

# He Said. She Said. The iPhone Said. The Use of Secret Recordings in Domestic Violence Litigation

Janelle Lamb\*

Trigger Warning: This Note describes graphic scenes of domestic violence. It also discusses child abuse, elder abuse, and sexual assault.

*This Note explores the use of secret recordings in domestic violence litigation. It is particularly concerned with how the criminalization of domestic violence influences the laws governing the creation and use of secret recordings in this context. Secret recordings can provide determinative evidence of domestic violence. However, a domestic violence survivor who makes a secret recording is criminally and civilly liable under California's Anti-Eavesdropping Statute (CEPA). CEPA also renders secret recordings inadmissible as evidence. Although the "Right to Truth-in-Evidence" provision of Proposition 8 abrogates CEPA for purposes of admitting secret recordings for criminal prosecutions, there is no equivalent rule for civil and family court litigation. The only statutory exceptions to CEPA that apply to domestic violence are narrow in scope and do not legalize secret recordings for use in noncriminal settings. CEPA encourages dependence on criminal remedies and denies domestic violence survivors the ability to effectively pursue the remedy of their choice. This Note proposes statutory exceptions to CEPA that would protect domestic violence survivors from liability and enable them to use secret recordings to secure civil law, family law, and alternative justice remedies as well as, or instead of, criminal remedies.*

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## INTRODUCTION

In the spring of 2017, the public was outraged after watching a viral recording of a Silicon Valley CEO beating his wife, a software engineer at Apple. His wife, Neha Rastogi, had secretly recorded the video, which captured Abhishek Gattani brutally berating and beating Rastogi.<sup>1</sup> Rastogi's secret recording was admitted as evidence, and Gattani pleaded no-contest to misdemeanor offensive touching and felony accessory after the fact.<sup>2</sup> Prior to his conviction, Gattani had been abusing his wife for a decade—since shortly after their marriage.<sup>3</sup> Rastogi believed that Gattani would soon kill her.<sup>4</sup>

Rastogi's secret recordings were critical to her case. Indeed, *The Daily Beast* referred to Rastogi's story as “the case of she-and-the-iPhone said.”<sup>5</sup> Rastogi's first recording started with her saying, “Repeat what you were saying, what were you saying?”<sup>6</sup> Gattani responded that he was going to make her resign from her job, even if he had to push her around all day, and that he wanted to see her burn.<sup>7</sup> On May 17, 2017, Rastogi filmed the now widely-shared video, where one can hear Gattani berating Rastogi as he hit her nine times.<sup>8</sup> In another recording, Rastogi asked, “What did you just say? You want to kill me basically?”<sup>9</sup> He responded that he would like to see her murdered.<sup>10</sup> In her victim impact statement, Rastogi described the importance of these recordings to her case:

This time around there is evidence in the form of audio and video clips which clearly show and prove that Abhishek was hitting me . . . there are videos of him threatening to stab me 45 times and many of these videos show this abuse towards and happening in the presence of our then 2.5 year old child . . . There is also evidence of his parents confirming (over a video recording) to his physical abuse against them (both father and mother) as well as Abhishek's younger sister.<sup>11</sup>

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1. Maria Medina, *Silicon Valley Exec's Domestic Violence Plea Deal Stirs Calls for Stiffer Sentence*, CBS SF BAYAREA (May 1, 2017), <https://sanfrancisco.cbslocal.com/2017/05/01/sj-tech-ceos-plea-deal-in-domestic-violence-case-stirs-calls-for-harsher-sentence/> [https://perma.cc/JH9S-YMS4]; Michael Daly, *Silicon Valley CEO Pleads 'No Contest' to Abusing his Wife—and Is Offered a Deal for Less Than 30 Days in Jail*, DAILY BEAST (May 5, 2017) [hereinafter Daly, *Silicon Valley*], <https://www.thedailybeast.com/silicon-valley-ceo-pleads-no-contest-to-abusing-his-wifeand-is-offered-a-deal-for-less-than-30-days-in-jail> [https://perma.cc/2FVT-4USH].

2. Michael Daly, *Here is the Powerful Statement a Wife Read Aloud to the Court and Her Abusive Husband*, DAILY BEAST (May 5, 2017) [hereinafter Daly, *Powerful Statement*], <https://www.thedailybeast.com/here-is-the-powerful-statement-a-wife-read-aloud-to-the-court-and-her-abusive-husband> [https://perma.cc/6CV8-TNWR].

3. Daly, *Silicon Valley*, *supra* note 1.

4. Daly, *Powerful Statement*, *supra* note 2.

5. Daly, *Silicon Valley*, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Daly, *Powerful Statement*, *supra* note 2.

Even with these recordings, Gattani was only sentenced to fifteen days in jail.

The same themes—domestic violence and secret recordings—were present in the story of Tiawanda Moore, as recounted by Professor Beth E. Richie.<sup>12</sup> Yet that story had a very different ending. Moore called the police after her boyfriend assaulted her.<sup>13</sup> The police arrived and separated Moore from her boyfriend.<sup>14</sup> One of the officers then proceeded to proposition Moore and ask for her phone number.<sup>15</sup> Moore filed a complaint, and ultimately secretly recorded a conversation of the officers' disturbing responses to her complaint.<sup>16</sup> Unfortunately, making a secret recording violated an anti-eavesdropping law, and so the officers retaliated against Moore with criminal charges.<sup>17</sup> Thus, Moore went from suffering domestic violence to suffering violence by the state.<sup>18</sup>

The stories of Rastogi and Moore reveal several complicated dynamics of obtaining domestic violence remedies. First, their stories reveal that domestic violence and other gender-based crimes (such as the sexual harassment in Moore's story) are incredibly difficult to prove. Second, their stories reveal that secret recordings can provide evidence that is absolutely critical to proving domestic violence and gender-based crimes to both a judge and to one's community. Third, their stories reveal that criminal remedies can be inadequate. It is inconceivable that Gattani would be rehabilitated from a decade-long history of domestic violence after a fifteen-day stay in a jail where he was unlikely to get any sort of psychological counseling. Fourth, their stories reveal that criminal remedies can be dangerous—Moore's call to the police ended up with her being harassed and, ultimately, criminally charged. And, finally, their stories reveal that making a secret recording can open one up to serious criminal liability and repercussions.

This Note explores the use of secret recordings in domestic violence litigation. Part I identifies certain tensions between aspects of the criminal justice reform movement—such as calls to defund or abolish police and prisons—and the anti-domestic violence movement's dedication to criminalization as the primary remedy against domestic violence. Part II discusses the merits and limitations of criminal law, civil law, family law, and alternative justice remedies to domestic violence in California. Part III explains why secret recordings are uniquely crucial to a survivor's ability to prove domestic violence and obtain a remedy. Part IV argues that California's Anti-Eavesdropping Statute (CEPA) exposes domestic violence survivors to criminal and civil liability and makes it

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12. Beth E. Richie, *Reimagining the Movement to End Gender Violence: Anti-racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 257, 271 (2015) [hereinafter Richie, *Reimagining the Movement*].

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Richie, *Reimagining the Movement*, *supra* note 12.

nearly impossible for a survivor to obtain noncriminal remedies if their case turns on the admissibility of a secret recording. Part IV also identifies exceptions and strategies for circumventing CEPA in this context. Part V proposes new statutory exceptions that would protect survivors from CEPA liability and make secret recordings admissible for domestic violence proceedings in civil and family court. Throughout this Note, I will use a hypothetical family (“Anna and Jon”) as a vehicle to help readers understand the available domestic violence remedies, the importance of secret recordings, and the impact of anti-eavesdropping laws on the ability of survivors to use secret recordings to obtain remedies.

Ultimately, this Note seeks to reveal some of the collateral effects of CEPA on the criminal justice system, the penal state, and a domestic violence survivor’s ability to pursue the solution of their choice. I make three main arguments: (1) the combined effects of CEPA and the truth-in-evidence rule encourage reliance on criminal domestic violence remedies at the expense of noncriminal remedies; (2) this limits a domestic violence survivor’s ability to choose the remedy—be it criminal, family, civil, or extralegal—that works best for the survivor and their family; and (3) California should pass legislation that protects domestic violence survivors from CEPA liability and empowers them to pursue civil, family, and alternative justice remedies as well as, or instead of, criminal remedies.

Finally, a brief note on terminology. There have been many debates among the people who experience domestic violence about whether they should be referred to as “survivors” or “victims.”<sup>19</sup> This Note has opted to use the term “survivor” rather than “victim” wherever possible. However, in certain places, I use the word victim because the person at issue did not survive the domestic violence, or because the word victim is used in the statute or case law at issue. In addition, this Note uses a hypothetical family in order to illustrate how the current laws impact a survivor’s ability to obtain a legal remedy. In this hypothetical, the person experiencing domestic violence is a woman and the perpetrator is a man, in recognition of the fact that domestic violence remains a gendered crime: women are predominantly the survivors and victims of domestic violence, and men are predominantly the perpetrators.<sup>20</sup> However, domestic

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19. See Rahila Gupta, *‘Victim’ vs ‘Survivor’: Feminism and Language*, OPENDEMOCRACY (June 16, 2014), <https://www.opendemocracy.net/en/5050/victim-vs-survivor-feminism-and-language/> [<https://perma.cc/6F62-MXY2>]; Barry Goldstein, *Appreciating Survivors of Abuse While Supporting Its Victims*, DOMESTIC SHELTERS (May 13, 2019), <https://www.domesticshelters.org/articles/domestic-violence-op-ed-column/appreciating-survivors-of-abuse-while-supporting-its-victims> [<https://perma.cc/5CAV-KFMM>]; Kate Harding, *I’ve Been Told I’m a Survivor, Not a Victim. But What’s Wrong With Being a Victim?*, TIME (Feb. 27, 2020), <https://time.com/5789032/victim-survivor-sexual-assault/> [<https://perma.cc/DM5T-CCLT>]; Emma Fulu, Caroline Liou, Stephanie Miedema & Xian Warner, *Preferred Terminology*, PARTNERS FOR PREVENTION, [http://www.partners4prevention.org/sites/default/files/preferred\\_terminology\\_final.pdf](http://www.partners4prevention.org/sites/default/files/preferred_terminology_final.pdf) [<https://perma.cc/L8P9-HXSZ>] (last visited Mar. 25, 2022).

20. *Statistics*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/statistics> [<https://perma.cc/A5HT-FKC6>] (last visited Mar. 25, 2022); Alberto R. Gonzales, *Family Violence*

violence is nonbinary. It impacts people of all gender identities, including many people in the LGBTQ+ community.<sup>21</sup>

## I.

### THE RELATIONSHIP BETWEEN STATE VIOLENCE AND DOMESTIC VIOLENCE

This Section explains how the criminalization of domestic violence resulted in the limited remedies that are available to survivors today. This context is important because it explains why there are currently so few noncriminal remedies available to people experiencing domestic violence. Moreover, it gives context as to why the current domestic violence exceptions to CEPA are almost exclusively only available in criminal court. The purpose of this Section is to provide some background as to why lawmakers need to think beyond criminal remedies when they create legal remedies for domestic violence survivors.

Part I.A explains some of the similarities and contradictions between the anti-domestic violence movement and the prison abolition movement, both of which emerged from the progressive left. Part I.B recounts how the anti-domestic violence movement became so dependent on criminal remedies in the first place. Part I.C explains some of the major criticisms of the criminalization of domestic violence and describes alternative, feminist abolitionist approaches to ending domestic violence. Finally, Part I.D argues that any proposed remedy to domestic violence should neither focus exclusively on criminal remedies nor ignore the reality that—at least for the time being—criminal remedies will sometimes be necessary in a subset of cases. This Note trusts the individual survivor to determine what type of remedy is best for the survivor and their family.

#### A. Background

The movements to combat state violence and gender-based violence—reiterated most recently in the Black Lives Matter and #MeToo movements—share common origins. First, each movement seeks to address a type of systemic violence against a marginalized group. Historically speaking, gender violence and state violence against people of color share many characteristics. This violence occurs because (1) each marginalized group—Black people, women, and particularly Black women—have been systematically denied dominion over

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*Statistics*, U.S. DEP'T JUST. (June 2005), <https://bjs.ojp.gov/content/pub/pdf/fvs02.pdf> [<https://perma.cc/9US3-HGG9>]; *Domestic Abuse is a Gendered Crime*, WOMEN'S AID, <https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/domestic-abuse-is-a-gendered-crime/> [<https://perma.cc/52FT-SR6Q>] (last visited Mar. 25, 2022).

21. *Sexual Assault and the LGBTQ Community*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/sexual-assault-and-the-lgbt-community> [<https://perma.cc/2QDP-QKKM>] (last visited Mar. 25, 2022); *The Problem: DV in LGBTQ Communities & Barriers to Safety*, VAWNET, <https://vawnet.org/sc/rates-and-prevalence-dv-lgbtq-communities> [<https://perma.cc/X3BE-LGX5>] (last visited Mar. 25, 2022); *Common Myths about LGBTQ Domestic Violence*, HUM. RTS. CAMPAIGN (Oct. 18, 2017), <https://www.hrc.org/news/common-myths-about-lgbtq-domestic-violence> [<https://perma.cc/LPQ6-NCY4>].

their own bodies, and (2) because law enforcement and the legal system have historically ignored or actively contributed to violence against these marginalized groups.<sup>22</sup> Indeed, Angela Harris noted that it is not always possible to distinguish between domestic violence and state violence.<sup>23</sup> Historically, society approved of the right of husbands to mete out the equivalent of state-inflicted corporal punishment on their wives—even to the point of using state instruments of torture.<sup>24</sup> In fact, prison was originally imagined as an alternative to state-inflicted corporal and capital punishment.<sup>25</sup> Yet even as prisons replaced some of the most violent forms of corporal punishment, little was done to protect the people who were subjected to corporal punishment in their own homes.<sup>26</sup> In sum, domestic violence and state violence share common goals of punishing marginalized groups and have historically been enabled by the same structures.

Second, the Black Lives Matter and anti-domestic violence movements took so long to gain popular traction because the general public simply did not believe the accounts of such violence from survivors and witnesses. In other words, the public did not believe the accounts of police violence towards Black people and gender violence towards women and gender nonconforming people because these accounts were coming from Black people, women, and gender nonconforming people. Because of this, recordings and other forms of tangible evidence have played a critical role in changing public opinion about the prevalence of racist police violence and domestic violence. Although police have long terrorized communities of color, many White and privileged communities did not believe or understand the extent of the problem until they saw video recordings of police brutality. Indeed, it is very likely that there would not have been nearly so much support for the Black Lives Matter protests of the summer of 2020 without the video recording of the murder of George Floyd. Similarly, there was little recognition of the pervasiveness of domestic violence in the United States until the anti-domestic violence movement launched a targeted campaign featuring first-person accounts of domestic violence in the 1980s, as described in the following Section. Moreover, many survivors of domestic violence and gender violence have only been believed after they were able to

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22. A huge thank you to Rudi Miller for her insight on this topic.

23. “Prior to the emergence of the prison as the major form of public punishment, it was taken for granted that violators of the law would be subjected to corporal and frequently capital penalties. What is not generally recognized is the connection between state-inflicted corporal punishment and the physical assaults on women in domestic spaces. This form of bodily discipline has continued to be routinely meted out to women in the context of intimate relationships, but it is rarely understood to be related to state punishment.” ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 68 (2003).

24. Davis recounted that women in seventeenth-century Britain were often punished with “instruments of torture . . . imported by authorities into the household,” such as “a headpiece with a chain attached and an iron bit that was introduced into the woman’s mouth” and attached to the wall of the house until the husband decided to release her. *Id.* at 41–42.

25. *Id.* at 106.

26. “I mention these forms of punishment inflicted on women because, like the punishment inflicted on slaves, they were rarely taken up by prison reformers.” *Id.* at 42.

produce recordings or photographic evidence, as described in Part III. Thus, both movements have suffered from systemic disbelief, and recordings and other tangible forms of evidence have been crucial in overcoming that disbelief.

Despite their shared origins, each movement has respectively demanded a very different remedy for addressing such violence. In the summer of 2020, the horrific police murders of George Floyd and Breonna Taylor forced the nation—or at least segments of it—to acknowledge what disenfranchised communities of color have always known: that American police and carceral systems are deeply racist, violent, and overly punitive. In response, the Black Lives Matter movement gained widespread support among the American people, corporations, sports teams, and the Democratic party.<sup>27</sup> Many of the Black Lives Matter protesters advocated for defunding the police and prison abolition.<sup>28</sup>

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27. See Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-CHOWd-size.html> [<https://perma.cc/67AF-HAKY>]; Nate Cohn & Kevin Quealy, *How Public Opinion Has Moved on Black Lives Matter*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/interactive/2020/06/10/upshot/black-lives-matter-attitudes.html> [<https://perma.cc/8VTH-9JV5>] (describing how the majority of American voters support the Black Lives Matter movement); Rachel Lerman, *From Wake Word to Woke Word: Siri and Alexa Tell You Black Lives Matter, but Tech Still Has a Diversity Problem*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/technology/2020/06/10/big-tech-black-lives-matter/> [<https://perma.cc/D5EH-QTXJ>]; Kari Paul, *Amazon Says 'Black Lives Matter'. But the Company Has Deep Ties to Policing*, GUARDIAN (June 9, 2020), <https://www.theguardian.com/technology/2020/jun/09/amazon-black-lives-matter-police-ring-jeff-bezos> [<https://perma.cc/335H-TUR2>]; Isabel Togoh, *The NBA Is Donating \$300 Million Over The Next Decade To Black Empowerment*, FORBES (Aug. 6, 2020), <https://www.forbes.com/sites/isabeltogoh/2020/08/06/the-nba-is-donating-300-million-over-the-next-decade-to-black-empowerment/#7e23be5d1af4> [<https://perma.cc/T7ER-99YZ>]; Annie Linskey, *Democratic Convention Embraces Black Lives Matter*, WASH. POST (Aug. 17, 2020), [https://www.washingtonpost.com/politics/democratic-convention-embraces-black-lives-matter/2020/08/18/f1de2ce8-e0f7-11ea-b69b-64f7b0477ed4\\_story.html](https://www.washingtonpost.com/politics/democratic-convention-embraces-black-lives-matter/2020/08/18/f1de2ce8-e0f7-11ea-b69b-64f7b0477ed4_story.html) [<https://perma.cc/SH7Q-PD4B>].

28. Defunding the police means different things to different people: some people mean reallocating some of the resources spent on police departments to social services; others mean abolishing the police altogether. See, e.g., *What Defunding the Police Really Means*, BLACK LIVES MATTER (July 6, 2020), <https://blacklivesmatter.com/what-defunding-the-police-really-means/> [<https://perma.cc/27ZV-FR45>]; Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES, (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/Sunday/floyd-abolish-defund-police.html> [<https://perma.cc/96L8-Z9A5>]; Paige Fernandez, *Defunding the Police Will Actually Make Us Safer*, ACLU (June 11, 2020), <https://www.aclu.org/news/criminal-law-reform/defunding-the-police-will-actually-make-us-safer/> [<https://perma.cc/M8QE-UMBL>]; Sawyer Bogdan, *Hundreds of Supporters at Black Lives Matter London Protest to 'Defund The Police,'* GLOBAL NEWS (Aug. 29, 2020), <https://globalnews.ca/news/7304701/london-black-lives-matter-defund-police/> [<https://perma.cc/2KFF-CXQW>]; Ellen Wulforst, *End racial injustice? Abolish prisons, some U.S. activists say*, REUTERS (June 11, 2020), <https://www.reuters.com/article/minneapolis-police-prisons/end-racial-injustice-abolish-prisons-some-u-s-activists-say-idUSL1N2DM2AH> [<https://perma.cc/5CJ2-T8RJ>]; K. Agbebiyi, *What We Mean When We Say Abolish Prisons*, REWIRE NEWS (June 15, 2020), <https://rewire.news/article/2020/06/15/what-we-mean-when-we-say-abolish-prisons/> [<https://perma.cc/E7FF-9Y6B>]; Ashish Prashar, *If Black Lives Matter, We Must Abolish Prisons*, NEW EUR. (July 14, 2020), <https://www.theneweuropean.co.uk/top-stories/if-black-lives-matter-we-must-abolish-prisons-1-6745736> [<https://perma.cc/YAL7-9G7C>]; Dana Washington, *Black*

While these concepts have been touted in progressive circles for decades, this was arguably the first time that the press, popular figures, and even members of the general populace started to treat these ideas with any degree of seriousness.<sup>29</sup> Of course, there is nuance and disagreement within the movement: while the Black Lives Matter movement is fundamentally about defunding the police and abolishing the carceral state, many activists still expect justice to be meted out within the criminal justice system—as demonstrated by the demand for criminal convictions for police brutality.<sup>30</sup> Yet even while progressives demanded a reduction in American policing and incarceration, 2020 witnessed an equally loud progressive demand for certain forms of violence to be pursued and punished *more* seriously. A few months before the Black Lives Matter protests kicked off in the summer of 2020, Harvey Weinstein was sentenced to twenty-three years in prison for rape and sexual assault after a monthlong trial.<sup>31</sup> For many, this was a fitting resolution for the serial rapist who had been outed by

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*Lives Matter Co-Founder Patrisse Cullors Talks Prison Abolition, Therapy as Reparations, and Teaming Up With Angela Davis & Yara Shahidi*, TEEN VOGUE (Feb. 22, 2019), <https://www.teenvogue.com/story/black-lives-matter-patrisse-cullors-interview-prison-abolition-angela-davis-yara-shahidi> [<https://perma.cc/4QAH-YUG5>]; Alex Woodward, *'We Are the Ones Who Keep Us Safe': How Abolitionists See An America Without Police And Prisons*, INDEP. (June 19, 2020), <https://www.independent.co.uk/news/world/americas/abolish-police-us-prison-reform-defund-13th-amendment-a9571816.html> [<https://perma.cc/9Q8W-N662>]; Caleb Ecarma, *"We Tried Band-Aiding the Problem": Black Lives Matter Activists Split on how Radical Change Should Be*, VANITY FAIR (June 18, 2020), <https://www.vanityfair.com/news/2020/06/black-lives-matter-protests-split-police-brutality-solutions> [<https://perma.cc/B7JA-UUG8>].

29. See, e.g., Rashawn Ray, *What does 'defund the police' mean and does it have merit?*, BROOKINGS (June 19, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/> [<https://perma.cc/FRG2-6EM2>]; Keeanga-Yamahtta Taylor, *We Should Still Defund the Police*, NEW YORKER (Aug. 14, 2020), <https://www.newyorker.com/news/our-columnists/defund-the-police> [<https://perma.cc/6HF8-J6SV>]; Amanda Arnold, *What Exactly Does It Mean to Defund the Police?*, CUT (June 12, 2020), <https://www.thecut.com/2020/06/what-does-defund-the-police-mean-the-phrase-explained.html> [<https://perma.cc/3XAY-UWUP>]; Scottie Andrew, *There's a Growing Call to Defund the Police. Here's What It Means*, CNN (June 17, 2020), <https://www.cnn.com/2020/06/06/us/what-is-defund-police-trnd/index.html> [<https://perma.cc/2ZZL-JWNB>]; John Lamparski, *Defund the Police?*, WALL ST. J. (June 16, 2020), <https://www.wsj.com/articles/defund-the-police-11592348002> [<https://perma.cc/VWR3-GACP>]; Gabriella Paiella, *How Would Prison Abolition Actually Work?*, GQ (June 11, 2020), <https://www.gq.com/story/what-is-prison-abolition> [<https://perma.cc/TW88-TPJE>]; *The Movement to Abolish Prisons and the Police*, NPR (Aug. 18, 2020), <https://www.npr.org/2020/08/18/903546893/the-movement-to-abolish-prisons-and-the-police> [<https://perma.cc/NH5Z-VX96>]; Bill Keller, *What Do Abolitionists Really Want?*, MARSHALL PROJECT (June 13, 2020), <https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want> [<https://perma.cc/E27Q-MPVE>]; German Lopez, *The case for abolishing prisons*, VOX (June 19, 2017), <https://www.vox.com/policy-and-politics/2017/6/19/15764176/prisons-abolition-alternatives> [<https://perma.cc/8ENN-93MU>].

30. Thank you to Rudi Miller for pointing out this nuance.

31. *Full Coverage: Harvey Weinstein is Found Guilty of Rape*, N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-verdict.html> [<https://perma.cc/K4BC-HFLX>].

Ronan Farrow in 2017,<sup>32</sup> triggering the #MeToo movement<sup>33</sup> that forced the nation to reckon with systemic sexual harassment and assault. While many prominent voices in the #MeToo movement have advocated for alternative forms of justice rather than increased criminalization,<sup>34</sup> there have undeniably been criminalization components to #MeToo as well: the #MeToo movement has resulted in calls for more expansive criminal sexual assault laws,<sup>35</sup> seven criminal convictions and five criminal charges,<sup>36</sup> and the recall of the judge who sentenced the infinitely privileged rapist Brock Turner to a mere six months in jail.<sup>37</sup> Thus, while neither movement is exclusively pro- or anti-criminalization, the primary remedy that the Black Lives Matter and gender justice movements demand is noticeably different. There have been moments of tension between progressive calls to reduce or eliminate the use of jails and prisons to punish, and

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32. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/W5L6-KVC2>].

33. The original “Me Too” movement was founded in 2006 by Tarana Burke to support survivors of sexual violence. Tarana Burke, *History & Inception*, ME TOO., <https://metoomvmt.org/get-to-know-us/history-inception/> [<https://perma.cc/3GXU-VUTF>] (last visited Mar. 25, 2022); see also Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/ST6K-RC53>].

34. See Lesley Wexler, Jennifer K. Robbennolt, & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 ILL. L. REV. 45 (calling for restorative justice and transitional justice to deal with sexual misconduct in the workplace).

35. Ginia Bellafante, *The #MeToo Movement Changed Everything. Can the Law Catch Up?*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/nyregion/metoo-movement-schneiderman-prosecution.html> [<https://perma.cc/2AAU-YQBM>] (reporting that special prosecutor Madelina Singas has proposed new criminal laws dealing with sexual assault).

36. Orion Rummmler, *Global #MeToo Movement Has Resulted in 7 Convictions, 5 Charges of Influential Figures*, AXIOS (July 3, 2020), <https://www.axios.com/global-metoo-movement-convictions-charges-382ff226-7ad3-4b26-ac89-451788192578.html> [<https://perma.cc/N8VF-PBPU>].

37. There was national outrage after Judge Aaron Persky sentenced rapist Brock Turner to only six months in jail. Richard Gonzales, *Sentence in Stanford Sexual Assault Case Sparks Outrage*, NPR (June 6, 2016), <https://www.npr.org/sections/thetwo-way/2016/06/06/481010919/california-rape-case-sentence-sparks-outrage?> [<https://perma.cc/LPG5-LMHR>]. In the context of criminal prosecutions, Brock Turner got an egregiously light sentence: where minorities and the poor are routinely sent to jail for years for non-violent crimes, Brock Turner was given the equivalent of a slap on the wrist. In response, Santa Clara County voters removed Judge Persky from the court, and replaced him with Cindy Hendrickson, a prosecutor. Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html> [<https://perma.cc/LK3J-JMS6>]. Judge Persky was the first judge to be recalled in California in more than eighty years. *Id.* Stanford Professor Michele Dauber, who led the recall effort, argued that Judge Persky's lenient sentence “reinforced the view that the legal profession itself—judges, lawyers, and court personnel—blame victims, excuse perpetrators, and do not take sexual assault seriously.” Jose A. Del Real, *California Today: 2 Views of the Judge Persky Recall*, N.Y. TIMES (June 13, 2018), <https://www.nytimes.com/2018/06/13/us/california-today-2-views-of-the-judge-persky-recall.html> [<https://perma.cc/A9CK-EQG2>].

on the other hand, calls to punish the perpetrators of gender violence by putting them in jails or prison.<sup>38</sup>

I am in no way arguing that defunding the police and prison abolition movements are incompatible with the #MeToo movement and gender justice movements generally. Indeed, I believe that these movements can, and should, be mutually reinforcing. Rather, I seek to highlight some of the tensions that many progressives have grappled with even as they passionately support both movements: how do we demand that perpetrators of domestic violence be held accountable while also demanding the reduction—or elimination—of police and incarceration? How do we ask society to believe survivors that have been sexually assaulted or harassed while also acknowledging that society used fabricated claims of sexual assault and harassment of White women to justify inflicting legal<sup>39</sup> and extralegal brutality against Black men?<sup>40</sup> How do we reconcile demands that sexual assaulters and women-beaters be banished from society with ideas of restorative justice and rehabilitation? Is it possible to end domestic violence without imposing the violence of the carceral state?

Before this Note can delve into these tensions, it is first necessary to summarize how the mainstream anti-domestic violence movement increased criminalization and empowered the prison state.

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38. Gruber referred to this as “millennial feminism,” which exists “in an uncomfortable equilibrium of distaste for gender crimes *and* punishments. On one side of the scale is a Black Lives Matter-informed belief that policing, prosecution, and incarceration are racist, unjust, and too widespread . . . On the other is a #MeToo-informed preoccupation with men’s out-of-control sexuality and abuse of power. This side wants to get tough.” AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION* 5 (2020).

39. In her amicus brief for *Coker v. State of Georgia*, Ruth Bader Ginsburg explained the racist roots of punishing rape by execution:

The historical origin of the death penalty for rape lies in the long standing view of rape as a crime of property where the aggrieved was not the woman but her husband or father. In the Southern states this view coalesced with a tradition which valued [W]hite women according to their purity and chastity and assigned them exclusively to [W]hite men. As a result, a double standard of justice developed for weighing and punishing rape by [W]hite and [B]lack men. This double standard of justice was reflected in Georgia’s penalty structure for rape which, until the abolition of slavery, reserved the death penalty exclusively for [B]lack men.

Even since 1861, the death sentence has rarely been imposed on [W]hite men.

Brief for ACLU et al. as Amici Curiae Supporting Petitioners at 6, *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444), 1976 WL 181482.

40. See, e.g., N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004) (examining how the stereotype of the “Bestial Black Man” impacted the use of extra-legal and legal punishment against Black men); Ronald Turner, *Remembering Emmett Till*, 38 HOW. L.J. 411 (1995) (attributing the murder of Emmett Till and other Black men to pervasive and continuous race discrimination in the United States); Chelsea Hale & Meghan Matt, *The Intersection of Race and Rape Viewed through the Prism of a Modern-Day Emmett Till*, AM. BAR ASSOC. (July 16, 2019) <https://www.americanbar.org/groups/litigation/committees/diversity/inclusion/articles/2019/summer2019-intersection-of-race-and-rape/> [<https://perma.cc/7KZ5-MXTB>] (exploring the discriminatory treatment of African American defendants accused of raping White women).

*B. The Criminalization of Domestic Violence*

This Section explains how the anti-domestic violence movement became so enmeshed with the criminal justice system. Although domestic violence has surely been around since the dawn of time,<sup>41</sup> only in the last fifty years has domestic violence been viewed as a legitimate societal wrong warranting state intervention. As Angela Davis explained in her 2000 keynote speech at the Color of Violence Conference:

Many of us now take for granted that misogynist violence is a legitimate political issue, but let us remember that a little more than two decades ago, most people considered “domestic violence” to be a private concern and thus not a proper subject of public discourse or political intervention. Only one generation separates us from that era of silence.<sup>42</sup>

Indeed, the full extent of domestic violence first came out publicly during the women’s liberation movement in the 1960s.<sup>43</sup> Perhaps more notably, domestic violence advocates of that era also revealed that police and prosecutors were systematically ignoring domestic violence and refusing to arrest and charge perpetrators.<sup>44</sup> In the late 1970s, twelve “battered wives” sued clerks of the Family Court of New York City and an official of the New York City Department of Probation for systematically acting to prevent and dissuade these women from accessing legal remedies to domestic violence, such as protection orders.<sup>45</sup>

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41. In the mid-1800s, Elizabeth Cady Stanton condemned marital rape as she argued that a woman should have the right to her person. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1417 (2000).

42. Angela Davis, *Keynote Address at The Color of Violence Against Women Conference* (Oct. 10, 2000) [hereinafter Davis, *Keynote Address*], <https://www.colorlines.com/articles/color-violence-against-women> [https://perma.cc/BZC4-MXLL].

43. BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* 68 (2012) [hereinafter RICHIE, *ARRESTED JUSTICE*].

44. LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE* 13 (2018) [hereinafter GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*]. For a specific example, Leigh Goodmark recounted a particularly egregious account of police inaction in the face of domestic violence that occurred on June 10, 1983:

Charles Thurman hands police officers the knife that dripped with his wife’s blood. Then, as the officers look on, he kicks her in the head—and he is still not arrested. After months of phone calls and reports to police warning of Charles Thurman’s violence and repeated threats against his wife, after a criminal conviction and a civil order both required Thurman to stay away from his wife, Charles Thurman was still able to stab his wife multiple times in the chest, neck, and throat, drop their son on top of her while she bled, and kick her repeatedly in the head. Thurman’s vicious attack on his wife was facilitated by the Torrington, Connecticut police department’s unwillingness to respond to numerous requests for assistance for Tracy Thurman and her son, Charles Jr.—inaction that continued after the stabbing. Charles Thurman was not arrested, in fact, until he again approached his wife while she was lying on a stretcher, waiting to be taken for medical treatment.

Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 1 (2009) [hereinafter Goodmark, *Autonomy Feminism*].

45. *Bruno v. Codd*, 393 N.E.2d 976, 976 (N.Y. 1979).

As it became increasingly clear that the state, courts, and law enforcement had routinely ignored domestic violence, “a sense of moral outrage took over.”<sup>46</sup> It was this “sense that violence against women is not taken seriously in our heteropatriarchal society” that “motivated feminists to ally with the criminal justice system.”<sup>47</sup> Starting in the late 1970s, feminists fought to force these actors to treat domestic violence as they would any other crime.<sup>48</sup> Arguably, second-wave feminists took it even further than that. I will briefly explain some of their most significant reforms:

**Mandatory Arrest.** In the early 1980s, a group of sociologists published the results from the Minneapolis Domestic Violence Experiment, which found that arresting domestic violence perpetrators was the most effective means of deterring future domestic violence.<sup>49</sup> This study became highly influential among police departments<sup>50</sup> and in the mainstream anti-domestic violence movement, which started lobbying vigorously for mandatory arrest and pro-arrest policies.<sup>51</sup> The idea behind such policies was that police could not be trusted to treat domestic violence like a real crime, and thus must be required to make arrests without room for discretion.<sup>52</sup> Such policies were revolutionary because officers normally could not perform a warrantless arrest for a misdemeanor that was committed outside the presence of an officer.<sup>53</sup> This lobbying was successful: in 1984, only 10 percent of police departments had pro-arrest policies for domestic violence, but by 1989, 89 percent of police departments had such policies.<sup>54</sup> Today, every state has either a pro-arrest or mandatory arrest policy for cases involving domestic violence.<sup>55</sup> Many scholars

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46. RICHIE, ARRESTED JUSTICE, *supra* note 43, at 71.

47. Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J. L. & POL’Y 13, 55 (2011); *see also* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 180 (2007) (noting that “[d]omestic violence has emerged over the last three decades as one of the clearest cases where a civil rights movement has turned to criminalization as a primary tool of social justice”).

48. GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE, *supra* note 44, at 13.

49. LAWRENCE W. SHERMAN & RICHARD A. BERK, POLICE FOUNDATION REPORTS: THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT 1 (Apr. 1984), <https://www.policefoundation.org/wp-content/uploads/2015/07/Sherman-et-al.-1984-The-Minneapolis-Domestic-Violence-Experiment.pdf> [<https://perma.cc/9EEW-XX53>].

50. Lawrence W. Sherman & Ellen G. Cohn, *The Impact of Research on Legal Policy: The Minneapolis Domestic Violence Experiment*, 23 LAW & SOC’Y REV. 117, 119 (1989).

51. 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, 281 (1997). A pro-arrest policy means that the police are highly encouraged, but not absolutely required, to arrest the perpetrator.

52. Goodmark, *Autonomy Feminism*, *supra* note 44, at 4.

53. *Id.* at 11.

54. GRUBER, *supra* note 38, at 82.

55. Goodmark, *Autonomy Feminism*, *supra* note 44, at 14.

and advocates have continued to push for such policies wherever police are called to address domestic violence.<sup>56</sup>

**No-Drop Prosecutions.** No-drop prosecutions emerged for the same reason as mandatory arrest policies: domestic violence advocates did not trust prosecutors to treat domestic violence like a real crime. In turn, many prosecutors blamed their failure to pursue such cases on the fact that many survivors of domestic violence refused to testify.<sup>57</sup> A no-drop policy meant that “prosecutors would not dismiss criminal charges in otherwise winnable cases simply because the victim was not interested in, or even adamantly opposed to, pursuing the case.”<sup>58</sup> Today, in certain jurisdictions, this means that prosecutors can compel unwilling survivors to testify by subpoena, by issuing a warrant, or even by arresting the survivor.<sup>59</sup>

**Special Evidentiary Rules.** Legislatures passed various special evidentiary rules designed to make it easier to prosecute gender crimes, including domestic violence. Three examples of these special evidentiary rules include the “Rape Shield Laws,” California Evidence Code Section 1109, and California Evidence Code Section 1370. “Rape Shield Laws” prohibit the defense from using evidence about the survivor and their past sexual behavior as evidence that they consented to sex during the alleged sexual assault.<sup>60</sup> Lisa Marie De Sanctis wrote and convinced the legislature to pass California Evidence Code section 1109, which allows previously inadmissible propensity evidence into domestic violence prosecutions.<sup>61</sup> This means that prosecutors can show evidence that a defendant committed domestic violence in the past in order to prove that they are guilty of this particular incident of domestic violence—an argument that is prohibited for almost every other crime.<sup>62</sup> After Nicole Brown Simpson’s diary entries detailing the domestic violence she had suffered at the hands of O.J. Simpson were excluded as hearsay in Simpson’s criminal trial, the California

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56. See, e.g., Machaela M. Hocror, *Domestic Violence As A Crime Against the State: The Need for Mandatory Arrest in California*, 85 CALIF. L. REV. 643, 648 (1997) (arguing for “the abolition of the warrant requirement for *all* misdemeanor domestic violence assaults not observed by a police officer and for the enactment of a mandatory arrest law for the primary physical aggressor in domestic assaults”).

57. Cheryl Hanna, *Making Hard Decisions After the Violence Against Women Act Grants*, 22 VT. B.J. & L. DIG. 33, 33 (1996).

58. Goodmark, *Autonomy Feminism*, *supra* note 44, at 24.

59. *Id.* at 19.

60. RICHIE, *ARRESTED JUSTICE*, *supra* note 43, at 79 (“In effect, the rape shield laws created a level of protection in the judicial process that is not afforded any other crime victim who is pursuing legal redress, which set male violence apart from other violent crimes.”).

61. Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 359 (1996).

62. Normally, propensity evidence is not permitted in court because it is considered unduly prejudicial and immaterial. For example, a prosecutor would not normally be allowed to argue that because a defendant stole a car twenty years ago that they are more likely to be guilty of stealing the car at issue in the trial today.

legislature enacted California Evidence Code section 1370, which creates a limited hearsay exception for domestic violence cases.<sup>63</sup>

**VAWA.** One of the biggest legacies of this era was the federal Violence Against Women Act (VAWA) of 1994. The primary goal of this Act was to heighten *criminal* justice responses to violence against women.<sup>64</sup> The secondary goal was to fund survivor services.<sup>65</sup> VAWA allocated millions of dollars to support courts, police, and prosecutors pursuing domestic violence cases.<sup>66</sup> In addition, VAWA also created monetary incentives to convince domestic violence advocates to work with police and prosecutors.<sup>67</sup> Multiple scholars have pointed out that these monetary incentives played a huge role in shaping the partnership between the mainstream domestic violence movement and law enforcement.<sup>68</sup> For example, part of VAWA funding was contingent on the state adopting a pro- or mandatory arrest policy for cases involving domestic violence.<sup>69</sup> Indeed, VAWA was part of the Omnibus Crime Bill of 1994, which played an infamous role in criminalization and mass incarceration.

In sum, the mainstream domestic violence movement of the 70s and 80s made great strides in convincing the public to take domestic violence seriously. It also contributed to important noncriminal responses to domestic violence: the first shelters for battered women emerged in the 1970s, as did the first national organization to end violence against women.<sup>70</sup> But ultimately, this wave of feminism has been remembered “for its contributions to policing, prosecution, and punishment.”<sup>71</sup>

### C. *The Feminist Abolitionist Approach to Addressing Domestic Violence*

This Section will summarize the feminist abolitionist approach to solving domestic violence. The feminist abolitionist movement emerged simultaneously with the mainstream criminalization movement of the 1970s, but the latter movement attracted more popular support. In recent years, the feminist abolitionist approach has gained more traction as people have recognized the repercussions of the criminalization era. Feminist abolitionists make three primary arguments regarding domestic violence: (1) criminalization does not improve outcomes for survivors, (2) criminalization increases domestic violence

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63. Karleen F. Murphy, *A Hearsay Exception for Physical Abuse*, 27 GOLDEN GATE U. L. REV. 497, 497–98.

64. RICHIE, *ARRESTED JUSTICE*, *supra* note 43, at 85.

65. *Id.*

66. GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*, *supra* note 44, at 15.

67. *Id.*

68. *Id.*

69. The Violence Against Women Act of 1994 “required states to certify that they had adopted either pro- or mandatory arrest policies in order to be eligible for federal funding under the Grants To Encourage Arrests program—a program that provided \$120 million over three years to state and local police departments.” Goodmark, *Autonomy Feminism*, *supra* note 44, at 13.

70. GRUBER, *supra* note 38, at 47–51.

71. *Id.* at 44.

on a societal level because criminal remedies are inherently violent and do not resolve the underlying issues that cause domestic violence, and thus (3) anti-domestic violence advocates should advocate for prison abolition in order to truly end domestic violence. I will evaluate each argument in turn.

*1. Criminalization Does Not Always Make Survivors Safer*

This Section discusses criticisms of the movement to criminalize domestic violence. It concludes that while criminalization can benefit privileged survivors—such as White, married women—it can cause oppressed and marginalized survivors—such as people of color and undocumented people—to suffer even worse and more frequent violence.

As the mainstream domestic violence movement became increasingly entwined with law enforcement, feminist abolitionists, most of them women of color, spoke up against what they saw as an unholy alliance. Women of color have been active in domestic violence advocacy since its inception.<sup>72</sup> At this inception, the movement was not grounded in criminal responses but focused primarily on community-based interventions and providing economic, social, and psychological support to survivors. Yet, as Beth E. Richie explained, the rhetoric and blind spots of the mainstream anti-violence movement made it the perfect conduit for the prison state:

There was a moment, I do not know if it was like fifteen minutes or maybe it was fifteen years, where our rhetoric, our resources, our approaches, our relationships with the criminal legal system meant that we were ripe for being taken advantage of by the forces that were building up a prison nation. In other words, they used us. They took our words, they took our work, they took our people, they took our money and said, “You girls doing your anti-violence work are right, it is a crime, and we have got something for that.” There was really a moment where we said “cool, take it.” Some of us said, “don’t go there,” but the train had already left the station.<sup>73</sup>

How did the mainstream movement become so entwined with law enforcement? Or, as Aya Gruber put it, “[h]ow were feminist lawyers so successful at making the remarkably broad claim that every woman benefited from arrest?”<sup>74</sup> The answer is that the anti-domestic violence movement was racist in many respects.<sup>75</sup> In particular, the movement was blind to how race and

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72. Davis, *Keynote Address*, *supra* note 42.

73. RICHIE, *ARRESTED JUSTICE*, *supra* note 43, at 268; *see also id.* at 266 (“We thought that we could work within the system to make it better . . . we credited ourselves because we won the mainstream, but guess what? We lost the movement.”).

74. GRUBER, *supra* note 38, at 70.

75. As she came to know the movement more, Richie described finding a “pernicious form of racism in the movement to end gender violence.” Richie, *Reimagining the Movement*, *supra* note 12, at 263.

class affect how people are impacted by domestic violence.<sup>76</sup> Richie recounted attending her first conference sponsored by the National Coalition Against Domestic Violence and resonating with the analysis of gender and inequality but being disappointed in the movement's failure to incorporate issues of race, class, and equality.<sup>77</sup> The theme of this initial movement was that domestic violence "could happen to anyone."<sup>78</sup> In reality, this meant that "the 'ones' with the most visibility, the most power, and the most public sympathy [were] the 'ones' whose needs [were] taken most seriously."<sup>79</sup> The prototypical domestic violence survivor became the White housewife being beaten by her husband, not, for example, the Black teenage survivor of sex trafficking.<sup>80</sup> Because the movement was centered around finding solutions for the White housewife, it did not come up with solutions for women with less power.<sup>81</sup> Instead, it focused on criminalization. But, as Leigh Goodmark explained, "[c]riminalization most benefits those who feel safer as a result of interventions but are immune from most of its costs: people who don't share children with their partners, people who are no longer in relationships with those partners, people who don't rely on their partners in any way, higher-income people."<sup>82</sup> In other words, the mainstream anti-violence movement focused on criminalization because this movement centered the needs of White women, and failed to account for how race, class, and other axes of disenfranchisement impact how people experience domestic violence.

As the criminalization of domestic violence progressed, many scholars and advocates pushed back against its deleterious effects on marginalized communities, including many survivors of domestic violence.<sup>83</sup> Feminist abolitionists noted that the mainstream movement's obsession with

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76. RICHIE, ARRESTED JUSTICE, *supra* note 43, at 29, 69 (explaining that Black women may suffer a greater impact from domestic violence than other demographics).

77. Richie, *Reimagining the Movement*, *supra* note 12, at 262.

78. RICHIE, ARRESTED JUSTICE, *supra* note 43, at 110.

79. *Id.*

80. Meghan Condon, *Bruise of A Different Color: The Possibilities of Restorative Justice for Minority Victims of Domestic Violence*, 17 GEO. J. POVERTY L. & POL'Y 487, 488 (2010); RICHIE, ARRESTED JUSTICE, *supra* note 43, at 27–28 (recounting the story of sixteen-year-old Sara Kruzan, who was sentenced to life without parole after she hit the pimp—who was violently abusing her—in the back of the neck and he died from his injuries).

81. "To the extent that these changes can be considered advantages at all, it is critical to note that they have benefited groups of women who have power much more than others." RICHIE, ARRESTED JUSTICE, *supra* note 43, at 3.

82. GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE, *supra* note 44, at 32.

83. Aya Gruber recounted, "I felt a sense of disillusionment that the feminist movement I so admired played such a distinct role in broadening and legitimizing the unconscionable penal state. As an academic, I was increasingly concerned that women's criminal law activism had not made prosecution and punishment more feminist. It had made feminism more prosecutorial and punitive." GRUBER, *supra* note 38, at 1. Harris explained that "scholars and activists committed to ending domestic violence and violence against sexual minorities have become increasingly disenchanting with the criminal justice system, and increasingly aware of its insidious role in the decimation of poor [B]lack and [B]rown communities." Harris, *supra* note 47, at 17.

criminalization actually increased the risk of domestic violence to women of color.<sup>84</sup> Perhaps the most glaring example of this is the ideological demise of mandatory arrest policies.<sup>85</sup> In 2015, Lawrence W. Sherman, father of the mandatory arrest, recanted his previous recommendations after conducting a new experiment that found that domestic violence victims were 64 percent *more likely* to have died of all causes if their abusers were arrested and jailed than if they were warned and allowed to stay home.<sup>86</sup> These numbers were even more stark when race was considered: arrest increased mortality rates for White victims by 9 percent, but increased mortality for Black victims by 98 percent.<sup>87</sup> Increased criminalization also increased the arrests and imprisonments of *survivors* of domestic violence.<sup>88</sup> After seeing the impact of these policies, Sherman now advocates for restorative justice.<sup>89</sup>

Advocates have pointed out that for many women of color, police are themselves perpetrators of violence, rather than the intervening force that the mainstream domestic violence movement imagined them to be.<sup>90</sup> Thus, the failure to focus on noncriminal remedies to domestic violence means that many

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84. Beth E. Richie explained that “women with less power . . . are in as much danger as ever, precisely because of the ideological and strategic direction the anti-violence movement has taken during the buildup of America’s prison nation.” RICHIE, *ARRESTED JUSTICE*, *supra* note 43, at 4; *see also id.* at 270 (“These policies may have benefitted a few people, but they did not fundamentally change anything. These policies may have removed an abusive person from access to someone they were harming, but that did not do anything to make the fundamental changes necessary to end gender violence.”).

85. Because White women have defined gender violence in a manner that privileges certain types of survivors over others, “the work that emerges from that narrowed definition of what counts as gender violence is still very closely aligned with narrow state practices and policies such as mandatory arrest.” RICHIE, *ARRESTED JUSTICE*, *supra* note 43, at 264.

86. Lawrence W. Sherman & Heather M. Harris, *Increased Death Rates of Domestic Violence Victims From Arresting vs. Warning Suspects in the Milwaukee Domestic Violence Experiment (MilDVE)*, 11 J. EXPERIMENTAL CRIMINOLOGY 1 (2014) (“Partner arrests for domestic common assault apparently increased premature death for their victims, especially African-Americans. Victims who held jobs at the time of police response suffered the highest death rates, but only if they were African-American. Replications and detailed risk factor studies are needed to confirm these conclusions, which may support repeal or judicial invalidation of state-level mandatory arrest laws.”).

87. *Id.*

88. RICHIE, *ARRESTED JUSTICE*, *supra* note 43, at 270 (“And guess what? Those places are increasingly incarcerating women, most of whom should have been able to turn to our services and support, but instead they were defined out of who is a legitimate victim.”). See, for example, the “Free Marissa Now” campaign. *Free Marissa Alexander*, FREE MARISSA NOW, <https://www.freemarissanow.org/> [<https://perma.cc/MP4Y-KXXP>] (last visited Mar. 25, 2022).

89. Lawrence W. Sherman, *Domestic Violence and Restorative Justice: Answering Key Questions*, 8 VA. J. SOC. POL’Y & L. 263, 265 (2000).

90. “Many years ago when I was a student in San Diego, I was driving down the freeway with a friend when we encountered a [B]lack woman wandering along the shoulder. Her story was extremely disturbing. Despite her uncontrollable weeping, we were able to surmise that she had been raped and dumped along the side of the road. After a while, she was able to wave down a police car, thinking that they would help her. However, when the [W]hite policeman picked her up, he did not comfort her, but rather seized upon the opportunity to rape her once more . . . I relate this story not for its sensational value, but for its metaphorical power.” Davis, *Keynote Address*, *supra* note 42.

domestic violence survivors who are unable or unwilling to involve the police simply have no one to turn to.

## 2. *Over-criminalization Makes Society More Dangerous*

This Section discusses how two aspects of criminalization—incarceration and policing—affect domestic violence rates on a societal level.

Feminist abolitionists have argued that because prisons are dangerous places where gender violence is endemic, reliance on the prison system “in the long run perpetuates more gender violence—directed particularly at the most vulnerable and disenfranchised communities.”<sup>91</sup> Feminist abolitionists acknowledge that state violence and gender violence are often mutually reinforcing. Angela Davis has questioned whether reliance on the criminal justice system to fix domestic violence has done more harm than good.<sup>92</sup>

Abolitionists have long argued that prisons make society *more* dangerous. The United States imprisons more people for lengthier sentences and has the highest incarceration rates of any other country.<sup>93</sup> In large part, this is because prisons are the opposite of rehabilitative: they are dangerous, violent,<sup>94</sup> and rife

91. Harris, *supra* note 47, at 64.

92. “[U]ncritical reliance on the government has resulted in serious problems. I suggest that we focus our thinking on this contradiction: Can a state that is thoroughly infused with racism, male dominance, class-bias, and homophobia and that constructs itself in and through violence act to minimize violence in the lives of women? Should we rely on the state as the answer to the problem of violence against women?” Davis, *Keynote Address*, *supra* note 42.

93. The United States imprisons more people than any other country on earth. Kelly Lytle Hernández, Khalil Gibran Muhammad & Heather Ann Thompson, *Introduction: Constructing the Carceral State*, 2015 J. AM. HIST. 18, 18. Moreover, the number of people in U.S. prisons has quintupled over the past three decades. *Americans With Criminal Records*, SENT’G PROJECT 1 <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> [<https://perma.cc/5MA3-ZX7Q>] [hereinafter *Americans With Criminal Records*]. As of 2018, 6,140,000 people in the United States were in prison, jail, or out on probation or parole. Laura M. Maruschak & Todd D. Minton, *Correctional Populations in the United States, 2017-2018*, U.S. DEP’T JUST., BUREAU JUST. STAT. 1 (Aug. 2020), <https://www.bjs.gov/content/pub/pdf/cpus1718.pdf> [<https://perma.cc/S3UR-MZ69>]. Put differently, one out of every forty adults in the United States was under correctional supervision in 2018. *Id.* Today, it is estimated that as many as one out of three Americans—between seventy and one hundred million people—have a criminal record. *Americans With Criminal Records*, *supra*, at 1. As of 2016, the average stay in state prison for a drug offense was twenty-two months, a property offense was twenty-one months, and a violent offense was 4.7 years. Danielle Kaebler, *Time Served in State Prison, 2016*, U.S. DEP’T JUST., BUREAU JUST. STAT. 2 (Nov. 2018), <https://www.bjs.gov/content/pub/pdf/tssp16.pdf> [<https://perma.cc/KXS5-JDGL>]. Overall, the average stay in state prison in 2016 was 2.6 years. *Id.* The average length of stay in federal prison was 37.5 months in 2012—up from 17.9 months in 1988. Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L.R. 114, 122 (2018), <https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/> [<https://perma.cc/JN3Y-5YC7>].

94. An average of 11 percent of deaths in state prison were due to unnatural causes, including suicide, substance abuse, accidents, and homicide. E. Ann Carson & Mary P. Cowhig, *Mortality in State and Federal Prisons, 2001-2016 – Statistical Tables*, U.S. DEP’T JUST., BUREAU JUST. STATS. 1 (Feb. 2020) <https://www.bjs.gov/content/pub/pdf/msfp0116st.pdf> [<https://perma.cc/2HE5-L3GS>]. Indeed, between 2001 and 2016, 1,024 people incarcerated in the United States died by homicide. *Id.* at 5.

with sexual abuse.<sup>95</sup> Additionally, incarcerated people are frequently unable to access adequate healthcare, particularly mental healthcare—a system failure that is completely inconsistent with rehabilitation.<sup>96</sup> Aside from the violence and trauma incarcerated people are subjected to while incarcerated, incarceration also has a detrimental effect on families because it strains familial bonds between parents that are incarcerated and their children.<sup>97</sup> In sum, the efficacy of incarceration in reducing crime has not been proven.<sup>98</sup>

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95. Sexual abuse in prisons is rampant. DAVIS, ARE PRISONS OBSOLETE?, *supra* note 23, at 81; *see, e.g., id.* at 63 (describing how cavity searches are tantamount to sexual assault). In 2015, federal and state correctional officers reported 24,661 allegations of sexual victimization. Tannyr Watkins, *Sexual Victimization Reported by Adult Correctional Authorities, 2012-15*, U.S. DEP'T JUST., BUREAU JUST. STATS. (July 25, 2018), <https://www.bjs.gov/content/pub/press/svraca1215pr.cfm#:~:text=Fifty%2Deight%20percent%20of%20substantiated,sexual%20victimization%20in%20correctional%20facilities> [https://perma.cc/D9TM-99RG]. Correctional officials found that only 1,473 of these incidents were substantiated, *id.*, which likely reveals more about the investigatory process of correctional facilities than the veracity of these claims. *See* Elizabeth A. Reid, *The Prison Rape Elimination Act (PREA) and the Importance of Litigation in its Enforcement: Holding Guards who Rape Accountable*, 122 YALE L.J. 2082, 2086 (2013). Of the substantiated incidents, 58 percent were perpetrated by incarcerated individuals, and 42 percent were perpetrated by staff members. *Sexual Victimization Reported by Adult Correctional Authorities, 2012-15*, U.S. DEP'T JUST., BUREAU JUST. STATS. 1 (July 2018), [https://www.bjs.gov/content/pub/pdf/svraca1215\\_sum.pdf](https://www.bjs.gov/content/pub/pdf/svraca1215_sum.pdf) [https://perma.cc/3XX2-XHC9]. Female prisoners are at particular risk of being assaulted by male guards. David W. Frank, *Abolishing Female Prisons to Prevent Sexual Abuse and Herald an End to Incarceration*, 29 BERKELEY J. GENDER, L. & JUST. 1, 2 (2014).

96. Prisoners are frequently unable to access adequate healthcare. Ira P. Robbins, *Managed Health Care in Prisons as Cruel and Unusual Punishment*, 90 J. CRIM. L. & CRIMINOLOGY 195, 196 (1999) [hereinafter Robbins, *Managed Health Care*]; Amber M. Charles, *Indifference, Interruption, and Immunodeficiency: The Impact and Implications of Inadequate HIV/AIDS Care in U.S. Prisons*, 92 BOS. U. L. REV. 1979, 1982 (2012). Between 2015 and 2016, the number of state prisoner deaths increased from 296 to 303 per 100,000 people. Carson & Cowhig, *supra* note 94, at 2. Indeed, illness is the leading cause of death in state prisons. *Id.* Access to mental healthcare is particularly limited. Robbins, *Managed Health Care, supra*, at 1. Annually, an average of seventeen out of 100,000 male state prisoners and thirteen out of 100,000 female state prisoners die by suicide. Carson & Cowhig, *supra* note 94, at 2. Between 2001 and 2016, 3,300 people in state and federal prisons died by suicide. *Id.* at 5. Some scholars have even suggested that there may be a connection between a prisoner's expected length of sentence and his decision to commit suicide. Nadia Campaniello, Theodoros Diasakos & Giovanni Mastrobuoni, *Rationalizable Suicides: Evidence from Changes in Inmates' Expected Length of Sentence*, *IZA Discussion Papers*, No. 8333, INST. STUDY LAB. 1 (July 2014), <https://ftp.iza.org/dp8333.pdf> [https://perma.cc/A5JY-FAQG].

97. As of 2007, over half of Americans in state and federal prison were parents to minor children. Lauren E. Glaze & Laura M. Maruschak, *Parents in Prison and Their Minor Children*, U.S. DEP'T JUST., BUREAU JUST. STATS. 1 (Mar. 30, 2010), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf> [https://perma.cc/K6Z2-E8Y9]. In other words, 2.3 percent of all U.S. children have a parent in prison. *Id.* The number of U.S. children with an incarcerated parent increased by 80 percent between 1991 and 2007. *Id.* The incarceration of a parent is a deeply traumatic event that has horrible consequences on the child's development, education, and well-being. Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 811 (2011).

98. Studies on this topic have come to vastly different conclusions, with some finding that crime rates drop in relation to incarceration, others finding that crime increases, and still others finding no correlation at all. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1200 (2015). Some scholars have found that lengthy prison sentences generally do more harm than good. Richard L. Lippke, *Crime Reduction and the Length of Prison Sentences*, 24 LAW & POL'Y. 17, 17 (2002).

Policing, too, frequently detracts from public safety and increases violence.<sup>99</sup> The amount of money we spend on policing and incarceration diverts funds<sup>100</sup> that could be better spent on education, access to healthcare, mental health and drug treatment, and general development and investment in communities.<sup>101</sup>

Finally, American imprisonment and policing systems are deeply racist, and have an enormously disparate impact on communities of color.<sup>102</sup>

As of today, evidence on whether increased criminalization has effectively reduced domestic violence is inconclusive.<sup>103</sup> What is clear, however, is that the

99. The actions of law enforcement cause 1 percent of all violent deaths, and 4 percent of all homicides, in the United States annually. Sarah DeGue, Katherine A. Fowler & Cynthia Calkins, *Deaths Due to Use of Lethal Force by Law Enforcement: Findings from the National Violent Death Reporting System, 17 U.S. States, 2009-2012*, AM. J. PREVENTIVE MED. 2 (Nov. 2016). Approximately 25–50 percent of these deaths involved mentally ill individuals. *Id.*

100. “A prison nation . . . is a set of ideologies and public policy changes that led to a divestment from communities of much needed health and human services.” Richie, *Reimagining the Movement*, *supra* note 12, at 268.

101. Goodmark pointed out that because government spending is often a zero-sum game, criminalization diverts resources that would be better spent on the community. GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*, *supra* note 44, at 22. In 2017, U.S. state and local governments spent \$115 billion on police. *Criminal Justice Expenditures: Police, Corrections, and Courts*, URBAN INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures#Question1Police> [<https://perma.cc/R8XR-3XSV>]. Over the past several decades, the share of police budgets out of overall public spending has grown considerably. Emily Badger & Quoc Trung Bui, *Cities Grew Safer. Police Budgets Kept Growing*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/interactive/2020/06/12/upshot/cities-grew-safer-police-budgets-kept-growing.html> [<https://perma.cc/RYP2-LWYT>]. Los Angeles, St. Louis, Baltimore, Memphis, and Tucson (among others) spend between 11 percent and 16 percent of their local spending on police. *Id.*

102. Many scholars have detailed the racist roots, intentions, and impact of the U.S. police and penal state. See DAVIS, *ARE PRISONS OBSOLETE?*, *supra* note 23, at 22–39; see generally Michelle Alexander, *THE NEW JIM CROW* (2010); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 3 (2019). Some studies have indicated that one out of every three Black men and one out of six Latino men—as opposed to one out of seventeen White men—can expect to spend time in jail or prison. Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, U.S. DEP’T JUST., BUREAU JUST. STATS. 1 (Aug. 2003), <https://bjs.gov/content/pub/pdf/piusp01.pdf> [<https://perma.cc/38UK-4VY5>]. This means that Black men are six times more likely to be incarcerated than White men are. *Americans with Criminal Records*, *supra* note 93, at 1. The era of mandatory minimums born out of the war on drugs disproportionately impacted poor and minority populations. Matthew C. Lamb, *A Return to Rehabilitation: Mandatory Minimum Sentencing in an Era of Mass Incarceration*, 41 J. LEGIS. 126, 127 (2014). Black communities are over-policed. Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. JUST. (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/5933-678H>]. Indeed, the expansion of a city’s police force correlates with the expansion of the Black population. Robert Vargas & Philip McHarris, *Race and State in City Police Spending Growth: 1980-2010*, 3 SOCIO. RACE & ETHNICITY 96, 97 (2017); Badger & Bui, *supra* note 101. The victims of police shootings are disproportionately Black. DeGue, Fowler & Calkins, *supra* note 99, at 1. Black people are 2.8 times more likely to die at the hands of police than White people are. *Id.* Black victims of police homicide were significantly more likely to be unarmed and significantly less likely to pose an immediate threat to police than White or Latinx victims were. *Id.* at 7.

103. GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*, *supra* note 44, at 24.

increase in criminalization has made the world decidedly less safe for disenfranchised women and has had an indeterminable impact on domestic violence as a whole. Thus, feminist abolitionists have argued that the mainstream anti-violence movement's marriage with criminalization was a mistake, and that prison should generally be seen as an exacerbator of, rather than a remedy to, domestic violence.

### 3. *State Violence Will Not End Domestic Violence*

Feminist abolitionist scholars have grappled with the tension between balancing the need to end gender violence with the need to end the violence of the carceral state. Davis explained this dilemma perfectly:

I should say that this is one of the most vexing issues confronting feminists today. On the one hand, it is necessary to create legal remedies for women who are survivors of violence. But on the other hand, when the remedies rely on punishment within institutions that further promote violence—against women and men, how do we work with this contradiction?<sup>104</sup>

Yet ending both state violence and domestic violence can be mutually reinforcing goals. Indeed, many scholars have advocated for prison abolition as a remedy to domestic violence. While prison abolition means different things to different people,<sup>105</sup> it can be broadly understood as the process of replacing incarceration with a combination of alternative remedies based on improving quality of life, empowering communities, and focusing on reparation and reconciliation rather than punishment for punishment's sake.<sup>106</sup> Many have argued that rehabilitation is actually a more effective means of protecting the community than incarceration.<sup>107</sup> At their core, calls to abolish prisons and

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104. Davis, *Keynote Address*, *supra* note 42.

105. Roberts, *supra* note 102, at 6.

106. Angela Davis explained that the abolitionist approach “would require us to imagine a constellation of alternative strategies and institutions, with the ultimate aim of removing the prison from the social and ideological landscapes of our society. In other words, we would not be looking for prisonlike substitutes for the prison . . . Rather, positing decarceration as our overarching strategy, we would try to envision a continuum of alternatives to imprisonment—demilitarization of schools, revitalization of education at all levels, a health system that provides free physical and mental care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance.” DAVIS, ARE PRISONS OBSOLETE?, *supra* note 23, at 107. Allegra M. McLeod explained that “abolition may be understood instead as a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement.” *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015). For example, David W. Frank argued that sexual abuse in female prisons is so bad that female prisons should be abolished in favor of support programs and community care centers. Frank, *supra* note 95, at 2.

107. Mirko Bagaric, Gabrielle Wolf, William Rininger, *Mitigating America's Mass Incarceration Crisis Without Compromising Community Protection: Expanding the Role of Rehabilitation in Sentencing*, 22 LEWIS & CLARK L. REV. 1, 1 (2018).

defund the police are about “demanding that the state divest from policing and imprisonment and invest in new forms of more equitable and just existence.”<sup>108</sup>

Angela P. Harris has called for a new analysis that “furthers neither the conservative project of sequestering millions of men of color in accordance with the contemporary dictates of globalized capital and its prison industrial complex, nor the equally conservative project of abandoning poor women of color to a continuum of violence that extends from the sweatshops through the prisons, to shelters, and into bedrooms at home.”<sup>109</sup> Many feminist abolitionist scholars have argued that moving towards decriminalization would be a more effective means of ending domestic violence.<sup>110</sup> As an alternative to the criminal justice system, Goodmark envisioned overlapping measures such as providing economic resources to survivors,<sup>111</sup> providing safe and affordable housing, gun control laws, public health programs that address mental health—particularly past trauma—of perpetrators, community accountability programs, and restorative justice.<sup>112</sup> In sum, feminist abolitionists have argued that noncriminal approaches would be more effective overall at ending domestic violence than defaulting to the penal state to end domestic violence.

As we work towards the dual progressive goals of ending state violence and domestic violence, no domestic violence remedy should be proposed without first evaluating how it will affect other marginalized groups, particularly communities of color. Moreover, I urge practitioners in the domestic violence field to invest more in noncriminal remedies to domestic violence and resist the urge to center police and prosecutors as the end-all be-all solution to domestic violence.

#### D. Empowering the Survivor

Although the mainstream anti-domestic violence movement has gone too far in promoting domestic violence exceptionalism,<sup>113</sup> it must also be

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108. Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1614 (2019).

109. Harris, *supra* note 47, at 13.

110. Richie, *Reimagining the Movement*, *supra* note 12, at 262 (“To me, the prison abolition frame provides a chance to talk about how to reframe the work to end gender violence as work against the patriarchal carceral state, and in particular the architecture of racism and related forms of oppression upon which the carceral state is built.”); GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE, *supra* note 44, at 30 (arguing that criminalization should not be the United States’s primary response to domestic violence). Gruber argued for a “neofeminist” approach to gender harm and violence: that criminal law should be a last, not first, resort. GRUBER, *supra* note 38, at 17.

111. As Gruber put it, if you really want to end domestic violence, “[g]ive women money.” GRUBER, *supra* note 38, at 46.

112. GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE, *supra* note 44, at 33.

113. Domestic violence exceptionalism refers to the policies and laws (described above) that treat domestic violence differently than any other crime. For example, mandatory arrest and pro-prosecution policies, as well as the evidentiary exceptions that are specific to domestic violence. See Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. REV. 397, 402 (2015).

acknowledged that domestic violence does present unique challenges.<sup>114</sup> Domestic violence can involve physical, psychological, and sexual abuse, as well as physical, psychological, financial, and legal entrapment.<sup>115</sup> Domestic violence can be all-encompassing to a victim in ways that an isolated incident of a more “typical” crime is not.<sup>116</sup> Moreover, chronic batterers pursue their victims with a dedication that is rarely seen in other crimes: globally, fifty thousand women are murdered each year by intimate partners and family members.<sup>117</sup> Between 2015 and 2020, nearly half of the transgender women who were murdered were killed by their intimate partners.<sup>118</sup> It is well documented that the most dangerous time for domestic violence victims and survivors is when they attempt to leave their

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114. See *DV Victim Charged with Murder After Repeated Failures of Court to Stop Her Abuser*, 19 NAT'L BULL. ON DOMESTIC VIOLENCE PREVENTION (2013); *Seven Women Seek Release from Life Sentences for Murdering Their Partners*, 27 NAT'L BULL. ON DOMESTIC VIOLENCE PREVENTION (2021); see, e.g., Mildred Muhammad, SCARED SILENT (2009) (raising awareness of domestic violence through detailing the author's experience in an abusive marriage and living in a shelter for abused women); Kyle Hopkins, *She Asked to Be Saved From Him. Now She's Dead.*, PROPUBLICA (July 28, 2020), <https://www.propublica.org/article/in-remote-villages-domestic-violence-kills-more-than-covid-19> [<https://perma.cc/HQK4-QPWM>] (tracing various cases of domestic violence across Western Alaska).

115. See *Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROJECT, <https://www.theduluthmodel.org/wp-content/uploads/2017/03/PowerandControl.pdf> [<https://perma.cc/XV2Z-879R>] (last visited Mar. 28, 2022); Morgan Lee Woolley, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS WOMEN'S L.J. 269, 270 (2007); David Ward, *In Her Word: Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors*, 14 SEATTLE J. SOC. JUST. 429, 429 (2015); see, e.g., Evan Stark, *Coercive Control: How Men Entrap Women in Person Life*, in INTERPERSONAL VIOLENCE (Claire Renzetti & Jeffrey L. Edleson eds., 2007) (showing how domestic violence is a pattern of controlling behaviors across all aspects of life, not just the domestic and not only involving violence); Shane M. Trawick, *Birth Control Sabotage As Domestic Violence: A Legal Response*, 100 CALIF. L. REV. 721 (2012) (describing birth control sabotage and its resulting emotional and physical distress as a form of domestic violence); Dennis Feeney Jr., *Ensuring the Domestic Violence Victim A Means of Communication: Why Passing Legislation That Criminalizes Impairing Another's Communication Is the Next Logical Step in Combating Domestic Violence*, 32 SETON HALL LEGIS. J. 167, 168 (2007); Alexandra Michelle Ortiz, *Invisible Bars: Adapting the Crime of False Imprisonment to Better Address Coercive Control and Domestic Violence in Tennessee*, 71 VAND. L. REV. 681, 682–83 (2018); Olivia S. Garber, *Animal Abuse and Domestic Violence: Why the Connection Justifies Increased Protection*, 47 U. MEM. L. REV. 359 (2016) (connecting animal abuse and domestic violence through economic, emotional and power dependency dynamics).

116. See general discussion from sources *supra* note 115.

117. Diane Cole, *U.N. Report: 50,000 Women A Year Are Killed By Intimate Partners, Family Members*, NPR (Nov. 30, 2018) <https://www.npr.org/sections/goatsandsoda/2018/11/30/671872574/un-report-50-000-women-a-year-are-killed-by-intimate-partners-family-members> [<https://perma.cc/GXF9-SF2N>]; see also Olga Khazan, *Nearly Half of All Murdered Women Are Killed by Romantic Partners*, ATLANTIC (July 20, 2017) <https://www.theatlantic.com/health/archive/2017/07/homicides-women/534306/> [<https://perma.cc/D3SZ-XSV6>].

118. Samantha Schmidt, Brittany Renee Mayes & Nia Decaille, *Surviving as a Black Transgender Woman in Baton Rouge*, WASH. POST. (June 29, 2021) <https://www.washingtonpost.com/dc-md-va/2021/06/28/transgender-women-homicides-intimate-partner-violence/> [<https://perma.cc/2P56-PAN7>].

abusers.<sup>119</sup> Abolitionists have discussed the possibility that even in a post-carceral world, prison—or some humane form of societal separation—may exist on the “margins.” I would not be surprised if these hypothetical margins ended up including the worst of domestic violence batterers.

In discussing injustices, progressives frequently focus on creating solutions that center the people suffering from the most axes of marginalization and disenfranchisement. The idea is that a solution that lifts up the people in the worst positions will lift *everyone* up. However, in domestic violence, this approach can produce vastly different outcomes depending on who you center. For example, the conversation could focus on an undocumented woman, living in extreme poverty with her four children, who is assaulted once by the children’s father, who is also undocumented. Assuming she does not want to risk the father of her children being deported, the best remedy for that woman may well be stable housing, money, and counseling. On the other hand, if the conversation focuses on a woman experiencing extreme, systematic violence at the hands of her husband—who happens to be a cop—the only solution may be incarceration because that may be the only realistic way to prevent him from murdering her in our current system. Thus, when discussing domestic violence remedies, we must simultaneously center both the people who suffer the most extreme forms of violence and oppression at the hands of the state and the people who suffer the most extreme forms of violence at the hands of their partners.

Of course, all of this requires acknowledging that domestic violence exists on a spectrum of harm, and while all domestic violence is unacceptable, different types of harm will require different solutions, responses, and interventions. This Note does not attempt to prescribe these different remedies. Instead, I presume that the survivor is the person best situated to determine which *existing* remedy is likely to work for them given their specific circumstances.

In the next Section, I will summarize the available criminal, civil, family, and alternative justice remedies to domestic violence in California. I will then discuss the benefits and drawbacks of each potential remedy for an individual who seeks to safely leave their abuser.

## II.

### DOMESTIC VIOLENCE REMEDIES

This Section will explain some of the myriad challenges that prevent domestic violence survivors and victims from successfully leaving their batterers, and the remedies available to people experiencing domestic violence in California. I will use an imaginary family to illustrate how the statutory

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119. See Jacquelyn C. Campbell, Daniel Webster, Jane Koziol-McLain, Carolyn Block, Doris Campbell, Mary Ann Curry, Faye Gary, Nancy Glass, Judith McFarlane, Carolyn Sachs, Phyllis Sharps, Yvonne Ulrich, Susan A. Wilt, Jennifer Manganello, Xiao Xu, Janet Schollenberger, Victoria Frye & Kathryn Laughon, *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1090 (2003).

provisions at issue affect the ability of domestic violence victims to secure aid through the California legal system. I will refer to these hypothetical family members by name to humanize the people who are impacted by domestic violence, and to avoid loaded words such as “victim,” “survivor,” and “batterer.” First, I will outline the hypothetical situation facing this family, and then I will describe the legal remedies available to this family in California.

#### The Family

Anna has been married to her husband, Jon, for five years. They live in a small town in Northern California. Anna and Jon have a daughter together named Rebecca, who has just turned two. Anna works full time as a sales associate at a retail store. Jon works sporadically at various construction jobs, mostly for cash. Jon’s mother, Mirabel, also lives with them. Mirabel is in the advanced stages of dementia and is nonverbal. Anna’s parents are deceased, and she has no extended family in the area. Jon has a small gun collection.<sup>120</sup>

Jon started to become abusive towards Anna when he lost his job a few months after their wedding. At first, the violence was infrequent and usually limited to slapping or pushing. But it gradually escalated in both frequency and intensity. A few weeks ago, he punched Anna so hard that she fell unconscious. He has also strangled her on several occasions, and frequently forces her to have sex with him.

Anna has not told anyone in her community about the abuse because she does not think anyone will believe her. This is partly because Jon has routinely told her that no one will believe her. Jon is also very well liked. He is routinely involved in their church and is a popular member of a recreational baseball team. He is charismatic, funny, and always the life of the party. Anna is shy, socially awkward, and has very few close friends. Since marrying Jon, she has lost most of her friends because Jon has been steadily isolating her. At this point, Anna is truly convinced that no one in her community will believe that Jon abuses her without proof.

Anna has always believed that she was Jon’s only target, since she never saw him mistreat their daughter or his mother. However, Anna grew suspicious a few weeks ago when she left Rebecca, who had developed a fever, home alone with Jon for the day. When Anna returned home, she noticed strange bruises on her daughter’s back. She confronted Jon about them, but he claimed that Rebecca had merely fallen. Another time, Anna came home to find Mirabel’s lip bleeding, though Jon said that Mirabel must have accidentally bit it while chewing.

These events were the last straw for Anna, and she has decided to leave Jon. However, there are many obstacles in her path. Anna’s most pressing concern is the physical safety of herself and her family: she is terrified that Jon will hurt or

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120. Gun ownership significantly increases the risk of femicide in abusive relationships. *Id.* at 1092; Larisa Martirosova, *Lethality of Guns in Domestic Violence*, in 2019 FIREARMS LAW, WHAT EVERY TEXAS LAWYER NEEDS TO KNOW; 2016 Stats Released for When Men Murder Women, 24 NAT’L BULL. ON DOMESTIC VIOLENCE PREVENTION 12 (2018).

kill her (or another family member) if she tries to leave.<sup>121</sup> Thus, Anna has decided to prioritize the following goals:

- Keep Jon away from herself and her child.
- Remove Jon’s guns and prevent him from obtaining new guns.
- Obtain full custody of her child.
- Protect her mother-in-law from Jon.
- Remain in the family home and kick Jon out.

Domestic violence law contains many remedies that may be able to help Anna achieve these goals. The following Sections will explore Anna’s available legal remedies.

### A. Criminal Remedies

This Section will describe the remedies available to Anna under California criminal law. The California domestic violence statute, though, is limited in both who it protects and what it criminalizes.

The statutory definition of *who* counts as a victim of domestic violence is narrow. The California Penal Code defines domestic violence as “abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship.”<sup>122</sup> Notably, courts have interpreted “cohabitant” to mean “those living together in a substantial relationship—one manifested, minimally, by permanence and sexual or amorous intimacy.”<sup>123</sup> Thus, batterers are not liable for criminal domestic violence when they harm a child or other non-romantic partner with whom they reside.<sup>124</sup> In addition, people who are in non-traditional relationships may struggle to find recourse under this statute. Here, the criminal domestic violence statute includes Jon’s abuse of Anna, but does not include Jon’s abuse of Rebecca or Mirabel. Therefore, Jon’s abuse of Rebecca or Mirabel would have to be prosecuted under child abuse statutes, elder abuse statutes, or general assault and battery statutes.

The statutory definition of *what* counts as domestic violence is also narrow. The California Penal Code limits domestic violence to “intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.”<sup>125</sup> Defining abuse as “serious bodily injury” or even “bodily

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121. The most dangerous day for a victim of domestic violence is the day they decide to leave. *Why Do Victims Stay?* NAT’L COALITION AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/why-do-victims-stay> [<https://perma.cc/CNS9-NKWC>] (last visited Sept. 24, 2021).

122. CAL. PENAL CODE § 13700(b).

123. *People v. Dallas*, 165 Cal. App. 4th 940, 952 (Ct. App. 2008) (internal quotations omitted).

124. *See id.* (explaining that a defendant, who was convicted of felony child abuse, was not charged with an offense involving domestic violence because the baby was not defendant’s “cohabitant”).

125. CAL. PENAL CODE § 13700(a).

injury” excludes many other types of abuse that may not cause immediate damage, but can nevertheless exact significant psychological and physical damage. For example, Anna may not be seriously physically injured if Jon pushes her around the house; however, if Jon ritualistically pushes Anna around the house every time she arrives home from work, he inflicts a serious psychological toll.

The California Penal Code criminalizes domestic violence assault under sections 273.5 and 243(e)(1). A person is guilty of felony domestic violence assault if they “willfully inflict[] corporal injury resulting in a traumatic condition” on a recognized victim.<sup>126</sup> Section 243(a)(1) is a misdemeanor, but section 273.5 is a “wobbler,” meaning that prosecutors can charge the domestic violence as a felony or misdemeanor. Section 273.5 criminalizes willful conduct that inflicts a “traumatic condition” on a victim.<sup>127</sup> In this section, a traumatic condition means “a wound, or external or internal injury, including, but not limited to, injury as a result of strangulation or suffocation.”<sup>128</sup> Generally, police will treat an assault that results in a corporal injury as a felony and treat all other assaults as misdemeanors. Jon may also be liable for criminal marital rape, which is a felony in California.<sup>129</sup> Notably, the associated punishment for marital rape is far less severe than for nonmarital rape.<sup>130</sup>

As described in Part I, California has several special policies to handle domestic violence cases under criminal law. First, California is a pro-arrest state.<sup>131</sup> This means that officers are encouraged, but not required, to arrest domestic violence offenders if there is probable cause that an offense has been committed. However, arrest is mandatory if there is probable cause that the perpetrator has violated a restraining order.<sup>132</sup> Second, in California, “dual arrests” are discouraged, but not prohibited.<sup>133</sup> This requires officers to identify and arrest the “dominant aggressor” in the relationship, rather than arresting both of the people involved in the altercation.<sup>134</sup> However, in California, each DA’s office has a different policy regarding no-drop prosecutions.<sup>135</sup> For example, San Diego and San Francisco both have no-drop policies for domestic violence. Notwithstanding this policy, San Francisco prosecutors have also been criticized

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126. CAL. PENAL CODE § 273.5(a).

127. *Id.*

128. CAL. PENAL CODE § 273.5(d).

129. CAL. PENAL CODE § 262.

130. *Id.* But see CAL. PENAL CODE § 261.

131. See CAL. PENAL CODE § 13701(b).

132. *Id.*

133. *Id.*

134. *Id.*

135. See, e.g., *FAQ: I am the victim in a domestic violence case and I want to drop charges. Can I do that?*, SAN DIEGO CNTY. DIST. ATT’Y, <https://www.sdcda.org/office/faq#26>. [<https://perma.cc/L75A-9KKC>].

for under-prosecuting domestic violence cases.<sup>136</sup> Third, if the prosecutor does pursue the case, successful prosecution will be made easier by California's special evidentiary rules for domestic violence cases, which allow into the record what would otherwise be inadmissible propensity evidence<sup>137</sup> and hearsay evidence.<sup>138</sup>

Therefore, if Anna wants to press criminal charges, her first stop is the police station. Ultimately, however, the prosecutor will decide whether to pursue felony or misdemeanor criminal charges against Jon. If a prosecutor does file charges against Jon, the prosecutor may also request, or the presiding court may decide to issue on its own, a criminal protective order.<sup>139</sup> This order would prevent Jon from contacting Anna and Rebecca and would also prohibit Jon from possessing guns.<sup>140</sup>

If the prosecution successfully convicts Jon of a felony or a misdemeanor, Jon will be subjected to strict probationary requirements. If not already in place, the court will issue a criminal protective order against him, which would also prevent Jon from possessing guns.<sup>141</sup> Furthermore, he will be required to complete California's one-year batterer's program.<sup>142</sup> A judge may also require Jon to reimburse Anna for expenses incurred as a direct result of his offense.<sup>143</sup>

However, there are limitations to a criminal prosecution. The definition of domestic violence is fairly restrictive and does not include many of the forms of abuse that Anna has suffered. While this criminal protective order can be issued to protect both Anna and her daughter, it will not be issued to protect Mirabel.<sup>144</sup> Furthermore, the prosecutor will have to prove their case against Jon beyond a reasonable doubt, which can be a particularly difficult burden to meet in a domestic violence case, as will be discussed further in the next Section.

Beyond the limited scope of the available criminal remedies, there are many other reasons why Anna might be reluctant to involve the police and criminal justice system.

First, Anna might fear that the police won't believe her. Considering the police's shoddy record with domestic violence, this fear is entirely rational. If

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136. Christopher Peak, *San Francisco Trails Bay Area in Domestic Violence Prosecutions*, S.F. PUB. PRESS (Sept. 24, 2012), <https://www.sfpublicpress.org/san-francisco-trails-bay-area-in-domestic-violence-prosecutions/> [<https://perma.cc/9K7L-C794>].

137. CAL. EVID. CODE § 1109.

138. CAL. EVID. CODE § 1370.

139. See CAL. PENAL CODE § 136.2.

140. *How does a Criminal Protective Order help me?*, CAL. CTS. (Nov. 1, 2001), <https://www.courts.ca.gov/documents/CPO1.pdf> [<https://perma.cc/SX5A-RWJD>].

141. See CAL. PENAL CODE § 1203.097(a)(2).

142. See *id.* § 1203.097(a)(6).

143. See *id.* § 1203.097(a)(11)(B).

144. If the prosecutor filed separate charges against Jon for elder abuse or another related crime, a judge could issue a separate criminal protective order on behalf of Mirabel. However, the criminal protective order that is issued in relation to Jon's charges for abusing Anna will ordinarily only allow for a protective order on behalf of Anna and her child. See *id.*

they don't believe her, she is in serious danger of Jon retaliating against her for involving the police.

Second, even if the police do believe her, the prosecutor might not bring charges. In other words, to pursue criminal charges, Anna has to put her fate in the hands of police officers and prosecutors who may not thoroughly pursue remedies on Anna's behalf. If Anna lives in a no-drop prosecution state, she could be subpoenaed and forced to testify. She could even be jailed for refusing to testify.

Third, Anna might be afraid that calling the police will result in disastrous consequences, such as the police killing Jon. Anna might be particularly scared of this outcome if she or Jon are people of color. Anna might also be worried about the police harming her. Furthermore, if Anna fought back during the assault, there is a serious risk that the police will arrest *her* as well as Jon, because California permits dual arrests in domestic violence cases.<sup>145</sup> If Anna gets arrested, she risks losing custody of Rebecca, and any public benefits she may be receiving. She could also lose her job.

Fourth, even if she isn't arrested, Anna still risks losing custody of Rebecca. In some states, survivors of domestic violence can lose custody of their children if the state decides that they have failed to protect their children from domestic violence.<sup>146</sup>

Fifth, Anna might be afraid of immigration consequences. If Jon isn't a citizen, he risks deportation or losing his residency if he acquires a criminal conviction. If Anna's immigration status is dependent on her marriage to Jon, she assumes similar risks.<sup>147</sup>

Sixth, Anna simply may not want Jon to suffer criminal penalties: if Jon were convicted of felony domestic violence, he would face up to four years in state prison and a fine of up to \$6,000; if Jon was convicted of misdemeanor domestic violence, he would face up to a year in the county jail and a \$2,000 fine.<sup>148</sup> While Anna may want to leave Jon forever, that does not necessarily mean she wants him to be in prison.

Seventh, if Anna is utilizing public housing, she risks losing this benefit if she is determined to be a "nuisance" for making too many police calls. In addition, if Jon is convicted and resumes living with Anna, she could lose her public housing for allowing a convict to live with her.

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145. See CAL. PENAL CODE § 13701(b).

146. See Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 1 (2001).

147. There are statutory exceptions designed to help domestic violence victims who risk losing their status if they leave their spouse, but this relief is never guaranteed and can be difficult to navigate. See *Assisting Immigrant Victims of Domestic Violence*, LAW ENFORCEMENT GUIDE (Battered Women's Just. Project, Minneapolis, Minn.) at 5, [https://www.bwjp.org/assets/documents/pdfs/assisting\\_immigrant\\_victims\\_law\\_enforcement\\_guide.pdf](https://www.bwjp.org/assets/documents/pdfs/assisting_immigrant_victims_law_enforcement_guide.pdf) [<https://perma.cc/6FH9-Q2MV>].

148. CAL. PENAL CODE § 273.5(a); CAL. PENAL CODE § 243(e)(1).

In sum, there are many rational reasons why Anna might decide that she does not want to involve the police or the criminal justice system at this time.

### B. Family Law Remedies

This Section will describe the remedies available to Anna under California family law. The California Family Code defines domestic violence as abuse against a current or former spouse, cohabitant, dating partner, fiancée, parents of one's child, or any other person related by "consanguinity or affinity within the second degree."<sup>149</sup> This definition of domestic violence affirmatively protects Anna, her daughter, and her mother-in-law. It also provides a far more expansive definition of abuse, including: causing or attempting to cause bodily injury, sexual assault, and forcing someone to fear serious bodily injury to themselves or another.<sup>150</sup> Furthermore, this definition of abuse "is not limited to the actual infliction of physical injury or assault."<sup>151</sup> This allows Anna to prove that she and her family are suffering from domestic violence by pointing to spoken, written, and other forms of emotional and psychological abuse.

Under California family law, Anna's first remedy is to apply for a domestic violence restraining order (DVRO).<sup>152</sup> A judge can issue this order to protect Anna, Rebecca, and Mirabel.<sup>153</sup> The presiding judge can also order Jon to move out of their home.<sup>154</sup> Perhaps most importantly, the DVRO can prohibit Jon from owning guns and ammunition.<sup>155</sup> It can also require him to take the same one-year batterers program that is assigned for criminal convictions of domestic violence.<sup>156</sup>

Next, Anna will likely want to sue for full custody of Rebecca. The California Legislature has declared that "children have the right to be safe and free from abuse, and that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the health, safety, and welfare of the child."<sup>157</sup> Issues of custodial arrangements turn on what's in the best

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149. CAL. FAM. CODE § 6211.

150. CAL. FAM. CODE § 6203(a).

151. CAL. FAM. CODE § 6203(b).

152. CAL. FAM. CODE § 6300. There are other restraining orders available to this family that are outside the scope of this essay but are worth mentioning, including: emergency protective orders, temporary restraining orders, elder and dependent adult abuse restraining orders, and civil harassment restraining orders.

153. See John E.B. Myers, *California's Eavesdropping Law Endangers Victims of Domestic Violence*, 31 J. MARSHALL J. INFO. TECH & PRIV. L. 57, 59 (2014).

154. See *DV-100 Request for Domestic Violence Restraining Order*, CAL. CTS. [hereinafter *DV-100 Request*], <https://www.courts.ca.gov/documents/dv100.pdf> [<https://perma.cc/GL74-2QU8>] (last visited Mar. 28, 2022).

155. See *DV-500-INFO: Can a Domestic Violence Restraining Order Help Me?*, CAL. CTS. (Jan. 1, 2012), <https://www.courts.ca.gov/documents/dv500info.pdf> [<https://perma.cc/SYZ2-9E6D>] (last visited Mar. 28, 2022).

156. See *id.*

157. CAL. FAM. CODE § 3020(a).

interest of the child.<sup>158</sup> Judges must consider a parent's abuse of the child or of the parent of that child in making that determination.<sup>159</sup> Because subjecting a child to domestic violence—even if the child is not directly harmed—constitutes a harm to the child in and of itself, California provides a statutory presumption against awarding custody to the parent who perpetrated domestic violence against the child, or against the other parent.<sup>160</sup> Therefore, if Anna can prove domestic violence, custody negotiations would begin with the assumption that Anna should have custody of Rebecca, and it would be Jon's burden to prove otherwise.<sup>161</sup>

### C. Civil Law Remedies

This Section will describe the remedies available to Anna under California civil law. Although the domestic violence restraining order would provide Anna the most protections in these circumstances, Anna could also pursue a civil harassment restraining order (CHO) under California Civil Procedure Code section 527.6. A judge can grant a civil harassment restraining order in response to behaviors that would cause a reasonable person to “suffer substantial emotional distress,” including “unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose.”<sup>162</sup> Through a CHO, a judge could order Jon to stay away from Anna and any other member of her household, and could even prohibit Jon from possessing guns if the judge found that Jon had used force or violence.<sup>163</sup>

Anna can also pursue civil money damages. California Civil Code section 1708.6 creates liability for the tort of domestic violence. This provision uses the California Penal Code definitions of what constitutes abuse, and who qualifies as a victim of domestic violence.<sup>164</sup> This means that survivors of domestic violence can sue their abusers for their injuries and receive general damages, special damages, punitive damages, equitable relief, injunctions, costs, attorney's fees, and “any other relief that the court deems proper.”<sup>165</sup> In addition, California Civil Code section 52.4 creates a civil action for gender violence, which includes domestic violence, even in situations where the survivor cannot prove a physical injury.

Anna, like most domestic violence survivors, had no idea that she could sue Jon for money damages. When Anna found out about this remedy, it appealed to

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158. *See id.*

159. CAL. FAM. CODE § 3011(a)(2)(A).

160. *See* CAL. FAM. CODE § 3044(a).

161. This presumption is rebuttable upon a preponderance of the evidence. *Id.*

162. CAL. CIV. PROC. CODE § 527.6.

163. *See Civil Harassment*, CAL. CTS., <https://www.courts.ca.gov/1044.htm?rdeLocaleAttr=en> [https://perma.cc/8NS6-PEYN] (last visited Mar. 28, 2022).

164. CAL. CIV. CODE § 1708.6; *see* CAL. PENAL CODE § 13700.

165. CAL. CIV. CODE §§ 1708.6(a)(1), 1708.6(b)–(c).

her because she has chronic health problems from the years of abuse and was recently diagnosed with PTSD. Anna also expects that her daughter might need therapy to deal with some of the trauma that she has experienced. In addition, Anna has missed a lot of work over the years due to Jon's abuse, and she would welcome recouping those wages. Anna knows that Jon currently has no money, but suspects that might change when she stops supporting him. Anna decides to initiate a civil suit with the aim of collecting the judgment from Jon if and when he finds a job. Thus, Anna adds a sixth goal to her list: money damages for current and expected medical expenses, and lost wages.

#### D. *Alternative Justice Remedies*

This Section will describe the remedies available to Anna outside of the traditional legal system. Anna may also be interested in pursuing remedies outside of criminal, family, or civil law remedies. A handful of scholars have advocated for restorative justice and transformative justice interventions to domestic violence.<sup>166</sup> Restorative and transformative justice systems are designed to respond to survivors' needs and to focus on remedying the harm caused by the conduct rather than punishing the crime.<sup>167</sup> Meghan Condon has argued that "restorative justice provides a better avenue to justice for minority victims of domestic violence than participation in the traditional legal system" because it is more adaptable to the needs of the specific survivor.<sup>168</sup> Restorative justice is about bringing together the survivor, perpetrator, and other people affected by the crime in order to learn about each other and collectively agree on a penalty.<sup>169</sup> Ultimately, the penalty is designed to repair the harm done to the survivor.<sup>170</sup> A key component to restorative justice is "reintegrative shaming," whereby the community makes clear that the harmful conduct is unacceptable but that the perpetrator is still essentially "good" and capable of being reintegrated into the community.<sup>171</sup> One model of restorative justice in the United States is victim-offender mediation.<sup>172</sup> Although there are a small handful of domestic violence restorative justice projects in the United States,<sup>173</sup> they are

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166. See Laurie S. Kohn, *What's So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 522–23 (2010); see also Lawrence W. Sherman, *Domestic Violence and Restorative Justice: Answering Key Questions*, 8 VA. J. SOC. POL'Y & L. 263, 264 (2000); Brenda V. Smith, *Battering, Forgiveness, and Redemption*, 11 AM. U. J. GENDER SOC. POL'Y & L. 921, 921 (2003).

167. Harris, *supra* note 47, at 57–59.

168. Condon, *supra* note 80, at 489.

169. *Id.* at 495.

170. *Id.* at 497.

171. *Id.* at 496.

172. *Id.*

173. See, e.g., Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 13–14 (1999) (describing the practice of Peacemaking, a form of relational justice, in domestic violence cases in Navajo Nation).

extremely rare, controversial, and under-researched. The success of such programs remains unclear.<sup>174</sup>

Given the rarity of formal restorative justice programs for domestic violence, this is probably not a realistic option for Anna at this time. However, Anna is still very much interested in informal community support and accountability as she attempts to leave Jon. For example, Anna would like the support of her church. If the church believes her, they may prevent Jon from attending church while she is there. The church would also be more likely to support Anna divorcing Jon, rather than advocating for marriage counseling. The church might also provide housing and food support as she navigates leaving Jon. In addition, the couple has some shared friends that Anna would like to keep in her life. Since Jon is such a good liar, Anna is worried that she will lose everyone if she leaves him because no one will believe her. The support of friends and family can make a critical difference in a survivor's ability to permanently leave their abuser. Whether Anna's fears about not being believed are well-founded or not, she is very concerned with proving to the people she loves that Jon has been abusing her.

In sum, even though a formal extralegal remedy may be unrealistic for Anna, there are many informal remedies that may vastly improve Anna's quality of life.

#### *E. Summary of Remedies*

In summary, the following table outlines Anna's goals and some<sup>175</sup> of the legal remedies available to accomplish each goal.

Table 1: Domestic Violence Remedies by Goal

<b>Goal</b>	<b>Potential Remedy</b>	<b>Law</b>
<i>Keeping Jon away</i>	Criminal conviction for felony domestic violence	Criminal
	Criminal conviction for misdemeanor domestic violence	Criminal
	Criminal protective order	Criminal
	Domestic violence restraining order	Family
	Civil harassment restraining order	Civil
	Civil injunction	Civil
<i>Removing Jon's guns</i>	Any criminal domestic violence conviction	Criminal
	Domestic violence restraining order	Family
	Civil harassment restraining order	Civil

174. See, e.g., *id.*

175. This list is not exhaustive.

<i>Full custody of Rebecca</i>	Establishing that Anna is a victim of domestic violence perpetrated by Jon	Family
	Establishing that Rebecca is a victim of domestic violence perpetrated by Jon	Family
<i>Protecting Mirabel</i>	Domestic violence restraining order	Family
	Civil injunction	Civil
<i>Remaining in the family home</i>	Domestic violence restraining order	Family
<i>Money damages</i>	Domestic violence tort action	Civil
<i>Community accountability</i>	Proving to friends, family, and her church that Jon has been abusive	Alternative justice
<i>Community support</i>	Proving to friends, family, and her church that Jon has been abusive	Alternative justice

### III.

#### PROVING DOMESTIC VIOLENCE

This Section discusses: the processes of proving domestic violence in criminal, family, and civil legal proceedings; the difficulty of proving domestic violence; and the ways in which secret recordings can offer determinative evidence.

##### A. *The Survivor's Burden*

This Section will explain what Anna will have to prove to access the available remedies. Each proceeding requires a different standard of proof for establishing domestic violence. Furthermore, each proceeding follows different evidentiary rules to prove domestic violence.

A criminal prosecution has the highest burden of proof and the strictest requirements. The prosecutor must prove that domestic violence occurred beyond a reasonable doubt. A criminal protective order requires that a judge find “good cause belief” that the defendant poses some sort of threat to the survivor; this finding is essentially left to the discretion of the judge.<sup>176</sup>

Restraining orders have lower burdens of proof than criminal prosecutions. To secure a DVRO, Anna must prove the occurrence of “past abuse by a preponderance of the evidence.”<sup>177</sup> Judges exercise great discretion when

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176. California Penal Code section 136.2(a)(1) provides that a court may issue a criminal protective order “[u]pon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur.”

177. See *In re Marriage of Davila & Mejia*, 29 Cal. App. 5th 220, 226 (Ct. App. 2018), as modified (Nov. 19, 2018).

determining whether abuse has occurred for the purposes of securing a DVRO. The relevant statute provides that a domestic violence restraining order may be granted upon a showing “to the satisfaction of the court, reasonable proof of a past act or acts of abuse.”<sup>178</sup> While this can work in Anna’s favor, results can vary depending on the judge’s views and background. Success is by no means guaranteed, and requests for DVROs are frequently denied by the courts.<sup>179</sup> To secure a CHO, Anna must prove that Jon has engaged in a course of conduct that qualifies as harassment by clear and convincing evidence.<sup>180</sup> This evidentiary standard is higher than that of a DVRO.

The burden of proof required in custody proceedings is fairly ambiguous. In order to secure the presumption that awarding Jon custody of Rebecca would be detrimental to Rebecca, Anna must prove that Jon has perpetrated domestic violence against either Anna or Rebecca within the past five years.<sup>181</sup> The court applies this presumption “upon a finding” that the party has committed domestic violence.<sup>182</sup> The finding requirement may be satisfied by evidence of a criminal conviction within the past five years for domestic violence or abuse.<sup>183</sup> However, it can also be satisfied by establishing the perpetrator’s “conduct” within the past five years.<sup>184</sup> Anna does not need to be successful in getting a DVRO or any of the other aforementioned remedies in order to secure this presumption.<sup>185</sup> In making this finding, courts shall consider “any relevant, admissible evidence submitted by the parties.”<sup>186</sup> In general, custody arrangements are extremely discretionary.<sup>187</sup>

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178. California Family Code section 6300(a) provides that a domestic violence restraining order “may be issued . . . if an affidavit or testimony and any additional information provided to the court . . . shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse. The court may issue an order under this part based solely on the affidavit or testimony of the person requesting the restraining order.”

179. The primary mandate of The Family Violence Appellate Project is to appeal trial courts’ denials of DVROs or other civil remedies. See *Our Programs*, FAM. VIOLENCE APPELLATE PROJECT, <http://fvaplaw.org/our-programs/> [<https://perma.cc/PUK8-MEYX>] (last visited Mar. 28, 2022).

180. See *Bolbol v. Brown*, 120 F. Supp. 3d 1010, 1013 (N.D. Cal. 2015).

181. See CAL. FAM. CODE § 3044(a).

182. California Family Code section 3044(a) provides that “[u]pon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party seeking custody of the child, or against the child . . . there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interests of the child.”

183. CAL. FAM. CODE § 3044(d)(1).

184. *Id.* § 3044(d)(2).

185. “[I]t is the finding of domestic violence that triggers the presumption, not the issuance of a restraining order . . . Accordingly, even though the restraining order may have expired, the trial court still may not award Hugo sole or joint legal or physical custody unless he establishes awarding him custody would be in the children’s best interest.” *Celia S. v. Hugo H.*, 3 Cal. App. 5th 655 (Ct. App. 2016), as modified (Sept. 23, 2016).

186. CAL. FAM. CODE § 3044.

187. “[T]he trial court has the widest discretion to choose a parenting plan that is in the best interest of the child[ren], when making initial custody orders.” *In re Marriage of Nguyen & Van*, No.

Other civil remedies require lower burdens of proof. To secure civil damages, Anna must prove by a preponderance of the evidence that Jon caused domestic violence that resulted in injuries to Anna, Rebecca, or Mirabel. This means that Anna must prove that it's "more likely than not" that Jon abused her or her family members. The following table summarizes the standards of proof for each legal remedy at issue.

Extralegal remedies do not have formalized burdens of proof. Of course, there is no formal standard for proving domestic violence to members of the community. The #MeToo movement has campaigned heavily for believing women<sup>188</sup> when they say there are survivors of gender crimes. The campaign's existence, however, shows just how reluctant society has been to believe women.<sup>189</sup>

Table 2: Standards of Proof for Domestic Violence Remedies

<b>Legal remedy</b>	<b>Standard of proof</b>
Criminal conviction for felony domestic violence	Beyond a reasonable doubt
Criminal conviction for misdemeanor domestic violence	Beyond a reasonable doubt
Criminal protective order	Good cause belief
Domestic violence restraining order	Preponderance of the evidence
Civil harassment restraining order	Clear and convincing evidence
Custody: establishing that Anna is a victim of domestic violence perpetrated by Jon	A "finding" of domestic violence (DV) by the court
Custody: establishing that Rebecca is a victim of domestic violence perpetrated by Jon	A "finding" of child abuse by the court
Civil harassment injunction	Preponderance of the evidence
Domestic violence tort action	Preponderance of the evidence
Community accountability and support	Varies, but generally very high

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H045348, 2019 WL 6245425, at \*7 (Cal. Ct. App. Nov. 22, 2019) (internal citation and quotation omitted) (unpublished and unreported).

188. See Helen Lewis, *Why I've Never Believed in 'Believe Women,'* ATLANTIC (May 14, 2020), <https://www.theatlantic.com/international/archive/2020/05/believe-women-bad-slogan-joe-biden-tara-reade/611617/> [perma.cc/W3UU-YSYX].

189. See Judy Woodruff, Emily Bazelon & Soraya Chemaly, *Why We Often Don't Believe Women Who Report Sexual Assault*, PBS (June 28, 2019), <https://www.pbs.org/newshour/show/why-we-often-dont-believe-women-who-report-sexual-assault> [https://perma.cc/X599-KAPR].

*B. Why Is Domestic Violence So Difficult to Prove?*

This Section will explore some of the reasons that domestic violence is harder to prove than other crimes.

Anna is very worried about proving what has been going on inside her home. The police have never been called to their home, so there are no police reports. Jon usually prevented her from seeing a doctor after his attacks, and so there is minimal medical documentation of his abuse. The one time she did visit a doctor after an episode, Anna told the doctor that she had slipped on ice and the doctor appeared to believe her. As discussed previously, Anna has not told anyone in her community about the abuse.

Anna's situation is not at all uncommon. Domestic violence is very difficult to prove, in part because it usually occurs behind closed doors in private homes.<sup>190</sup> Survivors and victims frequently hide evidence of abuse from family, friends, medical practitioners, and law enforcement, often because they—typically correctly—fear the consequences of revealing the abuse more than they fear the abuse itself.<sup>191</sup> Abusers often play an active role in destroying and hiding evidence of their abuse. Given these factors, if and when a domestic violence case finally gets to court—be it for a criminal prosecution, restraining order, or custody battle—concrete evidence of abuse is often scant.<sup>192</sup>

Domestic violence is also difficult to prove because of evidentiary rules. Hearsay rules can prevent the admission of many types of evidence of particular relevance to domestic violence cases. The prosecutor or plaintiff can interview witnesses to the abuse, but the testimony of witnesses who only heard about the abuse from the survivor or victim will often be excluded on hearsay grounds. For example, if Anna had told a friend over the phone that Jon had hit her, but the friend never witnessed any violence or saw any marks on Anna, the friend would likely be prevented from testifying about Anna's remarks to her. Admittedly, medical records are admissible, but their helpfulness can be limited if the survivor or victim had only visited infrequently, was adept at lying to medical professionals, or the file lacks thorough notes or pictures. In sum, the nature of domestic violence makes it very difficult to prove.

If Anna can't prove that Jon has committed domestic violence, she will not be able to access any of the legal remedies described above. This means that Jon will keep his guns, stay in their home, and maintain contact with Anna, Rebecca, and Mirabel. If Anna decides to leave anyway, Jon will still be able to pursue

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190. See Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Cases*, 34 F.A.M. L.Q. 43, 44 (2000); see also Owen Bowcott, *Third of Domestic Violence Victims Cannot Provide Evidence for Legal Aid*, GUARDIAN (Mar. 11, 2015), <https://www.theguardian.com/society/2015/mar/12/third-of-domestic-violence-victims-cannot-provide-evidence-for-legal-aid> [https://perma.cc/X599-KAPR].

191. See, e.g., Edward W. Gondolf & Ellen R. Fisher, BATTERED WOMEN AS SURVIVORS: AN ALTERNATE TO TREATING LEARNED HELPLESSNESS (1988) (describing the various ways that battered women react to domestic abuse and their motivations for doing so).

192. See Aiken & Murphy, *supra* note 190, at 43–45.

partial or even full custody of Rebecca.<sup>193</sup> Anna won't be able to secure the monetary damages she needs for medical care, counseling, and missed work. If Anna goes through with the divorce anyway, she could even end up paying Jon spousal support.<sup>194</sup>

Like many survivors of domestic violence, Anna has some idea of how hard domestic violence is to prove in court. This awareness is compounded by the fact that many abusers tell their targets that no one will believe them. The resulting doubt makes it even harder for survivors of domestic violence to leave or seek help, because they fear the consequences that their abusers will inflict on them if their attempts are unsuccessful. Survivors and victims often fear that their abusers will take partial or total custody of their children. Anna might rationally decide that it is better for their child if she remains in the house full-time as a buffer, rather than send Rebecca to her father's house each weekend unsupervised.

There can also be serious consequences to initiating and losing a domestic violence legal proceeding. Pursuing any legal action against Jon is likely to infuriate him, potentially causing him to lash out against her and the rest of the family. An abuser is statistically more likely to kill their victim after the victim leaves the abuser.<sup>195</sup> If Anna leaves without the protections of a criminal protective order or domestic violence restraining order, she increases her risk of incurring catastrophic injuries or death. Even with one of these orders, Anna is still in great danger if she leaves. Consequently, Anna is reluctant to antagonize Jon unless she has a decent chance of prevailing in court.

### C. Secret Recordings

In general, recordings provide powerful and persuasive evidence.<sup>196</sup> Perhaps the most powerful evidence of domestic violence is a video or audio recording of the abuse.<sup>197</sup> When cases come down to "he-said, she-said," a recording can prove a damning tiebreaker.<sup>198</sup> Although the case law is very scant, secret recordings—when admitted as evidence—have been critical to a judge's finding of domestic violence.<sup>199</sup>

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193. It is not uncommon for abusers to initiate aggressive custody disputes in order to continue to exert control over their primary victims. See Jessica Klein, *How Domestic Abusers Weaponize the Courts*, ATLANTIC (July 18, 2019), <https://www.theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086/> [<https://perma.cc/FU95-WS2L>].

194. See Tiffany Sala, *What Do You Get When You Abuse Your Spouse? Spousal Support*, 50 U. PAC. L. REV. 735, 735 (2019).

195. Campbell et al., *supra* note 119, at 1089.

196. See *People v. Kulwin*, 102 Cal. App. 2d 104, 109 (recognizing that "recordings might be more reliable and satisfactory evidence under ordinary circumstances than testimony from memory").

197. Myers, *supra* note 153, at 65.

198. See *id.*

199. See, e.g., Jim Crogan & Corky Siemaszko, *Fightin' Words on Tape Blake, wife battled in secret recording played at hearing*, DAILY NEWS (Feb. 27, 2003),

*Flores v. Reza*, an unpublished California decision, is an example of how a secret recording can determine whether a person experiencing domestic violence is able to obtain relief. In *Flores*, a trial court granted Flores a restraining order against her husband, Reza, after listening to a recording secretly made by Flores.<sup>200</sup> After a recent beating, Flores bought a recorder, hid the device in her bra, and taped a communication with her husband.<sup>201</sup> After Flores testified at the hearing about Reza's abuse, she was asked whether she had any support for her claims.<sup>202</sup> Flores explained that she had secretly made a recording that "would prove Reza had threatened to deport her and contained statements showing he knew she would not report the physical abuse because of her fears of deportation."<sup>203</sup> Reza testified that he had never abused Flores, and Reza's father testified to the same effect.<sup>204</sup> Without the recording, this case might well have been dismissed as "he-said, she-said." But after listening to the recording, the trial court judge found that domestic violence had occurred by a preponderance of the evidence. The trial court issued a restraining order and granted the mother full custody.<sup>205</sup> Thus, this case shows the importance of secret recordings for proving that domestic violence occurred and obtaining two critically important domestic violence remedies—restraining orders and custody of one's children.

However, *Flores* also shows how difficult it is to get such recordings admitted into court. The recording in *Flores v. Reza* was admitted as evidence at trial only because Reza's lawyer didn't know the law well enough to object.<sup>206</sup> On appeal, Reza argued that the admission of the recording was reversible error because evidence collected by eavesdropping was inadmissible under CEPA sections 631 and 632, and under Family Code section 2022.<sup>207</sup> However, his lawyer had failed to raise these objections at trial.<sup>208</sup> Thus, the appeals court responded, "Nice try, but we are not persuaded," and found that the issue had been forfeited.<sup>209</sup> In other words, this case could have turned out in favor of

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<https://www.nydailynews.com/archives/news/fightin-words-tape-blake-wife-battled-secret-recording-played-hearing-article-1.667768> [<https://perma.cc/SPU8-TG9G>]; *Man Charged in Domestic Assault Secretly Recorded by His Wife Waives Hearing*, REPORTER (Nov. 13, 2013), <https://www.thereporteronline.com/2013/11/13/man-charged-in-domestic-assault-secretly-recorded-by-his-wife-waives-hearing/> [<https://perma.cc/SPU8-TG9G>]; and the follow up: Carl Hessler Jr., *Telford Man Headed to Jail for Domestic Violence*, MERCURY (Jan. 13, 2015), [https://www.pottsmmerc.com/news/telford-man-headed-to-jail-for-domestic-violence/article\\_6f8d7adf-600f-5e34-b5e6-32880c3c7fba.html](https://www.pottsmmerc.com/news/telford-man-headed-to-jail-for-domestic-violence/article_6f8d7adf-600f-5e34-b5e6-32880c3c7fba.html) [<https://perma.cc/SPU8-TG9G>].

200. *Flores v. Reza*, No. G033683, 2005 WL 352464, at \*3 (Cal. Ct. App. Feb. 8, 2005) (unpublished).

201. *Id.* at \*2.

202. *Id.*

203. *Id.*

204. *Id.* at \*3.

205. *Id.*

206. *Id.* at \*4.

207. *Id.*

208. *Id.*

209. *Id.*

Flores's husband if he had raised his CEPA objections at trial. Furthermore, even though this recording was admitted as evidence, Flores still violated CEPA and could have been sued by Reza for civil damages, or even been prosecuted for felony or misdemeanor eavesdropping, as will be discussed in more detail in the following Section. Thus, this case also shows that batterers can weaponize California's eavesdropping statute to prevent their victims from using the only concrete evidence of domestic violence they have, and thus prevent their victims from obtaining a remedy.

Shifting back to our hypothetical, suppose Anna consults some domestic violence forums and support websites to learn what kind of evidence she needs. They advise her to document as much of the abuse as she can, in the form of telling outside witnesses, taking photos of injuries, and, if possible, making recordings of the abuse. Anna decides to start pressing "record" on her iPhone during moments of tension where she expects violence is imminent. Anna wants to make three types of recordings. First, she wants to record communications between herself and Jon. Second, she wants to place a hidden recording device to capture communications between Jon and Rebecca. Third, she wants to place a hidden recording device to capture communications between Jon and Mirabel. She hopes to show these recordings in court and to her community in order to prove that Jon is abusing all three of them.

#### IV.

##### ANTI-EAVESDROPPING STATUTES AND DOMESTIC VIOLENCE LITIGATION

This Section discusses how anti-eavesdropping statutes affect people experiencing domestic violence. Part IV.A summarizes the functions and consequences of federal and California anti-eavesdropping statutes. Part IV.B details various methods and arguments that practitioners can use to get around these statutes. Part IV.C applies the previous two Sections to our hypothetical to illustrate how these statutes affect Anna's ability to access domestic violence remedies.

##### A. *California's Anti-Eavesdropping Statutes*

The federal anti-eavesdropping prohibition is found in Title III of the Omnibus Crime Control and Safe Street Acts of 1968.<sup>210</sup> This statute prohibits private citizens from intercepting or recording private communications.<sup>211</sup> However, case law has interpreted this statute as a "one-party consent" rule that still permits private citizens to record any of their own conversations or interactions with other people.<sup>212</sup> This means that it is perfectly legal for private

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210. 18 U.S.C. §§ 2510–23.

211. 18 U.S.C. § 2511(2)(d).

212. 18 U.S.C. section 2511(2)(d) provides that

It shall not be unlawful under this chapter for a person not acting under color of law to

citizens to secretly record their own conversations or interactions with another, regardless of that other person's knowledge or consent.<sup>213</sup>

The majority of states have followed the federal example in enacting one-party consent statutes.<sup>214</sup> California is one of a handful of states that have enacted a far stricter version in the form of The California Electronic Privacy Act (CEPA).<sup>215</sup> CEPA prohibits private citizens from recording confidential communications unless everyone involved in the conversation has consented to being recorded.<sup>216</sup>

Violators of CEPA are subject to both criminal and civil liability. Penal Code section 631(a) provides that violators can be convicted for misdemeanor or felony wiretapping, which is "punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in a county jail not exceeding one year."<sup>217</sup> Furthermore, Penal Code section 637.2 creates a civil action for victims of wiretapping, allowing them to sue for money damages.<sup>218</sup>

Recordings made in violation of CEPA are inadmissible unless an exception applies, as discussed in the following Section. Penal Code section 632(d) provides that any evidence "obtained as a result of eavesdropping upon or recording a confidential communication" is inadmissible as evidence in any judicial, administrative, legislative, or other proceeding, except to prove that a CEPA violation has occurred.<sup>219</sup> This constitutes a blanket prohibition on admitting any recording for any judicial proceeding that was created in violation of CEPA.<sup>220</sup>

Just in case CEPA was not sufficient, the California Family Code created a special provision to reinforce the inadmissibility of surreptitious recordings. Family Code section 2022 provides that "evidence collected by eavesdropping"

intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

213. "It is still the prevailing federal law that warrantless recordings of conversations do not violate the Fourth Amendment where one party to the conversation consents to the recording." *United States v. Proctor*, 526 F. Supp. 1198, 1201 (D. Haw. 1981) *aff'd sub nom. United States v. Adams*, 694 F.2d 200 (9th Cir. 1982) (citing *Lopez v. United States*, 373 U.S. 427, 83 (1963)); *United States v. Keen*, 508 F.2d 986, 988 (9th Cir. 1974) ("In other words, section 2511(2)(c) left prior law of consensual wire taps intact").

214. *Myers*, *supra* note 153, at 64.

215. CAL. PENAL CODE §§ 631, 632, 632.5, 632.6, 632.7.

216. CAL. PENAL CODE § 632.

217. CAL. PENAL CODE § 631(a).

218. California Penal Code section 637.2(a) provides that "Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts: (1) Five thousand dollars (\$5,000) per violation. (2) Three times the amount of actual damages, if any, sustained by the plaintiff."

219. CAL. PENAL CODE § 632(d).

220. The only exception listed in section 632(d) is to prove that the victim violated CEPA and is liable for criminal prosecution or civil damages.

in violation of CEPA is inadmissible.<sup>221</sup> Furthermore, if it appears that such a violation exists, “the court may refer the matter to the proper authority for investigation and prosecution.”<sup>222</sup> The potential for criminal and civil liability for violating eavesdropping statutes is not an idle threat.<sup>223</sup>

For our purposes, this means that survivors of domestic violence who wish to create secret recordings of their abuse risk criminal and civil liability: they could be prosecuted for felony or misdemeanor eavesdropping, and their abusers could sue them for money damages. Furthermore, their recordings will be inadmissible as evidence against their abusers unless an exception applies—as will be explained in the next Section.

### B. Circumventing CEPA

This Section explores methods of circumventing CEPA in order to avoid civil and criminal liability or render a secret recording admissible. Because CEPA is its own exclusionary rule, evidentiary exceptions typically used by domestic violence practitioners are useless. Anna must find a way to get around CEPA just to get her recordings before the court. Unfortunately, there is no published case law interpreting CEPA in the domestic violence context.<sup>224</sup> Instead, I have pulled from statutory language, unpublished decisions, and analogous case law to identify four different strategies to get Anna’s secret recording into court.<sup>225</sup> This Section will explain how to argue each strategy, as well as their pros and cons.

#### 1. The Right-to-Truth-in-Evidence Provision

In 1982, California voters enacted Proposition 8, which included the “Right-to-Truth-in-Evidence” provision.<sup>226</sup> This provision instructs that “[e]xcept as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be

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221. CAL. FAM. CODE § 2022(a).

222. CAL. FAM. CODE § 2022(b).

223. See, e.g., Don Terry, *Eavesdropping Laws Mean That Turning on an Audio Recorder Could Send You to Prison*, N.Y. TIMES (Jan. 22, 2011), <https://www.nytimes.com/2011/01/23/us/23nceavesdropping.html> [https://perma.cc/TJ5A-B5FG]; Tim Cushing, *Bullied Student Records Bullies, Gets Threatened With Felony Charges for Violating Wiretapping Law*, TECHDIRT (Apr. 14, 2014), <https://www.techdirt.com/articles/20140411/16314926883/bullied-student-records-bullies-gets-threatened-with-felony-charges-violating-wiretapping-law.shtml> [https://perma.cc/EX6A-LUEN].

224. John Myers made the same observation. See Myers, *supra* note 153, at 62.

225. I am primarily concerned with the admission of secret recordings as evidence in Anna’s case-in-chief. However, it’s worth noting here that there is case law implying that recordings made in violation of CEPA could still be used for impeachment purposes. See *Frio v. Superior Court* 203 Cal. App. 3d 1480, 1490 (1998). However, the creator of the recording would still be liable for violations of CEPA even if the tape was admitted for this limited purpose.

226. See Diana Friedland, *27 Years of “Truth-in-Evidence”: The Expectations and Consequences of Proposition 8’s Most Controversial Provision*, 14 BERKELEY J. CRIM. L. 1, 1 (2009).

excluded in any criminal proceeding.”<sup>227</sup> In *People v. Guzman*, the California Supreme Court found that CEPA’s exclusionary rule<sup>228</sup> had been abrogated by the truth-in-evidence provision.<sup>229</sup> At trial, the jury had convicted Guzman of two counts of committing a lewd and lascivious act upon a child.<sup>230</sup> As part of the evidence, the jury heard a recorded phone conversation between the mother of one of the victims and the defendant’s niece.<sup>231</sup> The mother had secretly recorded that conversation without the niece’s consent in violation of CEPA, but the trial court admitted the recording pursuant to the truth-in-evidence rule.<sup>232</sup> The California Supreme Court affirmed this decision, holding that recordings made in violation of section 632.1 are admissible in criminal proceedings as long as the evidence is relevant and is not otherwise barred by the U.S. Constitution.<sup>233</sup>

For purposes of our hypothetical, this means that Anna’s recordings are admissible against Jon for purposes of criminal proceedings. However, the truth-in-evidence rule has absolutely no effect on civil proceedings: “it is undisputed that civil, administrative, legislative, and other noncriminal proceedings are unaffected by Proposition 8.”<sup>234</sup> Guzman attempted to argue that such an outcome violates equal protection because criminal defendants would be treated differently than civil defendants in that the secret recordings would be admissible against the former, but not the latter.<sup>235</sup> The California Supreme Court rejected this argument, reasoning that it is constitutionally permissible for the electorate to treat criminal and civil defendants differently.<sup>236</sup> Thus, Proposition 8 and *Guzman* will only allow Anna’s recordings to be admitted as evidence in a criminal prosecution against Jon.

Furthermore, Proposition 8 and *Guzman* do not change Anna’s liability for making the recording in the first place. The *Guzman* court noted that even though recordings taken in violation of CEPA are admissible as evidence in criminal proceedings, it is still illegal to make such recordings in the first place.<sup>237</sup> Thus, even if Anna’s tape was admitted in a criminal prosecution, she could still be criminally prosecuted or sued by Jon for taking the recording.

In sum, this strategy will allow Anna’s recordings to be admissible in criminal court, but will not protect her from civil or criminal liability.

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227. CAL. CONST. art. I, § 28(f)(2).

228. CAL. PENAL CODE § 632(d).

229. *People v. Guzman*, 453 P.3d 1130, 1137 (Cal. 2019).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 1137 (internal quotations omitted).

235. *Id.*

236. *Id.*

237. *Id.* at 1138.

## 2. *The Violent Felony Exception*

CEPA creates two statutory exceptions that are relevant to domestic violence cases, the first of which is the violent felony exception. This exception allows private citizens to make secret recordings of their own volition, if they record “the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of . . . any felony involving violence against the person.”<sup>238</sup> This provision was amended in 2018 to specifically include felony domestic violence, as defined by section 13700 of the California Penal Code.<sup>239</sup>

Recordings that fall under the violent felony exception are admissible as evidence only in criminal prosecutions, and not for purposes of any civil proceeding.<sup>240</sup> Thus, for admissibility purposes, the violent felony exception was rendered redundant by *Guzman*. However, the violent felony exception is very useful for purposes of avoiding liability: this exception provides that anyone who makes a recording for purposes of gathering evidence of felony domestic violence cannot be held criminally or civilly liable for violating CEPA. This Section will analyze case law to show how Anna could use the violent felony exception as both a shield against CEPA liability and a sword to prove past and anticipated future incidents of domestic violence against herself or her child.

### *a. Shield Against CEPA Liability*

*People v. Parra* shows how the violent felony exception can be used as a shield against CEPA liability. In *Parra*, a California Court of Appeal found that the applicability of the violent felony exception turns on the *purpose* of the recorder, not on the actual content of the tape.<sup>241</sup> That court articulated its reasoning as follows:

The record here stands uncontradicted that Walker decided to tape the December 29 telephone conversation with appellant because he learned that appellant had threatened him and his family with physical violence and because he was gravely concerned about his personal safety. His recording was clearly for the purpose of obtaining evidence of appellant’s intent to carry out her prior written threats of physical violence; that he did not succeed in accomplishing such purpose does not alter that purpose. Thus, Walker’s uncontradicted testimony of why

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238. CAL. PENAL CODE § 633.5.

239. *Id.*

240. Evidence obtained under this provision is not “inadmissible in a prosecution for extortion, kidnapping, bribery, any felony involving violence against the person, including, but not limited to, human trafficking . . . or domestic violence as defined in Section 13700, or any crime in connection therewith.” *Id.*

241. “[W]here, as here, the tape recording of a telephone communication is made for the purpose of obtaining evidence relating to the felonies listed in the statute, the recording is not prohibited by either [Penal Code] section 631 or section 632—hence, such evidence was not unlawfully obtained.” *People v. Parra*, 165 Cal. App. 3d 874, 880 (Ct. App. 1985).

he recorded the appellant's voice was sufficient to except that recording from the prohibition of section 632 . . . and to render it admissible pursuant to the general rules of evidence.<sup>242</sup>

Although *Parra* was not a domestic violence case, its logic can be adopted for our purposes. First, *Parra* tells us that Anna's secret recording may be admissible even if she failed to capture an incident of felony domestic violence, so long as she can argue that her *purpose* in making the recording was to capture an incident of felony domestic violence.<sup>243</sup> It's helpful to Anna here that Penal Code section 273.5 provides that domestic violence causing *any* injury can be a felony. Thus, the scope of this exception is arguably very broad. Furthermore, even if Anna doesn't succeed in capturing an incident that would qualify as felony domestic violence, she may be able to show verbal abuse or other troubling behavior that could bolster her general claims of domestic violence. Second, *Parra* tells us that the violent felony exception is likely the best defense against criminal prosecutions or civil suits for CEPA violations: if Anna can prove that her purpose in making the tape was to record felony domestic violence, *Parra* absolves her of any liability.

*b. Evidence of Past Incidents of Domestic Violence*

In *People v. Murray*, the violent felony exception was applied to secret recordings that were made to gather evidence of *past* incidents of domestic violence. In *Murray*, Molly and Murray shared an intimate relationship for several years before Molly broke it off in response to Murray's increasingly possessive behaviors, which included eavesdropping outside her window and snooping around her house.<sup>244</sup> When these behaviors continued after Molly ended the relationship, she reported Murray's behavior to the police department.<sup>245</sup> The employee to whom Molly made the report advised Molly to move.<sup>246</sup> After Murray found Molly in bed with another man, he hit, kicked, strangled, and sexually assaulted her.<sup>247</sup> A week later, Molly reported this incident to the same police department, where she was told that because there was no longer any physical evidence of the rape, "it would be . . . more or less [Murray's] word against hers."<sup>248</sup> Eventually, Molly underwent a physical exam, which revealed lingering bruises and microtrauma consistent with her

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242. *Id.* at 879–80.

243. The court noted that the fact that Parra "did not succeed in accomplishing such purpose does not alter that purpose." *Id.*

244. *People v. Murray*, No. G029728, 2003 WL 21324437, at \*1 (Cal. Ct. App. 2003) (unpublished).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at \*2.

description of the sexual assault.<sup>249</sup> Blood and semen stains collected from her home also fit her description of the incident.<sup>250</sup>

Molly, worried that the physical evidence and her testimony would be insufficient, secretly recorded a phone conversation between herself and Murray, during which she attempted to make him admit to his crime.<sup>251</sup> The recording was admitted at trial, and Murray was convicted of “two counts each of forcible rape and forcible oral copulation, and one count each of anal or genital penetration with a foreign object and battery.”<sup>252</sup> Like *Flores* above, this case shows that many people experiencing domestic violence understand how difficult it is to prove their claims, and thus prepare for litigation by making secret recordings. Moreover, the prominence of the secret recording in the court’s reasoning in both cases vindicates both this fear of not being believed as well as the strategy of making a recording in the first place.

The admissibility of Molly’s recording was hotly contested. On appeal, Murray argued that the trial court erred in admitting this recording.<sup>253</sup> However, the appeals court found that the recording was admissible under the violent felony exception.<sup>254</sup> The court reasoned that

It is evident from the questions Molly asked defendant during the conversation that she was attempting to obtain evidence of the violent felony offenses defendant committed against her. That this was her intent is also supported by the fact she gave the tape to the police when she reported the crime. It is irrelevant that defendant did not directly admit committing the felonies for which he was ultimately convicted during the conversation.<sup>255</sup>

Thus, the applicability of the violent felony exception turned on the intent of the person making the recording, rather than whether the recording actually produced evidence of a felony.

Although unpublished, this case is helpful because it shows how the violent felony exception can be applied to admit secret recordings that were created with the purpose of gathering evidence of a *past* violent felony. Indeed, Rastogi employed a similar strategy when she initiated one of her recordings by asking her husband, “[w]hat did you just say? You want to kill me basically?”<sup>256</sup> Gattani responded that he would like to see her murdered.<sup>257</sup> A lawyer representing someone in Rastogi’s position could argue that this tape falls under the violent

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249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at \*1.

253. *Id.*

254. *Id.* at \*3.

255. *Id.*

256. Daly, *Silicon Valley*, *supra* note 1.

257. *Id.*

felony exception because her purpose was to record evidence of Gattani threatening to murder her—a felony.

Thus, *Murray* tells us the violent felony exception may apply if Anna made secret recordings for purposes of securing evidence of Jon's *past* domestic violence. Even if she doesn't succeed in securing such evidence, she can likely avoid liability if she can prove that such was her intent.

*c. Evidence of Anticipated Domestic Violence*

*People v. Butler* shows how the violent felony exception applies to recordings of *anticipated* domestic violence.<sup>258</sup> The relevant facts were as follows:

Butler erupted from bed and screamed at Doe to stop giving J.B. (her son) a hard time. He told J.B. to step outside the RV. His demand and aggressive movements frightened Doe because he had threatened to punch her in the face the previous week. She grabbed two cell phones—hers and her daughter's—and pressed the record button on her phone. The recording captured Butler yelling at Doe, "I'm gonna say this to you one fuckin' time and one time only. You have about one freakin' millisecond before I twist your head off like a fuckin' chicken in the goddamn field."<sup>259</sup>

Butler proceeded to pick Doe up, throw her over his shoulder, and drop her outside their RV.<sup>260</sup> The jury convicted Butler of a variety of offenses, including attempting to make a criminal threat and spousal battery.<sup>261</sup>

On appeal, Butler argued that the trial court erred in admitting Doe's secret recording under the violent felony exception.<sup>262</sup> He argued that Doe's recording did not fall under this exception because "Doe did not reasonably believe that [Butler] was about to commit any felony involving violence."<sup>263</sup> The appeals court disagreed, and found that Doe had presented "substantial evidence" supporting her belief as reasonable.<sup>264</sup> Specifically, the court noted the following:

Doe testified she started recording conversations because Butler was becoming increasingly aggressive, and she wanted a record to protect her young child in case something happened to her. A week before the incident, Butler threatened to punch her in the face. On October 23, Butler overreacted and was behaving very aggressively, "like a bull." Doe hit record because she was concerned when Butler asked his son to

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258. See *People v. Butler*, No. D073612, 2018 WL 3342844, at \*1 (Cal. Ct. App. 2018) (unpublished).

259. *Id.*

260. *Id.*

261. *Id.* at \*2.

262. *Id.*

263. *Id.* at \*3.

264. *Id.*

step outside the RV. She did not know what Butler would do, but his threat and demeanor were “very scary.” This evidence supports the finding that Doe recorded the incident “for the purpose of obtaining evidence reasonably believed to relate to the commission by [Butler] of . . . any felony involving violence against the person.”<sup>265</sup>

Thus, the appeals court affirmed the verdict because it found that Doe’s recording was properly admitted under the violent felony exception.<sup>266</sup> This case is helpful because it lowers the standard for what a survivor of domestic violence must “reasonably expect” to happen in order to justify pressing the record button. Doe was able to prove that her expectation was reasonable by describing his history of abuse towards her—which had taught her to recognize the signs of when Butler was about to become violent.<sup>267</sup> Doe bolstered her case further by emphasizing how scared she was in the moment, and that this fear was reasonable based on her history.<sup>268</sup> Thus, *Butler* shows that a domestic violence survivor may be able to use the violent felony exception if they can show that they made the recording based on a reasonable expectation of imminent domestic violence.

Anna should be able to point to similar factors in justifying her own decision to record a communication with Jon. While these factors are particularly pertinent to the violent felony exception, they can likely also be adapted for use in the other exceptions discussed in this Note.

*d. Evidence of Violence Against a Child*

Anna is still worried about obtaining custody of her daughter and would like to place a recording device in Rebecca’s room to capture interactions between Jon and Rebecca when Anna isn’t present. She would also like to create a recording of Jon and Mirabel, whose dementia is too far progressed for her to communicate any abuse that she may have suffered at the hands of Jon. Although the violent felony exception requires that Anna be a party to the conversation, she may be able to get around this through the doctrine of vicarious consent. *In re Trever* shows how the vicarious consent doctrine interacts with the violent felony exception.

*In re Trever* concerned an appeal from a twelve-year-old boy who was convicted of sexually molesting his four-year-old cousin.<sup>269</sup> Trever argued that the trial court erred in admitting an audio recording made surreptitiously by the victim’s mother in violation of CEPA.<sup>270</sup> Based on comments the victim made to his mother, Trever did not deny that she had “objectively reasonable grounds

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265. *Id.*

266. *Id.*

267. *See id.*

268. *See id.*

269. *In re Trever P.*, 14 Cal. App. 5th 486, 488 (Ct. App. 2017).

270. *Id.*

for believing the recording would result in evidence of a felony involving violence.”<sup>271</sup> The only question pertinent to the violent felony exception was whether the victim’s mother could consent on her son’s behalf; the court found that she could:

The victim’s mother reasonably suspected such a crime when she arranged to make the recording. She was not a party to the conversation, but, as we will explain, section 633.5 is properly construed as allowing a parent to consent on behalf of a child under circumstances like these. In so holding, we adopt reasoning applied in several other jurisdictions.<sup>272</sup>

Thus, *In re Trevor* allows Anna to place a recording device in her daughter’s room because Anna has the right, and indeed the obligation, to consent to the recording on her daughter’s behalf.<sup>273</sup> But again, even if this exception does apply, it would only be admissible for criminal proceedings, as well as for absolving Anna of liability. Anna could not use this tape to get custody of her daughter in family court or to pursue any other civil remedy. Furthermore, while vicarious liability doctrine has been applied fairly regularly with respect to the parent-child relationship, Anna may have a far harder time using this theory if she wants to make a secret recording of Jon interacting with Mirabel.

To summarize, the violent felony exception is useful because it provides survivors of domestic violence with an affirmative defense in case they are prosecuted or sued civilly for violating CEPA. However, this exception also has severe limitations. It does not allow secret recordings to be admitted for purposes of securing or initiating DVROs, CHOs, custody disputes, or other civil actions. Furthermore, while this case law has provided examples of creative arguments that can be made to admit recordings that don’t actually capture incidents of felony violence, there will likely be limits to how far the law can be stretched here. A history of limited physical violence, or misdemeanor sexual assault, harassment, or stalking, might not be enough to prove that the survivor had a reasonable fear that their abuser would commit felony violence pursuant to *Butler*. In particular, survivors of severe verbal abuse who seek CHOs will not find any help from this exception.

### 3. *The Domestic Violence Restraining Order Exception*

The second statutory exception to CEPA relevant to domestic violence survivors is the DVRO exception. There are two avenues for admitting a secret recording under this exception. First, if a judge grants Anna a temporary restraining order (TRO),<sup>274</sup> that judge can add a provision to the restraining order

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271. *Id.* at 495.

272. *Id.* at 488–89.

273. *See id.*

274. Typically, survivors first request TROs and only later request DVROs.

that explicitly authorizes Anna to “record any prohibited communication made to . . . her by the perpetrator.”<sup>275</sup> The TRO form includes a box for Anna to tick if she wishes the judge to include this authorization.<sup>276</sup> The request to record is typically granted, although not always. However, this first avenue is of limited use for survivors who do not feel comfortable going to court because they fear they do not have enough evidence to successfully obtain a TRO in the first place.

In recognition of this limitation, the legislature added a provision to this exception in January 2018.<sup>277</sup> This addition provides that “a victim of domestic violence who is seeking a domestic violence restraining order from a court, and who reasonably believes that a confidential communication made to [them] by the perpetrator may contain evidence germane to that restraining order, may record that communication for the exclusive purpose and use of providing that evidence to the court.”<sup>278</sup>

This provision is helpful to Anna because it explicitly allows her to record incidents that she believes will be relevant to her TRO or DVRO request. Unfortunately, this provision is so new that there is no case law available to help Anna better understand its limits. However, because the standard of proof for securing a DVRO is much lower (preponderance of evidence) than the standard of proof for a domestic violence criminal conviction (beyond a reasonable doubt), Anna will likely be able to draw from many of the factors identified in the violent felony exception to prove that she has a reasonable basis for her belief.

The benefits of the DVRO exception are that it allows Anna to create recordings in order to secure a DVRO. In addition, if Anna were sued or criminally prosecuted for violating CEPA, she could defend herself by arguing that she was recording a communication for purposes consistent with this exception.<sup>279</sup> The biggest drawback of this exception is that it can be used only to secure a DVRO.<sup>280</sup> This recording still cannot be used for civil or family court proceedings. Furthermore, like the violent felony exception, it requires that Anna be a party (or, arguably, consent to her daughter being a party) to the communications that she records.

#### 4. *Outside the Scope of CEPA*

Anna’s best option is to argue that her recording does not fall under CEPA. If Anna can prove this, her recording would not be excluded and she would be safe from incurring criminal or civil liability. If the recording is not within the

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275. CAL. PENAL CODE § 633.6(a).

276. In her TRO application, Anna can check a box that says, “I ask for the right to record communications made to me by [the abuser] that violate the judge’s orders.” *DV-100 Request*, *supra* note 154, at 3.

277. CAL. PENAL CODE § 633.6(b).

278. *Id.*

279. *See id.*

280. *Id.*

scope of CEPA, Anna's recordings are admissible in any criminal, civil, or family court proceeding.

CEPA applies only to confidential communications.<sup>281</sup> A conversation is considered confidential "if a party to the conversation had an objectively reasonable expectation that the conversation is not being overheard or recorded."<sup>282</sup> However, the "presence of others does not necessarily make an expectation of privacy objectively unreasonable."<sup>283</sup> Thus, Anna may not be able to overcome CEPA by arguing that Jon had no reasonable expectation of privacy because his mother or their child was in the room. However, Anna may be able to point to other circumstances surrounding the communication to negate its confidentiality.

*People v. Butler* shows how a domestic violence survivor can successfully argue that CEPA does not apply because the communication was not sufficiently "private."<sup>284</sup> In *Butler*, the trial court found that a domestic violence survivor's secret recording was not a confidential form of communication under CEPA because it featured a "loud violent argument that took place in front of other people" and happened outside their front door.<sup>285</sup> Unfortunately, the appeals court never decided whether the trial court was correct in assessing that the incident was not confidential, so *Butler* does not provide any authority on this issue.<sup>286</sup> However, this case does show that arguing that a domestic violence recording is outside the scope of CEPA can be successful at the trial level. This argument is most likely to be successful when the domestic violence takes place outside the home, as in *Butler*, or when it's loud enough that a reasonable person could not expect it to remain private from neighbors. This argument will likely be bolstered by the presence of anyone outside the immediate family.

A limitation to this strategy is that the majority of domestic violence incidents happen behind closed doors in private homes. In *Butler*, the family at issue lived in a trailer park, which the judge may have viewed as balancing against their privacy interests because those who live in trailer homes have historically been afforded fewer rights than those who live in permanent dwellings.<sup>287</sup> Furthermore, the fight ended up spilling outside the front door. Thus, many survivors of domestic violence may have a harder time making this

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281. Flanagan v. Flanagan, 41 P.3d 575, 577 (Cal. 2002).

282. Kight v. CashCall, Inc., 200 Cal. App. 4th 1377, 1396 (Ct. App. 2012) (internal citation and quotation omitted).

283. Lieberman v. KCOP Television, Inc., 110 Cal. App. 4th 156, 168 (Ct. App. 2003).

284. See *People v. Butler*, No. D073612, 2018 WL 3342844, at \*2 (Cal. Ct. App. 2018) (unpublished).

285. *Id.*

286. *Id.* at \*3.

287. See Shane V. Nugent, *Function Over Form: The Automobile Exception Applied to Motor Homes--Fourth Amendment*: California v. Carney, 105 S. Ct. 2066 (1985), 76 J. CRIM. L. & CRIMINOLOGY 955, 955 (1985).

argument if they do not live in trailer homes or the disputes remain behind closed doors.

Another drawback to this strategy is that it is unreliable. It will be difficult to predict, prior to pressing “record” on a device, whether the requisite circumstances are in place to convince a judge that this was not a confidential communication. At the point in the interaction where Anna is still capable of secretly pressing the record button, she is unlikely to know whether that particular argument will become loud enough, or travel far enough, to negate expectations of privacy. If these circumstances do not manifest, or if the interaction deescalates to a point where its content would provide no evidentiary value of domestic violence, then Anna may have violated CEPA.

In conclusion, if a practitioner has a client with a secret recording containing relevant evidence of domestic violence, that practitioner should argue that the recording does not qualify as a confidential recording under CEPA by pointing to factors such as the physical setting, volume of the argument, and presence of outside witnesses. However, survivors of domestic violence cannot trust that the requisite legal circumstance will be in place prior to making a secret recording inside their homes.

### *C. The Effect of CEPA on Domestic Violence Remedies*

This Section illustrates how the eavesdropping statutes discussed in Part IV.A and the strategies analyzed in Part IV.B affect domestic violence survivors. Part IV.C.1 discusses the impact of the eavesdropping statutes on the individual survivor while Part IV.C.2 discusses the broader implications of the eavesdropping statutes on the justice system.

#### *1. The Impact on the Individual*

As demonstrated in the previous Section, the scope of each of these five strategies is limited. The following table summarizes whether each respective strategy: (1) allows Anna’s recordings to be admitted as evidence in a criminal proceeding, (2) allows Anna’s recording to be admitted in a civil proceeding, or (3) absolves Anna from criminal and civil liability for making the recording under CEPA. Absolving Anna of criminal and civil liability is particularly important if Anna wants to use the video to pursue an alternative justice remedy or if she simply wants to use the video in order to garner community support and accountability.

Table 3: Summary of Strategies and Exceptions

<b>Approach</b>	<b>Is the tape recording admissible as evidence in criminal proceedings?<sup>288</sup></b>	<b>Is the tape recording admissible as evidence in civil proceedings?<sup>289</sup></b>	<b>Does the approach protect Anna from CEPA liability?</b>
Truth-in-evidence	Yes	No	No
Violent felony exception	Yes <sup>290</sup>	No	Yes
Domestic violence restraining order exception	No <sup>291</sup>	Yes, but only for purposes of obtaining a domestic violence restraining order.	Yes
Argue that CEPA does not apply	Yes <sup>292</sup>	Yes	Yes

Table 3 tells us two things. First, that it is nearly impossible to use a secret recording in civil domestic violence proceedings. Unless Anna can successfully argue that CEPA does not apply because her recording wasn't actually confidential, she cannot use her tapes as evidence to secure custody of her child or obtain civil remedies such as money damages and civil restraining orders. In other words, if Anna's ability to prove abuse turns on her ability to use a secret recording, she will be forced to pursue a criminal remedy. This situation is most likely to occur for child custody reasons: if Anna cannot admit a domestic violence recording in family court, she might press criminal charges just to keep Jon from getting custody of their daughter.

Second, Table 3 tells us that Anna is opening herself up to liability by making this recording in the first place. Even if her recording is admitted in a criminal prosecution, Anna can still be prosecuted or sued. Assuming the recording is confidential, Anna will have to be able to prove that her recording

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288. As in, the tape is not barred by anti-eavesdropping statutes. It could still be barred for other reasons, but that is outside the scope of this Note.

289. Civil proceedings include family and custody proceedings.

290. *Guzman* and Proposition 8 make this redundant, but I think it's worth spelling out exactly what each exception was intended to accomplish.

291. Again, any recording here would now be allowed under *Guzman* and Proposition 8, but the DVRO exception itself does not provide for that.

292. Again, redundant because of *Guzman* and Proposition 8.

falls under the violent felony exception or DVRO exception to avoid liability. This is a risk. Even if the video falls under one of those exceptions, it is unclear whether she can show this video to her community in a nonlegal setting.

Table 4 focuses on which exceptions Anna can use to avoid criminal and civil liability for violating CEPA, depending on whose conversations she is recording.

Table 4: Anna's CEPA Liability for Making the Recordings

<b>Recording</b>	<b>Is there an exception that could protect Anna from CEPA liability?</b>
<i>Communication between Anna and Jon</i>	Felony violence exception OR domestic violence restraining order exception
<i>Communication between Rebecca and Jon (Anna is not a party)</i>	Violent felony exception + vicarious consent doctrine
<i>Communication between Mirabel and Jon (Anna is not a party)</i>	Probably none. She can attempt to argue violent felony exception + vicarious consent doctrine

Table 4 tells us that it will be extraordinarily difficult for Anna to make secret recordings of Jon's interactions with Rebecca and Mirabel. She may be able to avoid liability if she makes a recording of Rebecca, but making a legal recording of Mirabel will be harder.

Table 5 summarizes which exceptions Anna can use to admit her secret recordings in each of the judicial proceedings she wishes to initiate. I have not included the outside-the-scope-of-CEPA approach because it is extremely fact dependent. I have distinguished between recordings where Anna is a party to the communication, and recordings where she is not a party.

Table 5: Admissibility of Anna's Recordings as Evidence

<b>Recording</b>	<b>Remedy</b>	<b>Evidentiary Exception</b>
<i>Communication between Anna and Jon</i>	Criminal prosecution for felony or misdemeanor domestic violence	The right-to-truth-in-evidence rule ( <i>Guzman</i> )
	Criminal protective order	The right-to-truth-in-evidence rule ( <i>Guzman</i> )
	Domestic violence restraining order	Domestic violence restraining order exception
	Civil harassment restraining order	None

<b>Recording</b>	<b>Remedy</b>	<b>Evidentiary Exception</b>
	Custody proceedings	None <sup>293</sup>
	Civil injunction	None
	Domestic violence tort action	None
	Alternative justice remedy	None
<i>Communication between Rebecca and Jon (Anna is not a party)</i>	Criminal prosecution for child abuse (or other crime against Rebecca)	The right-to-truth-in-evidence rule ( <i>Guzman</i> )
	Domestic violence restraining order	None
	Civil harassment restraining order	None
	Custody proceedings	None
	Civil injunction	None
	Domestic violence tort action	None
	Alternative justice remedy	None
<i>Communication between Mirabel and Jon (Anna is not a party)</i>	Criminal prosecution for elder abuse (or other felony crime against Mirabel)	The right-to-truth-in-evidence rule ( <i>Guzman</i> )
	Domestic violence restraining order	None
	Civil harassment restraining order	None
	Civil injunction	None
	Domestic violence tort action	None
	Alternative justice remedy	None

Table 5 shows us the gaps in the existing laws. While Anna's recordings are always admissible for criminal remedies, they are almost never admissible for civil and family remedies. In other words, the effect of CEPA is to discourage civil domestic violence remedies while pushing survivors toward criminal remedies. As discussed earlier, there are many reasons why Anna might not want to involve the police or the criminal justice system. However, if Anna feels that she can only secure the support she needs from the criminal justice system—

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293. It's worth noting that judges sometimes make evidentiary exceptions in custody proceedings where justice so demands. While I have not found a CEPA statutory exception that allows for use of secret recordings in these proceedings, it's possible that exceptions are being made at the trial level on a case-by-case basis.

because that is the only place where she will be able to prove domestic violence—then she may be forced to take that option. Alternatively, she may choose not to pursue any remedy at all. In sum, CEPA detracts from Anna’s autonomy and impedes Anna from being able to effectively pursue any and all of her available remedies.

Table 5 also shows that there are huge gaps in the law that preclude Anna from getting the help she needs for the people she loves. Domestic violence is complicated and involves many parties. If Anna feels she will lose custody of Rebecca, or that Mirabel will be in danger, Anna may rethink attempting to leave Jon at all. Survivors’ fear of losing custody of their children can be all that holds them back from leaving their abusers; we should do everything possible to remove that particular roadblock.

Many of these civil remedies are both useful and seriously underutilized. Domestic violence torts, in particular, are rarely brought. Money can make an enormous difference to survivors as they attempt to rebuild their lives.<sup>294</sup>

## 2. *The Impact on the Penal State*

Collectively, these tables show that the domestic violence justice system is built to favor criminal remedies over any other type of remedy. A survivor who makes a recording for the purpose of pursuing a civil remedy or an alternative justice remedy is almost certainly violating CEPA and risking civil and criminal liability. Moreover, if we are serious about creating noncriminal remedies, such as by implementing restorative or transformative justice approaches, we must make it possible for survivors to actually prove domestic violence to their communities. At the moment, it would be difficult to advise any domestic violence survivor in California to make a secret recording for the purpose of gaining community support and forcing their abuser to face community accountability. Community shaming can be a powerful tool against gender crimes, but such shaming tends to occur only when the community actually believes the survivor. CEPA is a direct obstacle to creating and empowering community-based remedies to domestic violence.

These exceptions were deliberately created to only allow the admission of domestic violence recordings for criminal law proceedings. While the admissibility of secret recordings may seem like a small issue, it is yet another example of how the legal system insidiously promotes criminal remedies at the expense of all others. The legislature easily could have extended the domestic violence exceptions to include civil and family remedies, but they did not. Perhaps such an extension did not occur to the legislature because the idea is so engrained in the legislature that the first response to domestic violence should be criminal, or perhaps the legislature deliberately only made criminal remedies

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294. Of course, civil damages are only possible if the batterer has an income. Such remedies will not be feasible for many poor and underprivileged families.

available because it favors criminal punishment, or it does not trust domestic violence survivors to recognize the remedy that will work best for them.

In sum, the combination of Proposition 8, CEPA, and the few CEPA exceptions increase reliance on criminal domestic violence remedies while making it more difficult, or even impossible, to pursue otherwise viable remedies outside the criminal justice system.

## V.

### PROPOSED STATUTORY LANGUAGE

This Section advocates for a new statutory exemption to CEPA to resolve the aforementioned issues in domestic violence litigation.

Professor John E. B. Meyers, an authority on child abuse and domestic violence, has also advocated for a special domestic violence exemption. He proposed adding a subsection to section 632, providing an exception for “any recording . . . made by or at the request of a person who is or who becomes the complaining party or victim in civil or criminal litigation regarding allegations of domestic violence as defined in section 6211 of the Family Code.”<sup>295</sup> Alternately, Meyers proposed a subsection providing that it would not violate CEPA for a complaining party or survivor in domestic violence litigation to record communications related to domestic violence.<sup>296</sup> In other words, this suggestion would create a one-party consent rule under CEPA for communications relevant to domestic violence.<sup>297</sup> Finally, Meyers advocated that California adopt a vicarious consent rule for purposes of wiretapping.<sup>298</sup>

My proposal is as follows:

#### The Eavesdropping Exception for Domestic Violence

##### California Penal Code Section 633.7

(a) Sections 631, 632, 632.5, 632.6, and 632.7 do not prohibit victims of domestic violence, as defined in California Family Code section 6211, from recording communications for the purpose of obtaining evidence reasonably believed to relate to the commission of domestic violence, as defined in California Family Code section 6203.

(b) Sections 631, 632, 632.5, 632.6, and 632.7 do not render any evidence obtained pursuant to section 633.7(a) inadmissible in any family or civil judicial proceeding related to the commission of domestic violence, as defined in California Family Code section 6203, against any victim of domestic violence, as defined in California Family Code section 6211. Authorized use includes, but is not limited to, domestic violence restraining order proceedings, civil restraining order proceedings, family court proceedings, and civil actions.

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295. Myers, *supra* note 153, at 66–67.

296. *Id.* at 67.

297. *Id.*

298. *Id.* at 67–68.

My proposed statutory exception has several aims. First, the exception absolves domestic violence litigants of any liability for recording anything related to domestic violence. Unlike Meyers's proposal, I do not condition this exception on the survivor becoming a litigant or survivor in domestic violence litigation. Although this Note has attempted to promote civil remedies as a viable and underutilized option, I am fully cognizant of the fact that many women will be unable to afford the legal counsel that could make these options realistic. Therefore, my proposed exception frees Anna to make a recording with the sole purpose of showing it to her family, friends, church members, or other members of her community. Thus, if Anna does not want to pursue criminal remedies and cannot pursue civil remedies, she at least has the option of using her recordings to garner community support and intervention. Moreover, it is my hope that someday restorative and transformational justice approaches will be more realistic and accessible options. Allowing survivors to use secret recordings for the purpose of alternative justice will go a long way in making these remedies more viable and more effective.

Second, my proposed exception allows certain secret recordings to be admissible in civil and family judicial proceedings. As discussed, these secret recordings are already admissible in criminal proceedings.<sup>299</sup> My proposed language makes civil and family remedies a more realistic option, thus decreasing reliance on the criminal justice system. Of course, survivors are still free to pursue criminal remedies, but my proposed language gives them more options. Some of the greatest obstacles preventing survivors from leaving their abusers are the fear of losing custody of one's children and the fear of being killed. My proposal would make it significantly easier for survivors to prove domestic violence in civil and family court, thus enabling Anna to secure custody of her children and to secure a restraining order that would force Jon to turn over his guns. My exception empowers survivors to choose any and all remedies that work best for themselves and their families.

Third, it is my hope that this exception will result in a decreased reliance on the criminal justice system as the primary remedy to domestic violence. As discussed in Part I, I believe that the survivor is best situated to determine which existing remedy will work best for their current situation. If a criminal remedy is necessary, then it is available. However, for the many survivors who are unable or unwilling to involve the criminal justice system, my proposed exception empowers them with noncriminal legal options that can accomplish many of the same goals as the criminal justice system. By making noncriminal remedies more viable, I expect that there will be a natural decline in the use of the criminal justice system for domestic violence on the lower end of the spectrum of harm. This will mean that fewer people are incarcerated, and fewer people are burdened with criminal records that can make it immeasurably more difficult to be fully

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299. CAL. CONST. art. I § 28(d).

contributing members of society. Because imprisonment is a cause of gender-based violence, a decrease in incarceration will hopefully result in a decrease in domestic violence on a societal level. Moreover, the involvement of the criminal justice system has demonstrably shortened the lifespans of domestic violence survivors on a macro level, particularly women of color. A decreased use of the criminal justice system will improve the safety outcomes of the many survivors of domestic violence who have been made less safe by policing and incarceration. The domestic violence movement has significantly contributed to the prison state by creating special evidentiary rules and policies for domestic violence within the criminal law. It is time for the domestic violence movement to return to its roots, before it became enmeshed with the police state, and get creative about creating and empowering new remedies to domestic violence.

Finally, my statutory exception is designed to include all kinds of violence that happen within the domestic space. I use the California Family Code to define who constitutes a victim of domestic violence because it is more expansive than the Penal Code definition, and because it will include both Anna's child and mother-in-law. Also, the Family Code definition allows Anna to capture behaviors that the existing exceptions do not account for. Furthermore, this exception does not require that Anna be a party to the communication, thus incorporating a vicarious consent doctrine and allowing her to make secret recordings of interactions between Jon and other members of her household for purposes of recording anything related to domestic violence.

Although not strictly within the scope of this Note, I have mentioned other crimes that are related to domestic violence, including child abuse and elder abuse. These abuses are difficult to prove for the same reason that domestic violence is difficult to prove: they happen behind closed doors between people with close relationships. Thus, I am also proposing separate statutory exceptions for child abuse and elder abuse.

I have framed both the child abuse and elder abuse exceptions to account for vicarious consent. I propose that a parent, guardian, or other member of the household be exempted from CEPA for purposes of making secret recordings to uncover child abuse, and that a spouse, guardian, or household member be exempted from CEPA for purposes of making secret recordings to uncover elder abuse. As in my domestic violence provision, each of these provisions creates an exception to CEPA liability and provides that the secret recordings are admissible in relevant civil and family court proceedings. My proposals are as follows:

#### The Eavesdropping Exception for Child Abuse

##### California Penal Code Section 633.9

- (a) Sections 631, 632, 632.5, 632.6, and 632.7 do not prohibit a child, or a child's parent, guardian, or household member from recording communications for the purpose of obtaining evidence reasonably believed to relate to the commission of child abuse, as defined in

California Penal Code section 11165.6.

(b) Sections 631, 632, 632.5, 632.6, and 632.7 do not render any evidence obtained pursuant to section 633.7(a) inadmissible in any family or civil judicial proceeding related to the commission of child abuse, as defined in California Penal Code section 11165.6.300

#### The Eavesdropping Exception for Elder Abuse

##### California Penal Code Section 633.11

(a) Sections 631, 632, 632.5, 632.6, and 632.7 do not prohibit an elder as defined by California Welfare and Institutions Code section 15610.27 or a dependent adult as defined by California Welfare and Institutions Code section 15610.23, or the spouse, guardian, or household member of an elder or dependent adult, from recording communications for the purpose of obtaining evidence reasonably believed to relate to the commission of the abuse of an elder or dependent adult, as defined in California Welfare and Institutions Code section 15610.07.

(b) Sections 631, 632, 632.5, 632.6, and 632.7 do not render any evidence obtained pursuant to section 633.7(a) inadmissible in any family or civil judicial proceeding related to the commission of the abuse of an elder or dependent adult, as defined in California Welfare and Institutions Code section 15610.07.

Collectively, my proposed exceptions cover every evidentiary gap identified in the previous Section and will allow Anna to pursue any and all of the aforementioned legal remedies identified in this Note.

The primary criticisms to my proposed exceptions are likely to be that (1) decreased reliance on the criminal justice system is an undesirable outcome, and that (2) these exceptions will be abused and enable unacceptable invasions of privacy. I largely addressed the first criticism in Part I, but my primary response is that if empowering noncriminal remedies results in a decreased use of criminal remedies, then that is evidence that the criminal justice system has been failing survivors of domestic violence. Arguments to the contrary are largely built on the paternalistic assumption that battered women require saving and are not in a mental state to know what's best for them. While that may be true of some survivors, it certainly is not true of most of them. My proposals do not weaken criminal remedies; they merely strengthen the efficacy of noncriminal remedies. My response to the second criticism is that courts are equipped to determine

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300. The scope of the admissibility of secret recordings in this context is purposefully narrow so that the recordings may be used *only* for purposes of determining child abuse. This exception does not include parents making secret recordings for custody purposes where no child abuse has been alleged.

whether someone “reasonably believed” a recording would capture domestic violence. Moreover, California is only one of eleven two-party consent states. Given the inherently secretive nature of domestic violence, it should not be controversial for California to follow the federal anti-eavesdropping law and thirty-nine other states’ laws by adopting a one-party consent exception for this very narrow category of situations. I believe that the benefits of revealing domestic violence outweigh the risk that a small segment of people may abuse these exceptions. Although the child abuse and elder abuse exceptions go further than one-party consent, I again believe that the societal benefits of catching and remedying such abuse outweigh the costs. Moreover, child abuse and elder abuse are again very specific situations that the courts are fully capable of recognizing.

Domestic violence, child abuse, and elder abuse are rampant, secret, and enormously difficult to prove. The fact that there already are some exceptions within CEPA for this kind of violence is evidence that the legislature has already decided that the benefits of stopping such violence are worth the costs. It is time for the legislature to apply this same logic to noncriminal remedies and a broader spectrum of behavior. At a bare minimum, the legislature should decriminalize CEPA where a survivor makes a recording with a reasonable expectation of experiencing or witnessing domestic violence, child abuse, or elder abuse. Anna should not have to risk state violence in order to escape from domestic violence.

#### CONCLUSION

Secret recordings are critical to proving many of the atrocities that happen behind closed doors. CEPA has made it more difficult for survivors to pursue family and civil remedies to domestic violence and has unnecessarily exposed survivors to civil and criminal liability. This Note has argued that the combination of CEPA and the truth-in-evidence rule has favored the criminal justice system as a provider of domestic violence remedies. The truth-in-evidence rule allows any relevant secret recording into a criminal prosecution, but there is no equivalent exception for civil judicial proceedings. CEPA offers a shoddy patchwork of exceptions that are confusing and leave many domestic violence scenarios uncovered. There is no current route to admit a secret recording into a domestic violence civil or family court proceeding, except to secure a DVRO.

The result of all of this is that victims and survivors of domestic violence are prevented from choosing the domestic violence remedy that works best for themselves and their families. In sum, the evidentiary rules at issue enhance reliance on the criminal justice system and deny agency and choice to people who experience domestic violence. I have proposed three statutory exceptions that fill all of these gaps, protect survivors from CEPA liability, and allow survivors to seek noncriminal, as well as criminal, remedies.