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## Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence

Tamara L. Kuennen\*

### ABSTRACT

*This Article maps out a new theoretical critique of no-drop prosecution policies, the criminal justice system's predominant approach to domestic violence. No-drop rules compel prosecutors to make decisions about whether to pursue charges against a batterer without regard to the victim's wishes. When the law mandates this approach, it not only enforces the criminal law, but also effectively terminates the relationship between the victim and her partner. This blunt response to what is often a complex situation indiscriminately dispenses with the many reasons a victim may want or need to preserve her intimate relationship.*

*While numerous scholars have grappled with the issue of no-drop prosecutions, with few exceptions, the body of academic literature has neglected to fully consider the norms and values associated with the intimate relationship between the victim and batterer, and between the victim and other communities. This Article introduces an original perspective to this scholarly discourse that draws from a source that at first seems completely unconnected to domestic violence—Relational Contract Theory (“RCT”). RCT has been employed to criticize substantive contract law by arguing that the law ought to analyze a discrete, legally significant incident (e.g., a breach) in the context of the ongoing relationship between the parties. It suggests that for the law to understand any single incident—let alone design an effective remedy for it—it must assess the significance of the multiple and complex human relations that surround the incident. Drawing on that perspective, the Article contends that states' decisions about whether to prosecute would be enhanced by permitting prosecutors to look at discrete incidents of domestic violence with a more nuanced assessment of the*

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*parties' relational values rather than unilaterally tossing aside those important considerations.*

*The Article begins by documenting the evolution of the no-drop prosecution rule, and surveys the debate amongst feminist legal scholars with regard to the values and limits of no-drop. This section of the article concludes that scholars have not sufficiently considered the importance of the relation. Next, the Article discusses the methodology of RCT and models how it could be applied to the prosecutorial decision-making process in domestic violence cases. Viewing the relationship underlying the incident of violence as an exchange, and applying the relational method to that exchange, brings into focus all that a victim gets from the relationship and all that she loses by leaving it. The Article anticipates and addresses resistance to incorporating relational values into domestic violence law. It also responds to the fear that importing relational principles to this context will mean a return to an era in which the state treats domestic violence as a private, relationship problem rather than a crime. It suggests instead that there is room between the current no-drop regime and the "always-drop" policy of the past to address the relational values of victims. The Article concludes by demonstrating how the application of relational principles to domestic violence prosecution may, in fact, advance feminist values.*

## I. INTRODUCTION

When prosecutors follow the no-drop prosecution rule<sup>1</sup>—the criminal justice system's predominant response to domestic violence—they not only enforce a criminal law, but also effectively terminate the relationship between the victim and her partner.<sup>2</sup> Both our current legal regime and our social prejudices suggest that ending this relationship is the only desirable outcome.<sup>3</sup> This blunt response to what is often a complex situation fails to take into account the many reasons why couples involved in domestic violence incidents may want to nonetheless preserve their relationships.<sup>4</sup>

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1. "No-drop" refers to an amalgam of policies that limit a prosecutor's discretion to drop domestic violence cases based solely on the victim's request and that consequently limit the victim's ability to withdraw a complaint. A concept related to the no-drop rule is "victimless" prosecution. See *infra* notes 43–45 and accompanying text.

2. See discussion *infra* Part II.B.

3. *Id.*

4. See discussion *infra* Part II.C.

While feminist and other scholars have long debated the values and limits of the no-drop prosecution rule, the conversation has been limited mostly to weighing only two distinct interests: safety and autonomy. Those who support no-drop prosecution and other devices that remove decision makers' discretion in domestic violence ("DV") cases argue that women are safer under such a rule because it prioritizes punishing and deterring the batterer over any other consideration.<sup>5</sup> Feminists who oppose no-drop rules contend that the legal regime's enforcement of criminal statutes without regard to victims' wishes undermines their autonomy, which is a paternalistic and disempowering policy.<sup>6</sup> With few exceptions, scholars on both sides of this discourse have not assessed no-drop prosecution in light of the norms and values associated with the intimate relationship between the victim and batterer. In this Article, I introduce a new perspective to the scholarly debate by drawing from a source that at first seems completely unconnected to DV—Relational Contract Theory ("RCT").

I argue that DV law has much to learn from RCT. RCT makes the case that for the law to understand any single incident—let alone design an effective legal remedy for it—it must closely examine the multiple and complex human relations that surround the incident.<sup>7</sup> When those relations are not particularly significant, treating the parties like arm's-length transactors (in contract) or like strangers (in DV prosecution) by evaluating the discrete incident alone may suffice.<sup>8</sup> The more intertwined the parties, however, the more the norms and values surrounding their relations govern the parties' behaviors.<sup>9</sup> Consequently, the law must account for those norms and values. To the extent that it does not, the law becomes "empirically

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5. See discussion *infra* Part II.D.

6. *Id.*

7. James W. Fox, Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE W. RES. L. REV. 1, 12 (2003) ("[R]elational contract theories force us to look outside doctrine and toward the world of contract actually practiced; they ask us to think very seriously about the world of human relations surrounding what we tend to think of as the legal contract.").

8. RCT does not suggest that a relational approach is necessary in all cases. In some cases, where relations do not significantly affect the transaction, a transactional analysis will suffice. However, RCT suggests that there are very few transactions that are not affected by the relations within which they occur. See discussion *infra* Part III.A.

9. See *id.*

irrelevant” and “incoherent,” in the words of Ian Macneil, founder of RCT.<sup>10</sup>

One may wonder how examining a private, contractual theory contributes to a debate about how the criminal justice system should respond to DV. First, it conceptualizes the underlying intimate relationship as an “exchange relation,” bringing into focus all that a victim gets from the relationship, and all that she has to lose by leaving it. I apply the foundational principles of RCT to DV law, and argue both that a victim’s relational values should be critical to the criminal prosecution of DV, and that RCT provides a method for determining what those values are and how significantly they impact what the current legal regime deems a successful solution to DV: severing the intimate relationship. In the same way that RCT has been an important perspective from which to criticize substantive contract law, the relational perspective can be a valuable lens through which to critique the current legal regime governing DV law.

Second, analogizing to a private, contractual theory abstracts the legal response from the political tensions of the feminist debate. The debate is understandably animated by the fear of losing ground in activists’ hard-won fight for state intervention in DV.<sup>11</sup> By applying RCT to DV, my goal is to compel a reexamination, freed of the political constraints of the current debate, of the wisdom of a legal approach that ignores relational values.<sup>12</sup>

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10. IAN MACNEIL, *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* 9 (David Campbell ed., 2001).

11. See, e.g., Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657 (2004) (warning that the divide amongst feminists with regard to aggressive state interventions threatens the ground gained). Christine Littleton called this a problem of transition. Christine A. Littleton, *Women’s Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 51 (“Often it appears as if feminist questioning of the [law’s] impulse toward separation should at least wait until women can count on the *law* allowing them to separate.”). For further discussion of the problem of transition, see discussion *infra* Part V.A.

12. For an example and discussion of the value of interdisciplinary work in which principles of one body of law have been applied to another, see Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119, 152–53 & n.194 (2003) (contrasting treatment of minority races in constitutional jurisprudence with treatment of minority shareholders in corporate law, and discussing the value of transferring theory, practice, and technology across legal domains). Particularly with regard to domestic violence, see, for example, CATHARINE A. MACKINNON, *ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* 261–74 (2006) (comparing international war crime of violence against women with domestic law crime of violence against women); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999) (examining theoretical possibilities of Navajo Peacemaking, an informal adjudicative model, outside of the Navajo locale); Bonita C.

I argue that in cases where the relational values tell us that separation is unlikely, because the victim wants or needs to preserve her relationship, a successful outcome should be re-defined to mean keeping her safer while in her relationship. RCT is particularly valuable in this endeavor. It is concerned with the creation and restraint of power in relations, and explicitly understands the law as a source of power. In the context of DV, victims would use the law to regain control in their relationships. The law, and particularly the threat of criminal prosecution, can be a substantial bargaining chip for victims if they can both threaten to use it and withdraw their threats when their partners comply with their demands.<sup>13</sup> No-drop policies do not provide this option.

By analogizing DV to RCT, I do not suggest that an incident of DV should be analyzed as a breach of contract, nor do I suggest that a relationship in which DV takes place be viewed as a purely private, contractual matter. My purpose is to examine how another body of law has addressed the problems posed by a discrete incident occurring within an ongoing, complex relationship. I conclude that importing some fundamental principles of RCT into prosecutorial decision-making policy avoids dispensing with norms such as love, harmony, and privacy that—outside of the context of DV—the law fosters.

Examining a different way to approach DV prosecution is particularly timely. In the past several years, the Supreme Court issued three decisions expanding a defendant's Sixth Amendment rights to confront his or her accuser.<sup>14</sup> These decisions will have a significant impact on DV prosecution because prosecutors now need to urge victims to testify, even in circumstances where victims do not want to pursue the charges.

This Article presents the case for consideration of relational values in the following manner. Part II documents the current regime's response to DV, explaining both what the state does and

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Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371 (2003) (comparing the international law definition of torture to the domestic law definition of domestic violence).

13. See discussion *infra* Part III.B.2.

14. These are *Crawford v. Washington*, 541 U.S. 36 (2004), *Davis v. Washington*, 547 U.S. 813 (2006), and *Giles v. California*, 128 S. Ct. 2678 (2008), discussed *infra* Part V.A. As a result of these holdings, prosecutors are likely to redouble their efforts to persuade victims to testify at trial. See Deborah Tuerkheimer, *Forfeiture After Giles: The Relevance of "Domestic Violence Context"*, 13 LEWIS & CLARK L. REV. 711 (2009).

why it does it. It then describes the ways in which the state's intervention impacts the private lives and relationships of victims and the debate in the literature with regard to the cost of this intervention to victim decision-making autonomy. Part III answers the question "Why Apply RCT to DV?" by first setting forth the overarching principles of the theory. It then illustrates how—outside of the context of no-drop prosecution—DV scholars argue in support of importing relational values into DV law. This section concludes by identifying and addressing a critique of the analogy between RCT and DV—that RCT applies to parties who have relatively equal power. I interpret RCT to be particularly concerned with exchanges involving unequal power, and argue that this makes RCT relevant in the context of DV.

In Part IV, I describe the methodology of RCT as it applies to exchange relations, and then discuss its value in the context of a particular DV case. I illustrate how viewing the underlying intimate relation as an exchange relation, and applying the relational method, enriches both prosecutorial decision making and the scholarly discussion surrounding no-drop policies. I conclude this section by addressing critics' potential normative arguments against importing relational values into DV prosecutorial policy.

Finally, Part V addresses the political problem for battered women's activists: the fear of returning to an era in which the state treats DV as a relationship problem rather than a crime. I argue here that the application of RCT provides an opportunity to implement feminist values in prosecutorial policy. RCT normalizes rather than pathologizes the desire to preserve relationships in the context of DV. It values people's actual experiences in the world, and holds that law should reflect these considerations. RCT understands that liberal notions of autonomy, upon which both contract and DV law are built, do not account for the web of interdependencies that are the reality of life. Many feminist legal scholars have long argued that all of these values should infuse law and policy. I argue that applying relational principles to DV prosecution is a step toward that goal.

## II. NO-DROP PROSECUTION OF DOMESTIC VIOLENCE

This Part describes the current criminal justice approach to DV. It begins by discussing the goals of battered women's activists in the 1960s and 1970s who lobbied for legal reforms requiring the criminal justice system to respond to DV as zealously as it would to

crimes of violence between strangers.<sup>15</sup> It then illuminates an unintended consequence of these reforms—the legal system’s emphasis on *termination* of the intimate relationship as a solution to DV—and explains the many reasons victims may need or choose to preserve their relationships rather than sever them. It then turns to the debate in the scholarly literature. Both proponents and opponents of aggressive, mandatory criminal justice reforms acknowledge that a victim’s autonomy is diminished. However, the autonomy of which they speak is the autonomy to make decisions that further one’s safety. Neither side of this debate pays enough attention to the autonomy to make decisions about one’s intimate relations and private life. As I will later argue, this type of autonomy is critical to victims, and therefore should be critical in prosecutorial decision making and the scholarly debate about it.

*A. The Transformation of DV from a “Relationship Problem” to a Crime*

Prior to the battered women’s movement of the 1960s and 1970s, the criminal justice system treated DV as a private matter in which it had no business interfering.<sup>16</sup> Battered women’s activists sought to change this perception.<sup>17</sup> They wanted DV to be treated as

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15. See *infra* notes 18–19.

16. SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN’S MOVEMENT 157–58 (1982). See generally Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1990). But see Donna Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 131–32 (Heather Strung & John Braithwaite eds., 2002) (arguing that it is inaccurate to describe the state’s response to domestic violence as a unified refusal to intervene in private family matters when there has been little objection to major state intervention when domestic violence is viewed as a race or class issue; in that case, the lives of poor women and women of color have been traditionally under-privatized).

17. ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 13 (2000) (“In the 1960s, with the rebirth of an active women’s movement in the United States, feminists again began to challenge this concept of family privacy; the new consciousness created by these efforts provided an arena in which hidden ‘private’ violence became more and more visible.”); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 191 (1989) (“Why a person would ‘allow’ force in private (the ‘why doesn’t she leave’ question raised to battered women) is a question given its insult by the social meaning of the private as a sphere of choice. . . . This is why feminism has had to explode the private. This is why feminism has seen the personal as the political.”). For a recent description of liberal and radical feminists’ deconstruction of privacy in the context of domestic violence, see Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 569–83 (2006).



seriously as a crime of violence between strangers.<sup>18</sup> The criminalization of DV was one piece of a larger political strategy designed to change cultural attitudes about violence against women.<sup>19</sup>

At the beginning of the battered women's movement, police did not routinely respond to reports of abuse.<sup>20</sup> When they did respond, they avoided making arrests.<sup>21</sup> Instead, they counseled, mediated, and helped the suspect "cool off."<sup>22</sup> Battered women recounted stories of police choosing not to arrest, even though perpetrators were still assaulting them when officers arrived at the scene.<sup>23</sup>

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18. SCHNEIDER, *supra* note 17, at 184 (describing the historic rationale for criminalization of domestic violence as "a clear statement that assault in intimate relationships will be treated the same as assault by strangers"). *But see id.* at 182 (describing how feminist activists have always been and continue to be deeply divided regarding the appropriateness of criminalization).

19. G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 265 (2005) ("Criminalization, as envisioned by advocates in the 1970s and 1980s, was strategic. The institution of mandatory practices, specifically arrest, was perceived as the first step in a process that would lead to a seismic cultural change by inscribing women's empowerment, individual and collective accountability, and conceptions of equality upon the cultural landscape.").

20. SCHECHTER, *supra* note 16, at 158 ("At the beginning of the movement, battered women complained frequently that the police simply would not come when called."); Miccio, *supra* note 19, at 274 ("Police arrest avoidance was the rule rather than the exception."); *id.* at 283 (describing the testimony of witnesses at the 1978 U.S. Commission on Civil Rights hearings regarding police arrest avoidance).

21. *See* LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 90, 95-105 (2008) (arguing that those involved in the domestic violence movement must understand the importance of a victim's relationships and community ties); SCHECHTER, *supra* note 16, at 159-60 (describing class action lawsuits brought by battered women in Oakland and in New York for failure to arrest); Sue E. Eisenberg & Patricia L. Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RTS. L. REP. 138, 156 ("Once inside the home, the officer's sole purpose is to preserve the peace[,] . . . attempt to soothe feelings, pacify parties . . . [and] suggest parties refer their problem to a church or a community agency. . . . In dealing with family disputes the power of arrest should be exercised as a last resort.").

22. *See* SCHECHTER, *supra* note 16, at 157, 161 (describing police being trained to mediate, rather than arrest); Miccio, *supra* note 19, at 269 ("Police would routinely separate the parties, take the assailant on the proverbial walk around the block, and permit him to return home with barely a slap on the wrist.").

23. SCHECHTER, *supra* note 16, at 160 ("One plaintiff's deposition stated that the police refused to arrest her husband even though he was still hitting her when they arrived and they had to pry his hands from around her neck."); Miccio, *supra* note 19, at 300 & n.275 (describing how in the 1970s and 1980s police refused to arrest even when they witnessed assaults, believing the assaults to be private matters); Sack, *supra* note 11, at 1690 (recalling when police watched a victim being beaten and did nothing in response).

Activists identified two problems in need of resolution.<sup>24</sup> First, they argued that, when given discretion, police would not arrest at all.<sup>25</sup> As a result of their law reform efforts, today many states' statutes do not merely authorize, but explicitly encourage and even require arrest.<sup>26</sup> Similarly, most states mandate police to arrest when they have probable cause to believe a violation of a DV restraining order has occurred.<sup>27</sup>

Second, activists argued that police viewed assaults that occurred in the home as less serious than assaults that occurred between strangers.<sup>28</sup> If an incident was viewed as a misdemeanor rather than a felony, police could not make an arrest at the scene without a warrant.<sup>29</sup> Thus, activists lobbied for the expansion of arrest powers so that, in DV cases, police could arrest without a warrant for misdemeanor (not just felony) offenses.<sup>30</sup> Today, laws in forty-nine states and the District of Columbia authorize police to make warrantless arrests in DV cases.<sup>31</sup>

Like police, prosecutors also viewed DV as a relationship problem rather than a crime.<sup>32</sup>

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24. SCHECHTER, *supra* note 16, at 159 (describing battered women's movement goals as (1) seeing that "wife beating was treated as a crime" by both working with the police to enforce the already existing laws and (2) by expanding police power to arrest).

25. *See id.* at 158, 160.

26. *See* Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L & SOC. CHANGE 191, 215 n.110 (2008) (recently compiling these statutes). In 1994, Congress passed the Violence Against Women Act ("VAWA"), authorizing the Attorney General to make funding available to jurisdictions that implemented pro-arrest and mandatory-arrest policies. *See* 42 U.S.C. § 3796hh (2008).

27. *See* Miccio, *supra* note 19, at 237 n.2 (compiling statutes that mandate arrest when there is probable cause to believe that a violation of a protection order has occurred).

28. SCHECHTER, *supra* note 16, at 159.

29. *Id.* (citing DEL MARTIN, BATTERED WIVES 90 (1976)).

30. SCHECHTER, *supra* note 16, at 159 ("As one lawyer noted, 'in battered women's cases, the police tend to view serious cases as misdemeanors rather than felonies so you must specify in legislation that the police may arrest without a warrant for a misdemeanor offense.'").

31. *See* Kohn, *supra* note 26, at 214 n.109 (compiling and describing states' statutes).

32. *See* Naomi R. Cahn & Lisa G. Lerman, *Prosecuting Woman Abuse*, in WOMAN BATTERING: POLICY RESPONSES 95, 96 (Michael Steinman ed., 1991) (explaining that prosecutors failed to proceed in domestic violence cases because they believed battering was a minor dispute or a private family matter); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 299-302 (1985) (describing family privacy as one of the many reasons that the legal system used to justify non-intervention); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47-48, 52-53 (1992).

Badly beaten women, desperate for protection, often saw charges reduced or dismissed by prosecutors and heard attorneys and judges alike recommend counseling or mediation. The constant taunts: “You don’t want to lock him up; he’ll lose his job; your kids need a father,” greeted battered women who tried to prosecute. Prosecutors considered these cases a bother, demanding proof of severe injury, promises to follow through, and “character” checks to verify battered women’s credibility as witnesses. Like rape victims, battered women often felt like the criminal.<sup>33</sup>

In addition to viewing DV as a relationship problem rather than a crime, another reason prosecutors dropped cases was because the victim either explicitly requested them to do so or she otherwise did not cooperate with the prosecutor.<sup>34</sup> Some activists believed prosecutors used victim non-cooperation as an excuse to drop,<sup>35</sup> while others worried that victims’ explicit or implicit reluctance to prosecute was due to intimidation or threats by the batterer.<sup>36</sup>

To correct prosecutors’ historic failure to initiate charges and follow through with prosecution in DV cases,<sup>37</sup> many battered women’s activists argued that prosecutors’ discretion to act, like that

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33. SCHECHTER, *supra* note 16, at 166.

34. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1861 & n.41 (1996); Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1857 (2002) (explaining district attorneys’ reluctance to waste time and resources on domestic violence cases in which victims typically did not follow through); Kohn, *supra* note 26, at n.150 (reviewing statistics gathered in the “early days” of no-drop prosecution, showing percentages of cases dropped and victims who purportedly wanted to drop).

35. SCHECHTER, *supra* note 16, at 175 (describing some activists’ views that victim non-cooperation was merely a rationalization for not proceeding with cases).

36. *Id.* It is worth noting here that this discussion implies that the victim, rather than the prosecutor, has the power to make the decision to dismiss or go forward with a charge. Only the prosecutor can determine whether to go forward with or “drop” a case. But as will be discussed *infra*, the term “drop” is commonly used in the literature to describe the victim’s desire for the prosecutor to go forward with or “drop” a case. See MICHELLE MADDEN DEMPSEY, *PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS* 14, 17 n.61 (2009) (explaining that victims ask, rather than officially decide, to drop and describing “no-drop” as a misnomer in the literature).

37. For discussion of prosecutors’ failure to initiate and follow through with charges, see R. EMERSON DOBASH & RUSSELL P. DOBASH, *WOMEN, VIOLENCE AND SOCIAL CHANGE* 146 (1992); Laura Dugan, *Domestic Violence Legislation: Exploring Its Impact on the Likelihood of Domestic Violence, Police Involvement, and Arrest*, 2 CRIMINOLOGY & PUB. POL’Y 283, 302 (2003); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 15 (1999); Hanna, *supra* note 34, at 1857.

of police, should be curtailed.<sup>38</sup> The state should, some activists argued,<sup>39</sup> prosecute it at the same rate and in the same manner as violence between strangers.<sup>40</sup> To achieve this formal equality, prosecutors must file and pursue charges based solely on the sufficiency of the evidence, like in any other case.<sup>41</sup> Limiting prosecutorial discretion in this manner would at once prevent prosecutors from using victim non-cooperation as an excuse to drop cases and it would discourage batterers from coercing victims to drop cases.<sup>42</sup>

This kind of policy was initially referred to as “no-drop”<sup>43</sup> or “mandatory”<sup>44</sup> prosecution. More recently it has been referred to as

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38. SCHNEIDER, *supra* note 17, at 184–86 (discussing activists’ arguments in support of no-drop); Miccio, *supra* note 19, at 265–66 (describing many feminists’ view of no-drop policies as a “necessary prophylactic”); Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL’Y REV. 51, 53 (2000) (describing activists’ arguments in support of less discretion).

39. Not all battered women’s activists were supportive of the criminalization strategy. Many expressed serious concerns about working with the criminal justice system because they identified the state as a source of women’s oppression and subordination. *See, e.g.*, SCHNEIDER, *supra* note 17, at 184 (“Historically, criminalizing domestic violence has been a strategy dogged by controversy. Because the state has been deficient in protecting women from abuse in the past, feminists have been wary of using state mechanisms to intervene on behalf of battered women.”); *see also* Miccio, *supra* note 19, at 266–67 (“Because mandatory practices first evolved as a political strategy, the discourse among feminists has been marked by reluctance and anxiety concerning interaction with the state. This anxiety reflects more than ambivalence; it reveals the distrust that feminists hold for law enforcement. . . . [T]he anxiety associated with mandatory arrest and prosecution is emblematic of the paradox inherent in working with systems that have been the sources of the problem.”).

40. Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225, 1232 (1996) (describing the legal treatment of domestic violence over the past decade as mirroring the “evolving consciousness . . . that men who beat their wives should be given the same legal treatment as men who beat their neighbors” and a belief that “the criminal justice system should act unequivocally to protect a battered woman from her abuser and that the threat of incarceration will deter future perpetrators from violence”).

41. *But see* MADDEN DEMPSEY, *supra* note 36, at 179 (arguing that although the call for law enforcement to treat domestic violence like any other crime has been used to support no-drop policies, in actuality “victim cooperation is widely taken as sufficient grounds for dismissal in the vast majority of generic assault” cases).

42. *See generally* Hanna, *supra* note 34, at 1852 (describing how a batterer’s threats to intimidate or dissuade a victim would be pointless); *id.* at 1854 (arguing that aggressive criminal prosecution would be one way to “make the criminal justice system more responsive to crimes that predominantly affect female victims”).

43. The term “no-drop” represents an amalgam of policies, from “hard” no-drop, in which a case proceeds regardless of the victim’s wishes, including sanctioning her should she refuse to participate, to “soft” no-drop policies, in which prosecutors do not force, but encourage victims to participate. *See id.* at 1863.

“victimless” or “evidence-based” prosecution.<sup>45</sup> While there is no single nationwide survey of existing DV prosecution policies,<sup>46</sup> scholars have reported various iterations of these policies over the years,<sup>47</sup> and a recent on-line search illustrates that they are in effect in many jurisdictions today.<sup>48</sup> As a result, the rate of DV prosecutions has dramatically increased.<sup>49</sup>

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44. Hanna coined this term, which she defines as a policy that “can require a woman to sign statements; be photographed to document injuries; be interviewed by police, prosecutors, or advocates; provide the state with other evidence or information; produce her children if subpoenaed; and appear in court throughout the proceedings.” *Id.* at 1867.

45. Though these terms are used interchangeably in the literature, they represent markedly different concepts. “No-drop” and “aggressive” prosecution refer to the normative proposition that the state *should* prosecute the case based on the sufficiency of the evidence, regardless of the victim’s desire. “Victimless” and “evidence-based” prosecution refer to a strategy or method for *how* the state can proceed with the case, without the victim’s cooperation. See MADDEN DEMPSEY, *supra* note 36, at 15–16, 21. Whether the state *should* versus whether it *can* prosecute DV are distinct questions that are at times conflated. See *id.* at 15. See also Kimberly D. Bailey, *The Aftermath of Crawford and Davis: Deconstructing the Sound of Silence*, 2009 BYU L. REV. 1 (2009) (discussing victimless prosecution as a method of prosecuting cases that is often used indiscriminately, without attention to the “should” question).

46. Hanna, *supra* note 34, at 1863; Telephone interview with Kristina Marie Korobov, Senior Attorney, National Center for Prosecution of Violence Against Women, National District Attorney Association (Apr. 2, 2009) (notes on file with author).

47. See Kohn, *supra* note 26, at 219 (noting that “[i]n many states, prosecution policies mandate that the state intervene in domestic violence cases and minimize the impact of victims’ preferences” and describing no-drop prosecution as “the prime example of this type of mandatory intervention protocol”). Examples of no-drop are cited in ANDREW R. KLEIN, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH, FINAL REPORT 45 (Apr. 2008) (compiling reports from National Institute of Justice funded studies on no-drop prosecution); Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 176, 180, 181–82 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (commenting on national mail survey developed by American Prosecutors Research Institute directed to 200 prosecutors’ offices; 85 responded to the question of how to proceed when the victim is uncooperative and, of these, 80 percent stated that they would proceed with the prosecution of the case). Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1520 n.52 (1998) (discussing jurisdictions with aggressive no-drop policies); Sack, *supra* note 11, at 1672 & n.75 (listing some, but not all, jurisdictions that have implemented no-drop prosecution policies); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006) (“A decision to effectively end a relationship is initiated by the prosecutor on behalf of the state, adjudicated as a criminal matter, and criminally enforced. It becomes an extension of the imperative to treat DV as a crime.”).

48. See *infra* App. I.

49. Kohn, *supra* note 26, at 225, 237 (“[N]o-drop prosecution policies have generally increased the percentage of cases charged and decreased the percentage dismissed . . . .”); Epstein, *supra* note 37, at 1858 (noting that in Washington, D.C., the conviction rates for stranger and domestic violence cases were virtually the same after the implementation of no-

*B. The Law Presumes Separation is the Solution*

The arrest and prosecution of DV on a scale similar to the arrest and prosecution of stranger violence has effected what some commentators have called a sea change in the state's approach to DV.<sup>50</sup> Through it, many argue, the state has sent a powerful symbolic message that it takes DV seriously—as a crime that will not be tolerated—rather than as a relationship problem.<sup>51</sup>

One unintended effect of the criminalization of DV is the criminal justice system's emphasis on separating perpetrators from victims as a solution to DV.<sup>52</sup> Separation is accomplished not only via arrest, prosecution, and in some cases incarceration,<sup>53</sup> but also through a relatively newer phenomenon: the widespread issuance of criminal restraining (or protection) orders.<sup>54</sup>

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drop and victimless prosecution); BARBARA E. SMITH ET AL., AN EVALUATION OF EFFORTS TO IMPLEMENT NO-DROP POLICIES: TWO CENTRAL VALUES IN CONFLICT 47 (2001) (evaluating no-drop policies in four sites: San Diego, California; Omaha, Nebraska; Everett, Washington; and Klamath Falls, Oregon, and observing the increase in prosecution rates).

50. Bailey, *supra* note 45, at 8; Epstein, *supra* note 37, at 14.

51. This “expressive value” is the most widely recognized value of no-drop policies discussed in the literature. MADDEN DEMPSEY, *supra* note 36, at 162.

52. See, e.g., DONILEEN LOESKE, THE BATTERED WOMAN AND SHELTERS 20 (1992) (“[T]he collective representation of wife abuse leads to the common sense conclusion that a woman *should* leave such a relationship, and this prescription is part of the collective representation: A woman experiencing wife abuse must leave her relationship.”); Sally Engle Merry, *Wife Battering and the Ambiguities of Rights*, in IDENTITIES, POLITICS, AND RIGHTS 271, 304 (A. Sarat & T. Kearns eds., 1995) (arguing that the price women pay for going to court is separation; law expects women to sever connections with violent men); Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1498 (2008) (“The cumulative effect of these [mandatory] reforms was a transformation of legal policy from the assumption that battered women should stay to the assumption they should leave.”); Leigh Goodmark, *Law is the Answer? Do We Know that for Sure? Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 8 (2004) (“[A]lmost all of these legal interventions are premised on the notion that battered women want to end their relationships, invoke the power of the legal system to keep their batterers away, and ultimately sever all legal ties with their abusers.”); Miccio, *supra* note 19, at 307 (“Both law and popular culture equate existence of violence with separation from the relationship . . . .”); Suk, *supra* note 47, at 59.

53. Miccio, *supra* note 19, at 290 (describing the solution for male intimate violence as arrest, prosecution, and incarceration of offenders) (citation omitted).

54. Kohn, *supra* note 26, at n.134 (compiling a list of state statutes and protocols); see also Lisa G. Lerman, *Criminal Prosecution of Wife Beaters*, 4 RESP. TO VIOLENCE FAM. 1, 19 (1981) (“To reduce case attrition, prosecutors should adopt a policy that once charges have been filed in spouse abuse cases, a victim’s request for dismissal will be denied unless there are exceptional circumstances.”). See generally Christine O’Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937 (1999).

A criminal protection order prohibits the defendant from having any contact with the victim.<sup>55</sup> Typically it is issued as a condition of the defendant's pre-trial release and remains in effect through final disposition of the criminal case.<sup>56</sup> As with mandatory arrest and no-drop prosecution, in many states victims have no input into the state's decision to issue the order.<sup>57</sup>

The purpose of a restraining order in a case that does not involve DV is to protect the integrity of the court proceeding by preventing the defendant from intimidating the victim. In a DV case, the state's use of the protection order goes far beyond this. Jeannie Suk argues that the state, viewing separation as a direct means of stopping violence, issues protection orders in lieu of punishment.<sup>58</sup> Separation is much easier to achieve than punishment.<sup>59</sup> Suk describes the process by which this is accomplished. The state reduces the charges or dismisses them, in exchange for the defendant's consent to the issuance of a protection order. If the protection order is violated, it constitutes a fresh crime—one that is far easier to prove than DV proper.<sup>60</sup> A defendant who contacts a victim, even if invited to do so, risks charges.<sup>61</sup> Occasionally victims—the parties protected by the orders—are criminally charged.<sup>62</sup> The result is that, regardless of

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55. O'Connor, *supra* note 54, at 947.

56. *Id.* at 946–47; Suk, *supra* note 47, at 48 (describing a typical order as preventing contact with the victim and the children, and excluding the defendant from the victim's home, even if it is his home).

57. Kohn, *supra* note 26, at n.134; Suk, *supra* note 47, at 48 (“Ascertaining whether the victim wants the order is not part of the mandatory protocol. The prosecutor generally requests a full stay-away order even if the victim does not want it.”(citations omitted)).

58. Suk, *supra* note 47, at 53 (“Court-ordered separation becomes a goal of prosecutors in bringing criminal charges—a substitute for, rather than a means of, increasing the likelihood of imprisonment. Punishment as a goal can be put on the backburner because separation is a more direct and achievable way to stop or prevent violence.”).

59. *See id.* at 18–19 (suggesting that obtaining a protection order is much easier than proving domestic violence).

60. *Id.* at 56.

61. *Id.* (“Even a phone call, letter, or e-mail risks arrest and criminal charges.”).

62. See, for example, Iowa's Petition for Relief from Domestic Abuse, at the bottom of which the following statement appears: “I . . . understand that I could be arrested and jailed for aiding and abetting defendant's violation of the protective order.” [http://www.iowacourts.gov/wfdata/frame3233-1389/petition\\_for\\_relief.pdf](http://www.iowacourts.gov/wfdata/frame3233-1389/petition_for_relief.pdf). For examples of victims held responsible for the restrained party's violation of the protection order, see Goodmark, *supra* note 52, at 25 (describing protection order cases in Kentucky, Indiana, and Ohio in which women are held in contempt of court for contacting the restrained parties, and describing this practice as a trend that is spreading); *cf.* SCHNEIDER, *supra* note 17, at 261 (“Several states, including Maine and Minnesota, confirm by statute what has become the

whether the perpetrator and victim are formally married, it is criminal for them to continue in their relationship.<sup>63</sup>

Intuition and common sense tell us that DV victims would be safer if they left their abusive partners. Statistics paint a very different picture. DV victims are at great risk of serious physical abuse after they separate from their perpetrators,<sup>64</sup> and run the greatest risk of being killed during the separation stage.<sup>65</sup> In 1991, Martha Mahoney named this violence “separation assault”<sup>66</sup> and defined it as “a specific type of attack that occurs at or after the moment [the victim] decides on a separation or begins to prepare for one.”<sup>67</sup> Empirical data supports Mahoney’s theory.<sup>68</sup>

Despite separation assault and post-separation violence statistics, legal actors (judges, lawyers, and court personnel) presume that

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working understanding in many jurisdictions, that a petitioner cannot be found in violation of her own order, even if she invites the defendant to ignore its terms.” (citations omitted)).

63. See Suk, *supra* note 47, at 53.

64. See, e.g., Callie Marie Rennison & Sarah Welchans, U.S. DEP’T OF JUSTICE, *Intimate Partner Violence* 5 (2000) (“[D]ivorced or separated persons were subjected to the highest rates of intimate partner victimization . . . .”); Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1115 (1996) (“Divorced and separated women report being battered 14 times as often as women still living with their abusers, and they account for 75 percent of all battered women killed by their past or present male partners.”).

65. Jacquelyn C. Campbell, *If I Can’t Have You, No One Can*, in FEMICIDE: THE POLITICS OF WOMAN KILLING 99–113 (J. Radford & D. Russell eds., 1992); Angela Browne & Kirk R. Williams, *Gender, Intimacy, and Lethal Violence: Trends from 1976 Through 1987*, 7 GENDER & SOC’Y 78, 84–87 (1993).

66. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65 (1991).

67. *Id.*

68. See, e.g., Laura Dugan, Daniel S. Nagin & Richard Rosenfeld, *Do Domestic Violence Services Save Lives?*, 250 NAT’L INST. OF JUST. J. 20, 22 (2003) (reviewing homicide data from the Supplementary Homicide Reports of the FBI’s Uniform Crime Reporting Program between 1976–1996 in forty-eight large urban cities in the United States, finding that when women seek arrest warrants they are at most risk of physical danger by the batterer); Renée Römken, *Protecting Prosecution: Exploring the Powers of Law in an Intervention Program for Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 160, 163 (2006) (summarizing empirical data and arguing that “[p]recisely when the victim wishes to withdraw from the relationship, the desire to maintain or regain control is prominently at stake for the abusive partner . . . . The violence, therefore, often becomes more intense and severe during this period, in a last effort to exert control. Fear of escalation and threats of revenge with which many women are confronted before and during the period of separation often keep them from breaking off the relationship. Women run the greatest risk of being killed by their ex-partners during the separation stage. We can conclude that the decision to separate or divorce puts these women in the highest risk category for becoming victims of excessive abuse and/or continued stalking, menacing, and mental terror by their ex-partners . . . .” (citations omitted)).



women should leave abusive partners.<sup>69</sup> This was not the goal of battered women's activists who sought legal reform; their goal was "to end violence and coercion, not to have women leave their relationships."<sup>70</sup>

### *C. Why Separation May Not Be the Solution*

Many victims choose not to separate from their intimate partners—even after the criminal justice system has intervened<sup>71</sup>—

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69. Coker, *supra* note 16, at 135 (describing the presumption in the law that women should separate as faulty because it presumes women who leave are safer, and presumes that women can leave); Goldfarb, *supra* note 52, at 1498 ("[A]ctors in the legal system—including judges, legislators, prosecutors, and police—increasingly see their role as assisting a battered woman to separate from her abuser . . . . Under this new paradigm, every victim should leave her abuser, and if she turns to the legal system at all, she should cooperate with its efforts to remove her from the relationship."); Kohn, *supra* note 26, at 200 ("Most individuals in the justice system hope to protect battered women from further violence by seeking to remove them from abusive relationships. When confronted with a domestic violence offense, the system actor sees a straight-forward scenario: an individual has been beaten by her partner and needs protection."); Littleton, *supra* note 11, at 53 ("[T]he law assumes that the woman must leave the battering relationship."); Mahoney, *supra* note 66, at 20 ("Despite the many responsibilities and connections of women's lives, courts and legal scholars widely assume that it is a woman's responsibility to leave the relationship."). A recent and widely publicized example of the presumption that women should leave abusive relationships appeared in *People* magazine. Commenting on pop star Rihanna's response to the assault charges pending against her boyfriend Chris Brown, a criminal defense attorney stated that many women in her position have taken their men back. In his words, "It's extremely common for a domestic violence victim to do what we would call 'go backward'". Joey Bartolomeo et al., *A Romance Gone Wrong*, PEOPLE, Mar. 2, 2009, at 47.

70. SUSAN SCHECHTER, EXPANDING SOLUTIONS FOR DOMESTIC VIOLENCE AND POVERTY: WHAT BATTERED WOMEN WITH ABUSED CHILDREN NEED FROM THEIR ADVOCATES 7 (2000).

71. LINDA G. MILLS, INSULT TO INJURY 109 (2003) (arguing that given the likelihood that people involved in a violent intimate relationship will stay together despite state intervention, mandatory arrest is not effective); Christopher R. Frank, *Criminal Protection Orders in Domestic Violence Cases: Getting Rid of Rats with Snakes*, 50 U. MIAMI L. REV. 919, 924–25 (1996); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 742 n.1 (2007) (discussing a case that represents an "amalgam of many similar experiences" the author had while defending cases in domestic violence court, in which the alleged batterer was being prosecuted for domestic violence and in which a criminal protection order was issued while the parties lived together; the victim did not want to pursue charges and refused to comply with the terms of the no-contact order); Kristen Little et al., *Assessing Justice System Response to Violence Against Women: A Tool for Law Enforcement, Prosecution and the Courts to Use in Developing Effective Responses* (1998), available at <http://www.vaw.umn.edu/Promise/pplaw.htm> (discussing the many instances that domestic violence victims stay in relationships (information provided under the Link, "Interventions Grounded in an Understanding of Violence Against Women")); Suk, *supra* note 47, at 61 (arguing that many couples live together despite issuance of criminal no contact orders prohibiting the batterer from

because of the rational fear that doing so will put them in greater danger.<sup>72</sup> Other barriers to separation have also been well documented.<sup>73</sup> Like women in non-violent relationships, a victim may be dependent on the relationship for money,<sup>74</sup> child care,<sup>75</sup> housing,<sup>76</sup> and immigration status.<sup>77</sup> She might fear losing custody of

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contacting the victim); Zorza, *supra* note 32, at 67 (reporting that fifty-three percent of women plan to reconcile with a batterer in treatment).

72. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 61, 144 (1987) (discussing the high incidence of further abuse and homicide); Sarah M. Buel, *A Lawyer's Understanding of Domestic Violence*, 62 TEX. B.J. 936, 937–38 (1999) (arguing that one of the reasons many women stay in violent relationships is their reasonable fear that their partners will follow through on his threats to hurt her or the children); “Failure to Protect” Working Group, *Charging Battered Mothers with “Failure to Protect”: Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 858–59 (2000) (describing how “during and after separation . . . the batterer is most likely to stalk, harass and even kill the mother,” and thus women should take batterers’ threats seriously in concluding that it is safer in the short term to stay in the relationship).

73. See generally Buel, *supra* note 72; Jinseok Kim & Karen A. Gray, *Leave or Stay?: Battered Women’s Decision After Intimate Partner Violence*, 23 J. INTERPERSONAL VIOLENCE 1465 (2008); Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993); Vera E. Mouradian, *Women’s Stay-Leave Decisions in Relationships Involving Intimate Partner Violence* (Wellesley Centers for Women, Working Paper No. 415, 2004).

74. See generally Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1019 (2000); see also Richard J. Gelles, *Abused Wives: Why Do They Stay*, 38 J. MARRIAGE & FAM. 659, 661–63 (1976) (arguing that the fewer resources and less power wives had, the more likely they were to stay with violent husbands); Barbara J. Hart & Erika A. Sussman, *Civil Tort Suits and Economic Justice for Battered Women*, 4 VICTIM ADVOC. 3, 3 (2004) (arguing that inadequate material resources render women more vulnerable to battering, increase batterers’ access to women who separate, and are a primary reason why women do not attempt to separate).

75. SCHNEIDER, *supra* note 17, at 77 (“Many women who are battered have little money, no child care, no employment; they may be financially . . . dependent on the men who batter them . . .”).

76. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY & NAT’L NETWORK TO END DOMESTIC VIOLENCE, LOST HOUSING, LOST SAFETY: SURVIVORS OF DOMESTIC VIOLENCE EXPERIENCE HOUSING DENIALS AND EVICTIONS ACROSS THE COUNTRY 2 (2007). The report found that domestic violence is a leading cause of homelessness nationally and that, among cities surveyed in 2005, fifty percent reported domestic violence as a primary cause of local homelessness. *Id.* Additionally, the report found that victims are frequently evicted or later denied housing because of the domestic violence perpetrated against them. *Id.* at 3; see also Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181 (2008) (discussing housing barriers for victims of domestic violence and arguing that application of chronic nuisance codes to victims exacerbates these barriers); Naomi Stern & Terri Keeley, *The Impact of the Violence Against Women Act 2005 (VAWA) on the Housing Rights and Options of Survivors of Domestic and Sexual Violence*, in THE OFFICE OF VIOLENCE AGAINST WOMEN: THE LAPTOP UPDATE, LEGAL ASSISTANCE PROVIDERS’ TECHNICAL OUTREACH PROJECT 1 (Spring 2006).

77. See generally Leslye E. Orloff et al., *Battered Immigrant Women’s Willingness to Call for Help and Police Response*, 13 UCLA WOMEN’S L.J. 43 (2003).

her children to her partner.<sup>78</sup> She might feel a sense of economic responsibility to the children to maintain their standard of living.<sup>79</sup> She might feel shame and embarrassment and, therefore, be reluctant to take a step that would require her to disclose the abuse.<sup>80</sup>

She might love her partner. For many women, the violence does not define the relationship.<sup>81</sup> Rather, it represents the low points.<sup>82</sup> Many victims want the *violence*, rather than the relationship, to end.<sup>83</sup>

In addition to its impact on the intimate relationship, a decision to separate may impact many related relationships. External relationships include those with the partner's family, friends, and colleagues; those with various groups or associations to which the couple belongs, such as their neighborhood, church, or social club; and those with a larger community, such as an ethnic or immigrant group or neighborhood. If the couple has children, a victim may be concerned about how a decision to leave impacts the children's relationships with any one or all of these individuals and groups.<sup>84</sup>

The criminal justice system's response to DV ignores this intricate, multi-dimensional web of relationships. Outside of the context of DV, preserving these relationships is often considered not only normal, but laudable. And outside of the context of DV, preservation of intimate and family relations is a norm fostered by

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78. Goodmark, *supra* note 52, at 28.

79. Mahoney, *supra* note 66, at 23.

80. *Id.* at 18 (recounting an interview with a woman who stated, "That session in the hospital when I had been married one month, and the nurse came and sat on the bed and said she had heard I didn't care if I went home for Christmas . . . The truth was, I couldn't face what I was going home to. I instinctively knew it was very bad to lie about this but I couldn't bear to tell the truth. It was too humiliating. I didn't tell her anything. To my friends, I said I fell down. I did not intend to cover for him but for myself . . . for the confusion and humiliation . . . for finding myself in this unbelievable position.").

81. Katherine K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L.J. 1459, 1461 (2001) (book review).

82. Mahoney, *supra* note 66, at 16.

83. *See* Baker, *supra* note 81, at 1471–81 (describing the importance of relationships to women who have been battered). Baker also argues that many women want their abusive partners to change more than they want the relationship to end. *Id.* at 1490; *see also* Littleton, *supra* note 11, at 44–49 (discussing the tremendous value of connection in relationships, even when the relationships are violent). According to Littleton, "battered women may stay in relationships that are physically dangerous to them because they value connection . . ." *Id.* at 44.

84. These and other potential losses will be discussed *infra* Part IV.

law.<sup>85</sup> Within the context of DV, however, victims who value preservation of their relationships are seen as pathological, incapacitated, weak, not credible, and annoying.<sup>86</sup>

#### *D. The Scholarly Debate*

No-drop policies have been the subject of an enormous amount of debate amongst DV scholars.<sup>87</sup> This debate includes, among other measures of success,<sup>88</sup> whether no-drop has effectively reduced recidivism, whether it has increased the number of DV prosecutions, and whether it enhances victim safety.<sup>89</sup> One strand of the debate concerns victim autonomy of decision making.<sup>90</sup> “No-drop” policies do not merely limit a prosecutor’s discretion to dismiss a case, they also limit a victim’s discretion to withdraw a complaint once formal charges have been filed.<sup>91</sup>

Both proponents and opponents of no-drop acknowledge that no-drop deprives DV victims of decision-making autonomy.<sup>92</sup> Proponents argue that the deprivation is worthwhile because it

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85. See, e.g., *Troxel v. Glanville*, 530 U.S. 57, 66 (2000); *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Smith v. Org. of Foster Families*, 431 U.S. 816 (1977).

86. See Kohn, *supra* note 26, at 240–41.

87. See SCHNEIDER, *supra* note 17, at 184–88 (providing an overview of the debate). For a more recent description of the debate, see MADDEN DEMPSEY, *supra* note 36, at 20–24.

88. As Madden Dempsey persuasively argues, many involved in this debate are talking past one another, because the effectiveness of prosecution policies has not yet been clearly defined in the literature and thus depends largely upon how one defines effectiveness. MADDEN DEMPSEY, *supra* note 36, at 167 & n.37.

89. See generally Hanna, *supra* note 34; Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 *FORDHAM L. REV.* 853, 878–80 (1994).

90. Goodmark, *supra* note 52, at 31 (“Perhaps no issue has been so hotly debated among battered women’s legal advocates and scholars as whether and to what extent it is appropriate for the state to substitute its judgment for that of a battered woman when making decisions about arresting and prosecuting batterers.”). See generally Miccio, *supra* note 19 (describing how battered women’s activists have always been aware of, and debated, the potential sacrifice to the victim’s autonomy of decision making when assessing whether to engage with the state to effect broad social change).

91. SCHNEIDER, *supra* note 17, at 184; Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 *HARV. L. REV.* 550, 557 (1999) (describing mandatory interventions as eliminating the state actor’s discretion, as well as the victim’s desires, from the state’s decision-making equation).

92. Goodmark, *supra* note 52, at 32 (“Both sides agree that, to a greater or lesser extent, these policies deprive battered women of agency: the ability to make crucial, potentially life and death, decisions, by and for themselves.”).

promotes victim safety in the long run.<sup>93</sup> By punishing batterers, the state holds them accountable and sends the message to batterers and to society that the state will not tolerate DV.<sup>94</sup> Proponents also maintain that victims are not in the best position to make decisions about their safety in a moment of crisis.<sup>95</sup> Not only is the state in a better position to do so, but it is the state's proper role, not the victim's.<sup>96</sup>

Opponents argue that only the victim can determine what is in her interest.<sup>97</sup> Because victims are accurate predictors of the likelihood of re-abuse, prosecutors should respect a victim's decision that pursuing prosecution will put her in more danger rather than less.<sup>98</sup> Opponents also argue that victims who feel that their decisions are respected feel empowered, and victims who feel empowered are safer than those who do not.<sup>99</sup>

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93. See, e.g., 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, 290 (1997) (describing how this benefit to victims as a group, particularly those who are coerced or intimidated, outweighs the harm to an individual woman's potential deprivation of autonomy).

94. Hanna, *supra* note 34, at 1890–91 (arguing that the goals of prosecution include reducing recidivism and communicating strong educational and social messages: "One of the most important ways to curb domestic violence is to ensure that abusers understand that society will not tolerate their behavior. A public education approach to domestic violence, coupled with punishment that demonstrates that there are consequences for violent behavior, can be effective both symbolically and practically."); Donna Wills, *Domestic Violence: The Case for Aggressiveness for Prosecution*, 7 UCLA WOMEN'S L.J. 173, 173 (1997); see also discussion *infra* Part IV.C.

95. See, e.g., Cheryl Hanna, *Because Breaking Up Is Hard To Do*, 116 YALE L.J. POCKET PART 92 (2006) (arguing against asking of a victim what we would not ask of ourselves: to determine the course of her relationship in a moment of personal trauma).

96. Casey G. Gwinn & Sgt. Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297 (1993) (arguing that when the victim steps into the shoes of the prosecutor, the batterer is given more control because he can pressure and intimidate her; the solution is to take responsibility out of the hands of the victim and place it with the state, where it belongs; the victim is not trained or paid to be the prosecutor); Hanna, *supra* note 34, at 1891–92; Wills, *supra* note 94, at 173 (arguing that the prosecutor rather than the victim should decide whether to go forward with charges and that this delineation of roles takes the responsibility off of the victim's shoulders).

97. See, e.g., Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 166 (2003); Mills, *supra* note 91, at 554–55.

98. Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 818, 826–27 (2001); Mills, *supra* note 91, at 599–600; Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1159–60 (1994).

99. Welch, *supra* note 98, at 1159–60; see also David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, in LEGAL RESPONSES TO

The autonomy that both sides speak of is the victim's autonomy to make decisions about her safety. Less widely discussed in the "no-drop debate" is the autonomy to make decisions about one's personal relationships. Katherine Baker argues that feminist legal scholars have underappreciated the importance of relationships to victims.<sup>100</sup> Of those scholars seeking to reform prosecutorial policy, only two treat the victim's relational values as a central part of their suggestions for alternatives to no-drop.<sup>101</sup> Linda Mills, in her earlier work, suggested that prosecutors adopt a "survivor-centered" approach to victims.<sup>102</sup> Accordingly, the prosecutor should accept the emotional connection between a woman and her partner<sup>103</sup> and explore with her how this connection, as well as religion, culture, race and other factors, affect her willingness to support

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WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 157 (finding that victims who made a personal choice to cooperate with prosecutors' requests were less likely to experience subsequent violence than women who were coerced to cooperate).

100. Baker, *supra* note 81, at 1471.

101. However, victims' relational values are enormously important to scholars who embrace alternative theories of justice, such as restorative justice, therapeutic justice, and transformative justice. Alternative theories such as these are outside of the scope of this Article. For discussion of restorative justice in the context of DV, see generally RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN (James Ptacek ed., 2009); RESTORATIVE JUSTICE AND FAMILY VIOLENCE (Heather Strang & John Braithwaite eds., 2002); Coker, *supra* note 12, at 1 (analyzing Navajo peacemaking, an informal adjudicatory process recognized as a form of restorative justice, for battered women in the Navajo nation and for use in other locales and addressing major criticisms leveled against restorative justice models more generally); Loretta Frederick & Kristine C. Lizardas, *The Role of Restorative Justice in the Battered Women's Movement* (2003), available at <http://www.ncjrs.gov/app/abstractdb/AbstractDBDetails.aspx?id=239179>. For a discussion of therapeutic justice in the context of DV, see generally Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33 (2000); Carolyn Copps Hartley, *A Therapeutic Jurisprudence Approach to the Trial Process in Domestic Violence Felony Trials*, 9 VIOLENCE AGAINST WOMEN 410 (2003). For a discussion of transformative justice in the context of DV, see Donna Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, in STRANG & BRAITHWAITE 129-52 (2003).

102. Mills, *supra* note 91, at 597-607. In her later work, Mills abandons the criminal justice system entirely as a viable option for addressing domestic violence. See, e.g., Linda G. Mills, *Intimate Violence as Intimate: The Journey and a Path*, 9 CARDOZO WOMEN'S L.J. 461, 462 (2003) ("The criminal justice system turned out to be an inadequate system for the problems posed by intimate abuse. . . . Intimate abuse is at heart, intimate . . . as much as we want to call it a 'crime.'"); *id.* at 463 ("Once we accept that intimate abuse is intimate and therefore warrants a different way of thinking about violence, we can conceptualize the responses we suggest in more radical ways. . . . This will not be achieved by reforming the criminal justice system."); see also Linda Mills et al., *Circulos de Paz and the Promise of Peace: Restorative Justice Meets Intimate Violence*, 33 N.Y.U. REV. L. & SOC. CHANGE 127 (2009).

103. Mills, *supra* note 91, at 597.

prosecution.<sup>104</sup> Mills argued that ultimately it should be the victim's, rather than the prosecutor's, decision to pursue or dismiss a case.<sup>105</sup> I agree with Mills's central theory—that a prosecutor's decision must be informed by a victim's relational context<sup>106</sup>—but a reflexive, “always drop” policy, without an investigation into the likelihood of coercion by the batterer, runs the risk of batterers intimidating victims into dropping.<sup>107</sup>

Deborah Epstein suggested a model called “prosecution in context.”<sup>108</sup> She asks prosecutors to view victims through an ecological lens. This lens reveals layers of factors, viewed as concentric circles surrounding the victim, that influence a victim's strategic decision making for coping with violence.<sup>109</sup> Epstein's concentric circles include relations between the victim and her partner and the victim and her community.<sup>110</sup> They also include individual, institutional, and economic factors.<sup>111</sup> With a better understanding of the victim's broad scope of concerns, Epstein argues, prosecutors are in a better position to facilitate victims' long-term safety,<sup>112</sup> such as by dismissing charges when the likelihood of

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104. *Id.* at 597–98.

105. *Id.* at 607–08.

106. I note the similarity between the value Mills places on the prosecutor's consideration of the victim's relational context and the value that relational contract theorists place on legal decision makers—particularly judges—to consider the litigants rather than their own understandings of the relational context. *See, e.g.*, Elizabeth Mertz, *An Afterword: Tapping the Promise of Relational Contract Theory—“Real” Legal Language and a New Legal Realism*, 94 NW. U.L. REV. 909, 935 (2000) (“One could certainly attempt to argue that . . . judges should simply restrict themselves to their own contextual understandings in interpreting contracts rather than delving into the details of contractual context. But it is difficult to see how this would do anything but empower judges further, leaving them with no pressure to look outside of their own understandings in interpreting the words of others.”).

107. MADDEN DEMPSEY, *supra* note 36 at 19, 26–27 (arguing that “prosecutors who routinely abdicate their decision-making responsibility by universally deferring to victim's requests . . . do a disservice not only to the individual victims, but they violate their obligation to execute the duties of their office in good faith” and that prosecutors must, at a minimum, ameliorate the concern that the victim is not, by her request to dismiss, merely attempting to appease her partner); Epstein, *supra* note 37, at 15–16 (describing “automatic drop” decisions by prosecutors as ceding too much control to a batterer, who need only threaten or intimidate the victim to persuade her to drop).

108. Deborah Epstein, Margret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465 (2003).

109. *Id.* at 472.

110. *Id.*

111. *Id.*

112. *Id.* at 473.

felony level re-assault is high but probability of incarceration is low.<sup>113</sup>

Epstein's prosecution-in-context model is primarily concerned with victims' safety, not victims' relationships. In her more recent work, however, Epstein places far greater emphasis on victims' relationships.<sup>114</sup> She argues that system reform must evolve along two separate but related tracks: eradicating obstacles that prevent women who wish to leave from so doing, and promoting greater safety for women who choose to maintain their relationships with their partners.<sup>115</sup>

Safety concerns and relational concerns often overlap in the context of victim decision making, but as Epstein's dual tracks recognize, they are not co-extensive. A victim may choose to stay in a relationship that she knows is dangerous because the intimate connection is worth the risk. The debate surrounding victim decision-making autonomy in the context of prosecutorial reform, with the exception of Epstein's work, largely ignores victims' relational values. In a seminal article commenting on this body of scholarship, Cheryl Hanna observed, "the difficulty of encouraging a more public response to domestic violence while preserving women's autonomy from excessive state intervention is a dilemma that no particular school of feminist thought has been able to resolve . . . ."<sup>116</sup> Unstated, but significant to Hanna's conclusion, is that the current "public response" to DV effectively ends the intimate relationship.<sup>117</sup>

Many victims do leave their partners,<sup>118</sup> and many cooperate with the justice system in so doing.<sup>119</sup> For victims who want to separate from their partners, the criminal justice system's response may be

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113. *Id.* at 493.

114. GOODMAN & EPSTEIN, *supra* note 21, at 72 (arguing that those involved in the domestic violence movement must understand the importance of a victim's relationships and community ties).

115. *Id.* at 99.

116. Hanna, *supra* note 34, at 1855.

117. See discussion *supra* Part II.B. and accompanying notes; see also Gruber, *supra* note 71, at 751 (arguing that Hanna is "pro-retribution-from-batterer" rather than pro-autonomy for victims, though she engages the autonomy rhetoric); Miccio, *supra* note 19, at 242, 293–97 (arguing that Hanna's characterization, which has been accorded considerable currency in the literature, fails to situate these policies in their proper historical context and thus has conservatized the debate).

118. Mahoney, *supra* note 66, at 61–68.

119. See KLEIN, *supra* note 47, at 45–46.



welcomed. But many want or need to preserve their relationships with their partners.<sup>120</sup> To the extent that a legal response to DV requires termination of the relationship, Hanna's argument is correct: no school of feminist thought has resolved the autonomy dilemma.<sup>121</sup> Must a legal response ignore the relational values of the victim?<sup>122</sup> The next section explores the applicability of an alternative legal framework—one that emphasizes, rather than ignores—the relational norms and values that envelop the “discrete” issue they present to the legal system.

### III. WHY RELATIONAL CONTRACT THEORY?

RCT proposes an alternative way for the legal system to analyze contracts.<sup>123</sup> It rejects the idea that the practice of contracting can be understood by viewing contracts as discrete, one-shot deals between strangers, during which a meeting of the minds is thought to have

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120. See discussion *supra* Part II.C. and accompanying notes.

121. Goodmark, *supra* note 52, at 32 (observing that the question of whether the state should step in has no easy answer).

122. See Littleton, *supra* note 11, at 52. Christine Littleton asks: “What would legal doctrine and practice look like if it took seriously a mandate to make women safer *in* relationships, instead of offering separation as the *only* remedy for violence against women?” *Id.*

123. Actually, RCT may suggest several alternative ways for the legal system to analyze contracts, depending upon how one views its underlying empirical claim that contracts are deeply relational. See Ethan J. Leib, *Contracts and Friendship* (forthcoming 2009), available at <http://ssrn.com/abstract=1358562>, 6–12 (discussing how, if one views contracts as pervasively relational, one might call for a complete paradigm shift in contract theory, whereas if one views only *some* contracts as deeply relational, one might call for a more moderate shift such as a different set of rules to be applied to this specific set of contracts. Or one could use a continuum to distinguish types of contracts—such as Macneil's as-if-discrete to relational continuum—that would be analytically useful). The notion that a subset of contracts are relational and call for a specific set of rules has been described as the neoclassical or mainstream contract law's interpretation of RCT. See Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 740 (2000). For Feinman, this interpretation does not go far enough. *Id.* For the purpose of this Article, I focus on the positions advanced by Ian Macneil, founder of RCT, and Stewart Macaulay and Jay Feinman, self-proclaimed followers of Macneil, all of whom Leib would, I believe, include in a category he calls “hard core relationists.” Leib, *supra*, at 7. While I rely upon Macneil and his followers, I note that there are several strands of RCT. *Id.* at n.2; see also Fox, *supra* note 7, at 3–4 (“[T]here are almost as many definitions of relational contract theory as there are scholars discussing it.”); *id.* at 4–5 (citing examples such as law-and-economics based relational contract theory, Ian Macneil's foundational relational contract theory, law-and-society relational contract theory, libertarian relational contract theory, and liberal communitarian relational contract theory (citations omitted)).

occurred.<sup>124</sup> This “transaction” almost never provides an accurate picture of the parties’ understanding of their obligations to each other. What really matters are the rules, or “norms,” that emerge from the relationship itself, such as loyalty, or the desire to preserve the relationship.<sup>125</sup> Rather than treating contracting parties as if they are strangers—the paradigm of classical contract law—contract law and theory should focus on the parties’ relationships and “relational norms” flowing from them.<sup>126</sup>

In this section, after sketching out fundamental principles of RCT, I turn in Part B to the question: what do these principles have to do with how the criminal justice system should respond to DV? In the same way that RCT has provided an important perspective from which to criticize substantive contract law, the relational values perspective is a valuable lens through which to critique the current regime governing DV law. Like relational contract theorists, feminist legal theorists criticize the law’s “transactionization” of relationships. They argue that the law’s myopic view of DV as discrete episodes of physical violence, in isolation from the underlying intimate relationship, distorts legal actors’ understanding of the victim’s responses to the violence and obstructs the law’s capacity to fully redress DV. In short, like relational contract theorists, many feminist legal theorists oppose the law’s treatment of parties involved in relationships as if they are strangers.

In Part C, I argue that the relationship enveloping an incident of DV is an “exchange relation,” to further explain the analogy to and relevance of RCT in the context of DV. I identify and address a critique of the analogy—that RCT applies to parties who have relatively equal power. I interpret RCT to be particularly concerned

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124. Leib, *supra* note 123, at 3 (describing the most general point of relationists: “discrete, one-shot transactions between strangers have occupied the center of ‘classical’ contract law and contract theory to its detriment”); *see also* Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 *BUFF. L. REV.* 763, 767 (1998).

125. *See* discussion *infra* Part IV.A.

126. Feinman, *supra* note 123, at 748 (describing the fundamental unit of inquiry of relational contract theory as the extensiveness of the parties’ relation rather than the discrete transaction); *see also* Leib, *supra* note 123, at 2 (describing relational contract theorists as those “who urge us to focus on ‘relational’ elements in contracts in order to devise a theory and law of contracts”).

with exchanges that involve unequal power,<sup>127</sup> and argue that this makes RCT particularly pertinent in the context of DV.

*A. What Is Relational Contract Theory?*

First articulated in the 1960s, RCT was borne out of opposition to traditional contract law. A “persistent tendency of [current contract] law is its attempt to locate the entire content of the parties’ agreement, and thus the entire source of their obligation to each other, in an initial moment of agreement that contracts treatises describe as the ‘meeting of the minds.’”<sup>128</sup> Ian Macneil sought to construct a coherent and relevant rival law,<sup>129</sup> one that emphasized the social and interpersonal relations between the parties and not simply the contractual agreement.<sup>130</sup> Indeed, for Macneil, “contract” and “relation” are synonymous: “contract” is a relationship in which parties are, were, or will be exchanging something<sup>131</sup> and “a” contract is “a particular example of such relations.”<sup>132</sup>

Macneil defined exchange expansively.<sup>133</sup> It involves any human interaction in which reciprocity, or the giving up of something in return for something else, is a dominant element.<sup>134</sup> Reciprocity does

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127. Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1307–08 (1990) (describing relational contract theorists’ interest in context, and particular different contexts of power, lead to their argument that these require different legal treatment).

128. Gudell, *supra* note 124, at 767–68 (describing how criticism of existing contract law has centered on the persistent tendency of classical contract law to “attempt to locate the entire content of the parties’ agreement, and thus the entire source of their obligation to one another, in an initial moment of agreement that contracts treatises describe as the ‘meeting of the minds.’ Correspondingly, courts have been extremely reluctant to intervene in any contract if that intervention cannot be justified by reference, albeit fictional, to this magic moment of agreement”).

129. MACNEIL, *supra* note 10, at 9.

130. Fox, *supra* note 7, at 5 (describing all strands of RCT as sharing one important characteristic: “they emphasize the social and interpersonal relations between the parties to the contract and not simply the contractual agreement of those parties.”).

131. Ian Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 878 (2000) (“In this Article, ‘contract’ means relations among people who have exchanged, are exchanging, or expect to be exchanging in the future—in other words, exchange relations. Experience has shown that the very idea of contract as *relations* in which exchange occurs—rather than as specific transactions, specific agreements, specific promises, specific exchanges, and the like—is extremely difficult for many people to grasp.” (citations omitted)).

132. *Id.* at 878 n.6.

133. Feinman, *supra* note 123, at 741.

134. MACNEIL, *supra* note 10, at 47.

not call for equality,<sup>135</sup> but only that the participants to the exchange subjectively perceive a benefit.<sup>136</sup>

This expansive definition of exchange is important in the analogy between RCT and DV law, in two key ways. First, RCT applies to a wide array of relations beyond those existing in business or commercial settings.<sup>137</sup> Macneil explicitly included the marital relationship, and relations within the nuclear family, as examples of relational exchanges.<sup>138</sup> Scholars have since applied RCT to a continuum of intimate relationships, from marriage<sup>139</sup> to non-marital intimate relationships<sup>140</sup> to friendship.<sup>141</sup>

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135. IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* 44 (1980).

136. *Id.* (explaining that reciprocity calls merely for each participant's perception of a possible improvement from pre-exchange conditions).

137. Feinman, *supra* note 123, at 741 (“[T]he scope of relational contract is very general, in some respects even more general than was classical contract law. It brings back within the field of contract law some of the topics that were spun off in the development of neoclassical law; labor relations is a prominent example. It breaks down doctrinal boundaries further by potentially bringing tort and property law topics within the definition of contract. And it brings within the scope of contract relations those activities that have economic aspects but that are not primarily economic, such as family relations. Relational contract, therefore, is willing to treat an astonishingly wide range of transactions as subject to the same body of theory.” (citations omitted)).

138. Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 721, 725, 746, 747, 751 (1974) (describing marriage as a relational contract); *Id.* at 785–86 (describing parent-child and sibling-sibling relationships as relational contracts).

139. For applications of RCT to marriage, see Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1919–25 (2000) (discussing generally the relational norms in marriage as a complex set of expectations and patterns of behavior that evolve over time); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 302 (1982) (“[M]arriage is exceptionally well captured by [Macneil’s] relational type. The overriding importance of continuing relationships; the whole-person nature of the exchange; the presence of quantifiable and nonquantifiable elements; the expected range of interaction, from altruism to self-interest to conflict; the need for planning as a continuing process that focuses on flexibility of structure and procedure rather than on any single transaction; the emphasis on remedies that repair and restructure relationships rather than replace a specific failed performance—each of these characteristics of Macneil’s relational contract type is an important characteristic of marriage.” (citation omitted)); see also Laura Weinrib, *Reconstructing Family: Constructive Trust at Relational Dissolution*, 37 HARV. C.R.-C.L. L. REV. 207, 211 (2002) (describing how the principles established in relational dissolution carry over into every aspect of family formation and inter-relation, and specifically examining the doctrine of constructive trust).

140. See John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 FEMINIST LEGAL STUD. 93 (2000).

141. See Leib, *supra* note 123 (arguing that friendship—rather than marriage—should be viewed as the paradigmatic relational contract); *Id.* at 2 & n.4 (describing and citing relational contract theorists who argue that the bulk of contracts are like marriages).

Second, a common view of DV victims is that they are passive, helpless—even paralyzed—in their intimate relationships, and as a result, stay with their partners.<sup>142</sup> This view fails to account for all that victims get from their relationships, and all that they risk by leaving.<sup>143</sup> In relational contract terms, this view ignores the existence of reciprocity. In feminist legal parlance, it denies a victim's agency (or autonomy)—a topic of concern to any scholar exploring how the state should respond to DV.<sup>144</sup>

To understand an exchange, legal actors must carefully examine the relational context within which the exchange occurred. Macneil gives this example:

Consider 'I promise you \$400 a week.' It means one thing when a personnel manager says it to a newly hired employee receiving a weekly wage, something else when a foreman says it to an hourly employee who has been complaining about short working hours, something else when said by a sales manager to a commission salesman, again something different when said by a salesman of video games to the owner of a video game arcade. And yet a promise of so many dollars is one of the clearest, least-affected-by-context promises to be found. Most promises, even those concerning the sale of goods, are far less understandable freed of their relational context.<sup>145</sup>

Ignoring the relational context produces a body of law that is empirically irrelevant.<sup>146</sup> Stewart Macaulay, Macneil's contemporary,<sup>147</sup> demonstrated as an empirical matter that contract law bore little resemblance to what people in the business world engaging in contract actually do.<sup>148</sup> Macaulay describes "[falling] down the rabbit hole to the land of empiricism," when as a young contracts professor, he spoke with his father-in-law, a retired CEO,

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142. See discussion *infra* Part III.C.

143. See discussion *supra* Part II.C.

144. See discussion *infra* Part V.B.4 (discussing victim agency/autonomy).

145. Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 502 (1985).

146. MACNEIL, *supra* note 10.

147. Stewart Macaulay's ground-breaking empirical work is described as the counterpart to Macneil's ground-breaking theoretical work. See Fox, *supra* note 7, at 6–7 (describing how, in the 1960s, scholars began exploring what was actually "going on in the world of contracting" and were finding the answer was based on the empirical work of Stewart Macaulay and the theoretical work of Macneil); *infra* notes 150–52 and accompanying text.

148. Fox, *supra* note 7, at 7.

who described “a business world where long-term continuing relationships provided their own norms and sanctions. Contract law was either unnecessary or something far at the margins of the way things worked.”<sup>149</sup>

This was the conclusion Macaulay drew in 1963 in his renowned study of the role of contract law in the everyday functioning of the business world.<sup>150</sup> The driving force in continued contractual relations is not the fear of legal consequences, but relational and reputational sanctions.<sup>151</sup> Since even discrete transactions take place in a setting of continuing relationships and interdependence, the “value of these relationships means that all involved must work to satisfy each other. Potential disputes are suppressed, ignored, or compromised in the service of keeping the relationship alive.”<sup>152</sup>

Several scholars since Macaulay have empirically demonstrated the gap between contract doctrine and the day to day practice of contract.<sup>153</sup> According to Macneil, the primary way that the law ignores the reality of contracting is by “transactionizing” relationships, in two ways.<sup>154</sup> First, the law imagines an exchange as having a clear start and finish, severable from both the events temporally precedent and subsequent to the exchange.<sup>155</sup> Second, it conceptualizes a transaction separate from the values (like the desire

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149. Mark P. Gergen, Victor Goldberg, Stewart Macaulay & Keith A. Rowley, *Transcript of Panel Discussion—Transactional Economics: Victor Goldberg’s Framing Contract Law*, 49 S. TEX. L. REV. 469, 476 (2007).

150. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

151. Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 467–69 (1985).

152. *Id.* at 468.

153. See Feinman, *supra* note 127, at 1304–08 (describing Empirical Contract Theory and summarizing the findings of its school of thought); Leib, *supra* note 123, at 5 n.9 (citing Macaulay as well as the works of Bob Ellickson, Lisa Bernstein, and David Charny).

154. Macneil refers to the Restatement’s definition as examples of this transactionization: “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” Macneil, *supra* note 138, at 693 (citing RESTATEMENT OF CONTRACTS § 1 (1932) and RESTATEMENT (SECOND) OF CONTRACTS § 1 (Tentative Drafts Nos. 1–7, 1973)).

155. Macneil asked: “[I]s the world of contract a world of discrete transactions so defined? Or is it a world of relation, an ongoing dynamic state, no segment of which—past, present or future—can sensibly be viewed independently from other segments?” *Id.* at 694 (citation omitted).

to smooth over difficulties in order to further the relationship)<sup>156</sup> of the parties participating in it.<sup>157</sup>

Real life, Macneil argued, is “a world of relation, an ongoing dynamic state,” not a world of discrete transactions.<sup>158</sup> Relational contract law promises “freedom from the conceptual restraints of a discrete system.”<sup>159</sup>

### *B. The Importance of Relational Context in DV Law*

The criminal law, as applied to DV, is “[p]remised on a transactional model of crime that isolates and decontextualizes violence.”<sup>160</sup> DV scholars have leveled critiques of this transactional, decontextualized approach in two particular contexts: when arguing for greater retribution from men who are violent toward their female partners and when arguing for less retribution from women who are violent toward their male partners.<sup>161</sup>

In calling for increased retribution against men charged with DV, feminist legal scholars argue in favor of consideration of relational norms. For example, several scholars have argued for the reform of statutory definitions of DV to capture the batterer’s pattern of coercive behaviors, not just the incident of physical violence.<sup>162</sup> Scholars have proposed reforms to the evidence code

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156. See *infra* Part IV.A. for a discussion of Macneil’s contract values and norms.

157. Macneil, *supra* note 138, at 694 (citation omitted).

158. *Id.* (citation omitted).

159. MACNEIL, *supra* note 135, at 77.

160. Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 960–61 (2004).

161. See, e.g., Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 972 (1998) (“To put it bluntly, feminists have pushed for greater retribution, including criminal prosecutions, for violence done to women, and more caring empathic responses to women who risk criminal charges for their own conduct. This pattern smacks not only of inconsistency, but also of unreflective desires simply to advance what is good for women.”); see also MADDEN DEMPSEY, *supra* note 36, at n.59 (“It is ironic that those who call for formalistic, reigned law enforcement policies for arrest also complain when victims who engage in retaliatory violence are arrested and prosecuted.”); cf. Martha McMahon & Ellen Pence, *Making Social Change, Reflections on Individual and Institutional Advocacy With Women Arrested for Domestic Violence*, 9 VIOLENCE AGAINST WOMEN 47, 71 (2003) (arguing that advocacy for women who are arrested for DV “will be countered by accusations of reverse sexism” and that such arguments are answered by “explaining the gendered nature of violence and the meaning of pursuing equality in social contexts in which people are clearly not equal in power or social resources”).

162. See, e.g., Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 601–03 (2007) (proposing a

that would admit otherwise prohibited prior bad acts for the purpose of proving the course of conduct that is “battering.”<sup>163</sup> They have argued that if the course of conduct and not just the violent episode were recognized, more serious charges could be filed and tougher sentences could be imposed.<sup>164</sup>

Based on the same reasoning, scholars argue that contemporary doctrine governing a batterer’s Sixth Amendment right to confront his witness should be re-examined.<sup>165</sup> As argued in two ground-

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“Coercive Domestic Violence” statute that includes an inchoate theory of liability); Joan Erskine, Note, *If It Quacks Like a Duck: Recharacterizing Domestic Violence As Criminal Coercion*, 65 BROOK. L. REV. 1207 (1999) (arguing that domestic violence be defined as a crime of coercion); Victor Tadros, *The Distinctiveness of Domestic Violence: A Freedom Based Account*, 65 LA. L. REV. 989, 993 (2005) (arguing for a “crime of domestic violence” because “[t]o regulate domestic abuse is to regulate relationships” in which violence occurs systematically, distinguishing it from stranger violence); Tuerkheimer, *supra* note 160, at 1019–20 (proposing that battering be defined as a course of conduct crime in which the batterer reasonably should know that the conduct is likely to result in substantial power or control over the victim or her family).

163. See, e.g., Michael H. Graham, *Fostering Domestic Violence Prosecutions After Crawford/Davis: Proposal For Legislative Action*, 44 CRIM. LAW BULL. 871 (2008) (advocating for two new federal and state evidence rules that would incorporate the definition of domestic violence and create an exception for admissibility of evidence of prior domestic violence in domestic violence cases); Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 907 (2009) (proposing an amendment to FRE 804(b)(6) that would “delete the present requirement that the opponent of the hearsay must have ‘engaged or acquiesced in wrongdoing that was intended to, and did procure, the unavailability of the declarant as a witness,’” and replace it with “language requiring that the opponent of the hearsay must have ‘engaged in wrongdoing that foreseeably could cause, and did in fact proximately cause, the unavailability of the declarant as a witness’” (citation omitted)). See generally Sarah J. Lee, *The Search for Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence*, 20 U. HAW. L. REV. 221 (1998); Lisa A. Linsky, *Use of Domestic Violence History Evidence in the Criminal Prosecution: A Common Sense Approach*, 16 PACE L. REV. 73 (1995); Debra Raye Hayes Ogden, *Prosecuting Domestic Violence Crimes: Effectively Using Rule 404(b) to Hold Batterers Accountable for Repeated Abuse*, 34 GONZ. L. REV. 361 (1998–99).

164. See, e.g., Erskine, *supra* note 162, at 1221 (arguing that if viewed as coercion, in many cases prosecutors could bring felony rather than misdemeanor charges); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALA. L. REV. 973, 980–81 (1995) (“My concern is that this [episodic] categorization of domestic violence has created a new (second) class of misdemeanor assaults rather than criminalized the far more severe pattern of coercive behaviors that are distinctive to partner relationships, that is, battering.”). In the context of advocating for more lenient sentences for women arrested for domestic violence, see McMahon & Pence, *supra* note 161, at 70 (arguing for a sentencing matrix that “attempts to contextualize violence” and thus “is a shift from determining a sentence based on the defendant’s relationship to the state to one based on understanding his or her relationship to the victim”).

165. See, e.g., Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 750 (2005) (arguing that after *Crawford v. Washington*, “[s]tatutory hearsay law is now



breaking articles by Deborah Tuerkheimer, “a ‘relational approach’ to Confrontation Clause analysis” is in order.<sup>166</sup> If DV was conceptualized as ongoing, rather than episodic, a victim’s out of court statements to police would be deemed exigent and therefore admissible at trial without being subject to cross examination by the defendant.<sup>167</sup> Indeed, a DV victim’s statements occurring between episodes of DV should be considered exigent because of the relational norms inherent in DV.<sup>168</sup>

In contexts in which women are held criminally liable for assaulting their partners, feminist legal scholars argue that the transactional approach is unmistakably problematic. One of the most widely discussed topics in this body of scholarship is how the law should treat battered women who kill their abusive partners.<sup>169</sup> Scholars argue that evidence of the social context must be admitted for judges and jurors to accurately apply the doctrine of self-

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misaligned with constitutional confrontation law, and the incongruities are more problematic in domestic violence prosecutions than in any other context”); Deborah Tuerkheimer, *A Relational Approach to the Right of Confrontation and Its Loss*, 15 J.L. & POL’Y 725, 727 (2007) [hereinafter Tuerkheimer, *Relational Approach*]; Deborah Tuerkheimer, Crawford’s *Triangle*, 85 N.C. L. REV. 1 (2006) [hereinafter Tuerkheimer, *Crawford’s Triangle*]; see also Deborah Tuerkheimer, *Exigency*, 49 ARIZ. L. REV. 801 (2007).

166. Tuerkheimer, *Relational Approach*, *supra* note 165, at 727; see also Tuerkheimer, Crawford’s *Triangle*, *supra* note 165, at 7 (“A full appreciation of the dynamics of abuse and attention to the context of relationship that embeds victim and defendant results in what I call a ‘relational approach’ to Confrontation Clause analysis.”).

167. Tuerkheimer, *Relational Approach*, *supra* note 165, at 730 (explaining the conceptual tension underlying the bar on testimonial hearsay as an “uncritical acceptance of . . . ‘the dichotomy between a plea of help and testimonial statements’”). For a domestic violence victim, this dichotomy is false because her narration of events to police—what would in paradigmatic stranger violence cases be considered testimonial statements—are part and parcel of her ability to obtain immediate protection. A “narration of past events” is necessary “to resolve the immediate danger they precipitated. This reality fatally undermines judicial reasoning predicated on the ‘crying for help’ versus ‘providing information to law enforcement’ rubric.” *Id.* at 732.

168. Tuerkheimer, Crawford’s *Triangle*, *supra* note 165, at 24–25 (“The domestic violence victim’s exigency extends beyond what might appear to an outside observer, or even to the ‘reasonable person’ unfamiliar with the culture of the particular battering relationship, to be the ‘end’ of the criminal incident. . . . In short, the meaning of ‘exigency’ to a victim of domestic violence is different than it is to victims of other types of crime.”).

169. See SCHNEIDER, *supra* note 17, at 112–47 (summarizing legal reform for battered women who kill and the misunderstood framework of equality in judicial application of the law to these cases); Mahoney, *supra* note 66, at 35 n.141. See generally BROWNE, *supra* note 72 (providing a historical overview of women who kill their abusive partners and describing the legal response).

defense.<sup>170</sup> Self-defense may not be asserted unless the defendant's actions are perceived as reasonable, and the determination of reasonableness involves both subjective (the defendant's perspective) and objective (the reasonableness of that perspective) components.<sup>171</sup> Evidence of "battering"—a pattern of intimidation, coercion, and violence—provides the only "appropriate context in which to decide whether a woman's apprehension of imminent danger of death or great bodily harm was reasonable."<sup>172</sup>

Scholars extend this argument to the arrest of a woman for the use of any violence against her partner. "To understand women's use of violence means one must understand the context."<sup>173</sup> A woman may use force not only in self-defense, but also in response to a recent assault by her partner or in response to her partner's ongoing abuse.<sup>174</sup> Such violence may be a signal that she will not simply "take" the abuse, or a symbolic assertion of dignity.<sup>175</sup> The pertinent inquiry is whether she used force to achieve the relational norms of power and control.<sup>176</sup>

Because an isolated incident of violence is not the equivalent of "battering," victims' advocates argue that in the context of deciding whether and how to prosecute women, prosecutors must carefully investigate relational norms. For example, prosecutors should consider whether the defendant is a victim of ongoing abuse.<sup>177</sup> They should consider gender norms, and the gendered nature of domestic violence.<sup>178</sup> They should identify the relational norms that dominate

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170. See, e.g., Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991).

171. See *id.* at 391.

172. SCHNEIDER, *supra* note 17, at 124.

173. See McMahon & Pence, *supra* note 161, at 51.

174. *Id.* ("A woman may or may not hit back at the moment when she is being beaten or abused—many women will not, as they realistically fear that any display of defiance will result in an even more brutal beating. Rather than simply 'taking it,' however, some women will choose a safer and more strategic moment to 'hit back' . . . . Whereas one may understand that interpersonal violence has historically been a masculinist resource to help men maintain power and control over women, women's use of violence in intimate relationships does not typically carry the same gendered cultural meaning of powerfulness, nor does it likely accomplish the outcome of control.")

175. *Id.*

176. *Id.*

177. See *id.* at 68.

178. *Id.* at 65, 68 (citing Shamita Das Dasgupta, *A Framework for Understanding Women's Use of Nonlethal Violence in Intimate Heterosexual Relationships*, 8 VIOLENCE AGAINST WOMEN 1364, 1377–80 (2002)); see also Joan Zorza, *The Problem with Proxy*

relationships of immigrant victims and partners.<sup>179</sup> In light of these relational norms, advocates argue that if female defendants are not “batterers,” prosecutors should not pursue a conviction merely because it is technically possible.<sup>180</sup>

These scholars’ critiques of the transactional approach to DV illustrate a shared normative value: consideration of the dynamics and norms of the underlying relationship should be critical to the law’s treatment of DV. This is precisely what Macneil has in mind.<sup>181</sup> I extend this reasoning to a prosecutor’s decision to proceed with or dismiss charges when the victim is female and the defendant is male. Before doing so, however, I pause to address what may seem on the surface to be a problem with the analogy between RCT and DV law.

### *C. The Incomplete Analogy*

RCT applies to “exchanges.” One may ask: where is the exchange, when one party physically assaults another? The incident of violence is not an exchange; rather, it is the relationship enveloping that incident.

As noted earlier, Macneil defined exchange as involving any interaction in which reciprocity is a dominant element,<sup>182</sup> and noted explicitly that reciprocity does not require equality.<sup>183</sup> But when one party maintains power and control in a relationship, can there be reciprocity? According to Macneil, a wide range of relationships

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*Measures: The Inaccuracy of the Conflict Tactic Scales and Other Crime Surveys in Measuring Intimate Partner Violence*, 6 DOMESTIC VIOLENCE REP. 83 (2001), reprinted in 2 VIOLENCE AGAINST WOMEN 8–12 to 8–18 (Joan Zorza ed., 2004).

179. See Zelda B. Harris, *The Predicament of the Immigrant Victim/Defendant: “VAWA Diversion” and Other Considerations in Support of Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 49, 49 (2004).

180. McMahon & Pence, *supra* note 161, at 67.

181. As Macneil stated: “Relations involve a flow of exchanges, or often many flows at the same time, occurring in complex patterns not lending themselves to divisions into discrete periods. It follows that relational contract law must, if it is to concern itself at all with mutuality and power, deal with those issues before, during, and after exchanges.” MACNEIL, *supra* note 135, at 86. This does not mean that discrete legal principles are never appropriate, but rather that “these principles can never be the absolutes they intend to be in a system of discrete transactional law.” *Id.*

182. Feinman, *supra* note 123, at 741 (quoting Macneil, *supra* note 131, at 546–48).

183. MACNEIL, *supra* note 10, at 47; see also Feinman, *supra* note 127, at 1301 & n.81 (arguing that, contrary to modern contract law, RCT recognizes that relations are not mutually favorable to all, because “they arise out of social conditions of inequality” and thus “include elements of coercion and dependence”; modern law, on the other hand, assumes “rough equality”).

constitute exchange relations.<sup>184</sup> Among these are abusive exchange relations.

[I insist upon including in the concept] one-sided and abusive exchange relations . . . [T]he presence of such characteristics in relations does not somehow magically wipe out the element of exchange . . . [T]he failure to include highly coercive, one-sided, and abusive relations creates the need for an entirely arbitrary dividing line between what is sufficiently coercive to exclude the relation from the realm of exchange relations and what is not.<sup>185</sup>

Perhaps DV—a pattern of behaviors “defined by both physical and non-physical manifestations of power”<sup>186</sup>—is *not* an entirely arbitrary dividing line. One could argue that battered women are so coercively controlled that their choices are actually “choiceless.”<sup>187</sup> I join those who argue that this is not the case for most victims of DV,<sup>188</sup> but that law assumes it to be so.<sup>189</sup> This assumption is the product of early theories of DV put forth by advocates and social theorists to explain DV to legal decision-makers.<sup>190</sup>

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184. See MACNEIL, *supra* note 135, at 1–5.

185. MACNEIL, *supra* note 10, at 47 (citing Ian R. Macneil, *Political Exchange as Relational Contract*, in GENERALIZED POLITICAL EXCHANGE: ANTAGONISTIC COOPERATION AND INTEGRATED POLICY CIRCUITS 151, 155 (Bernd Marin ed., 1990)).

186. See Tuerkheimer, *supra* note 160, at 962–63 (“Outside the criminal law context, domestic violence is widely understood as an ongoing pattern of behavior defined by both physical and non-physical manifestations of power.”).

187. See Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 641–42 (2000) (arguing for guardianship in certain DV cases in which victims are so extremely coerced that they cannot make voluntary decisions).

188. See Stark, *supra* note 164; see also, e.g., MADDEN DEMPSEY, *supra* note 36, at 19–20 (explaining that, in the context of victims who decide not to support the prosecution of their partners, the majority are not requesting a dismissal merely to appease the batterer); Miccio, *supra* note 19, at 320–21 (arguing that the view that autonomy is meaningless because it is exercised in the face of oppression and terror obscures victims’ resistance to that oppression and terror, and “denies how women survivors of male intimate violence have become agents in their own lives”).

189. See Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 832–35 (1999) (arguing that the law overlooks victims’ “resistant self-direction” or acts of agency). For a discussion of how the “disabling dichotomy between notions of women’s victimization and agency manifests itself in diverse areas of feminist legal theory” and in laws addressing domestic violence, see SCHNEIDER, *supra* note 17, at 74–86.

190. Kohn, *supra* note 26, at 198 (describing the “coercion theories,” such as learned helplessness, put forth by victim advocates to explain DV to judges and prosecutors).

Over the last three decades, two theories of DV have developed to explain DV victims' reactions to violence.<sup>191</sup> The first, referred to as the "traumatization framework,"<sup>192</sup> has its roots in the pioneering work of Lenore Walker.<sup>193</sup> Walker posited that victims were paralyzed by an exaggerated sense of the batterer's control over their lives.<sup>194</sup> As a result, victims believed that none of their actions could either change the batterer's behavior or could help them escape the violent relationship.<sup>195</sup> This theory, "learned helplessness," was used by lawyers representing women—largely in self-defense cases—to explain the dynamics of DV to judges and juries.<sup>196</sup>

Although Walker later repudiated the concept of learned helplessness, explaining that it was a mythology to characterize a victim's behavior as exclusively passive,<sup>197</sup> pieces of the theory loom large in the legal response to DV.<sup>198</sup> As Christine Littleton put it, the "syndrome" of Battered Woman Syndrome lingers, while its cause—violence by men—disappears.<sup>199</sup> However, like post-traumatic stress disorder and other traumatization theories, learned helplessness applies to only a minority of DV victims.<sup>200</sup> Large scale research conducted since Walker's work has shown that battered women

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191. Lisa Goodman et al., *The Intimate Partner Violence Strategies Index*, 9 VIOLENCE AGAINST WOMEN 163, 165–66 (2003) (describing the frameworks—learned helplessness and survivor theory—and creating a research instrument to measure the nature and extent of battered women's strategic responses to violence in the context of a longitudinal study of battered women's experience over time).

192. Stark, *supra* note 164, at 1000 (referring to Battered Woman Syndrome and Post-Traumatic Stress Disorder, in the context of their use to explain victims' behaviors in court).

193. LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* (1984).

194. LENORE E. A. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 73 (1989).

195. Goodman et al., *supra* note 191, at 165.

196. See Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOEFSTRA L. REV. 1295, 1303–06 (1993); see also Dutton, *supra* note 73, at 1215–26 (1993).

197. WALKER, *supra* note 193, at 33.

198. Kohn, *supra* note 26, at 198 (noting that legal actors have internalized theories such as learned helplessness); Littleton, *supra* note 11, at 42 ("In Walker's account of learned helplessness, the *cause* (random, uncontrollable violence inflicted by men) is at least part of the 'syndrome.' In the case law, the cause disappears while the 'syndrome' remains.").

199. Littleton, *supra* note 11, at 42.

200. Stark, *supra* note 164, at 1000 (describing Walker's learned helplessness model of depression as part of the traumatization framework and noting that "[T]he traumatization framework applies to only a minority of battered women, emphasizes the disabling effects of violence rather than women's survival skills, and fails to adequately distinguish post-traumatic events . . . from intratraumatic stress . . .").

actually become increasingly active, not increasingly passive, in their attempts to cope with violence in their relationships.<sup>201</sup> A number of studies, both qualitative and quantitative, have provided support for this now widely accepted “survivor theory” of DV.<sup>202</sup>

Drawing a line between battered women’s relationships (or exchanges) and “normal”<sup>203</sup> relationships is exactly the kind of arbitrary line Macneil opposes in the realm of contract. To exclude relations involving DV from a definition of exchange relations would render nearly half of all intimate relationships as in need of an exception to the rule.<sup>204</sup> Yet, she argues, the law treats DV as if it is a

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201. Goodman et al., *supra* note 191, at 165–66 (citations omitted); *see also* LEE H. BOWKER, BEATING WIFE-BEATING 75–85 (1983).

202. *See* Goodman et al., *supra* note 191, at 166 (summarizing the empirical literature).

203. I use quotation marks to describe “normal” because of the prevalence of DV in intimate, heterosexual relationships. *See* Littleton, *supra* note 11, at 56–57 (arguing that if women are seen as abnormal, or crazy, for staying in abusive relationships, “then as many as half of all women’s relationships with men are crazy”).

204. And it would render suspect the substantial body of scholarship applying RCT to marriage. *See supra* note 139 and accompanying text (describing this body of scholarship). I note that at least one prominent scholar applying RCT to marriage, Elizabeth Scott, has been criticized for insufficiently considering domestic violence. *See* Linda J. Lacey, *Mandatory Marriage “For the Sake of the Children”: A Feminist Reply to Elizabeth Scott*, 66 TUL. L. REV. 1435, 1443–46 (1992) (criticizing Scott’s argument in favor of a mandatory waiting period before divorce as “blind or at best insensitive to the realities of life for battered women”). Scott’s response to this criticism is conclusory: “A straightforward response to an abusive spouse is legal separation with spousal support, if appropriate, together with an injunctive restraining order.” Scott, *supra* note 139, at 1962 n.166. This response relies far too heavily on the effectiveness of protection orders, the enforcement of which is widely acknowledged among DV scholars as an Achilles Heel. *See* ANDREW R. KLEIN, THE CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE 75 (2004). While I agree with Lacey’s critique of Scott, and more generally that the work of scholars who apply RCT to marriage would be greatly enriched by deeper consideration of DV, I believe the body of scholarship applying RCT to marriage has much to offer feminist legal scholars who seek a reconceptualization of the market-based, arm’s-length, autonomous transactor engaged in a discrete transaction paradigm. Citation to these scholars is potentially voluminous, but for some examples, *see* CAROLE PATEMAN, THE SEXUAL CONTRACT (1988); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L. J. 997 (1985); Mary Joe Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); Debora L. Thredy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247 (1999); Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue, and Norms*, 28 HOUS. L. REV. 791 (1991). Similarly, the work of scholars who apply RCT to marriage has much to offer feminist legal scholars who seek a reconceptualization within the criminal law of DV as a relation, rather than a discrete transaction. *See* discussion *supra* Part III.B.

mysterious aberration.<sup>205</sup> The law must incorporate, rather than exclude, consideration of DV, given its widespread occurrence.

To do so, the law must account for coercion, rather than exclude it. Excluding coerced choices obscures the reality that all choices involve some degree of coercion.<sup>206</sup> The types of pressure exerted and their effects must be examined.<sup>207</sup> No-drop prosecution policies do the opposite. Rather than investigating whether or how a victim is coerced, no-drop policies presume that the victim is coerced<sup>208</sup> and that, as a result, any decision to drop is untrustworthy or invalid.<sup>209</sup>

Macneil rejects such a presumption in law, favoring instead an investigation into, rather than exclusion of, coerced exchanges.<sup>210</sup> His view of the doctrine of undue influence in classical contract law illustrates this concept. He argues that undue influence is a factual circumstance that should be included within, rather than outside of, a definition of contract.<sup>211</sup> The task is to carefully assess the types of

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205. Mahoney, *supra* note 66, at 11 (“This radical discrepancy between the ‘mysterious’ character of domestic violence and repeatedly gathered statistics reflects massive denial throughout society and the legal system.”); *see also* MADDEN DEMPSEY, *supra* note 36, at 7 (coining the term “domestic violence amnesia,” a syndrome in which infected academics briefly note the prevalence of domestic violence and then “promptly forget this fact when making empirical claims and reaching normative conclusions”).

206. *See generally* Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?*, 22 BERKELEY J. GENDER & JUST. 2 (2007); Miccio, *supra* note 19, at 317–21.

207. Kuennen, *supra* note 206, at 5–6 (arguing for a conceptualization of coercion in legal analyses of domestic violence that account for, among other factors, the type and severity of the batterer’s pressure on the victim to pursue or drop a case).

208. Hanna, *supra* note 34, at 1891–92 (arguing that when prosecutors dismiss domestic violence cases, this shows that the batterer’s use of “[f]ear, intimidation, and imposition of guilt on the victim ‘work’”); *id.* at 1891 (“If participation is mandated, the state takes away the batterer’s ability to influence the victim’s actions.”); Wills, *supra* note 94, at 179–80 (“A ‘no drop’ policy means prosecutors will not allow batterers to control the system of justice through their victims.”).

209. Kuennen, *supra* note 206, at 27 (arguing that a victim’s decision to drop a case, even if done in response to a batterer’s pressure, is not by definition an “involuntary” decision; rather, a victim’s decision to drop may be quite strategic and well-reasoned).

210. Macneil, *supra* note 145, at 504–05 (“We may or may not want to relieve the overstretched businessman or the unemployed worker who makes onerous arrangements. But our decision depends on the nature and amounts of pressure they are under as well as many other circumstances, not on any concept of ‘real voluntariness.’”).

211. Ian R. Macneil, *Review of H. Shepherd and B. D. Sher, Law in Society: An Introduction to Freedom of Contract*, 46 CORNELL L.Q. 176, 177 (1960) (describing the concept of undue influence as one example of an exception “to some general rule permitting the parties fully to define their legal status [but] if the role of the law in creating contracts were more completely presented this distortion would not occur, and these matters would be seen

pressure brought to bear and the manner in which this is done, not to exclude this pressure from the law's consideration. Relational contract theorists acknowledge that in relationships—unlike in discrete transactions—power is shifting and dynamic.<sup>212</sup> And in many relationships, the “dominated party continues in the relationship because it is the best of a bad set of options open.”<sup>213</sup>

Macneil's inclusion of coerced and even abusive relations within a legal approach to contract is one part of its appeal as an alternative way to think about how the criminal justice system might approach DV. My purpose in drawing the comparison is limited, however. I examine how another body of law has approached the problem posed by a discrete incident occurring within an ongoing, often complex relationship.<sup>214</sup> I do not argue that DV law should share the normative goals of RCT—for example, to promote solidarity between contracting parties. Hence, the analogy is not complete. Nonetheless, several core tenets of RCT are useful to develop a less transactional, more relational approach to the prosecution of DV.

#### IV. THE VALUE OF RELATIONAL THINKING IN THE PROSECUTION OF DV

“Relational thinking” is the methodology of RCT. I begin this Part by explaining it. I then articulate, in Section B, its value in prosecutorial decision making—and in the scholarly debate surrounding prosecutorial decision making—by applying it to the

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not as exceptions to freedom of contract but as simply part of the law's definition of contract.”).

212. MACNEIL, *supra* note 135, at 56 (describing the inherent shifting of power in relations).

213. Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775, 801 (2000).

214. In addition to Macneil's thinking regarding coercion and undue influence, I was also inspired to look more closely at relational contract theory after reading *Relational Contract Theory: Unanswered Questions A Symposium in Honor of Ian R. Macneil*, 94 NW. U. L. REV. (2000), particularly the article by Elizabeth Mertz, *supra* note 106, at 936, in which she asks: “Under what circumstances can and do courts usefully examine relational features of the underlying interaction in making decisions? As Macneil has noted, many modern interactions simultaneously inhabit extremes of discrete and relational characteristics; how, then, can scholars and courts most productively approach this combination? . . . [I]t seems possible that particular areas of law may converge in approach (if not in particular substance) as they grapple with similar relationships and concomitant legal problems” (citing as examples MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH-CENTURY TRAGEDIES* 228–30 (1995); PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991)).



facts of a case. I suggest solutions to DV that are more responsive to the victim's relational context. I conclude, in Section C, by anticipating and addressing resistance to the import of relational thinking to DV prosecution.

### *A. The Relational Method*

According to Macneil's theory, exchanges exist on a relational spectrum, with relational at one end and discrete (or "as-if-discrete")<sup>215</sup> at the other. The more discrete the exchange, the more a traditional, transactional legal approach may suffice.<sup>216</sup> As applied to DV law, the less intertwined the parties, the more that the current legal response—that emphasizes only the most recent incident of violence and that seeks to separate parties—will suffice. But the more relational (or "intertwined") the intimate relationship in which the violence takes place, the more the law must account for relational values.

To determine where on the continuum an exchange falls, Macneil articulated a set of norms and behaviors through which the facts of a given case may be filtered.<sup>217</sup>

#### *I. Norms*

A brief summary of Macneil's norms cannot possibly convey the intricacies and complexity of his theory. I therefore limit this discussion to those norms most pertinent to DV law, including what

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215. Macneil, *supra* note 131, at 894–95 (stating that a discrete transaction is more accurately called an "as-if-discrete" transaction, because even those transactions that appear discrete are embedded in relations).

216. See MACNEIL, *supra* note 135, at 86; see also Mertz, *supra* note 106, at 915 (arguing that Macneil acknowledged that a transactional approach to analyzing contract should not be abandoned, but used sparingly, for even within a given relational contract there are discrete aspects that are still best dealt with by this approach).

217. Feinman, *supra* note 123, at 742. Macneil identified ten general norms that are present in any given exchange. These are: implementation of planning, effectuation of consent, role integrity, reciprocity, flexibility, solidarity, linking norms (restitution, reliance, expectation), creation and restraint of power, propriety of means, and harmonization with the social matrix. MACNEIL, *supra* note 135, at 40; Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340, 347 (1983) [hereinafter Macneil, *Values*]; Macneil, *supra* note 138, at 698–704. Some of these norms are more pronounced, or take on a different meaning, as the exchange moves toward the relational end of the continuum. MACNEIL, *supra* note 135, at 64–70. The relational norms are: preservation of the relations, maintenance of role integrity, harmonization of relational conflict, and supra-contract norms.

Macneil calls the “relational norms,” and provide specific examples of how these norms are relevant to understanding DV.

*a. Preservation of the relations.* In relational contracts, the parties expect that the relations will continue indefinitely.<sup>218</sup> Marriage is perhaps the clearest example of a relational contract; so too are most employment contracts. Preserving the relationship is therefore a prominent value, unlike in discrete transactions, in which the parties expect that specific performance will terminate the relationship.<sup>219</sup> As discussed in Part II.C, in the context of DV, preservation of the intimate relationship is the pronounced norm for many victims of DV, for a range of reasons, from safety to economic interdependence to love.

Preservation of the relations involves solidarity.<sup>220</sup> Solidarity, in RCT, refers to the interest that each party has in the welfare or well-being of the other party.<sup>221</sup> Victims of DV report many concerns for the welfare of their partners. A victim may fear that her partner would be harmed through involvement with the criminal justice system.<sup>222</sup> This fear may be particularly prevalent among women whose partners are members of a racial minority.<sup>223</sup> African-American victims may face tremendous pressure to resolve problems within their community and outside of the judicial system.<sup>224</sup> Asian-

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218. MACNEIL, *supra* note 135, at 66.

219. *Id.*

220. *Id.* Solidarity is what Macneil would call a general, rather than relational, norm; but because preservation of the relations is an expansion of solidarity, I include it in this discussion.

221. *Id.* at 40.

222. See Lauren Bennett et al., *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, 14 J. INTERPERSONAL VIOLENCE 761, 769 (1999).

223. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991) (“Race and culture contribute to the suppression of domestic violence in other ways as well. Women of color are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile. There is also a more generalized community ethic against public intervention, the product of a desire to create a private world free from the diverse assaults on the public lives of racially subordinated people.”); see also Maguigan, *supra* note 170.

224. See Crenshaw, *supra* note 223, at 1256 (describing the political or cultural interests of the community being interpreted in a way that precludes full public recognition of the problem of domestic violence and how race adds another dimension to why the problem of domestic violence is suppressed within nonwhite communities: “People of color often must weigh their interests in avoiding issues that might reinforce distorted public perceptions against the need to acknowledge and address intracommunity problems.”); see also Goodmark, *supra* note 52, at 36–37 (discussing a generalized ethic among communities of color against public intervention in domestic violence cases).

American<sup>225</sup> and Latina<sup>226</sup> victims may face the same. Immigrant women face the additional risk of deportation of their partners because of their involvement with the criminal justice system.<sup>227</sup>

A mother may not want to deprive the father of her children of his parenting time.<sup>228</sup> Similarly, if the children have not been physically harmed, she may be reluctant to deprive them of his companionship, even at substantial danger to herself.<sup>229</sup> As one woman stated: “I may have to leave. But if I do, I’m giving up on a father for the children, and I’m giving up on him. And I can’t just throw away those nine years. . . . I’m not going to do it lightly.”<sup>230</sup> Finally, a DV victim may feel solidarity with the batterer against the state’s child protection agency, for she may accurately fear that the children are in jeopardy of removal from both parents as a result of the DV perpetrated on her.<sup>231</sup>

*b. Role Integrity.* Role integrity refers to the idea that in a relationship, each party has a role to play, or a pattern of behavior expected of her by the other party.<sup>232</sup> In more relational exchanges, roles grow in duration and the range of obligations that they impose, so that role integrity means more than simply keeping the role honest but also acts as a foundation for future reliance and

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225. Sujata Warriar, *(Un)Heard Voices: Domestic Violence in the Asian-American Community* 10 (2002), <http://endabuse.org/userfiles/file/ImmigrantWomen/UnheardVoices.pdf>.

226. Coker, *supra* note 74, at 1019.

227. See Goodmark, *supra* note 52, at 37 (discussing the risk of deportation to both the victim and the batterer that results from a victim obtaining a CPO).

228. Buel, *supra* note 73, at 938 (“We may believe that our children’s interest is best served by having both parents raise them . . . .”); Dutton, *supra* note 73, at 1234 (1993) (describing concern for the children as a factor leading women to remain in violent relationships, “believing that to separate the children from their father may be detrimental to the children.”); Mahoney, *supra* note 66, at 17 (“Battered women interviewed by social workers often say they felt a responsibility to support their children’s relationship with their father because ‘he’s really good with the children.’” (citations omitted)).

229. Buel, *supra* note 72, at 938; see also Mahoney, *supra* note 66, at 20–21 (Mahoney also notes, however, that “our social and legal doctrines increase the cost of her loyalty by viewing her attempt to fulfill this responsibility as problematic ‘staying’ in the relationship”).

230. Mahoney, *supra* note 66, at 21.

231. See *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002) (class action lawsuit on behalf of battered mothers whose children were removed by the state for mothers’ alleged engagement in domestic violence when mothers were in fact the victims of domestic violence); see also Goodmark, *supra* note 52, at 26–27 (describing the child protection system’s increased involvement in DV cases, the *Nicholson* case, and the reporting of DV cases involving children to police and prosecutors).

232. MACNEIL, *supra* note 135, at 40–41.

expectation.<sup>233</sup> In exchanges that are more discrete, where parties are only interested in a specific transaction, the role of each is limited to maximizing his own gain.<sup>234</sup>

In the context of DV, examples of victims' roles discussed in the literature include the role of care taker: women are socialized to care for others and to make decisions around what is best for others.<sup>235</sup> A mother's love for her child should overcome all "physical, financial, emotional and moral obstacles."<sup>236</sup> As Nina Tarr explained,

[A] mother may stay in an abusive relationship because she does not see alternatives which provide for a "family." Her constructed image of what a life is "supposed to be" may include a male in the home, regardless of his behavior. Accordingly, she may . . . perpetuate the illusion for . . . her children, and for the outside world that everything is "okay."<sup>237</sup>

Young girls and women are trained to think of marriage and family as the measure of success and to keep the marriage together, no matter what.<sup>238</sup> This role—of maintaining the sanctity of the family—is in direct opposition to the justice system's emphasis on separation as a solution to DV.<sup>239</sup>

*c. Harmonization of Relational Conflict.*<sup>240</sup> This norm could be subsumed under "preservation of the relations," because if conflict is unresolved the relationship could collapse.<sup>241</sup> In a contract, one

233. *Id.* at 66.

234. *Id.*

235. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2129–30 (1993).

236. Jeanne A. Fugate, Note, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. Rev. 272, 290–91 (2001) (quotation omitted).

237. Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 WASH. U. J.L. & POL'Y 157, 170 (2003); see also G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89, 93 (1999) ("[T]he socially constructed paradigm of mothering leaves no accommodation for the battered mother. Within this construct, the 'good mother' is selfless and deferential. The needs and desires of fathers and children define her existence. The 'bad' or 'evil' mother is one who insinuates her independent self into the familial picture, permitting her needs to co-exist with those of familial members." (citation omitted)).

238. SCHECHTER, *supra* note 16, at 19 (describing women's role as ensuring tranquility in the family); SCHNEIDER, *supra* note 17, at 77 ("Women have been socialized to stay in the family—to keep the family together no matter what.").

239. Evan Stark, Remarks, *Violence Against Mothers, Violence Against Children: Law, Morality and Conceptions of State Accountability* (Mar. 17, 2007) (on file with author).

240. Macneil, *Values*, *supra* note 217, at 350.

241. MACNEIL, *supra* note 135, at 67.

party's bad conduct could lead to a suit for breach or termination of the contract. But when parties seek to protect the relationship, they resolve, ignore, or suppress the conflict. They seek solutions shy of litigation, such as informal conflict resolution, mediation, and ADR.

In the context of DV, the norm of harmonization is reflected in many victims' desires for the violence, rather than the relationship, to end<sup>242</sup> and in the many strategies that victims employ to preserve the relationship, to stay safe. Leaving is one such strategy, but short of permanently leaving, there are countless others, including leaving temporarily; accessing shelter services; calling the police; participating in support groups; seeking help from friends, neighbors, clergy, an employer or a lawyer; or working out a safety plan, and more.<sup>243</sup> Lee Bowker's study of victims who remained with their partners found that victims' threats to leave the relationship were particularly effective as a strategy for ending the violence.<sup>244</sup> Victims in Lenore Walker's renowned work reported the same.<sup>245</sup> Successful strategies that end the violence by methods shy of permanently leaving are often obscured, however, by the system's emphasis on permanent separation as the solution to DV.<sup>246</sup>

*d. Harmonization with the social matrix.* This norm is part of harmonization with the relational conflict in discrete exchanges, but becomes its own norm as the exchange becomes more relational.<sup>247</sup> It addresses the need to account for external relationships affected by the parties' exchange. Macneil gives this example: a contract between

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242. See discussion *supra* Part II.C.

243. See *generally* Goodman et al., *supra* note 191 (creating a research instrument to measure the nature and extent of battered women's strategic responses to violence in the context of a longitudinal study of battered women's experience over time).

244. BOWKER, *supra* note 201 (surveying 1,000 community women regarding the strategies they employed to stay safe while in the relationship); *id.* at 75–85 (examining informal help seeking strategies).

245. WALKER, *supra* note 193, at 33 (documenting battered women's reports that the single most effective strategy to stopping a particular incident of violence is a credible threat to leave).

246. See Martha Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 59, 77 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) ("The women in Bowker's study are the success stories that become invisible in studies of recurrent violence. Their actions tracked the actions of many battered women. . . . Women who 'succeed' in stopping violence without permanently leaving the relationship have made decisions that are not treated as legitimate or intelligent in women who 'fail' to halt the violence of their lovers.?).

247. MACNEIL, *supra* note 135, at 69.

the administration of a law school and an individual faculty member must account for the relations between the administration and other faculty members, the relations between faculty members themselves, and the relations between the administration, faculty members, and alumnae.<sup>248</sup> This norm acknowledges that in more relational exchanges, relations with the outside world become more complex, and more important.<sup>249</sup> As discussed in Part II.C., in the context of DV, victims consider the impact on numerous external relations (such as the children, the couple's friends in common, and the in-laws) when determining how best to cope with violence.

In addition to these relational norms, Macneil posited that other, "general" norms exist in all exchanges.<sup>250</sup> Most relevant to DV is creation and restraint of power.

*e. Creation and restraint of power.* Power, inherent in the concept of exchange, is created and restrained both within the relationship and external of it.<sup>251</sup> Power may be legal, economic, social, and political in nature.<sup>252</sup> A batterer's use of power and control is a defining element of relationships involving DV. The source of the batterer's power, feminists argue, is rooted in a culture in which men have legal, economic, social, and political dominion over women, and in social conditions that produce and support violence against women.<sup>253</sup> A victim of DV, like anyone, may use the law to regain power in her relationships. There is evidence that victims use the threat of arrest and prosecution for precisely this.<sup>254</sup> The victim may want to send her partner a message that she will not

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248. *Id.*

249. *Id.*

250. These norms are as follows: linking norms (restitution, reliance, expectation), MACNEIL, *supra* note 135, at 52–53; propriety of means (generally refers to whatever means are necessary and appropriate to accomplish what the parties agreed upon), Macneil, *Values*, *supra* note 217, at 360–61; flexibility (the capacity to change as the relation becomes broader in scope, duration, and increased personal involvement), MACNEIL, *supra* note 135, at 50–51. The two "discrete norms" are implementation of planning, in acknowledgment that planning is a significant part of modern contract law and effectuation of consent, which encompasses the idea that every choice involves the sacrifice of an alternative. *See id.* at 47–48.

251. MACNEIL, *supra* note 135, at 56.

252. *Id.*

253. *See* Miccio, *supra* note 19, at 249.

254. *See* discussion *infra* Part IV.B.

tolerate the abuse.<sup>255</sup> Or she may want—and be able to successfully obtain—child custody, parenting time, child support or other material resources that the threat of criminal prosecution, but not conviction, can get her.<sup>256</sup>

## 2. Behaviors

In addition to the above-described norms, Macneil articulated a set of behaviors that can be examined in conjunction with the norms.<sup>257</sup> Generally speaking, relatively discrete exchange behaviors involve “short duration, limited party interactions, and precise measurement of the value of the objects exchanged.”<sup>258</sup> There is little planning for the future, because the transaction itself is the sum total of the exchange.<sup>259</sup> Transactional contracts tend to commence and to end sharply.<sup>260</sup> Being finished and not finished are clearly defined.<sup>261</sup> Obligations are explicitly expressed.<sup>262</sup>

More relational exchanges extend over time, so that parts of the contract “cannot be easily measured or precisely defined at the time of contracting,” and the interdependence of the parties reaches beyond the contract to a range of social interactions that others may support or rely on.<sup>263</sup> There is extensive planning for the future, and particularly planning processes to deal with anticipated but unforeseen events and conflict.<sup>264</sup> The relation rarely commences sharply, and termination tends to be gradual, if the relation fades away at all.<sup>265</sup> Some of the parties’ obligations are explicitly

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255. GOODMAN & EPSTEIN, *supra* note 21, at 92 (describing how a victim called the police to “communicate clearly that although she was willing to give him another chance, she would not tolerate any future violence in the relationship”).

256. *See, e.g.*, David A. Ford, *Wife Battery and Criminal Justice: A Study of Victim Decision-Making*, 32 FAM. REL. 463, 469 (1983); *see infra* Part IV.B.

257. Macneil, *Values*, *supra* note 217, at 345–46 (explaining that the norms and behaviors are so connected that they should be analyzed together).

258. Feinman, *supra* note 127, at 1301 & n.75.

259. Macneil, *supra* note 138, at 754.

260. *Id.* at 753.

261. *Id.* at 750.

262. *Id.* at 784.

263. Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 823–24 (2000).

264. Macneil, *supra* note 138, at 761–63, 805.

265. *Id.* at 750–53.

expressed, but many are not specific and are generated by the relation itself.<sup>266</sup>

In the context of DV, these behavioral descriptions are helpful to understand the circumstances in which a legal approach that treats DV as episodic, and that views separation as a solution, may be a better or worse fit. For example, in cases in which the parties are not involved in a committed relationship, have not been together for a substantial period of time, or do not intend to stay together, a “sharp-out” approach, such as the immediate issuance of a no-contact restraining order, is appropriate. In cases in which the parties have been involved in a long term relationship, or in which they are married or live together, or in which there is a continuing need or desire for contact, such as when they have children in common, a solution should contemplate future contact and mechanisms for dealing with future conflict. In Part IV.B.2, I suggest alternatives to the criminal justice system’s current “sharp-out” approach. I turn first, however, to the application of Macneil’s norms and behaviors to DV prosecution.

*B. The Value of the Relational Method to Prosecutorial  
Decision Making*

*1. Identifying the relational values that impact a case*

Laws applied to DV tend to treat it as an episodic crime.<sup>267</sup> A prosecutor’s approach is shaped by this episodic conception. Prosecutors respond to the most recent, discrete incident that constitutes a violation of the criminal law.<sup>268</sup> In their interactions with victims, they gather the information necessary to prove each

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266. *Id.* at 785–86 & n.268 (“[C]onsider the obligation one brother may feel toward another brother . . . simply because of the obligations created through growing up together.”).

267. Typically the crimes that apply to DV include “assault, battery, burglary, trespass, disorderly conduct, property destruction, harassment, violation of a restraining order, intimidation of a witness, kidnapping, homicide, rape, sexual assault, and an attempt to commit any of these crimes.” Tuerkheimer, *supra* note 160, at n.60; see SCHNEIDER ET AL., DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 275–76 (2008). These crimes are “transaction-bound.” See Gerald E. Lynch, *Rico: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 932–33 (1987); see also Tuerkheimer, *supra* note 160, at 971 (“Laws applied to prosecute domestic violence are generally characterized by a narrow temporal lens and a limited conception of harm.”); Burke, *supra* note 162, at 561.

268. Epstein et al., *supra* note 108, at 467 (“[P]rosecutors typically approach cases with a short-term focus: How should the government respond to the perpetrator’s most recent violation of the criminal law?”).



element of the statutory definition of the crime.<sup>269</sup> Information about the relationship is unnecessary to assess the strength of the case.<sup>270</sup>

According to Macneil, assessing both the discrete episode and the enveloping relationship is a better analytical choice than assessing the episode alone.<sup>271</sup> This is because of the probability that the relational norms will impact the expected outcome of the case. In the prosecution of DV, the ultimate outcome—expected by prosecutors, judges, and other legal actors—is separation of the perpetrator and victim,<sup>272</sup> as in cases of stranger violence. Without inquiry into the relationship, legal decision-makers miss, or misunderstand, critical information that might contraindicate separation as a realistic outcome.

To illustrate, I draw from a case discussed by Cheryl Hanna in her seminal article, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*.<sup>273</sup> Hanna, an ardent supporter of no-drop policies, described the case as illustrative of “the conflict between victim autonomy and a strong commitment to [the] criminal prosecution [of DV].”<sup>274</sup>

When Hanna was a prosecutor, she was assigned a case in which Beverly Johnson was the victim.<sup>275</sup> Johnson called the police to her

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269. Tuerkheimer, *supra* note 160, at 977 (describing a typical interview between a prosecutor and a victim of domestic violence: “[T]he content of the interview is framed by the statutory definition of the crime of assault. The prosecutor assesses the strength of the case by focusing on how each element of the crime charged will be proven—and on defeating any possible defenses—should the case ultimately go to trial. What happened in the time period immediately preceding the incident is relevant to the prosecutor; what happened in the weeks, months or years preceding it is not.”).

270. In states that have separate domestic violence offenses, the law requires proof of the intimate or familial relationship. Prosecutors would thus need to gather information to prove the existence of the relationship. But they would need no further information regarding the relationship, because these states’ statutes largely replicate the episodic paradigm of stranger crimes. See Tuerkheimer, *supra* note 160, at n.60 (citing Neal Miller, *A Review of State Domestic Violence-Related Legislation: A Law Enforcement and Prosecution Perspective*, INST. FOR LAW AND JUSTICE (2000)).

271. Macneil, *supra* note 131, at 891 (“Relational contract theory advances the proposition that it is both more efficient and more sure to engage in combined contextual analysis of relations and transactions than to commence with noncontextual analysis of transactions.”).

272. See discussion *infra* Part II.B.

273. Hanna, *supra* note 34, at 1873–74.

274. *Id.* at 1874.

275. *Id.* at 1873 n.118 (noting that the victim’s name was changed in the article to protect her identity).

home, and when they arrived they observed swelling on her face and arms.<sup>276</sup> Johnson told the police that her boyfriend had beaten her, and the police arrested him.<sup>277</sup> When she later met with Hanna, Johnson explained that she did not want her boyfriend prosecuted, despite the fact that he had abused her throughout the relationship.<sup>278</sup> She said that she had AIDS and that it was the stress produced by her illness that caused the boyfriend to hit her.<sup>279</sup> Johnson said that she was afraid that her family would discover she had AIDS, that she and her boyfriend were working out their problems, and that she felt that she would die soon and did not want a criminal case to interfere with her life.<sup>280</sup> She stated: “You’re making things worse, not better,” and begged Hanna not to pursue the case.<sup>281</sup>

Hanna eventually decided not to pursue charges, “with a stern warning” to Johnson that she “would reopen it if her boyfriend laid a finger on her.”<sup>282</sup> Hanna did not indicate whether relational factors influenced her decision. She noted, however, that many judges and prosecutors alike reason that: “[I]f the woman wants to live in a violent relationship, it is her choice.”<sup>283</sup> Of her decision to dismiss, Hanna wrote that it “focused on the individual woman and relied on a choice to preserve her privacy . . . .”<sup>284</sup>

Without investigating the relationship, how did Hanna reach the conclusion that Johnson wanted to live in a violent relationship? How did she reach the conclusion that this was a case about privacy? Without an understanding of at least some of Johnson’s relational values, it is impossible to know whether such conclusions are accurate.

One other legal scholar—also a law professor and former prosecutor—has written about the Johnson case. She interpreted the case differently than did Hanna. Kris Miccio argued that the case was not about privacy, but about safety.<sup>285</sup>

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276. *Id.* at 1873.

277. *Id.* at 1873–74.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. Miccio, *supra* note 19, at 306.

Johnson made the decision to cease prosecution to preserve her health and her relationships—not only with her boyfriend but also with her family. Here, safety was associated with Johnson’s conditions particular to AIDS and not the violence perpetrated by the boyfriend. Johnson’s decision was strategic. . . . It was a decision based on the conditions that shaped Johnson’s environment, with AIDS taking center stage.<sup>286</sup>

Miccio begins to consider the relational context. She considers Johnson’s desire to preserve her relationships. She explicitly links that value to Johnson’s safety. But how can one know with such certainty, given the facts presented, that Johnson’s reluctance to prosecute was about safety? Especially in light of Johnson’s disclosure that her boyfriend abused her during, indeed throughout, the relationship?

If Johnson’s decision was motivated by love (for example), rather than safety, it should matter to legal scholars writing about how the justice system should address DV. A victim’s decision to stay in a relationship that is dangerous may implicate much more than safety. It may implicate love, along with a range of other relational values. Many victims do not want to be in a position to “just leave” their intimate relationships.<sup>287</sup> A legal policy that wins for victims the right to do so—a “sharp-out” approach, in RCT terms—misses this point. A victim may know that her decision to preserve her relationship puts her in danger. She may nonetheless choose love, or some other relational value, over safety.

Returning to the conclusions drawn by Hanna and Miccio, both scholars *may* be right. Johnson’s decision may have been motivated by both privacy and safety. But Hanna and Miccio also both may be wrong.<sup>288</sup> RCT offers a systematic approach to the discovery of relational factors designed to “lead the lawmaker or law-user to consider the things needing consideration.”<sup>289</sup> Macneil calls for a “relational-first” rather than “transactional-first” analysis. Starting with the relations forces legal actors to analyze the relational

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286. *Id.* at 306–07.

287. Baker, *supra* note 81, at 1474.

288. For another example of a conclusion about a victim’s relational values, without an investigation of them, see Hanna, *supra* note 95, at 93 (arguing generally that aggressive prosecution is appropriate because victims should not bear the responsibility of ending a “less than perfect relationship”).

289. Macneil, *supra* note 138, at 813–14 (speaking of transactional contract doctrines and not DV policy).

components of a case as a theoretical requirement, rather than as incidental to analyzing the transaction.<sup>290</sup>

Continuing with the Johnson case, let us imagine the relational investigation that could have been conducted, using Macneil's norms.

*a. Preservation of the relations.* Johnson explicitly expressed her desire to preserve her relationship with her boyfriend. Why she held this value is less clear. Perhaps she loved her boyfriend. Perhaps she was fearful of him. Maybe the boyfriend threatened to hurt her or her family if she did not drop the case. Maybe Johnson wanted to maintain the relationship for the sole reason that she was fearful that he would disclose that she had AIDS.<sup>291</sup> Perhaps she was covered under his health insurance policy. Maybe she struck a deal with him that in exchange for dropping the case he would not drop her from his insurance plan. Or maybe the couple had been together for ten years and there was too much at stake for Johnson to leave the relationship, particularly in light of her illness.

A prosecutor could inquire how long the couple had been together, how serious they were, what the victim's feelings were for her partner, whether they lived together, whether they had children together, and whether they jointly owned property. These are just a few factual circumstances that would uncover the extent to which the couple was intertwined. She could ask explicitly what Johnson's goals were with regard to the future of the relationship. Did she intend to continue the intimate relationship with him? Was it important merely to preserve a friendship with him?

What were the boyfriend's relational values? From Johnson's perspective, did he intend to continue the relationship with her? Did he love her? Did he believe that she loved him? Did he threaten her? Does he continue to threaten her? Does he threaten to disclose that she has AIDS? What does he tell Johnson about the relationship?

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290. Macneil, *supra* note 131, at 890 (describing how a transactional approach starts at the "wrong" end in relational terms" because it means acquiring knowledge of relational factors only for "practical necessity rather than a theoretical requirement").

291. Perhaps Johnson did not care about preserving her relationship with her family. Perhaps she simply did not want her diagnosis disclosed to them. For an interesting article arguing that some victims stay in violent relationships due to the batterer's threats to divulge personal information, see Laurie S. Kohn, *Why Doesn't She Leave? The Collision of First Amendment Rights and Effective Court Remedies for Victims of Domestic Violence*, 29 HASTINGS CONST. L.Q. 1, 2 (2001).

Was Johnson concerned about what might happen to the boyfriend if he was prosecuted? In RCT terms, was there solidarity between Johnson and her boyfriend? Perhaps Johnson thought that her boyfriend would be harmed or mistreated by the police. Perhaps she thought that, if prosecuted, he would receive a lengthy jail sentence.

*b. Harmonization with the social matrix.* Johnson's desire to preserve a relationship outside of the primary relationship with her boyfriend—a.k.a. harmonization with the social matrix—also appears to have been a significant relational norm. Who does Johnson mean by family? What are those relationships like? How close is she with them? Why is it important to her to preserve those relationships? How well does her boyfriend know her family? Do they consider him a part of the family? Does he consider himself part of the family? In Johnson's case, preserving the external relationships may have been more important than preserving the primary relationship with the boyfriend.

*c. Harmonization of the relational conflict.* Johnson stated that she and her boyfriend were working out their problems. She stated that Hanna was making things worse, not better. Did Johnson mean that the boyfriend was continuing to assault her because of the looming possibility of prosecution? Did she mean that things with him were tense? Did she mean that the couple could not move past the incident of violence? Or was there too much at stake in the relationship for Johnson to just leave?

*d. Creation and restraint of power.* Johnson called the police on the night of the incident because she needed immediate protection from her boyfriend. The police arrested him. By calling the police, she both created power for herself and restrained the power of her boyfriend. Does she now want to give up that power? If so, why? Perhaps the arrest alone was sufficient to restore a balance of power in the relationship. Perhaps Johnson's boyfriend fears the possibility of being arrested again, and thus arrest acted as a sufficient deterrent. Alternatively, perhaps the arrest angered the boyfriend to such a degree that he re-assaulted Johnson, and she fears that he will do so again if the case is prosecuted.

Macneil's project of describing and analyzing relations has been likened to peeling an onion: "It is as if contract is the center of an

onion and Macneil is trying to study all the surrounding layers but always with the assumption that contract lies at the core.”<sup>292</sup>

In the context of no-drop prosecution, Epstein proposes a model that also might be characterized as the peeling of an onion, at the core of which is a proactive victim.<sup>293</sup> The layers of the onion—or concentric circles, in the words of the authors—are the factors that influence the strategies that the victim employs to cope with the violence.<sup>294</sup> These include individual, relational, community, institutional, and cultural factors.<sup>295</sup> Cutting across all of the circles is the socio-economic status of the victim.<sup>296</sup> Epstein’s ecological factors are consistent with Macneil’s relational norms. Their impact on the outcome of the case must be assessed and accounted for. It is to that endeavor that this discussion now turns.

## *2. Assessing the impact of relational values on the outcome of the case*

Macneil argues that after the legal actor has considered the relational values, he should explain why he has concluded that these values will not significantly affect the outcome of the case.<sup>297</sup> In this section, I address potential case outcomes in a narrow sense, from the perspectives of an individual prosecutor and an individual victim. In Part IV.C., I address the import of case outcomes on a broader level, examining the goals of prosecution beyond the individual case.

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292. Fox, *supra* note 7, at 21.

293. Epstein et al., *supra* note 108, at 472.

294. *Id.* Macneil’s theory has also been described as “concentric circles of exchange relations.” Fox, *supra* note 7, at 39.

295. Epstein et al., *supra* note 108, at 472. (“That first circle represents the individual level (e.g., the woman’s mental and physical health); the second represents the relational level (e.g., her relationship with her partner, family members, and friends); the third circle represents the community level (e.g., religious, work-related, ethnic, and neighborhood communities); the fourth represents the institutional level (e.g., the woman’s perceptions of the police, the court, and other potential help sources); and the outermost circle represents cultural identification and beliefs (e.g., religion and ethnic identity).”).

296. *Id.*

297. Macneil, *supra* note 131, at 885 (“[E]ven a modest . . . analysis calls for at least the following: (1) a statement that this is an area of extremely complicated . . . relations; (2) a brief description of these relations with suggestions, where available and appropriate, of further sources of information; (3) an explanation of why the analyst has concluded that the relations will not affect the outcome of his or her . . . study; and (4) a conclusion that *ceteris paribus* is therefore appropriate in such a case and constitutes adequate consideration of these relational impacts.”).

At the individual level, there are two immediately expected outcomes, from the prosecutor's point of view, in any given DV case. One is the successful legal disposition of the case, whether it is in the form of a conviction, a plea, or the defendant's agreement to the issuance of a protection order. Another is the separation of the defendant and the victim.<sup>298</sup> In the Johnson case, how might the relational norms and values impact the immediate disposition of the case, and the longer term goal of separation?

With regard to a successful legal disposition, from the vantage point of the prosecutor, perhaps not at all. Beverly Johnson might have refused to show up or testify at trial, or she might have testified but recanted her earlier statement. But there was sufficient evidence to proceed with or without Johnson's support. A police officer could have testified to seeing swelling on Johnson's face and arms; a recantation could have been impeached with Johnson's prior statements. When there is sufficient evidence to proceed without the victim's cooperation,<sup>299</sup> considering her relational values is unnecessary to dispose of the case successfully. For this reason, some prosecutors prefer proceeding without the victim.<sup>300</sup>

With regard to separation as an expected case outcome, however, a different picture emerges. Here the relational values have tremendous impact. For example, Johnson may have continued seeing her boyfriend, despite the existence of a protection order restraining him from contacting her. Such a situation is not uncommon, as Suk has persuasively argued, and it wreaks chaos, subjecting the defendant to criminal liability and in some jurisdictions, subjecting the victim to criminal liability for aiding and abetting the crime of violating a protection order.<sup>301</sup>

It wreaks other havoc. If the partner commits another act of DV, the victim may be reluctant to call the police or turn to the legal system for help. She may feel that the system is unresponsive to her

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298. See discussion *supra* Part II.B. and notes 58–61.

299. This is an example of “victimless” or “evidence-based” prosecution, characterized as the “state of the art” means of prosecuting DV cases, at least prior to the U.S. Supreme Court's holding in *Crawford v. Washington*. Joan S. Meier, Davis/Hammon, *Domestic Violence and the Supreme Court: The Case for Cautious Optimism*, 105 MICH. L. REV. FIRST IMPRESSIONS 22, 23 (2006), available at <http://www.michiganlawreview.org/assets/fi/105/meier.pdf>.

300. Kohn, *supra* note 291, at 33–49 (describing prosecutors who prefer that victims not be involved with prosecution because it makes their jobs easier).

301. See discussion *supra* Part II.B.

individual needs, as evidenced by a prosecutor's decision to proceed with charges that she did not support. She may feel that she is at fault or undeserving of help because she has continued the relationship despite the prosecution and protection order. This fear is realistic. In some jurisdictions, police may be less likely to respond to her call or less likely to find probable cause to arrest, concluding that the victim is partly at fault for the violence. They may find the victim to be untrustworthy. Or they may simply feel frustrated with her.

For relationships that have been ongoing for a significant number of years, where parties have children in common and are financially intertwined, and for relationships in which relational values and behaviors indicate the desire to preserve and harmonize both the intimate relationship and all of the relationships connected to it, RCT suggests that a "sharp out" approach is unrealistic. RCT, as applied to the prosecution of DV, suggests an alternative method of structuring a case outcome, one that revolves around the seriousness of the relations and not just the seriousness of the violent incident.

Scholars opposing aggressive no-drop policies have suggested numerous alternative outcomes. These include the issuance of a protection order, but one that is short in duration, to provide the victim the space to consider whether she values the connection with her partner as much as she thinks she does. Prosecutors could more narrowly tailor the substance of the protection order to prohibit the defendant from harassing, threatening, or assaulting the victim, but not to prohibit him from contacting her.<sup>302</sup> Prosecutors may consider delaying prosecution or offering deferred sentencing in a broader range of cases.<sup>303</sup>

Another alternative, but one that has received little scholarly attention, is that proposed by David Ford. Ford argued that victims use the threat of prosecution as leverage with violent partners and as a means of managing the violence in their relationships.<sup>304</sup> This is directly analogous to Macneil's proposal that parties use contract law

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302. See Coker, *supra* note 12, at 105 (suggesting remedies currently available in restraining orders, but that include additional terms like an affirmative agreement to express anger in a noncontrolling, nonthreatening way). Goldfarb suggests this type of narrow tailoring in the context of civil protection orders. Goldfarb, *supra* note 52, at 1532–38.

303. Goldfarb, *supra* note 52, at 1508–09.

304. David A. Ford, *Prosecution As a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships*, 25 LAW & SOC'Y REV. 313, 316–19, 327 (1991).



to create—and restrain—power in relations. Ford proposed that prosecution could be an effective “power resource” for a victim.<sup>305</sup> But significantly, it can only be a power resource to the extent that the victim can control the manner in which it is brought to bear.<sup>306</sup> The victim must be able to show her partner that she is committed to prosecution and that her threat is credible, and she must be able to withdraw that threat.<sup>307</sup>

Prosecutors could act in alliance with victims in their negotiations to keep the victims safe.<sup>308</sup> Indeed, the threat of prosecution may prove to be more significant than actual prosecution. A victim could use the threat to bargain for outcomes that might be more advantageous to her, or even impossible to obtain, through a criminal prosecution.<sup>309</sup>

In my experience representing DV victims in civil protection order cases over the past thirteen years, I observed (and often assisted) victims as they bargained for and entered into agreements with their partners or ex-partners “in the shadow of the law.”<sup>310</sup> For example, a victim might offer to give up relief she is legally entitled to in the case, such as child support, to get in return relief she might not be entitled to, such as her partner’s promise to transport the child to and from school each day.<sup>311</sup>

RCT explicitly assumes that parties will enter into agreements that restrict their freedom for the purpose of pursuing their own ends—to create more choices, later.<sup>312</sup> An agreement between a

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305. *Id.* at 314.

306. *Id.* at 317.

307. *Id.* at 317–18.

308. *Id.* at 318 (“For a woman, [prosecution] may be an effective means of deterring her partner’s violence when invoked in alliance with committed agents of criminal justice.”).

309. *Id.*

310. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979) (developing a “framework within which to consider how the rules and procedures used in court . . . affect the bargaining process that occurs . . . outside the courtroom,” i.e. “bargaining in the shadow”).

311. See Mahoney, *supra* note 66, at 47–49 (describing a woman who dropped her civil protection order case in exchange for her husband dropping his child custody case). See generally Randy Frances Kandel, *Squabbling in the Shadows: What the Law Can Learn from the Way Divorcing Couples Use Protective Orders as Bargaining Chips in Domestic Spats and Child Custody Mediation*, 48 S.C. L. REV. 441 (1997).

312. Scott & Scott, *supra* note 139, at 1232; see also Macneil, *Values*, *supra* note 217, at 356–57 (1983) (describing the value of enforcing the consequences of choices people freely make). I acknowledge that there is a significant divergence of opinion with regard to the nature and purpose of contracts and contract law, and that this divergence is prominent in the

victim and her partner in a civil protection order case might not be legally enforceable as a contract,<sup>313</sup> and might never become part of the official order issued by the court—or even brought to the court’s attention—what Stewart Macaulay refers to as the difference between the “paper deal” and the “real deal.”<sup>314</sup> Yet, it is a bargained for exchange borne out of the parties’ understanding of their obligations to each other, and out of DV law.

Viewing DV within a larger exchange relationship has additional benefits. It more accurately reflects how victims view discrete incidents of DV.<sup>315</sup> Research indicates that victims feel that there is a gap between how prosecutors view a case and how victims view a case. A careful investigation into the victim’s relational values is, in and of itself, a valuable intervention.<sup>316</sup> For victims who feel ambivalent about the relationship or for victims who want the relationship to continue (but the violence to stop), the investigation indicates an interest in the relationship—and therefore the victim—and a willingness by the prosecutor to work within the victim’s context.<sup>317</sup>

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opinions of scholars who write in support of and against RCT. *See generally* Dori Kimel, *The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model*, 27 OXFORD J. LEGAL STUD. 233 (2007).

313. For lack of consideration, given that the father of the child is legally required to pay child support to the custodial parent, regardless of whether this victim waived child support in the particular context of the civil protection order case.

314. Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44 (2003).

315. Mahoney, *supra* note 66, at 16 (describing women whom she interviewed and shared her own story with: “Women often discussed the relationship at length before they mentioned any violence. Finally, I began to understand that the violence against these women seemed shocking to me . . . precisely because we heard each others’ reports of violence isolated from the context of the marriages. . . . We resisted defining the entire experience of marriage by the episodes of violence that had marked the relationship’s lowest points.”); *see also* Goodmark, *supra* note 52, at 29 (describing the legal system’s myopic view of the narrow range of behaviors it defines as domestic violence and the disparity between this definition and the totality of women’s experiences of domestic violence).

316. Epstein et al., *supra* note 108, at 470 (describing a prosecutor’s willingness to consider the layers of factors that affect her decision making: “[T]his focus on the victim in and of itself constitutes an intervention that may enhance her long-term safety by promoting her sense of autonomy and self-reliance, as well as her sense that others are on her side.”). *See generally* Mills, *Affective Lawyering*, *supra* note 40; Mills, *Killing Her Softly*, *supra* note 91.

317. *See* EVE BUZAWA, GERALD T. HOTALING, ANDREW KLEIN & JAMES BYRNE, RESPONSE TO DOMESTIC VIOLENCE IN A PROACTIVE COURT SETTING: EXECUTIVE SUMMARY 13 (2000), <http://www.ncjrs.gov/pdffiles1/nij/grants/181428.pdf> (reporting that in a scale study, victims generally perceived a gap between their interests and prosecutors’ interests); *see also* Epstein et al., *supra* note 108, at 486 (arguing that the prosecutor’s

Indeed, as Mills argues, every positive contact between the prosecutor and the victim is a valuable intervention. The relationship between prosecutor and victim should be critical to prosecutors. Prosecutors themselves could function in a relational fashion. Pamela Karlan theorized the relationship between a criminal defense attorney and his client as a relational contract.<sup>318</sup> While a prosecutor is not the victim's attorney, his ability to transcend the transaction-bound constraints of the criminal law is no less significant. By developing a relationship with the victim, becoming familiar with victim-specific concerns, and developing the norms of reciprocity, flexibility, and trust, the victim may feel encouraged to support prosecution<sup>319</sup> and to seek assistance from the criminal justice system in the future should abuse recur.

Perhaps most importantly, by developing a relationship with the victim, a prosecutor is in a better position to assess whether a victim who does not support prosecution has been coerced, or intimidated, by a batterer to drop the case.<sup>320</sup> This assessment is complex.<sup>321</sup> But, a victim who trusts the prosecutor assigned to her case may admit outright that she has been coerced to drop.<sup>322</sup> Alternatively, she may

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“willingness to understand and work within this context” is critical to understanding the victim's priorities and concerns and ultimately in increasing her long term safety).

318. Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 673 (1992).

319. Waits, *supra* note 32, at 307 (1985) (describing how helping a victim assess her situation may encourage her to act as a witness in the case).

320. Scholars are divided with regard to how a prosecutor should proceed if the victim is coerced. Some believe that no-drop is an answer to the problem of coercion because it takes away the batterer's incentive to coerce the victim. *See, e.g.*, Hanna, *supra* note 34, at 1891. Others argue that when the state proceeds despite the victim's wishes to the contrary, the state replicates the very coercion of the victim that it seeks to eradicate by taking complete control over the case, functioning as the sole decision-maker and ignoring victims' voices. *See* Mills, *supra* note 91, at 566.

321. *See* Epstein, *supra* note 37, at 15 (noting that one reason for the reluctance of prosecutors to proceed with cases was their “claim[ ] that they could not distinguish between a battered woman who was communicating her true feelings and one who had a literal or figurative gun to her head”); Kuennen, *supra* note 206, at 14 (describing the “considerable obstacles” to determining if a batterer's actions are coercive and arguing that “there are varying types and degrees of coercion that are difficult to ascertain” and that “[v]ictims' decisions to drop their cases may be influenced by numerous external sources in addition to the batterer, and these influences must be distinguished”).

322. CAROLYN HOYLE, NEGOTIATING DOMESTIC VIOLENCE 171–74 (1998) (arguing that victims may feel intimidated for numerous reasons to drop cases, but that prosecutors “rarely make the necessary checks” to determine whether withdrawals are made voluntarily); *id.* at 172.

disclose that she wants the prosecution to proceed but feels it is unsafe to state this position in the presence of her partner.<sup>323</sup> Or, she may explain that while her partner has threatened her with harm if she does not drop, she does not feel coerced by the threat because she does not believe it to be credible.<sup>324</sup> Or, she may feel that her primary goal of exercising increased power in the relationship was satisfied by the act of calling the police, or successfully negotiating factors such as separation, child custody, and parenting time, as discussed above. A relational approach to prosecution would significantly enhance the prosecutor's ability to obtain this information and to begin to assess the voluntariness of a victim's reluctance to support prosecution.<sup>325</sup>

*C. Addressing Resistance to Importing Relational Values  
into DV Prosecution*

In the context of effectively prosecuting DV, numerous objections have been raised to the consideration of a victim's desire with regard to whether prosecution in a given case should proceed. These objections often fall into the categories of what prosecutors *should* do, and what prosecutors *can* do.<sup>326</sup>

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323. MADDEN DEMPSEY, *supra* note 36, at 17 (calling this type of victim withdrawal "performative withdrawal"); *id.* at 17 (arguing that in many cases when victims meet privately, face-to-face with prosecutors, they expressed their sincere desire that the prosecutor proceed with the case despite their stated desire, for the benefit of the defendant, that the case be dropped); *id.* at 20 ("In my experience, the majority of victims who withdrew support were, to my belief and understanding, entirely sincere in their request that the charges be dismissed."); *cf.* Epstein, *supra* note 37, at n.62 (detailing an interview of a prosecutor in the District of Columbia who explained that after interviewing victims daily for six months, he could not distinguish between those victims who sought to drop charges because of a threat by the defendant and those who sought to drop for other reasons).

324. See Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 *SEX ROLES* 743, 748 (2005) (arguing that for a threat to be coercive, the batterer must communicate "the ability, willingness and readiness to control one's partner" and the victim must "believe that, when it is threatened, the negative consequence will be delivered").

325. Mills calls this relational approach "affective lawyering." See *generally* Mills, *supra* note 40.

326. See, e.g., MADDEN DEMPSEY, *supra* note 36, at 15 ("It is important to distinguish between two questions that often arise in thinking about the prosecution of domestic violence without victim support: (1) *can* such cases be prosecuted? (2) *should* such cases be prosecuted? . . . Often these two questions become conflated in prosecutors' thinking . . ." (emphasis in original)); see also Deborah Tuerkheimer, *Why Criminalize Domestic Violence?* Abstracts of Panelist's Remarks, Symposium: *Thinking Outside the Box: New Challenges and New Approaches to Domestic Violence*, St. John's University, Mar. 20, 2009 ("A fair characterization

*1. Should the criminal justice system account for relational values?*

Michelle Madden Dempsey argues that prosecutors' actions (to pursue or not to pursue a given case) realize values.<sup>327</sup> Her categorization of these values into two types, consequential and intrinsic,<sup>328</sup> provides a useful organizational tool. Examples of consequential values include conviction and punishment of the offender, prevention of DV generally, and increased safety of particular victims.<sup>329</sup>

Although no-drop policies have increased the number of DV cases prosecuted, both the charges filed and dispositions obtained are generally lenient.<sup>330</sup> As discussed previously, prosecutors routinely negotiate pleas with defendants that include a reduction in charge, with little or no jail time, in exchange for the defendant's consent to the continuance of a restraining order.<sup>331</sup> In those cases in which

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of the responses I have encountered is: true, the criminal law *does* not respond to the realities of domestic violence, but perhaps *need* not, or *should* not, or *cannot*." (emphasis in original)).

327. MADDEN DEMPSEY, *supra* note 36, at 59 (describing prosecutorial actions as having the potential to realize myriad values, and identifying and organizing them to "understand more clearly the relationship between these values and the reasons they generate (or fail to generate) for prosecutors").

328. *Id.*

329. *Id.* at 160.

330. See Hanna, *supra* note 47, at 1523 (describing lenient sentences and noting that "few batterers ever see the inside of a jail cell"). The New York District Attorney's office is known as one of the most aggressive in the nation in prosecuting domestic violence cases. See SCHNEIDER, *supra* note 17, at 342. Yet even here, scholars note very lenient dispositions. See, e.g., Richard R. Peterson, *Combating Domestic Violence in New York City*, NEW YORK CITY CRIMINAL JUSTICE AGENCY (2003) (comparing case outcomes between DV and non-DV misdemeanor cases found 72% of DV cases resulted in conditional discharge compared with 47% of non-DV cases; only 17% accused of DV received a sentence that included jail compared with 45% of non-DV cases); see also Miccio, *supra* note 19, at 298 (describing sentences in New York as consisting largely of fines and conditional discharges rather than jail, concluding that "the data from New York challenges the notion that punish and protect are consistently part of a criminal justice repertoire" (citing N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS. & N.Y. STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1994: EVALUATION OF THE MANDATORY ARREST PROVISIONS, FINAL REPORT TO THE GOVERNOR AND LEGISLATURE (2001); CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 180-83 (2000) (providing examples of judges and juries treating domestic violence cases with relative leniency))).

331. See Suk, *supra* note 47, at 54-55 (describing the process and substance of this type of plea bargain, and stating that this result "is so common that it is plausible to consider it a standard disposition sought by prosecutors."); *id.* at 56 (describing the issuance of a criminal court protection order as a "phenomenon that is so routine in criminal court that it disappears in plain sight."); KLEIN, *supra* note 47, at 55-57.

defendants are convicted, the charges are overwhelmingly misdemeanors.<sup>332</sup>

One reason for this is that, despite aggressive anti-domestic violence laws, prosecutors are not always able to get juries to convict, and thus must use plea bargains to obtain convictions in the first place.<sup>333</sup> The average juror may believe that some amount of violence within an intimate relationship is acceptable, and thus be disinclined to convict.<sup>334</sup> Another reason is that criminal justice actors, despite mandatory policies, are more likely to view DV as technical, rather than real, violence.<sup>335</sup> Dan Kahan argues that, in the case of DV, “legislative reforms reflected strong, feminist-inspired critiques of norms that had not yet been fully repudiated by society at large.”<sup>336</sup> When the law is much more condemnatory of a social norm than the average decision-maker tasked to enforce it, the decision-maker resists enforcing it.<sup>337</sup> This, in turn, reinforces the very norm that lawmakers seek to change. Kahan calls this a problem of “sticky norms,”<sup>338</sup> and describes DV as falling squarely within it.<sup>339</sup>

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332. KLEIN, *supra* note 47, at 55 (“[T]he vast majority of domestic violence defendants are prosecuted for misdemeanor assaults.”); Suk, *supra* note 47, at 44 (“[M]ost DV cases are misdemeanors.”).

333. See Keith Guzik, *The Agencies of Abuse: Intimate Abusers’ Experience of Presumptive Arrest and Prosecution*, 42 L. & SOC’Y REV. 111, 123 (2008).

334. See *id.* As one state’s attorney stated: “It’s that . . . attitude that family problems should stay in the family, until they get to a certain point. If the jury believes it hasn’t gotten to that point, then leave them [suspects] alone.” *Id.* at 122; see also Murray A. Straus, *Physical Violence in American Families: Incidence Rates, Causes, and Trends, in ABUSED AND BATTERED: SOCIAL AND LEGAL RESPONSES TO FAMILY VIOLENCE* 17, 27 (Dean D. Knudsen & JoAnn L. Miller eds., 1991) (“The informal social norms have changed much less than the law has. Almost a third of American men and a quarter of American women perceive that it is normal for a husband or wife to slap the other ‘on occasion.’”).

335. Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Caseload*, 55 EMORY L.J. 691, 701 (2005) (“Much of the available literature suggests that as the relationship between the parties moves toward the intimate end of the spectrum, criminal justice actors are more likely to regard the crime as technical rather than real, which produces a more lenient disposition.”).

336. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 629 (2000).

337. *Id.* at 607.

338. *Id.*

339. *Id.* at 628 (“When states enact mandatory arrest policies, police departments refuse to implement them. When states raise the penalties for repeat offenders, prosecutors drop cases, juries acquit, and judges refuse to sentence severely. When judges make nonabuse a condition of probation, probation officers look the other way . . . . Though not as prevalent as it once was, the view that occasional violence is a normal part of family life persists. Many decisionmakers either hold this view or empathize with individuals who do. Predictably, these

Recent interviews with defendants arrested for DV in a “presumptive prosecution” jurisdiction provide examples of the problem.<sup>340</sup> Attorneys advised defendants that the state “does not drop” charges and almost always “take[s] the female[’s] side,”<sup>341</sup> that the district attorney was female and was “going to crack down on domestic violence,”<sup>342</sup> and that, despite the existence of a no-contact order, the defendant should “remain on good terms” with the victim so that the attorney could persuade her to drop the case.<sup>343</sup> Statements such as these give batterers the message that it is the system, and not the batterer’s conduct, that is to blame for the charges pending against them.<sup>344</sup> As a result, batterers were not deterred from intimidating victims to drop charges; instead, they changed their tactics for so doing.<sup>345</sup> The study concluded that mandatory practices “fail to fulfill their promise of increasing abusers’ responsibility for violence.”<sup>346</sup>

Nor is there evidence to support the consequential value of keeping individual victims safer. Of the very few studies that compare recidivism in no-drop versus discretionary-drop jurisdictions, none

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decisionmakers refuse aggressively to enforce condemnatory [sic] domestic violence laws.” (citations omitted)).

340. Guzik, *supra* note 333. The study consisted of in-depth interviews of thirty persons arrested and prosecuted for domestic violence and is the first in which defendants were contacted for the purpose of understanding how the policies affect them. *Id.* at 112.

341. *Id.* at 132.

342. *Id.* at 127.

343. *Id.* at 125.

344. *Id.* (commenting that such statements send the message that the defendant did not do anything wrong, but rather that the legal system is overly strict or unjust); *see also* Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1870 & n.123–24 (2002) (observing that as mandatory arrest and prosecution policies went into effect, the perpetrator population and their attorneys claimed unfair, discriminatory treatment, and documenting statements of defendants such as “that the ‘system is against men,’ and that in responding to a ‘family matter,’ the police ‘always arrest the man’ and ‘judges always believe the woman’”); *see id.* at 1903 (“Perpetrators’ tendencies to attribute responsibility externally, make arbitrary inferences, and exaggerate negativity may be encouraged when their attorneys—correctly or incorrectly—articulate the position that the court system is biased and unfair.”).

345. Guzik, *supra* note 333, at 125 (describing tactics such as “trying to be nice,” “attempting to generate or play upon feelings of regret from their partners about their arrests,” and using family members to contact and pressure victims: “In these contexts of diminished power, abusers transformed rather than severed their forms of influence over their partners.”).

346. *Id.* at 136.

conclude that no-drop enhances victim safety.<sup>347</sup> Jeffrey Fagan concluded that, when compared with discretionary policies, no-drop policies increase the risk of re-abuse in cases in which men with prior arrests or lengthy histories of severe violence toward their partners.<sup>348</sup> Ford and Renzetti concluded that “contrary to popular advocacy, permitting victims to drop charges significantly reduces risk.”<sup>349</sup>

Currently, batterers are being arrested and charged, but then their charges are reduced or dismissed. Instead of being punished, they are told to stay away. Instead of holding batterers accountable, system actors blame the system for the batterer’s arrest and prosecution. Batterers themselves blame the system. And there is no evidence to suggest that women are any safer.

If consequential values are not realized by a policy that purposefully excludes consideration of relational values, perhaps “intrinsic values” are. An example of an intrinsic value is the expressive value of criminal prosecution, or its ability to send a message regarding the wrongful nature of particular conduct.<sup>350</sup>

The expressive value of no-drop policies is one of the most widely recognized intrinsic values discussed in the scholarly debate.<sup>351</sup> Supporters argue that one of the most important ways of ending violence against women is to ensure that batterers get the message that society will not tolerate their behavior.<sup>352</sup> But sending a strong message, they argue, requires consistently sought, swift

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347. I note, however, that one small study (sample size of eleven) conducted in Duluth, Minnesota, found that victims preferred no-drop policies to policies which allowed them to have some influence over the decision to prosecute. See Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 *HAMLIN L. REV.* 115, 137 (1991) (“In interviews conducted with victims subpoenaed to testify against their partners . . . nine of eleven said they were relieved when they were told that they could not have the charges dropped, even though they never would have voluntarily testified.” (citing Duluth Abuse Intervention Project, Data Collection Files (1990))).

348. JEFFREY FAGAN, *NAT’L INSTITUTE OF JUSTICE, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 17 (1996).

349. See David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, in *LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION* 157 (1993).

350. MADDEN DEMPSEY, *supra* note 36, at 162.

351. *Id.*

352. Hanna, *supra* note 34, at 1890.



punishment,<sup>353</sup> that adheres to the underlying goals of the criminal justice system: to punish and deter.<sup>354</sup>

But if consistently sought, swift punishment is not the norm in DV prosecutions, as above argued, perhaps the message sent by aggressive prosecution is illusory. As Katherine Baker notes: “Whatever norm or law tells men that battery is wrong is counteracted by gender norms that reaffirm their right to control and their partners’ duty to obey . . . . In order to attack the problem, therefore, the law needs to do more than just label domestic battery and rape wrong . . . .”<sup>355</sup>

Battered women’s activists in the 1970s sought to use the criminal law to do just this—to change cultural perceptions about violence against women. They situated DV within a cultural paradigm and sought to alter the social conditions that created and supported intimate abuse.<sup>356</sup> No-drop prosecution, like mandatory arrest, was a “corrective to a social system that refused to treat male intimate violence as offensive conduct and as criminal behavior.”<sup>357</sup> It was one piece of the larger puzzle of changing cultural perceptions about violence against women.<sup>358</sup>

Many feminist legal scholars acknowledge that the criminalization strategy did not affect the cultural shift that activists had hoped for.<sup>359</sup> Not only that, it led to the unintended consequence of requiring victims to sever their relationships in exchange for getting the state’s help. This was not the goal of the

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353. *Id.*

354. *Id.* at 1870 (citing William F. McDonald, *The Role of the Victim in America*, in *ASSESSING THE CRIMINAL* 295, 295–96 (Randy E. Barnett & John Hagel, III eds., 1977)).

355. Baker, *supra* note 81, at 1488–89.

356. Miccio, *supra* note 19, at 249.

357. *Id.* at 265.

358. *Id.* at 249 (“In the lexicon of the early movement, what needed fixing was not the survivor but the culture.”).

359. *Id.* at 241 (“Ten years later, the quality of battered women’s lives, as well as society’s view of male violence, still needs redress.”); SCHNEIDER, *supra* note 17, at 113 (observing the deep societal resistance to perceiving the circumstances of battered women as a problem of gender equality); *id.* at 230 (“Intimate violence has now been recognized as a ‘public’ harm, but it is significant that this recognition is, in a sense, conditioned on a view that intimate violence is an individual problem, not a systemic or social one. . . . [O]ur culture wants a quick-fix explanation and denies the link to gender.”); Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 *DEPAUL L. REV.* 817, 817–20 (2000) (arguing that criminalization of DV has obscured women’s sexual and financial subordination, the underlying problems that “lead to the need for criminalization”).

battered women's movement. It sought to end violence in women's lives, not to have them leave their relationships.<sup>360</sup>

When considering the expressive value of no-drop policies, one may also wonder: what messages are sent to battered women? Laurie Kohn recently asked this question, and concluded that there are several.<sup>361</sup> One potential message is that the system aggressively and proactively protects the victim.<sup>362</sup> But this message, as Kohn notes, is not supported by empirical data. The message is therefore particularly troublesome; it gives victims a false sense of security and potentially leaves them in more, rather than less, danger.

Kohn argued that at least two other potential messages are sent to victims. One is that victims cannot make rational, informed decisions about themselves, their families, and their futures.<sup>363</sup> Another is that criminal justice system actors are more capable than victims of making these decisions.<sup>364</sup> Yet there is substantial evidence that victims are accurate predictors of future violence.<sup>365</sup> Kohn concluded that because the messages vary to such an enormous degree based on context and perspective, they alone cannot justify the imposition of mandatory policies.<sup>366</sup>

With regard to the message sent to society, some argue that mandatory arrest and prosecution policies have communicated that the state will respond to DV.<sup>367</sup> But given the messages that no-drop

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360. SUSAN SCHECHTER, EXPANDING SOLUTIONS FOR DOMESTIC VIOLENCE AND POVERTY: WHAT BATTERED WOMEN WITH ABUSED CHILDREN NEED FROM THEIR ADVOCATES 8 (2000) (describing the historic goal of the battered women's movement as "to end violence and coercion, not to have women leave their relationships").

361. Kohn, *supra* note 26, at 240 (arguing generally that there is an inverse relationship between the seriousness with which the state treats DV cases and the seriousness with which it treats DV victims).

362. *Id.* at 240–41.

363. *Id.* at 240.

364. *Id.* at 241.

365. See D. Alex Heckert & Edward W. Gondolf, *Battered Women's Perceptions of Risk Versus Risk Factors and Instruments in Predicting Repeat Reassault*, 19 J. INTERPERS. VIO. 778, 796 (2005); Donna Coker, *supra* note 98; Welch, *supra* note 98.

366. Kohn, *supra* note 26, at 244.

367. See, e.g., SCHNEIDER, *supra* note 17; Epstein, *supra* note 34, at 1885 (mandatory policies have made gains "in sending a clear message of disapproval"); Ford & Regoli, *supra* note 99, at 128 (discussing the important symbolic shift); Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 217, 224–25 (1992) ("Even if a law enforcement approach fails to result in specific deterrence in some cases, enforcement of the law . . . sends an appropriate message to the community—that domestic violence is not acceptable."); Miccio, *supra* note 19, at 240 ("One must not overlook the

sends (or fails to send) to batterers, the sticky norms problem that no-drop has created, the disempowering messages that no-drop sends to victims, and the lack of conclusive data that no-drop policies make victims safer, it is hard to make the case that the message has been received.

2. *Can the criminal justice system account for relational factors?*

Prosecuting DV is a “tall order.”<sup>368</sup> Taking the victim’s relational values into account is doubly so. It requires prosecutors to consider a host of factors that hitherto they have been trained to ignore,<sup>369</sup> not to mention the time it requires to gather this wide range of facts, listen to the victim, and think carefully about a hard-to-make decision. Applying Macneil’s relational method, rather than a rule such as no-drop, might slow down the criminal justice system to an objectionable extent.<sup>370</sup>

While it is certainly the case that prosecutors have been trained to ignore victims’ relational values, they are hardly unqualified to conduct such an assessment. Battered women’s advocates have already successfully trained and collaborated with prosecutors to conduct individualized assessments of the underlying relationships enveloping incidents of DV. They have done so in the context of women who are arrested.

For example, in Duluth, Minnesota, advocates work with the prosecutor’s office to establish a process through which victims of ongoing abuse charged with misdemeanor offenses against their abusers can obtain a conditional deferral, which sidetracks the cases and puts the defendants on a quasi-probation status for a year.<sup>371</sup> Instead of focusing on the incident of assault, prosecutors focus on the relationship behind the assault.

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radical and beneficial nature of mandatory [interventions]: They placed male intimate violence at the center of law enforcement policy by criminalizing conduct that the justice system and society previously had sanctioned.”).

368. DEMPSEY, *supra* note 36, at 217.

369. GOODMAN & EPSTEIN, *supra* note 21, at 92 (describing how anti-domestic violence legislation has trained state actors to assume that they cannot determine when a victim truly wants the case dropped or is being coerced into dropping).

370. See Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 798 (1967) (arguing that when we have to mass process, we turn to quantitative rules, rather than asking a legal decision-maker to weigh and balance individual factors, for unlike a department store, for the legal system more business is not necessarily a good thing).

371. McMahan & Pence, *supra* note 161, at 67–68.

Similarly, in Tucson, Arizona, the prosecutor's office operates a diversion program for immigrant victims of DV who are arrested.<sup>372</sup> DV victims' advocates work closely with prosecutors who are specially trained to identify and recognize the particular forms of coercive control that abusive spouses use against immigrant victims.<sup>373</sup> The case is held open during the pre-trial phase while the defendant undergoes counseling.<sup>374</sup> Upon completion, the prosecutor dismisses the case and the defendant exits the system without a conviction on her record.<sup>375</sup>

These examples demonstrate that victims' advocates can train prosecutors to conduct an individualized assessment, and that prosecutors are willing to be trained. They also illustrate the fact that prosecutors' offices can, and do, dismiss cases in which they could otherwise secure convictions. There is thus reason to believe that advocates and prosecutors can collaborate to find creative solutions in all cases.

A prosecutor need not conduct a relational analysis on her own. Innovative collaborations between prosecutors, victims' advocates, and victims' civil attorneys are already in existence. In Washington, D.C., the "Victim Informed Prosecution Project" connects victims' civil attorneys on civil protection order cases with the prosecutors in charge of the criminal cases for the purpose of giving the victim more voice in the prosecution.<sup>376</sup> Civil attorneys who work in collaboration with prosecutors can provide victims with detailed information such as what charges the prosecutor is likely to bring, the types of plea offers he will make and his assessment of the likelihood of conviction.<sup>377</sup> They can also relay to the prosecutor details such as the victim's concerns about prosecution and can advocate with the prosecutor for an approach that accounts for these

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372. See Harris, *supra* note 179.

373. *Id.*

374. *Id.*

375. *Id.*

376. Lauren Bennett Cattaneo et al., *The Victim-Informed Prosecution Project: A Quasi-Experimental Test of a Collaborative Model for Cases of Intimate Partner Violence*, 15 VIOLENCE AGAINST WOMEN 1227 (2009).

377. Epstein et al., *supra* note 108, at 496 (describing the information that civil attorneys can provide their clients, when those attorneys work as a team with prosecutors and advocates).

concerns.<sup>378</sup> In Chicago, the “Target Abuser Call” program functions similarly.<sup>379</sup>

Significantly, funding exists to support such collaborations. The Violence Against Women Act of 2005 reauthorized funding for grants supporting programs such as Victim-Informed Prosecution and Target Abuser Call.<sup>380</sup> In addition, the American Recovery and Reinvestment Act of 2009, signed into law on February 17, 2009, provides to the Office on Violence Against Women \$225 million, \$140 million of which is designated for STOP (Services Training Officers Prosecutors Formula Grant Program) “to promote a coordinated, multidisciplinary approach to enhance services and advocacy to victims, improve the criminal justice system’s response, and promote effective law enforcement and prosecution strategies to address domestic violence, dating violence, sexual assault and stalking.”<sup>381</sup>

I recognize that my optimism in the capacity of the criminal justice system to respond to DV—even with the incentivized trend toward community coordination and collaboration—may be naïve.<sup>382</sup> I am asking prosecutors to take into account a long list of factors by applying a relational approach. Even in the realm of contracts,

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378. *Id.*

379. Bailey, *supra* note 45, at 49–51 (describing the collaboration between service providers, community advocacy groups, civil attorneys and prosecutors to include “the victim in the prosecution process by directly addressing the economic and safety needs that often make her reluctant to seek prosecution” and to provide “a supportive, cooperative environment that takes away any sense of alienation she might feel in the typical prosecution scenario”).

380. *See* Violence Against Women And Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960; *see also* American Recovery and Reinvestment Act of 2009, signed into law on February 17, 2009, <http://www.ovw.usdoj.gov/recovery/programs.htm>, which provides to the Office on Violence Against Women \$225 million, \$140 million of which is designated for STOP (Services Training Officers Prosecutors Formula Grant Program) “to promote a coordinated, multidisciplinary approach to enhance services and advocacy to victims, improve the criminal justice system’s response, and promote effective law enforcement, prosecution, and judicial strategies to address domestic violence, dating violence, sexual assault and stalking.” *See generally* OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP’T OF JUSTICE, 2004 BIENNIAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT (2004).

381. *See* United States Department of Justice, <http://www.ovw.usdoj.gov/recovery.htm> (last visited Mar. 19, 2010).

382. *See, e.g.*, Coker, *supra* note 74, at 1039–40. (arguing that too much trust and reliance have been placed on a “coordinated community response” as a panacea); *see also* Römken, *supra* note 68, at 161 (arguing that even in coordinated community responses, the prosecutor dominates).

scholars question legal actors' abilities to do so.<sup>383</sup> Notwithstanding these objections, proposing an approach to the prosecution of DV that does not account for the relational complexity inherent in domestic relationships will not work.<sup>384</sup> As Macneil has stated, "This produces no trouble free-Eden, but it works. And relational contract law does not promise a rose garden, just freedom from the conceptual limitations of a discrete system."<sup>385</sup>

#### V. THE OPPORTUNITY TO IMPLEMENT FEMINIST VALUES

In this Part, I turn to what Christine Littleton calls the "problem of transition,"<sup>386</sup> which refers to the tension amongst feminist legal scholars between taking seriously women's actual experiences of no-drop while simultaneously trying to maintain the little protection from male violence that the current law provides.<sup>387</sup> I agree with those scholars who suggest that the problem need not be portrayed as a policy choice between "never drop" and "always drop," and I suggest that the incorporation of relational principles may, in fact, provide an opportunity to implement feminist values through law.

##### *A. The Problem of Transition*

Feminist legal scholars appreciate the importance of relational context to DV law, as evidenced by their arguments in support of its analysis at virtually every stage of DV prosecution.<sup>388</sup> They acknowledge that the relational context is critical to the victim's decision to support prosecution: "What can be said of virtually every consideration militating against cooperation . . . is that each is rooted in the continuing relationship between the woman and the defendant. The victim's decision making with regard to prosecution

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383. See, e.g., Mertz, *supra* note 106, at 917 (describing the tension between those who articulate the desire for simplicity to produce more uniform and predictive results and what Macneil advocates—careful consideration of details). See generally RICHARD DANZIG AND GEOFFREY R. WATSON, *THE CAPABILITY PROBLEM IN CONTRACT LAW* (2d. ed. 2004) (examining several famous contracts cases and discovering that, even when judges attempt to implement legal realism values, their capabilities of so doing are questionable).

384. See, e.g., Miccio, *supra* note 19, at 305 (describing the widespread criticism leveled at "one-size-fits-all" approaches to the prosecution of DV).

385. MACNEIL, *supra* note 135, at 77.

386. This term was coined by Christine Littleton. See Littleton, *supra* note 11, at 31, 47.

387. *Id.* at 47.

388. See discussion *supra* Part III.B.

simply cannot be evaluated without reference to the context in which she remains embedded.”<sup>389</sup> However, scholars are deeply divided whether prosecutors should consider context when deciding to proceed or dismiss DV cases. Both proponents and opponents of no-drop fear a return to treating DV as a private matter rather than a crime.<sup>390</sup> As Emily Sack recently asked, “Isn’t this where we were over twenty-five years ago?”<sup>391</sup>

Activists have won legal reform favoring battered women by advocating that prosecutors ignore relational factors. No-drop prosecution policies have decreased the number of cases dismissed and brought prosecution rates in DV cases on par with stranger violence cases.<sup>392</sup> These are remarkable accomplishments, given that thirty years ago both police and prosecutors refused to respond to DV victims’ requests for help. Given this tremendous change in the criminal justice system’s approach, it is difficult to argue against the current regime. This is the problem of “transition.” As stated by Littleton:

To ask society—and especially to ask the law—to take [women’s] love and hope seriously is to run headlong into the problem of transition. How could we possibly take seriously women’s accounts of love and hope without undermining the little protection from male violence women have been able to wrest from the legal system, without indeed increasing our already overwhelming vulnerability?<sup>393</sup>

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389. Tuerkheimer, Crawford’s *Triangle*, *supra* note 165, at 17.

390. See, e.g., Sack, *supra* note 11, at 1687 (“[E]ven those [opponents of mandatory policies] advocating this position do not want to abandon the benefits of having the potential intervention of the criminal justice system available as a realistic threat to batterers. Battered women’s advocates, with good reason, also do not want to abandon the conception of domestic violence as a public problem.”); *id.* at 1690 (“[D]o proponents of this discretionary structure really believe that without mandatory policies in place, the criminal justice system would make the ‘right’ choices and adhere to victims’ desires to treat domestic violence seriously (when they wanted them to)?” (citation omitted)); see also Hanna, *supra* note 34, at 1863 (discussing threat of giving up ground gained).

391. McMahon & Pence, *supra* note 161, at 61 (“How, one might ask, can the anti-domestic violence movement be reflective and self-critical about their analysis of battering and the role of criminalization without demeaning or devaluing the integrity of activists’ work or their accomplishments over the last 30 years?”); Sack, *supra* note 11, at 1688; see also Hanna, *supra* note 34, at 1863 (discussing giving up the ground gained).

392. See discussion *supra* Part IV.C.

393. Littleton, *supra* note 11, at 47.

Yet if feminist legal scholars value women's experiences<sup>394</sup>—and particularly if they value women's desire for connection, in addition to women's desire for safety—they must ask the law to take these desires seriously. No-drop prosecution policies are effective for some victims—for those who have the resources and the desire to leave their partners.<sup>395</sup> But what about everyone else?<sup>396</sup>

There are choices between current no-drop policies and the “always-drop” policies of the past.<sup>397</sup> Solutions proposed by Epstein and Ford<sup>398</sup> demonstrate that there is room to maneuver to take advantage of an aggressive prosecutorial strategy while simultaneously being sensitive and responsive to the relational context.<sup>399</sup>

While the problem of transition in the context of prosecutorial policy is a difficult one, recent United States Supreme Court decisions have made it difficult to ignore.<sup>400</sup> These cases substantially limit a prosecutor's use of a victim's out of court statements, to the extent that a criminal defendant did not have the opportunity to cross-examine the statements.<sup>401</sup> Tuerkheimer describes the cases as “throwing-off” and “retrenching” victimless prosecution.<sup>402</sup> If proceeding without the victim is now more difficult for prosecutors, yet the pressure remains to prosecute DV at the same rate as stranger

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394. See discussion *infra* Part V.B.3.

395. SCHECHTER, *supra* note 70, at 7–8.

396. *Id.* (“Current solutions to domestic violence offer tremendous help and important options to women who have resources and who want to leave their partners or end their relationships . . . . But what about everyone else?”).

397. Epstein et al., *supra* note 108, at 496; Coker, *supra* note 98, at 843–44 (arguing that a solution need not pose so stark of a dilemma).

398. See discussion *supra* Part IV.B.2 (describing Epstein's, Coker's, and Ford's proposals).

399. See SCHNEIDER ET AL., DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 329 (2008) (“Ultimately, the argument is not as simple as whether or not to adopt, or advocate for, a no-drop prosecution policy. No-drop policies are in reality an amalgam of policies and practices which together dictate how prosecutors will pursue domestic violence cases. Within this mix there is plenty of room to maneuver in an attempt to reap the advantages of the no-drop strategy, without putting victims of domestic violence in greater danger of private abuse, or making them newly vulnerable to abuse at the hands of the state.”).

400. I refer here to the Court's recent Confrontation Clause decisions: *Giles v. California*, 128 S.Ct. 2678 (2008), *Crawford v. Washington*, 541 U.S. 36 (2004), *Davis v. Washington*, 547 U.S. 810 (2006), and its companion case *Hammon v. Indiana*, 514 U.S. 1213 (2006).

401. See *supra* notes 163–68 and accompanying text.

402. Tuerkheimer, *supra* note 14 (describing *Crawford v. Davis* as throwing-off victimless prosecution and *Giles v. California* as retrenching it).



violence,<sup>403</sup> it is foreseeable that prosecutorial policies might veer toward more, rather than less, coercive measures to procure the victim's testimony at trial.<sup>404</sup>

Prior to these decisions, prosecutors subpoenaed victims to testify,<sup>405</sup> held them in contempt,<sup>406</sup> and, in some jurisdictions, incarcerated them for failing to appear.<sup>407</sup> Some DV scholars who support aggressive prosecution have done so on the condition that a prosecutor's ability to use coercive measures to obtain victim cooperation should be limited.<sup>408</sup> To the extent that their support of no-drop policies hinges on the implementation of non-coercive measures, the Supreme Court's Confrontation Clause decisions suggest a careful reconsideration of that position.

### *B. The Opportunity*

The application of several foundational tenets of RCT to the prosecution of DV provides a second opportunity: to implement feminist values through policy. RCT normalizes, rather than pathologizes, the desire to preserve relationships. It understands that liberal notions of autonomy, upon which both contract and DV law are built, do not account for the web of interdependencies that are the reality of life. RCT values people's actual experiences in the

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403. See discussion *supra* Part II.A. (describing the demands of battered women's activists for the state to prosecute DV at the same rate and in the same manner as stranger violence).

404. Indeed, prosecutors have begun conducting what Deborah Tuerkheimer refers to as "Giles hearings," in which they attempt to prove two things: that the defendant's intimidation of, or tampering with, the victim has caused her unavailability at trial, and that they have made diligent efforts to procure the victim to testify at trial. See Tuerkheimer, *supra* note 14 (discussing these pre-trial hearings in Queens County, New York, and describing Queens County as "leading the nation" on this issue and training prosecutors in other jurisdictions to conduct such hearings); see also Deborah Tuerkheimer, *Forfeiture After Giles: The Relevance of "Domestic Violence Context,"* 13 LEWIS & CLARK L. REV. 711, 723 (2009) (describing "Giles hearings").

405. Hanna, *supra* note 34, at 1863 (describing the routine practice in some "hard" drop jurisdictions of routinely issuing a subpoena for the victim to appear).

406. *Id.* at 1865-66 (describing this practice generally, and the particular case of Maudie Wall as an example).

407. See Corsilles, *supra* note 89, at 876 (describing sanctions including jail); Carol Demare, *Victim Jailed for Own Safety*, THE TIMES UNION (Albany), Sept. 13, 2003, at B5; John Riley, *Spouse Abuse Victim Jailed After No-Drop Policy Invoked*, NAT'L L.J. Aug. 22, 1983, at 4.

408. See, e.g., Sack, *supra* note 11, at 1722 (arguing for "the adoption of clear policies that limit the use of the criminal justice system to coerce or punish victims" to support her contention that no-drop policies not be abandoned).

world, and holds that law should reflect this. Feminist legal scholars writing in the area of DV have long argued that these values should inform law and policy.

### *1. Normalizing the need or desire to preserve a relationship*

Both law and society expect women who are victims of DV to leave their intimate partners.<sup>409</sup> Women who do not leave are considered weak, helpless, incapacitated, and crazy.<sup>410</sup> This is true despite the fact that leaving is in many instances much more dangerous than staying,<sup>411</sup> that preserving relationships is valued by law and lauded by society outside of the context of DV,<sup>412</sup> and that women—particularly mothers—are expected to preserve the sanctity of the family.<sup>413</sup>

RCT describes in extensive detail the reasons why people involved in exchanges value preserving their relationships, not only with each other but with the many others who affect, and are affected by, the parties' exchange.<sup>414</sup> Even in relationships that appear to be of a purely business nature, such as a franchisee/franchisor relationship, preserving the relationship matters. And even in relationships that involve power imbalances and exploitation, the less powerful party may value preservation of the relation; this may be a rational response to the best of a bad set of available options.<sup>415</sup> In short, RCT is a legal approach that normalizes "staying."

### *2. Contextualizing*

Not all victims are the same, not all relationships are the same, and not all domestic violence is the same.<sup>416</sup> The latter is especially

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409. See discussion *supra* Part IV.B.

410. See *supra* notes 86, 364–65 and accompanying text.

411. See *supra* notes 64–68 and accompanying text.

412. See *supra* note 85 and accompanying text.

413. See *supra* note 238 and accompanying text.

414. See *supra* note 249 and accompanying text.

415. See *supra* note 213 and accompanying text.

416. See generally, e.g., Michael P. Johnson, *Conflict and Control: Symmetry and Asymmetry in Domestic Violence*, in COUPLES IN CONFLICT 95 (Alan Booth et al. eds., 2001) (distinguishing between "patriarchal terrorism," which is ongoing violence in the context of coercion and control, and "common couple violence," which are discrete acts of violence that exist outside of a context of coercion and control).

true when the violence is perpetrated by a victim against her abusive partner.<sup>417</sup> Yet the current criminal justice system response provides a “one-size-fits-all” approach to DV.<sup>418</sup> If there is sufficient evidence to prove a violation of the criminal law, a prosecution should proceed, and the victim and perpetrator should be separated.

RCT is anathema to such an approach. It is “contextual with a vengeance.”<sup>419</sup> It requires an extensive examination of the facts of a given exchange, seen through the internal and external norms particular to that exchange, to suggest what result the law ought to reach.<sup>420</sup>

### 3. *Reflecting people’s actual experiences*

Feminist jurisprudence places a premium on the importance of law grounded in the reality of parties’ actual experiences.<sup>421</sup> In fact, the idea that policy makers must listen to and believe what women say has been described as the “methodological secret” of feminism.<sup>422</sup> Feminist jurisprudence “critiques and seeks to remedy the lack of empirical inquiry into contexts that lie outside the mainstream, such as the actual conditions of women’s lives.”<sup>423</sup>

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417. See discussion *supra* Part III.B.

418. MADDEN DEMPSEY, *supra* note 36, at 27–31 (arguing that the predominant theme in the literature is to confine, structure, and check prosecutorial discretion, but that a general rule does not assist a prosecutor, so positive laws which attempt to mandate a one-size-fits-all approach are unlikely to be justifiable); see also Hanna, *supra* note 95, at 94 (“We should always rethink our strategies and avoid one-size-fits-all approaches. The criminalization of domestic violence is still in its infancy, and we have much to learn about what works best and for whom.”); Miccio, *supra* note 19, at 305 (describing the predominant, or “protagonist” ideology underlying the current criminal justice system approach as emphasizing the need for victims to leave their relationships as a deeply problematic one-size-fits-all approach); Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454, 456 (2008) (“In many jurisdictions domestic violence cases, identified principally by evidence of physical violence, are handled on a one-size-fits-all basis.”).

419. Feinman, *supra* note 123, at 742.

420. *Id.* at 743.

421. SCHNEIDER, *supra* note 17, at 71–73 (discussing the importance of accounting for women’s particular experiences when crafting law and policy). See generally Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 CORNELL L. REV. 1221, 1225–32 (2000) (describing feminist empiricism).

422. CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 5 (1987).

423. Susan Bandes, *What’s Love Got to Do with It?*, 8 WM. & MARY J. WOMEN & L. 97, 97–98 (2002).

Macneil has been described as leading the way into the “swamp’ of law-on-the-ground” by his insistence on examining social context and the “messy relational clutter that so often surrounds—and indeed defines—human agreements and conflict.”<sup>424</sup>

#### 4. Critiquing liberal notions of autonomy

Feminist legal scholars have long argued that the promise of an autonomous, liberal self—disconnected from an analysis of relations with others—does not work for women.<sup>425</sup> Especially for women who are mothers.<sup>426</sup>

424. Mertz, *supra* note 106, at 909–10.

425. See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 9 (2004) (arguing that conceptions of autonomy are “mired in a simplistic rhetoric of individual responsibility”); *id.* at 28 (stating that independence is “neither desirable nor possible because of the webs of economic and social relationships that sustain” women); Bandes, *supra* note 423, at 103 (“The autonomy women value might be one that allows them to choose love and connection.”); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 *YALE J.L. & FEMINISM* 7, 12 (1989) (“If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships . . . .”); Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 *WIS. WOMEN’S L.J.* 149, 211 (2000) (arguing that the goals that both liberal and radical feminists “seek—increased freedom and increased equality, respectively—are surely intended to benefit . . . the well-being of autonomous creatures. These goals will simply not serve women, if women are not ‘autonomous.’”); Robin West, *Jurisprudence and Gender*, 55 *U. CHI. L. REV.* 1, 1–2 (1988) (arguing that traditional notions of autonomy are based on a view of individuals as “distinct and not essentially connected with one another” (quoting Naomi Scheman, *Individualism and the Objects of Psychology*, in *DISCOVERING REALITY* 225, 237 (Sandra Harding et al. eds., 1983))); *id.* at 3 (“[P]erhaps the central insight of feminist theory of the last decade has been that women are ‘essentially connected,’ not ‘essentially separate’ . . . .”). See generally MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* 81–112 (2003); LINDA C. MCCLAIN, *THE PLACE OF FAMILIES* 18 (2006) (referring to relational autonomy); Lorraine Code, *The Perversion of Autonomy and the Subjection of Women: Discourses of Social Advocacy at Century’s End*, in *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* 181 (Catriona Mackenzie & Natalie Stoljar eds., 2000); Abrams, *supra* note 189; Linda C. McClain, “Atomistic Man” Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 *S. CAL. L. REV.* 1171 (1992).

426. See, e.g., Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 *CAL. L. REV.* 1011, 1023–24 (1989) (describing how women in families might prefer autonomy that recognizes the web of love and duty binding them to their children); Mahoney, *supra* note 66, at 19 (“One of the most pervasive fictions in the case law is that women with children are individual actors. . . . In fact, mothers continually make decisions on the basis of extended, collective, multiple self-interest (their children’s as well as their own, their husbands’ as well as their children’s).”); West, *Jurisprudence and Gender*, *supra* note 423, at 40 (1988). See generally Sara Ruddick, *Maternal Thinking*, 6 *FEMINIST STUD.* 342 (1982).

In the context of DV, many argue that the law's presumption that victims can and should leave their intimate partners "assumes—pretends—the autonomy of women. Every legal case that discusses the question 'why didn't she leave?' implies that the woman *could* have left."<sup>427</sup> Sally Engle Merry observed that the promise of "liberal legalism[—]a self protected by legal rights, able to make autonomous decisions"<sup>428</sup>—only delivers if she is willing to sever her relationship and does not need money from her partner or the support of her family and community.<sup>429</sup>

Kathryn Baker describes another problem with the liberal ideal of an autonomous self. Drawing on the work of Robin West,<sup>430</sup> she argues that liberal feminism is based on a faulty assumption—that if fully autonomous, a woman would choose to leave a violent intimate relationship rather than preserve it.<sup>431</sup> This idea of autonomy—reified by liberal feminists—discounts the fact that many victims, like all human beings, want to be involved in intimate relationships.<sup>432</sup> Liberal ideals of autonomy, choice, and freedom do not effectively speak to feelings of interdependence, bonding, and love.<sup>433</sup> The response of liberal feminists, Baker argues, has "been to deny that women are different from men with regard to relationship and autonomy."<sup>434</sup> Advocating for liberal notions of autonomy has in turn led courts and society generally to ask the wrong question; instead of asking "why didn't she leave" they should be asking "why does he do this?"<sup>435</sup> If relationship, rather than autonomy, was the

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427. Mahoney, *supra* note 66, at 64.

428. Merry, *supra* note 52, at 300.

429. Sally Engle Merry, *Resistance and the Cultural Power of Law*, 29 LAW & SOC'Y REV. 11, 19–20 (1995); *see also* Mahoney, *supra* note 66, at 20 ("When women tell the stories of their commitment to relationships, stories which may include love and hope, the legal system often has no way to hear them.").

430. Baker, *supra* note 81, at 1475–76 & n.82 (citing Robin West, *supra* note 425, at 210, for the proposition that the need and desire for relationships is particularly powerful in women and that regardless of the "quest for relationship[s] is biologically driven and different from men's because of women's biological difference, the fact is that many women and arguably all caretakers have very powerful needs for relationship").

431. *Id.* at 1473–80.

432. *Id.* at 1475 ("To address the problem of domestic violence, feminism must address what relationships are and how they operate. It cannot simply adopt the liberal reification of autonomy and thereby discount the positive potential of and desire for relationships.").

433. *Id.* at 1474.

434. *Id.* at 1476.

435. *Id.* at 1477–78 & n.89.

ideal, the abnormality would be the person who destroys the relationship, not the person who values it.<sup>436</sup>

Macneil argued that when contracts are treated as discrete and relational values are not considered, it is not because the values do not exist, but because they are ignored.<sup>437</sup> When they are ignored, the analysis fails to acknowledge that we do not live in “the world of the rights-bearing, autonomous individual” but in a “world where every person is inextricably bound to others by a complex web of interdependencies and relations.”<sup>438</sup> As stated by Macneil: “[M]ainstream liberal thinking avoids the existence of relations like the plague, because the concept of relation . . . is anathema to the individualism upon which liberalism is based.”<sup>439</sup>

## VI. CONCLUSION

RCT, as applied to DV cases, asks us to think seriously about the multiple and complex relations that affect a victim’s decision to support the prosecution of her partner, and about the impact that these relations have on the wisdom of the current legal regime’s solution to DV. It teaches that the relations and their impact are far more significant than current prosecutorial policy, and the scholars who seek to reform it, have yet contemplated. RCT provides a method for analyzing the impact of relational values. It first suggests that we conceive of the intimate relationship as an exchange; by so doing, we bring into focus all that the victim gains from, and has to lose by terminating, that relation. As a result, our view more closely resembles the way victims themselves see their relationships, and the way they see the violence that occurs within them. RCT then asks that we explain how the impact of those relations has been adequately considered. To date, feminist legal scholars and policy-makers have not sufficiently done so. Now, particularly given the Supreme Court’s decision in *Giles*, it is timely to reconsider the wisdom of treating DV as an episode of violence between strangers. RCT frees us of the limitations of this transactional thinking.

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436. *Id.* at 1478.

437. *See supra* notes 145–46 and accompanying text.

438. James Cassels, Book Review, 27 MCGILL L.J. 591, 602 (1982).

439. Ian R. Macneil, *Bureaucracy and Contracts of Adhesion*, 22 OSGOODE HALL L.J. 5, 21 (1984).

## APPENDIX

State	Jurisdiction	Policy Statement	Location
AK	N/A	"[I]t is the prosecutor's policy that once charges have been accepted for prosecution, the case should be prosecuted despite reluctance by the victim."	Alaska Network on DV & SA Legal Advocacy Project, Working Together for Justice, Ch. 7, Sec. II
AL	N/A	"Prosecution offices should develop policies which emphasize the State's authority in case decisions. . . . One strategy for accomplishing this goal is to develop 'no drop' policies."	Guidelines for Prosecution of Domestic Violence Cases, 2004 www.acadv.org/Prosecutionguidelines.pdf
AR	Springdale	"[T]he Springdale City Attorney's Office . . . will not allow victims to simply drop charges."	<a href="http://www.springdaleark.org/cosa/domestic_abuse.htm">http://www.springdaleark.org/cosa/domestic_abuse.htm</a>
AZ	Scottsdale	Only reference is to "systems approach" and "vertical prosecution"	United States Conference of Mayors, 1999
CA	San Francisco	"The District Attorney's Office fully prosecutes incidents of domestic violence and stalking."	<a href="http://www.sfgov.org/site/frame.asp?u=http://www.sfdistrictattorney.org/">http://www.sfgov.org/site/frame.asp?u=http://www.sfdistrictattorney.org/</a>
CA	Tulare County	"Vertical prosecutor" "Aggressive prosecution"	<a href="http://www.dattulareco.org/domestic_violence.htm">http://www.dattulareco.org/domestic_violence.htm</a>
CA	AG's Office	Provides program grants for "vertical prosecution" to CA jurisdictions	<a href="http://ag.ca.gov/saprogram/">http://ag.ca.gov/saprogram/</a>
CO	Denver	"Denver has a no drop policy on Domestic Violence cases."	<a href="http://www.denvergov.org/CityAttorney/FrequentlyAskedQuestions/FrequentlyAskedQuestions8/tabid/380916/Default.aspx">http://www.denvergov.org/CityAttorney/FrequentlyAskedQuestions/FrequentlyAskedQuestions8/tabid/380916/Default.aspx</a>
CT	New Haven	"Multi-disciplinary response" "The unit has built strong cases without relying solely on victim testimony."	United States Conference of Mayors, 1999
FL	N/A	"The state attorney in each circuit shall adopt a pro-prosecution policy for acts of domestic violence."	FLSA 741.2901

GA	Bibb County	"The Solicitor-General's Office feels these are serious matters and vigorously pursues the prosecution of such cases. . . . It is the goal of this office to stop the violence, not to break up the family."	<a href="http://www.co.bibb.ga.us/solicitor/solicitor.asp">http://www.co.bibb.ga.us/solicitor/solicitor.asp</a>
HI	City of Maui	"The prosecutors have. . . adopted a 'no drop' policy, whereby a victim cannot simply drop charges against the abuser."	United States Conference of Mayors, 1999
ID	Bonneville County	"Prosecutors now pursue charges whenever they think they can get a conviction using evidence - no matter what the victim wants."	Idaho Falls Post Register, 5/22/05, Peter Zuckerman <a href="http://www.ncdsv.org/images/withorwithoutyouadvprosecution.pdf">www.ncdsv.org/images/withorwithoutyouadvprosecution.pdf</a>
IL	Kane County	"[T]he State's Attorney's Office will not drop a case of domestic violence simply because the victim so desires."	<a href="http://www.co.kane.il.us/sao/ DOMESTIC/five.htm">http://www.co.kane.il.us/sao/ DOMESTIC/five.htm</a>
IN	Marion County	"As Prosecutor, Mr. Brizzi takes pro-active steps to protect victims of domestic violence . . . by aggressively and consistently prosecuting domestic batterers and demanding respect for the victims."	<a href="http://www.indy.gov/eGov/County/Pros/Protect/DomViolence/Pages/home.aspx">http://www.indy.gov/eGov/County/Pros/Protect/DomViolence/Pages/home.aspx</a>
KS	Sedgwick County	"The decision whether to prosecute rests solely within the discretion of the District Attorney. . . ."	Guidelines for the Prosecution of Domestic Violence <a href="http://www.sedgwickcounty.org/da/dv_prosecution.html">http://www.sedgwickcounty.org/da/dv_prosecution.html</a>
KY	Fayette County	"We operate on a 'no-drop' policy on criminal domestic violence cases."	<a href="http://www.fayettecountyattorney.com/">http://www.fayettecountyattorney.com/</a>
MA	Cape and Islands DA's Office	"The Cape and Islands District Attorney's Office Domestic Violence Unit is committed to the aggressive vertical prosecution of misdemeanor and felony domestic violence cases."	<a href="http://www.mass.gov/dacape/dvunit.htm">http://www.mass.gov/dacape/dvunit.htm</a>
MD	Carroll County	"Pro-prosecution policy"	<a href="http://ccgovernment.carr.org/ccg/stateatt/dvunit.htm">http://ccgovernment.carr.org/ccg/stateatt/dvunit.htm</a>



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MI	Macomb County	"The Prosecutor's office should continue the no drop policy regarding domestic violence cases."	Macomb County Domestic Violence Fatality Review Team 2006 Report www.mplp.org/Resources/mplpresource.2006-11-10.3173138920/
MN	Ramsey County	The Joint Domestic Abuse Prosecution Unit "prosecut[es] all levels of domestic assault and seek[s] tough consequences for offenders."	<a href="http://www.co.ramsey.mn.us/Attorney/SPdomesticabuse.htm">http://www.co.ramsey.mn.us/Attorney/SPdomesticabuse.htm</a>
MO	Scott County	"If the partner, spouse, or family member wants to stop the cycle of violence, they must be willing to stand their ground so that the suspect will change or they leave the suspect before someone really gets hurt. . . . We hope if victims will not prosecute for themselves she will do it for the kids."	<a href="http://www.scottcountymo.com/p_attorney.html#DomesticViolence">http://www.scottcountymo.com/p_attorney.html#DomesticViolence</a>
MT	MT Dept of Justice	"The State of Montana must ensure that domestic violence is prosecuted aggressively and effectively."	<a href="http://www.doj.mt.gov/victims/domesticviolence.asp">http://www.doj.mt.gov/victims/domesticviolence.asp</a>
NE	Douglas County	"It is the position, in Douglas County, that the aggressive prosecution of domestic violence is a necessity in order to protect victims and future victims of domestic violence."	<a href="http://www.douglascounty-ne.gov/countyattorney/domestic-violence-division">http://www.douglascounty-ne.gov/countyattorney/domestic-violence-division</a>
NH	N/A	"The decision whether to file charges and which crimes to charge is solely the responsibility of the prosecutor. . . . As a general rule, when a factual basis exists and there is some corroboration, charges should be filed."	Governor's Commission on DV, Prosecution: Domestic Violence Protocol, p 4-5
NV		"The burden of prosecuting domestic violence cases should be placed on the prosecutor and not the victim. Prosecutors should always . . . be prepared for an evidence-based prosecution . . ."	Domestic Violence Prosecution Best Practice Guidelines, State of Nevada Advisory Council for Prosecuting Attorneys, p.4
NY		"The input of victims should be <i>considered</i> when making enforcement and prosecutorial decisions, but responding to the presenting needs of victims need not interfere with law enforcement's primary goal - to enforce the law."	Criminal Justice, Legal, and Judicial Systems Model Domestic Violence Policy for Counties, NY Office for the Prevention of Domestic Violence, 2008, p.2

PA	Allegheny County	“With victim safety as our primary goal, the success of the Domestic Violence Prosecution Unit will not be measured by the number of convictions. The new unit . . . [will] focus[] on improvement in . . . : Ensuring cases are not withdrawn or dropped simply due to victim reluctance . . . .”	<a href="http://www.da.allegheny.pa.us/dv_default.asp">http://www.da.allegheny.pa.us/dv_default.asp</a>
RI	AG’s Office	“[T]he Unit . . . has implemented an evidence based prosecution approach”	<a href="http://www.riag.ri.gov/civilcriminal/violence.php">http://www.riag.ri.gov/civilcriminal/violence.php</a>
UT	Salt Lake County	DV team has increased prosecution rates and decreased dismissal rates by “being more proactive with victims.”	<a href="http://www.districtattorney.slco.org/media/dvprogram.html">http://www.districtattorney.slco.org/media/dvprogram.html</a>
VA	Suffolk Commonwealth	No reference to approach to prosecution	<a href="http://www.suffolk.va.us/cwatty/dvpp.html">http://www.suffolk.va.us/cwatty/dvpp.html</a>
VT	AG’s Office	No statement regarding prosecution policy	<a href="http://www.atg.state.vt.us/issues/criminal-law/domestic-violence.php">http://www.atg.state.vt.us/issues/criminal-law/domestic-violence.php</a>
WA	Seattle	“Prosecutors will continue to make the decision as to when to prosecute a case and will promote public awareness that domestic violence is not acceptable in our society. . . . There is no ‘one-size-fits-all’ approach to domestic violence prosecution that will work in every case.”	City of Seattle, 2005-2009 Strategic Plan on Seattle’s Criminal Justice Response to Domestic Violence, Sept. 5, 2005, p. 56
WI	WI Dept of Justice	“Proceed with prosecution unless the case cannot be proven; the decision to prosecute is based on evidence, not on the cooperation of the victim.”	Model Domestic Violence Policies and Procedures, Wisconsin Dept of Justice, Wisconsin Crime Victims Council, Last Update: Nov. 2002, p.10
WV	Kanawha County	“With the Kanawha County Prosecutors office that established a ‘no drop’ policy for abuse cases this crime will be prosecuted and service will be provided to victims.”	<a href="http://www.charlestonwvpolice.org/Pages/dv2.htm">http://www.charlestonwvpolice.org/Pages/dv2.htm</a>

