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Under-Protected: Failures of State Actors to Protect Black Women from Intimate Partner Violence

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I. Introduction

Megan Thee Stallion is a Grammy Award winning rapper known for her hit songs. Her songs can be found anywhere on social media platforms and elsewhere. But recently, media attention surrounding Megan Thee Stallion has focused on the July 2020 act of gun violence against her by former partner, Tory Lanez. In a New York Times Op-Ed article written by Megan, she denied any relationship with Lanez.¹ But when she took the stand to testify in a criminal case that was brought against Lanez in December 2022 in connection with the incident, Megan admitted she and Lanez had an intimate relationship and that he had shot her.² Reflecting on the night of the shooting and why she did not admit that she had had a relationship with Lanez, Megan said that she did not feel safe speaking with police officers so she was not fully forthcoming.³ In addition to testifying about trust with police officers, Megan briefly touched upon issues surrounding survivor credibility, declaring that “women aren’t believed when they speak out.”⁴

Prosecutors filed assault charges against Lanez three months after the shooting.⁵ The trial of Tory Lanez for the 2020 shooting of Megan Thee Stallion is an example of how the state intervenes in cases of intimate partner violence.⁶ Prosecutors pursue charges against abusers where survivors may testify in court, like Megan did against Lanez. The process of getting to the trial stage for an intimate partner violence offense is not an easy one. Survivors of domestic

¹ Megan Thee Stallion, *Megan Thee Stallion: Why I Speak Up for Black Women* New York Times, Oct. 13 2020. <https://www.nytimes.com/2020/10/13/opinion/megan-thee-stallion-black-women.html>

² Gabby Bulgarelli, Sidney Madden, Sam Leeds, *Megan Thee Stallion takes the stand in Tory Lanez trial, shares suicidal thoughts* NPR, Dec. 13 2022. <https://www.npr.org/2022/12/13/1142692108/megan-thee-stallion-takes-the-stand-in-tory-lanez-trial-shares-suicidal-thoughts>

³ Id.

⁴ Id.

⁵ Id.

⁶ In this paper, I will be using intimate partner violence and domestic violence interchangeably.

violence are often met with skepticism due to violence induced trauma that lends itself to non-linear storytelling.⁷ This affects how judges view victims of domestic violence and if they grant orders of protection for survivors. Historically, state actors saw incidents of intimate partner crimes as private matters that did not justify the state's intervention in pursuing charges.⁸ The perception of domestic violence as a situation that infrequently justifies state intervention has only changed in recent history. We are increasingly seeing prosecutors bringing domestic violence cases against perpetrators or court orders of protection for survivors being issued.

State intervention is now seen as the best approach to punishing intimate partner violence to seek accountability for survivors. Both the civil and criminal legal systems bring state power to bear to help survivors escape abusive situations. In the civil realm this is best seen through orders of protection, which “provide remedies and benefits to victims that are unavailable in criminal court or in other civil proceedings, including provisions for child custody, maintenance, counseling, reduced filing-fees, and provisions requiring an abuser to vacate a shared residence.”⁹ All fifty states and D.C. offer orders of protection to domestic violence survivors.¹⁰ In the criminal system, prosecutors pursue criminal charges against abusers in hopes of imposing prison time to keep survivors safe. Depending on the jurisdiction, these prosecutions for intimate partner violence may be mandatory and continue regardless of whether the survivor so desire. While these systems of punishment and accountability are commendable, they fall short because their operating logic reveals that they

⁷ Deborah Epstein, Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors Credibility and Dismissing Their Experiences*, 167 U. Pa. L. Rev. 399, 425 (2019).

⁸ Mary A. Lynch, *Building an Anti-Racist Prosecutorial System: Observations from Teaching a Domestic Violence Prosecution Clinic*, 73 Rutgers U. L. Rev. 1515, 1526 (2021).

⁹ Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 Yale L. & Pol'y Rev. 93, 95 (2005).

¹⁰ Catherine F. Klein and Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 810 (1993).

were developed on the premise that only white women can be victimized by intimate partner violence, although that is plainly untrue.¹¹ This schema inevitable erases racialized women, which is the focus of my paper.

Although Black women face intimate partner violence crimes at higher rates than white women, they face significant barriers from state actors in the legal process. The image of the battered woman as a white survivor hinders the legal process for Black women. Intimate partner violence is guided by the stereotype of the battered woman.¹² They are women who were persistently subjected to abuse. But those battered woman are not just victims, they are white victims.¹³ The image of the battered woman influences the remedy a woman receives from the state, and it is an remedy influenced by racial privilege.¹⁴ While white women also face barriers in seeking domestic violence remedies, Black women are at even higher disadvantage.¹⁵ It is racial identity that lay the basis for what legal help a person may receive. Identity through survivor status, identity through Blackness, identity through womanhood, identity through class; all of these identities define a person as they navigate through the courts. It is identity precisely that prevents a Black woman from receiving legal help for domestic violence. By discerning the battered woman as white, this paper explains why this stereotype influences state actors' discretion regarding intimate partner violence crimes.

Black women are more likely to become a victim of intimate partner violence than a white woman.¹⁶ A Black woman is twice as likely to be killed by their spouse and four times as

¹¹ Leigh Goodmark, *When is a Batter Woman Not a Battered Woman? When She Fights Back*, 20 Yale J.L. & Feminism 75, 86 (2008).

¹² Id.

¹³ Id.

¹⁴ Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 43 UC Davis L. Rev. 1061, 1065 (March 2006).

¹⁵ Id. 1065.

¹⁶ Geneva Brown, *Ain't I A Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 Cardozo L.J. & Gender 147, 150 (2012).

likely to be killed by a partner than a white woman.¹⁷ Additionally, inadequate documentation of bruising on Black women contributes to the underenforcement of crimes against them.¹⁸ The harm Black women face in the domestic sphere has been long-established but their legal redresses vary starkly in comparison to white women. Although all women can file for protective and restraining orders under the same laws, Black women do not receive these benefits as adeptly as white women do.¹⁹ Remedies of intimate partner violence rely on the judgment of judges and prosecutors to condemn the actions of an abuser. Judges and prosecutors act as gatekeepers to legal remedies in the civil and criminal sphere respectively. This paper theorizes that the racial makeup of both judges and prosecutors as mostly white professions provides one possible explanation why significant barriers exist.²⁰

Most legal system actors do not view the law through an intersectional lens.²¹ Naturally, this includes judges and prosecutors. Progressive scholars about race such as Kimberle Crenshaw recognize that multiple identities intersect and create different systems of privilege.²² “The point is that Black women can experience discrimination in any number of ways and that the contradiction arises from our assumptions that their claims of exclusion must be unidirectional.”²³ Class, gender, and race can all affect how one is perceived by the court and its actors, and even whether someone is able to appear in court. This is especially true in intimate

¹⁷ Amber Simmons, *Why Are We So Mad? The Truth Behind “Angry” Black Women and Their Legal Invisibility as Victims of Domestic Violence*, 36 Harv. J. Racial & Ethnic Just. 47, 55 (2020).

¹⁸ Deutsch, Lauren S, Kathryn Resch, Tiffany Barber, Yoni Zuckerman, Jennifer Thompson Stone, and Catherine Cerulli. 2017. “Bruise Documentation, Race and Barriers to Seeking Legal Relief for Intimate Partner Violence Survivors: A Retrospective Qualitative Study.” *Journal of Family Violence* 32 (8): 767–73. 769

¹⁹ Id.

²⁰ See Jeffrey J. Rachlinski & Sheri Lynn Johnson, *Does Unconscious Racial Bias Affect Trial Judges*, 84 Notre Dame L. Rev. 1195, 1210 (2009).

²¹ Brown, *supra* note 16, at 169-170.

²² Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 Univ. Chi. Legal F. 139, 157.

²³ Id. at 149.

partner violence cases. In these cases, judges and prosecutors look at survivors with the expectation that they all want the same thing and in the same exact manner.²⁴ They expect these survivors want to get away from their abuser. While it is true that survivors want to escape abuse, the social institutions in this country impose significant burdens on intimate partner violence victims. Intersectionality shows scholars that Black women face more barriers seeking protection against abusers than a white woman would. For example, they are more likely to face issues of credibility through both their racial identity and gender identity.²⁵ Without an intersectional lens, judges and prosecutors take for granted that a Black woman's plight as domestic violence survivor is informed not only by her gender but her gender *and* race in ways that make what constitutes an appropriate remedy more complicated than might first appear.

This paper examines violence perpetuated on Black women and how the state intervenes through its actors. The struggles Black women endure in advocating for themselves in abusive situations warrant special consideration. They are not afforded the special legal interventions the state provides to their white counterpart. This paper will also consider the effects of poverty for survivors of intimate partner violence. Black women face poverty at increased rates which influence their choice to pursue, or not pursue, a remedy when faced with intimate partner violence. Without an intersectional lens, state actors aiming to prevent domestic violence fall short of doing so when it comes to incidents against Black women. A few caveats. First, this paper does not consider the additional legal barriers that Black transgender women who are DV survivors face. It looks solely at the effects of states intervention on cisgender Black women. I do

²⁴ Leigh Goodmark, *The Impact of Prosecutorial Misconduct, Overreach, and Misuse of Discretion on Gender Violence Victims*, 123 Dick. L. Rev. 627, 631 (2019).

²⁵ It is important to note that white women survivors of intimate partner violence also face issues of credibility when presenting stories of their abuse, but Black women face more credibility questions because they are perceived as overly sexual due to their race.

so not because I think transgender Black women are undeserving of such attention but because transgender Black women warrant their own special consideration in a separate work. Second, my focus is limited to Black women, and not other racialized women.

This paper argues that state actors fail to protect Black women from intimate partner violence because their discretion is guided by the white battered woman and not intersectionality. In Part I of this paper, I explore the image of the “battered woman” and its effect on providing effective legal remedies for Black women. This stereotype creates an idea to state actors that to be a victim of intimate partner violence, you must be white and helpless.²⁶ In Part II, I discuss the biases of judges when Black women appear in their court. Judicial hostility to granting orders of protection to Black women can be explained through two biases: implicit racial bias²⁷ and bias towards domestic violence survivors.²⁸ Domestic violence is a difficult crime to litigate from a process prospective because domestic violence survivors suffer from trauma. In Part III, I focus on the issues surrounding prosecution and intimate partner violence. Prosecutors are state actors in an inherently political system.²⁹ As political actors, prosecutors become powerful state actors who zealously advocate against crime in hopes of furthering political aspirations.³⁰ Some jurisdictions even mandate zealous advocacy through no drop policies, which require prosecutors to pursue criminal charges regardless of victim participation.³¹ But zealous advocacy and no drop policies for intimate partner violence are not always the best solution to protecting Black victims.

²⁶ Goodmark, *supra* note 11, at 86.

²⁷ Jeffrey J. Rachlinski & Sheri Lynn Johnson, *Does Unconscious Racial Bias Affect Trial Judges*, 84 *Notre Dame L. Rev.* 1195, 1210 (2009).

²⁸ Epstein, *supra* note 7, at 425.

²⁹ The Prosecutors and Politics Project, *National Study of Prosecutor Elections*, 4, available at <https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf>

³⁰ Carissa Byrne Hessick and Michael Morse, *Picking Prosecutors*, 105 *Iowa L. Rev.* 1537, 1538 (2020).

³¹ Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 *Harv. L. Rev.* 550, 557 (1999).

This section considers Black women's views towards prosecution of these crimes, and why this may be.

II. The "Battered Women"

The image of the battered woman is rooted in whiteness and prevents Black women from successfully obtaining legal help. If domestic violence affects all women, all races, and all classes, then remedies should be readily accessible to all victims. However, Black women warrant special consideration because of disparities in the court process. Because of the depiction of the stereotypical "battered women," courts are less likely to help Black women than they provide their white counterparts. This section looks at the stereotype of the battered woman. It considers the stereotypes of Black women and how these stereotypes have excluded them from fitting into a tight category of victims. The "battered woman" leads to harmful comparisons with actual victims and creates a barrier for state intervention. The intersections between race and class show that Black women experience abuse differently than the average white, middle-class woman. By implementing a critical race theory analysis into this term, this paper understands "battered woman" as a category that is unnecessary.³² Instead, intersectionality and intersecting categories provide the best combative approach to intimate partner violence.

A. Who is the Battered Woman?

Historically, prosecutors and law enforcement were apathetic towards domestic disputes and oftentimes chose not to pursue these cases in court.³³ Because of this, advocates turned to lawmakers to pass legislation and make the prosecution of intimate partner violence crimes a

³² Goodmark, *supra* note 11, at 85.

³³ Paula C. Johnson, *Danger in the Diaspora: Law, Culture and Violence Against Women of African Descent in the United States and South Africa*, 1 J. Gender Race & Just. 472, 514 (1998).

priority.³⁴ This led to the passage of the Violence Against Women Act (VAWA).³⁵ Its goals were to provide grants to improve law enforcement, increase prison sentence for perpetrators, enforce protective orders across state lines, and provide services to victims.³⁶ It gained bipartisan support and was seen as a success for intimate partner violence victims. In seeking out better domestic violence remedies, the VAWA showed that advocates were successful in reaching out to legislators. But despite their well-intended advocacy, the unintended consequence was a rigid image of who qualified for legal assistance.

Because of historical apathy to domestic violence, the Anti-Violence movement in the 1980s and 1990s sought legal remedies for white women instead of all women.³⁷ In pushing for more legal protections for domestic violence victims, domestic violence advocates were careful to paint their victims as someone legislators would support.³⁸ While domestic violence affects women of all races and all classes, it was particularly appealing to advocates to approach legislators with white, middle-class women as victims because they looked like wives, sisters, and mothers of the country's most powerful people.³⁹ In an identity rooted in oppression, the image of the battered woman become one rooted in privilege. Victims of intimate partner violence became white.⁴⁰ This strategic move by advocates erased Black women who are at higher risks of intimate partner violence. In associating the battered woman with whiteness, this makes it more difficult for the courts to see a Black woman as a victim in need because the assumed victim is white. White women have a political power that Black women, unfortunately,

³⁴ Id.

³⁵ Id.

³⁶ No civilized system, 503

³⁷ Goodmark, *supra* note 11, at 88.

³⁸ Id.

³⁹ Id.

⁴⁰ Id. at 86.

cannot access under past and current societal arrangements. In a racially hierarchical society, their white racial identity puts them in a higher political status than Black victims.⁴¹

The label of the “battered woman” for all domestic violence victims should be eliminated. Categorizing all victims into a limited box is harmful to Black women. It pushes them to the sidelines of an anti-violence movement they are firmly a part of.⁴² The battered woman arises from essentialism, which tells theorists that groups of people all share similar attributes and is a guide for identity.⁴³ But anti-essentialism suggests that these categories, like the “battered woman,” presuppose uniformity and is inherently disempowering.⁴⁴ By taking an anti-essentialist stance against this image, removing the battered woman from domestic violence vocabulary will recognize that not all incidents of abuse are the same. Abuse to one victim is not the same to another. Every victim faces a different set of circumstances and require fact-by-fact analysis. The battered woman does not allow for the legal system to assess intimate partner violence victims case by case because of its firm stance in whiteness. Removing this term will also force state intervention to include all women in its perceptions of victims. If there is not a singular battered woman, then the net is widened for what abuse looks like to different women. Abuse is not a singular experience, so its victim should not be a singular representation.

B. Black Women as “Battered Women”

Battered women are abused and helpless and are in desperate need of aid. They are someone society wants to protect; someone they need to protect. A battered woman is the perfect victim.⁴⁵ But these victims are not Black; the battered woman is white. While a white woman

⁴¹ Id. at 88.

⁴² Id.

⁴³ Khiara M. Bridges, *Critical Race Theory: A Primer* (2019).

⁴⁴ Id.

⁴⁵ Morrison, *supra* note 14, at 1084.

and Black woman may share gender, it is race that determines protection. Because Black women do not fit into the “battered woman” label, their experiences of intimate partner violence are discredited. A battered woman is the classic domestic violence victim.

Additionally, the image of the battered white woman is associated with class privilege. Advocates wanted to help the battered woman, but not the poor Black woman. Women in poverty are more likely to become victims of violence than any other group.⁴⁶ Within this group, Black women are disproportionately affected by poverty, which increases the likelihood of intimate partner violence among them.⁴⁷ This follows that a poor Black woman faces a higher chance of abuse by their partner than the average white middle class woman. Yet, a white middle class woman has a better probability of receiving an order of protection because they have the resources that a poor Black woman does not. The image of the battered woman inherently takes on a higher-class status because white women are less likely to be impoverished than women of color. Women with higher class statuses have a better chance of affording legal counsel than those in poverty. With legal counsel, it is easier to obtain an order of protection. Additionally, it is easier for courts to conceptualize that a middle-class white woman is more likely to have the resources to put her back on her feet and leave an abusive situation. But this ignores the financial vulnerability that many intimate partner violence victims face. If the “battered woman” is rooted in whiteness, it cannot account for the fact women in poverty face higher rates of intimate partner violence.

Harmful stereotypes about Black women further prevent them from utilizing the “battered woman” image in the legal system. Black women in the United States consistently face stereotypes about their personalities and their sexualities. They are perceived to be angry, instead

⁴⁶ Brown, *supra* note 16, at 150.

⁴⁷ *Id.* at 150.

of strong. Perceived to be sexual, instead of oppressed. Rarely are they perceived as victims. Black women also face stereotypes that they are not credible.⁴⁸ Police officers do not take domestic disputes as seriously when Black women are involved.⁴⁹ Their experiences are ignored because Black women are not seen as battered women.⁵⁰ Because of Black women's perceived sexuality, it is often assumed they do not warrant similar protections to white women.⁵¹ Take for example, the stereotype of "welfare queen," as a hyper-sexual deviant who cannot care for all of her children.⁵² "Welfare queens" are often subject to public scrutiny as many people see these stereotypes as relying on public assistance and taking away money from hardworking Americans.⁵³ It contributes to the idea that Black women are excessively sexual.⁵⁴ If Black women are excessively sexual, then attaining battered woman status becomes more difficult. Stereotypes about Black women and their sexuality guides the help they receive, and it is not one that equal to white women.⁵⁵

Take for example Megan Thee Stallion and the example I averted to in the introduction. In her Op-Ed article for the *New York Times*, Megan openly takes on the status as a survivor.⁵⁶ However, Megan relays that her status as a survivor of intimate partner violence did not come naturally.⁵⁷ She questioned whether she was really a victim of assault.⁵⁸ Megan details the skepticism she met as a Black women: "The way people have publicly questioned and debated

⁴⁸ Simmons, *supra* note 17, at 53.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Jennifer C. Nash, From Lavender to Purple: Privacy, Black women, and Feminist Legal Theory, 11 *Cardozo Women's L.J.* 303, 321.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1989 *Univ. Chi. Legal F.* 139, 158-159.

⁵⁶ Megan Thee Stallion, *Megan Thee Stallion: Why I Speak Up for Black Women*, *New York Times*, Oct. 13, 2020. <https://www.nytimes.com/2020/10/13/opinion/megan-thee-stallion-black-women.html>

⁵⁷ *Id.*

⁵⁸ *Id.*

whether I played a role in my own violent assault proves that my fears about discussing what happened were, unfortunately warranted.”⁵⁹ Since this article in 2020, Megan has continued to open up about this incident. After years of telling media outlets she and Lanez were not in any relationship, Megan took the stand against Lanez in 2022 and admitted their intimate relationship.⁶⁰ Stereotypes, such as the fact that Black women are not credible, play a huge role in victim status. If it took years for Megan--someone who enjoys privileges far superior to what the average Black woman could ever imagine—to open up about her experience because she correctly anticipated that the narrative of the disreputable Black woman would hinder her case, one wonders what it is like for the average Black woman. Megan did not fit the narrative of a “battered woman” because she was never seen as a helpless victim. Harmful comparisons between actual intimate partner violence cases and this stereotypical “battered woman” create scenarios where actual victims are not believed by the people at large. By eliminating the “battered woman” stereotype, the stories of Black survivors will become apart of the anti-violence movement.

The “battered woman” takes essentialism too far. It is unfair that a stereotypical battered woman guides the experiences for all battered women. It creates barriers for women who do not fit in in this limited box. The framework for the battered woman must change and encompass an intersectional woman. It should recognize that all women, of all races and of all classes, are affected by abuse. A rigid category will not serve justice best because not all victims and their experiences are the same. If the legal system removes the image of the battered woman from its

⁵⁹ Megan Thee Stallion, *Megan Thee Stallion: Why I Speak Up for Black Women*, New York Times, Oct. 13, 2020. <https://www.nytimes.com/2020/10/13/opinion/megan-thee-stallion-black-women.html>

⁶⁰Gabby Bulgarelli, Sidney Madden, Sam Leeds, *Megan Thee Stallion takes the stand in Tory Lanez trial, shares suicidal thoughts* NPR, Dec. 13 2022. <https://www.npr.org/2022/12/13/1142692108/megan-thee-stallion-takes-the-stand-in-tory-lanez-trial-shares-suicidal-thoughts>

framework, it begins a starting point for change. This change is necessary to recognize that Black women are victims too and not all abuse is the same.

III. The Civil System: Judicial Bias

The civil legal system, through state actors like judges, fails to protect Black women who are victimized by intimate partner violence. Judges abide by the battered woman stereotype. A victim who appears in their courtroom must be passive. The civil legal system provides one important remedy to intimate partner violence victims: an order of protection. Orders of protection provide one of the primary responses to intimate partner violence.⁶¹ It provides a wide timeline of legal aid for victims; these orders can range from temporary to emergency and to final orders.⁶² Its purpose is to ensure victims of domestic disputes have a legal protection if their abuser contact them. Yet, Black women remain under-protected victims of intimate partner violence under this remedy.⁶³ Unsurprisingly but no less disappointing, judges do not acknowledge the role intersectionality plays in the enforcement of civil protection orders.⁶⁴ The image of the battered woman and the makeup of the legal field help to explain the disparities in care to Black women. The legal system, as a state institution, is not immune to systemic racism. It is that systemic racism in the legal system that creates a cycle where Black women are denied protections because they are nonwhite. By looking into civil intervention practices and the wide judicial discretion given to this remedy, this section will explain the failures to protect Black female victims as it results from judicial bias.

A. Judicial Implicit Racial Bias

⁶¹ Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 Harv. J.L. 53, 55.

⁶² Id.

⁶³ Vanita Saleema Snow, *Veiling and Inverted Masking*, 36 Berkeley J. Gender L. & Just. 115, 128 (2021).

⁶⁴ Brown, *supra* note 16, at 148.

Implicit bias is unconscious prejudice that influences everyday perceptions and judgments.⁶⁵ Typically, implicit attaches stereotypes and attitudes towards racial groups.⁶⁶ It is widely accepted that everyone has implicit biases.⁶⁷ Implicit biases of judges affect whether a petition for an order of protection will be successful. Victims are at the behest of a judge. It is a judge's sole discretion that decides whether a victim receives any sort of civil legal protection. But judges are not immune from implicit biases. Judges are human beings with their own set of experiences and thoughts. Implicit biases unconsciously inform the perceptions of people who appear in court. In one study conducted by law professors at Cornell, white judges were shown to have a strong preference for white racial groups.⁶⁸ This can create a problem for Black women who seek an order of protection in court. In federal court, 78% of all federal judges were white, while 70% were male.⁶⁹ As of July 2022, 27 states did not have a single Black female federal trial judge.⁷⁰ California has 6 Black female federal trial judges, the highest number of any state.⁷¹ Only 18% of state supreme court justices are people of color.⁷² These statistics shed light on the precarious position Black women seeking protection under the law face. A Black woman going to court is likely not going to find someone who looks like them at the judge's bench. The chances are high that the judge will be a white male. This is problematic because puts Black women at a disadvantage within the legal system. If white judges are more likely to prefer white

⁶⁵ Perea, Delgado, Cuison-Villazor, James, STEFANCIC, & Wildman, *Race and Races: Cases and Resources for a Diverse America* (4th ed. 2023).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Jeffrey J. Rachlinski & Sheri Lynn Johnson, *Does Unconscious Racial Bias Affect Trial Judges*, 84 *Notre Dame L. Rev.* 1195, 1210 (2009).

⁶⁹ American Bar Association Profile of the Legal Profession 2022, American Bar Association (2022), available at <https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf>

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Brennan Center of Justice, *State Supreme Court Diversity May 2022 update* (May 20, 2022), available at <https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-may-2022-update>

petitioners, then Black women survivors are at a detriment. Both the makeup of the courts and implicit biases that judges hold help inform why Black women struggle to receive legal help in comparison to a white woman.

Judges have the most power in enforcing and granting orders of protection. Orders of protection are the most utilized remedy.⁷³ An order of protection provides injunctive relief and prohibits an abuser from abusing, threatening, or harassing a victim. It limits an abuser's contact with the victim and provides criminal remedies if violated. When granted, orders of protection are effective and decrease domestic violence incidents.⁷⁴ Additionally, these orders can be issued on a temporary or emergency basis to provide immediate protection for victims. This makes orders of protection the pinnacle of remedies for domestic violence. But not every victim who wants an order of protection can receive one. Women make up approximately 85% to 92% of petitioners for orders of protection.⁷⁵ But research shows that Black women are less likely to be successful than a white woman when filing a protective order.⁷⁶ Essentialism helps to explain this disparity. Judges view victims the battered woman, who is white. If the stereotype of the battered woman is white, then it is likely a judge expects to see a white woman appear before them in court. But this leads to misguided understanding of intimate partner violence. Because victims of intimate partner violence are assumed to be white, it improperly narrows the scope of intimate partner violence. Thus, orders of protection are not as accessible as they should be for a Black woman. While eliminating the battered woman category cannot completely erase the

⁷³ Jane K. Stoeber, *Access to Safety: Service of Process in Domestic Violence Cases*, 94 Wash. L. Rev. 333, 351 (2019).

⁷⁴ *Id.* at 353.

⁷⁵ *Id.* at 385.

⁷⁶ Snow, *supra* note 56, at 128.

implicit bias of judges, it can help put Black women at the center of the conversation. It can help judges recognize that the abuse Black women face may be different than that of another woman.

B. Lack of Intersectional Frameworks and Judicial Discretion

Intersectionality should be utilized by judges to combat implicit biases. *Cooper v. City of Chicago Heights* shows what happens when judges do not utilize intersectionality in their decision-making. In *Cooper*, Teresa Iacovetti, a poor Black woman, was murdered by Allen Perkins, her ex-boyfriend.⁷⁷ Following a break-up, Perkins began to harass and abuse Iacovetti.⁷⁸ She complained to both the Chicago Heights Police Department and Perkins's parole officer of the abuse.⁷⁹ Perkins threatened to shoot Iacovetti, but the department did not arrest him.⁸⁰ Iacovetti eventually obtained an emergency protective order, which required Perkins to not contact her, but the abuse continued.⁸¹ On June 21, 2007, Perkins shot Iacovetti in the head and she succumbed to her injuries.⁸² Her estate filed suit against the police department in federal district court and claimed the department violated the equal protection clause by giving her inferior protective services based on gender.⁸³ The crux of the case concerned admission of expert testimony by Dr. Kathleen Ferraro.⁸⁴ Her testimony sought to make a connection between Iacovetti's race, class, and gender to show she was at a higher risk for intimate partner violence and the police should have intervened.⁸⁵ While the district court judge recognized Dr. Ferraro's extensive knowledge about intimate partner violence, she deemed the expert testimony regarding

⁷⁷ *Cooper v. City of Chi. Heights*, 09-3452 U.S. Dist. LEXIS 56926 at *1 (N.D. Ill. May 27, 2011).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

race was irrelevant to this gender discrimination lawsuit.⁸⁶ The judge said Dr. Ferraro’s conclusion was “unreliable” and “improperly generalized” because she did not base it on any methodology.⁸⁷ But yet, the judge made it clear that no expert testimony was needed to show women are abused at higher rates than man, and called it “common sense.”⁸⁸

Cooper v. City of Chicago Heights provides one example of an unsuccessful attempt to bring the intersection of race and gender to a judge’s attention. The district court judge, a white woman, oversaw the estate of a Black woman sue a city police department that failed to protect her from intimate partner violence. Iacovetti died at the hands of her abuser despite multiple attempts to enforce her order of protection.⁸⁹ While Iacovetti herself could not bring the case, her estate stood as a representation for Iacovetti as a Black woman in a failed legal system. The federal trial judge in *Cooper* stated no expert witness needed to testify about domestic abuse towards women because it was common sense that women are commonly survivors of abuse.⁹⁰ But she did not extend that common sense belief to race despite Black women facing higher rates of domestic violence than white women.⁹¹ The judge was purposeful in her language that this case was a claim for gender discrimination, not race.⁹² But by viewing gender and race as two separate and distinct issues, *Cooper* misses the mark. Despite the acknowledgement that certain types of women, namely Black women, may receive less police protection, the judge ultimately decided expert testimony based on both race and gender is unnecessary because gender discrimination is not also discrimination based on race.⁹³ But if Iacovetti’s death resulted from a

⁸⁶ *Cooper*, U.S. Dist. LEXIS 56926 at *13.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

lack of law enforcement protection, it seems relevant that an expert testify that certain groups of women are less likely to receive police protection. The *Cooper* ruling on expert testimony shows that there is a fundamental misunderstanding about the intersection of race and gender by white judges.

When an order of protection is violated, there must be some relief granted to maintain its enforceability. But when law enforcement fails to enforce these orders, this puts judges at the center of action. A judge has the power to hold law enforcement accountable and provide Black women with results. However, if a judge is unwilling to hear evidence about the intersection of race and intimate partner violence, then it is impossible for that judge to understand the full implications of their decision. The effectiveness of orders of protection are reduced when Black women, or even the estates of Black women, cannot sue police departments for lack of care. Even in a gender discrimination suit, race plays a large role in the types of treatment a Black woman receives. The lengthy history of animosity between law enforcement and Black Americans should inform courts that their duty of care may not be properly executed when dispatched to a Black household. To many judges, a Black woman may only be seen through her identity of race or gender, not both. Courts consistently refuse to acknowledge that race and gender combined, affect outcomes.⁹⁴ Because judges typically do not appreciate how multiple axis of identity such as race and gender are constituted to in a domestic violence case, Black women are not properly protected from intimate partner violence. If judges will not use an intersectional lens when Black women appear in their court, then Black women once again fall victim to a system of white supremacy. They are entrapped in a system that does not care about

⁹⁴ *Cooper*, U.S. Dist. LEXIS 56926 at *13.

them nor view them as a whole person by separating their race from their gender. A judge's understanding of intersectionality becomes a necessary element to protect Black women.

Violence against Black women is not something that can be separated by race and gender. The courts failure to provide effective legal remedies to Black female victims of intimate partner violence rests on a lack of understanding of intersectionality. Identity matters. Pushing back against the typical battered white woman image changes the identity of intimate partner violence victims. Battered women are not just white. They are not just passive victims. They are not just middle class.

C. Judicial Bias to Domestic Violence

Black women not only face racial bias in the courts, but domestic violence bias as well.⁹⁵ Judges underestimate domestic abuse and tend to discount the victims who appear before them in court. Many judges have expectations for petitioners who appear in their court. They want clear narratives and consistency. This applies regardless of the legal matter. But domestic violence does not always allow for this.⁹⁶ Domestic violence victims have a tendency to tell non-linear explanations of abuse due to trauma.⁹⁷ But non-linear stories are harder to follow. It is not easy to track a series of events when it does not follow a logical order. Judges do not want this type of storytelling. Additionally, trauma creates issues of memory loss as well.⁹⁸ A victim's trauma may create inconsistencies which make domestic violence cases harder to adjudicate. This affects narrative stories of abuse in court. Unfortunately, when inconsistencies are apparent in court, it exposes domestic violence victims to issues of credibility. It becomes easier for judges to discredit a victim's experiences with abuse when they cannot attach themselves to a story.

⁹⁵ Epstein, *supra* note 7, at 425.

⁹⁶ Simmons, *supra* note 17, at 63.

⁹⁷ Epstein, *supra* note 7, at 406.

⁹⁸ *Id.* at 411.

Judges are likely to look at a domestic violence victim who stay with their abuser with more skepticism. Many women stay with their partners following domestic disputes.⁹⁹ But a judge is likely to view a woman's decision to stay in an abusive relationship as inconsistent with abuse.¹⁰⁰ If a situation was as violent or as abusive to induce legal protection, a judge wants to see concrete evidence of that. Staying with an abuser shows the opposite of evidence of abuse. Instead, it implies that a relationship still exists and that the victim wants to stay in that situation. But this judicial skepticism does not take intersectionality into account. Judges do not consider the implications of needing to stay with a partner out of financial necessity. For some women, staying with an abusive partner is a matter of security and resources. If their partner is kicked out of their house or even imprisoned, this could affect their financial situation. Women in poverty are more likely to stay with an abuser. Since Black women are at a higher risk for poverty, it follows that Black women face a higher likelihood that they will stay with their abuser. But this means Black women likely face increased skepticism from judges. Their living situations will be scrutinized in a court that does not understand the full implications of leaving an abuser permanently.

Because of the helpless battered woman image, courts are less likely to help women who resort to self-defense and protect themselves against abuse. Battered woman benefit the most from domestic violence laws.¹⁰¹ Their victim status is easy for courts to cling to as their abuse is recognizable and undeniable as helplessness. For a judge, this creates a black and white picture of who needs help. A woman seeking an order of protection from the court is not seen as an individual, but rather through the battered woman stereotype.¹⁰² They must be assessed through

⁹⁹ Id. at 413.

¹⁰⁰ Epstein, *supra* note 7, at 414.

¹⁰¹ Morrison, *supra* note 14, at 1081.

¹⁰² Id. at 1117.

the helplessness lens courts have construed for battered women before help is granted. But this lens prevents courts from helping women who turn to self-defense to protect themselves against an abuser. Courts disavow battered women who fight back, instead choosing to view the “typical” intimate partner violence victim as helpless. Courts want passive victims. But women who lack resources and those who are afraid of turning to the police are more likely to retaliate against abusers.¹⁰³ Since Black women are at higher risk of poverty, their class status puts them at a disadvantage where they are more likely to turn towards retaliatory practices to defend themselves. Additionally, racial status, as a Black American, makes it more difficult to turn to the police. In either instance, this obstructs a Black woman from receiving an order of protection from the court. The intersection of class and racism for Black women can make it harder to get the proper help. When appearing in court, a victim must be able to demonstrate why they deserve a protective order. They need victim status. But victim status cannot be construed when retaliation is involved. It creates a barrier to women who see retaliation as a short-term defense mechanism when access to the courts or police is unavailable at a moment’s notice.

When domestic violence bias exists simultaneously with racial bias, this creates a barrier for enforcing and receiving orders of protection. History tells scholars that courts have long discredited Black Americans as witnesses on the basis of race.¹⁰⁴ This history carries over into the domestic sphere. Black women as both members of a racial class and a victim class have double barriers to establishing credibility in court. They face credibility issues as domestic violence victims because of the increased likelihood for trauma while simultaneously dealing with historical credibility issues against Black Americans. This creates a need for intersectionality because victim status, race, and gender are combined and affect court

¹⁰³ Goodmark, *supra* note 11, at 77.

¹⁰⁴ Epstein, *supra* note 7, at 436.

perceptions. Black women are faced with a negative perception in court because of these credibility issues. This varies from the battered woman image, where race, gender, and victim status also intersect. Unlike battered women, Black women are not receiving the sympathy of the court. Battered woman, as it currently is presented as a white victim, only have the issue of domestic violence, not racial credibility. Therefore, only one barrier exists for the stereotypical battered woman. Judicial bias to domestic violence presents a real problem for Black women who seek civil help. While intersectionality will not completely rid the system of domestic violence or racial bias, by increasing this perspective in the legal field it can yield a better understanding for Black women who survive abuse.

IV. The Criminal Legal System: Prosecution of Intimate Partner Crimes

Transparency and intersectional perspectives from prosecutors are needed to overcome the barriers that Black women face when prosecutors zealously advocate for victims in court. Prosecutors are the gatekeepers to the criminal legal system. While police officers must initiate arrests, it is ultimately up to prosecutors to pursue criminal charges. Prosecutors are given a substantial amount of discretion over the cases they pursue. But there is little transparency into these decisions. It is the lack of transparency between prosecutors and the public that creates the initial hesitancy for domestic violence victims to pursue charges against their abuser. This is especially pertinent when Black women are the victims of the abuse. In spite of the hesitancy many Black victims face when pursuing charges, some studies show Black women support prosecution of abusers.¹⁰⁵ But this fails to provide a correlation to heightened participation in the criminal system. When discretion is taken away from prosecutors, the results for Black women are not much better. There is a fundamental misunderstanding between prosecutors and how to

¹⁰⁵ Arlene N Weisz, *Prosecution of Batterers: Views of African American Battered Women*, 17 VIOLENCE AND VICTIMS, 19–34, 24 (2002).

protect Black women. While prosecuting intimate partner violence crimes is well-intended, if a prosecutor does not consider the needs and experiences of the Black woman they help then they in turn perpetuate a system of white supremacy.

Before understanding how prosecutors lack intersectional perspectives in their lawyering, a background of the legal profession might be helpful. The demographic makeup of the legal profession is similar to the makeup of judges in that Black women are severely underrepresented. In 2010, 5% of lawyers were Black while 89% were non-Hispanic white.¹⁰⁶ In 2020, the American Bar Association reported that 5% of lawyers were Black, showing no increase of Black attorneys in ten years despite the fact that 13.4% of the United States population is Black.¹⁰⁷ In 2020, 86% of lawyers were non-Hispanic white, down slightly from the 89% in 2010.¹⁰⁸ It is no secret that Black Americans are underrepresented in the legal profession. The makeup of the legal field carries over into prosecution. Prosecutors are predominantly white and male; 75% of prosecutors' offices are led by white men.¹⁰⁹ 95% of elected prosecutors are white.¹¹⁰ Women of color only make up 2% of head prosecutors.¹¹¹ In framing the narrative around state intervention in the legal system, it is important to have the context of who makes up the legal profession. In pursuing criminal charges, it is likely a Black woman will see her case brought by a white male prosecutor. This white prosecutor, whether they are male or female, is unlikely to fully understand race as a factor for intimate partner violence survivors. They can only educate themselves and attempt to do what is best. The legal field will always benefit from

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 Calif. L. Rev. 795, 817 (2022).

¹¹⁰ Id.

¹¹¹ Id.

more diversity. With diversity comes new understandings of law and better advocacy for marginalized groups.

A. Prosecutors as Political Actors

Many county prosecutors are elected and utilize their prosecutors' offices to pursue the politics of the locality. The criminal legal system is not a national system but rather a series of local networks.¹¹² Prosecution occurs at the federal level and the state level. At the federal level are the U.S. Attorneys. These attorneys are appointed by the President and subject to confirmation by the Senate. Prosecutors that do not practice at the federal level are typically employees of a county. Their constituents consist of a small group of local people. This means the county prosecutor, or district attorney, is usually elected. In fact, forty-five states elect their county prosecutor.¹¹³ Even many states elect their attorney general.¹¹⁴ The elections of local prosecutors make it an inherently political position, even for the prosecutors who are hired as bureaucrats. Prosecutors' offices are overwhelmingly partisan.¹¹⁵ This is significant because "most local elections ... are nonpartisan."¹¹⁶ If prosecutor elections are partisan, this correlates to prosecutors having strong beliefs or causes they want to follow as a government official. The assistant prosecutors that work under this county official may be subjected to the will of the political landscape within their county depending on the case. Federal and state level prosecutors have inherently political roles and their appointment and election process exhibit that.

Political aspirations explain why prosecutors pursue charges zealously. At the state level, the fact that prosecutors' offices run at a local level makes it more likely that the locality is aware

¹¹² Hessick et. al., *supra* note 30, at, 1538.

¹¹³ The Prosecutors and Politics Project, *National Study of Prosecutor Elections*, 4, available at <https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf>

¹¹⁴ Hessick, et. al., *supra* note 30, at 1548.

¹¹⁵ *Id.* at 1552.

¹¹⁶ *Id.*

of the crimes occurring in the area. The ability of prosecutors to respond adeptly to the public makes them a powerful state actor.¹¹⁷ Zealous advocacy is one way to build trust within the community. Zealous advocacy is when an attorney presents their best representation of a client's case within the bounds of the law. The zealous advocate will do everything to win their case. If the people see prosecutors advocating against crime in the area, it is more likely they will see their position's longevity increased.

By viewing prosecutors as political actors rather than neutral attorneys, it partly explains why it is easier for these attorneys to categorize intimate partner violence victims as one unified whole. If most prosecutor elections are partisan, it is likely that the political landscape of prosecution affects how these attorneys will advocate for intimate partner violence victims in court. In jurisdictions that recognize a tough on crime approach, it is easier to pursue all crimes under the same standard. This applies equally for domestic violence. But intimate partner violence should not be a political issue, it should be a victim-centered focus. Zealous advocacy was made for political issues, but intimate partner violence is not a political issue. Even electing a progressive prosecutor, as some scholars have suggested, is not a clear sign that change, or reform will occur.¹¹⁸ Ultimately, prosecutors are elected in a system rooted in privilege. Prosecutors contribute to a system of mass incarceration where Black Americans are disproportionately held.¹¹⁹ Framing prosecutors as political actors explains why Black women are hesitant to seek help for intimate partner violence in the criminal legal system.

B. Hesitancy in Prosecution: Discretionary Power

¹¹⁷ Id.

¹¹⁸ Id. at 809.

¹¹⁹ Id. at 807.

Long-lasting effects on criminal defendants explain the hesitation that Black women have in to the criminal system for help when they are subjected to domestic abuse. It is no secret that many cases of domestic violence go unreported. One reason is because many victims are hesitant to seek legal help knowing that doing so will inevitably lead to interaction with the criminal legal system. This can partly be explained by the amount of discretion prosecutors possess. A lot of power is vested in prosecutors, with very little transparency into their decision-making process.¹²⁰ Decisions to impose criminal charges on a defendant can vary with a prosecutor's age and experience, so that they may seem tough on crime or appears to be a "winning" attorney. Prosecutors want to be able to prove themselves with their casework. Their selectivity and choices create long lasting effects for all criminal defendants. Prosecution is largely a self-regulating profession, but this is an inadequate system.¹²¹ When there are no standards to guide when criminal charges are pressed, this leads to disparities among racial and class lines.¹²²

Whether a prosecutor decides to charge a defendant with a certain crime could be the difference between fines and prison time. This is relevant in the domestic sphere, and especially for Black women with Black partners. For a Black woman with a Black partner, having a prosecutor bring charges of assault or battery against their partner could be seen as amplifying lengthy or mass incarcerations of Black Americans. Prosecutors may choose to overcharge the defendant.¹²³ Black victims face a paradigm that white victims do not; they must worry about working within the criminal legal system that overcharges even if that means it holds an abuser accountable.¹²⁴ The complexities of mass incarceration and over policing make the prosecutor a

¹²⁰ Lynch, *supra* note 8, at 1526 (2021).

¹²¹ Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor*,

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Lynch, *supra* note 8, at 1524.

fierce adversary for those victims, especially Black women, who seek help. Black women also risk stigma, as communities look down upon bringing their partners into the criminal system.¹²⁵ Criminal charges do not become a matter of what is best for yourself, but what is ultimately best for your community. This creates the hesitancy for pursuing charges. Even the most well-intended prosecutor can use their power in a way that creates undesirable consequences for Black communities.¹²⁶ Because prosecutors act as gatekeepers to the legal system, more transparency about their decisions, including the charges they pursue, is needed for Black women to pursue charges against their abusers.

Prosecutors, as state actors, and their legal discretion negatively impact the success of a Black woman in court. Just as they do with other criminal cases, prosecutors have large discretion over incidents of intimate partner violence. On the flip side of overcharging defendants comes the underenforcement of intimate partner crimes. Most jurisdictions allow prosecutors to choose which cases to pursue in court. But historically, prosecutors discouraged intimate partner violence victims from pursuing cases against their abusers.¹²⁷ But even once these domestic cases were pushed to court following an overhaul of the legal process, prosecutor apathy from the lack of victim participation within the court process continued.¹²⁸ The discretion of prosecutors plays a role in the underenforcement of intimate partner violence crimes for Black female victims. Some studies show that prosecutors utilize their discretion based on racial bias, typically in a way that disadvantages Black Americans.¹²⁹ Both apathy towards these domestic

¹²⁵ Brown, *supra* note 16, at 148.

¹²⁶ Lynch, *supra* note 8, at 1532.

¹²⁷ *Id.* at 1528.

¹²⁸ *Id.*

¹²⁹ Thusi, *supra* note 109, at 807.

crimes and racial bias cause a problem where prosecutors underenforce crimes against Black women.

Prosecutors may be less enticed to pursue criminal charges when Black women are victimized due to the complexities that can arise out of these cases. For example, inadequate documentation of bruising contributes to the underenforcement of intimate partner violence crimes against Black women. Intimate partner violence provides for a large range of harm; it includes physical, sexual, and psychological harm. In comparing physical harm to psychological harm, it is expected for physical harm to be visible whereas psychological harm can go undetected by many. A victim is likely to express bruising from assault. This indicates a sign of abuse to a police officer and provides evidence for a legal case. But for Black women, looking out for visible harm is not simple. A 2017 bruise documentation study of intimate partner violence survivors demonstrates the barriers of injury documentation. In comparing the bruising between white women and women of color, skin color affected the visibility of bruising with those with darker skin tones having either barely visible or invisible bruises.¹³⁰ Even if bruises appeared visible, many noted that bruises went away shortly after they appeared.¹³¹ Importantly, most participants in the study noted distrust over their cases with prosecutors.¹³² Inadequate documentation makes it harder for prosecutors to prove their case. It may be simpler for them to drop charges. Bruising is a prime example of racial disparities in prosecution and why standards for prosecutor discretion is necessary. Even if bruising on dark skin can so easily be discarded as evidence, this does not mean cases of abuse against Black women should also be discarded.

¹³⁰ Deutsch, Lauren S, Kathryn Resch, Tiffany Barber, Yoni Zuckerman, Jennifer Thompson Stone, and Catherine Cerulli. 2017. "Bruise Documentation, Race and Barriers to Seeking Legal Relief for Intimate Partner Violence Survivors: A Retrospective Qualitative Study." *Journal of Family Violence* 32 (8): 767–73. 769

¹³¹ Id.

¹³² Id. 770

C. Failure in the Court Process

Despite favorable views of prosecution from Black women, prosecutors fail to meet the needs of Black women in court. The distrust of law enforcement tends to carry over into distrust of the criminal legal system. In general, victims of color are wary of entrusting state entities with protecting them from abuse.¹³³ But surprisingly, studies show Black women have some sort of trust in prosecutorial systems. A 2002 study conducted by Arlene N. Weisz from interviews with 207 Black women found that 65% of these women looked favorably at prosecution of abusers.¹³⁴ The study attempted to contact all victims from 1,057 police incident reports from domestic violence calls, with a response rate of 22.8%.¹³⁵ A majority of respondents had a household income of \$20,000 a year and were in relationships with an abusive partner for an average of 7 years.¹³⁶ The “mean length of time since violence began in the relationship was 3.79 [years].”¹³⁷ All interviews were conducted by Black women with training about domestic violence and legal responses to this type of violence.¹³⁸ These surveys were conducted by telephone and asked open-ended questions about prosecuting abusers.¹³⁹ This study, however, did not look at participation in prosecution.¹⁴⁰ In spite of these results, systems of justice in this country have repeatedly failed to protect Black women. A 2011 study showed that women of color felt prosecutors were not responsive to their needs, with many feeling frustrated at the lack of meaningful involvement in the court process.¹⁴¹ This starkly contrasts with the favorable view of

¹³³ Lynch, *supra* note 8, at 1523.

¹³⁴ Weisz, *supra* note 105, at 24.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Weisz, *supra* note 105, at 23.

¹³⁹ *Id.* at 23.

¹⁴⁰ *Id.* at 24.

¹⁴¹ Margret E Bell et al., *Battered Women's Perceptions of Civil and Criminal Court Helpfulness: The Role of Court Outcome and Process*, 17 VIOLENCE AGAINST WOMEN, 71–88, 78 (2011).

prosecution presented by Black women in the 2002 study. Prosecutors typically approach intimate partner violence as what works for one, works for all.¹⁴² But this fails to recognize how intersectionality plays a role in each individualized case. Systemic racism naturally puts Black women at a disadvantage, and places systemic barriers on their access to justice. Judges have domestic violence biases that intersect with racial biases. The concerns of going through the legal system vary race to race, and class to class.

Black women with favorable views of prosecution are likely more willing to work within the legal system and report their crimes. Research has found that when prosecutors are sympathetic and attentive to victims' needs, the victim is more likely to support the prosecutor's case.¹⁴³ Prosecutors can facilitate an important role as a support system to victims. But favorable views of prosecution does not mean participation. Importantly, the Weisz study did not address actual participation in the legal process, and therefore these favorable views do not correlate with participation in the legal process.¹⁴⁴ It is important to remember that is it suspected most crimes of intimate partner violence go unreported. The 2002 Weisz study likely has a bias of Black women who were already willing to work within the criminal legal system and report their crimes. The response rate of the study was 22.8%, and some women who were contacted refused to be interviewed.¹⁴⁵ What these studies do not address are the concerns of Black women who are afraid to report their cases. All women contacted in the study were found through police reports.¹⁴⁶ It does not cover the women who chose not to call the police when domestic violence occurs.¹⁴⁷ In the 2002 study, 35% of Black female respondents were still wary of prosecution.¹⁴⁸

¹⁴² Lynch, *supra* note 8, at 1548.

¹⁴³ Davis, *supra* note 85.

¹⁴⁴ Weisz, *supra* note 105, at 24.

¹⁴⁵ *Id.* at 23.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 24.

This is where unreporting comes into play. If many more cases of domestic violence go unreported, then it is likely many women who disfavor prosecution have not and will not come forward and report unfavorable views. A willingness to work within the system defines the engagement between Black women and prosecution.

When cases ultimately go to trial, zealous prosecution to combat gender violence often overlooks the inequities Black women face. Prosecutors are different in that they represent the community as a whole, rather than a victim as an individual. This creates a disconnect for the zealous prosecutor and the true needs of a victim. Often when criminal charges are pursued against an abuser, prosecutors will call their victims to take the stand. This is seen as an effective way to convey to the jury that an abuser should face some type of punishment for harming their parent. Those victims are expected to do whatever prosecutors ask them to in exchange for their safety.¹⁴⁹ In fact, prosecutors expect that victims will want to testify against their abusers in response to the trauma they have endured. It is seen as an effective means to get the abuser to stop hurting the victim. Unfortunately, this is not always the best practice for victims. When the focus is on deterrence and not the individual, it becomes easy for victims to get lost in the process. It is traumatic to appear before a jury trial and relive the abuse. But this can be even more traumatic for a Black woman. Not only do Black Americans face credibility issues in front of judges when civil matters occur, but this credibility issue occurs in the criminal system as well.¹⁵⁰ It is unfair to assume every victim wants to, or should be, subjected to the judgment of their peers. The court process assumes every juror and every attorney is a race neutral player. But

¹⁴⁹ Goodmark, *The Impact of Prosecutorial Misconduct, Overreach, and Misuse of Discretion on Gender Violence Victims*, 123 Dick. L. Rev. 627, 634 (2019).

¹⁵⁰ Epstein, *supra* note 7, at 436.

credibility issues against Black women show this is not the case. If prosecutors are not listening to the victim, it can cause more trauma throughout the court process.

If prosecutors are more attentive to the needs of Black women once they enter the court process, this will yield more positive feedback in response to prosecution. Research has previously shown that victims with support from family and friends leads to more positive engagements with prosecution.¹⁵¹ This is the same when prosecutors are attentive to the needs of victims. Support in intimate partner violence is necessary because victims are abused at the hands of someone they are typically close with. Building trust through a support system is encouraging for victims who decide to go through the court process. To address the concerns of Black women, prosecutors must be more responsive to their needs. They need to be more sympathetic. They need to be intersectional. To address the needs of Black women and intimate partner violence, prosecutors should be attentive to willingness to participate when they are in a position to utilize their discretion. They should trust that women, and especially Black women, know what is best for them and their current situation.

D. Taking Away Discretion: Failures of Zealous Advocacy

For some jurisdictions, zealous advocacy is mandated through no drop policies that are meant to take away prosecutor discretion. Following the passage of the Violence Against Women Act, some states imposed mandatory arrest policies for perpetrators of domestic violence. Naturally what followed was the idea of no drop prosecution, or what some scholars call “mandatory prosecution.”¹⁵² No drop policies are implemented in domestic violence cases when a victim does not wish to participate in a case anymore. Prosecutors will pursue criminal charges regardless of what the victim wants. This ensures that the case will go on, even without

¹⁵¹ Lynch, *supra* note 8, at 1545.

¹⁵² Mills, *supra* note 31, at 561.

victim participation. The goal is to fix the underenforcement of these crimes.¹⁵³ In some jurisdictions, prosecutors apply no drop policies when addressing crimes of intimate partner violence. In reality, these policies likely contribute to the underenforcement of domestic violence against Black women.

No drop policies are seemingly race-neutral laws by applying a blanket “mandatory prosecution” for all victims, but they can have a racialized effect.¹⁵⁴ Uniform tactics through no-drop policies leads to hyper legal surveillance of the Black female body.¹⁵⁵ Despite the good intentions of prosecutors to provide help to domestic violence survivors, no drop policies only serve to take away Black women’s consent. Black women through stereotypes of the “welfare queen” are seen as contributing to state deterioration.¹⁵⁶ Because “welfare queen” is seen as a product of Black women’s excessive sexuality, reform centers around curbing the choices Black women make regarding their body.¹⁵⁷ No drop policies result in the hyper legal surveillance of Black bodies.¹⁵⁸ It takes away Black women’s private choices over fear of Black women’s autonomy. Some black women view state intervention as threatening because it can exacerbate the harm these incidents of violence have on their home lives.¹⁵⁹ Intimate partner violence crimes result from private matters, a realm where Black Americans can find refuge away from public scrutiny.¹⁶⁰ While intimate partner violence crimes should be fully prosecuted, this should be done with consent of the victim. The state does not always know what is best for the people who has historically disadvantaged.

¹⁵³ Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. Rev. 762, n. 212 (2016).

¹⁵⁴ *Id.* at 325.

¹⁵⁵ Nash, *supra* note 52, at 323.

¹⁵⁶ *Id.* at 321.

¹⁵⁷ *Id.* at 322.

¹⁵⁸ *Id.* at 323.

¹⁵⁹ *Id.* at 324.

¹⁶⁰ Nash, *supra* note 52, at 325.

No drop policies are too punitive and should be abandoned. No drop prosecution policies harm Black women more so than they protect them. By creating a mandatory punitive approach to intimate partner violence, it ensures that racial bias and discrimination continues to permeate the criminal legal system.¹⁶¹ No drop policies are paternalistic in nature. Leigh Goodmark notes that no drop policies imply battered woman cannot make rational choices and that prosecutors judgments should be trusted.¹⁶² This is paternalistic. By assuming women cannot make rational choices for their safety, it negatively impacts their trust in the state. Not all victims are helpless. This recalls the battered woman framework. Prosecutors and their offices assume “battered women” cannot make choices for themselves because they are helpless. It categorizes victims based on the stereotype’s needs, not the victim’s needs. Additionally, mandated prosecution continues to perpetuate victimness as whiteness. Victims should want to use the system, but the system benefits white victims more than it does Black victims. For prosecutors to effectively advocate for Black women in court, no drop policies should be abandoned.

Since taking away prosecutor discretion in intimate partner violence cases does not yield more effective results for Black women, prosecutors should instead pursue cases with active, willing participants. Taking away mandatory prosecution will build trust with intimate partner violence victims. Prosecutor discretion is necessary, to a certain degree. No drop policies show prosecutors should have the freedom, albeit transparent freedom, to pursue criminal charges against abusers. If mandatory prosecutions are kept in place, it will likely continue to hinder reporting of domestic disputes. This reaffirms that the best approach to protecting Black women from intimate partner violence is increasing the transparency behind criminal charge decisions. Prosecutors must trust that a victim knows best when it comes to their situation. Forcing a Black

¹⁶¹ Thusi, *supra* note 109, at 799.

¹⁶² Goodmark, *supra* note 11, at 120.

woman to participate in a criminal system that consistently fails them and their community will not increase enforcement of intimate partner violence.

V. Conclusion

When the state intervenes in intimate partner violence cases involving Black women, its actors should be cautious in using their discretion. Judges and prosecutors are important actors within the legal system and hold a lot of discretionary power. By increasing the transparency and intersectional perspectives within the court process, Judges and prosecutors can better serve Black survivors. Increasing transparency in decisions will build trust between Black women and a legal system that historically has failed them. The battered woman framework for victims of abuse should be abandoned. By removing this stereotypical victim, remedies can then be geared towards all women and not just white women. Not all survivors are passive, but all survivors deserve the same consideration when they involve the state in their abuse.

Judges must implement intersectionality into their interpretations regarding civil protection orders. Unfortunately, Black women face multiple barriers when they try to obtain an order of protection. They are met with implicit racial bias and domestic violence biases from judges. This makes them harder to obtain. When orders of protection are granted, intersectional perspectives must guide their remedy. Without understanding how civil protection orders for Black women are less likely to be enforced, it prevents true justice from prevailing. By recognizing gender and race can both play a role in how the state intervenes in abuse, Black women will be better protected. Judges set standards for how their orders are enforced, and intersectionality must prevail in these standards.

Like judges, prosecutors should aim to use an intersectional framework to understand why a Black woman is hesitant to enter the court process against an abuser. Prosecutors should be

aware of the role they play in mass incarcerations and tacking on charges. Transparency is necessary for prosecutors to better protect Black women from abuse. Although studies have shown favorable views towards prosecution by Black women, prosecutors' inability to empathize with Black women continues to hinder the process. Intersectional perspectives can help ease the burden Black women feel when they continue through the legal process. Zealous advocacy, though well-intended, should be cautious and not overlook the needs of a survivor. Mandating prosecution through no drop policies is not a helpful way to help survivors of domestic violence. Giving survivors a voice in their journey should be the ultimate goal, and transparency and intersectionality can and will help trust building.