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VICTIMS AS INSTRUMENTS

Rachel J. Wechsler*

Abstract: Crime victims are often instrumentalized within the criminal legal process in furtherance of state prosecutorial interests. This is a particularly salient issue concerning victims of gender-based violence (GBV) because victim testimony is typically considered essential for successful prosecution of these types of crimes. Since the U.S. Supreme Court’s 2004 decision in *Crawford v. Washington*, courts require declarants to be available for cross-examination on “testimonial” hearsay evidence. Consequently, criminal legal actors are further incentivized to employ highly coercive practices aimed at securing GBV victims’ participation in the criminal legal process as evidentiary tools. These practices include arresting and incarcerating victims through material witness warrants and contempt power, criminally charging and threatening charges against them, and conditioning key assistance measures upon their full cooperation with law enforcement. This Article critically examines paternalistic and utilitarian justifications for these practices and exposes their misalignment with the core principles of paternalism and utilitarianism. It then examines the state’s approach to GBV victims under three interrelated conceptual frameworks which have thus far been overlooked in this context: deontological ethics, dehumanization constructs, and liberal legal principles. This novel critique argues that the practices at issue are incompatible with foundational principles concerning the dignified treatment of individuals within the liberal legal order. It also contends that the targeted use of these coercive mechanisms operates as punishment for victims who fail to conform to “ideal” and legitimate GBV victim stereotypes, which require full cooperation with criminal legal authorities. Following this analysis, the Article proposes a normative shift in the approach, from one that conceptualizes GBV victims primarily as instruments to one that constructs them as agents whose dignity and autonomy the state must respect.

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INTRODUCTION

All Western languages as well as modern Hebrew and Arabic refer to crime victims “with words denoting sacrifice and/or sacrificial objects.”¹ For example, the English “victim,” the French “*victime*,” and the Italian “*vittima*” all derive from the Latin “*victima*,” which means “sacrificial object.”² Victimologist Jan van Dijk links these etymological origins with contemporary constructions of the “ideal” victim as one who is innocent, passive, suffering, non-retaliatory, and forgiving.³ But there is an additional linkage between the etymological roots and contemporary status of victims:⁴ they are often treated as objects to be sacrificed in

1. Jan van Dijk, *Free the Victim: A Critique of the Western Conception of Victimhood*, 16 INT’L REV. VICTIMOLOGY 1, 2 (2009) [hereinafter van Dijk, *Free the Victim*]; see also Jan van Dijk, *In the Shadow of Christ?: On the Use of the Word “Victim” for Those Affected by Crime*, 27 CRIM. JUST. ETHICS 13, 13–14 (2008) [hereinafter van Dijk, *Shadow of Christ*].

2. van Dijk, *Shadow of Christ*, *supra* note 1, at 13.

3. *Id.* at 15, 20–22; van Dijk, *Free the Victim*, *supra* note 1, at 8, 12–25. The concept of the “ideal” crime victim was originally introduced by criminologist Nils Christie. Nils Christie, *The Ideal Victim*, in FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM 17, 18–19 (Ezzat A. Fattah ed., 1986).

4. The use of the term, “victim,” is complex and contested in scholarly and popular discourse. Some feminists have argued that “survivor” should be used instead of “victim” on the grounds that the latter stigmatizes women who have experienced violence as weak and passive, and the former highlights their strength and resistance. This conceptualization propelled a shift from the use of “victim” to “survivor” within the feminist discourse in the early 1980s. LIZ KELLY, SURVIVING SEXUAL VIOLENCE 159–60 (1988). However, the use of “survivor” has also been criticized as minimizing the trauma of sexual violence and depriving the individual who has experienced it of support and sympathy when the need arises. *E.g.*, Monica Thompson, *Life After Rape: A Chance to Speak?*, 15 SEXUAL & RELATIONSHIP THERAPY 325, 330 (2000). Both terms have rightly been criticized as reductive and together representing a false dichotomy. See, e.g., Jericho M. Hockett, Lora K. McGraw

furtherance of state⁵ prosecutorial interests.

The treatment of crime victims as proverbial “sacrificial objects”—essentially mere instruments of the criminal legal system—has been observed and criticized in the U.S. and in other jurisdictions across the globe, especially with respect to victims of gender-based violence (GBV).⁶ The prevalence of this phenomenon is an outgrowth of the dominant crime-centered approach to GBV, which prioritizes carceral

& Donald A. Saucier, *A “Rape Victim” by Any Other Name*, in *EXPRESSION OF INEQUALITY IN INTERACTION: POWER, DOMINANCE, AND STATUS* 81, 97–98 (Hanna Pishwa & Rainer Schulze eds., 2014). In reality, many individuals who have experienced crime identify differently within different contexts—utilizing one, both or neither of the terms in various settings and time periods in their lives. *See id.* at 85. In this Article, the word “victim” is used to refer to an individual who has had a (gender-based violence) crime committed against her and does not employ the term to suggest a particular identity, set of characteristics, or pattern of behavior for this individual (though I acknowledge the difficulty of disentangling terms from certain cultural connotations). Moreover, I often use “victim” instead of “survivor” to underscore the harm the state inflicts through its use of coercive and instrumentalizing practices with this population, as the former term is more often associated with harm and injury (both legally and colloquially). *See Victim*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “victim” as “[a] person harmed by a crime, tort, or other wrong”); Amy Leisenring, *Confronting “Victim” Discourses: The Identity Work of Battered Women*, 29 *SYMBOLIC INTERACTION* 307, 316 (2006) (finding that women who experienced intimate partner violence “commonly defined a victim as a person who is in some way harmed” in a qualitative study). Yet, I recognize that neither “victim” nor “survivor” is perfect.

5. I primarily employ the term “state” to refer to government in general rather than to one (or more) of the fifty U.S. states.

6. *See, e.g.*, Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 *U. PA. L. REV.* 1655, 1705 (2010) (U.S.); DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 189 (2019) (U.S.); Luz María Puente Aba & Agustina Iglesias Skulj, *The Spanish Plan Against Trafficking in Women: Policies and Outcomes (2008–2011)*, in *THE ILLEGAL BUSINESS OF HUMAN TRAFFICKING* 71, 81 (Maria João Guia ed., 2015) (Spain); Witold Klaus, Konrad Buczkowski & Paulina Wiktorska, *Empowering the Victims of Crime: A Real Goal of the Criminal Justice System or No More Than a Pipe Dream?*, in *TRUST AND LEGITIMACY IN CRIMINAL JUSTICE: EUROPEAN PERSPECTIVES* 65, 79 (Gorazd Meško & Justice Tankebe eds., 2015) (Poland); Marie Segrave, *Surely Something Is Better than Nothing? The Australian Response to the Trafficking of Women into Sexual Servitude in Australia*, 16 *CURRENT ISSUES CRIM. JUST.* 85, 88, 90 (2004) (Australia); Mary Cunneen, *Anti-Slavery International*, 1 *J. GLOB. ETHICS* 85, 91 (2005) (multinational). “[G]ender-based violence” is traditionally understood as “violence which is directed against a woman because she is a woman or that affects women disproportionately.” Comm. on the Elimination of Discrimination Against Women, Gen. Recommendation No. 35 on Gender-based Violence Against Women, Updating Gen. Recommendation No. 19, U.N. Doc. CEDAW/C/GC/35, at 2 (July 14, 2017). More recently, the term has also been used to describe violence against individuals who do not identify or present as women, perpetrated on the basis of their actual or perceived gender identity and/or sexual orientation. *See INT’L LAB. ORG., MEDIA-FRIENDLY GLOSSARY ON MIGRATION: WOMEN MIGRANT WORKERS AND ENDING VIOLENCE AGAINST WOMEN (EVAW) EDITION 9* (2020). This Article does not exclude these individuals, but I recognize that there are particular issues and potential differences related to the experiences of gender minorities which merit exploration but fall outside of the scope of this discussion.

responses in addressing this social problem.⁷ This Article focuses on the state's "instrumentalization" of GBV victims within the criminal legal process—referring to the construction and use of these individuals as evidentiary tools in the state's investigation and prosecution of GBV offenders.

GBV victims are particularly vulnerable to state coercion and instrumentalization because victim testimony is typically considered essential for successful prosecution of GBV crimes, including human trafficking, intimate partner violence (IPV), and sexual assault.⁸ Governments are further incentivized to instrumentalize this population by overreliance upon numerical indicators, particularly those concerning criminal legal system activities such as number of prosecutions and convictions, in assessments of their responses to GBV (e.g., the U.S. State Department's annual Trafficking in Persons reports).⁹ The incentives to do so are especially strong in the U.S. due to the Supreme Court's Confrontation Clause jurisprudence. The seminal *Crawford v. Washington*¹⁰ decision has made victims' cooperation practically indispensable in GBV prosecutions because it requires them to be available for cross-examination if their testimonial out-of-court statements, such as verbal statements during police interviews conducted after a GBV incident and written statements in petitions for civil orders of protection, are to be admitted into evidence.¹¹ *Crawford's* progeny

7. See Chuang, *supra* note 6, at 1663, 1694, 1704–05, 1725; Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147, 149, 155 (2016); Donna Coker & Ahjané D. Macquoid, *Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement*, 5 U. MIA. RACE & SOC. JUST. L. REV. 585, 587 (2015); JENNIFER MUSTO, CONTROL AND PROTECT: COLLABORATION, CARCERAL PROTECTION, AND DOMESTIC SEX TRAFFICKING IN THE UNITED STATES 7 (2016).

8. See Amy Farrell, Colleen Owens & Jack McDevitt, *New Laws but Few Cases: Understanding the Challenges to the Investigation and Prosecution of Human Trafficking Cases*, 61 CRIME, L. & SOC. CHANGE 139, 157–58, 162 (2014); Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 870–71 (2009).

9. See SALLY ENGLE MERRY, THE SEDUCTIONS OF QUANTIFICATION: MEASURING HUMAN RIGHTS, GENDER VIOLENCE, AND SEX TRAFFICKING 134, 137 (2016); Kimberly D. Bailey, *It's Complicated: Privacy and Domestic Violence*, 49 AM. CRIM. L. REV. 1777, 1806–07 (2012).

10. 541 U.S. 36 (2004).

11. See Lininger, *supra* note 8, at 864 (“The Supreme Court’s recent confrontation jurisprudence, beginning with *Crawford v. Washington* in 2004, has exacerbated the plight of [domestic violence] victims by making them indispensable as trial witnesses.”); Anoosha Rouhanian, *A Call for Change: The Detrimental Impacts of Crawford v. Washington on Domestic Violence and Rape Prosecutions*, 37 B.C. J.L. & SOC. JUST. 1, 70 (2017) (“*Crawford v. Washington* and its progeny can be a significant detriment to the prosecution of rape and domestic violence cases by keeping testimonial hearsay—evidence that is often essential for a conviction—out of trial when victims of such cases are unavailable for cross-examination.”); Deborah Tuerkheimer, *Forfeiture After Giles: The Relevance of “Domestic Violence Context”*, 13 LEWIS & CLARK L. REV. 711, 730 (2009) (“Because evidence-

affirmed strict cross-examination requirements for many types of evidence typically relied upon in GBV prosecutions, thereby incentivizing the instrumentalization of victims as prosecutorial tools.¹²

Moreover, it is crucial to examine the coercive tactics used to instrumentalize GBV victims in particular because the potential harms are especially serious for this population, given their already high risk of post-traumatic stress disorder (PTSD) and other psychological sequelae.¹³ The significant likelihood of harm combined with powerful incentives for

based prosecution has undoubtedly become more difficult in this post-*Crawford* era, it is fair to predict that the Court's rulings will compel prosecutors to secure victim testimony in a greater number of cases.").

12. See *Crawford*, 541 U.S. 36; *Davis v. Washington*, 547 U.S. 813, 822 (2006) (holding that statements made in response to a police interrogation are classified as "testimonial," and therefore subject to the Confrontation Clause, if they are not made during an "ongoing emergency" and the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"); *Michigan v. Bryant*, 562 U.S. 344, 371–77 (2011) (suggesting that a lack of threat and injury during and the existence of formality and structure in a police interrogation weigh in favor of classifying statements made during it as testimonial); Rouhania, *supra* note 11, at 18–21 (criticizing *Michigan v. Bryant* on the grounds that the multi-factor analysis it introduces to determine whether a statement made within the context of an emergency is "testimonial" leaves courts too much discretion, which is likely to adversely affect domestic violence and rape prosecutions); see also *Giles v. California*, 554 U.S. 353, 356–58 (2008) (accepting that verbal statements made to a police officer responding to a domestic violence report counted as "testimonial," a classification which the State did not dispute). Although the forfeiture by wrongdoing doctrine allows for the admission of testimonial hearsay when the witness is unavailable for cross-examination due to the defendant's actions, which were designed to prevent her from testifying, this of course does not apply in the numerous other situations in which a victim resists involvement in the criminal legal process. See *id.* at 359–69; Andrea J. Nichols, *No-Drop Prosecution in Domestic Violence Cases: Survivor-Defined and Social Change Approaches to Victim Advocacy*, 29 J. INTERPERSONAL VIOLENCE 2114, 2118–19 (2014) (describing many reasons why some domestic violence victims do not wish to assist with the prosecution of their abuser, including a desire to avoid reliving their abuse and seeing their abuser in court, financial concerns about missing work to attend proceedings or losing the defendant's income, and a fear of Child Protective Services intervention); Rachel J. Wechsler, *Deliberating at a Crossroads: Sex Trafficking Victims' Decisions About Participating in the Criminal Justice Process*, 43 FORDHAM INT'L L.J. 1033, 1049–55, 1070–71, 1073–74, 1078–80 (2020) (identifying fear of reprisals, a belief that pressing charges would be futile, a link with one's trafficker, and a desire to move on from the past as factors weighing against proceeding with the criminal justice process for sex trafficking victims).

13. See, e.g., Mazeda Hossain, Cathy Zimmerman, Melanie Abas, Miriam Light & Charlotte Watts, *The Relationship of Trauma to Mental Disorders Among Trafficked and Sexually Exploited Girls and Women*, 100 AM. J. PUB. HEALTH 2442, 2444–45 (2010) (finding that 77% of a sample of 204 female sex trafficking victims had high levels of PTSD symptoms, 48% experienced high levels of anxiety symptoms, and 55% had high levels of depression symptoms, after statistically controlling for pre-trafficking violence and abuse); Emily R. Dworkin, *Risk for Mental Disorders Associated with Sexual Assault: A Meta-Analysis*, 21 TRAUMA, VIOLENCE & ABUSE 1011, 1018 (2020) (finding that experiencing sexual assault is associated with an increased risk of many DSM-defined mental disorders, especially PTSD and depressive disorders); Dominique E. Roe-Sepowitz, Kristine E. Hickie, Jaime Dahlstedt & James Gallagher, *Victim or Whore: The Similarities and Differences Between Victim's Experiences of Domestic Violence and Sex Trafficking*, 24 J. HUM. BEHAV. SOC. ENV'T 883, 890 (2014) (observing that both victims of domestic violence and sex trafficking frequently experience traumatic events).

instrumentalization likely contribute to the high incidence of secondary victimization¹⁴ and re-traumatization among victims of GBV.¹⁵ Furthermore, these dynamics are significant because they are colored by wider societal norms, both current and historical, which disempower GBV victims and women more generally.¹⁶

This Article examines several tactics used to coerce GBV victims' participation in the investigation and prosecution of offenders. These tactics are emblematic of a wider approach in which GBV victims are constructed as sacrificial, prosecutorial instruments: arresting and incarcerating them through material witness and contempt warrants,¹⁷ threatening and bringing criminal charges against them,¹⁸ and conditioning key assistance upon their full cooperation with criminal legal authorities.¹⁹ The severity of these practices calls for in-depth analysis of their implications, justifications, consequences, and moral status. This Article provides this novel analysis and argues that both traditional justifications for these practices based on paternalism and utilitarianism,

14. "Secondary victimization" is broadly defined as the inadequate, insensitive, unfair, or inappropriate treatment of crime victims, typically on the part of criminal justice and social agencies, which compounds the trauma from their primary victimization. See Anna Gekoski, Joanna R. Adler & Jacqueline M. Gray, *Interviewing Women Bereaved by Homicide: Reports of Secondary Victimization by the Criminal Justice System*, 19 INT'L REV. VICTIMOLOGY 307, 308 (2013); Jo-Anne Wemmers, *Victims' Experiences in the Criminal Justice System and Their Recovery from Crime*, 19 INT'L REV. VICTIMOLOGY 221, 221–22 (2013).

15. See Rebecca Campbell, *What Really Happened? A Validation Study of Rape Survivors' Help-Seeking Experiences with the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 55, 61–62 (2005) (finding high rates of secondary victimization among rape survivors within the context of their interaction with police officers following their primary victimization); Rebecca Campbell & Sheela Raja, *The Sexual Assault and Secondary Victimization of Female Veterans: Help-Seeking Experiences with Military and Civilian Social Systems*, 29 PSYCH. WOMEN Q. 97, 102 (2005) (finding that 65% of female veterans in their study reporting their sexual assaults experienced secondary victimization within the legal system); CORTNEY A. FRANKLIN, ALONDRA D. GARZA, AMANDA GOODSON & LEANA ALLEN BOUFFORD, CRIME VICTIMS' INST., DOES TRAINING AFFECT RAPE AND DOMESTIC VIOLENCE MYTH ENDORSEMENT AMONG POLICE PERSONNEL? A TREND ANALYSIS 1 (2020), http://dev.cjcenter.org/_files/cvi/90-brief-2020-01.pdf [<https://perma.cc/T9FW-BCEN>] (attributing low reporting rates for domestic violence and sexual assault incidents to the tendency of criminal justice actors to secondarily victimize survivors).

16. See *infra* sections II.A, III.B.

17. See *infra* section I.A.

18. See *infra* section I.B.

19. See *infra* section I.C. There are other tactics that also serve as examples of the state's overarching approach to GBV victims, such as threatening to refer their case to child protective services if they fail to cooperate with the police or prosecutor and utilizing highly aggressive interview techniques, including "question[ing] victims until they 'break.'" Farrell et al., *supra* note 8, at 158; see also LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 76 (2008); DONNA COKER, SANDRA PARK, JULIE GOLDSCHIED, TARA NEAL & VALERIE HALSTEAD, ACLU, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING 25 (2015).

as well as overlooked philosophical approaches based on deontology and liberal legal theory, simply cannot provide sound justification for their use. The Article proposes an alternative approach for the state to adopt towards GBV victims, rooted in the conceptualization of them as agentic individuals, which is significantly more consistent with both relevant empirical evidence and our normative commitments as a liberal society.

Thus far, scholars who have noted the state's tendency to instrumentalize victims within the criminal legal process have only done so very briefly, without providing robust analysis of this phenomenon.²⁰ Furthermore, scholarship discussing tactics that this Article contests has mainly focused on singular practices as instrumentalizing or otherwise harmful to GBV victims rather than holistically viewing the practices as part of an overarching, multi-faceted state approach.²¹ The few who have viewed them holistically have applied useful but very different conceptual frameworks from the one employed in this Article. Two important examples are Linda Mills's application of a clinical and state violence (as mimicking the dynamics of "battering relationships") framework to the state's treatment of victims of domestic violence²² and Leigh Goodmark's analysis of the state's approach to this same population through the lens of prosecutorial (mis)conduct and discretion.²³

20. See, e.g., *supra* note 6 (noting briefly that state actors treat victims as investigatory and/or prosecutorial tools in various jurisdictions); Jessica Emerson & Alison Aminzadeh, *Left Behind: How the Absence of a Federal Vacatur Law Disadvantages Survivors of Human Trafficking*, 16 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 239, 246 (2016) (mentioning that prosecutors threaten certain trafficking victims with prosecution to coerce their testimony against their trafficker, thereby treating them as "instruments of criminal investigation" (quoting Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, ¶61, U.N. Doc. A/HRC/17/35 (Apr. 13, 2011))); Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 949 (2007) (observing that in the traditional criminal justice process, "the victim may feel like simply a tool the prosecution uses to obtain a conviction (which essentially is the case)," with little further discussion of this point).

21. See, e.g., Chuang, *supra* note 6, at 1705 (highlighting only conditional assistance as instrumentalizing); Russell D. Covey, *Recantations and the Perjury Sword*, 79 ALB. L. REV. 861, 874–75 (2015) (discussing the use and harms of perjury charges against domestic violence victims); Njeri Mathis Rutledge, *Looking a Gift Horse in the Mouth—The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims*, 19 DUKE J. GENDER L. & POL'Y 223, 243–45 (2011) [hereinafter Rutledge, *Gift Horse*] (criticizing the conditioning of eligibility for government-run crime victim compensation programs upon a victim's cooperation with law enforcement on the grounds that it is "extortionary" and particularly harmful for domestic violence victims).

22. Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999). Sabrina Balamwalla has more recently applied this framework to the state's treatment of human trafficking victims. See generally Sabrina Balamwalla, *Trafficking Rescue Initiatives as State Violence*, 122 PENN ST. L. REV. 1 (2017).

23. Leigh Goodmark, *The Impact of Prosecutorial Misconduct, Overreach, and Misuse of Discretion on Gender Violence Victims*, 123 DICK. L. REV. 627 (2019) [hereinafter Goodmark, *Prosecutorial Misconduct*].

In contrast, this Article employs a moral philosophical lens to analyze the state's approach to GBV victims more broadly. Furthermore, it draws upon empirical evidence to examine the (mis)alignment between claimed normative commitments justifying this approach and its impact in practice. And importantly, it analyzes the state's approach through key theoretical frameworks that have thus far been overlooked in this context: deontological ethics, dehumanization constructs, and liberal legal principles. These frames illuminate how the state's highly coercive and instrumentalizing approach to GBV victims violates foundational principles that sit at the very heart of our liberal society and are meant to protect the human dignity of its members. These principles include general prohibitions on treating human beings "merely as a means," regarding them as objects or things rather than as people, and sacrificing individuals against their will for the sake of the greater good.²⁴ As law has "immanent moral content" that is also reflected in its practice, implementation, and institutions, drawing upon moral philosophy to analyze legal practices and procedures is an "important philosophical project in the law."²⁵ Doing so enables us to identify, question, and critique our normative commitments, and with the addition of empirical evidence, understand whether we are indeed faithful to them in practice. These are essential steps if we wish to make meaningful progress towards becoming a more enlightened, self-aware, ethical, and just society.

The remainder of this Article proceeds in four parts. Part I describes several coercive practices state actors employ to force GBV victims to participate in the criminal legal process as evidentiary tools against their will: jailing victims through material witness warrants and contempt power, charging or threatening criminal charges against them, and conditioning assistance measures upon their cooperation with law enforcement and prosecutors. Part II examines traditional justifications for these practices, which are still advanced today to defend their use with GBV victims. These justifications are categorized as paternalistic or utilitarian and are analyzed through the lens of these respective conceptual frameworks. Drawing on empirical evidence, this part exposes fundamental inconsistencies among the goals of these frameworks and the real-world impact of the contested practices. Part III analyzes these practices and the instrumentalizing approach they reflect under the rubric of three interrelated, overlooked frameworks: deontology, dehumanization, and liberal legal theory. In doing so, it makes clear that

24. See *infra* sections III.A–C.

25. See Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 STAN. L. REV. 1087, 1151–52 (2013).

the state's coercive and instrumentalizing approach often dehumanizes GBV victims and offends their human dignity. Part IV begins by conceptualizing state responses to GBV victims who resist being instrumentalized as punishment for violating prevailing "ideal" and "genuine" victim constructions, which require full cooperation with law enforcement.²⁶ This Part then proposes changes to the approach that would facilitate, rather than punish, GBV victims' exercises of agency within their lives. A conclusion highlighting implications for the current conversation around criminal justice reform follows.

I. MEANS OF STATE INSTRUMENTALIZATION OF GBV VICTIMS

Governmental actors employ various means to instrumentalize and coerce GBV victims within the criminal legal process in furtherance of the state's prosecutorial goals. Some of these means reduce victims to evidentiary tools—objects to be sacrificed for the sake of the greater good or even in the name of the victims themselves. The results of criminologist Amy Farrell and her collaborators' empirical study on human trafficking cases involving over 100 in-depth interviews with federal, state, and local law enforcement agents and prosecutors across twelve U.S. counties provide strong support for this notion.²⁷ One key finding is the tendency of police to "describe[] victims as 'evidence' that needed to be secured and stabilised."²⁸ For example, a law enforcement agent explained, "As a criminal investigator, I look at a victim as a piece of evidence just like that tape recorder and so my interest is in having that evidence stabilized into proper custody."²⁹ It is this very conceptualization of GBV victims that animates a system in which it is common for state actors to

26. See Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 83 (2008) (asserting that the "paradigmatic battered woman" is expected to cooperate with police and prosecutors in their pursuit of her abuser); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 187 (2007) (characterizing the "iconic" human trafficking victim in the U.S. as fully cooperative with law enforcement requests); Barbara Masser, Kate Lee & Blake M. McKimmie, *Bad Woman, Bad Victim? Disentangling the Effects of Victim Stereotypicality, Gender Stereotypicality and Benevolent Sexism on Acquaintance Rape Victim Blame*, 62 SEX ROLES 494, 497 (2010) (describing stereotypical "genuine rape victims" as "cooperat[ing] with the police in every possible way").

27. See AMY FARRELL, COLLEEN OWENS, JACK MCDEVITT, MEREDITH DANK, REBECCA PFEFFER, STEPHANIE FAHY & WILLIAM ADAMS, IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 32 (2012).

28. Amy Farrell, Monica J. DeLateur, Colleen Owens & Stephanie Fahy, *The Prosecution of State-Level Human Trafficking Cases in the United States*, 6 ANTI-TRAFFICKING REV. 48, 63 (2016).

29. See FARRELL ET AL., *supra* note 27, at 111.

instrumentalize them in ways that are harmful, dehumanizing, and morally problematic. The following subsections describe several of these troubling practices: arresting and incarcerating GBV victims through material witness warrants and contempt power, threatening and bringing criminal charges against them, and conditioning crucial assistance measures upon their full cooperation with criminal legal authorities.

A. *Material Witness Warrants and Contempt Power*

The practice of arresting and incarcerating victims of GBV for their refusal or reluctance to testify has long been a means of state instrumentalization of these individuals within the criminal legal process.³⁰ This practice has been documented across the U.S. at federal, state, and local levels.³¹

30. See Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 313 (1992) (explaining that the policy of employing contempt warrants to jail any domestic violence victim who fails to appear in court has “resulted in significant numbers of victims being arrested and incarcerated” and constitutes “the purest form of re-victimization”); HENRY WU & ALEXANDRA YELDERMAN, HUM. TRAFFICKING LEGAL CTR., PROSECUTION AT ANY COST? THE IMPACT OF MATERIAL WITNESS WARRANTS IN FEDERAL HUMAN TRAFFICKING CASES 1 (2020), http://www.htlegalcenter.org/wp-content/uploads/Material-Witness-Report-FINAL-FOR-PUBLICATION_April-2020.pdf [<https://perma.cc/W72Z-XS37>] (finding that “[i]t is not uncommon for courts to issue these [material witness] warrants in human trafficking prosecutions, particularly in sex trafficking cases, where the material witnesses are sometimes the defendant’s victims”); Sarah Stillman, *Why Are Prosecutors Putting Innocent Witnesses in Jail?*, NEW YORKER (Oct. 17, 2017), <http://www.newyorker.com/news/news-desk/why-are-prosecutors-putting-innocent-witnesses-in-jail> [<https://perma.cc/N9SC-ZJ4P>] (highlighting the nationwide trend of arresting and jailing victims of GBV (as well as other witnesses) with material witness warrants to compel their testimony); Alex Roth, *Jailing the Victim—Courts Force Battered Women*, DAILY NEWS L.A., June 8, 1998, at N1 (reporting the jailing of a domestic violence victim by a municipal court judge to force her to testify in her abuser’s trial); John Riley, *Spouse-Abuse Victim Jailed After No-Drop Policy Invoked*, 5 NAT’L L.J. 2, 2 (Aug. 22, 1983) (reporting the jailing of a domestic violence victim, which was ordered by an Alaska District Court judge for the victim’s “adamant refusal to testify”).

31. See, e.g., WU & YELDERMAN, *supra* note 30 (highlighting the incarceration of human trafficking victims through material witness warrants in federal human trafficking cases); Stillman, *supra* note 30 (noting the imprisonment of a domestic violence victim in Orleans Parish, Louisiana, a sexual assault victim in Washington State, and a rape survivor in Harris County, Texas on material witness warrants); Nate Morabito, *Advocates Horrified After Domestic Violence Victims Jailed in Washington County, TN*, WJHL (Sept. 11, 2016, 12:21 AM), <http://www.wjhl.com/news/advocates-horrified-after-domestic-violence-victims-jailed-in-washington-county-tn/> [<https://perma.cc/HZH2-S4T5>] (reporting the arrest and jailing of more than a dozen domestic violence victims in Washington County, Tennessee for failing to appear in court to testify against their abusers); Mitchell Byars, *Boulder DA Discusses Recent Decision to Hold Named Domestic Violence Victim in Contempt for Refusing to Testify*, DAILY CAMERA (June 13, 2021), <http://www.dailycamera.com/2021/06/13/boulder-da-discusses-recent-decision-to-hold-named-domestic-violence-victim-in-contempt-for-refusing-to-testify/> [<https://perma.cc/CAW9-DLYZ>] (discussing a Boulder County, Colorado district judge’s decision to hold a domestic violence victim in contempt and jail her overnight for her refusal to testify against her abuser).

A material witness warrant is used to arrest and detain a witness whose testimony is expected to be material in a criminal case and who a court determines is unlikely to appear voluntarily.³² Not only are material witness warrants used to jail GBV victims who are unwilling to testify, but they are also employed to confine victims who are viewed as unreliable—and thus potentially unlikely to respond to a subpoena—due to mental illness, past or current addiction, homelessness, undocumented status, or other reasons.³³ Detention pursuant to material witness warrants is synonymous with incarceration for offenders. Material witnesses are detained in penal facilities and are “fingerprinted, photographed, shackled and clothed in jail garb”—despite not being accused of committing any crime.³⁴ The number of GBV victims who are arrested and incarcerated through material witness warrants is not possible to ascertain because proceedings regarding these warrants are often under seal and do not appear in docketed documents or available transcripts. Moreover, it is frequently difficult to determine whether a detained material witness is a victim when relevant documents are available.³⁵ From the limited amount of accessible information, researchers at the Human Trafficking Legal Center were able to identify forty-nine instances of human trafficking victims being detained as material witnesses in federal criminal proceedings against their traffickers between 2009 and early 2020, predominantly in sex trafficking cases.³⁶ As these researchers acknowledge, the actual number of trafficking victims jailed on material witness warrants is likely to be far greater.³⁷ Similarly, the length of material witnesses’ detention is shrouded in secrecy, but anecdotal

32. WU & YELDERMAN, *supra* note 30, at 3 (noting that the federal material witness statute requires an affidavit showing that the witness’s testimony is “material in a criminal proceeding” and that “it may become impracticable to secure the presence of the person by subpoena” for a material witness warrant to be issued (quoting 18 U.S.C. § 3144)). U.S. states and the District of Columbia have material witness statutes as well. *See generally* NAT’L CRIME VICTIM L. INST., SURVEY OF SELECT STATE AND FEDERAL MATERIAL WITNESS PROVISIONS (2016), <http://law.lclark.edu/live/files/23521-state-and-federal-material-witness-provisions> [<https://perma.cc/7MVJ-X5HB>] [hereinafter NAT’L CRIME VICTIM L. INST., SURVEY].

33. *See* WU & YELDERMAN, *supra* note 30, at 9–16, 20–22; Samantha Michaels, *Courts Are Jailing Victims of Sexual Assault*, MOTHER JONES (Oct. 31, 2016), <http://www.motherjones.com/politics/2016/10/why-are-women-thrown-jail-after-theyre-raped-or-assaulted/> (last visited Apr. 4, 2022).

34. Preston Burton, Paige Ammons & Caroline Eisner, *Coercive Process for Material Witnesses Needs Reform*, LAW360 (Mar. 24, 2019, 8:02 PM), <http://www.law360.com/articles/1140264/coercive-process-for-material-witnesses-needs-reform> [<https://perma.cc/F7XS-UYH4>].

35. *See id.*; WU & YELDERMAN, *supra* note 30, at 4.

36. WU & YELDERMAN, *supra* note 30, at 3–4.

37. *Id.* at 4.

examples range from overnight to months for GBV victims.³⁸

Another means used to arrest and incarcerate GBV victims who are unwilling to testify is the court's contempt power. Unlike material witness warrants, which authorize preemptive arrest and detention, contempt power is used to arrest and detain subpoenaed victim-witnesses after they do not appear in court at the designated time or refuse to testify when there. If a witness defies a subpoena, the court can hold her³⁹ in contempt and order her arrest and detention, *sua sponte* or on a party's motion.⁴⁰ A prosecutor may also file contempt charges against a recalcitrant witness who has been subpoenaed and request a warrant for her arrest.⁴¹ The

38. See, e.g., Alex Barber, *Prosecutor Orders Arrest of Woman as Material Witness to Testify Against Her Alleged Abuser*, BANGOR DAILY NEWS (Sept. 20, 2013), <http://bangordailynews.com/2013/09/20/news/prosecutor-orders-arrest-of-woman-as-material-witness-to-testify-against-her-alleged-abuser/> (last visited Apr. 4, 2022) (reporting the arrest and overnight jailing of a domestic violence victim in Maine on a material witness warrant); Kevin McGill, *City Council Votes to End Jailing Uncooperative Victims*, ASSOCIATED PRESS (Feb. 7, 2019), <http://apnews.com/article/218cc9c448944e499a66df70ed9631a3> (last visited Apr. 4, 2022) (describing a lawsuit in which a plaintiff who is a sex trafficking victim alleges that she was incarcerated for more than 100 days on a material witness warrant); Michaels, *supra* note 33 (reporting the jailing of a sexual abuse victim in Oregon for approximately fifty days and a rape victim in Texas for about a month on material witness warrants); WU & YELDERMAN, *supra* note 30, at 8–10, 16, 19–20 (describing examples of human trafficking victims being detained on material witness warrants for periods ranging from one night to at least six weeks).

39. In line with other scholarship on GBV, I employ female pronouns when referring to victims and male pronouns when referring to perpetrators because this is the most common gender dynamic at play for these types of crimes. See, e.g., Daniel Maggen, “*When You’re a Star*”: *The Unnamed Wrong of Sexual Degradation*, 109 GEO. L.J. 581, 594 n.77 (2021) (“Given that an overwhelming share of victims of sexual wrongdoing are female and the perpetrators male, I use mostly gendered pronouns that reflect this proportion.”); Natalie Nanasi, *Disarming Domestic Abusers*, 14 HARV. L. & POL’Y REV. 559, 561 n.13 (2020) (“Although both men and women experience intimate partner abuse, this Article uses female pronouns to refer to survivors because men and women are not equally impacted by violence in the home”); Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J.L. & FEMINISM 125, 125 n.5 (2017) (“The female pronoun is used to refer to the survivor and the male pronoun is used to refer to the alleged perpetrator. These pronouns reflect the generally gendered nature of campus sexual assault.”). However, it is important to recognize that men and non-binary individuals can also be victims of GBV and that women and non-binary individuals can be perpetrators.

40. See 18 U.S.C. § 401(3) (“A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority . . . as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command.”); 28 U.S.C. § 1826(a) (“Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify . . . the court . . . may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony. . . . No period of such confinement shall exceed the life of . . . the court proceeding . . . but in no event shall such confinement exceed eighteen months.”); Paul A. Grote, Note, *Purging Contempt: Eliminating the Distinction Between Civil and Criminal Contempt*, 88 WASH. U. L. REV. 1247, 1269 (2011); NAT’L CRIME VICTIM L. INST., SURVEY, *supra* note 32.

41. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1854 n.17, 1864 (1996); Morabito, *supra* note 31 (reporting

length of incarceration pursuant to civil contempt orders is often tied to the victim's will—offering release upon a decision to comply and become the state's evidentiary tool.⁴² For example, a Nebraska trial court judge held an adult survivor of child sexual abuse in contempt for refusing to testify and ordered her imprisonment for “90 days or until such time as she testifies as ordered, whichever occurs first.”⁴³ The Nebraska Supreme Court affirmed this order on appeal.⁴⁴

The following transcript excerpts exemplify the dynamics around the state's instrumentalization of GBV victims by means of material witness warrants and contempt power, particularly the potential for serious harm.⁴⁵ The victim featured in the excerpts is a nineteen-year-old survivor of child sex trafficking.⁴⁶

[ASSISTANT U.S. ATTORNEY]: . . . Ms. [Elaine] REDACTED does not want to testify at the trial. The government has served her with a subpoena to testify.

. . .

[VICTIM'S MOTHER]: Elaine was on another case last year. . . . And she's trying to overcome certain things that's traumatized her from that last case. And, for her, at this time, it's like a—a rolling stone to what that last case was to be presented into this new case, that for her understanding, . . . because she has bipolar disorder and some other tendencies, as well For her, it is a stressful, hurting thing to do. And we've just come, at this point in time in her life, where she is starting to do something positive with herself, and starting to learn to love and respect herself in trying to understand that what has happened to her is not her fault. So, right now, it's very overwhelming for her.

. . .

THE COURT: I mean the trouble is in these cases, that you can be held as a material witness and, that, I don't think would be a wise thing for us to get into.

that prosecutors in Tennessee filed contempt charges against and requested arrest warrants for domestic violence victims based on their defiance of a subpoena).

42. Civil contempt is “coercive or remedial in nature” and “the usual sanction is to confine the contemnor until he or she complies with the court order.” *Contempt*, BLACK'S LAW DICTIONARY (11th ed. 2019). In contrast, criminal contempt is “punitive in nature” and any confinement of the contemnor imposed as a sanction must be for a definite period. *Id.*

43. *State v. Riensche*, 812 N.W.2d 293, 296 (Neb. 2012).

44. *Id.* at 301.

45. Transcript of Hearing at 3–4, *United States v. Corley*, 2016 WL 9022508 (S.D.N.Y. Jan. 15, 2016) (No. 13-cr-48) [hereinafter Transcript of Nov. 6, 2013].

46. *Id.*

...

[VICTIM'S MOTHER]: Well what is the kind of penalty if she does not testify. What's the—what would happen?

THE COURT: She would be ordered to. She can be held in contempt of court for not testifying, and be put in jail for not testifying if she, you know, disobeys the Court order.

...

[VICTIM]: . . . I don't want to do this. I would rather go to jail than testify. I said already I don't want to do something, I'm not going to be forced to do something I do not want to do.

...

[VICTIM'S MOTHER]: Elaine is not—is—is just not fit right now to do this. . . . [W]e've come a long way with her, trying to get her back, stable to where she was. Elaine already does not sleep at night. Elaine still hears voices. Elaine is—is just getting by by a thread to live life, as it is now, to even deal and cope. She just started a new job two days ago. And, she was just starting to come out and try to blossom and be where she needs to be. And for this to come, right now, in her life, for something that she feels, because she has only seen that person once or twice, have only had a relationship with him once or twice, why do I need to testify—this is her thinking, her way of thinking.

...

[PUBLIC DEFENDER ON DUTY]: Having spoken with Ms. REDACTED, she, at this point, is 100 percent—mathematically impossible, but 110 percent adamant that she would rather, as she puts it, go to jail than testify. I have had some conversations with the U.S. Attorneys, the assistants in the case. Obviously, we hope, all of us, I hope, it doesn't come to that. We don't want Elaine to suffer more than she already has[.]

[VICTIM]: I feel like I already am.

...

THE COURT: Has anyone talked to you about . . . this case? Any third party? Has anyone approached to you and talked to you about this?

[VICTIM]: No.

THE COURT: So, no one has tried to tell you not to testify?

...

[VICTIM]: I don't feel that, in any way, somebody is threatening my life, no. This is—I don't feel, in a way, like somebody is trying to threaten me not to do this. This is something I do not want to do. Nobody's telling me you better not do this. This is how I feel.

...

[PUBLIC DEFENDER ON DUTY]: I have also explained, just to be clear, your Honor, that Ms. REDACTED's experience with her prior testimony was in State court. State prosecutors are less inclined to use the power of their office to hold people in contempt. And I think it's a much more common occurrence in this building, than it is across the street.

THE COURT: I know. That's the sort of thing—that is the reason I asked whether she talked to anyone else. Because the people have misconceptions. They know what happens across the street, they don't know what happens here.

...

[VICTIM'S MOTHER]: She's not going to do it. Like I'm trying to tell you, she's not mentally fit to do this. . . . I'm not having her go to jail. I'll go to jail. We are not going to do this and put her through this if she does not want to do this. You see how this is affecting her. . . . [S]he's been through enough. And just to go through the situation of entering into a court door, sitting in a room to wait to be called into the thing, is not doing nothing but traumatizing her more. Because she's thinking about the rape. . . . I'm not going to have her pushed over the deep end because she don't want to do something. She shouldn't be forced to do something that she does not want to do.⁴⁷

This example demonstrates the seriousness of the potential consequences for many GBV victims and those who care about them when the state threatens to use its power to jail them for the purpose of compelling their testimony. The victim's mother makes her daughter's psychological issues and the precarity of her mental state clear, including the trauma resulting from doing the very thing the state is attempting to force her to do again—testify in a criminal case. The mother convincingly asserts that testifying against her trafficker will cause her daughter to have a mental health crisis and reverse the recent progress she had finally made towards recovery. However, this information does not appear to even give the judge (or the prosecutors present) pause to reconsider whether he should be attempting to force her to testify against her will. The judge misleadingly speaks as if it is out of his hands, even though he would be the one to sign any material witness or contempt warrants for the victim's arrest and confinement. Because of the willingness of state actors to use their coercive powers against this trafficking victim, she is faced with harsh consequences no matter what she chooses: the pains of arrest and

47. *Id.* at 3–4, 7, 9, 11–14, 16–17.

imprisonment or the pains of re-traumatization from recounting traumatic experiences in an adversarial setting against her will.⁴⁸ Both run a high risk of causing her to experience a crisis, given her severe mental health issues. Notably, the victim asserts that she “already” feels that she is experiencing additional suffering.⁴⁹ The agony that the mother would experience from watching her daughter suffer from either of these options is also apparent. This example thus elucidates some of the harms that victims and their families face when the state treats them as sacrificial objects. And in the end, the state’s threats against Elaine achieved their aim: she testified as a prosecution witness against her wishes.⁵⁰

B. *Criminal Charges*

Prosecutors often utilize their power to threaten or bring criminal charges against GBV victims as a means of gaining their acquiescence to being used as prosecutorial tools. As discussed in the preceding subsection, prosecutors may threaten or file contempt charges against victims who defy a subpoena.⁵¹ But there are also other, often more serious, charges that prosecutors use as leverage in their dealings with GBV victims. For example, they employ charges for sex trafficking offenses to coerce “bottoms”—victims whom traffickers appoint as their “lead prostitute” and offer certain responsibilities and/or privileges—into testifying and otherwise participating in the prosecution of their traffickers.⁵² Many “bottoms” engage in conduct prohibited by trafficking statutes, such as recruiting, transporting, and coercing other victims, because they are under their trafficker’s control.⁵³ But Farrell et al.’s study also documents prosecutors and law enforcement using this practice more generally with sex trafficking victims, including those who are not “bottom[s].”⁵⁴ A law enforcement agent interviewed in the study explained:

[Sex trafficking victims] did [provide information] after they got arrested when we were like, “Do you want to be a witness, or do you want to be suspect? Decide.” So, we charged these folks as

48. See *infra* notes 131–134 and accompanying text.

49. Transcript of Nov. 6, 2013, *supra* note 45, at 12.

50. See Transcript of Direct Examination at 255–56, 305, *United States v. Corley*, 2016 WL 9022508 (S.D.N.Y. Jan. 15, 2016) (No. 13-cr-48).

51. See *supra* note 41.

52. Sarah Crocker, Note, *Stripping Agency from Top to Bottom: The Need for a Sentencing Guideline Safety Valve for Bottoms Prosecuted Under the Federal Sex Trafficking Statutes*, 111 NW. U. L. REV. 753, 753, 771–72, 777–82 (2017).

53. *Id.* at 772–75, 781.

54. FARRELL ET AL., *supra* note 27, at 197.

co-conspirators to the organization and once they came in they got charged with felony prostitution and felony conspiracy. They were like, “No. I may have been a prostitute, but I’m not involved in child prostitution. I don’t know what you’re talking about.” And they became cooperative witnesses. Which is what we wanted. That was the hardest part to sell to the DA’s office to try. It was very successful. All of these girls rolled and became cooperative witnesses so they could go back to just a regular prostitution charge and testified on the conspiracy. And so, we ended up with exactly what we had anticipated.⁵⁵

The practice of charging or threatening charges against GBV victims exerts powerful pressure upon them to comply with the state’s demands,⁵⁶ especially when the offenses carry significant mandatory minimum sentences.⁵⁷ When facing ten- or fifteen-year minimum sentences, many victims reasonably feel that they have no choice but to accept a plea deal that includes testifying against their trafficker.⁵⁸

Police and prosecutors also use prostitution arrests and charges as means of instrumentalizing sex trafficking victims as sources of information and evidence for human trafficking cases. In doing so, authorities communicate to victims that these charges will be dropped if they acquiesce.⁵⁹ Evidence of this practice also emerged in Farrell et al.’s research.⁶⁰ For example, one prosecutor interviewed for this study explained, “You can’t get [to] [a trafficking charge] without breaking a few eggs . . . at some point in time you’ve got to be willing to charge some

55. *Id.* at 116–17 (second alteration in original).

56. For example, in a 2015–2016 National Survivor Network survey of human trafficking survivors in which nearly a third of the 130 respondents reported having felt pressure from law enforcement to testify against their traffickers, one respondent explained, “I was scared they told me if I didn’t tell they would keep arresting me& keep me in jail for a very long time[.]” Another recalled, “I was told they would go after me for tax evasion and I would get 20+ years and take my daughter, whom I would never see again. They also told me my mom would go to prison for living off the proceeds of a prostitute and she would die in prison.” BETH JACOBS & STEPHANIE RICHARD, NAT’L SURVIVOR NETWORK, NATIONAL SURVIVOR NETWORK MEMBERS SURVEY: IMPACT OF CRIMINAL ARREST AND DETENTION ON SURVIVORS OF HUMAN TRAFFICKING 2, 5 (2016), <http://nationalsurvivornetwork.org/wp-content/uploads/2017/12/VacateSurveyFinal.pdf> [<https://perma.cc/ZW9T-NV5M>].

57. *See, e.g.*, 18 U.S.C. §§ 1591(b), 2422(b), 2423(a) (setting out mandatory minimum sentences for human trafficking and pimping offenses).

58. *See* Crocker, *supra* note 52, at 777–80.

59. *See* Farrell et al., *supra* note 28, at 63–65; Lauren Hersh, *Sex Trafficking Investigations and Prosecutions*, in SUP. CT. STATE N.Y. & N.Y. STATE JUD. COMM. ON WOMEN COURTS, LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE VICTIMS 255, 260 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2013).

60. Farrell et al., *supra* note 28, at 63–65.

of these girls with prostitution[.]”⁶¹ Furthermore, domestic sex trafficking survivors in Love et al.’s study, which was conducted in eight cities across the U.S., reported that prosecutors had leveraged prostitution, drug possession, and other charges against them for the purpose of coercing their participation in criminal prosecutions against their traffickers.⁶² Prosecutors often require victims to comply within a short time frame to avoid criminalization.⁶³ In her examination of prostitution arrest and prosecution policies in New York City, public defender Kate Mogulescu noted, “[s]hould the [sex trafficking] victims be unwilling or unready [to cooperate], at the precise moment of arrest, or immediately thereafter, they are made to go through the criminal court process marked as defendants.”⁶⁴

Some prosecutors and even judges threaten GBV victims with perjury charges in an effort to prevent them from recanting their allegations against their abusers and to coerce them to testify consistently with their earlier statements.⁶⁵ The threat of perjury charges is often sufficient to prevent victims from recanting or changing their stories, thereby providing prosecutors with the evidence they need for a conviction.⁶⁶ However, at times the threat alone does not outweigh victims’ reasons for

61. *Id.* at 64.

62. HANNAH LOVE, JEANETTE HUSSEMAN, LILLY YU, EVELYN MCCOY & COLLEEN OWENS, URB. INST., JUSTICE IN THEIR OWN WORDS: PERCEPTIONS AND EXPERIENCES OF (IN)JUSTICE AMONG HUMAN TRAFFICKING SURVIVORS 1, 7, 14 (2018), http://www.urban.org/sites/default/files/publication/97351/justice_in_their_own_words_0.pdf [<https://perma.cc/P2Q8-KB56>].

63. Kate Mogulescu, *The Public Defender as Anti-trafficking Advocate, an Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking*, 15 CUNY L. REV. 471, 481 (2012).

64. *Id.*; see also Amy Farrell, Meredith Dank, Ieke de Vries, Matthew Kafafian, Andrea Hughes & Sarah Lockwood, *Failing Victims? Challenges of the Police Response to Human Trafficking*, 18 CRIMINOLOGY & PUB. POL’Y 649, 664 (2019) (finding that it often takes a long time for trafficking victims to recognize their exploitation and victimhood, which is in tension with law enforcement’s aims of quickly securing victim statements and evidence).

65. See Goodmark, *Prosecutorial Misconduct*, *supra* note 23, at 641; Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 403 (2001); Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 155–56, 162 (2009); see also, e.g., *State v. Gutierrez*, 2014-NMSC-031, ¶¶ 7–16, 333 P.3d 247, 250–51 (detailing prosecutor, investigator, and district attorney office victim advocate’s visit to a teenage victim of criminal sexual contact at her school, during which they privately threatened to charge her with perjury and take her young son away if she denied the abuse during her upcoming trial testimony); *State v. Hancock*, 2004-Ohio-1492U, ¶¶ 16–32, No. C-030459, 2004 WL 596103, at *2 (Ohio Ct. App. Mar. 26, 2004) (indicating that the trial judge had threatened a domestic violence victim with five years’ imprisonment for perjury during her testimony because she had deviated from her earlier statements to police).

66. Covey, *supra* note 21, at 875.

recanting, and some prosecutors then follow through with prosecuting them for perjury.⁶⁷

C. *Conditioning Assistance upon Cooperation*

Conditioning assistance for GBV victims upon their cooperation with criminal legal authorities is often used as a means of facilitating victims' instrumentalization within the criminal legal process. Victims typically have significant needs as they exit and in the aftermath of their GBV situation. These needs vary depending upon the particular victim and her circumstances, but can range across financial, legal, health, housing, safety, transportation, and other areas.⁶⁸ The state often exploits these needs by tying measures to ameliorate them to victims' willingness to assist the state with realizing its prosecutorial goals.⁶⁹ This is done both structurally, through formal laws and policies, and more informally, through approaches to interacting with victims. The latter is reflected in Farrell et al.'s most recent study of responses to human trafficking in the U.S., in which police officers interviewed "stressed the need to connect victims to services primarily for the purpose of securing [their] cooperation and developing a case against the perpetrator."⁷⁰ Furthermore, the researchers found that "although some police [they] interviewed used a social service approach as a means to be more effective

67. *Id.*; Goodmark, *Prosecutorial Misconduct*, *supra* note 23, at 641–42; *see also, e.g., Domestic Violence Victim Sent to Jail for Lying for Her Abuser*, CBS L.A. (Apr. 23, 2011, 12:01 AM), <http://losangeles.cbslocal.com/2011/04/23/domestic-violence-victim-sent-to-jail-for-lying-for-her-abuser/> [<https://perma.cc/VM9N-N7TD>] (reporting the jailing of a domestic violence victim for six months following her perjury conviction for denying that her abuser had repeatedly beaten her); Maureen O'Hagan, *In Baltimore, a Victim Becomes a Criminal*, WASH. POST (Mar. 30, 2001), <http://www.washingtonpost.com/archive/politics/2001/03/30/in-baltimore-a-victim-becomes-a-criminal/69e9f6f5-ef03-41dd-9338-aa3d771ff0c0/> [<https://perma.cc/KB8Z-PQ7R>] (describing the incarceration of a domestic violence victim for thirty months for perjury and obstruction of justice after she lied during her compelled grand jury testimony in an attempt to protect her abuser).

68. *See* Nathaniel A. Dell, Brandy R. Maynard, Kara R. Born, Elizabeth Wagner, Bonnie Atkins & Whitney House, *Helping Survivors of Human Trafficking: A Systematic Review of Exit and Postexit Interventions*, 20 TRAUMA, VIOLENCE, & ABUSE 183, 184, 191 (2019); Melissa E. Dichter & Karin V. Rhodes, *Intimate Partner Violence Survivors' Unmet Social Service Needs*, 37 J. SOC. SERV. RSCH. 481, 481–83, 485–87 (2011); Shanti Kulkarni, *Intersectional Trauma-Informed Intimate Partner Violence (IPV) Services: Narrowing the Gap Between IPV Service Delivery and Survivor Needs*, 34 J. FAM. VIOLENCE 55, 56–58 (2018).

69. For example, in its 2015–2016 survey of human trafficking survivors, the National Survivor Network found that 22.2% of the 130 respondents reported having "felt like they had to testify against their trafficker to get help or services." One respondent recalled, "In order to get victim witness assistance I had to sign papers saying I would testify against my trafficker in court. If I accepted financial assistance and then refused to testify the program could then sue me for the assistance money." JACOBS & RICHARD, *supra* note 56, at 5.

70. Farrell et al., *supra* note 64, at 664.

in their work, the goals of arrest and prosecution continue to outweigh meeting victim needs.”⁷¹

Informal approaches to exploiting GBV victims’ needs in an attempt to secure their cooperation often come into play in the process of victim identification, which is a prerequisite to receiving services intended for GBV victims.⁷² For example, regarding sex trafficking victims who have been arrested and charged with prostitution in New York City, Mogulescu explains that they “must cooperate in the specific way deemed appropriate by prosecutors in order to qualify for the ‘benefits’ of identification as a victim.”⁷³ She further highlights the difficulty facing victims who must decide “whether to cooperate before they have been provided services or an opportunity to develop stability and independence.”⁷⁴ Practices such as this one, which require victims to commit to assisting law enforcement in order to receive services, implicate stereotyped constructions of “real” GBV victims as fully cooperative with police and prosecutors in the pursuit of their abusers.⁷⁵ As a result, many victims who choose not to cooperate with law enforcement are not afforded legitimate victim status, which often places much-needed services and assistance out of their reach.

Moreover, there are formal, structural links between certain victim assistance measures and cooperation with law enforcement. One significant example is state-run crime victim compensation programs

71. *Id.*

72. See David R. Hodge, *Assisting Victims of Human Trafficking: Strategies to Facilitate Identification, Exit from Trafficking, and the Restoration of Wellness*, 59 SOC. WORK 111, 113 (2014); see also JACLYN HOUSTON-KOLNIK & AMANDA L. VASQUEZ, ILL. CRIM. JUST. INFO. AUTH., VICTIM SERVICE DELIVERY: ILLINOIS PROVIDERS’ PERSPECTIVES ON VICTIM SERVICE BARRIERS AND AGENCY CAPACITY 11 (2017), <https://ncvc.dspacedirect.org/bitstream/handle/20.500.11990/3756/322.pdf?sequence=1&isAllowed=y> [<https://perma.cc/Q6WZ-EAMT>]. Many GBV victims who obtain social services access them through law enforcement referrals. See Farrell et al., *supra* note 64, at 664. However, this is certainly not the only means by which victims obtain services. Regardless of whether police, a government social services agency, or a non-profit organization first encounters a victim, she must be identified as such in order to access services available for GBV victims, such as shelters for domestic violence and/or human trafficking victims and support from specialized GBV organizations. Depending on the organization’s particular practices, the identification process may be based partially or wholly upon an individual’s self-identification as a victim of GBV. See, e.g., KATHLEEN TURNER, MICHELLE ANDERSON & STEFANIE LOPEZ-HOWARD, GA. CRIM. JUST. COORDINATING COUNCIL, ASSESSING THE SCOPE AND AVAILABILITY OF SERVICES FOR HUMAN TRAFFICKING VICTIMS AMONG GEORGIA’S VICTIMS’ SERVICES PROVIDERS 17–18 (2014), <http://cjcc.georgia.gov/document/human-trafficking-victim-services-needs-assessment/download> [<https://perma.cc/B8NE-DC5Z>] (finding that ten out of forty responding Georgia victim services agencies reported that victim self-identification was the method they most frequently used to identify human trafficking victims).

73. Mogulescu, *supra* note 63, at 481.

74. *Id.*

75. See *supra* note 26.

(CVCs). Every state in the U.S. has a statutorily created CVCP,⁷⁶ which also receives federal funding through the Victims of Crime Act (VOCA).⁷⁷ These programs reimburse eligible crime victims for expenses related to their victimization, such as medical care, mental health counseling, lost wages, and moving costs.⁷⁸ However, eligibility criteria for most, if not all, CVCPs include cooperation in the investigation and prosecution of the perpetrator.⁷⁹ This is unsurprising given VOCA's requirement that state CVCPs "promote[] victim cooperation with the reasonable requests of law enforcement authorities" in order to receive federal funding.⁸⁰ The conditioning of compensation upon cooperation with law enforcement has undoubtedly contributed to GBV victims' underutilization of CVCPs,⁸¹ and in turn, their lack of access to funds which could vastly improve their financial situations and even enable them to avoid future victimization.⁸²

In July 2021, Congress amended VOCA and added an exception to the requirement that CVCPs promote victim cooperation with law enforcement when a CVCP "determines such cooperation may be impacted due to a victim's age, physical condition, psychological state,

76. *Crime Victim Compensation: A Valuable Resource for Victim Recovery*, NAT'L CRIME VICTIM L. INST. (Lewis & Clark Law School, Portland, OR), Sept. 2016, at 1, <http://law.lclark.edu/live/files/25182-ncvli-newsletter---victim-compensation-processpdf> [<https://perma.cc/PV7A-JV3B>] [hereinafter *Victim Compensation*, NAT'L CRIME VICTIM L. INST.].

77. 34 U.S.C. § 20102.

78. *Victim Compensation*, NAT'L CRIME VICTIM L. INST., *supra* note 76.

79. *Id.*

80. 34 U.S.C. § 20102(b)(2).

81. For example, CVCPs paid compensation to only 254 human trafficking victims and 45,170 victims of adult sexual assault/stalking during fiscal year 2018. *See* OFF. FOR VICTIMS OF CRIME, VICTIMS OF CRIME ACT VICTIM COMPENSATION FORMULA GRANT PROGRAM: FISCAL YEAR 2018 DATA ANALYSIS REPORT 4, 8, 11 (2020), <http://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/2018-voca-annual-compensation-performance-report.pdf> [<https://perma.cc/8D6C-X2HL>]. By comparison, there were 52,459 trafficking victims and 693,731 victims of adult sexual assault/stalking who were clients of VOCA-funded service providers during that same period. *See* OFF. FOR VICTIMS OF CRIME, VICTIMS OF CRIME ACT VICTIM ASSISTANCE FORMULA GRANT PROGRAM: FISCAL YEAR 2018 DATA ANALYSIS REPORT 2, 5–6 (2020), <http://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/2018-voca-annual-assistance-performance-report.pdf> [<https://perma.cc/UVP2-LJF7>]. Thus, only a very small fraction of known trafficking and adult sexual assault/stalking victims received compensation from CVCPs—0.48% and 6.5%, respectively—and these figures are likely to be significantly lower when accounting for victims of these crimes who are not clients of VOCA-funded service providers.

82. *See* Rutledge, *Gift Horse*, *supra* note 21, at 228, 232–33, 243–45. *See generally* GLADYS McLEAN & SARAH GONZALEZ BOCINSKI, INST. WOMEN'S POL'Y RSCH, THE ECONOMIC COST OF INTIMATE PARTNER VIOLENCE, SEXUAL ASSAULT, AND STALKING (2017), http://iwpr.org/wp-content/uploads/2020/10/B367_Economic-Impacts-of-IPV-08.14.17.pdf [<https://perma.cc/YF2H-JCGU>] (summarizing the literature on the many financial hardships that survivors of intimate partner violence, sexual assault, and stalking often face, including medical debt, lost wages, and poor credit).

cultural or linguistic barriers, or any other health or safety concern that jeopardizes the victim's wellbeing[.]”⁸³ Yet, this exception to the cooperation rule is vague and merely permits, rather than requires, state CVCPs to allow victims whose well-being is jeopardized for one of the enumerated reasons to receive compensation without first cooperating with law enforcement requests.⁸⁴ Problematically, it also fails to include many of the reasons why GBV victims may not wish to accede to law enforcement requests, including economic, temporal, relational, and community-based concerns.⁸⁵ Thus, the cooperation condition is likely to remain a structural barrier for many GBV victims in need of compensation going forward.

Structural links conditioning assistance upon cooperation also exist for the many victims of GBV who are undocumented immigrants.⁸⁶ Immigration relief in the form of the T visa for human trafficking victims and the U visa for victims of domestic violence, female genital mutilation, rape, sexual assault, sexual exploitation, abusive sexual contact, or human trafficking (among other serious crimes) require victims to cooperate with law enforcement in the investigation and prosecution of the perpetrators.⁸⁷ There is a limited exception for T visa applicants who are minors or who

83. VOCA Fix to Sustain the Crime Victims Fund Act of 2021, Pub. L. No. 117-27, 135 Stat. 301 (codified as amended at 34 U.S.C. § 20102(2)(b)(2)); OFF. FOR VICTIMS OF CRIME, OVC BULL., VOCA FIX EXCEPTION RE: VOCA COMPENSATION ELIGIBILITY REQUIREMENT TO PROMOTE VICTIM COOPERATION WITH LAW ENFORCEMENT (2021), <http://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/ovc-compensation-bulletin-9.20.21.pdf> [<https://perma.cc/3VVZ-VLPZ>].

84. VOCA Fix to Sustain the Crime Victims Fund Act of 2021 § 2(b)(2). In addition, the amendment's wording regarding the exception is vague because it refers to a victim's *cooperation* potentially being impacted due to one of the enumerated issues instead of referring to a victim's *well-being* potentially being impacted by cooperation with law enforcement.

85. Specific examples include dependence upon the defendant's income, a desire to avoid a lengthy legal process, and distrust of the police. See Sara C. Hare, *What Do Battered Women Want? Victims' Opinions on Prosecution*, 21 VIOLENCE & VICTIMS 611, 614–16, 623–24, 626 (2006); Nichols, *supra* note 12; Jessica Pishko, *The Defund Movement Aims to Change the Policing and Prosecution of Domestic Violence*, TYPE INVESTIGATIONS (July 28, 2020), <http://www.typeinvestigations.org/investigation/2020/07/28/the-defund-movement-aims-to-change-the-policing-and-prosecution-of-domestic-violence/> [<https://perma.cc/S4XB-EGXK>].

86. See Nadine Shaanta Murshid & Elizabeth A. Bowen, *A Trauma-Informed Analysis of the Violence Against Women Act's Provisions for Undocumented Immigrant Women*, 24 VIOLENCE AGAINST WOMEN 1540, 1541–42, 1545 (2018); OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 517–19 (20th ed. 2020). Undocumented status is a vulnerability that perpetrators of GBV often exploit to keep their victims under their control. Hilary Axam & Soumya Silver, *Human Trafficking Enforcement and the Rule of Law*, 67 DOJ J. FED. L. & PRAC. 93, 93–94, 98 (2019); Natalie Nanasi, *The U Visa's Failed Promise for Survivors of Domestic Violence*, 29 YALE J.L. & FEMINISM 273, 306–07 (2018).

87. See 8 U.S.C. §§ 1101(a)(15)(U)(i)(III), (a)(15)(U)(iii), (a)(15)(T)(i)(III)(aa).

are unable to cooperate due to physical or psychological trauma,⁸⁸ but this exception is not available for U visa applicants.⁸⁹ Furthermore, a mandatory part of the U visa application is a certification from law enforcement, a judge or other investigatory authority of the applicant's helpfulness⁹⁰ whereas the T visa application allows for the submission of *any* "credible evidence" of compliance with reasonable requests from law enforcement instead.⁹¹ This distinction is significant because empirical research has revealed that many law enforcement agencies across the U.S. refuse to complete the certification form required for U visa eligibility in spite of victims' helpfulness with investigating or prosecuting the criminal activity, for wholly discretionary reasons not included in or aligned with the U visa statute, regulations, or Department of Homeland Security/USCIS guidance.⁹² Studies have found that these reasons include a belief that the victim may stop cooperating after the certification is signed, the lack of an arrest, prosecution or conviction, the view that the victim did not suffer sufficient injury or harm, and the passage of an (arbitrary) time period since the date the offense occurred.⁹³ Yet, the mere possibility of "potentially life-saving immigration status" is enough of an inducement for many GBV victims to fully cooperate with law enforcement, even when doing so undermines their particular goals,

88. *Id.* § (a)(15)(T)(i)(III)(bb)–(cc).

89. Nanasi, *supra* note 86, at 314. However, if a U visa applicant is under the age of 16, the victim's parent, guardian, or friend is permitted to assist authorities with investigating or prosecuting the crime instead—but there is no exception to the requirement that the victim or one of these other individuals does so. 8 U.S.C. § 1101(a)(15)(U)(i)(III).

90. 8 U.S.C. § 1184(p)(1).

91. DEP'T OF HOMELAND SEC., USCIS, OMB No. 1615-0104, INSTRUCTIONS FOR PETITION FOR U NONIMMIGRANT STATUS AND SUPPLEMENT A, PETITION FOR QUALIFYING FAMILY MEMBER OF U-1 RECIPIENT (2021), <http://uscis.gov/sites/default/files/document/forms/i-918instr.pdf> [<https://perma.cc/EF4N-MYA8>]; DEP'T OF HOMELAND SEC., USCIS, OMB No. 1615-0099, INSTRUCTIONS FOR APPLICATION FOR T NONIMMIGRANT STATUS 8 (2021), <https://www.uscis.gov/sites/default/files/document/forms/i-914instr.pdf> [<https://perma.cc/429D-6866>].

92. See JEAN ABREU, SIDNEY FOWLER, NINA HOLTSBERRY, ASHLEY KLEIN, KEVIN SCHROEDER, MELANIE STRATTON LOPEX & DEBORAH M. WEISSMAN, UNC SCH. OF L. IMMIGR./HUM. RTS. POL'Y CLINIC & ASISTA, THE POLITICAL GEOGRAPHY OF THE U VISA: ELIGIBILITY AS A MATTER OF LOCALE 3, 27–29, 47–65 (2014), <http://unc.edu/wp-content/uploads/2019/10/uvisafullreport.pdf> [<https://perma.cc/Q6RC-994W>]; NATALIA LEE, DANIEL J. QUINONES, NAWAL AMMAR & LESLYE E. ORLOFF, NAT'L IMMIGRANT WOMEN'S ADVOC. PROJECT & AM. UNIV. WASH. COLL. OF L., NATIONAL SURVEY OF SERVICE PROVIDERS ON POLICE RESPONSE TO IMMIGRANT CRIME VICTIMS, U VISA CERTIFICATION AND LANGUAGE ACCESS 13–20 (2013), <http://masslegalservices.org/system/files/library/Police%20Response%20U%20Visas%20Language%20Access%20Report%20NIWAP%20%204%2016%2013%20FINAL.pdf> [<https://perma.cc/32WY-QMHK>].

93. ABREU ET AL., *supra* note 92, at 28–29, 48–49, 51–55, 57–58; LEE ET AL., *supra* note 92, at 13–14.

priorities, and safety.⁹⁴ As legal scholar Natalie Nanasi keenly observes, “in practice, by requiring survivors to cooperate with law enforcement in order to obtain U nonimmigrant status, benefits to police and prosecutors are achieved at the expense of the victims[.]”⁹⁵

II. TRADITIONAL JUSTIFICATIONS FOR COERCING AND INSTRUMENTALIZING GBV VICTIMS

Justifications for the use of the highly coercive and instrumentalizing practices described above can generally be categorized as paternalistic or utilitarian—focusing on purported benefit to individual GBV victims or to society as a whole, respectively. Yet, there is fundamental misalignment between the normative commitments of these approaches and the actual impact of the practices at issue. Drawing on empirical research, the following subsections demonstrate how the rhetoric does not match reality, thereby rendering the proffered justifications insufficient.

A. *Paternalism*

Paternalism is the interference with an individual’s liberty or autonomy without her consent on the basis of purported benefit to or protection from harm for that individual.⁹⁶ The U.S. had a long tradition of gender paternalism within its customs, common law, and constitutional jurisprudence, a regime which was not repudiated until the 1970s.⁹⁷ It justified limits on women’s freedom with claims that these restrictions benefitted and protected them.⁹⁸ Major premises underlying this system were that women lack the capacity to make rational and responsible choices within their lives and need protection from male coercion.⁹⁹ Paternalistic justifications for coercing and instrumentalizing victims of GBV within the criminal legal process against their will reflect vestiges

94. See Nanasi, *supra* note 86, at 293–97, 304–06.

95. *Id.* at 273.

96. See Gerald Dworkin, *Paternalism*, 56 *MONIST* 64, 65 (1992); Gerald Dworkin, *Paternalism*, *STAN. ENCYC. PHIL.* (Sept. 9, 2020), <http://plato.stanford.edu/entries/paternalism> [<https://perma.cc/UB7U-WFYB>].

97. Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *YALE L.J.* 1694, 1773–80, 1792 (2008). For example, in rejecting the common law of coverture in *Frontiero v. Richardson*, the Court observed that “an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage” had led to “our statute books gradually bec[oming] laden with gross, stereotyped distinctions between the sexes.” 411 U.S. 677, 684–85 (1973).

98. Siegel, *supra* note 97, at 1775–79.

99. *Id.*

of this outdated, harmful approach.¹⁰⁰ “Like old forms of gender paternalism, the[se] new forms of gender paternalism [attempt to] remedy harm to women through the control of women”¹⁰¹—ironically addressing the threat of male coercion with coercion from the patriarchal state.

This approach is clearly manifested in the justifications many state actors give when they employ the instrumentalizing and coercive practices described in Part I. For example, at the ribbon-cutting ceremony for a (now-defunct) government-run domestic violence shelter that only accepted victims who promised to testify against their abusers, Honolulu prosecutor Keith Kaneshiro asserted that his office “did a lot of things to help victims of domestic violence, even when the victims did not know what’s good for them.”¹⁰² Another example is the explanation a District Attorney in Texas proffered for her decision to jail a rape victim for nearly a month on a material witness warrant, which included a claim that the victim’s “life would have been at risk while homeless on the street.”¹⁰³ Based in part on this paternalistic justification (though the woman was not actually homeless), the state chose to detain her in a large and infamous jail, where she was assaulted twice—once by an inmate and another time by a guard.¹⁰⁴ Furthermore, several participants in Thomas Kirsch II’s qualitative study of responses to domestic violence victims who do not want their abuser to be prosecuted also expressed paternalistic views.¹⁰⁵ One such participant, a judge and former prosecutor in favor of forcing victims to participate in domestic violence prosecutions, asserted that “[e]ven though the victim may think she’ll be better off if the case is dropped, I know that on so many other levels that that’s just not true.”¹⁰⁶ These types of paternalistic positions purport that instrumentalizing GBV victims in the prosecutorial process is necessary for their own good.

Like traditional forms of gender paternalism, which were justified by

100. *Cf. id.* at 1781–94, 1796 (explaining that women-protective justifications for abortion restrictions rely upon antiquated notions of women’s decision-making capacities that are “fundamentally at odds with the understanding of women’s dignity on which the modern constitutional order rests”).

101. *Id.* at 1705 (discussing abortion restrictions, but I contend that this assertion also applies to compelling GBV victims’ participation in the criminal legal process).

102. Rebecca McCray, *Jailing the Victim*, SLATE (July 12, 2017, 12:07 PM), <http://slate.com/news-and-politics/2017/07/jailing-the-victim.html> [<https://perma.cc/5889-JK49>].

103. Daniel Victor, *Texas Rape Victim Was Jailed for Fear She Would Not Testify, Lawsuit Says*, N.Y. TIMES (July 22, 2016), http://www.nytimes.com/2016/07/23/us/texas-rape-victim-was-jailed-for-fear-she-would-not-testify-lawsuit-says.html?_r=0 [<https://perma.cc/8JSM-MP5Q>].

104. *See id.*

105. Kirsch, *supra* note 65, at 399, 403, 418 (interviewing a small sample comprised of current and former prosecutors, defense attorneys, judges, and victim-witness advocates in Lake County, Indiana).

106. *Id.* at 418.

constructing women as “too weak to be entrusted with legal agency to act autonomously” and therefore in need of protection from male coercion,¹⁰⁷ measures to compel GBV victims’ participation are often similarly justified with characterizations of victims as too weak, naïve, and lacking in courage to resist male coercion.¹⁰⁸ Offenders pressuring victims to drop charges or refrain from assisting criminal legal authorities is a real issue in the GBV context, but this conceptualization of victims lacks nuance and “fails to account for any degree of victim volition, even in the face of a[n] [offender’s] pressure.”¹⁰⁹ It allows for a presumption of involuntariness regarding victim decision-making¹¹⁰ and is used to justify paternalistically taking the decision of whether to prosecute a particular GBV offender, along with the victim’s participation in the prosecution, “off the victim’s shoulders.”¹¹¹ Yet, forcing a victim who is facing serious threats from her abuser to testify puts her in a position in which she is likely to conclude that committing perjury is her safest option, which Linda Mills characterizes as “state-induced missocialization.”¹¹²

Paternalism also manifests in the conceptualization of arresting GBV victims as “rescuing” them, which has become an increasingly common justification for the practice among law enforcement, particularly with respect to sex trafficking victims.¹¹³ Ohio Attorney General David Yost’s

107. Siegel, *supra* note 97, at 1777.

108. See, e.g., Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN’S L.J. 173, 177, 180 (1997) (arguing that “the great majority of domestic violence victims[,] . . . after making the initial report, . . . have neither the will nor the courage to assist prosecutors in holding the abusers criminally responsible” and “naively accept responsibility to stop the batterer on their own”); see also Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 842 (1999) (asserting that “observers often miss [women’s exercise of resistant or partial agency] when it emerges because it does not conform to their more confrontational expectations about what it means to resist oppression. This misperception often has been costly for women, because when observers fail to see the response they expect, they conclude that women are passive in the face of oppression. This leads many observers, including some legal actors, to assume that women are either weak, wholly compromised figures who can be treated paternalistically, or inadequately assertive individuals who should be compelled by the use of legal incentives to defend their own rights”). Notably, paternalism towards GBV victims has been championed by certain groups of feminists, who effectively advocated for mandatory criminal legal interventions on “maternalistic” grounds—namely that they are necessary to protect abused women from men’s coercive control and further abuse. See LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 123–24 (2012); Bennett Capers, *On “Violence Against Women”*, 13 OHIO ST. J. CRIM. L. 347, 360 (2016).

109. Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?*, 22 BERKELEY J. GENDER L. & JUST. 2, 5 (2007).

110. See *id.* at 6.

111. See Wills, *supra* note 108, at 173.

112. Mills, *supra* note 22, at 593 (“In many cases, prosecutors force battered women to testify even when the prosecutors know the battered women will lie.”).

113. See WU & YELDERMAN, *supra* note 30, at 22–23; Farrell et al., *supra* note 64, at 664.

recent comments following the arrest of eight sex trafficking victims is a clear example embodying this view.¹¹⁴ He characterized arresting human trafficking victims as “often . . . the best way that law enforcement can help.”¹¹⁵ He then explained his belief that doing so helps women “reset” because they are offered services and “give[n] the opportunity to share information that can help put their traffickers behind bars.”¹¹⁶ The Human Trafficking Legal Center rightly criticizes “arrest-as-rescue” rhetoric on the grounds that arrests are inherently hostile and coercive for victims.¹¹⁷ As Rachel Harmon observes, “[e]very arrest harms an individual, and perhaps a community, no matter how lawful.”¹¹⁸ It is a “serious personal intrusion,” invasion of the arrested individual’s privacy, and disruption of her life.¹¹⁹ Once arrested, victims are under law enforcement control and are more easily subjected to additional coercive practices, such as being threatened with criminal charges or offered conditional assistance, aimed at securing their participation in the investigation and prosecution of their traffickers. An arrest can also cause long-term harm for survivors by damaging their future employment prospects¹²⁰ and making them too fearful to disclose their current or future victimization to law enforcement.¹²¹

In coercing GBV victims’ participation in the criminal legal process for paternalistic reasons, state actors are substituting their own judgment about what constitutes and serves particular victims’ best interests for that of the victims themselves—hearkening back to the gender paternalism of an earlier era.¹²² This begs two questions: (1) is the state truly a better judge of victims’ “best interests” than victims themselves? and (2) does coercing unwilling victims’ participation in the criminal legal process

114. See Corinne Moore, *8 Women Rescued and Arrested in Ohio Human Trafficking Single-Day Sting*, WANE.COM (Jan. 28, 2021), <http://www.wane.com/news/national-world/8-women-rescued-and-arrested-in-central-ohio-human-trafficking-single-day-sting/> [<https://perma.cc/AR6C-BBJK>].

115. *Id.*

116. *Id.*

117. See WU & YELDERMAN, *supra* note 30, at 22–23.

118. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 778 (2012). In a qualitative study about New York’s Human Trafficking Intervention Courts (HTICs), stakeholders underscored the traumatic impact of arrests upon presumptive trafficking victims whose cases were heard in HTICs. Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1393 & n.306 (2016).

119. William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 791, 797 n.67 (1993).

120. Farrell et al., *supra* note 64, at 668; see also JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 204–05 (2015) (noting that employers can easily access applicant arrest records through commercial information vendors).

121. See Balgamwalla, *supra* note 22, at 203.

122. See Siegel, *supra* note 97.

objectively leave them better off than they otherwise would be, in line with the goals of paternalism?¹²³

Regarding the first question, scholars have persuasively asserted that individual GBV victims, rather than the state, are best positioned to decide how to respond to violence in their lives.¹²⁴ In the GBV context, victims often know the perpetrator and can predict his future behavior and how he will react to various interventions based on their familiarity with his personality, tendencies, and past conduct.¹²⁵ Moreover, it is victims themselves who are most familiar with their own needs, interests, and goals,¹²⁶ and are therefore best placed to judge whether assisting authorities with the investigation and prosecution of the offender is consistent with them. This is supported by empirical research demonstrating that, when making this judgment, GBV victims typically engage in a complex decision-making process that involves weighing multiple costs and benefits.¹²⁷ And if they decide that participating is not in their best interests, it is for rational reasons. For example, a common reason is financial dependency upon the offender.¹²⁸ If the victim assists law enforcement and prosecutors, the defendant is much more likely to be prosecuted and convicted, which results in lost wages and current employment, as well as the barriers to future employment accompanying

123. The second question includes “objectively” to indicate that the costs and benefits of coercing victims’ participation will be evaluated from the perspective of an “outsider” rather than from the subjective perspective of the victim herself. This is necessary to explore whether assuming, *arguendo*, that the state (as an “outsider”) is a better judge of victims’ best interests than victims themselves, coercing their unwilling participation leaves them better off than not doing so.

124. See Mills, *supra* note 22, at 555 & n.24; Jyoti Sanghera, *Lessons from the Poetry of Departure*, Preface to GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN (GAATW), COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD, at vii–viii (2007); see also Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 229 & n.182 (2008).

125. See Kohn, *supra* note 124, at 229 n.182; Susan Brotherton & Jamie Manirakiza, *Understanding Sex Trafficking Through the Lens of Coercion: A Closer Look at Exploitation, Threats, and Betrayal*, in WORKING WITH THE HUMAN TRAFFICKING SURVIVOR: WHAT COUNSELORS, PSYCHOLOGISTS, SOCIAL WORKERS AND MEDICAL PROFESSIONALS NEED TO KNOW 125, 133 (Mary C. Burke ed., 2019).

126. See REBECCA SURTEES, INT’L CTR. FOR MIGRATION POL’Y DEV., LISTENING TO VICTIMS: EXPERIENCES OF IDENTIFICATION, RETURN AND ASSISTANCE IN SOUTH-EASTERN EUROPE 16 (2007).

127. See, e.g., Wechsler, *supra* note 12, at 1038–39 (finding that sex trafficking victims tend to weigh multiple, complex factors when deciding whether to press charges and participate in the criminal legal process); Rodney F. Kingsnorth & Randall C. Macintosh, *Domestic Violence: Predictors of Victim Support for Official Action*, 21 JUST. Q. 301, 321–22 (2004) (finding that victims of domestic violence “are engaged in a complex decision making process in which they seek to weigh the costs and benefits of involving criminal justice system officials in their lives”).

128. Hare, *supra* note 85, at 614–16, 623; Nichols, *supra* note 12.

a criminal record.¹²⁹ Thus, it is rational that a victim who relies on the offender for essential economic resources would not want to jeopardize her access to them.

Another major reason many victims report for wanting to avoid the process is distrust of or dissatisfaction with the criminal legal system.¹³⁰ The research has confirmed the legitimacy of this concern. The very nature of the criminal legal process has been identified as a source of stress and discomfort for crime victims, particularly victims of GBV. Aspects such as the need for victims to repeatedly and publicly recount traumatic details of the crime, endure credibility challenges during cross-examination (and often from police when reporting the crime), and come face-to-face with the offender in court typically pose considerable difficulties for them.¹³¹ Especially within adversarial justice systems (as opposed to inquisitorial systems), the “criminal trial has been criticised for creating a hostile climate in which the victim feels used as a mere witness to provide testimony that assists the court to reach a verdict.”¹³² In other words, the victim is negatively impacted by her role as a mere instrument or tool of the system. In her article focusing on victims of sexual and domestic violence, Judith Lewis Herman contends that “if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law.”¹³³ Participating in the criminal legal process is often difficult and re-traumatizing even for victims who wholly desire it,¹³⁴ but the level of secondary trauma that victims who are forced to participate by the coercive arm of the state experience is likely to be significantly greater.

Furthermore, secondary victimization of GBV victims by criminal legal actors is prevalent.¹³⁵ These actors often secondarily victimize GBV victims through victim-blaming, disbelieving them or discounting their

129. See LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* 27 (2018).

130. Hare, *supra* note 85, at 613–16; LOVE ET AL., *supra* note 62, at 5–7.

131. See Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 *VIOLENCE AGAINST WOMEN* 571, 574 (2005); MARY ILIADIS, *ADVERSARIAL JUSTICE AND VICTIMS' RIGHTS: RECONCEPTUALISING THE ROLE OF SEXUAL ASSAULT VICTIMS* 33–34, 36, 38–41 (2020); Farrell et al., *supra* note 8, at 159–60.

132. ILIADIS, *supra* note 131, at 38.

133. Herman, *supra* note 131, at 574.

134. OFF. OF JUST. PROGRAMS, OFF. FOR VICTIMS OF CRIME, HUMAN TRAFFICKING TASK FORCE E-GUIDE: STRENGTHENING COLLABORATIVE RESPONSES, USING A TRAUMA-INFORMED APPROACH, <http://www.ovcttac.gov/taskforceguide/eguide/4-supporting-victims/41-using-a-trauma-informed-approach/> [<https://perma.cc/R9D8-SA6D>]; see also Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 *OHIO ST. J. CRIM. L.* 293, 294–97 (2020).

135. See *supra* note 15.

credibility, trivializing the violence perpetrated against them, and otherwise insensitively responding to their victimization.¹³⁶ Social science research has found that being secondarily victimized by criminal legal authorities is associated with increased post-traumatic stress symptomatology for victims of GBV.¹³⁷ The likelihood and harms of secondary victimization are often known to them from their previous experiences and/or from stories shared with them by others in their network.¹³⁸ As a result, many GBV victims rationally decide against cooperating with legal system actors.

The above examples show that there are logical reasons underlying many GBV victims' conclusions that the harms they would experience from participating in the criminal legal process outweigh any benefits they would gain from the censure and temporary incapacitation of the offender. Given victims' familiarity with their own situations, needs, and goals, and their capacity for reasoned decision-making, there should be a strong presumption in favor of their own determination of their best interests over that of the state.

When the state attempts to override individual victims' judgment through the use of material witness warrants, contempt power, criminal charges, conditional assistance, and similar measures, it causes them serious harms (including the harms just discussed as rational reasons underlying many victims' desires to avoid the criminal legal process). The extent of these harms undermines paternalistic justifications for these tactics, which claim that their use will leave GBV victims better off than they otherwise would be (the second question posed above). We must examine the harms in-depth to fully appreciate why these tactics are inconsistent with paternalism's goals.

To start, forcing unwilling victims' participation greatly impairs their sense of agency within their lives, which can significantly disrupt and impede their healing, according to neurobiology research.¹³⁹ The

136. See Campbell, *supra* note 15, at 56, 61; Campbell & Raja, *supra* note 15, at 97, 102; FRANKLIN ET AL., *supra* note 15, at 1. See generally Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399 (2019).

137. Campbell & Raja, *supra* note 15, at 98, 103–04; see also Wemmers, *supra* note 14, at 226–29 (finding that crime victims (60% of study participants were female victims of violent crime) who felt that they had been treated unfairly by criminal legal authorities experienced more frequent and severe PTSD symptoms than those who felt that they had been treated fairly).

138. See Epstein & Goodman, *supra* note 136, at 452–53 (“Within many communities, these stories [about legal system actors discrediting women] spread like wildfire.”). David A. Ford, *Coercing Victim Participation in Domestic Violence Prosecutions*, 18 J. INTERPERSONAL VIOLENCE 669, 675 (2003).

139. See Elizabeth Osuch & Charles C. Engel, *Research on the Treatment of Trauma Spectrum*

traumatic impact of experiencing GBV is well-documented,¹⁴⁰ and thus the importance of the healing process for victims cannot be overstated. Furthermore, an in-depth study with eighty human trafficking survivors revealed that a key part of how they defined “justice” was as “their ability to ‘move on’ from their trafficking experiences, achieve autonomy, and feel empowered by accomplishing self-defined goals.”¹⁴¹ These findings strongly suggest that forcing victims to participate in the criminal legal process against their will is incompatible with their sense of justice and their expressed need to set and pursue their own ends in the aftermath of their victimization.

In addition to impeding their healing from their primary victimization, the highly coercive and instrumentalizing tactics described in Part I cause significant secondary injury to GBV victims. Regarding material witness warrants, contempt, and criminal charges, even just the threat of imprisonment for a failure to testify is a “form of government-sanctioned terrorizing” for GBV victims, which Linda Mills likens to the threats of punishment for disobedience that many victims are subject to from their abusers.¹⁴² When the state follows through with these threats, it further mimics aspects of the abusive dynamic that often exists in intimate partner violence and human trafficking situations, wherein the perpetrator confines, isolates, and punishes the victim.¹⁴³

Material witness warrants, contempt orders, and criminal charges typically result in loss of GBV victims’ physical liberty, which is one of the most profound injuries a person can experience.¹⁴⁴ Detention literally removes them from their lives—separating them from their loved ones, communities, workplaces, and support networks. It harms their families by preventing victims from fulfilling their caregiving responsibilities and

Responses: The Role of the Optimal Healing Environment and Neurobiology, 10 J. ALT. & COMPLEMENTARY MED. S-211, S-215 (2004) (explaining the severe disruption to the neurobiology underlying a person’s sense of agency during the course of a traumatic experience and asserting that “[i]t is probable that restoring agency is critical in creating the feelings of control necessary for healing in the individual”).

140. See *supra* note 13 and accompanying text.

141. EVELYN MCCOY, COLLEEN OWENS, LILLY YU, HANNA LOVE & JEANETTE HUSSEMAN, URB. INST., DELIVERING JUSTICE FOR HUMAN TRAFFICKING SURVIVORS: IMPLICATIONS FOR PRACTICE 10 (2018), http://www.urban.org/sites/default/files/publication/97356/delivering_justice_to_human_trafficking_survivors_0.pdf [<https://perma.cc/P2Q8-KB56>] (conducting qualitative interviews with a 70% female sample of sex and/or labor trafficking survivors in eight cities across the U.S.).

142. Mills, *supra* note 22, at 591.

143. See *id.* at 587, 591, 594; Balgamwalla, *supra* note 22, at 188–92, 197–200, 209–11.

144. See Allison Marston Danner & Adam Marcus Samaha, *Judicial Oversight in Two Dimensions: Charting Area and Intensity in the Decisions of Justice Stevens*, 74 *FORDHAM L. REV.* 2051, 2078 (2006).

interfering with their ability to provide financial support due to time away from work and potential job loss.¹⁴⁵ Detained victims and their families also must deal with the stigma associated with arrest and incarceration.¹⁴⁶ In addition to losing their physical liberty, they are often subjected to harmful treatment from correctional officers and other inmates while they are incarcerated.¹⁴⁷ Examples include a rape victim who was attacked by an inmate and punched in the face by a guard,¹⁴⁸ and a domestic violence victim who was “grabbed by both male and female guards, thrown down, (sprayed [with a chemical agent]), had every ounce of clothing taken from [her], even [her] glasses.”¹⁴⁹

There are additional serious harms associated with victims being criminally charged for the purpose of coercing their participation in the prosecution of GBV offenders. At the outset, being arrested and charged as a criminal can have negative psychological and emotional consequences for GBV victims and severely impede their healing process.¹⁵⁰ If victims then agree to participate in the investigation and prosecution of their abuser, they face potential re-traumatization from having to recount distressing and sensitive details about their victimization to the very authorities who treated them as criminals, and also from having to testify about their victimization in an adversarial setting in the presence of the perpetrator.¹⁵¹ Victims who refuse to acquiesce in the face of charges are likely to be prosecuted,¹⁵² which

145. Joel Gunter, *Why Are Crime Victims Being Jailed?*, BBC NEWS (May 5, 2017), <http://www.bbc.com/news/world-us-canada-39662428> [<https://perma.cc/E23Q-GEA3>] (quoting New Orleans ACLU spokesperson Colleen Kane Gielskie as stating, “Even a couple of days in jail can destroy someone’s life. . . . It sets off a cascading effect, you can lose a job, lose custody of children, all kinds of things that can have lasting consequences”); Stillman, *supra* note 30 (reporting the concerns of a domestic violence victim jailed on a material witness warrant about being fired for missing work and about her children’s well-being).

146. See Alex R. Piquero, David P. Farrington & Alfred Blumstein, *The Criminal Career Paradigm*, 30 CRIME & JUST. 359, 402 (2003).

147. See Goodmark, *Prosecutorial Misconduct*, *supra* note 23, at 639.

148. Michaels, *supra* note 33.

149. Morabito, *supra* note 31.

150. See Mogulescu, *supra* note 63, at 479, 485 (“[N]o matter how sympathetic or sensitive the court response may be, the mere existence of the criminal case and the experience of being arrested and then prosecuted in criminal court is devastating for someone being trafficked and exploited.”); Hersh, *supra* note 59, at 261 (asserting that “arrest re-victimizes and may re-traumatize” sex trafficking victims); see also, e.g., *Domestic Violence Victim Sent to Jail for Lying for Her Abuser*, *supra* note 67 (reporting that a domestic violence victim shared the following while in jail for perjury because she covered up past beatings after receiving a death threat from her abuser: “I feel wrong. I shouldn’t be here. I am the victim. I’m the victim”).

151. See *supra* notes 131–134 and accompanying text.

152. See Covey, *supra* note 21, at 875 (explaining that “prosecutors who threaten to bring perjury

results in additional trauma and secondary victimization.¹⁵³ If convicted, they must then endure the pains of incarceration for what can be lengthy periods—particularly in the case of “bottoms” convicted for sex trafficking offenses.¹⁵⁴ Even those who accept plea deals including an agreement to testify against their abuser may serve time, and in the case of deals related to sex crime charges, they are usually required to register as sex offenders—resulting in stigma, expense, and other harms.¹⁵⁵ Whether they accept a plea deal or are convicted, they will be plagued with a criminal record, which is often a barrier to accessing many types of housing, employment, immigration status, and other opportunities.¹⁵⁶ Accordingly, the practice of charging or threatening charges against GBV victims with the aim of securing their cooperation causes significant harm, regardless of whether they acquiesce to governmental actors’ wishes.

There are also considerable harms that result from conditioning assistance upon cooperation with criminal legal actors for the many GBV victims who cannot otherwise access much-needed resources. If they decide that cooperating is not in their best interests or if they are unable to fully cooperate due to trauma, a serious safety threat or another issue, they are denied key assistance that would otherwise be available to them.¹⁵⁷ The consequences can be severe. For those GBV victims who are un- or under-insured and cannot access CVCPs, medical treatment for injuries resulting from their victimization can be financially

charges must, to preserve their credibility, at least sometimes carry out the threat”); Crocker, *supra* note 52, at 780–82 (discussing the prosecution of “bottoms” who choose not to cooperate with prosecutors and testify against their traffickers).

153. See Mogulescu, *supra* note 63, at 479, 485.

154. See Crocker, *supra* note 52, at 780–83; see also, e.g., Morgan Smith, Edgar Walters & Neena Satija, *She Was a Sex-Trafficking Victim, but Texas Law Labeled Her a Pimp*, TEX. TRIB. (Feb. 16, 2017, 12:00 AM), <http://www.texastribune.org/2017/02/16/she-was-sex-trafficking-victim-texas-law-labeled-her-pimp/> [<https://perma.cc/YL5J-VSUA>] (describing the case of a “bottom” who “froze up” due to fear when it was time for her to testify against her trafficker, and as a result was unable to receive a reduced sentence as part of a plea deal that required her testimony; she was then convicted for trafficking a minor and sentenced to fifteen years in prison for this offense).

155. See, e.g., LAURA T. MURPHY, *SURVIVORS OF SLAVERY: MODERN DAY SLAVE NARRATIVES* 52 (2014) (describing the experience of a sex trafficking victim who spent three weeks in prison and accepted a plea deal requiring her to register as a sex offender after being charged with transporting minors across state lines for illegal purposes); Robert McClendon, ‘*Saved*’ from Her Life on the Streets, Only to Be Branded ‘Sex Offender’, NOLA.COM (July 19, 2019, 9:33 AM), http://www.nola.com/news/crime_police/article_8ee1b60c-df93-5549-be92-5e1896f10c35.html [<https://perma.cc/B7CU-L83T>] (reporting the detrimental impact of having to register as a sex offender upon a sex trafficking victim’s life, which was part of a plea deal she had accepted after spending two months in prison).

156. See Mogulescu, *supra* note 63, at 479, 483.

157. See *supra* section I.C.

devastating.¹⁵⁸ Empirical research has demonstrated that female GBV victims' annual health care costs are significantly higher than those of women who have not experienced GBV.¹⁵⁹ Furthermore, lost wages from missed work due to GBV victimization are also common, which research has shown has a considerable negative impact upon victims' income levels.¹⁶⁰ For undocumented GBV victims who cannot access a U.S. visa because they do not wish to or are unable to cooperate with law enforcement, or who cooperate but the relevant authorities refuse to sign the required certification, the harms are serious and far-reaching.¹⁶¹ They must contend with the continued harms of living in the U.S. without legal immigration status, including the enduring fear of detention and deportation, which often curtails their participation in community and social life.¹⁶² They remain barred from accessing potentially life-sustaining federal public benefits, such as the Supplemental Nutrition Assistance Program, Temporary Assistance for Needy Families, Supplemental Security Income, regular (non-emergency) Medicaid, and health care subsidies under the Affordable Care Act.¹⁶³ If undocumented victims end up being detained and/or deported, they face the harms of family and community separation, in addition to potential poverty, unemployment, homelessness, and other harsh conditions that may have driven them to immigrate in the first place.¹⁶⁴ Detention and deportation also carry serious collateral consequences for detained and deported individuals' families and communities left behind—including psychological trauma, loss of income and caregiving, adolescents abruptly needing to fill adult roles, and an uncertain future.¹⁶⁵

GBV victims who fail to be identified as such because they do not fit into stereotypes of “real” victims (who are constructed as fully

158. See MCLEAN & BOCINSKI, *supra* note 82, at 1–2.

159. Amy E. Bonomi, Melissa L. Anderson, Frederick P. Rivara & Robert S. Thompson, *Health Care Utilization and Costs Associated with Physical and Nonphysical-Only Intimate Partner Violence*, 44 HEALTH SERVS. RSCH. 1052, 1062–64 (2009).

160. MCLEAN & BOCINSKI, *supra* note 82, at 3.

161. This also applies to human trafficking victims who do not fit the age or trauma exceptions to the cooperation requirement for a T visa.

162. Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of “Illegality”*, 52 HARV. J. LEGIS. 355, 355–56, 361 (2015); Raymond Michalowski & Lisa Hardy, *Victimizing the Undocumented: Immigration Policy and Border Enforcement as State Crime*, in TOWARDS A VICTIMOLOGY OF STATE CRIME 87, 99–101 (Dawn L. Rothe & David Kauzlarich eds., 2014).

163. NAT'L IMMIGR. FACT SHEET: IMMIGRANTS AND PUBLIC BENEFITS 1 (2018), <http://immigrationforum.org/article/fact-sheet-immigrants-and-public-benefits/> [<https://perma.cc/5M3U-QRXY>].

164. See Cházaro, *supra* note 162, at 362.

165. Tanya Golash-Boza, *Punishment Beyond the Deportee: The Collateral Consequences of Deportation*, 63 AM. BEHAV. SCIENTIST 1331, 1333–45 (2019).

cooperative with law enforcement)¹⁶⁶ are likely to be deprived of referrals to service providers that could assist them with exiting their abusive situation and provide them with the support and resources they need for recovery. Even worse, GBV victims who are not given legitimate victim status could be forced to endure the criminal legal process “marked as defendants” for prostitution or other illegal activity related to their victimization.¹⁶⁷ If the practice of conditioning assistance upon cooperation effectively coerces them into cooperating against their will, they are then likely to experience the harms associated with an undermined sense of agency, GBV victims’ participation in the criminal legal process, and potential (further) secondary victimization.¹⁶⁸

Based on the foregoing, it is evident that the practices described in Part I result in significant harms for GBV victims. In light of the capacity of adult GBV survivors to make rational decisions about their lives and their familiarity with their personal situations, needs, priorities, and goals, we can conclude that they are better placed than the state to determine whether participating in the criminal legal process is in their best interests. But even setting this notion aside, an objective view of the costs and benefits of these tactics rebuts claims that their use leaves victims better off than they otherwise would be. Employing criminal law measures against certain offenders may temporarily make their victims safer from GBV perpetrated by those offenders (though the empirical research discussed in the next section indicates that these cases are far less common than most people think). But given the serious and myriad harms that coercive and instrumentalizing tactics aimed at compelling victims’ participation cause, this potential benefit cannot effectively justify their use on paternalistic grounds because they fail to serve paternalism’s goals. In reality, these practices cause GBV victims more harm than good—thereby undercutting the paternalistic justifications advanced by those who defend their past and continued use.

B. Utilitarianism

Many of the justifications advanced for instrumentalizing and coercing GBV victims within the criminal legal process can be characterized as utilitarian because they focus on overall benefit to the social welfare.¹⁶⁹ Utilitarianism is a form of consequentialist ethics because it judges the

166. *See supra* note 26.

167. *See Mogulescu, supra* note 63, at 481.

168. *See supra* notes 130–135, 138.

169. *See* NIGEL WARBURTON, *PHILOSOPHY: THE BASICS* 47 (5th ed. 2012).

morality of an action on the basis of its consequences.¹⁷⁰ Those who defend the use of the practices detailed in Part I by putting forward these types of justifications argue that they result in a greater amount of collective benefit than harm, and are thus the morally “right” course of action. They tend to rely on the assumption that criminal legal responses are necessary in most, if not all, cases of GBV in order to effectively address GBV within our society.

Defenders of forcing victims to cooperate cite the fact that GBV negatively affects others beyond the direct victims. Kirsch’s study found that some interviewees justified coerced cooperation with concerns about victims’ children, future victims, responding police officers, prosecutors’ offices (which may be blamed for future incidents if they drop charges), and/or the wider community.¹⁷¹ One of the prosecutors interviewed explained his position as follows:

I would have had no problem putting a victim in jail because she refused to cooperate. I have a legal obligation to the people of this state to prosecute crimes of this nature. To me, these are serious offenses that affect other people in the community. If he’s beating her up, it’s not too long before he’s beating up the kids. I have to do what I can to stop the abuse and I think prosecution is the best way.¹⁷²

Likewise, former New Orleans District Attorney Leon Cannizzaro defended his office’s practice of arresting rape and domestic violence victims on material witness warrants by appealing to the greater good.¹⁷³ He asked, “[i]s it more important for this witness to be inconvenienced for a very short period of time or is it better for the community to get the violent offender off the streets and keep him off the streets?”¹⁷⁴ Similarly,

170. *Id.* at 46–47.

171. Kirsch, *supra* note 65, at 387, 400, 403, 416, 421–23.

172. *Id.* at 402–03.

173. Pishko, *supra* note 85. Cannizzaro was so determined to force victims to cooperate in prosecutions that his office regularly served them with fake subpoenas ordering them to appear at his office for questioning and threatening fines and imprisonment if they failed to comply. See Charles Maldonado, *Orleans Parish Prosecutors Are Using Fake Subpoenas to Pressure Witnesses to Talk to Them*, LENS (Apr. 26, 2017), <http://thelensnola.org/2017/04/26/orleans-parish-prosecutors-are-using-fake-subpoenas-to-pressure-witnesses-to-talk-to-them/> [<https://perma.cc/XH37-QN8T>]. Victims, witnesses, and a non-profit organization sued Cannizzaro and his ADAs in 2017 for this practice and for their deceptive applications for material witness warrants. Complaint & Jury Demand, Singleton v. Cannizzaro, 397 F. Supp. 3d 840 (E.D. La. 2017) (No. 2:17-cv-10721-JTM-JVM), 2017 WL 11647620. The parties settled in October 2021. Kevin McGill, *Settlement Ends Lawsuit over Fake Subpoenas, Jailed Victims*, ASSOCIATED PRESS (Oct. 5, 2021), <http://apnews.com/article/new-orleans-subpoenas-lawsuits-crime-courts-1ccf1b85a57d7f6b7b791fa602ad9c1c> (last visited Apr. 3, 2022).

174. Pishko, *supra* note 85.

Maine District Attorney Maeghan Maloney asserted that “[t]he reason [for arresting victims] is the prosecution is not just for her but for the community. With domestic violence, she’s not likely to be his one and only victim.”¹⁷⁵

Proponents of forced victim participation practices also argue that they send the message to GBV offenders that they cannot escape criminal accountability by pressuring their victims not to testify.¹⁷⁶ They contend that without this message, the criminal legal system would lose credibility with abusers.¹⁷⁷ Consequently, defendants would have little incentive to enter into plea agreements if they knew that the state would not force their victims to cooperate.¹⁷⁸ In addition, proponents assert that the state needs to send the message to society as a whole that GBV is wrong by aggressively prosecuting it, even when doing so necessitates coercing victims’ participation.¹⁷⁹

One particularly strong proponent of mandating GBV victim participation was the late law professor and former prosecutor Cheryl Hanna. She strongly believed that any costs of forcing victims to participate in the criminal legal process are justified by overall benefits to society.¹⁸⁰ Hanna viewed punishing the offender in order to protect potential victims as the goal of the criminal legal system within the domestic violence context.¹⁸¹ Accordingly, she made the utilitarian argument that “prosecutors must consistently mandate participation [for victims of domestic violence], including testimony at trial, when necessary to proceed with a case. The societal benefits gained through this criminal justice response to domestic violence far outweigh any short-term costs to women’s autonomy and collective safety.”¹⁸² Despite good intentions, Hanna’s position plainly constructs victims of GBV as sacrificial objects: no matter the harms to individual victims, they should be reduced to evidentiary tools against their will. She viewed this as necessary to “condemn and control violence against women.”¹⁸³

Those in favor of coercing GBV victims to participate in the criminal

175. *Id.*

176. *See* Gwinn & O’Dell, *supra* note 30, at 313; Hanna, *supra* note 41, at 1890; Kirsch, *supra* note 65, at 419.

177. Gwinn & O’Dell, *supra* note 30, at 313; Hanna, *supra* note 41, at 1891.

178. *See* Hanna, *supra* note 41, at 1892; Kirsch, *supra* note 65, at 424.

179. Hanna, *supra* note 41, at 1889–90; *see also* Gwinn & O’Dell, *supra* note 30, at 305, 313–14; Morabito, *supra* note 31.

180. *See generally* Hanna, *supra* note 41.

181. *Id.* at 1870.

182. *Id.* at 1857.

183. *Id.* at 1909.

legal process often deny, minimize, or underestimate the severity of the harms involved. For example, Hanna contended that the “danger [of revictimization] is often exaggerated.”¹⁸⁴ She also referred only to “short-term costs” of compelling victim participation and overlooked the long-term harms to victims, their families, and their communities.¹⁸⁵ As indicated above, Cannizzaro characterized arrest and detention on material witness warrants as an “inconvenience[] for a very short period of time.”¹⁸⁶ This is quite an understatement, given the often serious and long-lasting harms this practice causes to GBV victims and their loved ones.¹⁸⁷ Some proponents of forced participation explicitly deny that it revictimizes GBV victims at all.¹⁸⁸ This view has been clearly debunked by the literature on secondary victimization and real-life examples.¹⁸⁹

There is disagreement over whether it is likely that curbing the practices that coerce and instrumentalize victims within the criminal legal process would thwart some GBV prosecutions.¹⁹⁰ Even if it does, there will undoubtedly still be GBV prosecutions and convictions, as victims often choose to participate in the criminal legal process for reasons unrelated to state coercion, including retribution, deterrence, and incapacitation.¹⁹¹ But before we can draw conclusions about the implications of potentially decreased prosecutions, we must ask: does instrumentalizing GBV victims within the criminal legal process actually result in a net benefit to society, in line with what the utilitarian approach demands? The aim of doing so is to achieve more prosecutions and convictions for GBV crimes. However, scholars, advocates, journalists,

184. *Id.* at 1894.

185. *See id.* at 1857. Long-term harms of utilizing highly coercive tactics to compel GBV victim participation are discussed below in this section and *supra* section II.A.

186. *See* Pishko, *supra* note 85.

187. *See supra* notes 131–139, 142–168 and accompanying text; *infra* notes 214–215, 217 and accompanying text.

188. *E.g.*, Kirsch, *supra* note 65, at 415; Morabito, *supra* note 31.

189. *See supra* notes 47–50, 94, 131–139, 150, 154–155 and accompanying text; *infra* notes 207–08 and accompanying text.

190. *Compare, e.g.*, WU & YELDERMAN, *supra* note 30, at 2 (contending that eliminating the practice of arresting and jailing of human trafficking victims on material witness warrants would “undoubtedly thwart some prosecutions”), with Goodmark, *Prosecutorial Misconduct*, *supra* note 23, at 655 (“Research suggests that prosecutors could forgo the use of material witness warrants with little impact on prosecutorial effectiveness.” (citing Robert C. Davis, Chris S. O’Sullivan & Donald J. Farole, Jr., *A Comparison of Two Prosecution Policies in Cases of Intimate Partner Violence: Mandatory Case Filing Versus Following the Victim’s Lead*, 7 CRIMINOLOGY & PUB. POL’Y 633 (2008))).

191. *See* Hare, *supra* note 85, at 615–16, 624–25; Wechsler, *supra* note 12, at 1046–49, 1054–58, 1066–70, 1074–77. Even Cheryl Hanna acknowledged that some women “zealously want to cooperate in the prosecution of their batterer.” Hanna, *supra* note 41, at 1884.

and survivors are increasingly challenging the wisdom of foregrounding prosecutorial responses to GBV, especially as the Black Lives Matter and Defund the Police movements shine a light on the disproportionately negative impact of these interventions upon low-income communities of color and other marginalized groups.¹⁹²

Scholars have highlighted the role of effective advocacy for increased criminal law responses to GBV in contributing to the mass incarceration problem in the U.S.¹⁹³ The socially and economically marginalized communities targeted with hyper-incarceration of its members experience weakened social ties and internal social controls, eroded community infrastructure, reduced civic participation, and depressed economic activity, resources, and opportunity as a consequence.¹⁹⁴ These conditions operate to increase the likelihood of violence, including GBV.¹⁹⁵ This serious harm must be accounted for when assessing the overall impact of increased prosecutions and convictions for GBV offenses upon society, as achieved through the instrumentalization of victims within the criminal legal process.

Along these lines, traditional criminal law responses fail to address, and often exacerbate, the underlying drivers of GBV.¹⁹⁶ The prioritization of

192. E.g., Sabra Boyd, *The Police Are Not Our Allies in the Fight Against Trafficking*, MEDIUM (Aug. 13, 2020), <http://sabra-boyd.medium.com/the-police-are-not-our-allies-5f4e9fc4f425> [https://perma.cc/H32D-3LV5]; GOODMARK, *supra* note 129; AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (2020); Aya Gruber, *How Police Became the Go-to Response to Domestic Violence*, SLATE (July 7, 2020, 4:03 PM), <http://slate.com/news-and-politics/2020/07/policing-domestic-violence-history.html> [https://perma.cc/24JH-LJ83]; Pishko, *supra* note 85; Deborah M. Weissman, *The Community Politics of Domestic Violence*, 82 BROOK. L. REV. 1479 (2017); Wilson Wong, *'Defund the Police' Movement Could Offer Sexual Assault Survivors a Different Path for Justice, Experts Say*, NBC NEWS (Aug. 2, 2020), <http://www.nbcnews.com/news/us-news/defund-police-movement-could-offer-sexual-assault-survivors-different-path-n1235478> [https://perma.cc/HVX5-ALPF].

193. E.g., GRUBER, *supra* note 192; BETH RICHIE, BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION 78–83, 159, 162–63 (2012); GOODMARK, *supra* note 129, at 3–4, 13–15.

194. See Coker & Macquoid, *supra* note 7, at 607–09; GOODMARK, *supra* note 129, at 27–28, 31–32; RICHIE, *supra* note 193, at 96; MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 94–96, 103, 123–26, 180, 184–91 (rev. ed. 2012); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281–97 (2004). “[I]nformal social controls” within a community refer to the largely informal networks among community members which enforce social and behavioral norms, including those impacting public safety. See Roberts, *supra*, at 1285–87. See generally Todd R. Clear, *The Problem with 'Addition by Subtraction': The Prison-Crime Relationship in Low-Income Communities*, in INVISIBLE PUNISHMENT: COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 181 (Marc Mauer & Meda Chesney-Lind eds., 2002).

195. See Coker & Macquoid *supra* note 7, at 610–14; GOODMARK, *supra* note 129, at 28; ALEXANDER, *supra* note 194, at 237; Roberts, *supra* note 194, at 1286–88, 1297.

196. See Chuang, *supra* note 6, at 1725–26; GOODMARK, *supra* note 129, at 8, 26–29, 47–74; Deborah M. Weissman, *Gender Violence, the Carceral State, and the Politics of Solidarity*, 55 U.C. DAVIS L. REV. 801 (2021).

arrests, prosecutions, and convictions has led to the concentration of resources in carceral interventions and significantly fewer resources being invested in tackling the root causes of this social problem.¹⁹⁷ Structural determinants of GBV include high unemployment rates,¹⁹⁸ low income levels,¹⁹⁹ cultures of hypermasculinity,²⁰⁰ prevalent alcohol abuse,²⁰¹ and high levels of social disorganization.²⁰² These are often amplified by criminal legal interventions. For example, the economic risk factors are exacerbated by missed work, lost wages, and lost jobs resulting from arrests, prosecutions, and incarceration (even short-term), as well as by hiring discrimination against job candidates with a criminal record.²⁰³ Furthermore, far from serving as “legitimate ‘therapy’ to persuade the abuser to reconsider before resorting to violence,” as prosecutor Donna Wills claims,²⁰⁴ prisons feature a widespread culture of “destructive masculinity,” which fuels and reinforces the hypermasculine attitudes often associated with GBV perpetration.²⁰⁵ And communities where a high proportion of members are incarcerated suffer from increased social disorganization as a consequence.²⁰⁶ Thus, the myopic concentration of resources in criminal legal responses to GBV not only comes at the expense of mitigating well-established risk factors for GBV, but also

197. See Coker, *supra* note 7, at 155; GOODMARK, *supra* note 129, at 5, 28.

198. Kirsten Beyer, Anne Baber Wallis & L. Kevin Hamberger, *Neighborhood Environment and Intimate Partner Violence: A Systematic Review*, 16 TRAUMA, VIOLENCE, & ABUSE 16, 40 (2015); Deborah M. Capaldi, Naomi B. Knoble, Joann Wu Shortt & Hyoun K. Kim, *A Systematic Review of Risk Factors for Intimate Partner Violence*, 3 PARTNER ABUSE 231, 242–43 (2012).

199. Beyer et al., *supra* note 198; Capaldi et al., *supra* note 198; see also Chuang, *supra* note 6, at 1724–26.

200. Catalina Vechiu, *The Role of Hypermasculinity as a Risk Factor in Sexual Assault Perpetration*, in HANDBOOK OF SEXUAL ASSAULT AND SEXUAL ASSAULT PREVENTION 257, 257–63 (William T. O’Donohue & Paul A. Schewe eds., 2019).

201. See GOODMARK, *supra* note 129, at 70; Carrie A. Moylan & McKenzie Javorka, *Widening the Lens: An Ecological Review of Campus Sexual Assault*, 21 TRAUMA, VIOLENCE, & ABUSE 179, 182 (2020).

202. Beyer et al., *supra* note 198 (identifying lower levels of collective efficacy, stronger norms of nonintervention, and higher perceived neighborhood disorder as “direct measures of social disorganization” that are associated with increased IPV rates).

203. See ALEXANDER, *supra* note 194, at 152; GOODMARK, *supra* note 129, at 27–28; Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 821–25, 839–41 (2015); Roberts, *supra* note 194, at 1293–94.

204. Wills, *supra* note 108, at 181.

205. Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL’Y 13, 27–32 (2011); see SpearIt, *Gender Violence in Prison & Hypermasculinities in the ‘Hood: Cycles of Destructive Masculinity*, 37 WASH. U. J.L. & POL’Y 89, 97, 106, 131–33 (2011).

206. Roberts, *supra* note 194, at 1285–87 (asserting that mass incarceration leads to “[d]isorganized communities [that] cannot enforce social norms” and likely reduces residents’ collective efficacy by weakening social networks).

amplifies many of these factors.

In light of these serious costs, the prioritization of criminal law responses to GBV would need to yield very large benefits for it to be justifiable under a utilitarian perspective. But existing research fails to demonstrate sizeable benefits, and alarmingly, provides evidence of additional significant harms. Most of the empirical research on the impact of criminal law interventions for GBV focuses on domestic violence or intimate partner violence (IPV), a major type of GBV.²⁰⁷ For example, the famed Minneapolis Domestic Violence Experiment and its five replication studies in different cities examined the effects of arrest (versus other police actions, which varied across experiments) on domestic violence recidivism.²⁰⁸ The results are mixed and complex. In the Omaha, Charlotte, and Milwaukee replication experiments, there is evidence that arrest initially deterred IPV reoffending but was associated with increased reoffending over a longer time period.²⁰⁹ A reanalysis of the original Minneapolis experiment data showed an overall deterrent effect of arrest that decayed over time and disappeared at six months based upon victim interview data, a trend suggesting possible long-term IPV escalation

207. Both IPV and domestic violence are used to refer to violence by one romantic partner against another. The latter term is broader than the former and is also used to describe violence by a family member against another family member related by blood or adoption. See GOODMARK, *supra* note 129, at 157 n.1. However, IPV and domestic violence “are terms that are often used interchangeably in reference to IPV.” Briana Barocas, Hila Avieli & Rei Shimizu, *Restorative Justice Approaches to Intimate Partner Violence: A Review of Interventions*, 11 PARTNER ABUSE 318, 325 (2020).

208. The Minneapolis Domestic Violence Experiment received a great deal of popular media attention, including from the N.Y. Times, Associated Press, CBS News, and ABC Nightline. See Lawrence Sherman, Joel Garner, Ellen Cohn & Edwin Hamilton, *The Impact of Research on Police Practices: A Case Study of the Minneapolis Domestic Violence Experiment*, in 1 NAT’L CONF. ON DOMESTIC VIOLENCE 145, 160–62 (Suzanne E. Hatty ed., 1986), https://www.aic.gov.au/sites/default/files/2021-04/aic-seminar-proceedings-12_vol1.pdf [<https://perma.cc/DZL3-37BU>]; Richard Lempert, *From the Editor*, 18 LAW & SOC’Y REV. 505, 506 (1984). It had a tremendous impact on public policy, prompting many jurisdictions to adopt mandatory arrest and other pro-arrest policies for domestic violence incidents. Notably, some scholars sharply criticized the researchers who had conducted the experiment for their extensive efforts to publicize the results. See, e.g., Arnold Binder & James W. Meeker, *Implications of the Failure to Replicate the Minneapolis Experimental Findings*, 58 AM. SOC. REV. 886, 887 (1992) (“Sherman and his various associates actively promoted the results of this study in a variety of nonacademic media, and the promotion implied advocacy of policy. The consequence was a dramatic change in public policy with potentially substantial negative effects on many people and an unwarranted large expenditure of public monies.”); Lempert, *supra*, at 509 (positing “that the results of this research have been prematurely and unduly publicized, and that police departments that have changed their arrest practices in response to this research may have adopted an innovation that does more harm than good.”).

209. LAWRENCE W. SHERMAN, JANELL D. SCHMIDT & DENNIS P. ROGAN, *POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS* 17 (1992).

effects as well.²¹⁰ The Colorado Springs and Miami replication experiments found deterrent effects from arrest and no escalation effects.²¹¹ Notably, there is compelling evidence that the impact of arrest varied based upon suspects' employment status: the Milwaukee, Colorado Springs, and Omaha data indicate that unemployed suspects' reoffending increased following arrest, while that of employed suspects did not.²¹² This finding strongly suggests that communities with high unemployment rates experience increased domestic violence when police frequently use arrest as a response to domestic violence incidents.²¹³

Serious harmful consequences of carceral interventions for domestic violence, particularly for people of color, have been confirmed by longitudinal research conducted twenty-three years after the original Minneapolis experiment, examining the very same sample.²¹⁴ The researchers discovered that 64% more victims whose partners had been arrested and jailed had died than those whose partners had only been warned.²¹⁵ This finding was much more pronounced for Black victims than it was for White²¹⁶ victims: 98% more Black victims had died, while 9% more White victims had died.²¹⁷ As most study participant deaths had been caused by heart disease and other internal morbidities rather than homicide, the researchers hypothesize that the higher likelihood of death among victims whose partners had been arrested is linked to the trauma of witnessing the arrest, mediated by employment status and other social

210. *Id.* at 197. Victim interview data can provide a more accurate picture of IPV reoffending because it encompasses IPV incidents that are not reported to police. However, low participation in follow-up interviews can also skew data. For the Minneapolis experiment, only 49% of victims completed all twelve follow-up interviews, which may have impacted the findings regarding recidivism over the course of the six-month study period. *Id.* at 275; Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2162–63 n.43, 2163 n.46 (1995).

211. *See* SHERMAN ET AL., *supra* note 209, at 17.

212. *Id.* at 17, 126–27, 174–77, 182–85 (analyzing the employment status variable for only the Milwaukee, Colorado Springs, and Omaha studies due to lack of availability or problems with the data from the other studies, and hypothesizing that the role of this variable was linked to suspects' "stakes in conformity," or how much they stand to lose as a consequence of being arrested).

213. *See id.* at 22.

214. Lawrence W. Sherman & Heather M. Harris, *Increased Death Rates of Domestic Violence Victims from Arresting vs. Warning Suspects in the Milwaukee Domestic Violence Experiment (MiDVE)*, 11 J. EXPERIMENTAL CRIMINOLOGY 1, 6 (2015).

215. *Id.* (finding that this difference was statistically significant).

216. I have chosen to capitalize "White" to highlight that all races are socially constructed categories, "White" should not be viewed as the neutral standard, White people are no more culturally diverse than people of other races, and to remove power from racists' norm-defying capitalization of White by contributing to a change in the norm. *See* Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, ATLANTIC (June 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159/> [<https://perma.cc/8LUX-79VU>].

217. Sherman & Harris, *supra* note 214, at 9.

contextual factors.²¹⁸

Regarding the ability of carceral responses to GBV to deter reoffending, which is often cited as a reason to continue prioritizing these interventions, the abundance of studies on the topic with complex and often seemingly contradictory findings renders meta-analyses especially useful and important. Meta-analysis is a methodology that systematically and quantitatively synthesizes the results from multiple empirical studies examining a particular research question in order to draw well-grounded conclusions from the combined data.²¹⁹ Fortunately, there is a recent, rigorous meta-analysis of fifty-seven studies examining the effects of post-arrest sanctions upon IPV recidivism to help us make sense of the abundance of research on this topic.²²⁰ The large number of studies included should give us a high degree of confidence in the results, since “the more inclusive and larger the body of prior studies considered [in a meta-analysis], the stronger and more reliable the conclusions can be.”²²¹ This meta-analysis found that prosecuting offenders had only a marginal deterrent effect, convicting them had no impact upon their future IPV offending, and incarcerating them had a large escalation effect—meaning that those who were incarcerated for IPV were significantly more likely to commit IPV again as compared with those who were not incarcerated.²²² These findings are compelling and refute the position that coercing and instrumentalizing victims to enable the conviction and incarceration of IPV offenders is necessary to reduce GBV and produces a net benefit to society. Since prosecuting IPV only marginally deters reoffending, the overall deterrence benefits of broadly prioritizing prosecution, including when victims do not wish to participate in the criminal legal process, very likely do not outweigh the overall costs of doing so.

In addition to marginal deterrence of reoffending through prosecutions, a utilitarian analysis must account for other benefits of criminal legal responses to IPV, and GBV more generally. One benefit is the expressive

218. *Id.* at 7, 14–17.

219. Edward Wells, *Uses of Meta-Analysis in Criminal Justice Research: A Quantitative Review*, 26 *JUST. Q.* 268, 270–71, 291 (2009). While descriptive surveys of existing studies are certainly useful, meta-analyses yield more valid and informative results on which to base policy decisions because they avoid the former’s subjectivity, ambiguity, and the great difficulty of drawing conclusions about and comparing individual studies with weak detected effects, limited samples, statistical errors, and/or the fallible measurements common in real-world research. *Id.* at 268–71, 291.

220. Joel H. Garner, Christopher D. Maxwell & Jina Lee, *The Specific Deterrent Effects of Criminal Sanctions for Intimate Partner Violence: A Meta-Analysis*, 111 *J. CRIM. L. & CRIMINOLOGY* 227 (2021).

221. *Id.* at 271.

222. Garner et al., *supra* note 220, at 227, 255–59.

value of enforcing criminal laws against those who commit GBV—it communicates to both offenders and to wider society that GBV is morally wrong and will not be tolerated.²²³ Yet, there are other ways to achieve this benefit without relying on traditional criminal law mechanisms, such as through community-based justice forums and well-developed educational interventions.²²⁴ Another benefit is potentially increased safety for both victims and others through the incapacitation of certain offenders pending trial and/or through sentencing.²²⁵ However, in the IPV context at least, this temporary reduction in violence is most likely negated and even outweighed by the future escalation of IPV associated with incarceration.²²⁶

As GBV victims are members of society, we also must account for the impact of aggressively coercing their participation in the criminal legal process upon them²²⁷ when analyzing whether doing so results in a net benefit or net cost to society. In addition, it is important to recognize that the harms of secondary victimization and re-traumatization stretch beyond the victim herself, to her partner, family members, friends, and others in her support network and community. Just as primary victimization typically has a “ripple effect,” resulting in emotional trauma for those who care about the crime victim, secondary victimization often imposes harms upon these individuals as well.²²⁸ This is primarily because their recovery is closely tied to the victim’s healing process.²²⁹ Secondary victimization can also harm professionals who work with victims, such as social workers, therapists, and lawyers, by leading to their “vicarious traumatization” from hearing victims describe the troubling treatment

223. See GOODMARK, *supra* note 129, at 30–31; Hanna, *supra* note 41, at 1889–90.

224. See, e.g., Leigh Goodmark, “Law and Justice Are Not Always the Same”: *Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. 707, 736–38, 744–47 (2015) (asserting that community-based justice forums for IPV survivors would allow the wider community to acknowledge the wrong of IPV, publicly shame the offender, and send a message that survivors’ suffering matters); Kristie A. Thomas, Susan B. Sorenson & Manisha Joshi, “Consent Is Good, Joyous, Sexy”: *A Banner Campaign to Market Consent to College Students*, 64 J. AM. COLL. HEALTH 639, 645 (2016) (finding that a sexual assault prevention campaign on a college campus featuring colorful banners with messages about consent (e.g., “Consent can be Revoked”) effectively communicated the message that sexual assault is wrong).

225. See GOODMARK, *supra* note 129, at 30.

226. See Garner et al., *supra* note 220, at 227, 258–59.

227. See *supra* section II.A.

228. Diane M. Daane, *The Ripple Effect: Secondary Sexual Assault Survivors*, in *SEXUAL ASSAULT: THE VICTIMS, THE PERPETRATORS, AND THE CRIMINAL JUSTICE SYSTEM* 113, 113–14, 117 (Frances P. Reddington & Betsy Wright Krisel eds., 2005) (explaining that it is common for sexual assault victims to experience setbacks in their healing process, especially during their involvement with the criminal legal system, and that these setbacks also disrupt the recovery of those close to the victim).

229. *Id.* at 117.

they experienced at the hands of criminal legal authorities.²³⁰ Finally, a victim's secondary victimization can impact her wider community by discouraging other victims from seeking help, out of fear of being secondarily victimized themselves.²³¹

Even recognizing the challenge of weighing costs and benefits in utilitarian analysis due to issues of incommensurability,²³² the foregoing examination makes clear that the costs of coercing and instrumentalizing GBV victims in the criminal legal process against their will outweigh the benefits of doing so to society as a whole. Not only do the contested practices result in great harms, but the primary utilitarian justification for employing them—that they lead to reduced GBV rates in society—has been refuted by rigorous empirical research. Thus, we can conclude that, like the paternalistic justifications advanced by defenders of these practices, their utilitarian justifications do not hold water. From a utilitarian perspective, the highly coercive and instrumentalizing practices described in Part I are, in fact, morally objectionable.

III. OVERLOOKED CONCEPTUAL FRAMES

Discussions around the state's use of coercive and instrumentalizing practices on GBV victims have overlooked three interrelated conceptualizations of the issue that are rooted in human dignity and the proper treatment of individuals within a liberal society. These frameworks are deontological ethics, dehumanization, and liberal legal theory. Together, they provide a powerful lens for understanding the wrongs of instrumentalizing GBV victims within the criminal legal process that goes beyond only considering the tangible consequences of doing so. In applying this lens, we can appreciate how these coercive and instrumentalizing practices offend foundational values concerning personal autonomy, limits on state power, and the respect of human

230. See Rachel Condry, *Secondary Victims and Secondary Victimization*, in INTERNATIONAL HANDBOOK OF VICTIMOLOGY 219, 235 (Shlomo Giora Shoham, Paul Knepper & Martin Kett eds., 2010) (noting that “[n]umerous studies have found professionals such as counselors or therapists, lawyers, and the police working directly with victims of rape, sexual assault, and other forms of interpersonal violence experience high levels of vicarious trauma”).

231. See Epstein & Goodman, *supra* note 136, at 452; Tamara Rice Lave, *Police Sexual Violence*, in THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 392, 400 (Tamara Rice Lave & Eric J. Miller eds., 2019); Sharyn J. Potter, *Reducing Sexual Assault on Campus: Lessons from the Movement to Prevent Drunk Driving*, 106 AM. J. PUB. HEALTH 822, 825 (2016); Michaels, *supra* note 33.

232. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 10–11 (1996). This refers to the difficulties of comparing costs and benefits that are not reducible to a common unit of measure. For example, the expressive value of criminal law enforcement and the practical impact on individuals' lives cannot be converted to common, easily comparable units.

dignity.

A. *Deontology*

Deontology is a duty-based ethical theory that determines the morality of an act with regard to its alignment with certain duties and obligations.²³³ Immanuel Kant's theoretical work is central to deontological ethics and is relevant to analyzing the moral status of instrumentalizing GBV victims within the criminal legal process. Specifically, Kant's well-known "Formula of Humanity," which prohibits the use of a human being "merely as a means" (the "Mere Means Principle"), is a particularly apposite framework.²³⁴

Philosophers have long discussed and debated the meaning of the Formula of Humanity. In one such discussion, Paulus Kaufmann explores the meaning of the colloquial expression, "to use a person."²³⁵ He concludes that three conditions must be fulfilled for person A to use person B: (1) A interacts with B, (2) A does so because he believes that B's presence or participation can contribute to the realization of A's goal, and (3) A's goal does not essentially refer to B.²³⁶ Tellingly, Kaufmann first explains the meaning of each of these conditions using an object as an example.²³⁷ For instance, he clarifies the third condition with a knife illustration.²³⁸ He explains that sharpening a knife does not count as using it because sharpness relates to the state of the knife itself.²³⁹ Importantly, Kaufmann notes that fulfilling these three conditions does not ipso facto render an act towards a person morally impermissible instrumentalization.²⁴⁰ He points to Kant's qualification to using a person as a means—"merely"—to identify prohibited uses.²⁴¹ Kaufmann argues that this turns on consent, such that the person being used must consent to

233. See WARBURTON, *supra* note 169, at 39, 41–45.

234. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 209 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797) ("Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being . . . but must always be used at the same time as an end.").

235. Paulus Kaufmann, *Instrumentalization: What Does It Mean to Use a Person?*, in *HUMILIATION, DEGRADATION, DEHUMANIZATION: HUMAN DIGNITY VIOLATED* 57, 60–61 (Paulus Kaufmann, Hannes Kuch, Christian Neuhäuser & Elaine Webster eds., 2010).

236. *Id.* at 61 n.7 (explaining that a "goal essentially refers to a person if it cannot be spelled out without linguistically referring in any way to the person in question, be it by using proper names or definite descriptions").

237. *Id.* at 60–61.

238. *Id.* at 60.

239. *Id.*

240. *Id.* at 61.

241. *Id.*

the interaction and its conditions for it to be morally permissible.²⁴²

Robert Audi points out that the qualifier, “merely,” usually has a derogatory connotation.²⁴³ Without it, he descriptively characterizes “instrumental treatment” as essentially “using its object not as something valued in itself (even if it happens to be so valued) but to achieve a *further* end.”²⁴⁴ In his view, this end “does not essentially contain . . . [the concept] of the means in question” and, in principle, can be achieved by more than a single means.²⁴⁵ To constitute “*merely* instrumental treatment,”²⁴⁶ the agent must be “*unconcerned* with anything about the person . . . that is not relevant to realizing the agent’s end.”²⁴⁷ Furthermore, Audi considers treatment “*merely* as a means”²⁴⁸ to be a type of negative instrumental treatment where “the instrumental function of the action in question, or some set of instrumental functions, [are] . . . in a certain way one’s *exclusive* aim.”²⁴⁹ Thus, under Audi’s account, the addition of “merely” connotes wrongness through the affirmative exclusion of non-instrumental motivations towards whom the agent acts.

Similarly, Derek Parfit posits the following “rough” definition: “we treat someone *merely* as a means if we both treat this person as a means, and regard this person as a mere instrument or tool: someone whose well-being and moral claims we ignore, and whom we would treat in whatever ways would best achieve our aims.”²⁵⁰ Like Audi’s conceptualization, Parfit’s conveys a callousness on the part of the agent using another person merely as a means. However, Parfit convincingly argues for an expansion of Kant’s Mere Means Principle to encompass not only treatment of a person merely as a means, but also treatment that “come[s] close” to that, as morally wrong.²⁵¹ He defines coming close to treating someone merely as a means as giving “too little weight to this person’s well-being or moral claims.”²⁵² Under this account, treating a person “merely as a means” and coming close to doing so are not materially different and are morally impermissible on the same grounds. Parfit

242. *Id.* at 61–62.

243. ROBERT AUDI, MEANS, ENDS, AND PERSONS: THE MEANING AND PSYCHOLOGICAL DIMENSIONS OF KANT’S HUMANITY FORMULA 21 (2015).

244. *Id.* at 17 (emphasis in original).

245. *Id.* at 15.

246. *Id.* at 26 (emphasis in original).

247. *Id.* at 25 (emphasis in original).

248. *Id.* at 22 (emphasis added).

249. *Id.* (emphasis in original).

250. 1 DEREK PARFIT, ON WHAT MATTERS 213 (2011) (emphasis in original).

251. *Id.* at 214.

252. *Id.*

provides the example of a hypothetical slaveholder who gave slight weight to his slaves' well-being and, as a result, allowed them to rest during the hottest part of the day.²⁵³ The slaveholder would not be treating his slaves "merely as a means" because his motivations were not *exclusively* instrumental in nature.²⁵⁴ However, since they *come close* to being entirely instrumental, his treatment of his slaves would be morally impermissible under Parfit's minimally expanded principle.²⁵⁵

It is important that we return to the concept of consent. Recall that Kaufmann views the meaning of "merely" using a person as fulfilling the three conditions for using another and doing so without that person's consent.²⁵⁶ Other Kantian scholars agree that consent should be part of the equation. For example, Samuel Kerstein asserts that "merely" should not be taken literally and that using someone "merely as a means" denotes "us[ing] the person in a way that does not exhibit sufficient respect for the person's rational agency, that is, for her capacity to determine how she is used and to rationally pursue her ends."²⁵⁷ In other words, it is morally problematic to insufficiently respect a rational agent's consent and freedom of choice in relation to her own life and goals. Kaufmann similarly identifies the capacity to set and pursue ends as the property that is impaired when a person is used "merely as a means" because the user fully prioritizes the realization of her own ends over those of the other person.²⁵⁸ He further argues that this property is valuable and bestows a special status upon the bearer—the status of possessing human dignity—which places constraints on how she may be treated.²⁵⁹ On this basis, Kaufmann concludes that treating a person "merely as a means" without her consent violates her dignity.²⁶⁰

The U.S. Supreme Court has espoused this conception of dignity in portions of its abortion jurisprudence. In *Thornburgh v. American College of Obstetricians & Gynecologists*,²⁶¹ Justice Blackmun, writing for the majority, recognizes that a woman's decision regarding whether to have an abortion is "basic to [her] individual dignity and autonomy."²⁶² Despite

253. *Id.* at 213.

254. *See id.*; *see also* AUDI, *supra* note 243, at 22.

255. *See* PARFIT, *supra* note 250, at 214.

256. Kaufmann, *supra* note 235, at 62.

257. SAMUEL J. KERSTEIN, HOW TO TREAT PERSONS 82 (2013).

258. Kaufmann, *supra* note 235, at 63.

259. *Id.* at 63–65.

260. *Id.* at 62–63.

261. 476 U.S. 747 (1986), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

262. *Id.* at 772.

partially overruling *Thornburgh*, the plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁶³ reiterates the assertion that a woman's ability to choose whether to continue her pregnancy is "central to [her] personal dignity and autonomy."²⁶⁴ Reva Siegel characterizes this invocation of "dignity" as "protect[ing] the ability of women to make self-defining and self-governing choices,"²⁶⁵ which aligns with Kerstein and Kaufmann's focus on an individual's ability to choose and pursue her own ends.

Consent to being used is only valid if it is informed and given freely. Regarding the former condition, Parfit rightly maintains that a person must know the relevant facts, including the effects an act may have, for rational consent to be meaningful.²⁶⁶ Both a lack of relevant information and deception with respect to this information preclude informed consent. The latter condition for valid consent, that it is given "freely," raises the issue of coercion. On these points, Christine Korsgaard argues that "[c]oercion and deception violate the conditions of possible assent, and all actions which depend for their nature and efficacy on their coercive or deceptive character are ones that others cannot assent to."²⁶⁷ Similarly, Onora O'Neill concludes that

if we coerce or deceive others, their dissent, and so their genuine consent, is in principle ruled out. Here we do indeed use others, treating them as mere props or tools in our own projects. Even the most rational and independent cannot genuinely consent to proposals about which they are deceived or with which they are compelled to comply.²⁶⁸

Therefore, when coercion or deception are employed to secure an individual's ostensible consent to being used merely as a means, the instrumentalization is just as morally unacceptable as it would have been had the instrumentalized person not expressed her "consent" to being

263. 505 U.S. 833 (1992).

264. *Id.* at 851. Alarming, it looks as though the Court is set to overrule this key liberal value in *Dobbs v. Jackson Women's Health Organization*, 945 F.3d 265 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (2021). See Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), <http://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/UD3D-CEBE>].

265. Siegel, *supra* note 97, at 1740.

266. PARFIT, *supra* note 250, at 184.

267. CHRISTINE M. KORSGAARD, *CREATING THE KINGDOM OF ENDS* 140 (1996).

268. ONORA O'NEILL, *CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY* 111 (1989).

treated as such.²⁶⁹

“Coercion” is a complex and contested concept, thereby requiring additional clarification.²⁷⁰ Due to the power the coercer wields over the coercee, the former is able to “force” the latter to comply with his wishes.²⁷¹ Coercion can be carried out via both physical and non-physical means,²⁷² such that the coercee’s compliance becomes a “practical imperative”—as a rational agent, the coercee yields to the will of the coercer because doing so accords with practical reason.²⁷³ This Article takes the view, like O’Neill and others, that both threats of harm and offers of benefit can be coercive.²⁷⁴ Regardless of whether the coercer presents a threat or an offer, the coercee’s agency is curtailed by the coercer’s power and willingness to impose unacceptable consequences upon the coercee if she fails to comply.²⁷⁵ Thus, if an individual’s “consent” to being instrumentalized is secured under coercive circumstances, it does not provide moral cover for the coercer’s instrumental treatment of the coercee.

Let us now apply this deontological framework to the practices of arresting and incarcerating GBV victims through material witness

269. See JOEL FEINBERG, HARM TO SELF 188 (1989) (asserting that “*invalid consent* is no better than *no consent* at all” (emphasis in original)).

270. See Scott Anderson, *Coercion*, STAN. ENCYC. PHIL. (Oct. 27, 2011), <http://plato.stanford.edu/entries/coercion/#ConPhiAccCoe> [<https://perma.cc/6G98-3ANG>]; see also Onora O’Neill, *Which Are the Offers You Can’t Refuse?*, in VIOLENCE, TERRORISM, AND JUSTICE 170, 170–71 (R. G. Frey & Christopher W. Morris eds., 1991).

271. See Joan McGregor, *Bargaining Advantages and Coercion in the Market*, 14 PHIL. RSCH. ARCHIVES 23, 25 (1988–89) (arguing that “coercion involves exercising power over another”); O’Neill, *supra* note 270, at 172, 191–92 (pointing out that “[p]ower depends on differentials” and that the vulnerability of those who are coerced lies in their *relatively* lesser “capacities, powers, or resources” vis-à-vis their coercer).

272. See O’Neill, *supra* note 270, at 172–73 (explaining that coercion can involve violent or non-violent methods); FEINBERG, *supra* note 269, at 253, 264, 267–68 (exemplifying how economic power, ability to inflict physical injury, and knowledge of an individual’s secrets can be vehicles for effectuating coercion); Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 55 (1992) (identifying “physical, psychological, economical, intellectual, or quasi-official” as forms of coercive power).

273. Mark Fowler, *Coercion and Practical Reason*, 8 SOC. THEORY & PRAC. 329, 330–31 (1982) (defining “practical reason” as morality and prudence, which demand action in response to particular circumstances).

274. See O’Neill, *supra* note 270, at 190–91; FEINBERG, *supra* note 269, at 216–19, 229–33; Virginia Held, *Coercion and Coercive Offers*, in COERCION 49, 54–57 (J. Roland Pennock & John W. Chapman eds., 1972); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 15 n.56 (2001); David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFFS. 121, 131–38 (1981). *But see, e.g.*, J.P. Day, *Threats, Offers, Law, Opinion and Liberty*, 14 AM. PHIL. Q. 257, 262, 265–66 (1977) (claiming, rather curiously, that offers cannot be coercive because it is “extreme temptation,” rather than an offer itself, that exerts coercive influence).

275. See O’Neill, *supra* note 270, at 181–82, 185; see also Fowler, *supra* note 273, at 331–32.

warrants and contempt power, threatening and bringing criminal charges against them, and conditioning key assistance measures upon their cooperation in the criminal legal process. At the outset, we must ask whether the state's use of these practices treats victims "merely as a means," in violation of Kant's Formula of Humanity.²⁷⁶ The first step of this inquiry is determining whether the state is "using" victims. Applying Kaufmann's three conditions, we see that they are easily satisfied when the state employs these tactics against GBV victims for utilitarian reasons: (1) state actors—law enforcement, prosecutors, judges, and others—interact with victims, (2) they do so because they believe that victims' participation can contribute to the realization of the state's goal of effectively investigating, prosecuting, and convicting GBV offenders, and (3) this goal does not "essentially refer to" victims, but rather is directed to the perpetrators of GBV crimes.²⁷⁷ However, if the state's motives are wholly paternalistic rather than utilitarian, Kaufmann's third condition is not met, as the goal would be directed at the "state" of victims and their "best interests."²⁷⁸

Similarly, under Audi's conceptualization of "instrumental treatment," the practices qualify because the recipients of the treatment—GBV victims—are not treated in a way that reflects their own value as ends in themselves, but instead are used to achieve the state's *further* end of investigating, prosecuting, and convicting offenders.²⁷⁹ But if the relevant state actors engage in the tactics solely for paternalistic reasons, their "*further* end" is to benefit or protect GBV victims, which "essentially contain[s] [the concept] of the means in question."²⁸⁰ Yet, in light of Amy Farrell and her collaborators' empirical research with a large sample of federal, state, and local government actors across the country, it appears that utilitarian motives likely feature more prominently than paternalistic ones when the practices at issue are utilized with GBV victims (even if motives are mixed).²⁸¹ Moreover, with respect to certain consequences for victims if they choose not to participate in the criminal legal process in spite of state actors' use of these coercive practices—such as being criminally prosecuted or denied vital assistance measures—it would be untenable for governmental actors imposing these consequences to claim

276. See KANT, *supra* note 234.

277. *Id.* at 60–61.

278. See *id.* at 60.

279. See AUDI, *supra* note 243, at 17.

280. See *id.* at 15, 17 (emphasis in original).

281. See generally FARRELL ET AL., *supra* note 27; Farrell et al., *supra* note 28 (showing findings more reflective of utilitarian than paternalistic motives for law enforcement's use of practices that coerce and instrumentalize GBV victims).

that they are doing so to protect or benefit these victims (as paternalism would require).²⁸² Thus, it is highly probable that, in the majority of cases, state actors employ the tactics at issue primarily for non-paternalistic reasons.²⁸³ When doing so, they are treating victims as a “means.”

The second step of the inquiry requires assessing whether the state treats GBV victims “merely” as a means when it employs the practices described in Part I, which would render them morally impermissible under the Kantian framework. According to scholars like Kaufmann and Kerstein, this is a question of whether the individual being used has consented to the use and its conditions (the “kind of interaction”).²⁸⁴ Victims who are arrested and incarcerated on material witness warrants or for contempt of court, for example, presumably have not consented to being “used” to realize the state’s prosecutorial goals and the conditions of the state’s interaction with them. Indeed, in many documented cases, the victim has made her desire not to testify explicitly clear to the relevant state actors.²⁸⁵ But even if a subset of detained victims would have consented to being used to convict their abusers,²⁸⁶ they most certainly would not have consented to the conditions of the state’s interaction with them—arrest and imprisonment. Furthermore, the “consent” of victims during their incarceration on a civil contempt order that provides for their release upon their agreement to testify (or when threatened with this type of order) should not be considered genuine due to coercion. Being deprived of their liberty through detention in a penal facility is sufficiently severe for compliance with the state’s demands to become a “practical imperative” for many rational agents, and thus the state’s use of this power is highly coercive.²⁸⁷ By the same token, GBV victims who “consent” to

282. See *supra* note 96 and accompanying text.

283. This includes not only utilitarian reasons but also other types of reasons, such as self-serving ones (e.g., a prosecutor who wants to improve his win-loss rate).

284. See Kaufmann, *supra* note 235, at 61–62; KERSTEIN, *supra* note 257.

285. See, e.g., Transcript of Nov. 6, 2013, *supra* note 45; State v. Riensche, 812 N.W.2d 293, 295–96 (Neb. 2012); Stillman, *supra* note 30; Riley, *supra* note 30.

286. At times, GBV victims who fail to respond to a subpoena would have been willing to testify in court but did not appear because they had not received the subpoena, they had a conflict with the scheduled time, or they had another issue that prevented them from appearing in court at the specified time. See, e.g., Barber, *supra* note 38 (quoting the attorney for a domestic violence victim arrested and detained on a material witness warrant explaining that the victim had “fully intended to testify” and had not replied to the two subpoenas that had been issued for her because they had been sent to the wrong address). Furthermore, some GBV victims jailed on material witness warrants expressed their willingness to cooperate and testify, yet the state continued to detain them. See, e.g., WU & YELDERMAN, *supra* note 30, at 20 (describing a federal human trafficking case in which victims from Mexico who “were willing to testify and cooperate with law enforcement . . . remained in detention for more than four months – first on material witness warrants, and then in ICE custody”).

287. See Fowler, *supra* note 273, at 330–32.

participating in the criminal legal process because they are faced with criminal prosecution or ineligibility for much-needed assistance measures that they cannot otherwise readily obtain are not doing so freely. By instrumentalizing victims without their free and informed consent, the state fails to “exhibit sufficient respect for [their] rational agency, that is, for [their] capacity to determine how [they are] used and to rationally pursue [their] ends.”²⁸⁸ These ends may include a desire to move on from past traumatic experiences, prioritize their family’s financial stability, reduce state intervention in their lives, or seek to resolve conflicts with their abuser outside of the criminal legal system.²⁸⁹

Under Audi’s conceptualization of treating an individual “merely as a means,” “the instrumental function of the action in question . . . [is] in a certain way one’s exclusive aim.”²⁹⁰ This appears to often be the case when state actors engage in the practices articulated in Part I. For instance, the explicit aim of detaining a material witness is to secure that individual’s testimony in a criminal proceeding,²⁹¹ which instrumentalizes her in the prosecution of the offender. And the above excerpts from Farrell et al.’s research provide support for this assertion with respect to the tactics of criminally charging GBV victims and offering them conditional assistance.²⁹² For example, the excerpt from a law enforcement agent clearly states that charging victims with felonies resulted in “exactly what we had anticipated”—i.e., that it would be an effective means of coercing victims into becoming “cooperative witnesses.”²⁹³ In addition, the prosecutor’s interview excerpt about “breaking a few eggs,” which Farrell et al. indicate was echoed by other law enforcement officials in the study, reflects the view that arresting and charging victims with prostitution is “necessary to get them to ‘flip’ and provide information that could lead to successful prosecution of pimps and other individuals who may be part of a larger trafficking network.”²⁹⁴ Thus, charging victims serves the instrumental function of advancing this *further*, and arguably primary, goal. Even if state actors’ motivations for charging victims are not *exclusively* instrumental in nature, under Parfit’s minimally expanded Mere Means Principle, their use of victims in this way would still be morally objectionable because their aims “come close” to being entirely

288. KERSTEIN, *supra* note 257, at 82.

289. See Nichols, *supra* note 12; Wechsler, *supra* note 12, at 1078–79; see also SERED, *supra* note 6, at 42–49, 186–90.

290. AUDI, *supra* note 243, at 22.

291. 18 U.S.C. § 3144; see also NAT’L CRIME VICTIM L. INST., SURVEY, *supra* note 32.

292. See *supra* sections I.B–C.

293. See FARRELL ET AL., *supra* note 27, at 116–17.

294. See Farrell et al., *supra* note 28, at 64.

instrumental.²⁹⁵

Likewise, Farrell et al. found that law enforcement “stressed the need to connect victims to services primarily for the purpose of securing [their] cooperation and developing a case against the perpetrator.”²⁹⁶ Accordingly, the instrumental function of assisting victims is these state actors’ primary aim in doing so, which indicates that the treatment comes close to regarding victims merely as a means.²⁹⁷ This also reflects the conceptualization of victims as essentially “mere instrument[s] or tool[s]”²⁹⁸—“‘evidence’ that need[s] to be secured and stabilised.”²⁹⁹ State actors know that service providers can “secure” victims in a shelter and/or by keeping track of them (e.g., staying in frequent contact with them and obtaining updates to their contact information), and that victims who are receiving services that meet their needs in a particular location are less likely to move away in search of ways to meet their needs. This makes them more available and accessible to law enforcement authorities. Receiving services can also “stabilize” victims in ways that enable them to serve as good “evidence” in the eyes of law enforcement. For example, mental health counseling can reduce PTSD-related behaviors that can affect perceived credibility as a witness.³⁰⁰

Moreover, a significant aspect of conditional assistance practices that is highly relevant to our inquiry is the fact that victims who fail to satisfy the state’s condition(s) are not provided with the assistance. Given the considerable needs of many GBV victims as they exit abusive situations and in the aftermath of their victimization,³⁰¹ depriving them of certain assistance measures because they do not (or do not sufficiently) assist the state with realizing its prosecutorial ends gives “too little weight to [their] well-being.”³⁰² This demonstrates a lack of concern about victims to the extent that they are not useful in achieving the state’s goals—a marker of “merely” and “close to merely” instrumental treatment.³⁰³

Insufficient concern for GBV victims’ well-being is also apparent when

295. See PARFIT, *supra* note 250, at 213–14.

296. Farrell et al., *supra* note 64, at 664.

297. See AUDI, *supra* note 243, at 22; PARFIT, *supra* note 250, at 214.

298. See PARFIT, *supra* note 250, at 213.

299. Farrell et al., *supra* note 28, at 63.

300. See Louise Ellison, *Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases*, 9 INT’L J. EVIDENCE & PROOF 239, 241 (2005) (“Psychological studies, in particular, suggest that commonly assumed credibility cues are potentially misleading when applied to the testimony of those who have witnessed or experienced a traumatic event, such as sexual assault.”).

301. See *supra* note 68 and accompanying text.

302. See PARFIT, *supra* note 250, at 214.

303. See *id.* at 212–14; AUDI, *supra* note 243, at 25.

the state compels their participation in the criminal legal process through the use of material witness warrants, contempt power, and criminal charges in order to advance its prosecutorial agenda. Arrest and incarceration (even for brief periods) are extremely harmful to GBV victims' well-being, as is being criminally charged and potentially convicted.³⁰⁴ There is evidence that many police, prosecutors, and other state actors are aware of this harm and are willing to “break[] a few eggs.”³⁰⁵ The continuation of these practices in spite of an awareness of the serious harms they cause demonstrates that certain state actors assign insufficient import to victims' well-being and are willing to essentially “treat [them] in whatever ways would best achieve [their] aims.”³⁰⁶ Even where state actors make certain efforts to mitigate the harmful impact on victims' well-being (e.g., arresting them closer in time to their scheduled testimony to decrease their period of detention), the practices at issue “come close” enough to purely instrumental treatment to be considered morally objectionable under Parfit's minimally expanded Mere Means Principle.³⁰⁷

Based on the foregoing analysis, we can conclude that the state often treats GBV victims “merely as a means” or close to this when it employs the tactics described in Part I to coerce their participation in the criminal legal process. In doing so, it causes dignitary harm to victims and acts in a morally impermissible manner under a deontological, Kantian-based ethical approach.

B. *Dehumanization*

Instrumentalizing a person is often dehumanizing. Broadly speaking, dehumanization means depriving a person of full human character, attributes, or dignity.³⁰⁸ Like “mere” instrumental treatment,

304. See discussion of the harms to GBV victims caused by arrest, incarceration, and criminalization, *supra* notes 117–121, 144–156 and accompanying text.

305. See Farrell et al., *supra* note 28, at 64 (stating that “the subjects . . . interviewed were knowledgeable and concerned about the potential for arrest or detention resulting in long-term victim harm”); Farrell et al., *supra* note 64, at 662 (finding that police officers in the southern U.S. study site understood that “arresting a potential victim may be further traumatizing, but ultimately, they felt they had few other options if the victim refused to provide sufficient information about his or her victimization”); see also Transcript of Nov. 6, 2013, *supra* note 45, at 12 (recognizing that incarcerating a human trafficking victim who did not want to testify would cause her “to suffer more than she already has”).

306. See PARFIT, *supra* note 250, at 213–14.

307. See *id.*

308. See *Dehumanize*, OXFORD ENGLISH DICTIONARY (2021); *Dehumanize*, MERRIAM-WEBSTER DICTIONARY (2021), <http://www.merriam-webster.com/dictionary/dehumanize> [<https://perma.cc/>

dehumanization is a complex concept that has received significant scholarly attention.³⁰⁹ The two concepts are linked in their relation to treating humans essentially as objects. We recall that Parfit's rough definition of Kant's Mere Means Principle included the treatment of a person as a "mere instrument or tool,"³¹⁰ terms which are primarily associated with devices, machines, and other inanimate objects.³¹¹ Similarly, social psychologist Nick Haslam identifies a "mechanistic" form of dehumanization, which is characterized by viewing humans as "object- or automaton-like."³¹² This type of dehumanization involves denying others core human characteristics, including individual agency and self-determination.³¹³ Haslam recognizes Martha Nussbaum's work on the objectification of women as an example of theory explicating a type of mechanistic dehumanization.³¹⁴

Nussbaum identifies seven forms of objectification, which she defines as treating a human being as an object.³¹⁵ For our purposes, the most significant of these are instrumentality (objectifier treats a person as a tool for his purposes), denial of autonomy (objectifier treats a person "as lacking in autonomy and self-determination"), inertness (objectifier treats

D7LX-9RXV]; Nick Haslam, *Dehumanization: An Integrative Review*, 10 PERSONALITY & SOC. PSYCH. REV. 252, 252 (2006).

309. See, e.g., Haslam, *supra* note 308 (integrating work on dehumanization from various fields and advancing a new theoretical model identifying two distinct forms of dehumanization); Herbert C. Kelman, *Violence Without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers*, 29 J. SOC. ISSUES 25, 38, 48–52 (1973) (theorizing the role of dehumanization in sanctioned massacres); Dayna Bowen Matthew, *On Charlottesville*, 105 VA. L. REV. 269, 289–90 (2019) (analyzing the role of dehumanization in racism and racial segregation); Adam Waytz & Juliana Schroeder, *Overlooking Others: Dehumanization by Commission [sic] and Omission*, 21 TPM 251 (2014) (identifying and distinguishing between dehumanization by commission and dehumanization by omission).

310. PARFIT, *supra* note 250, at 213.

311. See *Instrument*, OXFORD ENGLISH DICTIONARY (2022) (defining "instrument" first in terms of inanimate objects and only referencing persons in the third definition provided); *Tool*, OXFORD ENGLISH DICTIONARY (2022) (defining "tool" first in terms of inanimate objects and only referencing persons in the third definition provided); *Instrument*, MERRIAM-WEBSTER DICTIONARY (2022) (defining "instrument" first in terms of inanimate objects and only referencing persons in the fourth definition provided); *Tool*, MERRIAM-WEBSTER DICTIONARY (2022) (defining "tool" first in terms of inanimate objects and only referencing persons third definition provided); see also Jessica M. LaCroix & Felicia Pratto, *Instrumentality and the Denial of Personhood: The Social Psychology of Objectifying Others*, 28 REVUE INTERNATIONALE PSYCHOLOGIE SOCIALE 183, 203 (2015) (arguing that "using people as tools is the key way that people treat others as things").

312. Haslam, *supra* note 308, at 258 (differentiating this form of dehumanization from the "animalistic" form).

313. *Id.* at 256–60.

314. *Id.* at 260.

315. Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUB AFFS. 249, 257 (1995) (identifying fungibility, violability, and ownership as features of objectification as well).

a person “as lacking in agency”), and denial of subjectivity (objectifier treats a person “as something whose experience and feelings . . . need not be taken into account”).³¹⁶ Importantly, Nussbaum notes that treatment reflecting just one of these manners can constitute objectification, but that the term is more often applied when multiple features are present.³¹⁷ Further, different aspects of objectification often relate to one another. For example, Nussbaum builds upon Kantian principles to demonstrate the connection between instrumentality and denial of autonomy, contending that treating someone “*primarily or merely* as an instrument” negates that person’s proper human autonomy and dehumanizes her.³¹⁸ This conceptualization tracks Haslam’s mechanistic model of dehumanization, as autonomy is a fundamental human attribute that is denied to a person who is treated in this manner, thereby rendering her object-like.³¹⁹

Like Kaufmann, Nussbaum maintains that there exist instances of instrumentalization which are not morally problematic, and that the Mere Means Principle identifies a subset of morally impermissible instrumental treatment.³²⁰ However, Nussbaum’s addition of “primarily” goes further than Kaufmann does and invokes Parfit’s expansion of the Mere Means Principle to cover treatment that “come[s] close” to regarding a person merely as a means.³²¹ She also emphasizes the need to examine the overall context in determining whether a person is being treated primarily or merely as an instrument, which is a broader approach than Kaufmann’s focus only on consent.³²² In doing so, she concludes that instrumentalization is highly morally objectionable when “it does not take place in a larger context of regard for humanity,” thus connecting the concept with dehumanization.³²³ Relevant contextual information includes, but is not limited to, whether there exists mutual respect and (roughly) equal social power among the parties, consent to being

316. *Id.*

317. *Id.* at 258.

318. *Id.* at 265 (emphasis in original) (arguing that “there is something especially problematic about instrumentalizing human beings, something that involves denying what is fundamental to them as human beings, namely, the status of beings [sic] ends in themselves”); *see also* LaCroix & Pratto, *supra* note 311, at 196 (“The denial of autonomy and self-determination is implicit in the concept of instrumentalizing Others as tools to meet an Agent’s own ends—tools enable *others* to do things; they do not set their own goals and tasks.” (emphasis in original)).

319. *See* Haslam, *supra* note 308, at 256–58.

320. *See* Kaufmann, *supra* note 235, at 61; Nussbaum, *supra* note 315, at 265.

321. *See* Kaufmann, *supra* note 235, at 61–62; Nussbaum, *supra* note 315, at 265; PARFIT, *supra* note 250, at 214.

322. *See* Nussbaum, *supra* note 315, at 265, 271, 289; Kaufmann, *supra* note 235, at 61–62, 64–65.

323. Nussbaum, *supra* note 315, at 289.

instrumentalized, recognition of individuality, and genuine concern about the instrumentalized person's needs and experiences.³²⁴ In addition to these individual relational elements, overarching societal norms and historical power dynamics must be considered in assessing the moral status of instrumentalizing and objectifying treatment.³²⁵ When contextual features of this treatment indicate a lack of regard for a person's humanity, such as a failure to obtain that person's consent, account for her individual needs, and appreciate the impact of current and historical relational dynamics, the treatment is dehumanizing and morally objectionable.

When applying this framework to the state's coercion and instrumentalization of GBV victims within the criminal legal process, we can see how treating them in this way is dehumanizing. The tactics detailed in Part I deny them core human attributes—the ability to exercise individual agency and engage in self-determination regarding significant decisions in their lives—thereby corresponding with Haslam's "mechanistic" form of dehumanization.³²⁶ Furthermore, the four relevant forms of objectification from Nussbaum's model are reflected in the practices at issue. First, "instrumentality"—the state treats the victim merely or primarily as a tool for its own purposes, which are investigating, prosecuting, and convicting GBV offenders.³²⁷ Second, "[d]enial of autonomy"—the state disregards the victim's capacity for autonomy and self-determination by depriving her of the opportunity to make her own decision regarding her participation in the criminal legal process.³²⁸ Third, "[i]nertness"—the state treats the victim as "lacking in agency" and incapable of making rational decisions and taking action in her own life in response to GBV.³²⁹ Fourth, "[d]enial of subjectivity"—the state fails to properly account for the victim's feelings and experiences with respect to her participation in the criminal legal process and also to being arrested, jailed, charged, criminalized, and/or denied conditional assistance measures.³³⁰

Even if state actors engage in the practices at issue for ostensibly paternalistic reasons, they still deny GBV victims core human attributes of adult human beings, such as the capacity to decide what constitutes their own best interests and act accordingly. Moreover, the state's failure

324. *See id.* at 271–90 (examining these contextual features mainly within literary examples of objectification).

325. *See id.* at 269, 271–72, 277, 290.

326. *See* Haslam, *supra* note 308, at 256–60.

327. *See* Nussbaum, *supra* note 315, at 257, 261, 265.

328. *See id.* at 257.

329. *See id.*

330. *See id.*

to properly account for victims' subjective experiences and feelings has most likely contributed to its miscalculation regarding how to effectively advance their best interests, in line with the goals of paternalism.³³¹

Nussbaum reminds us to examine the overall context of the treatment to determine whether it is, in fact, morally problematic objectification and dehumanization.³³² There are several factors that strongly suggest that the use of material witness warrants, contempt power, criminal charges, and conditional assistance to coerce GBV victims' participation in the criminal legal process "does not take place in a larger context of regard for humanity."³³³ These include the vastly greater power of the state as compared with the individual, the lack of consent to being instrumentalized, the insufficient weight accorded to victims' subjective experiences and needs, and the existence of current and historical norms disempowering GBV victims.³³⁴ Even as they have evolved, societal norms have served to legitimize violence against women and perpetuate their subordination.³³⁵ For example, the myth that women "ask" to be raped manifested in the examination of accusers' behavior relative to historical expectations around women's modesty and respectability in the eighteenth and nineteenth centuries, such as whether they ventured into public spaces without their male guardians or socialized alone with men.³³⁶ In the present day, this myth is reflected in the focus on whether accusers wore provocative clothing, consumed alcohol or drugs or were walking alone at night.³³⁷ Victim precipitation and other rape myths "are endorsed by a substantial segment of the population and permeate legal,

331. See *supra* section II.A.

332. See Nussbaum, *supra* note 315, at 265, 271, 289.

333. See *id.* at 289.

334. See *id.* at 271–90. See generally Epstein & Goodman, *supra* note 136 (discussing societal norms which discount women's credibility and dismiss their experiences of abuse from men); Patricia L. N. Donat & John D'Emilio, *A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change*, 48 J. SOC. ISSUES 9 (1992) (explaining the role of patriarchal power structures and societal norms in promoting and maintaining disempowering conceptualizations of sexual violence and its victims from the colonial period through the twentieth century); Katie M. Edwards, Jessica A. Turchik, Christina M. Dardis, Nicole Reynolds & Christine A. Gidyez, *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761 (2011) (documenting the current prevalence and historical origins of rape myths among individuals and institutions in the U.S.).

335. See Edwards et al., *supra* note 334, at 762. Both subordination and objectification constitute "improper treatment of persons that fails to recognize the other as bearing the same human status as oneself." RADIN, *supra* note 232, at 157.

336. See Kim Stevenson, *Unequivocal Victims: The Historical Roots of the Mystification of the Female Complainant in Rape Cases*, 8 FEMINIST LEGAL STUD. 343, 361 (2000); Barbara S. Lindemann, "To Ravish and Carnally Know": *Rape in Eighteenth-Century Massachusetts*, 10 SIGNS: J. WOMEN CULTURE & SOC'Y 63, 66, 82 (1984).

337. Edwards et al., *supra* note 334, at 766–67.

media, and religious institutions.”³³⁸ More broadly, there exists “a long-standing tendency to trivialize women’s experiences of abuse at the hands of powerful, predatory men” and “[w]omen find their credibility discounted . . . by the larger society in which they live.”³³⁹ These types of norms contribute to a context in which GBV victims’ personhood is compromised.³⁴⁰ When the state treats them primarily as instrumentalities of the criminal legal system, denies their autonomy and agency, and/or insufficiently accounts for their subjectivity within this wider context, it deprives them of their full human character, attributes, and dignity. Under Nussbaum’s framework, this type of treatment is morally unacceptable.

C. *Liberal Legal Principles*

Central to the liberal legal order lies the principle that individuals possess rights that protect them from being sacrificed for the greater good.³⁴¹ In this sense, humans are considered inviolable.³⁴² A liberal legal system “treat[s] each individual as worthy of respect simply because he or she is a free and purposive being . . . [and does not treat them] as a thing, that is, merely as a potential means to the objectives of the state or of another person.”³⁴³ This foundational liberal value aligns with Kant’s Mere Means Principle and related moral prohibitions on forms of

338. *Id.* at 762.

339. Epstein & Goodman, *supra* note 136, at 402 (internal citation omitted).

340. See RADIN, *supra* note 232, at 157. Their personhood is compromised even further in cases where harmful gender-based norms intersect with those associated with socially subordinated races, classes, and other statuses. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

341. Jacob Bronsther, *The Corrective Justice Theory of Punishment*, 107 VA. L. REV. 227, 235–36 (2021) [hereinafter Bronsther, *Corrective Justice*]; see also ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 31–33 (1974) (asserting that the state may not sacrifice an individual for the sake of the greater overall good because doing so fails to “sufficiently respect and take account of the fact that he is a separate person”); JOHN RAWLS, A THEORY OF JUSTICE 3–4, 513 (Harvard Univ. Press rev. ed. 1999) (arguing that to respect persons is to “affirm that the loss of freedom for some is not made right by a greater welfare enjoyed by others”).

342. NOZICK, *supra* note 341; RAWLS, *supra* note 341, at 513; Carlos Santiago Nino, *Liberty, Equality and Causality*, 15 RECHTSTHEORIE 23, 23 (1984) (conceiving of the “principle of the inviolability of the person” roughly as a prohibition on “causing people harms or imposing sacrifices on them, against their will, for the sake of achieving goals which do not include primarily considerations about the well-being of those very people”); see also Jacob Bronsther, *Vague Comparisons and Proportional Sentencing*, 25 LEGAL THEORY 26, 48 (2019) (formulating the “principle of human inviolability” as a moral proscription on harming individuals for the “purpose of mitigating social harms or threats for which they lack responsibility”) [hereinafter Bronsther, *Vague Comparisons*].

343. Hamish Stewart, *The Right to Be Presumed Innocent*, 8 CRIM. L. & PHIL. 407, 408 (2014).

instrumentalization, dehumanization, and objectification.³⁴⁴ More broadly, it reflects liberalism's commitment to individualism, autonomy, and limits on state power.³⁴⁵

However, there are certain limits to the “non-sacrifice” principle within liberal legal systems.³⁴⁶ Ronald Dworkin, for example, contends that the state is justified in overriding an individual's rights for compelling reasons such as to prevent a catastrophe or to protect others' rights, but cannot do so simply based on its judgment that it will likely benefit the general welfare.³⁴⁷ Similarly, Louis Henkin emphasizes that an individual's rights may be infringed upon on a narrow set of critical public emergency, national security, and public order grounds, but adds that “a society may derogate from rights only to the extent strictly required by the exigencies of the situation.”³⁴⁸ John Rawls argues that sacrificing individuals is permitted in certain exigent circumstances, such as through military conscription when war is necessary “for the defense of liberty itself,” but maintains that this should be carried out in an equitable manner that distributes the burdens evenly among all members of society and avoids class bias.³⁴⁹ Despite these exceptions to the non-sacrifice principle, Henkin and others agree that there exists a core of fundamental rights which the state cannot invade under any circumstances (though its precise boundaries are debated).³⁵⁰

344. See *supra* sections III.A., III.B.

345. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 188–90 (1st ed. 1996).

346. Bronshter, *Corrective Justice*, *supra* note 341, at 236.

347. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 191–94 (1977).

348. LOUIS HENKIN, *THE AGE OF RIGHTS* 4 (1990).

349. RAWLS, *supra* note 341, at 333–34.

350. See HENKIN, *supra* note 348, at 4 (maintaining that “[e]ven in an authentic emergency, a society . . . may not derogate from basic rights: they must not invade the right to life, or involve torture or cruel, inhuman punishment, slavery or servitude, conviction of crime under ex post facto laws, denial of rights as a person before the law, or violate freedom of thought, conscience, or religion”); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867, 872–80 (1960) (arguing that the Bill of Rights contains absolute rights, including the rights to a jury trial, public trial, and freedom of religion, speech, and press); Frédéric Mégret, *Nature of Obligations*, in *INTERNATIONAL HUMAN RIGHTS LAW* 96, 110 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran eds., 2d ed. 2014) (asserting that “[o]ne of the only absolute rights is the right to be free from torture, which is absolute in the sense that no social goal or emergency can ever limit the categorical prohibition of torture”); see also ILIAS BANTEKAS & LUTZ OETTE, *INTERNATIONAL HUMAN RIGHTS: LAW AND PRACTICE* 68–69 (1st ed. 2013) (explaining that there exists no clear-cut list of *jus cogens* rights and the *jus cogens* status of particular rights is often contested). Even Mark Rosen, an ardent opponent of rights absolutism, admits that the Thirteenth Amendment may be an absolute constitutional right. Mark D. Rosen, *When Are Constitutional Rights Non-Absolute?:* McCutcheon, *Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535, 1541 n.15 (2015). *But see* RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 473 n.1 (2011) (arguing that individual rights are “trumps” but may be overridden by a

In interpreting the core of the non-sacrifice principle, Jacob Bronsther argues that, at a minimum, the principle protects an individual from being intentionally and significantly harmed without her consent in order to mitigate a social problem for which she lacks responsibility.³⁵¹ Bronsther applies this general principle to the social problem of future crime to argue that the state should only subject offenders to the amount of penal harm that corresponds with their past contributions to societal criminality.³⁵² He maintains that doing so would avoid sacrificing offenders because they are responsible for an increase in the objective threat of crime within society.³⁵³ In contrast, when we apply Bronsther's formulation of the non-sacrifice principle to crime victims, harming them intentionally and significantly without their consent for the purpose of reducing future crime would constitute an impermissible sacrifice because, unlike offenders, they bear no responsibility for this social problem. To conclude otherwise with respect to the "responsibility" element would amount to "victim blaming."³⁵⁴

We must also acknowledge that not all types of harm rise to the level of "sacrificing" a person. According to Bronsther, the level of harm must be "significant[.]"³⁵⁵ Presumably, violating an individual's fundamental rights would count,³⁵⁶ but mildly bruising her arm would not. Bronsther applies his interpretation of the non-sacrifice principle's core within the context of penal harm, which is sufficiently severe to rise to the level of harm associated with the concept of "sacrificing" a person.³⁵⁷ Likewise,

"higher trump" consisting of "competing interests [that] are grave and urgent, as they might be when large numbers of lives or the survival of a state is in question"); Rosen, *supra*, at 1544 (characterizing Dworkin's approach as "too subtle to justifiably equate trumps and absoluteness").

351. Bronsther, *Corrective Justice*, *supra* note 341, at 236; Bronsther, *Vague Comparisons*, *supra* note 342.

352. Bronsther, *Corrective Justice*, *supra* note 341, at 234.

353. *Id.* at 232–34.

354. See Christina Mancini & Justin T. Pickett, *Reaping What They Sow? Victim-Offender Overlap Perceptions and Victim Blaming Attitudes*, 12 VICTIMS & OFFENDERS 434, 434–35, 452 (2017) (defining victim blaming as an enduring social phenomenon in which crime victims are perceived as having contributed to their own victimization); MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* 11–12, 21–22, 125 (1980) (explaining that people irrationally reinterpret injustices by attributing their causation to something that the victim did or failed to do, or to personal attributes of the victim, as a means of maintaining their belief in a "just world" in which people get what they deserve).

355. Bronsther, *Corrective Justice*, *supra* note 341, at 236.

356. See Nino, *supra* note 342, at 25, 29–30 (positing that depriving a person of the goods that are necessary for the choice in or materialization of her life plans—including life, bodily integrity, and access to knowledge and economic resources—constitutes "sacrificing" her).

357. Bronsther, *Corrective Justice*, *supra* note 341, at 231, 233–34; see also Rinat Kitai, *Protecting the Guilty*, 6 BUFF. CRIM. L. REV. 1163, 1176, 1179, 1186 (2003) (characterizing the subjection of a

when the state subjects GBV victims to arrest, incarceration, and/or criminalization in the name of the greater good through the use of material witness warrants, contempt power, criminal charges, and prosecutions, it imposes a degree of harm upon them that can be characterized as “sacrifice.”³⁵⁸ Furthermore, intentionally withholding much-needed assistance measures from GBV victims who lack resources such as basic economic means, legal immigration status, and a support network significantly harms them.³⁵⁹ As discussed above, whether or not GBV victims acquiesce, they are significantly harmed by the use of these tactics intended to coerce their participation in the investigation and prosecution of the offender.³⁶⁰

Moreover, the practices at issue do not fit into putative exceptions to the non-sacrifice principle. A major reason for this is the absence of overall societal benefit resulting from their use, as demonstrated in the above discussion of flawed utilitarian justifications advanced by their defenders.³⁶¹ Thus, there are not compelling grounds that necessitate the sacrifice of individuals to effectively address. This is *not* to say that GBV is not a pressing societal issue; but rather that “sacrificing” victims against their will is neither a necessary nor a wise way to address it. Furthermore, even if sacrificing victims were an effective way of combatting GBV in society, doing so would violate Rawls’s prescription that burdens be distributed in an equitable manner³⁶² because GBV victims are disproportionately from disadvantaged groups.³⁶³ Given the lack of

potentially innocent person to criminal conviction and punishment as sacrificing that person for the general good of society).

358. See discussion of serious harms resulting from the state’s use of these practices with GBV victims, *supra* section II.A.

359. See *id.* Moral philosophical accounts of “intentional omissions” suggest that intentionally withholding needed assistance counts as intentional harm. For example, in a hypothetical involving a child drowning in a pond and a bystander, after deliberating for a bit, choosing not to jump in and save the child, the bystander harms the child by intentionally omitting to jump in the pond. The bystander had the capacity to save the child, but decided not to do so, which resulted in the child’s death. See Neil Feit, *Harming by Failing to Benefit*, 22 ETHICAL THEORY & MORAL PRAC. 809, 817, 819–20 (2019). David Boonin provides a similar example, arguing that if Person A has a pill in his pocket that would prevent Person B from suffering a great deal of pain, but A declines to give it to B, then A has harmed B by withholding the medicine. DAVID BOONIN, *THE NON-IDENTITY PROBLEM AND THE ETHICS OF FUTURE PEOPLE* 53 n.2 (2014).

360. See *supra* section II.A.

361. See *supra* section II.B.

362. See RAWLS, *supra* note 341, at 333–34.

363. ANDREA J. NICHOLS, *SEX TRAFFICKING IN THE UNITED STATES: THEORY, RESEARCH, POLICY, AND PRACTICE* 90, 224, 272 (2016); Bushra Sabri, Saraniya Tharmarajah, Veronica P. S. Njie-Carr, Jill T. Messing, Em Loerzel, Joyell Arscott & Jacquelyn C. Campbell, *Safety Planning with Marginalized Survivors of Intimate Partner Violence: Challenges of Conducting Safety Planning Intervention Research with Marginalized Women*, TRAUMA, VIOLENCE, & ABUSE 1, 1 (2021).

legitimate justification for the intentional and significant harms the state imposes on GBV victims without their consent through the types of practices detailed in Part I, we can conclude that the state improperly “sacrifices” them, in violation of foundational liberal values.

IV. SHIFTING THE APPROACH: VICTIMS AS AGENTS

After viewing the widespread state approach of treating GBV victims essentially as instruments to further its prosecutorial goals through multiple philosophical lenses, we can appreciate its lack of sound moral grounding and clearly see the need for change. But what type of approach would align both with our normative commitments and with what empirical research tells us about different responses to GBV? I propose taking steps to shift the state’s approach from one that constructs GBV victims as instruments to one that instead treats them as agents with the right to set and pursue their own ends. This would require state actors to avoid using coercive and instrumentalizing practices to compel GBV victims’ participation in the criminal legal process. These practices punish GBV victims who violate “ideal” or “genuine” victim stereotypes by exercising agency—making the decision that they do not wish to participate in the investigation or prosecution of the offender—and failing to fully cooperate with law enforcement authorities.³⁶⁴ The practices often employ the state’s penal structures and procedures—arrest, criminal charges, and jails and prisons.³⁶⁵ Even those that do not can be conceptualized as punitive in nature, as the denial of vital assistance to victims solely because they do not (or do not sufficiently) assist law enforcement arguably constitutes “hard treatment” that the state purposefully inflicts for putative wrongdoing.³⁶⁶ The perceived “wrongdoing” on the part of the victim is a failure to assist authorities with the investigation and prosecution of the offender, which the state views as beneficial for the victim and for society as a whole. Thus, an important first step towards treating victims as agents rather than as

364. See *supra* note 26; see also van Dijk, *Free the Victim*, *supra* note 1, at 13–18 (discussing criticism of and denial of legitimate victim status to crime victims who defy stereotypes by asserting their autonomy and/or interfering with the investigation or prosecution of the case).

365. See *supra* sections I.A–B.

366. See Mitchell N. Berman, *The Justification of Punishment*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 141, 142–43 (Andrei Marmor ed., 2012) (exploring the meaning of “punishment”); Rutledge, *Gift Horse*, *supra* note 21, at 246 (characterizing California’s denial of CVCP eligibility to domestic violence victims who choose not to participate in the prosecution of their abuser as “clearly punitive”); cf. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 *J. CRIM. L. & CRIMINOLOGY* 643, 673 (2009) (asserting that banning individuals with a past felony drug conviction from receiving public assistance “punishes not only parents, but also their children” and is also a “harsh punishment for first-time petty drug offenders”).

instruments is to stop punishing them for exercising agency within their lives.

A. *Increasing Viable Options*

Not only should the state avoid punishing GBV victims' exercises of agency, but it should take affirmative steps to facilitate them. Doing so would promote a Kantian and Nussbaumian vision of respect for human dignity and personhood, especially against the backdrop of current and historical norms which have greatly disempowered GBV victims. At its core, facilitating individuals' ability to exercise agency is about genuinely increasing their viable options.³⁶⁷ One way to do so is to decouple victim assistance measures from cooperation with law enforcement. This would increase victims' options because they would be able to decide at their own pace whether they wish to participate in the criminal legal process *and* receive resources, support, and status that can assist them in their recovery and help them to avoid revictimization.³⁶⁸ They would no longer be coerced into participation based on a desperate need for material support or legal immigration status, and could then more freely decide whether participating would further their own ends.³⁶⁹ In this way, removing the conditions placed on eligibility for assistance measures would loosen some of the constraints on GBV victims' freedom of choice.

Another means of facilitating GBV victims' agency is to increase the availability and legitimacy of restorative justice³⁷⁰ mechanisms for GBV

367. See Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 204–06, 216–17 (2011); Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 24–32, 43–48 (2009) [hereinafter Goodmark, *Autonomy Feminism*]; Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 977 (1998).

368. See Deborah K. Anderson & Daniel G. Saunders, *Leaving an Abusive Partner: An Empirical Review of Predictors, the Process of Leaving, and Psychological Well-Being*, 4 TRAUMA, VIOLENCE, & ABUSE 163, 171 (2003) (finding that a lack of financial resources is a significant barrier to leaving an abusive partner, thereby increasing the risk of further abuse); Jennifer L. Matjasko, Phyllis Holditch Niolon & Linda Anne Valle, *The Role of Economic Factors and Economic Support in Preventing and Escaping from Intimate Partner Violence*, 32 J. POL'Y ANALYSIS & MGMT. 122, 123–26 (2013) (explaining that economic assistance can be necessary for victims of intimate partner violence to escape violent relationships and can alleviate the financial stress that contributes to “situational couple violence” for victims who stay with their partners); Rebecca Surtees & Fabrice de Kerchove, *Who Funds Re/integration? Ensuring Sustainable Services for Trafficking Victims*, 3 ANTI-TRAFFICKING REV. 64, 65 (2014) (asserting that long-term reintegration services are critical to preventing human trafficking victims from being re-trafficked).

369. See Mills, *supra* note 22, at 603–04; Minow, *supra* note 367, at 980–81; Nanasi, *supra* note 86, at 286; Rutledge, *Gift Horse*, *supra* note 21, at 272.

370. Restorative justice refers to dialogue-based interventions aimed at repairing the harm the crime has caused. It typically involves bringing together, on an informed and consensual basis, the

crimes. Many state actors and victim advocates have traditionally opposed GBV victim participation in these processes, leading them to discourage victims from consenting to them.³⁷¹ Some states have even prohibited the use of restorative justice in IPV cases.³⁷² As a result, restorative justice is rarely utilized to address GBV in the U.S.³⁷³ But empirical studies have demonstrated the great promise of certain restorative justice mechanisms for addressing GBV in terms of promoting accountability, satisfying victims,³⁷⁴ and/or reducing the frequency and severity of reoffending.³⁷⁵ As the lack of options the state offers GBV victims in response to the violence they have endured has been a persistent issue,³⁷⁶ expanding the number and type of options that are both available to them and presented as legitimate courses of action, including restorative justice and other non-punitive mechanisms, would facilitate their agency.

B. *Statutory Reform*

Statutory reform is one avenue for implementing protections against

victim, the party responsible for causing the harm, and other family and/or community stakeholders to identify a tailored plan for healing and repair with the help of a trained facilitator. *See* Coker, *supra* note 7, at 187–92; SERED, *supra* note 6, at 133–41.

371. *See* Goodmark, *Autonomy Feminism*, *supra* note 367, at 30.

372. GOODMARK, *supra* note 129, at 92.

373. *See id.* at 97 (noting that “[a]lthough the United States has largely rejected the use of restorative justice in situations involving intimate partner violence,” many other countries use them regularly); Mimi E. Kim, *Transformative Justice and Restorative Justice: Gender-Based Violence and Alternative Visions of Justice in the United States*, 27 INT’L REV. VICTIMOLOGY 162, 169 (2021); Bazelon & Green, *supra* note 134, at 298.

374. *See, e.g.*, Robert C. Davis, *The Brooklyn Mediation Field Test*, 5 J. EXPERIMENTAL CRIMINOLOGY 25, 28, 33 (2009) (finding that 73% of victims whose case had been mediated reported satisfaction with the outcome and that 88% believed that their case had been conducted fairly, which is statistically significantly more than the 54% and 76% of victims whose cases had been prosecuted who had reported satisfaction and fairness, respectively, in a randomized controlled trial of adults arrested on felony charges for a crime against someone they knew (43% of which involved IPV)); Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1646–48, 1654 (2014) (finding that most participants in RESTORE, a restorative justice program adapted to adult misdemeanor and felony sexual assault cases, reported that they were satisfied with the program (especially survivor-victims and their supporters) and believed that justice had been done).

375. *See, e.g.*, Linda G. Mills, Briana Barocas, Robert P. Butters & Barak Ariel, *A Randomized Controlled Trial of Restorative Justice-Informed Treatment for Domestic Violence Crimes*, 3 NATURE HUM. BEHAV. 1284, 1289 (2019) (finding that domestic violence offenders randomly assigned to a restorative justice-informed treatment had statistically significantly fewer new arrests and lower crime severity scores during a 24-month period than domestic violence offenders randomly assigned to a standard batterer intervention program).

376. *See* Bazelon & Green, *supra* note 134, at 327 (“Under our current system, victims who report their sexual assaults to the police are presented at most with two options: the potential for a criminal conviction, which may or may not be realized, or nothing at all.”); Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 458, 487 (2006).

the punishment of GBV victim agency and affirmative mechanisms for facilitating it. For example, at the federal level, the recent VOCA amendment allowing state CVCPs to make exceptions to the requirement that victims cooperate with law enforcement requests as a prerequisite for compensation is a step in the right direction.³⁷⁷ However, victims' agency is still constrained by the lack of a statutory mandate that CVCPs actually apply the exception in practice and by the exception's vagueness and narrowness.³⁷⁸ An approach committed to respecting victims as agentic individuals requires further amendment to VOCA to fully decouple compensation eligibility from cooperation with law enforcement. Similarly, the Immigration and Nationality Act³⁷⁹ should be amended to provide T and U visa eligibility on humanitarian grounds to human trafficking and other GBV victims, respectively, who do not wish to participate in the criminal legal process, regardless of their reasons.

Some state legislatures have made statutory moves in the direction of an approach that values GBV victims' agency and dignity. Following public outcry about a rape victim with mental illness who was jailed for nearly a month on a material witness warrant, Texas enacted Jenny's Law,³⁸⁰ which entitles victims and other witnesses to counsel and a hearing before they can be detained as a material witness.³⁸¹ California has prohibited the imprisonment of sexual assault and domestic violence victims for contempt based on a refusal to testify about their victimization.³⁸² However, the law fails to include victims of other types of GBV crimes in this exemption, such as sex trafficking, female genital mutilation, and honor-based violence.³⁸³ Moreover, California's material witness statute contains no such exemptions, so GBV victims can still be arrested and jailed on material witness warrants.³⁸⁴

A number of states have also been reconsidering their statutory restrictions on restorative justice in GBV cases. For example, Vermont explicitly prohibited referral of "case[s] involving domestic violence, sexual violence, sexual assault, or stalking" to its community justice centers (restorative justice providers) in 2007,³⁸⁵ but a decade later created

377. See *supra* text accompanying notes 76–85.

378. See *supra* notes 83–85.

379. Pub. L. No. 82-414, 66 Stat. 163 (1952).

380. TEX. CODE CRIM. PROC. ANN. art. 24.111 (West 2017).

381. *Id.*; see also Gunter, *supra* note 145.

382. CAL. CIV. PROC. CODE § 1219(b) (West 2019).

383. *Id.*

384. CAL. PENAL CODE § 881 (West 2021).

385. VT. STAT. ANN. tit. 24, § 1967 (2007). The statute provided a limited exception for "Department of Corrections offender reentry programs pursuant to protocols protecting victims." *Id.*

a committee to study whether restorative justice processes should be permitted in these types of cases.³⁸⁶ In its final report, the committee concluded that “restorative justice ought to be pursued as a means to address domestic violence, sexual violence and stalking” through formalized, evidence-based programs housed within a public body or agency.³⁸⁷ Yet, as of this writing the prohibition remains on the books. Colorado’s Restorative Justice Coordinating Council³⁸⁸ has also recently been exploring the potential use of restorative justice in domestic violence cases,³⁸⁹ which would require the state to repeal its laws excluding those convicted of domestic violence from eligibility for restorative justice practices.³⁹⁰ The state’s Domestic Violence Offender Management Board (DVOMB), however, issued a white paper in opposition, citing a risk of harm to victims and the community, Colorado’s lack of regulations for restorative justice practitioners, concerns about inconsistencies in offender services and exacerbating criminal tendencies in “psychopathic” offenders, and insufficient research on the use of restorative justice for domestic violence cases.³⁹¹ Regarding this final justification, the white paper misleadingly states that “[t]he DVOMB searched for research on this topic and found that none had been published,”³⁹² despite the existence of published, peer-reviewed studies on the subject.³⁹³ One hopes

386. 2018 Vt. Acts & Resolves 146.

387. VT. NETWORK AGAINST DOMESTIC & SEXUAL VIOLENCE, FINAL REPORT TO THE GENERAL ASSEMBLY OF THE RESTORATIVE JUSTICE STUDY COMMITTEE, at 3, 11–12 (July 1, 2019), <http://legislature.vermont.gov/Documents/2020/WorkGroups/Justice%20Oversight/Incarceration%20Issues/W~Sarah%20Robinson~Final%20Report%20of%20the%20Restorative%20Justice%20Study%20Committee~9-6-2019.pdf> [<https://perma.cc/UL8E-ALDM>].

388. The Colorado legislature created this body in 2007 within the Office of the State Court Administrator to support the development of restorative justice programs, conduct trainings, and build restorative justice resources. 2007 Colo. Sess. Laws 277–78 (codified as amended at COLO. REV. STAT. ANN. § 13-3-116 (West 2022)).

389. DOMESTIC VIOLENCE OFFENDER MGMT. BD., PUBLIC SAFETY CONSIDERATIONS AND POLICY IMPLICATIONS WITH RESTORATIVE JUSTICE IN DOMESTIC VIOLENCE CASES, at 1 (Dec. 15, 2020), <http://cdpsdocs.state.co.us/dcj/DCJ%20External%20Website/DVOMB/Public%20Safety%20Considerations%20and%20Policy%20Implications%20with%20Restorative%20Justice%20in%20Domestic%20Violence%20Cases%20Final%2012.15.2020.pdf> [<https://perma.cc/6ARD-HKRT>].

390. See COLO. REV. STAT. ANN. §§ 18-1.3-104(1)(b.5)(I), 18-1.3-204(2)(a)(III.5) (West 2022). These provisions also exclude individuals convicted of unlawful sexual behavior, stalking, or a protection order violation from restorative justice eligibility.

391. See DOMESTIC VIOLENCE OFFENDER MGMT. BD., *supra* note 389, at 5–6, 8–9, 11–12.

392. *Id.* at 1.

393. See, e.g., Mills et al., *supra* note 375 (randomized controlled trial of a restorative justice-informed intervention for domestic violence perpetrators published in a peer-reviewed journal with a very high impact factor); Davis, *supra* note 374 (randomized controlled trial of restorative mediation intervention for felony arrest cases (43% of which involved IPV) published in a peer-reviewed journal). Barocas et al. identify three randomized controlled trials and twelve qualitative studies

that the Restorative Justice Coordinating Council will correct this misconception and continue to work towards establishing restorative justice as a legitimate option in GBV cases.

While many of these statutory reforms (and proposed reforms) are positive beginning steps, much more needs to be done to bolster victims' rights in the face of the state's power and tendency to coerce and instrumentalize them.³⁹⁴ Statutory change can be an effective tool to empower GBV victims, but it cannot be our only tool if we wish to realize an approach that genuinely respects their agency and dignity.

C. *Cultural Change*

Beyond statutory reform, shifting the state's approach to GBV victims requires cultural change within our criminal legal institutions, especially prosecutors' offices and police departments. Legislative reform is useful for addressing particular instrumentalizing practices, but often fails to address the values, biases, and social scripts that undergird the conceptualization of GBV victims as mere instruments to be used in furtherance of the state's prosecutorial goals. But how can we reform deep-seated cultures within these institutions, which are notoriously resistant to change?³⁹⁵

Third Circuit Judge and former law professor Stephanos Bibas proposes a two-part strategy to improve prosecutorial behavior more generally: (1) stakeholders should exert external pressure upon prosecutors, particularly head prosecutors, and (2) head prosecutors should structure and manage their offices in a way that fosters ethical behavior among their subordinates.³⁹⁶ On this latter point, Bibas underscores the power of institutional design and management to influence prosecutorial conduct more effectively than external regulation:

examining the use of restorative justice in the domestic violence context, most of which are published in peer-reviewed journals. Barocas et al., *supra* note 207, at 327. These fifteen empirical studies were published between 2005 and 2019. *Id.* The DVOMB white paper was released in December 2020 but fails to cite any of them. See DOMESTIC VIOLENCE OFFENDER MGMT. BD., *supra* note 389.

394. For example, it is deeply problematic that "courts frequently issue material witness warrants without *any* discussion of the negative impact arrest and detention will likely have on human trafficking victims." WU & YELDERMAN, *supra* note 30, at 2 (emphasis in original).

395. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 998 (2009); Ryan Cohen, *The Force and the Resistance: Why Changing the Police Force Is Neither Inevitable, Nor Impossible*, 20 U. PA. J.L. & SOC. CHANGE 105, 112–13 (2017); Rebecca Richardson & Besiki Luka Kutateladze, *Tempering Expectations: A Qualitative Study of Prosecutorial Reform*, 58 J. RSCH. CRIME & DELINQUENCY 41, 45, 51, 54, 57, 59, 62, 64–65 (2021); Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 662–66 (2016).

396. See Bibas, *supra* note 395, at 963–64.

“[s]imply commanding ethical, consistent behavior is far less effective than creating an environment that hires for, inculcates, expects, and rewards ethics and consistency.”³⁹⁷ Although Bibas’s analysis focuses on changing the culture and operation of prosecutors’ offices, his strategy should also work with police departments, as he largely bases his proposals on management literature concerning organizational culture, structure, and dynamics.³⁹⁸ A large-scale study surveying more than 13,000 officers across eighty-nine U.S. police and sheriff departments found that officers’ views on topics including the need for “toughness,” the duty to report observed officer misconduct, the fairness of promotion procedures, and whether top management acknowledges high- and low-quality work performance varied greatly across different departments.³⁹⁹ Notably, the study revealed that officers’ outlook was much more strongly associated with police department affiliation than with their personal characteristics (gender, race, age, rank, and education level).⁴⁰⁰ Thus, a particular police culture is not inevitable and organizational changes have the potential to create cultural change.

According to Bibas, an essential part of fostering a more ethical and consistent office culture is having prosecutorial leadership that frequently models and communicates values that are important to key stakeholders, including crime victims and the public.⁴⁰¹ Both of these stakeholder groups value GBV victim agency and dignity, and head prosecutors should communicate the importance of these values to line prosecutors. “District attorneys who repeatedly mention . . . victims’ concerns and discourage bragging about win-loss records can communicate these priorities to their subordinates.”⁴⁰² Likewise, state prosecutorial leadership like Ohio Attorney General David Yost should discourage, rather than encourage, arresting GBV victims and other coercive practices.⁴⁰³ Police chiefs and sheriffs can similarly foster a more ethical approach towards GBV victims through frequent words and deeds that demonstrate respect for victims’ concerns and agency, and discouraging coercive tactics aimed at securing their cooperation.

In addition to direct messaging and behavior modeling, prosecutor and police leaders can promote cultural change through their internal office

397. *Id.* at 963.

398. *See id.* at 963, 996.

399. Gary Cordner, *Police Culture: Individual and Organizational Differences in Police Officer Perspectives*, 40 *POLICING: INT’L J.* 11, 13–21 (2017).

400. *Id.* at 21.

401. Bibas, *supra* note 395, at 997–1000.

402. *Id.* at 1000.

403. *See Moore, supra* note 114.

policies, concrete objective-setting, personnel decisions, performance monitoring, training, and rewards for ethical conduct.⁴⁰⁴ For example, incentive systems that reward prosecutors solely or primarily for winning convictions encourage them to treat victims as a means of doing so. Changing these incentives to reward prosecutors who respect victims' dignity and agency would facilitate a change in behavior and institutional culture. Likewise, police should develop incentive structures that disincentivize instrumentalizing and coercive tactics such as threatening victims with charges to secure their cooperation, and reward agency-promoting practices like offering to refer victims to assistance services regardless of their interest in participating in the criminal legal process.⁴⁰⁵ This would require police leadership to pay more attention to officers' performance than they currently do, as the aforementioned large-scale survey of officer perspectives found that most departments fail to reward officers who consistently perform well and fail to penalize those who consistently perform poorly.⁴⁰⁶

Raising awareness about the pitfalls of "ideal" and "genuine" victim stereotypes through training initiatives can also help to shift perspectives on "appropriate" GBV victim behavior and wishes. High-quality training for police, prosecutors, and judges can similarly mitigate certain assumptions about GBV survivors' credibility and/or the seriousness of their victimization, which are typically based upon survivors' demeanor and ability to communicate consistent, coherent, and detailed narratives of their abuse.⁴⁰⁷ However, Epstein and Goodman point out that training alone is often insufficient to combat cultural assumptions about GBV victims rooted in implicit bias, and argue that these "may require a more complex set of interventions" to address.⁴⁰⁸ These interventions should be aimed at cultivating self-awareness and the motivation to overcome implicit biases among legal system actors.⁴⁰⁹ For police and prosecutors, the organizational design and management reforms discussed above could

404. See Bibas, *supra* note 395, at 1003–15; L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 *FORDHAM L. REV.* 2961, 2973, 2975–76 (2015); Richardson & Kutateladze, *supra* note 395, at 64.

405. Cf. Richardson, *supra* note 404, at 2973 ("Rewarding the problem-solving and social work aspects of policing will naturally lead to changes in the hypermasculine police culture because those individuals not interested in engaging in this type of policing will no longer be attracted to the field. Furthermore, as these problem-solving and relational skills become more important, departments will have to begin recruiting individuals who excel in these areas, again helping to slowly change the culture.").

406. Corder, *supra* note 399, at 17–18.

407. See Epstein & Goodman, *supra* note 136, at 453.

408. *Id.* at 454.

409. See *id.* at 454 & n.245.

effectively complement training initiatives to engender cultural change. For judges, much depends upon whether they are elected or appointed because elected judges, like elected prosecutors, tend to be sensitive to external stakeholder pressure.⁴¹⁰

As a foundational matter, greater transparency is needed to permit effective monitoring of system actors' conduct towards victims, which in turn would better allow stakeholders to respond to objectionable approaches. For instance, if there existed readily accessible information about the number of GBV victims incarcerated through material witness warrants across different jurisdictions, the public and other stakeholders could more precisely and persuasively exert pressure upon judges and prosecutors to cease this practice and change the underlying culture that sanctions it. Though it will take time,⁴¹¹ the investment in efforts to change cultures that permit, or even condone, highly coercive and instrumentalizing practices will yield considerable benefits for victims in the future.

D. *Revisiting Moral Philosophy*

An approach centered on GBV victims' ability to exercise agency within their lives would align well with the moral demands of Kantian ethics and avoid improperly dehumanizing and sacrificing them. But what of utilitarian ethics? Although deontology and consequentialist moral theories, like utilitarianism, are typically viewed in opposition to one another,⁴¹² we saw that the state's coercive and instrumentalizing approach towards GBV victims fails under *both* deontology and utilitarianism.⁴¹³ Facilitating victims' agency would not offend utilitarian ethics as a response to GBV as long as it was paired with other measures that will reduce overall GBV rates within society—which I argue require an investment in mitigating the structural drivers of this social problem. As defining features of a restructured approach to GBV that avoids a myopic focus on traditional criminal legal responses, constructing victims

410. See Carlos Berdejó & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT. 741, 742, 754–55 (2013) (finding empirically that elected Washington state judges hand down more severe sentences for serious offenses as elections approach due to political pressure); Bibas, *supra* note 395, at 996 (“Pressure from voters, victims, and defendants can influence prosecutors, particularly head prosecutors who care about reelection.”).

411. See Bibas, *supra* note 395, at 998; Richardson & Kutateladze, *supra* note 395, at 62; Stoughton, *supra* note 395, 674–75.

412. See Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYC. PHIL. (Oct. 30, 2020), <http://plato.stanford.edu/entries/ethics-deontological/> [<https://perma.cc/BR4S-SFF8>].

413. See *supra* sections II.B, III.A.

as agents and investing in communities offers the opportunity to honor our normative commitments and heed the existing evidence base.

Lastly, we must ask: is state paternalism towards GBV victims ever appropriate? As I argue above, there should be a very strong presumption that adult victims are better placed to know their own best interests than the state is.⁴¹⁴ However, in certain cases, a victim may have a psychological or cognitive impairment that seriously interferes with her ability to make decisions on her own behalf. As Linda Mills emphasizes, this type of impairment should not be presumed and should instead be diagnosed by a trained clinician.⁴¹⁵ Ideally, given the significant threat to a victim's autonomy in this situation, independent evaluations from multiple clinicians should be required. In cases where a serious impairment exists, paternalism may be appropriate. This also may be the case in limited situations where GBV is extremely severe, ongoing, and family- and community-based interventions have failed. But paternalistic state action must actually align with the goals of paternalism—to benefit and protect from harm—which is very often not the case when the state employs traditional criminal legal responses. The state must be thoughtful, considered, and restrained when engaging in paternalism with GBV victims. It should aim to do so in the least agency-restrictive way possible. It should also respect victims' individuality and ensure that its paternalistic actions are tailored to their individual needs and circumstances.⁴¹⁶ In some cases, this may take the form of having a specialized GBV counselor or social worker approach a victim to discuss safety planning even though she has not requested this assistance. As a last resort in very severe cases, paternalism may take the form of pursuing an evidence-based prosecution of the offender against the victim's wishes.⁴¹⁷ But paternalism should never translate to criminalizing and/or incarcerating a GBV victim for her unwillingness to testify or otherwise participate in the criminal legal process.

CONCLUSION

Drawing on moral philosophy and liberal legal theory to analyze our laws, practices, and institutions enables us to critically reflect upon the values they embody and whether these values are consistent with our foundational normative commitments as a liberal society. In applying this

414. See *supra* section II.A.

415. Mills, *supra* note 22, at 608.

416. See Nussbaum, *supra* note 315, at 265.

417. An evidence-based prosecution relies on types of evidence other than victim testimony, but this has become more difficult since the *Crawford* decision.

lens to the state's overarching approach to GBV victims, this Article exposes fundamental inconsistencies among this approach and various philosophical frameworks—both those used to justify the state's approach and those reflecting our commitment to respecting human dignity and autonomy.

At this current inflection point, we have the opportunity to widen the conversation around criminal justice reform to include practices that instrumentalize, dehumanize, and deny dignity to victims. Much of this conversation is rightly focused on the treatment of defendants, but victims—who this Article demonstrates also frequently become ensnared in the state's carceral machinery—must not be overlooked. Moreover, the practices at issue, intended to coerce victims' participation in criminal investigations and prosecutions, are not only harmful to victims, but also cause significant harm to offenders and communities. We must harness the current momentum for criminal justice reflection and reform to develop an approach that consistently values human dignity and avoids treating *any* individuals as mere "sacrificial objects."