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Handle with Care: Domestic Violence Safety Planning in the Age of Data Privacy Laws

Jenny Wu *

I. INTRODUCTION

Domestic violence is a pervasive and persistent public health crisis endangering many within our own communities, affecting about one in four women and nearly one in ten men and incurring a lifetime economic cost of \$3.6 trillion.¹ Abuse within intimate relationships primarily centers around power and control over a partner and is carried out by various means.² While the main types of domestic abuse include physical, sexual, emotional, psychological, and financial abuse, new forms of abuse continue to evolve.³

One new form of intimate partner abuse that is growing is technology-facilitated or technology-based abuse, where abusers utilize technology to control their partners.⁴ For example, during a twelve-month study, the Bureau of Justice Statistics found that one in four stalking victims reported being harassed with technology, with 83% being harassed by e-mail

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¹ CENTERS FOR DISEASE CONTROL & PREVENTION, PREVENTING INTIMATE PARTNER VIOLENCE 1 (2019), <https://www.cdc.gov/violenceprevention/pdf/ipv-factsheet508.pdf> [<https://perma.cc/6WMQ-7W6Y>] [hereinafter CDC].

² *About Domestic Violence*, WASH. STATE DOMESTIC VIOLENCE INFO. REFERRAL (2017), <https://www.domesticviolenceinfoforreferral.org/about-domestic-violence> [<https://perma.cc/DY9T-BM3G>].

³ Charles Montaldo, *The Different Types of Domestic Abuse*, THOUGHTCO (Feb. 11, 2020), [thoughtco.com/different-types-of-domestic-abuse-973311](https://www.thoughtco.com/different-types-of-domestic-abuse-973311) [<https://perma.cc/9SR4-UL5V>].

⁴ See Hadeel Al-Alosi, *Technology-Facilitated Abuse: The New Breed of Domestic Violence*, CONVERSATION (Mar. 26, 2017, 10:58 PM), <https://theconversation.com/technology-facilitated-abuse-the-new-breed-of-domestic-violence-74683> [<https://perma.cc/M39X-LBJD>]; Robin Young & Kalyani Saxena, *Domestic Abusers Are Weaponizing Apps And In-Home Devices To Monitor, Intimidate Victims*, WBUR (Nov. 27, 2019), <https://www.wbur.org/hereandnow/2019/11/27/domestic-abuse-apps-home-devices> [<https://perma.cc/B3UH-B2AS>].

and 35% by instant messaging.⁵ In a survey of over 350 domestic violence service providers, 88% handled cases that involved the misuse of technology, such as unwanted or abusive text messages (53%) and intimidation or threats made by social media or spy cameras (39%).⁶ Technology-based abuse is challenging for victims, victim advocates, and law enforcement to prevent and for the courts and the law to provide relief for due to the unique nature of technological development.⁷

Several approaches have been explored in recent years to address technology-based abuse within intimate relationships, including community-based educational outreach and trainings,⁸ working with the tech industry,⁹ and criminalizing technology-based abuse.¹⁰ However, the attempt to use the law to stop technology-abuse without stifling innovation and public access to information presents a delicate balancing question and a larger policy issue. The speed of technological advancement often puts new products into consumers' hands before regulations can be passed to address subsequent harm from the products' misuse, thus creating a whack-a-mole situation for lawmakers.¹¹ When one set of laws is passed to restrict the abusive use of one product, another new product has already been released to the public.

A. Data Privacy Concerns

One area of concern with technology-based abuse that the technology community and lawmakers have, and are often at odds over, is data privacy. Legal scholars and policy experts debate over the best method to protect privacy, while others theorize that privacy protection is futile and

⁵ Bureau of Justice Statistics: Stalking, U.S. DEP'T OF JUSTICE, <https://www.bjs.gov/index.cfm?ty=tp&tid=973> [https://perma.cc/YDB4-EJ6M]; NAT'L NETWORK TO END DOMESTIC VIOLENCE, TECH ABUSE: INFORMATION FROM THE FIELD 2-3 (2018), https://www.tech-safety.org/s/2018_09_10_-TAS-GAN-CCAW-Summary.pdf [https://perma.cc/WHL5-VCQG] [hereinafter NNEDV TECH ABUSE REPORT].

⁶ NNEDV TECH ABUSE REPORT, *supra* note 5, at 2-3.

⁷ Andrew King-Ries, *Teens, Technology, and Cyberstalking: The Domestic Violence Wave of the Future?*, 20 TEX. J. WOMEN & L. 131, 133 (2011).

⁸ Program Teaches Domestic Violence Victims Safe Use of Technology, 28 CHILD. L. PRAC. 25 (2009).

⁹ Karen Levy, *No Safe Haven for Victims of Digital Abuse*, SLATE (Mar. 1, 2018, 4:46 PM), <https://slate.com/technology/2018/03/apps-cant-stop-exes-who-use-technology-for-stalking.html> [https://perma.cc/657K-W8WC].

¹⁰ Aily Shimizu, *Domestic Violence in the Digital Age: Towards the Creation of A Comprehensive Cyberstalking Statute*, 28 BERKELEY J. GENDER L. & JUST. 116, 120-21 (2013).

¹¹ See Kaitlin Chandler, *The Times They Are A Changin': The Music Modernization Act and the Future of Music Copyright Law*, 21 TUL. J. TECH. & INTELL. PROP. 53, 55 (2019); Maya Raghu, *The Use of Technology to Stalk and the Workplace*, 3 FCADV: BOTTOM LINE ON DOMESTIC VIOLENCE 1, 2, http://fcadv.org/sites/default/files/BOTTOMLINE%20-%20Vol%203-Issue%201_0.pdf [https://perma.cc/D72W-XADF].

the focus should be on controlling the dissemination of data instead.¹² While the best approach to data privacy continues to be debated, new data privacy laws are emerging and rattling the data-driven tech industry, including the General Data Protection Regulation (GDPR) in the European Union and the California Consumer Privacy Act (CCPA). While the U.S. remains today without a comprehensive federal data privacy bill,¹³ a growing number of states are drafting its own data privacy laws.¹⁴

B. Domestic Violence Concerns

Similar to the current state of data privacy laws in this country, domestic violence has seen its share of letdowns by the law to adequately protect survivors' safety. The unique societal nature of domestic violence that pulls in family dynamics, emotionally-charged relationships, gender stereotypes, and intersectionality makes traditional law enforcement and criminal approaches an insufficient solution.¹⁵ Further, the unregulated and rapidly evolving technological tools that are publicly available makes containing the spread of domestic violence difficult. The challenges in managing data privacy are magnified when domestic violence survivors are involved.¹⁶

Due to the lack of adequate legal relief, domestic violence survivors are often left to rely on nonlegal avenues of support such as domestic violence advocacy organizations that are mostly community nonprofits or government-sponsored.¹⁷ Advocates at these organizations protect survivors largely by guiding them through the legal system, providing resources and service referrals, and devising safety plans to avoid harm from their abusers. This places a disproportionate burden to protect survivors on non-profit advocacy groups that are often struggling to maintain sufficient

¹² Justin Brookman & G.S. Hans, *Why Collection Matters: Surveillance as a De Facto Privacy Harm*, CTR. FOR DEMOCRACY & TECH. (Sept. 30, 2013), <https://cdt.org/insights/report-why-collection-matters-surveillance-as-a-de-facto-privacy-harm> [<https://perma.cc/PWF5-RNUP>].

¹³ Tony Romm, *Top Senate Democrats Unveil New Online Privacy Bill, Promising Tough Penalties for Data Abuse*, WASH. POST (Nov. 26, 2019, 4:45 PM), <https://www.washingtonpost.com/technology/2019/11/26/top-senate-democrats-unveil-new-online-privacy-bill-promising-tough-penalties-data-abuse> [<https://perma.cc/2PC9-KCHR>].

¹⁴ Tim Henderson *States Battle Big Tech Over Data Privacy Laws*, PEW TRUSTS: STATELINE (July 31, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/07/31/states-battle-big-tech-over-data-privacy-laws> [<https://perma.cc/7MZA-BP95>].

¹⁵ Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1293 (2000).

¹⁶ *Why Privacy and Confidentiality Matters for Victims of Domestic & Sexual Violence*, TECH. SAFETY, NAT'L NETWORK TO END DOMESTIC VIOLENCE, <https://www.techsafety.org/privacymatters> (last visited Apr. 9, 2020) [<https://perma.cc/G5YE-HWQK>].

¹⁷ Elizabeth L. MacDowell, *Domestic Violence and the Politics of Self-Help*, 22 WM. & MARY J. WOMEN & L. 203, 220 (2016).

funding and resources and are forced to turn away survivors seeking help.¹⁸

C. Overview

This paper explores how data privacy laws can impact the way domestic violence advocacy organizations conduct safety planning with survivors. This paper also looks at how data privacy laws can lessen the burdens of domestic violence advocates to protect survivors by curtailing technology-based abuse in intimate relationships and providing a non-criminal form of legal relief. Domestic violence is a complex and nuanced matter—reflective of the complexity that gender dynamics bring into it, requiring a diverse range of legal remedies. Current domestic violence remedies provide little to no satisfactory options that can be isolated from criminal prosecution.¹⁹ Data privacy laws can offer a potential non-criminal legal option to protect domestic violence survivors.

First, the paper analyzes the current state of domestic violence laws and how it helps and also fails to protect survivors, specifically in the area of technology-based abuse. Second, the paper looks at how data privacy laws attempt to address the harmful effects of unregulated technologies. Third, the paper explores how domestic violence survivors can use data privacy laws to protect their private information from abusive partners. The paper then looks at what future domestic violence legislations can learn from data privacy laws to protect survivors from technology-based abuse, such as by giving survivors rights to their data and a private right of action against companies that abuses their data. Finally, the paper explores how domestic violence safety planning can benefit from data privacy laws or should be adjusted to prevent technology-based abuses.

II. DOMESTIC VIOLENCE TERMS AND CLARIFICATIONS

For the purposes of this paper, the terms “domestic violence” and “intimate partner violence” are used interchangeably. The term “domestic violence” typically deals with violence within the familial household, including abuse between married spouses as well as between parents and

¹⁸ NAT'L NETWORK TO END DOMESTIC VIOLENCE, 13TH ANNUAL DOMESTIC VIOLENCE COUNTS REPORT 8 (2019), https://nnedv.org/wp-content/uploads/2019/10/Library_census_2018_full_report_high-res.pdf [<https://perma.cc/WTX2-USKE>].

¹⁹ Deborah M. Weissman, *The Politicization of Domestic Violence*, in *THE POLITICIZATION OF SAFETY: CRITICAL PERSPECTIVES ON DOMESTIC VIOLENCE REPOSSES* 38, 38 (Jane K. Stoeber ed., 2019).

children²⁰, whereas the term “intimate partner violence” addresses abuse between intimate partners, regardless of marital or cohabitational status.²¹ This paper focuses on abuse between intimate partners, regardless of marital or cohabitational status.

For the purposes of this paper, the terms “victim(s)” and “survivor(s)” are used interchangeably for a person who has suffered abuse from an intimate partner. In the domestic violence advocacy community, “survivor(s)” is used to describe those who have left an abusive relationship while “victim(s)” is used to describe those who are still in an abusive relationship.²² However, many consider “victim(s)” to be problematic as it suggests inferiority or weakness.²³

In addition, this paper focuses on violence against women by their male intimate partners as it looks at abused women as a specific vulnerable social group impacted by domestic violence and data privacy laws. While both men and women experience intimate partner violence, violence against women by their intimate partners is reported at a higher rate. One in four women experience sexual violence, physical violence, or stalking by an intimate partner compared to one in ten men experiencing the same.²⁴

III. DOMESTIC VIOLENCE LEGAL STRUCTURE AND SYSTEM

The federal government has largely left the issue of domestic violence to the states due to federalism, Tenth Amendment concerns, and the fact that domestic violence as a criminal matter is traditionally handled by the states.²⁵ As a result, domestic violence laws are inconsistently implemented across the country despite the fact that domestic violence occurs in

²⁰ See WORLD HEALTH ORGANIZATION, INTIMATE PARTNER VIOLENCE: UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN 1 (2012), https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf [<https://perma.cc/P5UQ-MYWD>]; see also Olivia Moorer, *Intimate Partner Violence vs. Domestic Violence*, YWCA SPOKANE (Mar. 1, 2019), <https://ywcaspokane.org/what-is-intimate-partner-domestic-violence/> [<https://perma.cc/A6HF-EKMT>].

²¹ CDC, *supra* note 1.

²² Clare Fitzpatrick, *Breaking Barriers to "Breaking the Cycle,"* 13 SEATTLE J. SOC. JUST. 603, 604 n.9 (2014).

²³ Rebecca Hulse, *Privacy and Domestic Violence in Court*, 16 WM. & MARY J. WOMEN & L. 237, 239 n.5 (2010).

²⁴ SHARON G. SMITH ET AL., CENTERS FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF – UPDATED RELEASE 7 (Nov. 2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf> [<https://perma.cc/MDS6-GBBP>].

²⁵ Melanie Kalmanson, *Filling the Gap of Domestic Violence Protection: Returning Human Rights to U.S. Victims*, 43 FLA. ST. U. L. REV. 1359, 1363 (2016).

every state.²⁶ While every state uses criminal and civil courts to administer relief to domestic violence survivors for intimate partner abuse, the options for available relief differ among states. For example, Louisiana does not provide protection orders against a same-sex partner.²⁷ Additionally, protection orders in Idaho are only issued to abuse victims of spouses, ex-spouses or the parent of a shared child (no unmarried non-cohabitating partners).²⁸

A. *Federal Relief for Domestic Violence*

One of the very few federal laws directly aimed at combating gender-based violence is the Violence Against Women Act (VAWA).²⁹ VAWA largely provides funding for criminal enforcement, victim advocacy services, and research on gender violence prevalence and prevention.³⁰ Since its passage in 1994, VAWA has provided a dedicated federal office within the Department of Justice to implement and facilitate VAWA-funded programs and policies,³¹ provided immigration visas for crime and trafficking victims,³² and authorized tribal courts to enforce civil protection orders against non-tribal members living on native territory.³³ While being groundbreaking for survivors of gender violence, VAWA has been criticized for directing the majority of its funding to the criminal prosecution of abusers instead of advocacy organizations that provide survivors with housing, counseling, and job training.³⁴

Despite its intention, VAWA provides very little direct relief to domestic violence survivors, particularly since the U.S. Supreme Court's de-

²⁶ John MacDonald, *Top 10 States with the Most Domestic Abuse Cases*, LAW OFFICE OF JOHN E. MACDONALD, INC. (Oct. 19, 2017), <https://www.aggressivelegalservices.com/domestic-abuse-cases-worst-states/> [https://perma.cc/23AH-8S2H].

²⁷ April Paredes et al., *Domestic Violence*, 19 GEO. J. GENDER & L. 265, 273-74 (2018).

²⁸ IDAHO CODE § 18-918 (2018).

²⁹ Paredes et al., *supra* note 27, at 267.

³⁰ *Id.*

³¹ *Id.* at 268.

³² *Id.* at 270.

³³ *Id.* at 275.

³⁴ LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 22 (2012). In 2019, the Services for Training Officers and Prosecutors (STOP) grant program, which was “designed to strengthen law enforcement response to violence against women,” received the largest amount of money appropriated under VAWA, at \$215 million, followed by the Improving Criminal Justice Response grant program at \$53 million. In comparison, the grant program for transitional housing received \$36 million. *See Id.* at 19; NAT’L NETWORK TO END DOMESTIC VIOLENCE, VAWA AND RELATED PROGRAMS APPROPRIATIONS FOR FISCAL YEARS 18, 19, AND 20 1 (2019), https://nnev.org/wp-content/uploads/2019/07/Library_Policy_NNEDV-FY20-Approps-Chart.pdf [https://perma.cc/H5B8-EX7S].

cision in *United States v. Morrison* struck down its provision giving victims of gender violence a civil cause of action.³⁵ In addition, reauthorization efforts for VAWA funding has stalled in the Senate since February 2019, diminishing expectations for extended federal relief for survivors of domestic violence.³⁶ Outside of VAWA, the federal government has been hands-off on domestic violence matters, as illustrated by *Castle Rock v. Gonzales*, where the U.S. Supreme Court held that a holder of a restraining order “cannot bring a due process claim against a government [including law enforcement] for its failure to actively enforce the order” and is not entitled to specific action by the government.³⁷

B. State Relief for Domestic Violence

While state laws vary in their specific domestic violence policies, all fifty states provide legal relief to survivors through criminal or civil courts.³⁸ Different courts have their own laws on domestic violence.³⁹ For example, the Seattle Municipal Court will hear domestic violence offenses classified as misdemeanors under the Seattle Municipal Code, while domestic violence felonies are processed by the King County Superior Court under the Revised Code of Washington.⁴⁰ In Spokane, Washington, protection orders against non-cohabitating partners with no children are filed

³⁵ Paredes et al., *supra* note 27, at 269. In *United States v. Morrison*, a college student filed a civil suit against her university administration under VAWA for failing to punish her rapist. The U.S. Supreme Court held that the VAWA provision providing a federal civil remedy to victims of gender-based violence unconstitutionally violated the Commerce Clause, reasoning that violence against women had no substantive economic impact to justify federal interference. The holding essentially prohibits the federal government from providing a private right of action against gender violence perpetrated by private individuals. 529 U.S. 598 (2000).

³⁶ Jordain Carney, *Senate Talks on Stalled Violence Against Women Act Reauthorization Unravel*, HILL (Nov. 8, 2019, 1:55 PM), <https://thehill.com/homenews/senate/469635-senate-talks-on-stalled-violence-against-women-act-reauthorization-unravel> [<https://perma.cc/29QR-6QVX>].

³⁷ Paredes et al., *supra* note 27, at 273-93. In *Town of Castle Rock, Colo. v. Gonzales*, the plaintiff sued her local police department for failing to enforce her restraining order against her estranged husband despite multiple pleas for help, which resulted in the death of her three children at the hands of her husband. 545 U.S. 748 (2005).

³⁸ *Id.* at 267.

³⁹ WASH. COURTS, A GUIDE TO WASHINGTON STATE COURTS 10 (12th ed. 2011), <http://www.courts.wa.gov/newsinfo/content/pdf/CourtGuide2011.pdf> [<https://perma.cc/58GU-9V5S>]. Municipal courts in Washington differ from district courts in that they hear municipal or city ordinance violations that occurs within the boundaries of the municipality. With domestic violence, “municipal court can issue antiharassment protection orders upon adoption of a local court rule establishing that process.”

⁴⁰ *Domestic Violence Victim Resources*, SEATTLE MUNICIPAL COURT, <https://www.seattle.gov/courts/programs-and-services/specialized-courts/domestic-violence-intervention-project/domestic-violence-victim-resources> [<https://perma.cc/B52B-BEQK>].

in District Court (inferior court), whereas protection orders against cohabitating patterns with children are filed in Superior Court.⁴¹

Historically, domestic violence was processed solely in criminal court.⁴² Starting in the mid-1970s and through the 1980s, many states gave survivors the option of processing domestic violence protection orders in civil court⁴³ as an alternative for those who did not want to send their partners to jail and thus would often refuse to cooperate with prosecutors and law enforcement in criminal matters.⁴⁴ In both civil and criminal systems, legal relief is limited to arresting an abuser or enforcing physical distance.⁴⁵

C. Domestic Violence Laws in Washington State

Washington State has an extensive and innovative set of domestic violence laws as compared to other states. The reach of Washington's criminalization and protection orders is stricter and wider than that of most states. Washington's domestic violence statute contains the following legislative declaration:

The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide ... [I]t is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship.⁴⁶

Washington statute defines "domestic violence" as "[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, sexual assault, or stalking" by an intimate partner, a family or a household member.⁴⁷ The statute's thorough definition of "intimate partners" includes current and former spouses; current and former domestic partners; parent of a shared child regardless of marital or cohabitation history; current and former cohabitating partners in a dating

⁴¹ Police Department – Domestic Violence Unit, CITY OF SPOKANE, <https://my.spokanecity.org/police/investigations/domestic-violence> [<https://perma.cc/L29Y-69UW>].

⁴² M. Alexandra Verdi, *Strengthening Protections for Survivors of Domestic Violence: The Case of Washington, D.C.*, 64 BUFF. L. REV. 907, 910 (2016).

⁴³ GOODMARK, *supra* note 34, at 17.

⁴⁴ See Verdi, *supra* note 42, at 910; JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 15 (2009).

⁴⁵ Verdi, *supra* note 42, at 910-11. The specific details of the protection order and criminal sentencing varies by state domestic violence and criminal laws. See also SUK, *supra* note 44, at 15 ("As an alternative to criminalization, the civil protection order was a prospective remedy designed to prevent future violence rather than to punish past conduct.").

⁴⁶ WASH. REV. CODE § 10.99.010 (1979).

⁴⁷ *Id.* § 26.50.010(3).

relationship; and those in a non-cohabitating dating relationship at age sixteen years old or older for both partners.⁴⁸ This definition is in contrast with other states that limit domestic violence relief to spouses, divorcees, parents sharing a child, and cohabitating partners.⁴⁹

In addition to its broad reach, Washington domestic violence laws provide innovative solutions to protect survivors. For example, Washington is one of three states that charges cyberstalking as a felony if the victim has filed a protection order against the offender.⁵⁰ Furthermore, Washington is one of the few states that recognizes a common law tort action for “battered women syndrome.”⁵¹

Washington also has one of the strictest domestic violence-related firearm policies in the country.⁵² The Lautenberg Amendment to the 1996 Federal Gun Control Act bans persons convicted of domestic violence as a misdemeanor or with a protection order against them from owning or possessing a firearm.⁵³ Washington takes this initiative further by requiring law enforcement officers responding to domestic violence calls to seize firearms and ammunition that are in plain sight, discovered during a lawful search, or believed to be used or threatened to be used in relation to

⁴⁸ *Id.* § 26.50.010(7).

⁴⁹ Christina L. Myers, *South Carolina Still Near Bottom in Violence Against Women*, AP NEWS (Feb. 11, 2019), <https://apnews.com/af9c4ee9c722496398f20d6e234d172e> [<https://perma.cc/WME3-FEFY>]. Other states that limit domestic violence relief to spouses, ex-spouses, parents of a shared child, and cohabitating partners include Florida (FLA. STAT. § 741.28 (2003)), Georgia (GA. CODE ANN. § 19-13-10 (2015)), Kentucky (KY. REV. STAT. ANN. § 403.720 (West 2019)), and Wisconsin (WIS. STAT. § 968.075 (2016)).

⁵⁰ See Shimizu, *supra* note 10, at 120-23; 11 R.I. Gen. Laws § 11-52-4.2 (2008). The other two states with felony cyberstalking laws are Ohio and Rhode Island. While Ohio does not have comparatively strict domestic violence laws as Washington, the city of Akron has been acknowledged as a heavy public investor in its women’s shelters. See Andy Chow, *Lawmakers Lament Lack of Action on Domestic Violence Bills*, WKSU (Oct. 30, 2019), <https://www.wksu.org/post/lawmakers-lament-lack-action-domestic-violence-bills#stream/0> [<https://perma.cc/G393-MP79>]; see also Megan Hadley, *Justice for Domestic Violence Victims Depends on Where You Live*, CRIME REPORT (Feb. 20, 2019), <https://thecrimereport.org/2019/02/20/justice-for-domestic-violence-victims-depends-on-where-you-live> [<https://perma.cc/X37R-KK54>].

⁵¹ See Paredes et al., *supra* note 27, at 294; see also M. Mercedes Fort, *A New Tort: Domestic Violence Gets the Status It Deserves in Jewett v. Jewett*, No. 93-2-01846-5 (Wash. Super. Ct. Spokane County April 21, 1993), 21 S. ILL. U. L.J. 355, 357 (1997) (“The court’s decision to recognize the tort of battered women’s syndrome/domestic violence... was a necessary and long overdue response to the woefully inadequate set of legal remedies so far provided by our courts. The *Jewett* court has allowed for the possibility that an individual injured by the effects of domestic violence can be fully compensated. The ruling in *Jewett* definitively sets forth the elements establishing the cause of action, and other courts may follow its lead.”).

⁵² Kate C. Prickett et al., *Firearm Ownership in High-Conflict Families: Differences According to State Laws Restricting Firearms to Misdemeanor Crimes of Domestic Violence Offenders*, 33 J. FAM. VIOLEN. 297, 300 (2018).

⁵³ Paredes et al., *supra* note 27, at 276.

the call.⁵⁴ Officers must also ask the abuser if they have access to other firearms and, with their consent, must collect these firearms until the abuser's court hearing.⁵⁵ In King County, Washington's largest county (which includes the city of Seattle), the Regional Domestic Violence Firearms Enforcement Unit was established to coordinate containment and enforcement of firearm removal orders.⁵⁶ In addition, Washington is the first state in the country to notify survivors when their abuser attempts to purchase a gun.⁵⁷

Washington has mandatory arrest laws under which law enforcement must make an arrest if they believe a domestic violence offense or a violation of a no-contact or protection order occurred based on probable cause.⁵⁸ Furthermore, only the prosecutor can drop domestic violence charges against an abuser, even if the victim requests not to charge the abuser or refuses to testify.⁵⁹ Mandatory arrests have been criticized for failing to prevent abuse in the long run, and for taking away the victim's autonomy and agency, including by having their partners arrested against their will and forcing the victim to participate in the criminal proceedings.⁶⁰

1. Washington State Laws on Technology-Based Abuse

Washington is comparatively extensive in its treatment of technology-based abuse. First, cyberstalking is treated as either a misdemeanor or a felony, depending if the perpetrator had a prior protection order against them or has harassed the same victim before.⁶¹ Additionally, computer trespass,⁶² electronic data theft,⁶³ and nonconsensual pornography distribution⁶⁴ are all treated as felonies.

⁵⁴ Melissa Santos, *New WA Laws Aim To Get Guns Away from Domestic Abusers*, CROSSCUT (Jul. 26, 2019), <https://crosscut.com/2019/07/new-wa-laws-aim-get-guns-away-domestic-abusers> [https://perma.cc/K4BS-LTMU] [hereinafter Santos, *WA Gun Laws*].

⁵⁵ *Id.*

⁵⁶ *Regional Domestic Violence Firearms Enforcement Unit*, PROSECUTING ATTORNEY'S OFFICE, KING COUNTY (Aug. 8, 2019), <https://www.kingcounty.gov/depts/prosecutor/ellies-place/rdvfeu.aspx> [https://perma.cc/HL5R-KGVX].

⁵⁷ *Washington State Leads in Laws Addressing Intersection of Gun Violence and Domestic Violence*, ALLIANCE FOR GUN RESPONSIBILITY (Oct. 3, 2019), <https://gunresponsibility.org/press-releases/washington-state-leads-laws-addressing-intersection-gun-violence-domestic-violence> [https://perma.cc/Z7F5-2PA8].

⁵⁸ *What Happens in Cases of Domestic Violence*, SEATTLE MUNICIPAL COURT, <http://www.seattle.gov/courts/programs-and-services/specialized-courts/domestic-violence-court> [https://perma.cc/HQ5Z-HKRT].

⁵⁹ *Id.*

⁶⁰ Paredes et al., *supra* note 27, at 287.

⁶¹ WASH. REV. CODE § 9A.160 (2004).

⁶² *Id.* § 9A.90.040.

⁶³ *Id.* § 9A.90.100.

⁶⁴ *Id.* § 9A.86.010. Nonconsensual distribution of intimate images is a gross misdemeanor for the first occurrence, then becomes a felony for the second and any subsequent offenses.

2. Washington State Domestic Violence Laws at the Courthouses

Outside statutory law, many courts that carry out Washington's progressive domestic violence laws have equally progressive practices. Washington has several dedicated domestic violence courts. Vancouver, Washington is home to one of the earliest dedicated domestic violence courts where all protective order requests go through one judge and domestic violence advocates and abuser treatment providers participate in the court's decision-making process on protection orders, treatment plans, and custody release.⁶⁵ The King County District Court located in Kent, Washington also has its own dedicated domestic violence court where domestic violence cases are consolidated and fast-tracked for processing. This domestic violence court additionally provides offender monitoring services as well as mental health, chemical dependency, and family intervention programs.⁶⁶ It also houses a free childcare center for children of parents with court hearings.⁶⁷ Seattle Municipal Court also has its own dedicated domestic violence court for misdemeanor offenses.⁶⁸ Other benefits of dedicated domestic violence courts include increasing efficiency in confidential communication between parties, decreasing delays for relief, and providing judges a more complete and nuance understanding of complex domestic violence cases to make fair decisions.⁶⁹

Another progressive measure that Washington courthouses are taking is establishing one-stop-shop, on-site domestic violence advocacy services. The King County Courthouse locations in Seattle, Kent, and Redmond house the Protection Order Advocacy Program (POAP) where staff will walk survivors through the protection order process; help fill out forms; provide referral services to local advocacy organizations, shelters, and social service providers; and provide general support before, during,

⁶⁵ Randal B. Fritzler & Leonore M.J. Simon, *The Development of A Specialized Domestic Violence Court in Vancouver, Washington Utilizing Innovative Judicial Paradigms*, 69 UMKC L. REV. 139, 161-63 (2000).

⁶⁶ *Domestic Violence Court*, KING COUNTY DISTRICT COURT (Jan. 24, 2017), <https://www.king-county.gov/courts/district-court/domestic-violence.aspx> [<https://perma.cc/C2FG-L3QV>].

⁶⁷ *Childcare Center*, KING COUNTY SUPERIOR COURT (May 30, 2019), <https://www.king-county.gov/courts/superior-court/locations/mrjc/childcare.aspx> [<https://perma.cc/74Z6-4NYF>].

⁶⁸ *Specialized Courts*, SEATTLE MUNICIPAL COURT, <http://www.seattle.gov/courts/programs-and-services/specialized-courts> [<https://perma.cc/5EC6-FZ8N>].

⁶⁹ Hulse, *supra* note 23, at 270-72; *see also* Fritzler & Simon, *supra* note 65, at 147-48; Tsai, *supra* note 15, at 1316.

and after protection order hearings including court accompaniment.⁷⁰ Interpreter services are provided for POAP functions as well as for court hearings in general.⁷¹

Other progressive domestic violence policies in Washington include an address confidentiality program that gives temporary addresses to domestic violence survivors to reroute their mail to the Secretary of State;⁷² providing survivors leave from work for domestic violence-related events such as court hearings, medical treatment, counseling, or appointments with advocacy organizations;⁷³ allowing domestic violence survivors to terminate rental agreements without further obligations;⁷⁴ and forbidding landlords from discriminating against tenants based on their domestic violence survivor status.⁷⁵

3. Shortcomings in Washington State's Domestic Violence Laws

While Washington has many progressive domestic violence laws, the implementation of these laws is not perfect. The District of Columbia has progressive domestic violence laws similar to the Washington's that includes a courthouse domestic violence advocacy unit, firearms removal program, mandatory arrest, and probation program for abusers.⁷⁶ However, survivors continued to report being victimized by judges and clerks, a lack of procedural flexibility, and unfair punishment decisions from judges and prosecutors.⁷⁷ Judges in domestic violence courts reportedly do not take allegations of abuse or protection order requests seriously and may not portray abusive treatment as problematic.⁷⁸ Survivors also experience procedural problems such as spending a burdensome amount of

⁷⁰ KING COUNTY COAL. AGAINST DOMESTIC VIOLENCE, WHEN SURVIVORS ARE SERVED: AN FAQ FOR ADVOCATES WORKING WITH SURVIVORS WHO HAVE BEEN SERVED WITH A DOMESTIC VIOLENCE PROTECTION ORDER IN KING COUNTY 3-4 (2015), <https://endgv.org/wp-content/uploads/2016/04/When-Survivors-Are-Served-FAQ-.pdf> [<https://perma.cc/3DZD-ADBQ>]; see also *Protection Orders, Prosecuting Attorney's Office*, KING COUNTY (Aug. 7, 2018), <https://www.king-county.gov/depts/prosecutor/protection-orders.aspx> [<https://perma.cc/3QN3-ZDUB>] [hereinafter *Protection Orders*].

⁷¹ *Protection Orders*, *supra* note 70.

⁷² WASH. REV. CODE § 40.24.010 (2019); *About Us*, ADDRESS CONFIDENTIALITY PROGRAM, WASHINGTON OFFICE OF THE SECRETARY OF STATE, <https://www.sos.wa.gov/acp/about.aspx> [<https://perma.cc/6BTG-DDQX>].

⁷³ WASH. REV. CODE § 49.76.030 (2008).

⁷⁴ *Id.* § 59.18.575.

⁷⁵ *Id.* § 59.18.580.

⁷⁶ Verdi, *supra* note 42, at 921.

⁷⁷ *Id.*

⁷⁸ *Id.* at 922-23. Verdi cites *Murphy v. Okeke*, where the presiding judge stated the petitioner was partly to blame for her abuse at the hands of her partner by "triggering the violence" and not immediately leaving. 951 A.2d 783, 786 (D.C. 2008).

time getting to and waiting in court for repetitive hearings; enduring embarrassment and pain from publicly telling their story; and having to face their abuser.⁷⁹

Abusers will often exploit the procedural burdens of court hearings against their partners by filing abusive litigation to drag their partners into court for frivolous matters.⁸⁰ These tactics employed by abusers include excessively scheduling and re-scheduling hearings on already resolved or irrelevant issues and requesting new a jurisdiction or judge.⁸¹ In Washington, judges can use their discretion to issue orders restricting the kinds of court filings an abuser can make.⁸² However, survivors have reported experiencing judicial officers not being able to recognize abusive litigation during their hearings.⁸³ Survivors have also felt that the courts were reluctant to impose real consequences on abusers such as sanctions or award provisions and instead would only verbally admonish the abuser.⁸⁴

Despite attempts to make victim-centered laws in domestic violence cases, the law is often unable to provide complete relief to survivors. This reality forces survivors to rely on community advocates to protect their safety.

IV. ADVOCACY ORGANIZATIONS AS NON-LEGAL RELIEF FOR DOMESTIC VIOLENCE SURVIVORS

Advocacy organizations against domestic violence play a critical role in protecting survivors who are waiting for or are unable to obtain relief from the legal system.⁸⁵ These organizations are typically grassroots or community-based nonprofits where advocates perform “care work” such as providing counseling, emotional support, and empowerment.⁸⁶ Advocates also perform “legal work” such as educating survivors on the legal process and their legal options; accompanying survivors to court hearings;

⁷⁹ *Id.* at 926.

⁸⁰ *Curbing Abusive Litigation Practices*, LEGAL VOICE (Mar. 2, 2020), <https://www.legal-voice.org/abusive-litigation-practices>, [<https://perma.cc/KK2W-5NJ2>].

⁸¹ See David Ward, *In Her Words: Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors*, 14 SEATTLE J. SOC. JUST. 429, 438-42 (2015). One survivor described her ex-husband filing 500-page motions in court. She counted eight complaints filed against her and her parents by her ex-husband, and almost 3,000 docket entries in her divorce case.

⁸² WASH. STATE HOUSE OF REPRESENTATIVES, ENGROSSED SUBSTITUTE HOUSE BILL ANALYSIS 2020, ESSB 6268 at 2 (2020), <http://lawfilesexternal.wa.gov/biennium/2019-20/Pdf/Bill%20Reports/House/6268-SE%20HBA%20CRJ%2020.pdf> [<https://perma.cc/4PXS-9WFH>].

⁸³ Ward, *supra* note 81, at 457.

⁸⁴ *Id.* at 459.

⁸⁵ Kimberly D. Bailey, *It's Complicated: Privacy and Domestic Violence*, 49 AM. CRIM. L. REV. 1777, 1812 (2012).

⁸⁶ MacDowell, *supra* note 17, at 220.

and connecting them to local resources such as shelters or food banks.⁸⁷ Most critically, advocates assist survivors with creating safety plans.

A. Safety Plans

A domestic violence safety plan is a detailed, personalized plan for a survivor to follow in specific situations to protect themselves from an abuser.⁸⁸ A survivor may have one general safety plan for when they leave their abusers; others may have a handful of safety plans for different areas of their lives, such as at home, at work, or at school.⁸⁹ Others may have safety plans for specific scenarios (during the violence, when there are children present, if the abuser leaves first, etc.).⁹⁰

Safety plans are critical for survivors as they face life-threatening danger, particularly when they leave their abuser.⁹¹ Because every survivor will have a different plan that is tailored to their situation, identity, and end-goals, not every safety plan will look the same.⁹² A trained domestic violence advocate is essential in helping a survivor walk through and craft their personalized plan as well as identify community resources.⁹³

Safety plan examples can be found on domestic violence advocacy organizations' websites. New Beginnings, a Seattle-based full-service agency serving domestic violence survivors, provides the following sample plan for pregnant individuals:

If you are in a home with stairs, try to stay on the first floor at times when violence is likely to occur. Doctor or midwife visits can be an opportunity to discuss what is going on in your relationship and get help. If your partner goes to these appointments with you, try to find a moment when they are out of the room to ask your care provider (or even the front desk receptionist) to come up with an excuse to talk to you one-on-one. If you've decided to leave your relationship, a

⁸⁷ *Id.* at 221.

⁸⁸ *Safety Information*, WASH. STATE DOMESTIC VIOLENCE INFO. REFERRAL, <https://www.domesticviolenceinfoforreferral.org/safety-information> [<https://perma.cc/9M5L-JAW9>] [hereinafter *Safety Information*].

⁸⁹ STALKING RES. CTR., THE NAT'L CTR. FOR VICTIMS OF CRIME, ARE YOU BEING STALKED? 2 (2008), <https://members.victimsofcrime.org/docs/default-source/src/english-aybs-2015.pdf> [<https://perma.cc/WM2J-LTY4>].

⁹⁰ *Safety Plan*, NEW BEGINNINGS (2018), <https://www.newbegin.org/find-help/staying-safe/safety-plan> [<https://perma.cc/H2LR-FV4Y>] [hereinafter *Safety Plan*].

⁹¹ Terry Gross, 'No Visible Bruises' Upends Stereotypes of Abuse, Sheds Light On Domestic Violence, NPR (May 7, 2019), <https://www.npr.org/sections/health-shots/2019/05/07/721005929/no-visible-bruises-upends-stereotypes-of-abuse-sheds-light-on-domestic-violence> [<https://perma.cc/NTL9-UYVZ>] ("The first 90 days after a victim leaves [their partner] is the most dangerous time for them of any kind of violence.").

⁹² *Safety Planning*, LOVEISRESPECT.ORG (2017), <https://www.loveisrespect.org/for-yourself/safety-planning>.

⁹³ *Personalized Safety Plan*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/personalized-safety-plan> [<https://perma.cc/2MRR-TARH>] [hereinafter *NCADV Safety Plan*].

health care provider can become an active participant in your plan to leave. If possible, take a women-only prenatal class, giving you an opportunity to speak to the class instructor about your situation.⁹⁴

While such tips may appear obvious, a person going through high stress or trauma may not be able to make logical decisions.⁹⁵ A trained advocate will be able to ask a survivor the right questions to help the survivor define what safety means to them and identify where and how to protect themselves.⁹⁶ Questions to ask may include the following: where the survivor can go; who the survivor can ask for help; what the survivor can do when a problem occurs; what scenarios the survivor could foresee happening; and how the survivor will handle them.⁹⁷

Safety plans incorporate a survivor's circumstances, wants and needs in relation to their life circumstances, and the risks posed by their abuser. The survivor is in the best position to determine these items. A safety plan will also account for any cultural or social factors that may impact a survivor's ability to protect themselves.⁹⁸ For example, an undocumented immigrant living in a rural area may need to think about where to keep original immigration or identification documents; make copies of said documents; determine alternatives to contacting law enforcement;⁹⁹ and know where main services or businesses are located.¹⁰⁰ It is necessary have a trained domestic violence advocate who can list out the details with a survivor on what they need to be safe because of how personalized safety plans are.

B. *Technology's Impact on Safety Plans*

Domestic violence advocacy organizations have been incorporating technology into safety planning due to the proliferation of technology usage and the rising number of methods that an abuser can use to harm their

⁹⁴ *Safety Plan*, *supra* note 90.

⁹⁵ *Safety Information*, *supra* note 88.

⁹⁶ Christine E. Murray et al., *Domestic Violence Service Providers' Perceptions of Safety Planning: A Focus Group Study*, 30 J. FAM. VIOL. 381, 382 (2015).

⁹⁷ *NCADV Safety Plan*, *supra* note 93.

⁹⁸ LUPITA PATTERSON, WASH. STATE COAL. AGAINST DOMESTIC VIOLENCE, CROSSING BORDERS: CRITICAL THINKING AND BEST PRACTICES 2-3 (2004), <https://wscadv.org/wp-content/uploads/2016/02/Crossing-Borders-Critical-Thinking-and-Best-Practices.pdf> [<https://perma.cc/QY8G-6KT6>].

⁹⁹ *Safety Plan for Immigrant Women Who Are Victims of Domestic Violence*, AYUDA INC. LEGAL AID, <https://vawnet.org/sites/default/files/assets/files/2016-12/safetyplan.pdf> [<https://perma.cc/URE2-ZXLF>].

¹⁰⁰ *Safety in Rural Areas*, WOMENSLAW.ORG (Mar. 28, 2016), <https://www.womenslaw.org/about-abuse/safety-tips/safety-rural-areas> [<https://perma.cc/94ST-ZZ9A>].

partners.¹⁰¹ In addition to the previously described considerations, survivors and advocates must also identify technology-based abuse in the survivor's life and how to manage it.¹⁰² For example, if a survivor discovers that their abuser has downloaded a monitoring app on their cell phone, the survivor may need to evaluate with their advocate how long their phone has been monitored, what personal data the abuser has already obtained (location, text messages, browsing history, etc.), how the abuser would react if the app is removed or if the cell phone is replaced, how to document or screenshot the abuse, and whether to remove the app.¹⁰³ Furthermore, a survivor may also need to think about whether an abuser had online access to their personal accounts, including email, bank accounts, or social media, and how to delete or change their accounts.¹⁰⁴

V. TECHNOLOGY AS A NEW TOOL FOR ABUSE

Technology is nearly impossible to avoid due to its ubiquity in the modern age. As of January 2017, 95% of Americans had a cellphone and close to 80% of Americans use the Internet daily.¹⁰⁵ Abusers are increasingly turning to technological products to harm their partners, but the ways in which abusers cunningly abuse technology is alarming. In 2015, nearly one in six women in the U.S. were victims of unwanted stalking at some point in their lifetime, half of which occurred before the age of twenty-five, including through the use of technological tools such as texting, social media, and GPS.¹⁰⁶ Depending on the state and the technology involved, there are very few legal recourses or restrictions for an abuser's exploitation of technology at the expense of the safety of their intimate partners.¹⁰⁷ Examples of technology-based abuse in intimate relationships include installing spyware or computer monitoring software or applications on a nonconsenting partner's computer or phone,¹⁰⁸ tracking partners

¹⁰¹ Brenda Baddam, *Technology and Its Danger to Domestic Violence Victims: How Did He Find Me?*, 28 ALB. L.J. SCI. & TECH. 73, 76 (2017).

¹⁰² *Technology Safety Plan: A Guide for Survivors and Advocates*, TECH. SAFETY, NAT'L NETWORK TO END DOMESTIC VIOLENCE (2018), <https://www.techsafety.org/resources-survivors/technology-safety-plan> [<https://perma.cc/7GZT-SXPF>].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Baddam, *supra* note 101, at 75.

¹⁰⁶ SMITH ET AL., *supra* note 24, at 5-6.

¹⁰⁷ Diana Freed et al., *Digital Technologies and Intimate Partner Violence: A Qualitative Analysis with Multiple Stakeholders*, 1 PROC. ACM HUM.-COMPUT. INTERACT. 1, 17 (2017), <http://nixdell.com/papers/digital-technologies-intimate.pdf> [<https://perma.cc/97K2-PMWL>].

¹⁰⁸ Cindy Southworth & Sarah Tucker, *Technology, Stalking and Domestic Violence Victims*, 76 MISS. L.J. 667, 668 (2007).

with GPS devices;¹⁰⁹ hacking into a partner's e-mail or social media accounts;¹¹⁰ online harassment on social media or message forums;¹¹¹ and abusing smart home devices to manipulate or scare partners.¹¹²

While technology-based abuse has started to emerge in new areas such as smart home devices, prosecution and prevention efforts from the law have been lackluster due to the fast pace of technological development and the investigatory challenges in prosecuting technology-based crimes.¹¹³ These challenges include the lack of technical knowledge, training, and resources by officers to conduct effective investigations.¹¹⁴ The lack of familiarity with both new technology and technology-based abuse statutes makes it difficult for investigators to determine what evidence to document and how to do so, which consequently impacts the prosecutor's ability to make charging decisions.¹¹⁵ Additionally, there may be statutory challenges to prosecute crimes of this nature.¹¹⁶ For example, Maryland does not have a cyberstalking statute and its general stalking statute requires physical pursuit, which does not apply to online stalking.¹¹⁷ Abusers will continue to use technology to harm their partners because of the ease of technology-based abuse and weak enforcement.

VI. DATA AND INFORMATION-DRIVEN TECHNOLOGY ABUSE

One area of technology-based abuse is harm derived from an abuser's access to their partner's personal data.¹¹⁸ In cyberstalking cases, abusers often obtain online data about their partners for monitoring or harassment purposes. This method may be done by hacking into a partner's email and

¹⁰⁹ Baddam, *supra* note 101, at 77.

¹¹⁰ *Id.*

¹¹¹ *Documentation Tips for Survivors of Technology Abuse & Stalking*, TECH. SAFETY, NAT'L NETWORK TO END DOMESTIC VIOLENCE (2014), <https://www.techsafety.org/documentationtips> [<https://perma.cc/QP3R-6UTU>].

¹¹² Nellie Bowles, *Thermostats, Locks and Lights: Digital Tools of Domestic Abuse*, N.Y. TIMES (Jun. 23, 2018), <https://www.nytimes.com/2018/06/23/technology/smart-home-devices-domestic-abuse.html> [<https://perma.cc/DM54-P2EA>].

¹¹³ See e.g. Freed et al., *supra* note 107, at 17 (“[W]hile an order of protection can be used to legally restrict abusers from contacting clients via Facebook, abusive messages on Facebook are not recognized as a form of abuse that warrants an order of protection.”); Christine Hauser, *\$6.4 Million Judgment in Revenge Porn Case Is Among Largest Ever*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/us/revenge-porn-california.html> [<https://perma.cc/6HB2-86EX>] (“The law in [nonconsensual distribution of intimate images] is imperfect and has been for some time... [It is] lagging behind technology.”).

¹¹⁴ King-Ries, *supra* note 7, at 141.

¹¹⁵ Kaofeng Lee & Jane Anderson, *The Internet and Intimate Partner Violence Technology Changes, Abuse Doesn't*, 31 CRIM. JUST. 28, 28-29 (2016).

¹¹⁶ *Id.*

¹¹⁷ Shimizu, *supra* note 10, at 121-22.

¹¹⁸ Lee & Anderson, *supra* note 115, at 28-29.

social media accounts and using that information to locate and further harass their partner.

A. *Current Abuses of Data-Driven Technology*

A nightmare scenario of data-driven technology-based abuse is presented in *Remsburg v. Docusearch, Inc.*, where a New Hampshire customer paid an Internet-based investigation service to look up the date of birth, address, social security number, and employment information for a woman.¹¹⁹ The company obtained and transferred the requested information to the customer, who then used the information to track down the woman at her job where he fatally shot her and then himself.¹²⁰ Today, rather than paying an investigation service to look for private information, many companies can directly sell the information they have on hand to consumers as more personally identifiable information becomes available on the Internet.¹²¹

Data brokers are companies that primarily collect and sell personal consumer information.¹²² In *Remsburg*, the investigation company obtained the victim's employment information by giving her a telephone call.¹²³ Data brokers would instead obtain this information from harvesting the Internet for publicly available data, such as public records, social networking content, and blogs as well as from purchasing private data from digital services that buy data from social media companies,¹²⁴ and from online retailers, including eBay and Amazon.¹²⁵ The ease in obtaining personal data, its lucrative market value, and the lack of preventative legal measures could likely make situations like *Remsburg* easy to replicate. Domestic violence survivors are more at risk of having their data harvested, especially where the data of women consumers are abundant and highly valued in the big data industry¹²⁶ and where the majority of domestic violence victims are women.¹²⁷

¹¹⁹ *Remsburg v. Docusearch, Inc.*, 149 N.H. 148, 152, 816 A.2d 1001 (2003).

¹²⁰ *Id.*

¹²¹ Theodore Rostow, *What Happens When an Acquaintance Buys Your Data?: A New Privacy Harm in the Age of Data Brokers*, 34 YALE J. ON REG. 667, 669 (2017).

¹²² *Id.*

¹²³ See *Remsburg*, 149 N.H. at 152-53.

¹²⁴ *Id.*

¹²⁵ *Id.* at 676.

¹²⁶ Ann Bartow, *Our Data, Ourselves: Privacy, Propertization, and Gender*, 34 U.S.F. L. REV. 633, 634-35 (2000) ("Women do most of the shopping in real space and will inevitably do the same in cyberspace, where we are appearing in ever increasing numbers. Women control 80 to 85% of all personal and household goods spending and are reportedly the fastest-growing audience on the web.").

¹²⁷ *Statistics, NAT'L COAL. AGAINST DOMESTIC VIOLENCE*, <https://ncadv.org/statistics> [<https://perma.cc/BL8D-M94F>].

The New Hampshire Supreme Court held that the investigation company was liable for selling a person's work address obtained by a pretextual phone call.¹²⁸ Nevertheless, it found no cause of action for appropriation because the company sold the information for its value.¹²⁹ The investigation company had a duty to exercise reasonable care in disclosing personal information because the risk of criminal misconduct was sufficiently foreseeable, even though employment information is not considered privileged.¹³⁰ However, the court noted that this narrow exception runs against the general presumption that "a private citizen has no general duty to protect others from the criminal attacks of third parties."¹³¹ The courts have yet to restrict the sale of data under common or statutory law.¹³²

B. Future Abuses of Data-Driven Technology

Domestic violence survivors and advocates need to be aware of the new threats arising as a result of the high-speed and unregulated growth of new technology. New technologies are constantly being released to the public without a full assessment of their collateral impact on vulnerable populations.¹³³ One particular tool that is concerning for domestic violence survivors is facial recognition systems fueled by artificial intelligence (AI) technology. AI-enabled systems are "fed" large amounts of data so that the system can "learn" from the data in order to recognize, identify, and target a specific subject.¹³⁴ One example of an AI-enabled system is predictive policing software that calculates an individual's likelihood to commit a crime based on their social media activities and criminal history that the software has scraped off the internet and analyzed through a proprietary algorithm.¹³⁵

1. Clearview and Facial Recognition Technology

While AI-enabled facial recognition technology has been utilized as early as 2011, the tech industry has not explored it further as the system is acknowledged to be too dangerous for mass distribution without further

¹²⁸ *Remsburg v. Docusearch, Inc.*, 149 N.H. 148, 155, 816 A.2d 1001 (2003).

¹²⁹ *Id.* at 158.

¹³⁰ *Id.* at 160.

¹³¹ *Id.* at 153.

¹³² Rostow, *supra* note 121, at 680.

¹³³ MEREDITH WHITTAKER ET AL., AI NOW INSTITUTE, AI NOW REPORT 2018 11 (2018), https://ai-nowinstitute.org/AI_Now_2018_Report.pdf [<https://perma.cc/W5W7-5BBR>].

¹³⁴ *Id.* at 12.

¹³⁵ Ali Winston, *Palantir Has Secretly Been Using New Orleans to Test Its Predictive Policing Technology*, VERGE (Feb. 27, 2018, 3:25 PM), <https://www.theverge.com/2018/2/27/17054740/palantir-predictive-policing-tool-new-orleans-nopd> [<https://perma.cc/YN64-GB8J>].

studies on its impact or accompanied regulations to reduce risks of harmful use.¹³⁶ If technology companies are required to understand how its products can be used consciously and unconsciously to harm survivors, particularly those from Black and immigrant communities,¹³⁷ policymakers and law enforcement can more adequately craft targeted and instructive laws and regulations to effectively prevent and prosecute technology-based abuse. This requirement may also force companies to conduct a more thoughtful risk assessment on its products before releasing it to market. However, a company called Clearview decided to ignore this industry acknowledgement by not only engineering its own facial recognition tool (which works by scraping images on the internet to “learn” an image and performing a Google search on a person’s face) but also by selling it on the open market.¹³⁸ Surprisingly, Clearview’s application of its technology was found not in violation of any existing federal laws.¹³⁹

Clearview initially sold its technology to law enforcement agencies to identify suspects (such as shoplifters) from surveillance cameras or smartphone recordings, with an expressed interest in expanding its market to private companies and consumers.¹⁴⁰ Clearview has since sold its technology to government entities such as public schools, the Department of Justice, (which oversee immigration enforcement), and private companies.¹⁴¹ These private companies include Macy’s, the National Basketball Association (NBA), and a sovereign wealth fund in the United Arab Emirates, where homosexuality is criminalized.¹⁴² In addition, Clearview has provided individual friends and investors access to its technology; these friends and investors then share the technology with their own networks.¹⁴³ The lack of regulation and oversight over Clearview’s potential buyers reveals the technology’s immediate harm to vulnerable groups like children, undocumented immigrants, LBGTQ+ individuals, as well as potential harm to women and domestic violence survivors.

¹³⁶ Kashmir Hill, *The Secretive Company That Might End Privacy as We Know It*, N.Y. TIMES (Jan. 18, 2020), <https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html> [https://perma.cc/HPT3-UQ94] [hereinafter Hill, *Secretive Company*].

¹³⁷ Malkia Devich-Cyril, *Defund Facial Recognition*, ATLANTIC (July 5, 2020), <https://www.theatlantic.com/technology/archive/2020/07/defund-facial-recognition/613771/> [https://perma.cc/45RJ-WZA6].

¹³⁸ Hill, *Secretive Company*, *supra* note 136.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Ryan Mac, Caroline Haskins & Logan McDonald, *Clearview’s Facial Recognition App Has Been Used by the Justice Department, ICE, Macy’s Walmart, and the NBA*, BUZZFEED NEWS (Feb. 27, 2020, 11:37 PM), <https://www.buzzfeednews.com/article/ryanmac/clearview-ai-fbi-ice-global-law-enforcement> [https://perma.cc/RSG3-U45D].

¹⁴² *Id.*

¹⁴³ Kashmir Hill, *Before Clearview Became a Police Tool, It Was a Secret Plaything of the Rich*, N.Y. TIMES (Mar. 5, 2020, 9:27 AM), <https://www.nytimes.com/2020/03/05/technology/clearview-investors.html> [https://perma.cc/L9DX-JXW7] [hereinafter Hill, *Clearview Police Tool*].

Providing unregulated access to facial recognition technology poses a clear danger, where a stranger can take a photo of someone, feed it through the software, and identify the person based on their internet foot-traffic.¹⁴⁴ John Catsimatidis, the owner of New York City-based grocery chain Gristedes, tested Clearview's app at his stores to identify shoplifters.¹⁴⁵ He also used the app to identify an unknown man, who went on a date with his daughter without either person's consent, and discovered the man's name, age, and profession.¹⁴⁶ If this app fell in the hands of an abuser who is stalking their partner, escape from an abuser would be impossible.

2. Threat from Lack of Regulations and Oversight

The lack of legal restrictions over the creation or application of new technologies is troubling, particularly with the knowledge that new tools that can potentially harm vulnerable people, including intimate partners, can be freely funded. For example, Clearview has received \$7 million in venture capital funding to develop its technology.¹⁴⁷ Currently, no laws or regulations exist that can prevent private investors from investing in controversial technological advances.¹⁴⁸ Additionally, there are no laws, regulations, or oversight that address how government agencies can utilize new technologies such as facial recognition without much familiarity with either the vendor or the technology.¹⁴⁹ In addition, no existing laws or regulations seem capable of forcing Clearview or other AI companies to comply with requests from social media companies to stop scraping images from its websites.¹⁵⁰ Too much regulation in technology development can

¹⁴⁴ *The Daily Podcast: The End of Privacy as We Know It?*, N.Y. TIMES (Feb. 2, 2020), <https://www.nytimes.com/2020/02/10/podcasts/the-daily/facial-recognition-surveillance.html?showTranscript=1> [<https://perma.cc/5BX9-AD28>].

¹⁴⁵ Hill, *Clearview Police Tool*, *supra* note 143.

¹⁴⁶ *Id.*

¹⁴⁷ Hill, *Secretive Company*, *supra* note 136.

¹⁴⁸ See generally Rick DeLucco & Juliyeen Davis, *The Companies Venture Capital Isn't Allowed to Invest In*, SUPERMAKER (Nov. 7, 2019), <https://supermaker.com/articles/the-companies-venture-capital-isnt-allowed-to-invest-in> [<https://perma.cc/KC4Q-L3AK>]; Nathan Heller, *Is Venture Capital Worth the Risk?*, NEW YORKER (Jan. 27, 2020), <https://www.newyorker.com/magazine/2020/01/27/is-venture-capital-worth-the-risk> [<https://perma.cc/8HTK-FBLU>]; *Ethics and the Investment Industry*, CFA INSTITUTE (Oct. 2017), <https://www.cfainstitute.org/en/ethics-standards/codes/standards-of-practice-guidance/ethics-and-investment-industry> [<https://perma.cc/W4U6-VEWX>]; Merkley, *Booker Introduce Legislation to Prohibit Irresponsible Government Use of Facial Recognition Technology*, JEFF MERKLEY: UNITED STATES SENATOR FOR OREGON (Feb. 12, 2020), <https://www.merkley.senate.gov/news/press-releases/merkley-booker-introduce-legislation-to-prohibit-irresponsible-government-use-of-facial-recognition-technology-2020> [<https://perma.cc/PL48-TATL>].

¹⁴⁹ Hill, *Secretive Company*, *supra* note 136.

¹⁵⁰ *Id.*

stifle innovation and growth of groundbreaking products.¹⁵¹ However, the lack of minimum regulation and oversight on how new technology is funded, distributed, and used is worrisome, particularly when analyzing technology-based abuse in intimate relationships.

3. Threat from Unauthorized Access to Private Data

One reason the public knows as much as it does about Clearview AI is due to a data breach that resulted in the publicization of its customers list.¹⁵² Clearview's attorney explained that "data breaches are part of life in the twenty-first century."¹⁵³ However, the fact that Clearview not only holds a massive volume of private information but can also give its powerful clients access to this data with no oversight cannot justify this reality. If such information gets in the hands of data brokers or the illegal online marketplace, we can expect more devastating cases like *Remsburg* to become normal occurrences.

However, there is already an organization that holds massive amounts of private data on domestic violence survivors: the government. Courts have used sophisticated, centralized case management systems to ensure efficiency and accuracy in domestic violence cases. These systems synchronize important information on domestic violence cases between judges, attorneys, clients, and other involved community members, including law enforcement, domestic violence advocates, health care workers, and batterers' intervention programs.¹⁵⁴ The Brooklyn Felony Domestic Violence Court of New York State uses its own proprietary data management system which allows instantaneous sharing of information between multiple parties.¹⁵⁵ The courts' reliance on case management systems creates a security concern because of the amount of personal data in a singular source, especially in the event of a data breach that may jeopardize a victim's safety.¹⁵⁶

Limiting access to personal data held by the government is critical in protecting the safety of survivors. However, the ability to prevent unlawful

¹⁵¹ William D. Eggers et al., *The Future of Regulation: Principles for Regulating Emerging Technologies*, DELOITTE (June 19, 2018), <https://www2.deloitte.com/us/en/insights/industry/public-sector/future-of-regulation/regulating-emerging-technology.html> [<https://perma.cc/PPH3-W2LJ>].

¹⁵² Betsy Swan, *Facial-Recognition Company That Works with Law Enforcement Says Entire Client List Was Stolen*, DAILY BEAST (Feb. 26, 2020), <https://www.thedailybeast.com/clearview-ai-facial-recognition-company-that-works-with-law-enforcement-says-entire-client-list-was-stolen> [<https://perma.cc/5D5S-F3S7>].

¹⁵³ *Id.*

¹⁵⁴ PAMELA YOUNG, CTR. FOR COURT INNOVATION, NEW YORK STATE UNIFIED COURT SYSTEM, AN INFORMED RESPONSE: AN OVERVIEW OF THE DOMESTIC VIOLENCE COURT TECHNOLOGY APPLICATION AND RESOURCE LINK 1-2 (2001), http://www.courtinnovation.org/sites/default/files/ccid6-legacy-files/pdf/info_response.pdf [<https://perma.cc/HJQ5-KQGG>].

¹⁵⁵ *Id.*

¹⁵⁶ Hulse, *supra* note 23, at 280.

access is made more difficult by data breaches in private data-driven products used by public agencies as well as by direct cyberattacks on the government. In 2019, there were 140 ransomware attacks targeting state and local government that exposed sensitive public data to danger.¹⁵⁷ While ransomware works by preventing access to computer systems and public databases, such as online payment sites or crime data statistics, it is not difficult to believe attackers could easily access these databases and sell the information within them.¹⁵⁸ Even if public agencies were able to protect their data from ransomware, they would not be able to protect data held by a vendor in the event of a data breach on the vendor's end.¹⁵⁹ A potential data breach on any private or public domestic violence case management system could expose domestic violence survivors to grave danger.¹⁶⁰

Another data-related problem illustrated by Clearview's business practices is the unfettered access to powerful technological tools coupled with the underlying data that companies are willing to give to individuals. Abusers are numerous and come in different shapes and forms. If a vendor gives broad access to its technology to its buyers without implementing safety measures regarding who can use the technology, their level of use, or mitigation plans for unauthorized usage, they may unknowingly give access to an abuser who can then use the technology to harm their partners. For example, law enforcement officers are likely to have access to highly sensitive databases, including domestic violence case management systems. Law enforcement officers have also been found to commit higher rates of intimate partner violence compared to the general public.¹⁶¹ Police abuse of confidential information to retaliate against an intimate partner is

¹⁵⁷ Allen Kim, *In the Last 10 Months, 140 Local Governments, Police Stations and Hospitals Have Been Held Hostage by Ransomware Attacks*, CNN (Oct. 8, 2019, 5:51 PM), <https://www.cnn.com/2019/10/08/business/ransomware-attacks-trnd/index.html> [https://perma.cc/SH38-2KEE].

¹⁵⁸ *Id.*

¹⁵⁹ See e.g. Mark Scott & Connor Murphy, *Swedish ministers resign amid data security breach scandal*, POLITICO (Jan. 28, 2018, 10:21 PM), <https://www.politico.eu/article/sweden-data-breach-privacy-security-stefan-lofven/> [https://perma.cc/9F9Q-PGN5] (The Swedish government's transport agency outsourced its IT operations to IBM Sweden, where a data breach occurred that exposed Swedish driving license records and military vehicle data); Andy Greenberg, *The Year of the Mega Data Breach*, FORBES (Nov. 24, 2009, 7:00 PM), <https://www.forbes.com/2009/11/24/security-hackers-data-technology-cio-network-breaches.html> [https://perma.cc/9R4A-8634] ("46% of all lost files last year" was traced to contractors).

¹⁶⁰ See e.g. Zack Whittaker, *A domestic violence prevention app backed by Dr. Phil exposed victims' distress recordings*, TECH CRUNCH (June 25, 2020, 8:00 AM), <https://techcrunch.com/2020/06/25/aspire-app-dr-phil/> [https://perma.cc/LAN8-R5M4].

¹⁶¹ GOODMARK, *supra* note 34, at 238. See also Conor Friedersdorf, *Police Have a Much Bigger Domestic-Abuse Problem than the NFL Does*, ATLANTIC (Sept. 19, 2014), <https://www.theatlantic.com/national/archive/2014/09/police-officers-who-hit-their-wives-or-girlfriends/380329/> [https://perma.cc/UF2E-9EAG].

not new phenomenon.¹⁶² The lack of restrictions on consensual access to new technology and its data is problematic.

VII. DATA PRIVACY PROTECTION LAWS

Existing federal data privacy laws are a patchwork of industry-specific laws varying in scope and purpose.¹⁶³ One of the very few pieces of federal data privacy policy is the Organization of Economic Cooperation and Development's (OECD) Privacy Guideline, which inspired the European data privacy laws of the 1970s and 1980s and unwittingly paved the way for the General Data Protection Regulation (GDPR).¹⁶⁴ The GDPR's guidelines include principles on limiting data collection, data security safeguard, and accountability.¹⁶⁵ The OECD Privacy Guidelines did not have as much of an impact in the U.S. as they did in Europe because they were administrative in nature. Similarly, the Federal Trade Commission set out its Fair Information Practices guidelines as an attempt to regulate private information with little fanfare.¹⁶⁶ However, no comprehensive federal data privacy law or regulations exist today.¹⁶⁷ The lack of oversight and regulation, particularly over today's tech behemoths, contributed to the data privacy problems we currently see. Congress has yet to successfully pass any federal privacy laws despite its continued shaming of corporations which participate in non-transparent user data sales.¹⁶⁸ However, in its absence, the General Data Protection Regulation (GDPR), the California Consumer Privacy Act (CCPA), and the Washington Privacy Act (WPA) have provided working frameworks that strive to protect consumers' data privacy.

A. General Data Protection Regulation

The General Data Protection Regulation (GDPR) attempted to regulate data privacy in the private sector by focusing on compliance law upon

¹⁶² Sadie Gurman, *Across the US, Police Officers Abuse Confidential Databases*, AP NEWS (Sep. 27, 2016), <https://apnews.com/699236946e3140659ff8a2362e16f43/ap-across-us-police-officers-abuse-confidential-databases> [<https://perma.cc/7S25-DUUH>].

¹⁶³ STEPHEN P. MULLIGAN & CHRIS D. LINEBAUGH, CONG. RESEARCH SERV., R45631, DATA PROTECTION LAW: AN OVERVIEW 7 (2019), <https://crsreports.congress.gov/product/pdf/R/R45631> [<https://perma.cc/6PQJ-QXLH>].

¹⁶⁴ Daniel J. Solove, *Chapter 1: A Brief History of Information Privacy Law*, PROSKAUER ON PRIVACY 35 (2006).

¹⁶⁵ MULLIGAN & LINEBAUGH, *supra* note 163, at 42.

¹⁶⁶ Nuala O'Connor, *Reforming the U.S. Approach to Data Protection and Privacy*, COUNCIL ON FOREIGN RELATIONS (Jan. 30, 2018), <https://www.cfr.org/report/reforming-us-approach-data-protection> [<https://perma.cc/525H-M67E>].

¹⁶⁷ MULLIGAN & LINEBAUGH, *supra* note 163, at 54.

¹⁶⁸ Romm, *supra* note 13.

its enactment in the European Union (EU) on May 25, 2018.¹⁶⁹ The GDPR applies to companies that either monitor or offer goods or services to people in the EU and has provisions inspired by various European data protection and privacy guidelines.¹⁷⁰ The GDPR explicitly recognizes an individual's fundamental right to protection of personal data and is intended to safeguard this right.¹⁷¹ It further details procedures for businesses which ensure personal data are easily accessible, easy to understand, and presented in clear and plain language for consumers.¹⁷² Consent to collect data must be expressed and unambiguous.¹⁷³ Both data collection and data use must be minimal.¹⁷⁴ Additionally, consumers have the right to access, change, and delete their data held by these companies.¹⁷⁵ The GDPR also sets standards for the way businesses store, maintain, and protect personal data.¹⁷⁶

Violations of the GDPR, such as collecting or selling consumer data without the consumer's consent, include very large monetary fines; a data breach costs 4% annual worldwide turnover or 20 million euros, whichever is greater.¹⁷⁷ In 2019, the top ten biggest GDPR fines amounted to a combined total of \$443.7 million. The biggest fine in 2019 came from British Airways at \$225.16 million from a data hack of customers' financial and personal information.¹⁷⁸ Marriott International came in second with a \$124 million fine for its breach of guest data.¹⁷⁹ Outside of the private sector, schools throughout Europe have been fined thousands of dollars each for utilizing personal data without consent, such as using minor students' fingerprint data to verify lunch payments or facial recognition software to track attendance.¹⁸⁰

¹⁶⁹ Jennifer Dumas, *General Data Protection Regulation (GDPR): Prioritizing Resources*, 42 SEATTLE U. L. REV. 1115, 1116 (2019).

¹⁷⁰ MULLIGAN & LINEBAUGH, *supra* note 163, at 41.

¹⁷¹ *Id.* at 40.

¹⁷² *Id.* at 43-44.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 45-46.

¹⁷⁶ *Id.* at 46-47.

¹⁷⁷ Dumas, *supra* note 169, at 1119.

¹⁷⁸ Sead Fadilpasic, *Top GDPR Breaches Caused Millions in Fines*, IT PRO PORTAL (Nov. 27, 2019), <https://www.itproportal.com/news/top-gdpr-breaches-caused-millions-in-fines/>, [<https://perma.cc/7H4G-B2ZL>].

¹⁷⁹ *Id.*

¹⁸⁰ Paul Sawers, *Polish School Hit with GDPR Fine for Using Fingerprints to Verify Students' Lunch Payments*, VENTURE BEAT (Mar. 6, 2020, 5:03 AM), <https://venturebeat.com/2020/03/06/polish-school-hit-with-gdpr-fine-for-using-fingerprints-to-verify-students-lunch-payments> [<https://perma.cc/WV5X-BJFF>].

The GDPR gives individuals greater control over their personal information by treating data as a quasi-property right rather than a commodity to be traded. For a domestic violence survivor in Europe, the GDPR provides a tangible method to prevent abusers from gaining access to their private information, gives survivors the ability to define what their private data looks like, and gives survivors control of who can access their data.

B. *California Consumer Privacy Act (CCPA)*

Inspired by the GDPR and its impatience with Congress's lack of a comprehensive data privacy law, the California Legislature became the first state in the U.S. to pass its own consumer data privacy law in 2018: the California Consumer Privacy Act. The CCPA is expected to have a national impact on the way businesses manage data and on consumer relationships due to the size of the California economy and number of interstate technology companies that work with or make the majority of their revenue from selling consumer data.¹⁸¹

The CCPA applies to any company that collects the personal information of Californians, regardless of how the collection is done or the type of industry in which the business operates.¹⁸² Both “collector” and “collection of personal information” are broadly defined.¹⁸³ The CCPA provides Californians: (1) the right to know their personal information that businesses have collected or sold; (2) the right to opt out of the sale of their information; and (3) the right to be forgotten.¹⁸⁴ Businesses are required to notify consumers about the kinds of information they have collected on them as well as how to opt out of the data collection.¹⁸⁵ Businesses are also required to delete consumers' information upon request.¹⁸⁶ Penalties for CCPA violations include civil fines, a private cause of action for consumers against businesses, monetary damages, and injunctive relief.¹⁸⁷ However, unlike the GDPR, the CCPA defines “personal information” more expansively and offers more opt-out rights.¹⁸⁸ The CCPA also gives businesses a one-year grace period to comply with consumers' requests for

¹⁸¹ Devin Coldewey, *California Passes Landmark Data Privacy Bill*, TECH CRUNCH, (Jun. 28, 2018, 2:08 PM), <https://techcrunch.com/2018/06/28/landmark-california-privacy-bill-heads-to-governors-desk/> [<https://perma.cc/A9SK-YGXG>].

¹⁸² MULLIGAN & LINEBAUGH, *supra* note 163, at 38.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 39.

¹⁸⁸ Jon Swartz, *California's Landmark Privacy Law: What It Does, What Has Change and What It Means for Investors*, MARKETWATCH (Oct. 6, 2019, 11:15 AM), <https://www.marketwatch.com/story/californias-landmark-privacy-law-what-it-does-what-has-changed-and-what-it-means-for-investors-2019-10-02> [<https://perma.cc/FB87-HDH2>].

access to or deletion of data.¹⁸⁹ The absence of immediate or aggressive enforcement measures resulted in the CCPA receiving the nickname of “GDPR Lite.”¹⁹⁰

The CCPA may also influence other states to create their own consumer data privacy laws due to its reach over businesses that deal with the California economy.¹⁹¹ For example, Microsoft responded to the enactment of the CCPA by changing its consumer privacy policy business-wide to be CCPA-compliant instead of creating a California-specific policy.¹⁹² Also, Microsoft’s leadership has urged its home state of Washington to enact even more rigorous sector- and state-specific data privacy laws.¹⁹³ The impact of the CCPA on non-California states may create a nationwide domino effect to prompt other states to alter their own data privacy and compliance laws in order to participate in the national economy. In addition, the CCPA may have also inadvertently influenced the federal government to seriously consider a federal data privacy law, even as it comes in the form of tech industry lobbyists’ attempt for a lenient alternative that that would undermine the CCPA.¹⁹⁴ The CCPA is one of the very few—if not the only—laws that provide a legal remedy against the misuse of personal data by a private party.¹⁹⁵

C. *Washington Privacy Act*

Despite having relatively progressive tech-crime laws, Washington has yet to pass a statewide data privacy law but not for a lack of trying. In 2019, the Washington State Legislature attempted to pass its own data privacy act modeled after the GDPR.¹⁹⁶ The bill, known as the Washington Privacy Act (WPA), did not become law because the House and Senate

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Jedidiah Bracy, *With the CCPA Now in Effect, Will Other States Follow?*, INT’L ASS’N OF PRIVACY PROF’L (Jan. 2, 2020), <https://iapp.org/news/a/with-the-ccpa-now-in-effect-will-other-states-follow/> [https://perma.cc/V8LV-NKEP].

¹⁹³ *Id.*

¹⁹⁴ Zack Whittaker, *Silicon Valley is Terrified of California’s Privacy Law. Good.*, TECH CRUNCH (Sept. 19, 2019, 9:00 AM), <https://techcrunch.com/2019/09/19/silicon-valley-terrified-california-privacy-law/> [https://perma.cc/M5MD-6H36].

¹⁹⁵ Laura Hautala, *CCPA is Here: California’s Privacy Law Gives You New Rights*, CNET (Jan. 3, 2020, 9:48AM), <https://www.cnet.com/news/ccpa-is-here-californias-privacy-law-gives-you-new-rights/> [https://perma.cc/8FEZ-34AC]. Unfortunately, this remedy is only limited to private businesses rather than individuals and can only be brought by the comparatively under-resourced Attorney General’s Office.

¹⁹⁶ Lucas Ropek, *Why Did Washington State’s Privacy Legislation Collapse?*, GOV’T TECH. (Apr. 19, 2019), <https://www.govtech.com/policy/Why-Did-Washington-States-Privacy-Legislation-Collapse.html> [https://perma.cc/TQ5H-RZGC].

were unable to reach a consensus,¹⁹⁷ with each side arguing that either the House draft of the WPA was too strict on private businesses or the Senate draft was too permissive to private businesses.¹⁹⁸

Specifically, the Senate bill would have exempted data that is “de-identified” from being protected, in spite of the fact that de-identified information can be easily discovered if linked with other information.¹⁹⁹ Provisions of the WPA would have allowed Washington residents to access their data from businesses, correct or delete their data, and opt out of data collection.²⁰⁰ The WPA also would have required businesses to conduct risk assessments of their data collection and maintenance process.²⁰¹ Alternatively, the House version of the WPA included facial recognition technology and automated decision system restriction requirements.²⁰² Similar to one of the CCPA’s shortcomings, the WPA would only allow the Office of the Attorney General to sue businesses for violations instead of a true private right of action by consumers.²⁰³ Therefore, while the WPA would have been a step in the right direction, it would not have been the perfect solution to the problems articulated in this paper.

VIII. WHERE DATA PRIVACY PROTECTION LAWS CAN HELP DOMESTIC VIOLENCE SURVIVORS

Data privacy laws can reduce the risk of another *Remsburg*. While personal information can never be completely wiped from the internet, data privacy laws can provide an option for survivors to take back some of their information from their abusers. The majority of domestic violence survivors are women; thus, the majority of consumer data floating in the data market belongs to women. This reality is attributed to the higher likelihood for women to shop online and to voluntarily share information on social media or for frequent buyer programs.²⁰⁴ The GDPR and the CCPA present an opportunity to correct the gendered consequences of unregulated data collection and reduce the risk of danger to survivors whereby survivors would have a method to protect themselves by controlling their private information. While existing laws do not provide direct relief for survivors, they are small but valuable steps for a survivor to reclaim control of their life. Additionally, large penalties for businesses would likely

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Melissa Santos, *Why WA’s Data-Privacy Bill Might Not Go Far Enough*, CROSSCUT (Mar. 21, 2019), <https://crosscut.com/2019/03/why-was-data-privacy-bill-might-not-go-far-enough> [https://perma.cc/6KRE-AEPK].

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Bartow, *supra* note 126, at 642–43.

make lax data retention practices a thing of the past, including for a survivor's data. Data privacy laws can help domestic violence survivors by (1) shifting the burden to protect data to private businesses; (2) imposing high penalties for data privacy violations specific to survivors; (3) creating a private right of action against domestic violence; and (4) passing domestic violence-specific privacy laws.

A. Shift the Burden to Protect Data to Private Businesses

First, putting the onus on businesses to take care of consumer data can alleviate the burdens put on overworked and underfunded grassroots domestic violence advocacy organizations to protect a survivor's personal online information. Data privacy laws would not replace advocates from having to teach survivors best practices for staying safe online. However, the fear of having online personal data potentially fall into the hands of an abuser is reduced by knowing there is an additional protective layer and another partner who can protect a survivor's safety.

For example, if a survivor wants to create an online shopping account with a retailer, an advocate can advise them on how to create an account safely by providing the minimum amount of personal information or by providing an alternative email, contact information, and shipping address. If the retailer experiences a data breach, an advocate will need to work with the survivor to timely cancel their account and its associated credit card or email address and ensure that the survivor does not re-use the same information or credit card. Additionally, the advocate may need to teach the survivor to look for irregularities in their financial records on a regular basis, or unexpected packages that are mailed to their home address. While these steps are no different from what a normal consumer would do under similar circumstances, a survivor and their advocate must be extra vigilant about covering their data footprints because the stakes for them are higher. Data privacy laws can limit the amount and types of consumer data that retailers can hold and can incentivize retailers to create stronger barriers against data breaches. Therefore, by reducing the unnecessary flow of personal information and the risk of data breaches, data privacy laws can remove one less item for survivors and their advocates to focus their energy and anxieties on.

B. Impose High Penalties for Data Privacy Violation Specific to Survivors

Second, amendments to data privacy laws could impose a higher standard of care or penalties if a business knowingly collects data from

vulnerable people such as survivors of domestic violence. Future consumer data privacy laws could also include a separate procedure for how businesses treat and maintain data for vulnerable populations.

Alex Alben, Washington State's Chief Privacy Officer, notes that "victims of harassment and stalking need more overt policy and protection to prevent abuse of technologies that enable such behaviors."²⁰⁵ In addition, Washington law places additional obligations on survivors' landlords such as not discriminating on the basis of domestic violence status and keeping survivors' statuses and documents confidential, particularly if the survivor is required to show evidence of their status to the landlord. Similarly, if a survivor were to disclose their domestic violence status to a business during their request to access and/or delete their data, the business could be held to a higher standard to keep a survivor's status and general data confidential. If not, businesses would be subjected to a higher penalty or a private right of action, such as negligence – a cause of action landlords are subject to already. Such a scheme could work in Washington because its purpose is in line with the legislative intent to provide "the maximum protection from abuse which the law and those who enforce the law can provide."²⁰⁶

C. *Create a Private Right of Action Against Domestic Violence*

Third, data privacy laws can help domestic violence survivors because they create a private right of action against domestic violence. A private right of action for survivors can help shift the discourse on domestic violence away from the criminal justice system and towards alternative forms of relief, such as the tort regime. This shift can then lead to broader and more inclusive legal options for survivors to obtain meaningful relief that fits their circumstances.

1. Criminalization of Domestic Violence

Domestic violence has been treated primarily as a criminal matter ever since the feminist social movements in the 1970s protested against the lack of police intervention for violence in homes.²⁰⁷ Although civil protection orders were originally designed to be an alternative to criminal

²⁰⁵ Alex Alben, *Privacy, Freedom, and Technology – or “How Did We Get into This Mess?”*, 42 SEATTLE U. L. REV. 1043, 1055 (2019).

²⁰⁶ WASH. REV. CODE § 10.99.010 (1979).

²⁰⁷ SUK, *supra* note 44, at 13.

enforcement, violations of civil protection orders are still treated as a criminal offense.²⁰⁸ Additionally, uncooperative victims must be arrested together with their abuser under mandatory arrest laws.²⁰⁹ Relegating domestic violence remedies solely through the criminal justice system does not always work to protect victims.²¹⁰

The criminalization of domestic violence has failed to properly protect the majority of victims. One criticism is that the criminalization of domestic violence forces victims to interact with the criminal justice system against their will.²¹¹ This reality is particularly felt in jurisdictions that have mandatory arrest laws for domestic violence.²¹² Effectively, these laws take away a victim's autonomy and power to make decisions and gives it to law enforcement officers, prosecutors, and judges.²¹³ These laws also ignore the historic, social, and political differences in lived experiences between domestic violence survivors based on race, gender, sexual orientation, religion, immigration status, language proficiency, marital status, disability, etc.²¹⁴ The inability of the criminal justice system to acknowledge and incorporate these differences means the criminalization of domestic violence may actually put survivors' lives in greater danger.²¹⁵

Furthermore, a victim may not want their abuser to be criminally prosecuted. Some reasons include concerns about increased retaliation from their abusers, fear of getting arrested, fear of confronting their abuser in court, expenses in time and money to prosecute the abuser, the loss of a household income source, and, for some, the loss of a parent to their children.²¹⁶

Particularly, the experiences of non-white, non-affluent, and non-citizen victims make a strong argument for why the criminal justice system should not be the sole avenue available for domestic abuse.²¹⁷ The history

²⁰⁸ *Id.* at 15.

²⁰⁹ WASH. REV. CODE § 10.31.100 (2019).

²¹⁰ See SUK, *supra* note 44, at 16; see also KEITH GUZUK, *ARRESTING ABUSE: MANDATORY LEGAL INTERVENTIONS, POWER, AND INTIMATE ABUSERS* 9-10 (2009); GOODMARK, *supra* note 34, at 22.

²¹¹ GUZUK, *supra* note 210, at 9-10.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities*, 11 VIOLENCE AGAINST WOMEN 38, 55-56 (2005); Geneva Brown, *Ain't I A Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J.L. & GENDER 146, 167-69 (2012).

²¹⁵ GOODMARK, *supra* note 34, at 75.

²¹⁶ *Id.*

²¹⁷ *Id.* at 4.

of brutality and distrust with law enforcement amongst BIPOC²¹⁸ communities make victims of color less likely to contact or cooperate with the police, which could lead to the victim's own arrest.²¹⁹ Victims with non-white partners are also cognizant of the possibility that reporting the abuse would lead to putting another BIPOC individual in the prison system.²²⁰

Immigrant survivors have the added challenges of language and cultural barriers. These barriers prevent them from understanding the legal system, leaving toxic relationships due to cultural or community pressures, or knowing when and who to ask for help.²²¹ Undocumented immigrants also have to consider the risk of deportation and separation of their families if they come in contact with law enforcement and the legal system.²²² Therefore, maintaining the criminal justice system as the sole solution to domestic violence can reinforce and exacerbate the marginalization of survivors from system-impacted communities.²²³

2. Tort Action for Domestic Violence

An area of growing discussion for domestic violence relief is providing tort actions for domestic violence survivors. While *U.S. v. Morrison* constitutionally barred a federal civil right of action for gender violence, individual jurisdictions can still provide non-criminal solutions for domestic violence survivors. Civil tort suits can provide a form of relief such as monetary damages, declarative relief, or injunctions that can serve as an alternative to incarceration.²²⁴

There are several arguments for using the tort system as a remedy for domestic violence. These arguments include being able to provide survivors the following: a true alternative to the criminal justice system,²²⁵ increased control of the direction of the litigation,²²⁶ a lower standard of

²¹⁸ See Sandra E. Garcia, *Where Did BIPOC Come From?*, NY TIMES (June 17, 2020), <https://www.nytimes.com/article/what-is-bipoc.html> [<https://perma.cc/AEM2-ZKQJ>]. The term "BIPOC" (Black, Indigenous, and people of color) is used to acknowledge the unique racial experience of Black and Indigenous people in the United States, particularly with regards to the country's systemic history of policing and incarceration.

²¹⁹ *Id.* at 72.

²²⁰ *Id.* at 131.

²²¹ *Id.* at 75.

²²² *Id.*

²²³ *Id.*

²²⁴ Barbara J. Hart & Erika A. Sussman, *Civil Tort Suits and Economic Justice for Battered Women*, CTR FOR SURVIVOR AGENCY & JUSTICE, https://csaj.org/document-library/CivilTorts_EconomicJustice.pdf [<https://perma.cc/JE9K-PCWA>].

²²⁵ Camille Carey, *Domestic Violence Torts: Righting A Civil Wrong*, 62 U. KAN. L. REV. 695, 745 (2014).

²²⁶ *Id.* at 746–47.

proof for a wider range of injuries, which may result in litigation success;²²⁷ and a way to level the power dynamic between the survivor and the abuser and judicial officers.²²⁸

However, tort litigation as a solution for domestic violence has been criticized for its difficulties in measuring emotional and economic abuse. Furthermore, the expensive nature of tort suits excludes meaningful participation from low-income survivors.²²⁹ The majority of general tort suits are paid out through marital assets or insurance, which typically excludes coverage for domestic violence (often categorized as an “intentional tort”).²³⁰ In addition, many federally funded legal services that serve low-income clients are restricted from engaging in “fee generating” claims, which include tort suits for monetary damages.²³¹

California specifically provides a statutory “tort of domestic violence” against an abuser if (1) the plaintiff’s injuries resulted from abuse, and (2) the abuse was committed by someone in a relationship with the plaintiff.²³² Statutory recovery includes “general damages, special damages, and punitive damages” as well as “equitable relief, an injunction, costs, and any other relief that the court deems proper, including reasonable attorney’s fees.”²³³

3. Need for Broad and Diverse Legal Options for Survivors

Due to the criminal justice system’s failure to adequately address the complexities of domestic violence survivors, advocates and scholars have argued for a broader range of legal options that allows a survivor to decide what remedy works best for their situation.²³⁴ The lack of feasible legal options for survivors drives them to depend on domestic violence advocacy organizations for non-legal recourses such as safety plans to protect themselves.²³⁵ A growing number of survivors are turning to the civil system for legal remedies as seen in the development of domestic violence tort claims.²³⁶ While tort claims may not be a feasible or ideal option for

²²⁷ *Id.* at 747.

²²⁸ *Id.*

²²⁹ *Id.* 755–56.

²³⁰ *Id.* at 729.

²³¹ *Id.* at 732.

²³² CAL. CIV. CODE § 1708.6 (West, 2003).

²³³ Carey, *supra* note 225, at 716–17.

²³⁴ GOODMARK, *supra* note 34, at 151.

²³⁵ *Id.* (“Rates of violence against women have not dramatically declined since the inception of legal reforms; they have, instead, kept pace with the declining crime rate in the United States. The only group that is markedly safer as a result of 40 years of domestic violence and policy is men. Fewer men are being killed by their abused partners today, likely because other options, like shelter, social services, and legal services, are available to their partners.”)

²³⁶ *Id.* at 140.

all domestic violence survivors, they provide a meaningful option for those who can benefit from them as opposed to being automatically forced into the criminal justice system when their partner hurts them.²³⁷ Data privacy laws will similarly provide another remedy for individuals who want to, or need to, avoid the criminal justice system. Creative legal advocacy is necessary to address not just the unmet needs of complex and vulnerable populations, but to address technology-based abuse and the absence of government intervention to mitigate such abuse against intimate partners.²³⁸

D. *Pass Domestic Violence Specific Data Privacy Laws.*

Finally, if no additional remedies can be drawn from existing data privacy laws to protect survivors of domestic violence, another option is to create new domestic violence specific data privacy statutes. These laws will likely come out of states like Washington and California, which already have expansive domestic violence and tech-abuse statutes.²³⁹ Local policymakers can gain inspiration from the GDPR or the CCPA when crafting new domestic violence specific data privacy laws by using broad definitions of “data brokers” and “consumers” in order to expand the statute’s reach over protected and liable individuals.²⁴⁰ Survivors can hold a business responsible for damages rather than the abuser when an abuser misuses the survivor’s information as a result of the business’s actions. Many survivors are reluctant to bring legal action against their abusers due to the complexity of domestic violence cases. Perhaps survivors would be more persuaded to bring an action against a third party that enabled their abuse in order to be made whole or prevent such abuse from happening to another person.

IX. SAFETY PLANNING IN THE MODERN AGE

Even with the advent of stronger consumer data privacy laws, survivors still need to be vigilant about the information they send online, whether it be posting on social media, sending emails, or signing up for frequent buyer programs. A technology-centered safety plan is a necessity because online information can be abused not just by private companies

²³⁷ Carey, *supra* note 225, at 717.

²³⁸ GOODMARK, *supra* note 34, at 154.

²³⁹ See Santos, *WA Gun Laws*, *supra* note 54; Kristian J. Berhost, *California Is A Model State for Domestic Violence Prevention and Gun Laws*, FAMILY JUSTICE CTR. ALLIANCE (Mar. 8, 2017), <https://www.familyjusticecenter.org/california-model-state-domestic-violence-prevention-gun-laws/> [<https://perma.cc/L3BV-MJXM>].

²⁴⁰ MULLIGAN & LINEBAUGH, *supra* note 163, at 38.

but by an intimate partner.²⁴¹ Advocates should prepare a tech-centered safety plan with a survivor as an additional safety plan or incorporate technology-based tips into a survivor's current safety plans. For example, advocates can encourage pregnant survivors to consider buying traditional manual baby monitors rather than monitors that can stream over cell phones or laptops.

Unfortunately, the burden continues to be on domestic violence advocacy organizations to educate and counsel survivors on how to protect their electronic information on top of traditional safety planning guidance. The passage and implementation of the GDPR and CCPA as well as the growing number of proposed state and municipal data privacy legislations may bring with it greater awareness and education to the public on data privacy management. For example, businesses that work with consumer data may need to provide staff trainings on data privacy management. Similar to how increased financial literacy skills can help survivors of domestic violence eliminate dependency and recognize signs of abuse,²⁴² it can be theorized that increased technology literacy skills can help survivors achieve similar goals. If a socially accepted data privacy management system becomes more widespread, less pressure is placed on domestic violence advocates to teach survivors about data privacy management.²⁴³

Furthermore, domestic violence advocates should educate themselves about the types of technology that are available so that they can teach survivors who may not be as technologically aware about managing tech-related abuse. For example, advocates should be able to teach survivors how to save and delete emails and text messages, and how to save screenshots from their phones and computers. Additionally, advocates should be aware of and be able to teach survivors how to carefully use money application such as Venmo, Cash App, or Apple Wallet. Advocates working with cross-national survivors should also be aware of culturally specific apps such as WeChat for Chinese speakers or Kakao for Korean speakers.

²⁴¹ Lee & Anderson, *supra* note 115, at 30 (“[A] lot of personal information is shared online that is out of [a survivor’s] control.”) Domestic violence advocates have asserted that abusers can stalk their partners with their social media accounts as well as with a shared child’s own social media accounts. *Id.*

²⁴² Laura Bradley, *Study: Financial Literacy Can Help Abused Women*, USA TODAY (July 24, 2014, 4:40 PM), <https://www.usatoday.com/story/news/nation/2014/07/24/financial-literacy-training-abused-women/13116295/> [<https://perma.cc/2W6A-G43Y>].

²⁴³ Jerry Finn & Teresa Atkinson, *Promoting the Safe and Strategic Use of Technology for Victims of Intimate Partner Violence: Evaluation of the Technology Safety Project*, 24 J. FAMILY VIOLENCE 53, 58 (2009).

X. CONCLUSION

Technology-based abuse is a prevalent form of intimate partner abuse, alongside physical, sexual, psychological, emotional, and economic abuse. The ubiquity of technology usage in everyday life makes the risk of technology-based abuse from intimate partners more common. The lack of laws and regulations to adequately address and prevent technology-based abuse makes it harder to contain and increases the risk of danger to victims. One source of technology-based abuse comes from an abuser getting access to their partner's online data, either through an online search, purchasing data, or if they're lucky, from a data breach.

Access to a partner's online information allows an abuser to easily track down and harm their partner, both physically and virtually. Where the law is unable to protect or provide immediate relief to survivors, domestic violence advocates attempt to fill in the gaps, specifically through safety planning. The lack of regulations and their enforcement over new technology and its abusive use puts a heavy burden on domestic violence advocates to protect the survivor from technology-based abuse from their partner.

The implementation of consumer data privacy laws can provide some relief to victims of technology-based abuse, especially for data-driven abuse. Not only can consumer data privacy laws allow a survivor to control and protect their own data from ending up in the hands of their abusers, but they can also allow a survivor to bring a cause of action against a business instead of being forced to criminally prosecute their abuser. The change in the public's understanding of data privacy will also implore more people to be educated and trained in best practices of data privacy management. A greater public acceptance on best practices and knowledge of online technology lessens the burden on domestic violence advocates to educate survivors on technology literacy and protecting their personal information. In addition, new domestic violence laws can draw inspiration and form strategies from current data privacy laws in how they define certain terms to provide the greatest amount of protection for survivors. As shown through the lens of data privacy, the complexity of domestic violence calls for creative solutions in all areas of the law in order to provide meaningful relief.