INTIMATE PARTNER VIOLENCE AND THE STATE'S PROBLEMATIC MASCULINE RESPONSE

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[*] Second year law student at the University of Mississippi. I am grateful to Professor Yvette Butler for being my sounding board, challenging me, offering advice, and supporting me through the direction of this Article. Additionally, I am thankful for Melissa Baker, my supervising attorney at the Law Office of the Shelby County Public Defender, for guiding me as I learned how to be a zealous advocate as a public defender. I acknowledge that I am writing about Intimate Partner Violence ("IPV") as a white, cis-gendered male, and it is limited to my own experiences and research. My intention with this Article is to address the seriousness of IPV with a solution that works to protect victims and holds perpetrators accountable using alternative methods, most notably by subscribing to the tenets of anti-carceral feminism. There is much written about anti-carceral feminism; this Article focuses less on adding scholarship to that particular field and more on how the Fourteenth and Eighth Amendments require the State to respond to IPV in a way outside of incarceration alone. Anti-carceral feminism, by definition, pushes for no incarceration. Mississippi is highly unlikely to subscribe to this—understandably so—so I take pieces of the theory and apply it people already incarcerated. Anti-carceral feminism is the end, but I propose using the Fourteenth and Eighth Amendments as the vehicles to get there.

INTRODUCTION

In July 2003, around 8:30 p.m., Laurel Police Officers were dispatched to Lisa Williams's residence regarding a domestic dispute with Kenneth Wilson.[1] The officers quickly arrived on scene and began investigating. Wilson admitted to "tussl[ing]" with Williams, and the officer "noticed a nick on" Wilson's knuckle, an abrasion Wilson described as a likely work injury.[2] Additionally, officers interviewed a witness that told police she "heard a lot of bumping" in the next room and that she saw Wilson was "on top of Williams" in a struggle.[3] The judicial opinion mentions nothing of Williams's field interview with officers.

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[1] City of Laurel v. Williams, 21 So. 3d 1170, 1173, 1182 (Miss. 2009).
[2] *Id.* at 1173.
[3] *Id.*

After investigating, the responding officers decided probable cause existed to arrest both Williams and Wilson.[4] Neither party wanted to press charges against the other, and Wilson agreed to leave the residence and go to Annie Walker's house, who was Lisa Williams's mother. Wilson informed officers that he went to Walker's house when he and Williams got into fights, indicating this had happened numerous times before.[5]

Approximately an hour later, around 10:00 p.m., officers were dispatched to Walker's house for another alleged domestic dispute involving Wilson.[6] When officers arrived at Walker's residence, Wilson was outside and presented as "calm, cool [and] cooperative"; Walker described him as "very intoxicated."[7] Walker indicated she wanted Wilson arrested for trespassing, but officers informed Wilson he could either go to jail or get his mother to come pick him up. Officers placed Wilson in handcuffs and drove him to the jail, where his mother picked him up within the hour.[8]

At around 11:15 p.m., police were called back to Williams's house, and upon arrival, police saw Wilson standing over Williams with a bloody knife; Williams subsequently succumbed to her stab injuries at the hospital.[9] Williams's family sued the City of Laurel ("the city"), claiming the city was liable for Williams's death by failing to arrest Wilson on two separate occasions prior to the murder. The court held that the officers did not act with reckless disregard for the safety of Lisa Williams, and neither the city nor the officers were liable for Williams's death.[10]

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[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* The same officer also acknowledged that Wilson could not drive because he was too drunk. *See id.* at 1183. Additionally, the officer recognized Wilson from a previous domestic call, and combined with the fact that Wilson was too drunk to drive, this suggested a potentially volatile situation. *Id.* at 1182.

[8] *Id.* at 1173-74.

[9] *Id.* at 1174.

[10] *Id.* at 1176. *See also* Fair v. Town of Friars Point, 930 So. 2d 467, 472 (Miss. Ct. App. 2006) (holding that the town did not act with reckless disregard in releasing boyfriend from custody and was not liable when he murdered his girlfriend); Collins v. Tallahatchie Cnty., 876 So. 2d 284, 288 (Miss. 2004) (holding that police failing to arrest a man before he shot his wife, after wife reported his violent behavior to police multiple times, did not rise to the level of "reckless disregard" but simply negligence).

Another tragic case involving intimate partner violence ("IPV") arose out of Colorado and involved a woman named Jessica Gonzales. Gonzales and her three daughters were granted a restraining order against Gonzales's estranged husband, and one day, he took the children from the yard as they were playing outside.[11] She contacted the local police department, who sent two officers to the residence, but they informed her there was nothing they could do about the restraining order. The officers advised her to give the husband some time to return the children.[12] For several hours, Gonzales implored the police on at least three separate occasions to locate her estranged husband and children, but the department continued advising her to wait. Six hours after learning of the children's disappearance, the husband arrived at the police station and began a shootout with police, where he was shot and killed. Police then discovered the bodies of all three children in the husband's pickup truck, where he had murdered them before initiating the shootout.[13] The court held that Gonzales had no constitutionally protected property interest in the restraining order; therefore, the police department had no mandatory duty to implement it. They insinuated that Colorado state law should be rewritten to hold police departments accountable instead of using the Fourteenth Amendment Due Process Clause.[14]

Time and again, the State fails to hold perpetrators of IPV accountable and because of this, the State is maintaining a danger in intimate relationships in which violence is occurring. It has become a war of attrition, where neither the perpetrator nor the victim benefit long-term, and both sides remain in a cycle of violence. The State is failing to adequately respond to this specialized violence, and because of this, they are responsible for any ensuing violence that occurs between partners.

Part I of this Article provides a brief historical overview of IPV, as well as the current States' responses to the crisis. Part II provides an overview of masculinity and how this concept has been

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[11] Town of Castle Rock v. Gonzales, 545 U.S. 748, 752-53 (2005).

[12] *Id.* at 753.

[13] *Id.* at 753-54.

[14] *Id.* at 768-69. This lack of action fits Justice Blackmun's interpretation of the "arbitrary action" the Due Process Clause should protect against. *See* Davidson v. Cannon, 474 U.S. 344, 354 (1986) (Blackmun, J., dissenting).

used to ineffectively respond to incidents of IPV. Part III covers how 42 U.S.C. § 1983 can hold the State liable for this response using the Fourteenth Amendment theories of special relationship and state-created danger, as well as the Eighth Amendment's deliberate indifference standard. Lastly, Part IV revisits masculinity and considers how it has been harmful on both a micro and macro level, to the detriment of victims and perpetrators. Additionally, Part IV suggests an alternate response to the crisis—anti-carceral feminism—and how this concept could be the right vessel to support the legality of special relationship, state-created danger, and deliberate indifference in responding to IPV more effectively.[15]

I. INTIMATE PARTNER VIOLENCE

Domestic disputes are nothing new. It has, however, only recently been recognized as a matter serious enough for arrest. In fact, many police departments in the 1970s and 80s were taught that IPV was a private affair, and many officers avoided arrests using a variety of tactics, such as delaying arrival or ignoring domestic violence calls altogether.[16] Some police departments taught officers that arrests in domestic assault calls would make things worse and that officers should therefore avoid arrest, instead encouraging the parties to reason with one another.[17] It became clear, though, that what was occurring was assault and battery; the only difference being the relationship between the parties. It was after cities began losing lawsuits after deaths and serious injuries of victims that police departments shifted their thinking regarding IPV calls and began arresting alleged batterers more often.[18]

This change in approach shifted from thinking IPV is a private matter to a public one, and the legislature followed suit. Two of the most common statutory enactments were "laws allowing victims to obtain protective orders against abusers" and "laws providing aid

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[15] This Article is limited to an analysis of the State's response to perpetrators of IPV who have been incarcerated as a result of their conviction. It could also be extended to convicted perpetrators on probation.

[16] Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992).

[17] *Id.* at 48.

[18] Nancy James, *Domestic Violence: A History of Arrest Policies and A Survey of Modern Laws*, 28 FAM. L.Q. 509, 513 (1994).

to support[] services," like shelters.[19] Congress passed the Violence Against Women Act ("VAWA") in 1994, one of the first large scale federal acknowledgments of the issue of IPV.[20] Mandated arrest policies began popping up around the country, allowing officers to arrest aggressors in domestic disputes with or without a warrant.[21] Along with a systems change, the public became more aware of the issue of IPV through articles that highlighted its seriousness and need for increased awareness and attention.[22] Even the Memphis Grizzlies, an NBA team, collaborated with NO MORE, a national organization dedicated to ending domestic violence and sexual assault by increasing awareness, inspiring action, and fueling culture change.[23]

The campaigns and a shift in awareness and policies may have had a slight effect: IPV has slightly decreased.[24] However, it is still a major problem facing the country. In fact, 21% of all violent crime in the United States is nonfatal IPV.[25] "More than 1 in 3 women (35.6%) and more than 1 in 4 men (28.5%) in the [U.S.] have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime."[26] A Washington state study found that perpetrators of IPV are at a high risk to reoffend for violent crimes, including recommitting domestic assaults.[27] The 1980s boasted arrest as the most effective method of reducing domestic violence, but it has become clear that this is not the case.[28] Even so, the State

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[19] Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 152-53 (1990).

[20] 42 U.S.C. § 13981 (2000) (current version at 34 U.S.C. § 12291), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

[21] MISS. CODE. ANN. § 99-3-7 (3)(a) (2023).

[22] *See generally* Nancy Gibbs, *'Til Death Do Us Part*, TIME, Jan. 11, 1993, at 38, https://content.time.com/time/subscriber/article/0,33009,977464,00.html [https://perma.cc/8WWP-66NY].

[23] *Memphis Grizzlies Join 'Memphis Says NO MORE'*, (Apr. 1, 2016, 7:00 PM), https://nomore.org/events/memphis-grizzlies-join-memphis-says-no-more-campaign/ [https://perma.cc/V83C-QW94].

[24] U.S. DEP'T OF JUST., NONFATAL DOMESTIC VIOLENCE, 2003-2012, at 4 (2014).

[25] *Id*.

[26] NAT'L CTR. FOR INJ. PREVENTION & CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 2 (2010).

[27] WASH. STATE INST. FOR PUB. POL'Y, RECIDIVISM TRENDS OF DOMESTIC VIOLENCE OFFENDERS IN WASHINGTON STATE 4 (2013) [hereinafter RECIDIVISM TRENDS].

[28] James, s*upra* note 18, at 513.

has continued to criminalize IPV in the same way, while also trying to address it through legislation.

A. Criminalization and Intimate Partner Violence

Criminalization and incarceration is the preferred method of responding to IPV. Scholars analyzing the criminalization response to crimes have identified four things to consider together when addressing criminalizing behavior. One, only acts with "the potential to cause harm should be criminalized."[29] Two, to effectively criminalize something, evidence must exist "that criminalization will deter the harmful behavior."[30] Three, criminalization must not do more harm than good.[31] Lastly, criminalization should occur only when less intrusive alternatives for prevention do not exist.[32] These provide a basis for considering when and how to criminalize a behavior. These theories are applicable to IPV, as well as violent crime more generally.[33]

When criminalizing IPV, legislators must consider these four factors. It is clear that violence between partners has the potential to cause harm, so the first factor is easily met. In many cases, once the State becomes involved, the harm has already occurred or has even happened several times before. However, it gets more nuanced with the last three factors. If criminalizing IPV with incarceration alone was working as intended, more than a slight overall decrease in IPV should be occurring. Deterrence is frequently cited as a foundational reason for incarceration, but incarceration is doing little to deter crime as a whole.[34] Drops in recidivism from reoffenders should also be apparent, but that is not the case;[35] in fact, recidivism data suggests that incarceration alone may actually

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[29] LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE 23 (2018).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *See id.*

[34] *See* THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 2 (2019) (Data suggesting that the increase in the prison population is not an increase in crime but a change in law and policy).

[35] RECIDIVISM TRENDS, *supra* note 27, at 5-6.

increase it.[36] It seems then that in some ways, incarcerating people for IPV may actually do more harm than good.

Outside of the general anti-carceral movement and the overbroad response to IPV, arrests for IPV can be problematic for less obvious reasons. Mandatory arrest policies have increased incarceration rates for people subjected to abuse.[37] Since aggression is the key to an arrest, if both people have been aggressive at some point in the encounter, both parties can be arrested.[38] This is true even for victims in situations of self-defense.[39] Because of this, in cases such as *Williams*, Lisa Williams met the statutory requirements of a perpetrator of IPV even though she was the one subjected to abuse.

Additionally, mandatory arrest policies shift any power the individual has over their life to the State, regardless of the victim's desires on how to handle the case, resulting in a reduction of IPV calls to police.[40] People subjected to abuse can feel disempowered when the State intervenes, especially when they lose control over what happens with the case. Professor Aya Gruber describes the nuances of IPV using her experience as a public defender in Domestic Violence Court:

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[36] Stacy M. Sechrist & John D. Weil, *Assessing the Impact of a Focused Deterrence Strategy to Combat Intimate Partner Domestic Violence*, 24 VIOLENCE AGAINST WOMEN 243, 245-46 (2018).

[37] GOODMARK, *supra* note 29, at 19.

[38] *Id.*; *see also* MISS. CODE ANN. § 99-3-7(3)(b) (2023).

[39] *See* City of Laurel v. Williams, 21 So. 3d 1170, 1185-86 (Miss. 2009).

[40] GOODMARK, *supra* note 29, at 20.

> Not only did I see the rampant destruction of domestic relations, entrenchment of economic disempowerment, and mass incarceration of minority men, but I also saw distinctly anti-female ideologies at work. I observed government actors systematically ignore women's desires to stay out of court, express disdain for ambivalent victims, and even infantilize victims to justify mandatory policies while simultaneously prosecuting the victims in other contexts. It seemed to me that feminist criminal law reform had become less about critiquing the state and society's treatment of women and more about allying with police power to find newer and better ways of putting men, who themselves often occupy subordinate statuses, in jail.[41]

As Gruber illustrates, there are many moving parts to IPV and many different issues to consider, and involving the criminal legal system can sometimes prove that it's ill-equipped to deal with the nuances and complexities of domestic disputes. Take X, an eighteen-year-old client who was charged with simple domestic assault. She admitted to assaulting her boyfriend after he failed to disclose that he had HIV and had infected her with it. Or Y, a man who, along with his wife, decided to take a vacation a day after a heartbreaking loss of their monochorionic-monoamniotic twins.[42] Still both reeling from the loss of their children, an argument ensued, and he rushed out and slammed the door, breaking it off the hinges. He was charged later that night with simple domestic assault. Or Z, a single mother of two whose two-year-old child continuously had seizures, reached her breaking point after losing her job and assaulted the child's father after years of unpaid child support.[43] The iron hand of justice—through arrest and incarceration—is simply not a clean fit for many of the domestic assault cases that come through the system. Studies show that

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[41] Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER RACE & JUST. 583, 583-84 (2012) (footnotes omitted).

[42] Monochorionic-monoamniotic ("Mo/Mo") twins are fetuses that share the same amniotic sac. For more on Mo/Mo twins, see Catherine Crider, *Mo/Mo Twins: Definition, Risks, and More*, HEALTHLINE (Oct. 14, 2020), https://www.healthline.com/health/pregnancy/momo-twins#what-they-are [https://perma.cc/7EHG-G25H].

[43] These are a few examples I encountered in General Sessions Court (Domestic Violence Court) in Memphis, TN as an intern.

mandatory arrest has no effect on future IPV, so a different response is necessary.[44]

B. Legislation and Intimate Partner Violence

Along with criminalization, legislation has worked to address issues of IPV, but it too has had little impact in curbing it. VAWA was a part of a larger crime control bill, the Violent Crime Control and Law Enforcement Act of 1994.[45] The Act later established a Commission with the general responsibility of crime control.[46] Regarding violence against women specifically, the Commission's responsibilities included (1) "evaluating the adequacy of" all levels of law enforcement "to reduce the incidence of such crimes"; (2) punishing those responsible for domestic violence crimes against women; (3) "making recommendations regarding the responsiveness of prosecutors"; (4) "ensur[ing] the effective prosecution and conviction of [offenders]"; and (5) considering "the need for a more uniform statutory response" to IPV.[47] Importantly, VAWA included provisions on rape and battering that focused on prevention, allocated more funding for victim services, recognized orders of protection across state lines, and provided a civil rights remedy for "victims of gender-based violence to sue their attackers."[48]

The results of VAWA have been mixed. On one hand, it brought millions of dollars into the anti-violence movement.[49] It helped substantiate and justify the pleas of millions of women (and more modernly, all victims of abuse)[50] across the country to take

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[44] WASH. STATE INST. FOR PUB. POL'Y, MANDATORY ARREST FOR DOMESTIC VIOLENCE: A SYSTEMATIC REVIEW 8 (2022).

[45] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat 1796 (1994).

[46] 42 U.S.C. § 14194(b)(1)-(7).

[47] *Id.* at § 14194(e)(1)-(3), (5).

[48] *History of VAWA*, LEGAL MOMENTUM, https://www.legalmomentum.org/history-vawa [https://perma.cc/GRJ7-AAPV]. The civil rights remedy was later overturned. *See* United States v. Morrison, 529 U.S. 598, 626-27 (2000).

[49] GOODMARK, *supra* note 29, at 30.

[50] This reflects the modern view that IPV is not limited to heterosexual relationships and it is not perpetrated by cis-men alone. The discussion of IPV in this Article is not limited to cis-men in heterosexual relationships, and masculinity is not applicable to cis-men only; it is a social construct subscribed to by people of all sexualities and genders. *See* Ronald F. Levant et al., *Evaluation of the Factor Structure and Construct Validity of*

the issue of IPV more seriously. It provided shelters, hotlines, a sense of protection and allyship, and an avenue to hold offenders accountable.[51] It also provided immediate safety to survivors of abuse through the incarceration of the offender.[52] It established the Office of Justice ("OJP"), a major source of victim support. One such program is the Office for Victims of Crime ("OVC"), devoted to researching and supporting programming designed to assist victims of crime.[53] The OVC supports victim service programs in a variety of ways, including training and technical assistance, helping build capacity for victim assistance organizations,[54] and a searchable database of victims' rights.[55]

On the other hand, the millions of dollars funneled into the response to IPV through VAWA has shifted over the years, perhaps to the detriment of victims. In 1994, 62% of VAWA funds were dedicated to the criminal legal system; the other 38% went to social services.[56] In 2013, the amount allocated to social services plummeted to 15%, resulting in millions more dollars for prosecutors and police departments.[57] This would not be as alarming had IPV decreased, but the opposite is true. The State, at the very least, has managed to maintain the danger of IPV.[58] By shifting money away from social services to prosecutors and police departments, victims are seeing a heightened States' response to perpetrators, a response proven to minimally decrease acts of violence against them.[59] This draws attention away from victims' overall well-being, and by default, no one is benefitting.

Scores on the Male Role Norms Inventory–Revised (MRNI-R), 11 PSYCH. OF MEN & MASCULINITY 25, 29 (2010).

[51] GOODMARK, *supra* note 329, at 30.

[52] *Id.*

[53] *See generally Achieving Excellence: Model Standards for Serving Victims & Survivors of Crime*, OFF. JUST. PROGRAMS, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/model-standards/6/index.html [https://perma.cc/2KMV-PD2U].

[54] *See generally Office for Victims of Crime Training and Technical Assistance Center*, OFF. OF JUST. PROGRAMS, https://www.ovcttac.gov [https://perma.cc/ETZ7-LC6R].

[55] *See generally VictimLaw*, OFF. JUST. PROGRAMS, https://victimlaw.org/victimlaw/ [https://perma.cc/J5FT-VW3P].

[56] GOODMARK, *supra* note 29, at 2-3.

[57] *Id.*

[58] *See infra* note 105.

[59] GOODMARK, *supra* note 29, at 2-3.

The increase in power to the State has also resulted in a disproportionate number of people of color being arrested for IPV. Between 2003-2012, non-Hispanic blacks and non-Hispanic persons of two or more races report the highest rate of IPV.[60] Additionally, women marginalized by their identities, such as women of color, immigrants, or trans women, face additional problems from the police and incarceration response.[61] In situations of IPV, women in one or more of these marginalized categories are more likely to be subject to the "dual arrest[]" policy because they do not fit the preconceived notion of abuse victims.[62] Their actions may be interpreted by officers as being "aggressive," and they are less likely to be able to use self-defense as a justification for a violent act.[63] Thus, these women are even less likely to have the law on their side, highlighting the ambivalence innate in the State's response to IPV. In 2013 alone, over 210,000 women were incarcerated, and a majority of those women were subjected to abuse prior to arrest.[64] If VAWA was intended to decrease IPV and support people subjected to abuse, it has had minimal impact in doing so. So then, failing to arrest perpetrators is dangerous, but incarcerating them with no other support is equally as ineffective.

II. MASCULINITY

Masculinity is a concept that has always existed. Its earliest iterations were commonly defined as a protective characteristic, one that has allowed for humanity's survival through time. As society progresses, though, the need for protection by a stereotypical male is not as necessary as it once may have been. With the advancement of technology, ideals, and culture, masculinity has faced scrutiny for its patronizing undertones and lack of necessity for today's more inclusive society. Even though the need for a more protective

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[60] NONFATAL DOMESTIC VIOLENCE, *supra* note 24, at 11. This data is based on a self-reporting survey, The National Crime Victimization Survey.

[61] Victoria Law, *Against Carceral Feminism*, JACOBIN https://jacobin.com/2014/10/against-carceral-feminism/ [https://perma.cc/7BQJ-D8JF] (last visited Apr. 17, 2023).

[62] *Id.*

[63] *Id.*; *see also* Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 Emory L.J. 665, 670 (2001).

[64] Law, *supra* note 61.

version of masculinity may be less relevant today, its lingering effects continue to dominate norms held by society.[65]

Masculinity is generally understood as being emotionally restrictive, having self-reliance through mechanical skills, negativity toward sexual minorities, avoidance of femininity, importance of sex, being dominant, and showing toughness.[66] Additionally, traditional masculinity shows lack of empathy and many times fails to take responsibility by shifting blame to other people. These characteristics are learned by people of all genders from an early age, and this construct helps sustain privileged men's dominance over other people in a patriarchal society.[67] Masculinity continues to shape many aspects of our culture, and IPV is one of those things affected by it, both in terms of its perpetrators and the State's stance on how to hold the perpetrators accountable.

A. Mississippi's Problematic Masculine Response to Intimate Partner Violence

The State's main solution regarding accountability of perpetrators of IPV, as highlighted above, has been through incarceration. Carceral minded people find it important to arrest people and send them to prison, placing a value on a form of reciprocal justice. Placing perpetrators of IPV in prison is in many ways similar to the concept of hegemonic masculinity, a social hierarchy learned early on at school.[68] This hierarchy values authority, power, and dominance, and the most rewarded aspects of this form of masculinity are being economically successful, racially superior, and visibly heterosexual.[69] The norms young

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[65] Ronald F. Levant et al., *Measurement Invariance and Comparison of Mean Scores by Age Cohort of Two Versions of the Male Role Norms Inventory*, 25 MEN & MASCULINITIES 438, 439 (2022) ("[M]asculinity ideologies may also change over time but mostly reflect the attitudes and values of the privileged men of a certain era." (citation omitted)).

[66] *See generally Male Role Norms Inventory – Revised (MRNI-R)*, EMERGE, https://emerge.ucsd.edu/r_ahdu4epclngxf7x/ [https://perma.cc/8MMF-7WBS]. This Article will use these masculine norms throughout as guidance for the carceral response to IPV.

[67] Levant et al., *supra* note 65, at 439.

[68] *See generally* Nicole L. Rosen & Stacey Nofziger, *Boys, Bullying, and Gender Roles: How Hegemonic Masculinity Shapes Bullying Behavior*, 36 GENDER ISSUES 295 (2019).

[69] *Id.* at 297.

people learn at school shape the way they view the world, and the social order developed at school has carried over into the world, particularly in the criminal legal system.

The power associated with hegemonic masculinity practiced at school closely resembles the process of the criminal legal system and incarceration: lower income individuals, with little social or political power, are arrested and incarcerated by people who sit much higher on the social ladder. A study on adolescent bullying at school saw key themes emerge regarding hegemonic masculinity: physical dominance, intimidation, and the acceptance and normalization of violence—all themes easily applicable to the foundation and maintenance of the carceral movement.[70] The school-to-prison pipeline may involve more than just individuals—it appears the criminal institution itself has been modeled after the pecking order students learn as young children. Choosing to respond to IPV in a masculine way reinforces a harmful social construct that places value on the lives of only a few, while maintaining control of many.[71] This response is problematic because it does not address the root causes of violence, resulting in a high recidivism rate for perpetrators of IPV.

Mississippi believes control and accountability for violent offenders can only be achieved through imprisonment, or it shows weakness, so the use of force is a necessary response. It values the oversimplification of a perpetrator's decision-making—make better decisions and avoid jailtime.[72] Masculinity criticizes a person's decision-making in situations in which, as an outsider, they have no real connection. This, in turn, decreases a person's (or the State's) empathic ability, which ironically, is the same driving force behind violent behavior: lack of empathy.[73] Lack of empathy is a necessary component of masculinity because masculinity is "essentially a social performance that is all about getting to the top of the power pyramid – and then fighting the competition to stay there, because having achieved the pinnacle, you have to defend

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[70] *Id.* at 308-12.

[71] *See* Gruber, *supra* note 41, at 591.

[72] Farmer v. Brennan, 511 U.S. 825, 834 (1994).

[73] *See* Nancy Eisenberg et al., *Empathy-Related Responding: Associations with Prosocial Behavior, Aggression, and Intergroup Relations*, 143 SOC. ISSUES POL'Y REV. 143, 159-60 (2010).

it."[74] To maintain control, refusing to empathize with others is imperative, so failing to understand the *why* behind a perpetrator's violent proclivities and instead placing them in prison is necessary to maintain order in the hierarchy. This same pecking order found in schools and the criminal legal system is also a major part of prison life, so placing a perpetrator of IPV in prison fails to address the cycle of violence that got them there in the first place. The likelihood of violent offenders leaving prison rehabilitated is almost zero, and much of it is because Mississippi is placing them in a similar situation and expecting a different result.

Many judicial decisions, including those in Mississippi and the Fifth Circuit, embody a major characteristic of masculinity—namely, emotional restrictiveness. This is clear in decisions like *DeShaney*, *Gonzales*, and *Piotrowski*, all of which are covered in more detail below. Each of these tragic cases begins and ends with a similar sentiment: The facts in this case are undeniably tragic, but we cannot conclude the State should be held responsible in protecting these victims from private violence.

The emotionally restrictive State response extends to victim care as well. VAWA created victim support groups to teach victims how to spot and identify coercive behavior and place the burden on the *victims* to end violence, while providing no rehabilitation for the offender to change their habits or alter their own decision-making. Therefore, masculine responses to IPV are fueling a resistance to truly help victims and offenders. The State says they care about preventing and responding to violence, but they are taking no responsibility for it.[75] State protections are illusory; the offender receives no attempt at rehabilitation and the victim has temporary protection for only a short time. Mississippi and the Fifth Circuit have an opportunity to rehabilitate perpetrators of IPV because of the special relationship mandated by the Fourteenth Amendment, but they are missing countless opportunities to do so.

It is important to note that highlighting discrepancies and issues with the criminalization and legislative response is not to say

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[74] Catherine Jackson, *The Big Issue: Sometimes It's Hard to Be a Man*, THERAPY TODAY, July–Aug. 2021, at 22, 23, https://www.bacp.co.uk/bacp-journals/therapy-today/2021/julyaugust-2021/the-big-issue [https://perma.cc/QL4Q-DHL7].

[75] The Fifth Circuit's apprehension of accepting the state-created danger doctrine illustrates this. *See* Leffall v. Dall. Indep. Sch. Dist., 28 F.3d 521, 530-31 (5th Cir. 1994).

that IPV should instead be tolerated or dismissed as impossible to stop. This is a crisis that certainly deserves a response and our attention. When considering the punishment of the perpetrator, arresting, prosecuting and incarcerating them are all rooted in *accountability*. Regarding the victim, the criminalization and legislative responses are rooted in how to *care* for that individual. It is imperative then to define these terms—accountability and care—in order to reach everyone's ultimate goal: ending IPV.[76] Providing accountability for perpetrators and care for victims is still possible through incarceration, but it will require a paradigm shift in how to do so. There are legal doctrines stemming from the Fourteenth and Eighth Amendments that mandate rehabilitation. These doctrines provide a legal avenue to provide better care and protection for victims of IPV by addressing the perpetrators' violence in a meaningful way.

III. STATE LIABILITY AND INTIMATE PARTNER VIOLENCE

A. § 1983

42 U.S.C. § 1983 provides a federal cause of action by individuals against government officials acting under color of state law who have, by some action, deprived them of federally guaranteed constitutional rights. It is rooted in accountability, and it is used to rectify government misconduct and supply a remedy to the aggrieved party. "To state a claim under § 1983, a plaintiff must [(1)] allege the violation of a right secured by the Constitution and laws of the United States, and (2) [demonstrate] that the alleged deprivation was committed by a person acting under color of state law."[77] Governmental liability is established when it is found that an alleged deprivation of a constitutional right is the result of some policy or custom maintained by the entity. § 1983 is the vehicle that plaintiffs use to sue governmental entities using the Fourth, Eighth, and Fourteenth Amendments.

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[76] This Article is limited to the legal context and is not presented as the sole solution to the crisis. It is but one part of a larger issue, and one that, when working with other systems' changes, can produce a positive result for everyone: victims, perpetrators, their families, their communities, and other invested individuals.

[77] West v. Atkins, 487 U.S. 42, 48 (1988) (first citing Parratt v. Taylor, 451 U.S. 527, 535 (1981); and then citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978)).

§ 1983 is one possible method to secure rehabilitation for perpetrators of IPV. The criminal legal system, from law enforcement to judges to prison officials, is failing to prevent perpetrators from re-offending, as well as victims from facing future violence from their partners. The entire process of incarceration *is* an attempt to protect victims, so the State is acknowledging that a threat to victims exists. The State controls every part of the process concerning inmates, but IPV is still occurring at an alarming rate. What is the State really doing if nothing is changing? At the very least, they are maintaining a danger for victims, which is a problematic result of the State's action. This is why using § 1983, with a focus on the Fourteenth and Eighth Amendments, for mandated perpetrator rehabilitation is the next logical step in securing perpetrator accountability.

B. Fourteenth Amendment and Due Process

Section one of the Fourteenth Amendment of the Constitution reads in part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[78] The Fourteenth Amendment's Due Process Clause is not limited to procedure; it has been interpreted to include a substantive component. Substantive due process generally protects individuals from government actions that deprive them of rights that may not be explicitly provided by the Constitution but are instead "implicit in the concept of ordered liberty."[79] These rights have been read into the Constitution to protect people's rights.[80]

1. The Fourteenth Amendment, Private Violence, and *DeShaney*

The Due Process Clause has been interpreted to protect individuals from the government, but it has not been read to protect them from private actors.[81] The case developing this rule involved child abuse and the Department of Social Services ("DSS"). Joshua

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[78] U.S. CONST. amend. XIV, § 1.

[79] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[80] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[81] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).

DeShaney, the four-year-old child of Randy DeShaney, was allegedly being abused by Mr. DeShaney. DSS received at least four calls detailing the abuse allegations, three of which occurred after Joshua was hospitalized for "suspicious injuries," including multiple bruises and abrasions.[82] Caseworkers for DSS suspected the abuse was continuing but continued to conclude that there was no basis for action but "dutifully recorded these incidents in [their] files."[83] Despite all the evidence pointing to the need for State intervention, DSS never removed Joshua from the home, and eventually, Mr. DeShaney beat Joshua so severely that he suffered irreversible brain damage.[84]

Joshua's mother sued DSS and various individual employees under 42 U.S.C. § 1983 alleging that DSS had deprived Joshua of his liberty without due process of law by failing to intervene to protect him against his father's violence.[85] The Court held that the language of the Due Process Clause does not require the State "to protect the life, liberty, and property of its citizens against invasion by private actors."[86] It instead places a limitation on the State's power to act, not as a guarantee of safety from others.[87] The Court noted that "[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them."[88] So then, the State has the power to intervene, but it faces no liability if it refrains from doing so. This is a tragic conclusion at which to arrive.

Importantly, the Court drew a line between inaction and action, or commission or omission, which is an important distinction to consider when suing State actors for potential misconduct. The *DeShaney* Court reasoned that because DSS had not been the perpetrator of the violence but simply stood idly by, it

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[82] *Id.* at 192.

[83] *Id.* at 213 (Blackmun, J., dissenting). Justice Brennan's dissent quotes the caseworker as saying at trial, "I just knew the phone would ring someday and Joshua would be dead." *Id.* at 209 (Blackmun, J., dissenting) (quoting DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 812 F. 3d 298, 300 (7th Cir.)).

[84] *Id.* at 193.

[85] *Id.* at 189.

[86] *Id.* at 195.

[87] *Id.*

[88] *Id.* at 203.

could not be held responsible for the ensuing assault.[89] However, the Court acknowledged that a Fourteenth Amendment Due Process claim is possible if the State had a "special relationship" arising from State intervention, or if the State created the danger resulting in the injury.[90] So to successfully hold the entity accountable under § 1983 and the Fourteenth Amendment, the plaintiff must characterize the facts of the case as a State actor's action or commission. This is a very difficult standard to meet, but however challenging it is to meet, it is still not impossible.

2. The Fourteenth Amendment and Special Relationship, State-Created Danger, and Deliberate Indifference

DeShaney created two avenues that can be used to address IPV: the special relationship theory and the state-created danger doctrine. These concepts have arisen several times in the context of school settings, but historically, they have not been used in the context of IPV. The key difference between *DeShaney* and what this Article proposes is that this Article is addressing perpetrators of IPV who are incarcerated. Once there, this Article posits that the State has a duty to rehabilitate them. As it stands now, the State is only incarcerating, a problematic response to a serious family issue. Incarceration alone has failed to prevent IPV, and arguably, has maintained the violence. The special relationship theory and the state-created danger doctrine mandate that the State intervene and operate in a more involved way.

A third avenue related to the special relationship theory and the state-created danger doctrine is the deliberate indifference standard. The deliberate indifference standard is normally considered within the context of the Eighth Amendment, but as *Leffall*, *McKinney*, and *Johnson* illustrate below, the Court has made a connection between this concept and the Fourteenth

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[89] *See id.* at 201.

[90] *Id.* at 197-200. Importantly, maintaining a danger is an acceptable practice, as the State "played no part in [the danger's] creation, nor did it do anything to render him more vulnerable to [the threat of violence]." *Id.* at 190. *See also* Piotrowski v. City of Houston, 237 F.3d 567, 584-85 (5th Cir. 2001) (explaining that potential liability exists where the State increases the danger of harm to a private citizen by third parties).

Amendment.[91] Each time the Court has considered either the special relationship theory or the state-created danger doctrine, an individual or entity's deliberate indifference to the individual is crucial in deciding the case. In cases of potential State liability, there is a clear connection between deliberate indifference and the Fourteenth Amendment.

a. Special Relationship

The *DeShaney* Court points to an earlier case, *Youngberg v. Romero*, to illustrate the special relationship exception.[92] Nicholas Romero was born with severe mental limitations and required constant care and attention.[93] By the time he reached the age of thirty-three, his mother was unable to continue caring for him, so she worked to admit him to a local psychiatric hospital.[94] While there, Romero suffered multiple injuries: some from himself, some from other residents, and some from staff at the hospital.[95] His mother sued the hospital's director and two of its supervisors, claiming they violated Romero's substantive liberty interests guaranteed by the Fourteenth Amendment.[96]

The Court held that involuntary commitment to an institution creates a special relationship between the State and the individual that is incarcerated. This relationship mandates a duty to provide adequate food, shelter, clothing and medical care, as well as the "unquestioned duty [of] provid[ing] reasonable safety for all residents and personnel within the institution."[97] They also held the State had a duty to provide Romero with reasonable, appropriate training to keep him safe and to help him develop the ability to function free from bodily restraints.[98] The Court noted

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[91] Deliberate indifference, as it relates to the Eighth Amendment, will be covered more thoroughly *infra* Part III.C.1.

[92] *DeShaney*, 489 U.S. at 198-202 (citing 457 U.S. 307 (1982)).

[93] *Youngberg*, 457 U.S. at 309-10.

[94] *Id.*

[95] *Id.* at 310-11 (noting that the injuries from staff were from placing Romero in bodily restraints).

[96] *See id.* at 310-12.

[97] *Id.* at 324.

[98] *Id.*

that it may even be unreasonable to not provide training when it could significantly reduce the likelihood of future violence.[99]

b. Special Relationship in the Context of Intimate Partner Violence

Although *Youngberg* failed to answer whether the State is required to provide minimal training to ensure safety and freedom beyond undue restraint, courts should seriously consider extending the holding to require training to reduce aggressive behavior. The case was not presented as a right to training *per se*, so that question remains unanswered, leaving the door open to applying the special relationship theory in the context of IPV.[100] The Court goes on to discuss the balance between a person's liberty interest and safety and freedom from bodily restraint, and a similar question arises here. On one hand, a perpetrator has the right to seek out treatments relating to mental health, substance abuse, or any other relevant factor that is driving their violence. They can also choose to decline it and not pursue the rehabilitation. In both cases, the perpetrator has a choice. On the other hand, a State has an interest in protecting its citizens from future IPV, particularly victims, and there are programs that other states utilize that are proven to reduce violent behavior.[101] The State also has a mandated interest in protecting the perpetrator while incarcerated because being violently assaulted in prison is not a part of a person's sentence.[102] Which is the more important interest—the individual's or the State's?

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[99] *Id.*

[100] *Id.* at 318.

[101] *See generally* Morrison et al., *Key Components of the Batterer Intervention Program Process: An Analysis of Observational Data from Two Community-Based BIPs*, 27 VIOLENCE AGAINST WOMEN 2617 (2021). The reasons perpetrators abuse is beyond the scope of this Article, but across the board, more research is needed to determine the factors leading to abuse. Many studies have found ACEs (adverse childhood experiences), substance abuse, mental health, and financial strain, among other things, contribute to the cycle of abuse. *See generally* Tilley et al., *Development of Violence in Men Who Batter Intimate Partners: A Case Study*, 12 J. THEORY CONSTR. & TESTING 28 (2008). Additionally, programs tailored to the specific needs of each individual perpetrator show promise. *See generally* Cheng et al., *Compared to What? A Meta-Analysis of Batterer Intervention Studies Using Nontreated Controls or Comparisons*, 22 TRAUMA, VIOLENCE, & ABUSE 496 (2021).

[102] Farmer v. Brennan, 511 U.S. 825, 834 (1994).

Mississippi and the Fifth Circuit have taken the traditional masculine approach by boiling it down to a person's individual choice, and although choice is a critical factor in behaving violently, multiple factors can influence a person's decision-making, consciously or unconsciously. Since the perpetrator has been convicted and sent to prison, a special relationship unequivocally exists, and the fact that there is a legal basis for the special relationship theory illustrates that the harshness of incarceration deserves special attention. Thus, the State's interest may outweigh the individual's interest in this context, so to what extent does the relationship mandate training designed to decrease a person's violent proclivities?

Since incarceration is rooted in accountability, the State should extend inmate services beyond providing adequate food, shelter, clothing, and medical care and extend it to include trainings designed to prevent or lessen violent outbursts. It is unreasonable to not provide training if that training could significantly reduce the likelihood of future violence.[103] In this way, the State is within the confines of the special relationship, and they are using that relationship to work toward a more effective way of accountability. Tailored rehabilitation for perpetrators of IPV would, by extension, increase the care provided for victims. If the State continues to refuse reconsidering the meaning of accountability and chooses to stick with incarceration alone, they are embodying several problematic masculine traits: emotional restrictiveness, self-reliance, dominance, and toughness. These same traits are present in perpetrators maintaining IPV, so it is counterproductive to respond to a perpetrator's violence with the same violence and expect a different result. Providing no anti-violence training, failing to address mental health and/or substance abuse issues, or any other issues affecting the batterer reflects the masculine trait of self-reliance, a problematic response considering the recidivism rate of perpetrators of IPV, as well as other types of violence, is high.[104] This response continues to show dominance and toughness, but it is coming at the expense of the persons subjected to abuse.

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[103] *See Youngberg*, 457 U.S. at 324.

[104] *See generally* Sechrist & Weil, *supra* note 36, at 243-65.

Continuing to respond in this way is a clear violation of the special relationship mandated in the Fourteenth Amendment and developed in *Youngberg*. In theory, if the State fails to abide by its duty mandated by the special relationship, they are violating both the perpetrator's and the victim's liberty interest in bodily integrity. Extending the special relationship doctrine to require training to decrease violent tendencies in perpetrators of IPV holds offenders accountable while satisfying the State's interest in protecting its citizens. Failing to do so should make Mississippi liable for any ensuing violence the offender, who was once in their care for years, goes on to later commit.[105]

c. State-Created Danger

Alternatively, there is the state-created danger doctrine. This doctrine rests on the idea that if a State greatly increases the risk of harm to its citizens, it may establish a state-created danger, an exception to the general rule that States have no duty to protect citizens from private violence.[106] One way of thinking about this is best illustrated in *Bowers v. Devito*: "If the state puts [someone] in a position of danger from private persons and then fails to protect [them], it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown [them] into a snake pit."[107]

Federal Circuit Courts of Appeals interpret the doctrine in different ways. For example, the Fifth Circuit closely follows the *DeShaney* rule, holding generally that the State's failure to protect an individual from private violence does not violate the Due Process Clause.[108] In contrast, the Ninth Circuit interprets it more liberally, increasing the chances of a State being held liable for an injury, or at the very least, not enjoying qualified immunity.[109] Most courts agree that a State official's negligent act alone does not implicate

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[105] If Mississippi provided training designed to reduce violence and the offender participated in the training but later committed another act of IPV, Mississippi at least tried to stop it and may not be held liable. As it stands now, though, the State provides nothing of the sort.

[106] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 190 (1989).

[107] 686 F.2d 616, 618 (7th Cir. 1982).

[108] Priester v. Lowndes Cnty., 354 F.3d 414, 421 (5th Cir. 2004).

[109] *See generally* Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989); L.W. v. Grubbs, 974 F.2d 119 (9th Cir. 1992).

the Due Process Clause and state-created danger theory.[110] There must be evidence of intentionality behind the official's actions in creating the danger.[111] The Fifth Circuit has yet to adopt the state-created danger doctrine, but it has not outright rejected it either.[112]

Leffall v. Dallas Independent School District

The first Fifth Circuit case to consider the state-created danger theory is *Leffall v. Dallas Indep. Sch. Dist.* In *Leffall*, eighteen-year-old Dameon Steadham was accidentally killed by gunfire in the school parking lot at a school sponsored dance.[113] Steadham's mother, Marsha Leffall, sued the district, the school's principal, the student that fired the weapon, and that student's mother. Leffall's petition alleged that it was well-known that students often carried and discharged firearms on campus, and armed with this knowledge, the district was "callously indifferent" when they hired only two unarmed security guards to work the dance.[114] The petition also claimed that the inadequate security was provided pursuant to a well-established district policy, and she further alleged a breach of implied warranty by the district that students at the dance would be safe and protected from foreseeable criminal activity.[115] The question in the case was whether the decision to sponsor the dance, despite the district's knowledge of the danger of the occurrence, violated Steadham's constitutional rights.[116]

The *Leffall* court began its analysis of the state-created danger doctrine by first acknowledging that it is not enough to show that the State actors increased the danger of harm from third persons—a plaintiff must show that the officials acted with the requisite culpability in failing to protect the plaintiff from a danger rising to the level of a constitutional violation.[117] The court concluded that

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[110] Daniels v. Williams, 474 U.S. 327, 328 (1986).

[111] Checki v. Webb, 785 F.2d 534, 538 (5th Cir. 1986).

[112] McKinney v. Irving Indep. Sch. Dist., 309 F.3d 308, 313 (5th Cir. 2002); Bustos v. Martini Club, Inc., 599 F.3d 458, 466 (5th Cir. 2010).

[113] Leffall v. Dall. Indep. Sch. Dist., 28 F.3d 521, 523 (5th Cir. 1994).

[114] *Id.* at 527.

[115] *Id.*

[116] *Id.* at 522.

[117] *Id.* at 531-32. "Requisite culpability" is synonymous with "deliberate indifference." *See* Manarite v. City of Springfield, 957 F.2d 953, 956 (1st Cir. 1992).

based on the facts presented, the actions of the defendants did not rise to the level of deliberate indifference, an aforementioned necessary component of the state-created danger doctrine.[118] They reasoned that the State did not knowingly bring the victim in close proximity with a specific individual known to be likely to commit violence, they did not abandon or leave the victim in a dangerous area, nor did the officials conspire with the private actor that committed the violence.[119] Additionally, because school officials hired two security officers, the school did not sponsor the dance with an utter lack of regard for the safety of the attendees. A "good faith but ineffective response[]" defeats a plaintiff's claims of deliberate indifference, and in analyzing the totality of the circumstances, Leffall failed to present facts proving that the school official's decisions rose to the level of deliberate indifference.[120] Therefore, the State created no danger for the victim.

McKinney v. Irving Independent School District

Additional Fifth Circuit cases have also confronted the state-created danger doctrine. *McKinney v. Irving Independent School District*. established a two-prong test to help analyze the doctrine. First, a plaintiff must show that the State actors created *or increased* the danger to the plaintiff, and second, the State actors acted with deliberate indifference.[121] McKinney was a bus driver that transported children with severe behavioral problems to and from school.[122] McKinney immediately began to have problems with the students on the bus, ranging from throwing things out of the window at passing drivers to jumping out of the back of the bus while the bus was moving.[123] McKinney repeatedly told school administrators he needed assistance and the environment was dangerous, but each request was denied.[124] On one particular trip, a student sprayed McKinney in the face with a fire extinguisher while he was driving, resulting in long-term injuries for McKinney,

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[118] *Leffall*, 28 F.3d at 531.
[119] *Id.*
[120] *Id.* at 531-32.
[121] McKinney v. Irving Indep. Sch. Dist., 309 F.3d 308, 313 (2002).
[122] *Id.* at 310.
[123] *Id.*
[124] *Id.*

including asthma and trouble speaking.[125] Because the school did not use its authority to create an opportunity that would not have otherwise existed, they were not deliberately indifferent and therefore could not be held liable for the student's actions.[126]

Johnson v. Dallas Independent School District and Deliberate Indifference

Another Fifth Circuit case, *Johnson v. Dallas Independent School District*, helped clarify the deliberate indifference standard as it relates to the state-created danger doctrine. *Johnson* established that to act with deliberate indifference, the State must place the plaintiffs in danger, increase their risk of harm, or make them more vulnerable to danger.[127] The key lies in the State actor's culpable knowledge in "affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid."[128] Subsequent Fifth Circuit cases have considered the doctrine, but the plaintiff's claims never rose to the level of deliberate indifference, causing the doctrine to remain stalled.[129]

d. State-Created Danger Doctrine and Intimate Partner Violence

The plain language—state-created danger—is a useful starting point to consider when applying the theory. If the State receives a call regarding IPV, and they arrest, charge, and convict

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[125] *Id.*

[126] *Id.*

[127] Johnson v. Dall. Indep. Sch. Dist., 38 F.3d 198, 200-01 (5th Cir. 1994); *see also* Manarite v. City of Springfield, 957 F.2d 953, 956 (1st Cir. 1992) ("[A] plaintiff must demonstrate 'deliberate indifference' by showing (1) an unusually serious risk of harm (self-inflicted harm, in a suicide case), (2) defendant's actual knowledge of (or, at least, willful blindness to) that elevated risk, and (3) defendant's failure to take obvious steps to address that known, serious risk. The risk, the knowledge, and the failure to do the obvious, taken together, must show that the defendant is 'deliberately indifferent' to the harm that follows.").

[128] *Johnson*, 38 F.3d at 201 (quoting Wideman v. Shallowford Cmty. Hosp., Inc., 826 F.2d 1030, 1035 (11th Cir. 1987).

[129] *See* Doe *ex. rel* Magee v. Covington Cnty. Sch. Dist., 675 F.3d 849, 865 (5th Cir. 2012) (declining to accept the state-created danger doctrine because plaintiff's allegation did not support it); Piotrowski v. City of Houston, 237 F.3d 567, 585 (5th Cir. 2001) (refusing to accept the state-created danger doctrine based on lack of evidence).

the offender, the person likely goes to prison. Prisons are a violent place, and placing an alleged batterer in prison can be seen as counterproductive for the simple reason that violence is being met with more violence. Choosing only to incarcerate and providing no additional rehabilitation creates a future danger for the perpetrator's victim upon their release from prison.

The State sends the message that subjecting another person to violence is a crime mandating incarceration, but while there, the prisoners themselves are subjected to violence. Thus, the State is doing the same thing they are incarcerating the offender for: subjecting another person to violence.[130] Additionally, "[p]risons reinforce and magnify the destructive ideologies that drive [IPV]"—namely hypermasculinity.[131] A person that has been charged with IPV is already bringing violence into the prison, and while there, those notions of masculinity become more warped are eventually brought back to their communities where it becomes recycled in their relationships.[132]

Additionally, spending extended time in prison does nothing to develop empathy or help a person learn to appreciate the inherent value of other people, which is a critical piece to preventing further harm.[133] So plainly speaking, Mississippi and the Fifth Circuit have created a danger to the victim by incarcerating the violent offender in a violent place and not providing any meaningful rehabilitation, especially considering the offender is likely to offend again.[134] It is an act of commission by the State to choose to underfund mental health and other services that could work to rehabilitate the offender. In a way, the State has also created a danger to the perpetrator because incarceration increases the chance of serious mental health issues, such as post-traumatic stress disorder ("PTSD"), and triggers symptoms of trauma. PTSD is a major factor in IPV, and since prison increases that, the State creates a danger for the perpetrator because they are more likely to place themselves in violent scenarios, and they are definitely more

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130 This is a circular argument revolving around accountability.

131 GOODMARK, *supra* note 29, at 29.

132 *Id.*

133 *Id.*

134 *See* RECIDIVISM TRENDS, *supra* note 27, at 6.

likely to be violent again toward their partners.[135] These are dangers that should not happen again if treated effectively, but since they are not, the State is creating a new danger for victims upon the perpetrator's release.

This analysis fits the plain language definition of state-created danger, but in the legal context, the courts usually stick with interpreting and applying precedent. As Justice Blackmun points out in his *DeShaney* dissent, this makes the Court seem "unmoved by 'natural sympathy.'"[136] When dealing with the complexities of human life and emotion, it is necessary to "undo the formalistic legal reasoning [that] infected antebellum jurisprudence" and still does to this day.[137] However, with the new Supreme Court, precedent may not be as important as it used to be.[138] Until then, a plain language argument is interesting but useless, so the application and interpretation of the legal definition of a state-created danger in the context of IPV is imperative.

McKinney, State-Created Danger, and Intimate Partner Violence

Turning to *McKinney*, a plaintiff must show that the State actors created *or* increased the danger to the plaintiff. Placing a violent offender in a violent place is likely to make a person *more* violent, and once the perpetrator's sentence is complete, the likelihood of being re-involved with the victim in some way is high. This satisfies the first prong outlined in *McKinney* because this increases the danger of future violence against the victim.

The second *McKinney* prong requires the entity to show deliberate indifference. Not providing services to address the perpetrator's mental health (which encompasses their proclivity to violence, poor responses to lack of control, etc.) is both increasing the risk of harm to the victim and making them more vulnerable to

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[135] GOODMARK, *supra* note 29, at 28.

[136] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting); *see also* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 615 (2001) (Scalia, J., concurring) (explaining the "importance" of quoting legal dictionaries).

[137] *DeShaney*, 489 U.S. at 212.

[138] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overruling the previously constitutional right to an abortion); Egbert v. Boule, 142 S. Ct. 1793 (2022) (questioning the usefulness of the *Bivens* standard).

danger. This satisfies the second *McKinney* prong. The remaining question would be regarding the State's culpability, which is always the most difficult aspect to prove. Since the State is not affirmatively placing the *victim* in a position of danger, they are not cutting off methods of defending themselves nor cutting off sources of private aid, it is a difficult test to satisfy in the context of IPV. However, *Johnson* went on to reason:

> Thus the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur. Put otherwise, the defendants must have been at least deliberately indifferent to the plight of the plaintiff.[139]

By arresting an alleged perpetrator of IPV, the State has sent the unequivocal message that the victim's environment is dangerous. Since probable cause is present, police officers are concluding that danger is there. By taking them out of the situation without properly addressing the perpetrator's issues, they are creating a more dangerous environment for the victim. Additionally, the knowledge of danger—especially information leading to an arrest and eventual incarceration—rises to the level of deliberate indifference.

When an alleged perpetrator of IPV is incarcerated, and the state officials in charge of their well-being do not address their proclivity to violence, they are using their authority to create an opportunity for additional violence to occur. Considering *Johnson*, the State is making the victim more vulnerable to danger, while increasing the perpetrator's likelihood of returning to a dangerous environment: prison. Both parties have an increased vulnerability to danger, all at the hands of the State. The State's response to this, as it always has been, is that even if this is true, it is an omitted action, as opposed to a commissioned one. Additionally, the State concludes that the victim was already in danger, so there is no way the State *created* a dangerous situation.[140] However, setting the stage for another act of violence to occur, especially considering the

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[139] Johnson v. Dall. Indep. Sch. Dist., 38 F.3d 198, 201 (5th Cir. 1994).

[140] *See* Piotrowski v. City of Houston, 237 F.3d 567, 584 (5th Cir. 2001).

recidivism rate is high for perpetrators of IPV, is creating a danger for the victim. Additionally, as mentioned before, the "special relationship" has been established, and because of this, the State must adhere to its duty of effectively rehabilitating the perpetrator.

Leffall, State-Created Danger, and Intimate Partner Violence

This can also be analyzed using *Leffall*. A critical piece of the court's reasoning in *Leffall* was that the district did not "knowingly br[ing] the victim into close proximity with a specific individual known to be likely to commit violence."[141] To reiterate, the State has used its authority to send a message that a specific individual committed violence against a victim by convicting and incarcerating them. Once the perpetrator's sentence is complete, at the very least, it is highly likely that they will again be in close proximity to the victim at some point.[142] At most, the perpetrator will go right back to their relationship with the victim and begin living together again. If then, the State does not attempt to rehabilitate the perpetrator, they are operating with an utter lack of regard for the victim's safety, a necessary component to analyze in the state-created danger doctrine.[143] The State would argue again that they did not affirmatively place the perpetrator with the victim, and they cannot be held liable. Either way, both *McKinney* prongs are satisfied: there is an increased danger to both the victim and the perpetrator, and the act of releasing the prisoner satisfies the deliberate indifference standard.

3. Difficulties in Successful Fourteenth Amendment Claims Regarding Private Violence

Unfortunately, it is exceedingly difficult to meet the state-created danger standard, regardless of how egregious the facts are. In *Pinder v. Johnson*, Carol Pinder called the police after being

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[141] Leffall v. Dall. Indep. Sch. Dist., 28 F.3d 521, 531 (5th Cir. 1994).

[142] A potential solution could be a re-entry program, but these are historically underfunded and lacking in truly supportive services. Orders of protection are sometimes granted, but these only go so far. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 752-53 (2005).

[143] *Leffall*, 28 F.3d at 531.

threatened by her ex-boyfriend.[144] The police arrested the ex-boyfriend, and Pinder explained that he had been violent toward her before, and that he was just released from prison for attempted arson.[145] The police noted the ex-boyfriend was "hostile and unresponsive," and Pinder pleaded with officers to confirm she, and her three children, would be safe from him when she returned home from work that evening.[146] Police assured Pinder he would be kept in jail overnight, and Pinder returned to work. After a hearing later that evening, the ex-boyfriend was released, and he subsequently burned down Pinder's house with her three children inside. Each child died.[147] The court concluded that no special relationship existed between the police and Pinder and her children, so the State did not meet the requirements of a state-created danger.[148] The court rooted its reasoning on the idea of a domino effect—a State cannot feasibly be held liable for every injury at the hands of released prisoners.[149]

Each of the most horrific cases—*DeShaney*, *Gonzales*, *Pinder*, and countless others—begin and end with a similar sentiment: the facts in this case are undeniably tragic, but we cannot conclude the Fourteenth Amendment intended to hold the State accountable in protecting these victims from private violence. So, the State can be found to be responsible for maintaining a danger, but it is not responsible for the fruit of that danger, even if the concomitant danger results in paralysis or death.[150] Courts acknowledge the devastating effect each scenario has on its victims and their families, then they proceed to wash their hands of any responsibility.[151]

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144 54 F.3d 1169, 1172 (4th Cir. 1995).

145 *Id.* The attempted arson was on the same home he later burned down that evening. *Id.*

146 *Id.*

147 *Id.*

148 *Id.* at 1175.

149 *Id.*

150 *See* Piotrowski v. City of Houston, 237 F.3d 567, 584 (5th Cir. 2011). Additionally, there is room for a general argument that incarceration is not simply maintaining a danger but increasing one.

151 *See also* Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) ("It is *monstrous if the state fails to protect its residents against such predators* but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. . . . [I]t does not require the federal government or the state to provide

This masculine response illustrates the illusory nature of the State's protections, resulting in maintained cycles of violence in relationships, which are upheld by the State's lack of empathy and significance placed on dominance, toughness, and order. Convicting a perpetrator of IPV then releasing them after their sentence concludes is an act of commission; it is an affirmative act. If, after spending time in prison, the State has done nothing to address the perpetrator's violence, the State is creating a danger for the victim because the likelihood of reoffending is high.[152] Therefore, there is an act of commission that is placing a victim in danger, and the State should be held responsible for any act of subsequent violence against the perpetrator's victim.

C. Eighth Amendment

The Eighth Amendment states that, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[153] The Framers' primary focus regarding cruel and unusual punishments was to proscribe tortures and other unnecessary cruelty, as well as other barbaric methods of punishment.[154] This "underscore[s] the essential principle that . . . the State must respect the human attributes even of those who have committed serious crimes."[155] Cruel and unusual punishment centers around the dignity of man and recognizes that the power to punish should be exercised within "the limits of civilized standards."[156] As society progresses, what is accepted as civilized has shifted, emphasizing the need to interpret the amendment in light of standards of decency that mark the progress of a maturing society.[157] Thus, the amendment is not static but dynamic, and it

services, even so elementary a service *as maintaining law and order*" (emphasis added)). Once again, the court insinuates that common sense tells them one thing, but because they are bound by precedent, they refuse to move the needle to protect its citizens. The court says there is no requirement to maintain law and order, but cities and municipalities all across the country employ a police force to do just that.

[152] *See* RECIDIVISM TRENDS, *supra* note 27, at 6.

[153] U.S. CONST. amend. VIII.

[154] Graham v. Florida, 560 U.S. 48, 59 (2010) (first citing Hope v. Pelzer, 536 U.S. 730 (2002); and then citing Wilkerson v. Utah, 99 U.S. 130, 136 (1879)); *see also* Estelle v. Gamble, 429 U.S. 97, 102 (1976).

[155] *Graham*, 560 U.S. at 59.

[156] Trop v. Dulles, 356 U.S. 86, 100 (1958).

[157] *Id.* at 101.

should evolve as society becomes "enlightened by a humane justice."[158]

Thus, the present standard of what is considered cruel and unusual not only relates to punishment for crimes, but also extends an affirmative duty on the State to care for and protect incarcerated individuals.[159] This has been most utilized in situations in which prisoners were subjected to excessive force by prison guards,[160] as well as circumstances in which an inmate requires medical attention but fails to receive it.[161] Failing to provide incarcerated people these basic needs results in pain and suffering, which provides no penological purpose.[162] The State therefore violates the Eighth Amendment if they show "deliberate indifference to serious medical needs of prisoners."[163] The court was then tasked with defining "deliberate indifference" and "serious medical needs" as it relates to prisoners.

1. Deliberate Indifference and the Eighth Amendment

Deliberate indifference, as it relates to the Eighth Amendment, was created in the 1976 case *Estelle v. Gamble*. Gamble, an inmate of the Texas Department of Corrections, injured himself while performing a prison work assignment.[164] Gamble continued to work but became stiff, and he was granted a pass to be seen at the unit hospital. The initial doctor diagnosed the injury as a hernia, but two hours later, his pain was so intense that he returned to the hospital to receive pain medication. Gamble continued to experience lower back pain, and prison doctors eventually recommended he take time off work duty. The prison officials recognized the recommendation for a few days but

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[158] Hall v. Florida, 572 U.S. 701, 708 (2014) (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).

[159] *Estelle*, 429 U.S. at 102-03; *see also* Farmer v. Brennan, 511 U.S. 825, 832 ("[P]rison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care . . . .").

[160] Hudson v. McMillian, 503 U.S. 1, 8-9 (1992) (concluding that prison officials intending to cause harm to inmates constitutes cruel and unusual punishment).

[161] *Estelle*, 429 U.S. at 104 (concluding that failing to provide necessary medical care amounts to unnecessary and wanton infliction of pain).

[162] *Id.* at 103.

[163] *Id.* at 104.

[164] *Id.* at 99.

ultimately decided to put him back to work. Over the next several months, Gamble saw hospital staff due to various medical conditions seventeen times, and throughout the process, prison officials continued to mandate his work assignment regardless of Gamble's pleas of pain and doctor's orders to remain idle.[165]

Gamble eventually sued the prison's medical director, as well as two correctional officials, under 42 U.S.C. §1983, claiming the prison had subjected him to cruel and unusual punishment in violation of the Eighth Amendment.[166] The *Estelle* Court concluded that such unnecessary suffering is inconsistent with contemporary standards of decency, and therefore "deliberate indifference" to a prisoner's serious medical needs constitutes "unnecessary and wanton infliction of pain" and states a cause of action under §1983.[167] Importantly, to state a cognizable claim, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[168] Following this decision, lower courts struggled with whether applying the test should be objective or subjective, and this set the stage for the intent standard later outlined in *Farmer v. Brennan.*[169]

Farmer involved Dee Farmer, a woman who was sentenced to federal prison for twenty years for credit card fraud.[170] Farmer is transgender, and she was beaten and raped in her cell shortly after being transferred to a different prison facility. She sued prison officials, claiming they violated her Eighth Amendment rights by being deliberately indifferent to her safety in prison.[171] Farmer claimed that prison officials were deliberately indifferent because they placed her in the general prison population with the knowledge that it is violent, has a history of inmate assault, and that she would be particularly vulnerable due to her sexual identity.[172] The Court narrowed the deliberate indifference doctrine to two requirements: (1) the deprivation must be objectively and

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[165] *Id.* at 99-102.

[166] *Id.* at 98.

[167] *Id.* at 104-05.

[168] *Id.* at 106.

[169] 511 U.S. 825, 837-38 (1994) (comparing circuit splits highlighting the subjective and objective interpretation of deliberate indifference).

[170] *Id.* at 852.

[171] *Id.* at 829.

[172] *Id.* at 831.

sufficiently serious, and (2) a prison official must have a culpable state of mind, one where they knew of and disregarded an excessive risk to inmate health or safety.[173] Based on the newly developed test, prison officials were found not to be deliberately indifferent to Farmer's safety, and the Court determined that the new standard should be a subjective one.

a. Deliberate Indifference to a Serious Medical Need in the Context of Intimate Partner Violence

Once again, it is important to consider the plain language of deliberate indifference to illustrate the gap between antebellum jurisprudence and everyday colloquialism. The *Farmer* Court notes that incarcerating persons with demonstrated proclivities for violent behavior, and stripping them of all means of protection and access to outside aid, does not allow the government and prison officials to be hands-off with prisoners and let nature take its course.[174] In the context of *Farmer*, this is referring to violence between prisoners. In order for the Court to arrive at this conclusion, they acknowledged the dangerousness of prison—enough to mandate protection for prisoners from other inmates. In this way, the State is choosing to be reactionary, without seeming to consider *why* a person is being violent in the first place. Not considering the reasons behind a person's conduct and showing no signs of doing so is, for all intents and purposes, deliberately indifferent. Refusing to even *attempt* to rehabilitate someone to prevent future violence shows a lack of interest in preventing the behavior, an overtly masculine trait over-emphasizing self-reliance and lack of empathy. This again fails to consider the myriad of factors that influence a person's decision-making.

Moving away from plain language and into how deliberate indifference has been interpreted and shaped legally, it is commonly considered in the context of physical care. It usually applies in situations where an inmate has experienced some type of physical injury, needs medication for a condition (like blood pressure medication or pain reliever), or requires seeing a

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[173] *Id.* at 834.
[174] *Id.* at 833.

specialist. However, some jurisdictions have interpreted this to include mental health, and circuits are split in their analysis.

The Tenth Circuit accepts that violent self-harm, stemming from serious mental health issues, satisfies the serious medical need standard.[175] Although *Sawyers* is considered in the context of self-harm[176], a perpetrator's violent outbursts targeting vulnerable partners should be considered a serious issue, one important enough to mandate treatment under the Eighth Amendment. This is especially true since mental health issues are a major driving force influencing the decision-making of perpetrators of IPV.[177] On the other hand, Mississippi and the Fifth Circuit have chosen a masculine response in holding violent offenders accountable by de-emphasizing mental health treatment and focusing solely on the punitive aspect of incarceration.

Our neighboring State of Alabama's Middle District has acknowledged that mental health care is a prominent issue the Alabama Department of Corrections ("ADOC") must tackle. In *Braggs v. Dunn*, Judge Myron Thompson found that ADOC officials consistently failed to respond reasonably to inmates with mental health issues, and because of that, they were deliberately indifferent to serious medical needs.[178] Not only are prison officials aware of the seriousness of the lack of addressing inmates' palpable mental health needs, they are ignoring it, and inmates are dying because of it.[179] The *Braggs* case found seven interrelated areas of inadequacy related to mental health, which by extension are applicable to shortcomings in treating violent offenders:

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[175] *See* Sawyers v. Norton, 962 F.3d 1270, 1273 (10th Cir. 2020).

[176] *Id.*

[177] *See* Natalie Hoskins & Adrianne Kunkel, *"I Didn't Really Have Anybody to Turn To": Barriers to Social Support and the Experiences of Male Perpetrators of Intimate Partner Violence*, 37 J. INTERPERSONAL VIOLENCE, NP5317 (2022).

[178] 257 F. Supp. 3d 1171, 1185-86 (M.D. Ala. 2017).

[179] *See e.g., id.* at 1186 (describing how inmate was able to commit suicide because of lack of supervision).

> (1) identification and classification of prisoners with mental illness;
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> (2) treatment planning;
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> (3) psychotherapy;
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> (4) inpatient mental-health care units;
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> (5) crisis care and suicide prevention;
>
> (6) use of disciplinary actions for symptoms of mental illness; and
>
> (7) use of segregation for mentally ill prisoners.[180]

The court concluded that "[t]hese inadequacies, alone and in combination, subject mentally ill prisoners to actual harm and a substantial risk of serious harm—including worsening of symptoms, increased isolation, continued pain and suffering, self-harm and suicide."[181] Each of these seven factors is relevant to treatment that would rehabilitate perpetrators of IPV, and these violations are certain to be happening in Mississippi's prisons.[182] The ADOC had chosen the common problematic masculine response to inmates' serious health needs—toughness, dominance, and self-reliance. But closely related to toughness is the avoidance of femininity, and for years, various forms of masculinity have viewed therapy as a sign of weakness, holding the belief that real men do not need therapy.[183] Masculine punishment through incarceration is steeped deeply in tradition, but the Middle District of Alabama has at least acknowledged that failing to address mental health needs that result in violence violate the Eighth Amendment's deliberate indifference standard, and Mississippi should consider moving this way as well.

There is little evidence Mississippi and the Fifth Circuit read mental health in the deliberate indifference standard. As it

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[180] *Id.* at 1192.

[181] *Id.* at 1193.

[182] U.S. DEP'T OF JUST., INVESTIGATION OF THE MISSISSIPPI STATE PENITENTIARY (PARCHMAN) 26 (2022).

[183] This is despite the fact that therapy and counseling is a field developed by men. Jackson, *supra* note 74, at 22.

currently stands, Mississippi just needs to prove that it provided some type of care, which is, plainly speaking, deliberately indifferent to the needs of perpetrators of IPV, and by extension, their victims.[184]

Acknowledging the connection between perpetrators' mental health issues and the lack of effective mental health services is the first step in choosing to not be deliberately indifferent to serious medical needs. Inmates living with mental health issues, especially ones associated with violent behavior, constitute a serious medical need for both perpetrators of IPV and victims of it. Not only is it important to consider the perpetrators, but we should continue to recognize that deteriorating mental health is seen in victims as well. Victims' mental health responses to IPV include increased cases of anxiety, depression, PTSD, memory issues, and other serious problems.[185] IPV and poor mental health are closely intertwined, and the State is wasting countless opportunities to address this violence while perpetrators are incarcerated. This is a clear Eighth Amendment violation, as the State is deliberately indifferent to treating the perpetrators' serious medical needs, many times resulting in violence against their partners.

Resisting mental health treatment, or failing to see its usefulness, is a common characteristic of masculinity, rooted in toughness and dominance. It is also a major issue regarding the State's response to IPV. Incarcerating perpetrators of IPV is the extent of accountability offered up by the State; however, accountability should be extended to include preventing it from happening again. For repeat offenders, especially those that have served time in prison, the State cannot say it truly held them accountable if the crime keeps occurring. For example, if the State believes the perpetrator has been held accountable after incarceration, it believes the crime has been committed and reached its conclusion—the danger is over. However, if after being released, that same person commits a violent act against their partner, this is a new danger, separate from the one they have served time for.

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[184] *See* Grogan v. Kumar, 873 F.3d 273, 278-79 (5th Cir. 2017); Amos v. Cain, No. 4:20-CV-7-DMB-JMV, 2021 WL 1080518, at *16-17 (N.D. Miss. Mar. 19, 2021).

[185] Castro et. al., *Exploring the Relationship Between Mental Health and Neuropsychological Functioning in Female Survivors of IPV*, 39 BETHLEHEM UNIV. J. 1, 3 (2022).

This is arguably a situation the State has created, making the State fully liable for the violence. If the State responds to this with the belief that the incidents are related, then they also acknowledge that they knew of a potential danger for the victim but allowed it to happen anyway. This is, plainly speaking, deliberate indifference.

It is natural to wonder if inmates would seek out the help they may need on their own, but a recent study from the University of Memphis finds that inmates are, at the very least, aware of the importance of mental health and its effect on crime.[186] Inmates in Shelby County noted the importance of being provided access to mental health services, as well as the need for pre- and post-release support.[187] Being aware of an issue is only the first step—changing a behavior takes skill, not just will alone.[188] Having the will to change, coupled with quality mental health providers to help develop the skills needed to react to situations more appropriately, is an effective way to approach IPV. Once a perpetrator of IPV is incarcerated, it is the State's duty to help build this skill.

Justice Blackmun's sentiment in his *Davidson v. Cannon* dissent is fitting:

> It seems to me that when a State assumes sole responsibility for one's physical security and then ignores his call for help, the State cannot claim that it did not know a subsequent injury was likely to occur. Under such circumstances, the State should not automatically be excused from responsibility.[189]

Mississippi should not await a tragic event because the Eighth Amendment protects against all future harm.[190]

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[186] IESUE ET AL., PERSPECTIVES ON WHY INDIVIDUALS CONTINUE TO ENGAGE IN VIOLENT CRIME IN MEMPHIS-SHELBY COUNTY 22-23 (2022).

[187] *Id.*

[188] The Collaborative Problem Solving Model focuses on developing the skills needed to help young people succeed. Although it is normally used with young people, the sentiment logically applies to adults as well. For more information on the model, see *Collaborative Problem Solving*, THINK:KIDS, https://thinkkids.org/cps-overview/ [https://perma.cc/52ZR-XPWY] (last visited May 29, 2023).

[189] 474 U.S. 344, 354 (1986) (Blackmun, J., dissenting). It is important to note this was written considering a prison official's relationship with an inmate. However, it is not a radical idea to continue considering the victim's physical security by providing rehabilitation for the offender while incarcerated.

[190] *See* Helling v. McKinney, 509 U.S. 25, 33-34 (1993). This is used in the context of future harms to inmates but could logically be applied outside the prison walls.

IV. ISSUES WITH MISSISSIPPI AND THE FIFTH CIRCUIT'S RESPONSE TO INTIMATE PARTNER VIOLENCE

A. Masculinity

Throughout the courts' analysis of private violence through the lens of the Fourteenth and Eighth Amendments, a recurring theme of masculinity adulterates law enforcement and the courts' decision-making as it relates to the response to IPV. The State and its courts consistently maintain a parens patriae undertone in each opinion handed down, unaware or indifferent of its lack of justice for each involved party of IPV. The courts are utilizing a form of legal gaslighting—the State provides options for victims of IPV through arrests or orders of protection, but when faced with a lawsuit, the State has found ways to legally explain how they are not responsible. As Professor Aya Gruber pointed out, even when victims call on the State for help, the State historically ignores the victims and proceeds to continue its own way: a masculine response to maintain order and control.[191] This response also fails to even attempt to rehabilitate offenders of IPV, resulting in a continuing cycle of violence.

To illustrate, take the Fifth Circuit case, *Piotrowski v. City of Houston*. Barbra Piotrowski began dating Texas multi-millionaire Richard Minns, but after a few months, their relationship deteriorated.[192] Minns was physically aggressive with her on at least two occasions in which he broke Piotrowski's hand and nose.[193] Piotrowski became pregnant, and Minns told her to have an abortion or move out, so Piotrowski grabbed her belongings and left.[194] However, their interactions did not end there.

Minns began harassing Piotrowski with threats to her and her family, vandalizing her property and placing stalling devices on her car. What makes the harassment particularly troubling is that Minns had help to do these things from at least two members of the Houston Police Department ("HPD") and at least one member of the Houston Fire Department.[195] One member of the HPD fabricated

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[191] Gruber, *supra* note 41, at 594.

[192] Piotrowski v. City of Houston, 237 F.3d 567, 572 (5th Cir. 2001).

[193] *Id.*

[194] *Id.*

[195] *Id.* at 573.

arson charges against Piotrowski in an effort to blackmail her into releasing Minns from paternity claims, and another member contacted a private investigator to arrange a murder hit on Piotrowski.[196] Several other chilling events happened afterwards, including things like getting Piotrowski arrested at her home (with Minns present, warrant in hand), Minns and the aforementioned members of the police and fire departments gathering inside Piotrowski's home upon her returning home one evening, and the office of Piotrowski's attorney being set on fire and burglarized.[197] Piotrowski complained to HPD's internal affairs division, describing in detail all that had happened to her, but after conducting an internal investigation, HPD found no officer misconduct in any of the aforementioned scenarios.[198]

Several weeks later, Piotrowski was shot four times by a hitman, paralyzing her from the chest down.[199] At issue are several legal and moral issues, but the crux of Piotrowski claim asserted that HPD had knowledge about the hit on her, they did nothing about it, and by doing so, they affirmatively helped the hitman carry out the attack on her.[200] After a lengthy opinion concluding HPD lacked any culpability, while also reversing a $20 million civil liability suit Piotrowski had previously won, central to their reasoning for reversal was that since HPD did not *increase* the danger to Piotrowski, it follows they cannot be held liable under the state-created danger doctrine.[201] They found there was no evidence city actors knew of or participated in the contract, nor did they prevent her from protecting herself.[202]

At an individual level, Minns felt empowered to use his masculinity to provide Piotrowski an ultimatum regarding her body, while refusing to have any self-awareness of his role in the child's conception. This masculine response places an undue burden on the pregnant person alone, allowing Minns to absolve himself of any responsibility to maintain control. It also forces Piotrowski to

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196 *Id.*

197 *Id.* at 573-74.

198 *Id.* at 574.

199 *Id.*

200 *Id.* at 575.

201 *See id.* at 576-85. The opinion also reversed a $20 million civil judgment in Piotrowski's favor. *Id.* at 572.

202 *Id.* at 585.

make a decision that threatens her own bodily integrity; a human is beginning to develop in her body, but if she decides to abort the fetus, a doctor must perform an invasive procedure ending it. Minns has to worry about none of that. Minns may argue that he gave her a choice—have an abortion or leave—but this is no real choice for Piotrowski.

When intimidation did not work, Minns utilized another masculine stereotype: force. Minns felt out of control, and because a critical piece of masculinity is maintaining that control through force, he had to act accordingly. So, he began using his power and privilege to aggressively harass and stalk Piotrowski. Police officers, firefighters, and Minn's friends also subscribed to the masculine stereotype and were willing to incarcerate Piotrowski and even kill her to maintain control. The female judge issuing the opinion, Edith Jones, illustrates that masculinity is not an issue for men alone: power, force, and intimidation has permeated many parts of the judicial process.[203] So everyone involved—Minns, law enforcement, and the court—each chose to respond to Piotrowski's situation in a masculine way, resulting in no accountability for Minns and no care or justice for Piotrowski.

Piotrowski is another case in which themes of masculinity—in particular, lack of accepting responsibility—drive everyone's decision-making and control the case's outcome. Masculinity values the oversimplification of decision-making (make better choices to avoid jailtime), but when someone like Minns makes a poor choice, the court decides that his circumstances warranted the decision, a concept known as Fundamental Attribution Error.[204] Mississippi believes that using any other method to hold violent offenders accountable is approving of bad behavior, and this holds steady in the belief that you must win every battle to win the war, a large part of hegemonic masculinity.[205]

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[203] Judge Jones has a history of troubling thoughts on criminal justice and the people that come through the system. *See* Michael Barajas, *What Does Discrimination Look Like to Fifth Circuit Judge Edith Jones*?, TEX. OBSERVER (Dec. 14, 2017, 12:28 PM), https://www.texasobserver.org/fifth-circuit-appeals-judge-edith-jones/ [https://perma.cc/2B3U-DKP6].

[204] *See* Saul McLeod, *Fundamental Attribution Error*, SIMPLY PSYCH. (2018) https://simplypsychology.org/fundamental-attribution.html [https://perma.cc/E9ZR-B77H].

[205] *See generally* Rosen & Nofziger, *supra* note 68.

However, what makes *Piotrowski* particularly interesting is how Minns was not punished in the traditionally masculine way. Instead, the government in this case reacted similarly to how Minns did when he learned of Piotrowski's pregnancy: conclude that no responsibility laid with him and shifted the blame to the person subjected to abuse in the situation. The *Piotrowski* decision illustrates the harmful impact masculinity brings on the opposite end of the spectrum. Providing no state action at all does not work, and getting involved through incarceration alone is not working either. This failure to respond effectively is a poor outcome for victims of abuse.

1. A Broader Critique of Masculinity

Law enforcement's response highlights and mimics a larger issue seen in various points in the timeline once the State is involved with a couple. For example, in *Williams*, there is no indication Lisa Williams was ever interviewed by the officers that first arrived on scene.[206] In *Pinder*, officers failed to take adequate measures to protect [the wife] from [her husband], in circumstances very similar to *Gonzales*. When the husband in *Pinder* was previously incarcerated, providing some type of rehabilitation may have prevented the subsequent arson that killed the victim's children. In *Piotrowski*, Minns was able to get away with several crimes, each of which were never adequately addressed, either through incarceration or otherwise. Continuing to respond in this way is especially harmful for people subjected to intimate partner abuse, and it is doing little to curb IPV. The State can continue to be involved in this crisis without responding in a harmful, masculine way, and there is no doubt, that perpetrators should be held accountable. The question is what that accountability looks like.

People on either side of the debate regarding IPV would agree that perpetrators like Minns should be held accountable. The special relationship theory, state-created danger doctrine, and the deliberate indifference standard provide a legal avenue for accountability, all of which center around mandated rehabilitation. As analyzed earlier, these doctrines provide the best chance at

[206] *See* City of Laurel v. Williams, 21 So. 3d 1170 (Miss. 2009).

rehabilitating someone like Minns in a way that decreases the chance of something like this happening to someone else. To meet masculinity (Minns) with masculinity (force, violence in prison) perpetuates his violence and provides no effort to rehabilitate him. Minns is a danger to himself and to others, and if the State does not rehabilitate him, it is creating more dangers to others and is deliberately indifferent to both Minns and his future victims. Hence, the importance of rehabilitating under the doctrines of special relationship, state-created danger, and deliberate indifference cannot be overstated and are an important piece in addressing violence.

B. A Feminist Approach

If the special relationship theory, state-created danger doctrine, and the deliberate indifference standard are the best ways to ensure accountability for the perpetrators, what is the best avenue to get there? Professor Maria Isabel Medina provides a unique answer to that question by re-writing the *Gonzales* opinion from a feminist perspective, providing an alternative to the common masculine response. Instead of finding that Gonzales had no property interest in her order of protection and subsequently no Fourteenth Amendment protection, Medina sees it differently. Writing as a Supreme Court Justice, Medina writes that

> [T]he protective order granted to Gonzales is a property interest because a protective order secures to its beneficiaries a bundle of rights. The bundle includes a certain level of police protection . . . . [It also includes] the arrest of the person restrained if police had information amounting to probable cause to believe the person restrained . . . violated the order. [I]nherent in the bundle of rights plainly has monetary value.[207]

Medina goes on to analogize the order of protection to a contract with a private security firm. If Gonzales had hired a private firm, then that firm failed to protect her under the same

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[207] Patricia A. Broussard, *Commentary on* Town of Castle Rock v. Gonzales, *in* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 504, 520 (2016).

circumstances she faced with the local police department, the firm would be held liable for depriving her of her property interest in the order.[208] Medina criticized the Town of Castle Rock's police force for using their discretion when doing so clearly defied the Colorado legislation's intent.[209] The plain language of Colorado's mandatory arrest policy is clear: "You shall arrest . . . You shall enforce this order even if there is no record of it in the restraining order central registry . . . You are authorized to use every reasonable effort to protect the alleged victim and alleged victim's children to prevent further violence."[210]

Central to Medina's reasoning is the harmful impact of the male response to issues of IPV and how using their discretion to ignore Gonzales's multiple pleas resulted in an avoidable (and arguably predictable) outcome.[211] She highlights how their responses to Gonzales—implying she was overreacting, assuming the father may actually have custodial rights, and doing no investigation into the order—reflect a masculine bias from law enforcement, and in the case of Gonzales (and countless others), this response is wholly inadequate when dealing with issues of IPV.[212] Officers' perception that Gonzales was overreacting is emotionally restrictive and avoids femininity, two major aspects of masculinity. Officers' decision to not investigate any further into the order lacks empathy and allows them to maintain order and control, a decision that arguably led to the death of the Gonzales children. The officers' response in *Gonzales* shows how overtly harmful and damaging the masculine response can be, and it is similar to *Piotrowski*.

The rewritten opinion ends with the ruling that Gonzales did have a property interest in her protective order, and thus the right of its enforcement via the Fourteenth Amendment: a rational, logical, and practical conclusion, using the same body of law the Court had at their disposal when writing the original *Gonzales* opinion.[213]

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[208] *Id.* at 521.
[209] *Id.* at 522.
[210] *Id.* at 521.
[211] *Id.* at 524.
[212] *Id.* at 524-25.
[213] *Id.* at 526.

CONCLUSION

Once a perpetrator of IPV is arrested, a special relationship exists, and falling within that relationship is mandated rehabilitation as outlined in *Youngberg*. After serving time in prison and being subjected to violence that commonly manifests into serious health problems like PTSD, the State is creating a danger for victims by releasing the batterer back into society. A new danger is created because no training is being provided to build the skills necessary to prevent future violence. By failing to rehabilitate offenders while in prison, the State is deliberately indifferent to the needs of both perpetrators and victims of IPV because they know of a serious medical need and they choose to do nothing about it.

By definition, anti-carceral feminism pushes for no incarceration, but it relies on community accountability and restorative justice to hold people responsible for their actions.[214] An anti-carceral feminist approach to IPV that addresses the State's masculine, carceral response should be given more serious consideration.[215] It could work to expand Mississippi and the Fifth Circuit's thinking into adopting the doctrines of special relationship, state-created danger, and deliberate indifference in cases involving IPV in an effort to rehabilitate the perpetrator and provide long-term protection for the victims. Although anti-carceral feminism is by definition anti-incarceration, this mode of thinking is more conducive to long-term treatment of perpetrators and victims. This is true because of its willingness to consider less intrusive alternative methods to hold people accountable for their actions.

Additionally, it places more power in the hands of those subjected to abuse (not limited to people identifying as women), and it provides rehabilitative opportunities for perpetrators of the violence. It takes the harshness out of the police response to delicate and nuanced domestic issues and shifts the power back to families instead of placing all hope in the criminal legal system. An anti-carceral feminist approach defies the "formalistic reasoning"

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[214] *See generally* Kim, *Anti-Carceral Feminism: The Contradictions of Progress and the Possibilities of Counter-Hegemonic Struggle*, 35 AFFILIA: J. WOMEN & SOC. WORK. 309 (2020).

[215] Additionally, anti-carceral feminism rejecting carceral feminism as an arm of the State should be given more serious consideration.

adulterating the court's decision-making, and it allows protection for and inclusion of more American citizens. State mandated care through these doctrines, as opposed to the current masculine response, still holds offenders accountable while continuing to care for victims.

As previously mentioned, allocating resources and shifting focus to the perpetrators of IPV through rehabilitation is not diluting their accountability; it is recognizing the importance of not maintaining violence through incarceration, which they inevitably bring back to their relationships after being released from prison. It is acknowledging that heavy handed responses to IPV fail to recognize nuances in relationships and human behavior, as well as cultural differences. Treating the underlying causes of violence is a preemptive measure: it is not embracing their behavior but trying to prevent it, and if it has already happened, trying to prevent it from happening again. In short, with no perpetrator, IPV would not happen.

Shifting away from a hegemonic masculine response to a version of anti-carceral feminism should result in a decrease of IPV on a more macro level as well. It would shift money set aside for VAWA away from prosecutors and police departments and back to social services.[216] Social services organizations are in a better place to respond to violence between partners, and they would restore attention to the victims and their overall well-being. A harsh masculine response to this crisis is resulting in no one benefiting, trapping perpetrators and victims in a cycle nearly impossible to break after long term incarceration.

Interpreting and deciding cases involving IPV through this lens allows for the Fourteenth and Eighth Amendments to successfully provide and mandate a State's legal duty to rehabilitate offenders. The shift to more sympathetic judgments allows for a more human response to addressing violence, leading to a culture shift in attitudes surrounding the issue. Continuing to respond in a masculine way fails to meaningfully address the problems effectively, ultimately resulting in no victim care and a generally ineffective method of accountability, both of which are at the heart of responding to and dealing with IPV. IPV is not

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[216] GOODMARK, *supra* note 29, at 13.

something that will subside overnight, but changing the response to it is a necessary action and one that will benefit society on both a micro and macro level.