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WADING INTO PROFESSOR SCHNEIDER'S "MURKY MIDDLE GROUND" BETWEEN ACCEPTANCE AND REJECTION OF CRIMINAL JUSTICE RESPONSES TO DOMESTIC VIOLENCE

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INTRODUCTION

In *Engaging with the State*, a chapter in the remarkable history, analysis, and vision that is her book *Battered Women & Feminist Lawmaking*, Professor Elizabeth M. Schneider writes, "[w]ith both mandatory arrest legislation and VAWA [the Violence Against Women Act of 1994], familiar tensions are replicated— public and

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private, victimization and agency— which reemerge in the process of enforcement and raise questions concerning the potential utility and effectiveness of these statutes."[1] She challenges the reader to "understand the roles of the state, other institutions, law, and culture in encouraging, legitimizing, and perpetuating violence" and "to critically examine the murky middle ground between total rejection and total endorsement of working with the state."[2] This Essay is a very preliminary response to Professor Schneider's challenge. With gratitude I draw on the work of symposium participants and other advocates, activists, and scholars as I focus on mandatory arrest and no-drop prosecution policies[3] and what we do and do not know about their utility and effectiveness in keeping battered women safe. My modest proposal, like those of most of the people whose insights have informed mine, is that we recognize that the mandatory arrest train has left the station in over half of the states; that we work to ameliorate its effects in those places by convincing prosecutors to exercise discretion in making a determination whether prosecution in a particular case will contribute to increased safety or escalating danger; that we push for funding for studies that examine the real effect of the existing policies; and that in the meantime we do all we can to avoid doing more danger and do not encourage additional states to pass mandatory arrest legislation or support more prosecutors' decisions to adopt no-drop stances. It is my view that, once the research is available, it will be possible to convince legislators and prosecutors to reverse this damaging trend toward mandatory interventions.

I. THE CONTEXT: RACE AND THE CRIMINAL JUSTICE SYSTEM

Professor Schneider referred to two now-familiar tensions (familiar because her own scholarship has made them so) involved in mandatory-arrest policies: public/private, and victimization/agency.[4] There is a third tension to add to those she has identified as we assess

1. ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 182 (2000).

2. *Id.* at 196.

3. Mandatory and pro-arrest policies have been enacted in many local jurisdictions by city or county ordinance or regulation. According to David Hirschel and Eve Buzawa, by January 2002, twenty-three states had statewide mandatory arrest laws for at least some levels of domestic violence assault, and thirty-three states mandated arrest for violation of protection orders. David Hirschel & Eve Buzawa, *Understanding the Context of Dual Arrest With Directions for Future Research*, 8 VIOLENCE AGAINST WOMEN 1449, 1451 (2002). Most no-drop prosecution policies are a matter of local office choice in the exercise of prosecutorial discretion.

4. SCHNEIDER, *supra* note 1, at 182.

these mandatory criminal justice policies: that which exists between the appearance of fairness and the actual racialized impact of crime control measures in the United States.[5] It is important to confront that tension and to develop a nuanced view of the complexity of this country's society. Research now, in the main, reinforces the notion of a simple, binary divide described variously as "white/Black" and "white/non-white" (and distortions flow, in research and in criminal law-on-the-ground, from that simplistic divide). We simply do not have an accurate picture of the ways in which policies work differently in different communities. A recent analysis of the National Violence Against Women Survey found no disparities in victimization rates when the focus was on white and non-white (all other racial groups combined) men and women.[6] Analysis of those same data by specific racial groups led to findings of significant differences: Native American, African American and mixed race men and women reported more violence than their Asian/Pacific Islander and white counterparts (but no similar disparities existed between Hispanics and non-Hispanics).[7] Most likely to be classified as victims of violence in intimate relationships are African-American women.[8] The study determined also that women in heterosexual relationships are more at risk of violence than (in descending order) men in same-sex relationships, women in lesbian relationships, and men in heterosexual relationships.[9] Those disparities are a necessary part of the context in which we understand Professor Schneider's description of aspects of the anti-domestic-violence movement's increasing reliance on criminal law remedies:

> The move toward mandatory arrest, criminal prosecution, and prosecutorial "no-drop" policies has been widespread, yet for many battered women criminal prosecution is deeply problematic. Many

5. Professor David Cole argues that the United States criminal justice system affirmatively depends on inequality: "Absent race and class disparities, the privileged among us could not enjoy as much constitutional protection of our liberties as we do; and without those disparities, we could not afford the policy of mass incarceration that we have pursued over the past two decaded." DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 5 (1999).

6. *See* Patricia Tjaden, *Extent and Nature of Intimate Partner Violence as Measured by the National Violence Against Women Survey*, 47 LOY. L. REV. 41, 52 (2001) (describing the findings in PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE & CTRS. FOR DISEASE CONTROL, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (2000)).

7. *See id.* at 52-53 (discussing the findings for various racial subgroupings and noting that the pattern was fairly stable regardless of the type of crime and the type of perpetrator).

8. *Id.* at 55.

9. *Id.* at 54.

> activists and legal reformers continue to raise questions concerning criminalization, reflecting tensions around issues involving women's autonomy, poor women, and women of color, and problems of "dual arrests," where both men and women are arrested. Criminalization may be an appropriate strategy in some contexts, but it is only one of many strategies that we ought to be considering.[10]

In the quoted paragraph, Professor Schneider seems to use "criminalization" in a way that necessarily includes mandatory arrest and no-drop policies. Other parts of her analysis of engagement with the state make clear that she does not confuse the terms.[11] It is not always easy to discuss them in a way which demonstrates that resort to criminal interventions need not include making those interventions mandatory. It is important to recognize that the concepts are separate and that it is not necessary to posit an all-or-nothing choice when it comes to criminal justice responses. Many advocates for battered women have conflated *any* reliance on criminal justice strategies with across-the-board insistence on mandatory interventions and have embarked on a course of law reform which has played into the social-control agenda of the right in the United States.[12]

Professor Schneider has explained some of the reasons that inclined advocates toward mandatory criminal justice responses to domestic violence. She has pointed out that the desire to remove discretion from police and prosecutors stems from a sense of the historic inadequacy of their response to domestic violence, of the need to send a message to both society and the batterer that domestic violence is a serious crime, and to protect a battered woman from the abuser's pressure to abandon legal remedies.[13] Another impetus is the fear that police departments would be held civilly liable for failing to protect battered women.[14] Yet another, of course, is the hope that

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10. SCHNEIDER, *supra* note 1, at 196.

11. *Id.* at 184 (describing "the historic rationales for criminalization generally, and mandatory arrest in particular").

12. For elaboration on this point, *see generally* Martha McMahon & Ellen Pence, *Making Social Change: Reflections on Individual and Institutional Advocacy with Women Arrested for Domestic Violence*, 9 VIOLENCE AGAINST WOMEN 47 (2003). *See also* SCHNEIDER, *supra* note 1, at 183 ("[F]eminist liberatory discourse challenging patriarchy and female dependency . . . has been replaced by discourse emphasizing crime control.").

13. SCHNEIDER, *supra* note 1, at 185-86.

14. *See* Andrea D. Lyon, *Be Careful What You Wish For: An Examination of Arrest and Prosecution Patterns of Domestic Violence in Two Cities in Michigan*, 5 MICH. J. GENDER & L. 253, 270 (1999) (citing fear of police liability, the results of early studies of the effect of domestic violence arrests, and the political work of women's movements as causes

removal of discretion would eliminate racially-disparate treatment of victims of domestic violence. It is toward that unrealized goal that we must turn our attention.

The enactment of mandatory arrest statutes and regulations, and the adoption by prosecutors of no-drop policies, are parts of a process that has resulted in massive over-reliance on criminal strategies by advocates for battered women. The costs of that over-reliance have been distributed unevenly. For example, Anannya Bhattacharjee has pointed out that the strategy of more vigorous police response has sometimes backfired in communities of color, those in which law enforcement personnel themselves pose a threat of violence: "For women in this situation, the promise of police protection from battering is an empty one."[15] The negative impacts on communities of color, of all classes, and on poor people, of all ethnicities, were entirely predictable many years ago.[16] Racial disparities were already well established throughout the criminal justice system at the time battered women's advocates started working for more reliance on the system. They are starker now.[17]

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of the enactment of mandatory and pro-arrest legislation at state and local levels).

15. ANANNYA BHATTACHARJEE, AM. FRIENDS SERV. COMM., WHOSE SAFETY? WOMEN OF COLOR AND THE VIOLENCE OF LAW ENFORCEMENT 6 (2001), *available at* http://www.afsc.org/cru/whosesafety.pdf.

16. For an example of one state's analysis of the phenomenon, see N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., THE INCARCERATION OF MINORITY DEFENDANTS: AN IDENTIFICATION OF DISPARITY IN NEW YORK STATE, 1985-1986 1 (1991) (on file with author). The study, examining post-arrest case processing in New York State, found that "[d]ifferences in incarceration rates can be attributed to biases in the criminal justice system to the extent that arrest practices, case processing decisions, and parole decisions unfairly affect how minorities are treated. . . . minorities were incarcerated more often than similarly situated whites in almost all counties studied." *Id.*

17. For example, a recent Bureau of Justice Statistics study found:

> At year end 2000, black males (572,900) outnumbered white males (436,500) and Hispanic males (206,900) among inmates with sentences of more than 1 year. More than 46% of all sentenced inmates were black males. . . . Black non-Hispanic females (with an incarceration 205 per 100,000) were more than 3 times as likely as Hispanic females (60 per 100,000) and 6 times more likely than white non-Hispanic females (34 per 100,000) to be in prison in 2000.

ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2000 11 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p00.pdf. Professor Paula Johnson describes the growth in numbers of female prisoners as follows:

> [W]omen's overall imprisonment in state and federal institutions is characterized by sharp increases over the last twenty years. Women's imprisonment rose from just over 13,000 in 1980 to nearly 92,000 in 2000. . . . Almost half (48 percent) of female inmates across the nation are African American, one-third (33 percent) are Caucasian, 15 percent are Hispanic, and 4 percent are women of other racial backgrounds.

PAULA C. JOHNSON, INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON 34

That is the history against which we must evaluate both the successes and the prices of reliance on the criminal justice system. Anannya Bhattacharjee described the gains and costs this way:

> The achievements of the women's anti-violence movement are substantial, involving significant changes in police and court practices and legal standards, as well as a profound transformation of public awareness. . . . In seeking to hold police agencies accountable for enforcing laws against sexual assault and domestic violence, the women's anti-violence movement has largely sidestepped the problem of the violent and abusive nature of law enforcement in poor communities of color. . . . Over the years, this has resulted in a growing tension between the mainstream anti-violence movement and women-of-color organizations concerning the posture of women's organizations toward governmental agencies.[18]

It is not that some people did not foresee these consequences, but rather that the majority of advocates failed to heed the warning of activists like Professor Beth Richie:

> It is here, at a critical crossroads, that I ponder my work in the antiviolence movement as a Black feminist activist and academic. . . . First, it seems that to continue to ignore the race and class dimensions of gender oppression will seriously jeopardize the viability and legitimacy of the antiviolence movement in this country, a dangerous development for women of color in low-income communities, who are most likely to be in both dangerous intimate relationships and dangerous social positions. The overreliance on simplistic analyses . . . has significant consequences for the potential for radical social change. . . .
>
> For over a decade, women of color in the antiviolence movement have warned against investing too heavily in arrest, detention, and prosecution as responses to violence against women. Our warnings have been ignored, and the consequences have been serious: serious for the credibility of the antiviolence movement, serious for feminist organizing by women of color, and, most important, serious for women experiencing gender violence who fall outside of the mainstream.[19]

Sue Osthoff, the Director of the National Clearinghouse for the Defense of Battered Women ("NCDBW"), has noted that "unintended consequences are surfacing from over-reliance on the criminal legal system. Twenty-five years ago, women of color were

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(2003).

18. BHATTACHARJEE, *supra* note 14, at 23.

19. Beth Richie, *A Black Feminist Reflection on the Antiviolence Movement*, 25 SIGNS 1133, 1136 (2000).

saying that we should not turn to the criminal legal system. But we put all our eggs in one basket without seeking other creative ways of community intervention."[20] NCDBW publications have described also the ways in which costs that were not anticipated by many people three decades ago, like the immigration and child-custody consequences of engagement with the criminal system, have similarly been paid more by some groups than by others.[21]

In a similar vein, Melanie Shepard and Ellen Pence describe the early history of decisions to rely on that system in this way:

> Movement strategies, including legal reform strategies, were developed with women of color often in reactive rather than proactive leadership roles. In these roles, women of color have been far more cautious in mapping out strategies for reform that would involve an expanded role for police and the courts in women's lives. Much of the early work of legal reform efforts was marked by a certain naivete on the part of the White middle-class leadership about the role of the legal system in maintaining existing relations of ruling.[22]

> I think White women talked more as if the courts belonged to us [all women] and therefore should work for us where we [women of color] always saw it as belonging to someone else and talked more about how to keep it from hurting us.[23]

The unequal impact of criminal justice interventions on people and communities of color is not moving in any positive direction today. There certainly has been no discernible change in two of the system's primary functions: social control and the reinforcement of disparate social treatment. The persistence of this unequal impact represents one basis for underscoring Professor Schneider's important conclusion that "[o]ver the past twenty-five years,

20. BHATTACHARJEE, *supra* note 14, at 26 (quoting Sue Osthoff). *See also* Sue Osthoff, *But Gertrude, I Beg to Differ, a Hit is Not a Hit is Not a Hit: When Battered Women are Arrested for Assaulting their Partners*, 8 VIOLENCE AGAINST WOMEN 1521, 1533 (2002) ("Since women began to organize to end violence against women back in the 1970s, women of color have warned White advocates about the dangers and pitfalls, especially for communities of color, of relying so heavily on the criminal legal system as the primary method of assisting victims of violence.").

21. National Clearinghouse for the Defense of Battered Women, The Impact of Arrests and Convictions on Battered Women (Feb. 2001) (draft, on file with author). For additional discussion of collateral consequences that befall immigrants, see Anita Raj & Jay Silverman, *Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Immigrant Partner Violence*, 8 VIOLENCE AGAINST WOMEN 367 (2002).

22. Ellen L. Pence & Melanie F. Shepard, *An Introduction: Developing a Coordinated Community Response*, *in* COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND 3, 7 (Melanie F. Shepard & Ellen L. Pence eds., 1999).

23. *Id.* (quoting a legal advocate interview of Sept. 19, 1995).

[feminists'] critical view of engagement with the state has changed,"[24] but that the level of criticism has not changed, or has not changed in the same way, for everyone.

II. WHAT THE STUDIES SHOW

It is important to look at what current research does and, more importantly, does *not* show about the impact of mandatory criminal interventions which purport to limit exercises of discretion, but which in fact often simply relocate the points at which discretion is exercised.[25] It is likely that careful studies will convince us that the consequences of mandatory arrest and no-drop prosecution policies are too high a price to pay for the uncertain benefits of continuing current levels of reliance on them. This does not mean that I expect studies to show no role for arrest and prosecution, but it does mean that I expect demonstration that across-the-board mandatory responses actually make situations less safe for some women.

Mandatory policies are often justified on the ground that they make clear that domestic violence is *really* a crime and that they remove discretion to decline the law's protection to victims of color.[26] The problem is that we have only an incomplete picture of their purported benefits, and all-too-certain information about their costs,

24. SCHNEIDER, *supra* note 1, at 183.

25. *See* Osthoff, *supra* note 19, at 1534-35 ("Not trusting the police to do it right without extremely clear guidance, advocates worked to design statutes and protocols that spelled out exactly what a police officer was to do and under what circumstances when responding to a domestic violence call."); *see also id.* at 1541 n.14 ("Some, but certainly not all, police officers circumvent being told that they must arrest when they find probable cause by *never* finding probable cause.").

26. *See* SCHNEIDER, *supra* note 1, at 186 (asserting that no-drop policies send the message that domestic violence shall not be treated less seriously than violence between strangers); *see also* Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 634-35 (2000) (discussing the connection between failure to prosecute abusers and the implication that domestic abuse is accepted by society); Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 182 (1997) (arguing that a no-drop prosecution policy "tells batterers that violence against intimate partners is criminal, that offenders can and will go to jail, and that their victim's refusal to press charges is not a 'get out of jail free' card"); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1882 (1996) (arguing that the historical and systematic oppression and abuse of minorities by police and prosecutors supports "mandatory prosecution" because it "requires that all citizens be subject to the same prosecution policies," and thus provides "an equal and effective response to domestic violence."). According to a study done in Detroit, 65% of African American battered women (who called police) favored prosecution of their abusers: "Many members of this group seemed to favor prosecution as a means of stopping abuse and giving a clear message that domestic violence is unacceptable and illegal." Arlene N. Weisz, *Prosecution of Batterers: Views of African American Battered Women*, 17 VIOLENCE & VICTIMS 19, 28 (2002).

direct and collateral, whether men or women are arrested.[27] The claimed benefits have not even been demonstrated; and in light of the burdens imposed, they do not support an argument for maintaining current levels of criminal justice interventions.

A. The Studies do not Show a Causal Relationship Between Mandatory Policies and Changes in Intimate Partner Homicide Rates, and Yet These are the Rates that Drive many Policy Decisions.

When punitive interventions do not seem to work to control behaviors, a dominant response among U.S. policy makers is to increase the level of punitiveness.[28] We know now all too well the limits of many of these responses in the domestic violence area. It's the phenomenon Professor Martha Mahoney has described in another context as "the woman who dies with a protection order in her pocket."[29] As Professor Schneider reminds us, "[w]e now recognize the lethal limitations of legal remedies–whether orders of protection,[30] mandatory arrest policies, or anti-stalking laws–intended to provide safety to battered women."[31]

Let us heed Professor Schneider's note about the "lethal limitations" of legal remedies and question what we know and what we need to know about them. We have anecdotal information, of course, but what real work has been done on the benefits, however

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27. It is not at all clear that our knowledge has progressed since the publication of Robert C. Davis and Barbara Smith's *Domestic Violence Reforms: Empty Promises or Fulfilled Expectations?* in 1995, which called for more research because of the inadequacy of then-existing studies on benefits of arrests and protection orders. *See* Robert C. Davis & Barbara Smith, *Domestic Violence Reforms: Empty Promises or Fulfilled Expectations?*, 41 CRIME & DELINQ. 541, 551 (1995). For a recent description and analysis of studies that show uneven results, and escalation in some cases, from mandatory arrest and no-drop prosecution policies, see Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1865-70 (2002).

28. According to the Bureau of Justice Statistics, the United States incarcerated 2,100,146 persons at year end 2001. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2001 1 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p01.pdf. A major contributing factor to rising incarceration rates has been the war on drugs: federal prosecutions for drug offenses increased 147% from 11,854 in 1984 to 29,306 in 1999. *See* JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL DRUG OFFENDERS, 1999 WITH TRENDS 1984-99 1 (2001), *available at* http://www.sentencingproject.org/bried/pub1068.pdf.

29. Professor Mahoney offered this description during a presentation titled *Battered Women's Syndrome: Does it Further Disempower Women?* at a New York University School of Law Symposium on *Domestic Violence: Integrating Theory and Practice* (Oct. 1992) (notes of her presentation are on file with author).

30. In some jurisdictions, protection orders are only civil remedies, but in others they are issued by criminal courts as well.

31. SCHNEIDER, *supra* note 1, at 115.

limited they may be, of mandatory arrest and no-drop prosecution policies?[32] One National Institute of Justice report shows the following: mandatory arrest policies are associated with fewer killings of white women and of Black unmarried men; increased willingness of prosecutors to pursue protection order violations is associated with *increases in homicides* of white married intimates, Black married intimates, and white unmarried women; increased legal advocacy resources are associated with fewer white women being killed by their husbands and *more Black women being killed by their boyfriends*; certain protection order policies[33] are associated both with decreased victimization of Black married women and *increased homicides among Black unmarried intimates*; and, finally, that no one policy affects all groups the same way in terms of decreasing violence.[34]

There is another thing we know about results that are contemporaneous with the enactment of these policies, although we don't know what the results mean: overall, intimate homicide rates are down, especially and dramatically intimate homicides of men,[35] with rates dropping disproportionately quickly for African American

32. For a very careful and thorough analysis of studies as of 2001 involving the effect of arrest and prosecution on subsequent lethal and nonlethal violence, demonstrating the crucial need for careful evaluation of differential outcomes from similar legal responses, see Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 852-53 (2001) (noting that studies show at best a modest and short-term deterrent effect from arrest, and pointing specifically to the failure to examine evidence of disproportionate impact of mandatory arrest and no-drop policies in low-income African American and Latina/o communities).

33. The study did not distinguish between civil and criminal orders of protection.

34. LAURA DUGAN ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EXPOSURE REDUCTION OR BACKLASH? THE EFFECTS OF DOMESTIC VIOLENCE RESOURCES ON INTIMATE PARTNER HOMICIDE, EXECUTIVE SUMMARY (2001). For an updated analysis of these findings, see Laura Dugan et al., *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate-Partner Homicide*, 37 L. & SOC. POL'Y REV. 169, 191-93 (2003) (comparing and contrasting, in various groups, the impact on intimate partner homicides of government benefit availability, police arrest policies, availability of legal advocacy resources, no-drop prosecution policies, and the existence of specially-trained police and prosecution personnel).

35. *See* CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993-2001 (2003) (noting that while the numbers of both men and women killed by intimates has decreased between 1976 and 2001, since 1993 there has been a slight increase in the proportion of females killed by intimates), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf; *see also* JAMES ALAN FOX & MARIANNE W. ZAWITZ, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE U.S. 98 (2000) (an earlier and more comprehensive study also demonstrating the overall decline of intimate homicide, especially among male victims), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/htius.pdf. Intimates are defined to include spouses, ex-spouses, boyfriends, and girlfriends. *Id.* According to the report, the number of male victims of intimate homicide declined by 68% since 1976. *Id.* For women killed by intimates, the number was stable for two decades, declined after 1993 through 1995, and then remained relatively stable through 2000. *Id.*

men.[36] We also know that homicide rates drive much of domestic violence criminal justice policy, despite the relatively small number of homicides in the vast array of violent episodes between intimate partners.[37] This is not to say that any number of deaths, of men or of women, is to be viewed with tolerance. It is simply to point out that the numbers of deaths, viewed in the context of all the violence, should not be a determinant of overall policy, especially since we do not know the role of criminal justice interventions in the reduction of homicide figures.

B. We do not know the Different Needs for and Benefits from Mandatory Policies in Various Communities.

Research has yet to disprove the predictions Professor Jenny Rivera made in 1994, when mandatory arrest policies had been in place in a few jurisdictions for about a decade and were being enacted in many others. Professor Rivera expressed concerns about the potential impact of mandatory arrest policies on the Latina/o community: the dynamic between police and the Latina/o community, as well as other factors such as language barriers, she warned, would lead to further disempowerment of battered Latinas.[38] Police abuse, the inability to communicate with responding officers, and cultural

36. *See id.* at 99 (noting the decline of intimate homicide victims in each race and gender group). During the period between 1976 and 2000, the number of white female victims of intimate homicide rose in the mid-1980s but declined after 1993, reaching the lowest level recorded in the past two decades in 1997. *Id.* In the same time period, the number of white male victims of intimate homicide dropped by 54%, black female victims dropped by 53%, and black male victims dropped by 77%. *Id.* The number of intimate homicide victims by race and gender for years 1976-2000 is charted on page 107 of the report. *See also* Fox Butterfield, *Study Shows a Racial Divide in Domestic Violence Cases*, N.Y. TIMES, May 18, 2000, at A16 (discussing the Bureau of Justice Statistics report and noting that the reason for the overall decrease of intimate homicides was not clear). For a comparison of racial disparities in spousal homicide rates in Canada and the United States, *see* Wendy C. Regoeczi, *Exploring Racial Variations in the Spousal Sex Ratio of Killing*, 16 VIOLENCE & VICTIMS 591, 591-92 (2001).

37. *See* CALLIE MARIE RENNISON & SARAH WELCHANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 1 (2000) (indicating that in 1998, women constituted three out of every four victims of the 1830 murders attributable to intimates, while, in that same year, about 900,000 women experienced nonlethal violent offenses by intimates), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf. The report categorizes rape, sexual assault, robbery, aggravated assault, and simple assault as nonlethal offenses. *Id.* Recently, Dr. Rennison has published a study updating those numbers. *See* Rennison, *supra* note 35 (indicating that by 2001 the number of women who experienced nonlethal violence at the hands of intimates was 588, 490, and the number of women killed by intimates was 1247 in 2000).

38. *See* Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 245-46 (1994) [hereinafter Rivera, *Domestic Violence Against Latinas*] (discussing the linguistic, cultural, and political barriers Latinas face, and the failure of domestic violence strategies to address them).

pressures to maintain privacy in familial life all factored into her belief that these policies would not effectively deal with domestic violence in communities of color.[39] Two years later, Professor Rivera argued that encouraging mandatory arrest policies could further damage communities of color because of the grant of invasive power to the state.[40] She emphasized a need for clearer evidence on the effects of mandatory policies on women of color before such policies were implemented.[41] That evidence is still to be produced.

Focusing more on intimate partner violence than on police violence, Professor Linda Mills argued in 1999 that we should act on the basis of the evidence that *has* been produced that shows that mandatory interventions increase the risk to some women of both lethal and nonlethal violence.[42] With regard to no-drop policies, she noted that "[v]ery few studies have tested the effectiveness of mandatory prosecution policies in eliminating violence in battered women's lives."[43] She further contended that from the information that did exist, no clear conclusion could be reached on the effectiveness of no-drop prosecutions, and that research to date "suggested mixed results at best."[44] Professor Mills called for clearer information in order to avoid policies that appear to protect white women at the expense of women of color.[45]

At a very basic level, we have conflicting information about whether, when, and why women call 911. On the one hand are conclusions published in 2000 that Black women reported their nonlethal victimization to the police at higher rates than white women, Black men, and white men, and that Hispanic women

39. *See id.* at 247-49 (arguing that the failure to address the specific needs of women of color in law enforcement policy inhibits the empowerment of battered women).

40. *See* Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL'Y 463, 506 (1996) ("Dependence on initiatives which are strategies for authorizing state involvement in individual relationships have proved debilitating for communities of color and women.").

41. *See id.* at 505-06 (expressing concern over the utility and effectiveness of mandatory arrest policies for women of color because of the lack of research and analysis on the subject).

42. *See* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 585 (1999) (referring to studies showing that mandatory arrest policies may endanger the lives of intimate abuse victims, especially African-American women).

43. *Id.* at 567.

44. *Id.*

45. *See id.* at 568 (arguing that "the advantages of mandatory interventions do not clearly outweigh the disadvantages, especially if these interventions protect the safety of white women at the expense of African-American women.").

similarly report victimization at a relatively high rate.[46] On the other are slightly older findings that indicate "African American women . . . were less likely than European American women to call the police, go to court, or enter a shelter, and they are more likely to fight back or injure their partners while defending themselves."[47] There have been very few attempts to learn from women who do call what it is that they hope to achieve.[48]

Certainly, African American men and Latinos are disproportionately represented among domestic violence defendants in criminal courts, but we have yet to establish whether (and the reasons may vary from place to place) the explanations for the phenomenon are primarily (1) police abuses of arrest power, (2) real differentials in rates of violence (and whether these differentials are affected by studies controlling for socioeconomic status),[49] (3) a

46. *See* RENNISON & WELCHANS, *supra* note 36, at 7 (noting that the percentage of victims reporting to police differed by race and ethnicity: 67% of black women reported their victimization while 48% of black men, 45% of white men, and 50% of white women reported). The report also noted that Hispanic women reported intimate partner violence at a higher percentage (65%) than non-Hispanic women (52%). *Id.* Overall, the Bureau of Justice Statistics determined that more women report victimization (53%) than do not (47%), although reasons for reporting and not reporting were broken down in gender, but not racial, contexts. *Id. See generally* Julia Henderson Gist et al., *Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence Against Women*, 15 AM. J. FAM. L. 59 (2001) (responding to RENNISON & WELCHANS' study, and studying the efficacy of criminal justice remedies for a survey sample of English speakers in Houston who sought out those remedies).

47. Daniel G. Saunders, *Are Physical Assaults by Wives and Girlfriends a Major Social Problem? A Review of the Literature,* 8 Violence Against Women 1424, 1434 (2002). The findings of the 1997 study described in Saunders' article were consistent with those of a study of Harlem focus group participants where "each focus group echoed the distinct tendency to avoid using the police in almost any circumstance." GAIL GARFIELD, A RESPONSE TO VIOLENCE AGAINST WOMEN IN CENTRAL HARLEM 38 (1998) (report prepared for the African American Task Force on Violence Against Women) (on file with author). Both studies were consistent, too, with the earlier observation of Professor Kimberlé Crenshaw that women of color are often unwilling to call the police and "subject their private lives to the scrutiny and control of a police force that is frequently hostile." Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991).

48. *See* McMahon & Pence, *supra* note 11, at 72 n.8 (describing a National Institute of Justice study of Native American battered women in focus groups and quoting a woman who was described as expressing the group view that: "Sometimes you call the police just because you want the idiot out of there. Not because you want him taken to jail.").

49. *Compare* Mary Ann Dutton, Comments at U.S. Department of Justice, Office for Victims of Crime, Intimate Partner Homicide Forum, Washington, D.C. (Sept. 14, 2000) (notes on file with author) (noting no significant difference in violence rates among races where there is a control for socioeconomic status), *with* James Alan Neff et al., *Spousal Violence Among Anglos, Blacks, and Mexican Americans: The Role of Demographic Variables, Psychosocial Predictors, and Alcohol Consumption*, 10 J. FAM. VIOLENCE 1, 1-3 (1995) (finding that controlling for variables–including education, income and financial stress— did not eliminate "greater likelihood of reports of both beating and being beaten among married Black females" as differences in reported

disproportionate number of African American and Latina victims calling 911 (and, a related question, whether the caller hoped that arrest would be an outcome of the call),[50] or (4) a combination of those and other factors.

The extent to which studies overlook culturally-specific considerations by considering only white/Black or white/other classifications is serious at every level. At the level of the likelihood that some women will be deterred from calling for help when they are in trouble, the failure to consider culturally-specific factors is dangerous in the extreme.

We must examine the extent to which the benefits of mandatory arrests of batterers are unequally distributed among battered women. To do that effectively, it is important to look with care at the experiences of different groups now classified in the large-scale studies as "non-white" or "other."[51] There is evidence that these one-size-fits-all responses have failed to take into account the differences among races and cultures and therefore have failed to address many of the issues specific to various groups. The concern is that the behavior of certain groups of battered women has been or will be altered in reaction to the perceived effects of these mandatory policies. For instance, just two years ago Professor Linda Ammons wrote that African American women are deterred from calling 911 for assistance when faced with domestic violence, stating, "African-

violent behavior among Blacks and whites were present in the lowest income groups). *See also* NEIL WEBSDALE, POLICING THE POOR: FROM SLAVE PLANTATION TO PUBLIC HOUSING 120-21 (2001) (discussing studies suggesting higher rates of domestic violence among poor blacks than poor whites).

50. This inquiry seems so basic, but it is almost completely ignored. *See* Ruth Fleury, *Missing Voices: Patterns of Battered Women's Satisfaction with the Criminal Legal System*, 8 VIOLENCE AGAINST WOMEN 181, 182 (2002) (asserting that "existing research on the police and court responses to intimate partner violence has neglected to examine factors relating to survivors' satisfaction with the criminal legal system. However, such an examination is critical to developing policies and interventions to keep survivors safe."). Fleury's study did look at satisfaction levels, and found that 39% of women reported that they were "somewhat satisfied" with criminal system response). *Id.* at 192; *see also* Edna Erez & Joanne Belknap, *In Their Own Words: Battered Women's Assessment of the Criminal Processing System's Responses*, 13 VIOLENCE & VICTIMS 251, 252 (1998) (noting the difference among women's responses but the lack of "significant change in the sexist and victim-blaming attitudes of legal agents who serve domestic violence victims" despite the organizing efforts of the last quarter century).

51. For a careful review of existing research, its coverage and its gaps, *see* Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV 1009 (2000) [hereinafter Coker, *Shifting Power*]. *See also* Alisa Smith, *It's My Decision, Isn't It?: A Research Note on Battered Women's Perceptions of Mandatory Intervention Laws*, 6 VIOLENCE AGAINST WOMEN 1384, 1400 (2000) (discussing the need for future studies of domestic violence to distinguish women based on ethnic subgroupings for more accurate domestic violence data).

American women are still torn between reporting their abusers for fear that law enforcement officials will [be] more zealous than necessary in prosecuting the case."[52] Other observers have suggested that some Latinas as well as Asians and Asian Americans may also experience this deterrent effect.[53] Professor Rivera has noted that the criminal justice system was not prepared to handle the issues specific to the Latina/o community that accompany mandatory criminal enforcement in domestic violence cases.[54] In jurisdictions with no-drop policies or what are called "mandatory prosecutions," she argues, language and cultural barriers create problems that many court systems are unequipped to handle because of the lack of bilingual court personnel.[55] The fact that the victim and the police do not have a language in common presents problems with mandatory-arrest policies for many immigrant battered women, and those problems are compounded by the fear of immigration consequences whether the abuser or the victim is the person arrested.[56]

There is, in addition, for all poor battered women, the problem suggested by Professor Schneider's observation that "[c]riminalization may be an appropriate strategy in some contexts,

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52. Linda L. Ammons, *Dealing with the Nastiness: Mixing Feminism and Criminal Law in the Review of Cases of Battered Incarcerated Women—A Tenth-Year Reflection,* 4 BUFF. CRIM. L. REV. 891, 915 (2001).

53. *See* Rivera, *Domestic Violence Against Latinas*, *supra* note 37, at 244-46 (arguing that because the historical relationship between law enforcement and the Latino community has been one of racism and violence, Latinas are hesitant to turn to the criminal justice system as a whole for help); *see also* Susan L. Miller, *The Paradox of Women Arrested for Domestic Violence*, 7 VIOLENCE AGAINST WOMEN 1339, 1342 (2001) (asserting that Latinas, along with Asian women, may not report domestic violence and instigate arrest because of existing cultural norms in their communities).

54. *See* Rivera, *Domestic Violence Against Latinas*, *supra* note 37, at 245-46 (discussing the "different experiences and realities of women of color are not considered when designing effective guidelines on enforcement of domestic violence situations.").

55. *See id.* at 246 (noting that the lack of bilingual officers and staff in the court system requires many Latinas to fend for themselves in an unfamiliar language).

56. *See* Somini Sengupta, *Domestic Violence Law Set to be Renewed*, N.Y. TIMES, June 11, 2001, at B6 (describing ambivalence among battered women's groups over renewal of New York's mandatory arrest law and remarking on special problems facing immigrants). Specifically, Sengupta comments:

> In immigrant households, mandatory-arrest laws can be further complicated by language barriers and by fear of reprisal from immigration authorities. Sometimes, said Tuhina De O'Connor, executive director of the New York Asian Women's Center, the only shelter in the state with services tailored to the needs of Asian immigrant women, police officers rely on children to interpret. Or they show up at the scene only to find that only the accused abuser speaks English. Without sufficient resources to train interpreters, she said, *mandatory-arrest laws can be ineffective and, sometimes, darkly absurd.*

Id. (emphasis added).

but it is only one of many strategies that we ought to be considering,"[57] as well as by her criticism of the pro-arrest-policy focus of VAWA funding.[58] That problem is, of course, the lack of other resources to assist a woman who is forced to participate in a prosecution.[59]

C. We Cannot Explain the Dramatic Increase in the Numbers of Women Arrested for Domestic Violence or the Disproportionately High Number of Women of Color Among Those Arrested.

Simultaneous with the enactment of mandatory arrest policies in many jurisdictions has been a large increase in the numbers of women arrested and charged with crimes of domestic violence, either as the sole person arrested after an incident, or as the result of a "dual arrest" of both parties. In some areas a quarter or more of the domestic violence arrestees are women.[60] One view of the phenomenon is that increasing numbers of arrests are a reflection of the extent to which women are in fact perpetrators of violence.[61]

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57. SCHNEIDER, *supra* note 1, at 196.

58. *Id.* at 184, 197.

59. *See* Coker, *Shifting Power*, *supra* note 50, at 1009 (arguing for a test for the utility of anti-domestic-violence efforts that puts a priority on improving access to resources like transportation, counseling, and the tools for economic survival and that is designed on the basis of a local needs assessment that has as its particular focus poor women of color); *see also* INCITE! WOMEN OF COLOR AGAINST VIOLENCE, GENDER VIOLENCE AND THE PRISON INDUSTRIAL COMPLEX (Mar. 30, 2002) (on file with author) ("[W]hen public funding is channeled into policing and prisons, budget cuts for social programs, including women's shelters, welfare and public housing are the inevitable side effect. These cutbacks leave women less able to escape violent relationships.").

60. *See* Carey Goldberg, *Spouse Abuse Crackdown, Surprisingly, Nets Many Women,* N.Y. TIMES, Nov. 23, 1999, at A16 (noting various factors, including inadequate police training, dual arrests, and retaliatory arrests that account for women's arrest rates of 35% in Concord, New Hampshire; 33% in Connecticut; and 25% in Boulder, Colorado); *see also* Saunders, *supra* note 46, at 1426 (reflecting upon women's increasing rates of arrest, specifically for assault against their partners); Shamita Das Dasgupta, *A Framework for Understanding Women's Use of Nonlethal Violence in Intimate Heterosexual Relationships*, 8 VIOLENCE AGAINST WOMEN 1364, 1365-66 (2002) (summarizing studies of increased rates of women's arrests since the 1990s).

61. *See* Deborah Sontag, *Bad Love/Fierce Entanglements*, N.Y. TIMES, Nov. 17, 2002, (Mag.), at 52 (attributing this view to Professor Linda Mills). Sontag writes:

> One unforeseen consequence of the mandatory arrest laws has been that many women are getting arrested along with their boyfriends or husbands. Police arrive at a home, face accusations and counteraccusations and arrest both parties. Advocates for women see this as an unfortunate way in which the new laws, as interpreted by poorly trained police officers, have hurt women. In New York, legislators were persuaded to amend the law, requiring police officers to determine the 'primary physical aggressor' and arrest only that person. Mills argues, however, that the proliferation of dual arrests might signal that there is more reciprocal abuse than people want to acknowledge.

Others argue that there is a range of explanations, among which the least likely is that women are as violent as the arrest rates suggest.[62] Shamita Das Dasgupta, director of Manavi, Inc., has called for contextualized research and commented that "[o]ne of the most problematic issues currently facing the anti-domestic violence movement is the high number of battered women being arrested on domestic violence charges."[63] We know these things: (1) the increase has come at the same time as the enactment and enforcement of mandatory arrest laws; and (2) the direct and collateral consequences of criminal arrests and convictions are grave for both men and women, but often harder on children and families when the arrested person is the woman.[64]

In this area, too, there is strong evidence of the disparate impact of criminal justice sanctions on poor women and women of color. One study suggests that women who do not meet dominant culture expectations of "the good battered woman" are at greater risk for arrest; that women experience longer periods of pretrial detention than men with comparable domestic violence charges and similar criminal records because of their relative lack of access to resources for posting bail; that women of color and poor women get harsher sentences than men with similar histories and convictions.[65]

CONCLUSION

In the introduction to this Essay, I argued that we should at least *do no more harm* until studies show the efficacy of mandatory interventions, given what we know of their disparate impacts. At a minimum, we must not enact additional mandatory arrest laws. Where they exist, we should urge prosecutors to use discretion in

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Id.

62. *See, e.g.*, Osthoff, *supra* note 19, at 1529-34 (stressing the importance of knowing the context of arrest, and noting that some women are arrested for acts of self-defense that should not be prosecuted as crimes).

63. Das Dasgupta, *supra* note 59, at 1380-81 (emphasizing the need for recognition of the "cultural, historical, social, individual, and cross-cultural variables" involved in women's use of violence and in the responses of law enforcement, including mandatory arrest policies).

64. *See* JOHNSON, *supra* note 16, at 48 (noting that the majority of incarcerated African-American women are single parents of one or more children and are at greater risk than their white counterparts for losing of custody of their children); *see also* BHATTACHARJEE, *supra* note 14, at 4 (discussing the attitude of law enforcement reflecting the "double bind, in which women of color are prevented from caring adequately for their children and then are accused of child abuse and neglect").

65. *See, e.g.*, Miller, *supra* note 52, at 1349-50 (describing a Delaware-based analysis of arrest and pretrial detention patterns that disadvantage poor women and women of color).

making decisions about which victims will have their safety endangered by prosecution. We must encourage prosecutors not to adopt no-drop policies. When we know that we have enough information to be persuasive, we must ask legislatures to reverse themselves if they have passed mandatory arrest legislation. That is too cautious a view for some. Richard Sherman, one of the authors of the 1984 arrest experiment that was instrumental in refocusing police responses to domestic violence, now argues for the repeal of mandatory arrest laws: "Until you admit that mandatory arrest is a failure in our inner cities, you won't get anybody to spend a penny on looking for alternatives."[66]

In conclusion to this Essay, I include an end note from a social worker who was evaluating certain criminal court responses to domestic violence in New York City. She prefers to remain anonymous and not to name the court in which she was conducting her evaluation. She hopes that it is sufficient for the reader to know that she is a woman of color and that she was formerly battered. She wrote these comments April 4, 2002:

> As I think about the issue of batterers and what the [criminal courts] and related programs should do, I think they need to ask themselves what role they want to play in this issue. Are they interested in rehabilitating offenders? Interested in sending a strong message?
>
> Interested in punishing? And it may be all these and more, but in choosing what kind of approach to embrace, they'll have to prioritize these. This issue is so complex. I struggle with it because I know how devastating it is to be abused by a man and I know it's happening so often to so many women and I know that it needs to stop and I know that the jails are full of men of color and I know that women and families of color are suffering because their men are criminalized for so many things, and I know that men of color feel so disempowered and I know that must play a part in this and I know that no one gives a damn about this part of the equation or about social change to address this issue and that no one cares what happens to the family once the man is removed and that there is so much pain and in these families, every one is losing, including the children while the "experts" are preaching their ideologies and live lives that are so removed from the people who are suffering. So I have no answers. But I welcome any suggestions for how to approach thinking about this. It really is overwhelming. Whose voices are we really listening to when those of us who are working on this cause plan our interventions? When it comes to

66. Sontag, *supra* note 60.

> [criminal court] intervention, who should we be talking to? Are we paying attention to what the women know and what they want? Who is the constituency we are trying to serve?[67]

We must respond to her. It is the only way to rise to Professor Schneider's challenge and make a clear path through the murky middle ground between mandatory interventions and no help at all from the criminal justice system.

67. Comments written on April 4, 2002, and transmitted to the author by e-mail on April 7, 2002 (on file with author).