be more likely to abuse animals. Before relying on police as first responders to the problem of abuse of animals, activists must investigate carefully their rates of abuse of animals lest they find themselves in the same conundrum as anti-DV activists: relying on perpetrators to protect victims.

But there is a more troubling issue lurking here. Many animal rights advocates vehemently argue that there is a link between violence against animals and the proclivity to use violence against people. This link is one justification that animal rights activists use in support of more officers enforcing animal crimes. In other words, more police, if animal activists are correct about the link, should reduce domestic violence. Alas, the *opposite* is true in the context of DV. More police enforcing animal laws yields more, not less, abuse of people.

8.3.4 *Co-option of the Definition of DV*

Overreliance on the criminal justice system response had another unintended consequence in the broader social context. The definition of DV changed from what activists in the early battered women's movement intended. This movement grew out of the women's liberation movement of the 1960s and 1970s. At its inception, the "battered wives' movement," as it was first called, was about ensuring that women not only had the right to be safe in their own homes, but the right to be equal. Physical violence against women was just one manifestation of a larger pattern of subordination that included many other forms of control – over money, jobs, education, relationships outside of the home, to name a few. The goal of early

[47] *Id.* (quoting from Sarah Cohen et al., *Departments Are Slow to Police Their Own Abusers*, N.Y. Times (Nov. 23, 2013) www.nytimes.com/projects/2013/police-domestic-abuse/index.html).

[48] *See generally* Sharon L. Nelson, *The Connection between Animal Abuse and Family Violence: A Selected Annotated Bibliography*, 17 Animal L. 369 (2011); Frank. R. Ascione *et al.*, *Battered Pets and Domestic Violence: Animal Abuse Reported by Women Experiencing Intimate Violence and by Nonabused Women*, 13 Violence against Women 354 (2007); Jeff Fink, *The Link: Domestic Violence and Animal Abuse*, Off. of Women's Health Blog (Nov. 7, 2017), www.womenshealth.gov/blog/domestic-violence-animal-abuse.

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activists was to win autonomy – the ability to be full and equal citizens in society – not merely to win the right to be physically safe.

The criminal law definition focuses – as it does in cases of assaults perpetrated by a stranger – on a discrete, physical incident of violence.[49] It is the criminal definition, and not control over money or access to education or jobs, that people commonly think of when they think of DV. Think for a moment of the ads we see during the Super Bowl, or the images of women with black eyes on billboards. None captures the underlying causes of DV; all capitalize on the physical injury that matters to the criminal definition of DV.

There is thus a mismatch between the conduct for which offenders are arrested, restrained, and prosecuted, and the construct of DV as many activists understand it. The VAWA defines DV as "any felony or misdemeanor crime" perpetrated by one person against another in an intimate or familial relationship.[50] The felony or misdemeanor is set forth in states' criminal codes. No state statute criminalizes a "pattern of behavior for the purpose of gaining power and control" in a relationship. Indeed, few states have codified a standalone offense of "DV." Instead, states label, categorize, or enhance the penalties for numerous crimes such as assault, battery, and kidnapping in one circumstance: when perpetrated in a relationship.[51] Few state statutes mention, let alone require proof of, any motive.[52] Nor does any state statute require that criminal acts of violence within an intimate relationship be part of a

[49] Evan Stark, *Re-presenting Battered Women: From Battered Woman Syndrome to Coercive Control*, 58 Ala. L. Rev. 973, 980 (1995).

[50] 34 U.S.C.A. § 12291(a)(8) (2017).

[51] Ala. Code § 13A-6-130 *et seq.*, § 13A-6-138, § 13A-6-139.1 (1975); Ariz. Rev. Stat. Ann. § 13-3601 (A), § 13-3601.02 (2007); Ark. Code Ann. § 5-26-303 *et seq.*, § 5-26-306 et seq. (2017); Ga. Code Ann. § 16-5-23(f) *et seq.* (2015); Haw. Rev. Stat. Ann. § 709-906(1); Idaho Code Ann. § 18-918 (2018); 720 Ill. Comp. Stat. Ann. 5/12-3.2 et seq. (2015); Ind. Code Ann. § 35-31.5-2-76, et seq. (2016); Iowa Code Ann. § 708.2A (2017); Kan. Stat. Ann. § 21-5414 (2018); Ky. Rev. Stat. Ann. § 508.032; La. Stat. Ann. § 14:35.3, § 14:37.7 (2018); Me. Rev. Stat. tit. 17-A, § 207-A, § 209-A, § 210-B, § 210-C, § 211-A (2018); Mich. Comp. Laws Ann. § 750.81(2) (2016); Minn. Stat. Ann. § 609.2242, § 609.2247; Miss. Code. Ann. § 97-3-7(3)(a), § 99-3-7(5); Mo. Ann. Stat. § 565.072, et seq. (2017); Mont. Code Ann. § 45-5-206; Neb. Rev. Stat. Ann. § 28-323; Nev. Rev. Stat. Ann. § 33.018, § 200.485 (2018); N.H. Rev. Stat. Ann. § 631:2-b; N.J. Stat. Ann. § 2C:25-19 (2016); N.M. Stat. Ann. § 30-3-12, *et seq.*; N.C. Gen. Stat. Ann. § 50B-1 (2015); Ohio Rev. Code Ann. § 2919.25 (2019); Okla. Stat. Ann. tit. 21, § 644, *et seq.*; 12 R.I. Gen. Laws Ann. § 12-29-2; S.C. Code Ann. § 16-25-20, § 16-25-65 (2015); Tenn. Code Ann. § 39-13-111 (2018); Utah Code Ann. § 77-36-1(4) (2018); Vt. Stat. Ann. tit. 13, § 1042; Va. Code Ann. § 18.2-57.2 (2014); Wash. Rev. Code Ann. § 10.99.020; W. Va. Code Ann. § 61-2-28 (2017); Wis. Stat. Ann. § 968.075 (2016); Wyo. Stat. Ann. § 6-2-510, *et seq.* (2018).

[52] No state statute mentions "power and control," but some mention "coercion" and "control." *See, e.g.*, Colo. Rev. S. § 18-6-800.3, which defines DV for the purposes of sentence enhancement as "an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship," and as "any other crime against a person. . .- when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship."

pattern, though repeated acts against the same partner might warrant enhanced penalties.[53]

Thus, *any* single criminal act committed by one partner against another, for *any* reason, can qualify as a crime subjecting the perpetrator to mandatory arrest, aggressive prosecution, and restraint. This treatment bears little resemblance to the definition of DV that anti-DV activists most wanted, and indeed still do want, to target: a pattern of acts, not necessarily including physical violence, in which one partner seeks to control the liberty and autonomy of the other.

In short, the criminalization strategy usurped the very definition of the problem, as conceived of by anti-DV movement leaders. In 2006, pioneering activist Ellen Pence wrote:

> the new laws as well as procedures and public policies that were crafted to confront such abuse, lumped all acts of domestic violence into a unitary category. For example, the phrase "zero tolerance" was coined to emphasize the struggle to end intimate partner battering. However, over the years, its target has been extended to include all violence and any potential violence. That is, the single focus of stopping the ongoing use of violence and coercion against women by their partners became a diffused goal of confronting all acts of violence between couples under the rubric of "zero tolerance." We differ with this over-generalization and believe that it would lead to a "one-size-fits-all" intervention approach, which would meet neither the goals of fairness nor public safety.[54]

Overreliance on law's definition of DV draws attention away from, rather than toward, systemic violence, risking that we lose the war to win only small battles. At the beginning of the second wave of feminism in the early 1970s, activists made connections between abusive tactics within relationships and the larger institutions that supported those individual tactics. After naming specific tactics of an individual abusive partner, a second inquiry always followed. Women in shelters and in community support groups were asked to name, explicitly, all the "institutional and community decisions [that] support [the] individual batterer's ability to use abusive tactics (police, courts, media, medical, clergy, business, education, human services)."[55] Today, people who experience abuse are asked only the former. As noted by sociologist Joshua Price, the "second part of the code, *that part that seeks to*

[53] Ga. Code Ann. § 16-5-23.1; Ind. Code Ann. § 35-42-2-1.3(c)(4) states that "Domestic Battery" is a Class A misdemeanor, but the crime becomes a Level 5 felony if the person has a previous conviction for a battery offense against the same family or household member, or has a previous conviction for a similar offense in any other jurisdiction against the same family or household member; Mich. Comp. Laws Ann. § 750.81 (2016); N.M. Stat. Ann. § 30-3-17 (2008).

[54] Ellen Pence & Shamita Das Dasgupta, *Re-examining "Battering": Are All Acts of Violence against Intimate Partners the Same?* Praxis Int'l, Inc. 2, 2–3 (June 20, 2006), https://praxisinternational.org/wp-content/uploads/2016/02/ReexaminingBattering-1.pdf.

[55] *See* Joshua M. Price, Structural Violence: Hidden Brutality in the Lives of Women 21 (2012).

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uncover and describe institutional and cultural collaboration with the batterer, is often eliminated."[56]

A growing consensus among feminist scholars, in addition to activists, is that too little attention has been paid to the contribution of structural conditions to the problem of intimate partner violence[57] and too much attention has been paid to fine-tuning the law.[58] How could this not be the case, when law and particularly criminal law is the primary solution we have created for addressing DV?

The potential for co-option of definition should be of even greater concern to animal rights activists. The animal rights movement has yet to come to agreement, amongst its stakeholders, about what is, and what is not, abuse and what will, and what will not, sufficiently protect nonhuman beings.[59]

8.4 REFLECTIONS FROM THE TRENCHES

Recently, I was asked to make a presentation to the staff of a local anti-DV agency. One of the members of the audience asked: "What's the biggest change, since you were a shelter worker in 1990, about how we (advocates in shelters) help people experiencing domestic violence?" In reply, I recalled that I was taught to counsel women: "Leave. Abuse *only* increases over time. If you don't leave, things *only* are going to get worse. Leaving is the *only* way to be safe." This was the training I received as a shelter worker, in the early 1990s; this was the training that many shelter workers and anti-DV advocates received at the time.[60]

Yet only twenty years earlier, at the start of the shelter movement, getting women to leave their partners was not the goal. At the start of the second wave, the idea was to help people experiencing abuse identify their own solutions while providing them a space to live that was safe. Shelter provided not merely housing in an emergency,

[56] *Id.* at 25.

[57] *See, e.g.*, Deborah M. Weissman, *The Community Politics of Domestic Violence*, 82 BROOK. L. REV. 1479, 1480 (2017) (characterizing the anti-IPV movement as "indifferent to the structural sources of domestic violence as a problem"); *Id.* at 1483 ("Domestic violence persists as manifestation of gender and other forms of inequality, and social norms that oppress and repress victims. But mainstream responses often accomplish little to eliminate or repair damage, and often serve to undermine alternate responses to structural problems deeply entangled in a complicated web of larger political-economic crises.").

[58] *See, e.g.*, Kristin Bumiller, *The Nexus of Domestic Violence Law Reform and Social Science: From Instrument of Social Change to Institutionalized Surveillance*, 6 ANN. REV. L. & SOC. SCI. 173, 185 (2010) (demonstrating the focus on evaluating efficacy of law and arguing that a better question to address would be how domestic violence is linked to underlying conditions that create violence in the home, including the conditions that perpetuate women's subordination and gender inequality).

[59] MARCEAU, *supra* note 2, at 3 (noting the divergency "almost to the point of incompatibility" of the definition of animal protections and animal abuse).

[60] DONILEEN LOSEKE, THE BATTERED WOMAN AND SHELTERS: THE SOCIAL CONSTRUCTION OF WIFE ABUSE (1992).

but the support and company of other women; childcare co-ops; advocacy for benefits; job training; and a host of other supports.

Today, we (advocates for survivors) have returned to an era in which we don't dictate to women what to do. We sit down with each survivor, aspiring to partner with them to create realistic strategies given their particular context. We now understand that DV is not a problem for which a single solution can work for everyone, let alone be summed up in a sentence. We understand that "we" don't tell "them" how to live. We understand that suggesting that someone "just leave" an abusive home is about as realistic as asking teens to "just say no" to drugs.

Unfortunately, the response offered by the criminal justice system has not been recalibrated. Separation of the parties via mandatory arrest, aggressive prosecution, and automatically imposed criminal restraining orders, regardless of the individual victim's wishes, is the system's singular response to people who experience DV. The criminal justice system's separation strategy is a strategy that anti-DV activists lobbied for. Because anti-DV activists put all their eggs in the criminalization basket as a means of ending DV, rather than in community-based, or economic or restorative or therapeutic or other justice strategies, it is a strategy that we no longer have control over, and one that we therefore will not be able to undo anytime soon.

If I were able to rewind the clock, I would spend considerably more time gathering data to better understand what victims actually need, and then spend considerably more time prioritizing that need. In the case of DV, victims tell us what they need. They need housing. They need a safe space to live, and not just a safe place to "be" temporarily, for the thirty or sixty days that most shelters offer. They need a home of their own and one that is in their community. I would look less to law generally, but far less to criminal law particularly, as a means of changing a social norm – especially ones that are sticky, such as DV and the abuse of nonhuman beings. I would look more toward the community and the building of relationships and alliances and ascertaining where values across various constituencies align, to create momentum for change at a grassroots level. The anti-DV movement has alienated communities of color in its efforts. This too, I fear, will not be undone any time soon.

Perhaps the most important lesson to draw about the criminalization strategy in the anti-DV realm is one that cuts deep. Given the incontrovertible data about overincarceration generally, but overincarceration of certain groups of people more than others, it is hypocritical (to put it mildly) for social movements to on one hand fight for equality using terms like dignity, liberation, and "humane" treatment while on the other turning a blind eye to the inhumane treatment of so many people in the criminal justice system. It is my hope that animal rights activists will, if they do not already, see the writing on the wall.