

The Criminal Legal System Response to Domestic Violence: Questions and Debate

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February 2020

N | C | D | B | W NATIONAL CLEARINGHOUSE FOR
THE DEFENSE OF BATTERED WOMEN

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Acknowledgments

Thank you to the reviewers whose expertise and invaluable insights helped focus and shape this discussion of the complex questions and debate about the criminal legal system response to domestic violence.

Jacquelyn L. Boggess, JD – Lecturer, University of Wisconsin-Madison School of Social Work, member of the Nina Collective consulting agency, and past executive director of the Center for Family Policy and Practice

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This project was supported by Grant No. 2016-TA-AX-KO53 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

The criminal legal system response to domestic violence: Questions and debate

The role of the criminal legal system in victims/survivor's lives is complicated. Its intervention is sometimes helpful and sometimes harmful and destructive—even deadly—to the victims and to their families. The nature of the help or harm is shaped by context, community, identity, and practice. No single law, policy, or response impacts all victims/survivors of domestic violence in the same way.¹ There is no single narrative that encompasses all victim/survivor needs or experiences with the criminal legal system.

Each day, thousands of calls related to domestic violence are made to 9-1-1 centers across the country. Most calls come from victims seeking help and others come from concerned children, family members, friends, and neighbors, and sometimes from an abusive partner.² When an institution as powerful as the criminal legal system gets involved in people's lives, what can communities do to increase the likelihood that the responses are safe, fair, and just for all involved, in ways that center victim's needs, wants, and interests? Victims want the violence and abuse to stop but may not want the criminal legal system's full intervention, from arrest to prosecution and sentencing, or even the initial intervention of an arrest. Are safety, fairness, and justice through the criminal legal system even possible for victims whose lives are shaped and defined by danger, discrimination, and injustice, not only in their interpersonal lives but in the very society in which they live?

How the criminal legal system should intervene in domestic violence—and whether or when it should intervene at all—has been a concern of anti-violence advocates and subject to ongoing debates for decades. As mandatory arrest and prosecution took shape in the 1980s, women of color challenged assumptions that the criminal legal system could help victims/survivors from communities marginalized by race, poverty, and immigration status that were already over-policed and under-protected. Women of color continued to challenge reliance on police and prosecutors as the Violence Against Women Act was linked to the Crime Control Act of 1994.³ By 2020, many advocates have come to question the emphasis on and shift in resources to the

¹ This paper will use domestic violence and intimate partner violence interchangeably, unless otherwise noted. The types of relationships included under the term “domestic violence” vary according to state or tribal laws; some include violence between any family members, from teenager to parent, sibling to sibling, adult child to parent, and intimate partner to intimate partner. Most of the domestic violence that comes to the attention of the criminal legal system is adult intimate partner violence, although mandatory and pro-arrest domestic violence laws result in girls, and particularly girls of color, entering the juvenile justice system at increasing rates (see Francine T. Sherman and Annie Balck, *Gender Injustice: System-Level Juvenile Justice Reform for Girls*, 2015, National Crittenton Foundation and National Women's Law Center, at <https://nationalcrittenton.org/gender-injustice/>).

² Depending on the jurisdiction, 59% to 99% of domestic violence-related calls to 9-1-1 come from victims seeking help (Klein, 2009).

³ Mimi Kim, “Dancing the Carceral Creep: The Anti-Domestic Violence Movement and the Paradoxical Pursuit Criminalization, 1973-1986,” Institute for the Study of Societal Issues, University of California Berkeley, October 14, 2015, at <https://escholarship.org/uc/item/804227k6>; Beth E. Richie, *Arrested Justice: Black Women, Violence, and American's Prison Nation*, New York University Press, 2012.

criminal legal system. Since the passage and subsequent reauthorizations of VAWA there has been increased questioning of the effectiveness of arrest and prosecution in reducing violence and reconsideration of the criminal legal system as a primary response to gender-based violence. The critique has deepened as advocates continue to see victims/survivors' economic, housing, and other critical needs go unmet despite ongoing criminal legal reform efforts; see survivors criminalized for resisting violence; and confront the realities of state violence and mass incarceration.

*Ending Mass Incarceration,
Centralizing Racial Justice, and
Developing Alternatives: The Role of
Anti-Domestic Violence and Sexual
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Many anti-violence movement advocates are trying to sort out what kind of balance is possible between criminal system intervention, community-based alternatives, and prevention. Some question whether any balance is possible in face of the criminal legal system's power and the realities of pervasive racism and poverty. Many advocates seek to build safety for victims/survivors in ways that contribute to ending mass incarceration, centralizing racial justice, and developing alternatives to the criminal legal system. They struggle with the difficult and long-term but essential nature of creating advocacy practice that confronts mass incarceration, racism, and poverty.

This paper examines some of what we know and don't know about the criminal legal system's impact on domestic violence, particularly the impact of arrest and police response on survivors' safety and well-being. It is not a comprehensive review of research on domestic violence and the criminal legal system but provides sources and links for readers who want to go deeper. This paper also encourages us to keep an open and critical eye on research and on the complex and often contradictory nature of victims/survivors' experiences with the criminal legal system.

ONGOING DEBATE

Anti-violence advocates who have been engaged in criminal legal system reform seek to change a system that historically has been unresponsive to or dismissive of victims/survivors. Four decades of reform have helped to alter social norms that keep battering hidden "behind closed doors" and that keep victims/survivors isolated and cut off from community supports and services. There is research supporting the kinds of criminal legal system changes that have been made, particularly when delivered in the context of a coordinated community response.⁴

⁴ See *Research Supports the Intervention Strategies of the Blueprint for Safety*, Praxis International, October 2014, at <http://praxisinternational.org/wp-content/uploads/2016/08/Appendix-8-Research-that-Supports-the-Blueprint.pdf>. Archived webinars and papers available through the Battered Women's Justice Project address promising practices in criminal legal system interventions, including community safety assessment, criminal justice system and interagency coordination ("CCR"), and batterer intervention. Access at <https://www.bwjp.org/resource-center.html>.

Domestic violence reforms have resulted in expanded protection for many victims of battering, declines in non-fatal domestic violence, reduction in intimate partner homicide, and reduced societal acceptance of battering.

Anti-violence advocates critical of the emphasis on criminal legal system reforms contend that while some victims/survivors may have benefited—primarily white middle-class women—many others have not. Critics assert that for women of color and their communities, relying on the criminal legal system as a primary response to domestic violence contributes to and reinforces the racism and systemic disparity that underpins a highly troubled and fundamentally oppressive institution that is actively harmful to people.⁵ They contend that for victims/survivors overall—and for their children, families, communities, and partners—the criminal legal system is ineffective at best and extremely harmful, even deadly, at worst. The emphasis on mandatory arrest and prosecution in domestic violence cases brings many victims of battering into the system as defendants and has contributed to a significant increase in the proportion of girls entering the juvenile justice system.⁶ For many people, multiple facets of identity and social conditions and their interconnectedness—including poverty, immigration status, gender identity, sexual orientation, language, age, race, being a victim of battering— can mean encountering a criminal legal system that is unhelpful, frightening, destructive, and to be avoided.

⁵ Mimi Kim, “From carceral feminism to transformative justice: Women-of-color feminism and alternatives to incarceration,” *Journal of Ethnic & Cultural Diversity in Social Work*, 2018, 27:3, 219-233; Leigh Goodmark, *Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence*, University of California Press, 2018. *Coalition Chronicles: Transformative Justice*, October 2017, End Domestic Abuse Wisconsin; at <http://www.endabusewi.org/wp-content/uploads/2018/11/Chronicles-36-2.pdf>. The positions and publications of INCITE! at <https://incite-national.org/>. Donna Coker and Ahjané Macquoid, “Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement,” 2015, at <https://www.bwjp.org/assets/opposing-hyper-incarceration.pdf>. Kimberlé Crenshaw with Priscella Ocen and Jyoti Nanda, *Black Girls Matter: Pushed Out, Overpoliced and Underprotected*, 2015, at <http://www.aapf.org/recent/2014/12/coming-soon-blackgirlsmatter-pushed-out-overpoliced-and-underprotected>. Richie, *Arrested Justice*, 2012.

⁶ In some jurisdictions, mandatory arrest laws and policies have brought significant numbers of adult victim/survivors of battering into the criminal legal system. Girls of color are more likely to end up in juvenile justice case processing, less likely to be diverted out, and more likely to be in an out-of-home placement than white girls. Home-based arrests of girls for domestic violence battery are most likely to be a response to “family chaos,” result in little or no injury, and often involve defensive actions by the girl. Francine Sherman, “Unintended Consequences: Addressing the Impact of Domestic Violence Mandatory and Pro-Arrest Policies and Practices on Girls and Young Women,” National Crittenton Foundation, 2016, at <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2050&context=lsfp>. See also: Sherman and Balck, 2015; BWJP Webinar, Family Based Violence and Young Women: Unintended Consequences, Francine Sherman, October 8, 2019; at <https://www.bwjp.org/resource-center/resource-results/webinar-family-based-violence-young-women.html>.

Questions raised in a 2002 national discussion to explore the relationship between the anti-domestic violence movement and the criminal legal system remain relevant and largely unanswered in 2019.⁷ Some of the many questions posed include:

- How do we keep vulnerable individuals safe from battering and sexual violence and hold those causing the harm accountable?
- How do we meet the needs of victims/survivors without eroding judicial fairness and the due process protections of accused persons?
- What are effective alternatives for victim/survivor safety within and outside of the criminal legal system?
- When does reliance on the criminal legal system become over-reliance? How much reliance is acceptable?
- Would reducing the role of law enforcement in situations of gender-based violence provide a convenient excuse for some law enforcement officials to do nothing? Would disengaging from the criminal legal system absolve the state of its responsibilities to address the violence?
- Given the inherent racism of the criminal legal system, is it possible to utilize the system without further damage to communities of color?
- What, if anything, of the criminal legal system do we want to maintain? What parts of the legal system do we want to dismantle, modify, or replace?
- If we believe that the criminal legal system is not one of the answers to gender-based violence, what should replace it?

⁷ In January 2002, the National Clearinghouse for the Defense of Battered Women with the support of the Ms. Foundation for Women convened a roundtable of twenty advocates to examine the relationship between the women's anti-violence movement and the criminal legal system. While acknowledging achievements in raising awareness and changing policies aimed at protecting survivors, the roundtable also recognized that involvement with the criminal legal system was not necessarily positive or helpful for many survivors. Roundtable participants included activists and scholars from communities of color, immigrant communities, national advocacy organizations, national resource centers, and schools of law and social work. "Safety for women must be considered within a larger context that centralizes peace, liberation, and justice for all." See the roundtable report for a summary of the discussion and list of participants. *Safety and Justice for All: Examining the Relationship between the Women's Antiviolence Movement and the Criminal Legal System*, Ms. Foundation for Women, 2003, based on meeting report by Shamita Das Dasgupta and summary by Patricia Eng; at http://www.ncdsv.org/images/Ms_SafetyJusticeForAll_2003.pdf.

At the heart of the debate is the question of whether the criminal legal system is necessary as a response to gender-based violence. Do we continue to use the criminal legal system? Fix it a little? Fix it a lot? Abolish it altogether? What needs to happen to address the racism, social injustice, and violence that currently permeates the criminal legal system? Can we imagine something else in place of the criminal legal system? If yes, what is that “something else?” What do the alternatives look like and how do we ensure that they do not perpetuate danger, discrimination, and injustice?

CAUTION: EXISTING DATA DOESN'T TELL THE WHOLE STORY

Available research and data don't tell the whole story about the criminal legal system response to domestic violence and the stories told are often contradictory or incomplete. “Could not find data” or “an understudied area” or “lack of studies” or “most research simply did not address” or “research is needed” or “evidence is mixed” are common statements in academic papers and research that examine the criminal legal system response. Terms such as *likely*, *might*, *possible*, *probably*, *can be argued*, and *suggests* are common, often when data is sparse. Claims of one impact or another are sometimes based on a single study or small sample of incidents or participants or a study that is decades old and has not been revisited. Different surveys have contextual and methodological differences that make it challenging to compare results and can produce disparate findings in what becomes an “apple to oranges” kind of comparison.⁸ Side-by-side data comparison is difficult. To compare what is happening between states or between tribes on arrests and prosecutions of domestic violence-related crimes, for example, first requires finding what if any data exists and then determining whether it is even counting the same things and using the same definitions. Even homicide data is often incomplete and missing data related to basic demographic characteristics such as sex, race, and age or details about the circumstances of the incident and victim-offender relationship.⁹ Who gets to be a researcher in the first place also influences what kind of questions are asked and what kind of information gets collected. To go deeply into the breadth and impacts of domestic violence requires researchers with an intersectional gender- and race-based analysis of power and violence and family.

Cautions are also in order when considering survey data and conclusions about the level of domestic violence and what gets reported to the criminal legal system. The National Crime Victimization Survey (NCVS) and other population surveys that draw conclusions based on a

⁸ See *Apples to Oranges: Comparing Survey Findings from Selected National Surveys on Intimate Partner Violence*, National Resource Center on Domestic Violence, 2012; at <https://vawnet.org/material/apples-oranges-comparing-survey-findings-selected-national-surveys-intimate-partner>.

⁹ For example, from 1993 to 2010, the relationship between the victim and offender was not known or missing in 24% to 32% of homicide incidents involving female victims and in 40% to 51% of homicide incidents involving male victims (Catalano, 2013).

“nationally representative sample” may not adequately reflect the experiences of those who are outside of that “representative” category, especially those from marginalized and disenfranchised communities. Marginalized people may not be included in the first place and their experiences may be diluted in the larger sample when they are included. For example, surveys distributed based on phone or address or service provider records may miss or significantly underrepresent people who are homeless, move frequently, undocumented, or distrustful of service providers.

Similar considerations apply to looking at what happens to the arrest and incarceration of women. As the Prison Policy Initiative notes in its efforts to draw a picture of women’s experiences with mass incarceration, finding answers “requires not only disentangling the country’s decentralized and overlapping criminal justice systems, but also unearthing the frustratingly hard to find and often altogether missing data on gender. . . The data needed to explain exactly what happened, when, and why does not yet exist, not least because the data on women has long been obscured by the larger scale of men’s incarceration. Frustratingly, even as this report is updated every year, it is not a direct tool for tracking changes in women’s incarceration over time because we are forced to rely on the limited sources available, which are neither updated regularly nor always compatible across years.”¹⁰

COMMON QUESTIONS ABOUT DOMESTIC VIOLENCE AND THE CRIMINAL LEGAL SYSTEM

We can ask many questions about whether and how the criminal legal system should be used to intervene in domestic violence. The answers to several overarching questions help provide part of the picture. The big picture is incomplete, however, if we fail to centralize the most marginalized victims/survivors in both the questions we choose to explore and in the answers. As advocates ask questions about the criminal legal system, it is essential that we not assume a single, universal victim/survivor (typically perceived as white and middle class) and that we consider how the answer might vary depending upon race, immigration status, gender, or other aspects of identity and social standing. We must keep the complexity of risk and safety in the forefront and consider the ways in which the actions of the institution—from the everyday ways in which arrest, jail, prosecution, probation, and incarceration occur to deep abuses of power and control over people and communities—can increase risk and harm. For survivors of color and survivors who are transgender, for example, criminal legal system intervention can mean arrest or jail or police violence and make overall safety from a violent partner even more precarious.¹¹

¹⁰ *Women’s Mass Incarceration: The Whole Pie 2019*, Aleks Kajstura, Prison Policy Initiative, 2019; at <https://www.prisonpolicy.org/reports/pie2019women.html>.

¹¹ See survivor stories and reports from organizations such as the African American Policy Institute, including #SayHerName, <https://aapf.org/shn-campaign>, and Survived & Punished, <https://survivedandpunished.org/>. Also, *Unjust: How the Broken Criminal Justice Systems Fails LGBT People*, by Center for American Progress and

Some of the questions that anti-violence advocates ask when exploring its overall effectiveness and impact include:

1. How much domestic violence comes to the attention of the criminal legal system? Are there communities where there is under-reporting or over-reporting of domestic violence? Based on what factors?
2. What happens when domestic violence comes to the attention of the criminal legal system? What is the difference between the criminal legal system's response to victims perceived as white women compared those perceived as women of color? Or heterosexual survivors compared with transgender survivors?
3. Have criminal legal system reforms reduced domestic violence? If so, for who and for which communities? Are there communities in which criminal legal reforms have not reduced domestic violence? If so, which communities?
4. Has criminal legal system reform in response to domestic violence increased the arrest, charging, and conviction of victims/survivors of battering? If so, for which victims/survivors?
5. Has criminal legal system reform in response to domestic violence contributed to mass incarceration? If so, how and for which communities?

If anti-violence advocates are to get closer to seeing how the criminal legal system impacts victims/survivors whose lives are shaped and defined by danger, discrimination, and injustice, those victims/survivors' experiences need to be central to our inquiries and understandings.

In the following pages we explore a few common questions that advocates are asking about the effectiveness of criminal legal system intervention, particularly about the impact of arrest and police response.¹² We encourage anti-violence advocates to ask similar questions in their communities if they are not already doing so. The tools referenced at the conclusion of the

Movement Advancement Project, February 2016, <https://www.lgbtmap.org/lgbt-criminal-justice>; and reporting by *ProPublica*, including "Deadnamed," by Lucas Waldron and Ken Schwencke, August 10, 2018, at <https://www.propublica.org/article/deadnamed-transgender-black-women-murders-jacksonville-police-investigation>. The work of scholars such as Kimberlé Crenshaw, Beth E. Richie, and Andrea J. Ritchie includes analysis of criminal legal system-generated risk and harm (see Bibliography).

¹² We are not providing a comprehensive review of research on all facets of domestic violence and the criminal legal system. For a literature and research review specific to criminal legal system intervention see Buzawa, Buzawa, and Stark (2017). Klein (2009) and Klein and Hart (2013) have produced widely referenced research summaries. Critiques of reliance on the criminal legal system as a primary response to domestic violence, particularly as it impacts the most marginalized survivors and their communities, can be found in works by Coker and Macquoid (2015), Crenshaw (2012), Crenshaw (with Ocen and Nanda, 2015), Crenshaw and Ritchie (with Anspach, Gilmer, and Harris, 2015), Dasgupta and Eng (2003), Goodmark (2019), Kim (2018), Richie (2012), Ritchie (2017), Sherman (2015), and Sherman and Balck (2015).

discussion help to ask such questions in ways that pay attention to the experiences of victims/survivors who are marginalized by structural racism, poverty, and injustice.

[1] How much domestic violence comes to the attention of the criminal legal system?

Short answer: A lot but not all domestic violence gets reported to police.

Much domestic violence is not reported to police,¹³ nor is most violent crime of any kind reported to police.¹⁴ Based on ten years of NCVS data (2006–2015), police were notified in more than half (56%) of nonfatal domestic violence victimizations (Reaves, 2017). Serious violence, however, accounted for over one-third of *unreported* victimizations.¹⁵ An assault by a former rather than current partner and serious intimate partner violence is more likely to be reported to police than domestic violence overall (which includes a range of familial relationships).¹⁶ NCVS data for 2016–2018 shows an average reporting rate of 49% for domestic violence (which includes victimizations committed by intimate partners or family members) and an average of 47% specific to intimate partner violence.¹⁷

Data is inconsistent and sometimes contradictory. For example, national data over the past thirty years shows an upward, then downward, and then more stable trend in the rate of reporting domestic violence to police, holding at around 50%.¹⁸ Smaller studies in specific communities, however, suggest much lower reporting rates. Several studies conducted between 1985 and 2002 show reporting rates for domestic assault at less than 20% (Buzawa, Buzawa, and Stark, 2017). Victim reporting to police has increased *and* it's likely that most intimate partner violence is not reported, particularly among

¹³ And we don't accurately know how much domestic violence is reported to police. According to the Marshall Project (Meagher, 2016), the number of incidents of domestic violence reported to police are one of "13 Important Questions About Criminal Justice We Can't Answer." <https://www.themarshallproject.org/2016/05/15/13-important-questions-about-criminal-justice-we-can-t-answer>.

¹⁴ According to data from the 2018 National Crime Victimization Survey (NCVS), just under half (47%) of domestic violence victimizations in 2018 were reported to police, which is slightly higher than the overall rate of reporting for violent crime (43%) and slightly higher than reporting of stranger violence (45%). The reporting rate for intimate partner violence (excluding other family members) was 45% (Morgan and Oudekerk, 2019).

¹⁵ Primary reasons cited by victims for nonreporting serious violence included feeling the situation was a personal matter (32%) or fear of reprisal (31%). Other reasons included protecting the offender, feeling the crime was unimportant, and inefficient or biased police (Reaves, 2017).

¹⁶ In analysis by Morgan and Truman (2018), reporting of serious intimate partner violence (52%) was higher than reporting of domestic violence overall (47%) and increased from 2016 (47%).

¹⁷ Calculated from analysis of NCVS criminal victimization data published by the Bureau of Justice Statistics (Morgan and Truman, 2017, 7, at <https://www.bjs.gov/content/pub/pdf/cv17.pdf>) and Morgan and Oudekerk, 2018, 4, at <https://www.bjs.gov/content/pub/pdf/cv18.pdf>). The NCVS was redesigned in 2016.

¹⁸ Reporting rates for domestic violence based on the NCVS have been as high as 59% (2011) and for intimate partner violence as high as 60% (2011).

communities where distrust of police is high, there is a history of police violence and harassment, reluctance to involve outsiders, limited language access, and/or fear of deportation.

While most intimate partner violence is not reported to police, there are indicators of higher reporting rates among African American women and Latinas in heterosexual relationships. A 2007 review of non-fatal intimate partner victimization data (Catalano, 2007) showed an increase in reporting to police from 1992 to 2002, with the highest reporting rate for Black females (70%) and the lowest for Black males (47%). An earlier study of NCVS data (Rennison and Welchans, 2000) found that Latinas were more likely to report intimate partner violence to police than non-Latinas (65% versus 52%). A 2017 analysis of intimate partner violence against lesbian, gay, bisexual, transgender, and queer-identified people (NCAVP, 2018) reports most intimate partner violence survivors (60%) interacting with law enforcement (an increase from 39% in 2016).¹⁹

In looking at reporting data, however, “the unanswered question is who initiated the call to the police and whether the victim’s interests were served by an arrest” (Buzawa, Buzawa, and Stark, 2017). In urban areas with higher populations of communities of color that have experienced significant public and private resource and economic disinvestment, police may be called more often by victims who have few resources to bolster their safety or by neighbors or bystanders who have heard a disturbance. Critics of the criminal legal system’s role in the response to intimate partner violence argue that victims’ interests are rarely served by an arrest or by police involvement, which “all too often contributes to the criminalization of women’s efforts to prevent and avoid violence, and to defend themselves and their children and families” (Ritchie, 2017). This is particularly true for women of color and gender non-conforming people who do not fit prevailing assumptions by police and others about who constitutes a “legitimate” victim.

Victims/survivors who are most marginalized may turn to police because of immediate safety needs and few options only to face police hostility, dismissiveness, and misconduct. For example, while a majority of LGTBQ survivors of intimate partner violence had interactions with police (60%), most of those who had contact with police reported experiencing police misconduct (54%) (NCAVP, 2018). Most respondents to a national survey of advocates, service providers, attorneys, and others working with victims/survivors (77%) reported that the people they served “sometimes” called the

¹⁹ *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate and Intimate Partner Violence in 2017: A Report from the National Coalition of Anti-Violence Programs*, National Coalition of Anti-Violence Programs, 2018. At <https://avp.org/2017-hv-ipv-report/>.

police, in spite of also reporting significant levels of police hostility, dismissiveness, and bias based on people's identities, social status, or immigration status (Coker, Park, Goldscheid, Neal, and Halstead, 2015).

[2] What happens when domestic violence comes to the attention of the criminal legal system?

Short answer: Most of what is reported to police does not result in arrest, prosecution, conviction, or incarceration. However, any contact with the criminal legal system, including an arrest with diversion or charges dismissed or never filed can have a significant negative impact on people's lives—whether someone is accused of causing harm or is a victim/survivor. The collateral consequences of system involvement have far-reaching negative consequences for people from communities that face high levels of unemployment, housing insecurity and homelessness, and removal of children by the child welfare system.

Most victimization reported to law enforcement does not result in arrest or prosecution—or in assistance from a victim services agency, whether community or tribal-based or within the criminal legal system. In the NCVS data for 2006–2015, only 23% of victimizations reported to police resulted in an arrest at the time of initial police response (Reaves, 2017). Follow-up action by the police occurred in about one-third of reported victimizations, with arrest in 10% of those cases. Overall, including situations where the victim signed a criminal complaint, the alleged offender was arrested or charged in 39% of victimizations reported to police (Reaves, 2017). Incidents reported by victims are less likely to result in arrest than those reported by witnesses/bystanders (20% less likely, according to research cited by Buzawa, Buzawa, and Stark, 2017). According to the 2018 NCVS, only 18% of victims in intimate partner victimizations received assistance from a public or private victim service agency (Morgan and Oudekerk, 2019).²⁰

Another study with a nationally representative sample (Hamby, Finkelhor, and Turner, 2015) reports “marked attrition at every stage of the criminal justice system.” Only about half of incidents with in-person police contact led to an arrest, including those

²⁰ While low, this is higher than victim assistance to victims of violent crime overall (11%) or victims of simple assault (9%). The NCVS defines victim-service agencies as “public or private organizations that provide victims with support and services to facilitate their physical and emotional recovery, offer protection from future victimizations, guide victims through the criminal justice system, or assist them in obtaining restitution.” Between 2014 and 2018, victim assistance to victims of intimate partner violence has averaged 20% (from a low of 14.9% in 2017 to high of 28.2% in 2014), as calculated from analysis of NCVS criminal victimization data published by the Bureau of Justice Statistics.

with an injury involved. “Of the original 517 cases of family violence, only 10 perpetrators (less than 2%) served any jail time.” The authors note that “we do not think that a criminal justice response is needed or would be optimal for all [cases and] we are not suggesting that all 517 offenders deserve some jail time, but it seems possible that more than 10 do.”

Other studies suggest that prosecution and conviction rates vary greatly from one jurisdiction to another, with prosecution rates as low as 5% and as high as 95% and conviction rates from 50% to 90% (as reported by Klein and Hart, 2013).

The work of Robinson and Chandek (2000) found that the differential police response to Black battered women was in the direction of decreasing arrest and leaving women to fend for themselves (“our findings imply less sympathy and protectiveness of black battered women”). In their analysis of ten years of data from the National Incident Based Reporting System, Hirschel, McCormack, and Buzawa (2017) report that “compared with incidents involving White intraracial dyads, those involving both a Black victim and Black offender were 40.6% less likely to result in an arrest.”

Asking the question—what happens to domestic violence cases in the criminal legal system—reveals high levels of case attrition overall. But even if there were high and consistent levels of arrest, prosecution, and conviction, should advocates promote the criminal legal system as the primary response to intimate partner violence? Many advocates struggle with this question because of the significant and often lifetime collateral consequences of system involvement. Even an arrest with no subsequent charge, conviction, or sentence can mean such lasting impacts as losing a job or housing, incurring exorbitant legal expenses, and ending up on searchable databases. For immigrants, coming to the attention of the criminal legal system risks jeopardizing legal status and deportation (and increasingly almost guarantees deportation, regardless of the violence a survivor seeks to escape).

The ways in which people with criminal records are limited or prohibited from accessing employment, occupational licensing, housing, voting rights, education, and other opportunities are extensive.²¹ A woman who is being battered who calls 9-1-1 for help may only want police to remove her abusive partner without an arrest, but he may end up getting arrested and stuck in jail and lose his job, thereby endangering her family’s economic stability and housing. (She may not have wanted police involvement at all if it is a neighbor who calls.) If an arrest happens to end in a conviction and sentence, the costs of paying for pretrial electronic monitoring or probation can be high—not only for

²¹ The collateral consequences of involvement with the criminal legal system are so extensive that a database was created to keep track: National Inventory of Collateral Consequences, at <https://niccc.csgjusticecenter.org/>.

felonies, but also for misdemeanors, which include most domestic violence-related charges. For people with low or no income, monitoring and probation fees impact the immediate and long term economic stability of the person charged but also impact victims/survivors and their children as resources are withdrawn from the family and transferred to the state or a private entity.²² Calls to police can trigger local “nuisance ordinances” that lead to eviction, with significant impacts for African American women, in particular, who are more likely to be evicted and face the cascading harms of losing their home.²³ Victims/survivors who are arrested, charged, or convicted often face losing their children and being shut out of occupations that women commonly hold, such as child care and health care, along with a host of other negative consequences.²⁴

[3] Have criminal legal system reforms reduced domestic violence?

Short answer: yes, and no; maybe. Intervention by the criminal legal system has been helpful for *some* victims of battering under *some* circumstances, but how broadly and deeply remains unclear. Intimate partner violence remains a significant, entrenched problem.

Different national surveys focus on different aspects of the rate and prevalence of domestic violence and changes over time.

There are indicators of a decline in the prevalence of intimate partner violence between 1994 and 2011. There is also research that supports certain approaches as contributing to increased support and safety for victims of battering and effective sanctions and opportunities to change for those causing the harm. Effective approaches include

²² “Digital Jail: How Electronic Monitoring Drives Defendants into Debt,” Ava Kaufman, *ProPublica*, July 3, 2019; at https://www.propublica.org/article/digital-jail-how-electronic-monitoring-drives-defendants-into-debt?utm_source=pardot&utm_medium=email&utm_campaign=dailynewsletter. “Punishing Poverty: The high cost of probation fees in Massachusetts,” Wendy Sawyer, Prison Policy Initiative Report, December 8, 2016; at https://www.prisonpolicy.org/probation/ma_report.html. “Set up to Fail”: The Impact of Offender-Funded Private Probation on the Poor,” Human Rights Watch Report, February 20, 2018; at <https://www.hrw.org/report/2018/02/20/set-fail/impact-offender-funded-private-probation-poor>.

²³ “Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner City Women,” Matthew Desmond and Nicole Valdez, *American Sociological Review*, 78(1), 117-141, 2012; at https://scholar.harvard.edu/files/mdesmond/files/desmond.valdez.unpolicing.asr_0.pdf. Also, see analysis by the ACLU at <https://www.aclu.org/other/i-am-not-nuisance-local-ordinances-punish-victims-crime>. See the BWJP webinar, Nuisance Ordinances: How They Work, Who They Harm, and How to Fight Them, Sandra Park and Linda Morris, September 2019, at <https://www.bwjp.org/resource-center/resource-results/webinar-nuisance-ordinances-how-they-work.html>.

²⁴ *Understanding and Mitigating the Direct and Collateral Consequences of Criminal Records: Selected Resources Focusing on Women/Victims of Battering Charged with Crimes*, National Clearinghouse for the Defense of Battered Women, last updated March 2016; at <https://www.ncdbw.org/annotated-links>.

system-wide coordination, recognizing the patterned nature of domestic violence, messages of accountability and victim safety, and swift, certain consequences for ongoing violence.²⁵

One national study based on NCVS survey data (1992–2002) and including incidents not reported to police, as well as reported, concluded that arrest has a small, statistically insignificant impact on repeat intimate partner violence. But “police involvement has a strong deterrent effect” (Felson, Ackerman, and Gallagher, 2005). A more recent analysis of NCVS data (1996–2012) reached a similar conclusion: “police notification and victim-centered services are associated with a larger reduction in repeat intimate partner violence than are arrest-based responses” (Xie and Lynch, 2016). In other words, there are indicators that something about police involvement *without* arrest is protective for some victim/survivors. Any protective factors associated with police involvement are unlikely to be a universal benefit, however, and for some victims/survivors, police involvement is more likely to lead to their arrest.

A significant decline in the rate of intimate partner violence (IPV) coincides with the years in which many of the reforms in the criminal legal system response to domestic violence were made. Between 1994 and 2011, “the rate of serious intimate partner violence (rape or sexual assault, robbery, and aggravated assault) against females declined by 72%,” from 5.9 victimizations per 1,000 to 1.6 per 1,000. Similarly, the rate of IPV simple assault against females fell by 70%, from 10.3 per 1,000 to 3.1 per 1,000 (Catalano 2013, analyzing data from National Crime Victimization Survey).²⁶ Violence committed by intimate partners declined at a faster rate than violent crime committed by immediate family members and other relatives (Truman and Morgan 2014).²⁷

Since the early 1990s there has been a decline in overall intimate partner violence-related deaths in the United States, with a drop in the absolute number of persons killed, even as the population has grown. The benefit is not evenly spread, however, and men have benefitted far more than women in the decline in partner homicides. Homicide data also illustrates the contradictions and inconsistency in domestic violence data, with differing rates and ranges depending upon what is counted and how it is counted.

²⁵ *Research Supports the Intervention Strategies of the Blueprint for Safety*, at Note 4.

²⁶ Catalano reports a similar pattern of decline in intimate partner violence against males, who have lower overall rates of IPV victimization in comparison to females: a decline of 64% in the rate of serious intimate partner violence, from 1.1 per 1,000 to 0.4 per 1,000 and a 44% decrease in the rate of simple assault, from 1.9 per 1,000 to 1.0 per 1,000.

²⁷ Domestic violence data drawn from the NCVS includes victim-offender relationships of intimate partner, immediate family, and other relative. Most domestic violence is intimate partner violence (69%) in the period 2003-2012). IPV accounted for 15% of all violent victimizations (stranger and non-stranger) in this period. (Truman and Morgan, 2014).

Drawing on data from FBI Supplementary Homicide Reports, Cooper and Smith (2011) report that between 1980 and 2008, the percentage of male homicide victims killed by an intimate partner fell from 10% to 5%. The greatest decline was in the killing of black men by female partners. Between 1980 and 2008, the percentage of black male victims killed by an intimate declined from 13% to 5% (Cooper and Smith, 2011). “Far and away the largest proportion of the overall drop in partner homicides over the last 40 years is accounted for by the drop in the killing of Black men by female partners, both in absolute numbers and as a proportion of all partner homicides” (Buzawa, Buzawa, and Stark, 2017).

The decline in female homicides is a much different picture. While the number of women killed by intimates dropped between 1980 and 2008, the *rates* for women killed by an intimate (as a percentage of all homicides of women) remained largely the same or increased slightly. The percentage of female homicide victims killed by a male partner *increased* to 45%, after starting at 43% in 1980, declining through 1995 (38%), and then increasing thereafter (Cooper and Smith, 2011). Homicide data for 2003-2014 from the Centers for Disease Control and Prevention, based on the National Violent Death Reporting System, shows an even higher percentage of female homicide victims killed by an intimate partner: 55% (Petrosky et al., 2017).

Critics of the emphasis on criminal legal system intervention contend that while the rate of reported domestic violence has declined significantly, the decline reflects an aging population and the decline in violent crime overall rather than the impact of domestic violence reforms. If mandatory arrest and other laws were effective, some argue, we would have seen an even bigger decline in the rate of domestic violence.²⁸ Given the focus of public policy on intervention by police and increased arrest and prosecution since enactment of the Violence Against Women Act, intimate partner homicide should not remain one of the leading causes of death for women and women should have benefitted as much or more than men from a decline in homicide numbers. Whether or not rates of domestic violence always move in tandem with rates of crime in general is unknown, however. Nor is there a definitive explanation for the declines in rates of nonfatal and fatal intimate partner violence.

Research supports certain intervention approaches as being more effective in increasing protection and reducing violence, particularly those related to a coordinated community

²⁸ For a summary of the arguments that criminal legal system interventions have not been effective and that the declines in fatal and non-fatal intimate partner violence are explained by other factors, see Buzawa, Buzawa, and Stark (2017) and Goodmark (2018). Also, “Stop Treating Domestic Violence Differently from Other Crimes,” Leigh Goodmark, *New York Times*, July 23, 2019; at <https://www.nytimes.com/2019/07/23/opinion/domestic-violence-criminal-justice-reform-too.html>.

response (CCR). These approaches include system-wide coordination, recognizing the patterned nature of intimate partner violence, consistent messages of accountability and victim/survivor safety, and swift, clear consequences for ongoing violence.²⁹ Research also reveals significant variations in CCR content, quality, and implementation, with street-level practice among police, prosecutors, courts, and other system practitioners often diverging from the CCR model and ideals for intervention (Gondolf, 2012; Buzawa, Buzawa, and Stark, 2012 and 2017; Post et al., 2010; Bouffard and Muftic, 2007; Worden, 2003). Policy and practice reforms that seek to implement ideals of prioritizing victim/survivor safety while emphasizing individual and system accountability are highly dependent on how changes are introduced and on consistent training, supervision, and monitoring.³⁰

[4] Has criminal legal system reform in response to domestic violence increased the arrest, charging, and conviction of victims/survivors of battering?

Short answer: yes, although current national arrest data specific to the context of domestic violence is not readily or uniformly accessible and state-by-state comparisons are difficult. The consequences of being jailed can have an enormous and destructive impact on a woman's life, regardless of whether she is ever convicted of a crime.

The number of women arrested, convicted, and sentenced on all types of charges has increased dramatically since 1980.³¹ Women are more likely than men to commit property crimes and drug offenses than violent crime and many women who do commit violent or aggressive acts often do so in self-defense in situations of intimate partner violence (National Resource Center on Justice Involved Women, 2016).

²⁹ *Research Supports the Intervention Strategies of the Blueprint for Safety*, at Note 4.

³⁰ One of the most comprehensive efforts to change criminal legal system response is the Blueprint for Safety, designed by Praxis International and the community of St. Paul and Ramsey County, Minnesota. The Blueprint provides a framework and templates for coordinated policy and practice at each point of the system, from a 9-1-1 call to post-sentencing supervision. The Blueprint is anchored in six foundational principles: 1) an interagency approach and collective intervention goals, 2) attention to the context and severity of abuse at each point of intervention, 3) recognition of the need for continuing engagement with victims and offenders, 4) sure and swift consequences for continued abuse, 5) messages of help and accountability at each point of intervention, and 6) reducing unintended consequences and the disparity of impact on victims and offenders. Information and tools at <https://praxisinternational.org/blueprint-home/becoming-a-blueprint-community-2/>. The Battered Women's Justice Project provides archived webinars and other resources that highlight community experiences with criminal legal system reforms: <https://www.bwjp.org/resource-center.html>.

³¹ The number of incarcerated women increased by more than 750% between 1980 and 2017. Though many more men are in prison than women, the rate of growth for women has been twice as high since 1980. As of 2016-2017, 1.3 million women were under the control of the United States' criminal legal system. *Incarcerated Women and Girls*, The Sentencing Project, June 6, 2019; at <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/>.

More incarcerated women are held in local jails than in state prisons and most of those in jail—a staggering 60%—have not been convicted of a crime and are awaiting trial (Kajstura, 2019).³²

So, what does it mean that large numbers of women are held in jail — for them, and for their families? While stays in jail are generally shorter than in stays in prison, jails make it harder to stay in touch with family than prisons do. Jail phone calls are three times as expensive as calls from prison, and other forms of communication are more restricted — some jails don't even allow real letters, limiting mail to postcards.

This is especially troubling given that 80% of women in jails are mothers, and most of them are primary caretakers of their children. Thus children are particularly susceptible to the domino effect of burdens placed on incarcerated women. — (Kajstura, 2019)

Women's Mass Incarceration: The Whole Pie

The tentacles of mass incarceration have a long reach . . .

- Alex Kajstura, Prison Policy Initiative

Resource for best available national data on correction control of women, data that is “frustratingly hard to find and often altogether missing.” Since its inaugural publication in 2017, the report is updated annually.

Of the women under all forms of correctional control, three out of four are on probation (Kajstura, 2019). Probation typically means steep fees for supervision and mandated programs and frequent meetings that can be difficult for women who lack childcare, transportation, and other resources to attend. Failure to comply can be a violation of probation and result in re-incarceration.

Racial disparities in justice system involvement are significant. “Overall Black and American Indian women are markedly overrepresented in prisons and jails: Incarcerated women are 53% White, 29% Black, 14% Hispanic, 2.5% American Indian and Alaskan Native, 0.9% Asian, and 0.4% Native Hawaiian and Pacific Islander. While we are a long way away from having data on intersectional impacts of sexuality and race or ethnicity on women’s likelihood of incarceration, it is clear that Black and lesbian or bisexual women are disproportionately subject to incarceration” (Kajstura, 2019).³³

³² Most women in jails are held for local authorities, but jails also hold women under ICE custody. See *Women’s Mass Incarceration: The Whole Pie 2019*, Aleks Kajstura, Prison Policy Initiative, 2019 at <https://www.prisonpolicy.org/reports/pie2019women.html>.

³³ 2018 U.S. Census estimates show the overall population as 76.5% White, 13.4% Black or African American, 18.3% Hispanic, 1.3% American Indian and Alaskan Native, 5.9% Asian, and 0.2% Native Hawaiian and Pacific Islander;

Most incarcerated women are survivors of trauma and gender-based violence, either as a child and/or as an adult, with estimates ranging from 55% to 95%. Multiple studies indicate that **between 71% and 95% of incarcerated women have experienced physical violence from an intimate partner** (Dichter & Osthoff, 2015). There is no national data on the number of women arrested and incarcerated for intimate partner violence-related crimes, however.³⁴

Commentators infer that the “dramatic increase in the arrest of women for both simple and aggravated assault” is related to arrests made in IPV-related cases under mandatory arrest laws. For example, using 2001 FBI data, Chesney-Lind (2002) notes that arrests of adult women for simple assault increased by 65.9% between 1991 and 2000; women’s arrests for aggravated assault increased by 46.6% in that same time period. In 2010, 27% of arrests for simple assault were female arrests (adult and juvenile), the highest level in two decades and up 75% since 1990 (Snyder, 2012). Similarly, 23% of arrests for aggravated assault were female arrests. Between 1990 and 2010, almost all the growth rate in the female arrest rate for simple assault occurred between 1990 and 1997; for aggravated assault the increase occurred between 1990 and 1995 (Synder, 2010).³⁵ These years coincide with the introduction and expansion of mandatory arrest policies and laws in many jurisdictions. Male arrest rates for simple assault and aggravated assault did not increase between 1990 and 2010 but fell to their lowest levels in twenty years.

The increase in female arrest rates for assault does not reflect a comparable increase in

<https://www.census.gov/quickfacts/fact/table/US/PST045218>. While the rate of imprisonment for African American women has declined since 2000 (by 55%), African American women are still imprisoned at nearly twice the rate for white women (92 per 100,000 versus 40 per 100,000). There has been a significant increase in the rate of imprisonment for white women (by 44%). The rate of imprisonment for Hispanic women has also increased (by 10%). *Fact Sheet: Incarcerated Women and Girls*, The Sentencing Project, June 6, 2019; at <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/>). While national data is helpful for seeing the big picture of trends and issues, local and regional variations can be significant. Comparing the Census figure for Hispanic population at 18.3% of the general population and an incarceration rate for Hispanic women at 14% suggests that there may not be an overrepresentation. Looking at individual states, however, shows greater disparities and overrepresentation in incarceration rates. For example, state profiles compiled by the Prison Policy Initiative show overrepresentation in the jail/prison population as compared to the state population for Latinos in Oklahoma (15% jail/prison population and 9% state population), Arizona (41% jail/prison and 30% state) and Minnesota (12% jail/prison and 5% state); <https://www.prisonpolicy.org/profiles/>.

³⁴ Survived & Punished organizes to de-criminalize efforts to survive domestic and sexual violence, support and free criminalized survivors, and abolish gender violence, policing, prisons, and deportations. Its publications include *Research Across the Walls: A Guide to Participatory Research Projects and Partnerships to Free Criminalized Survivors* (January 2019), at <https://survivedandpunished.org/research-across-the-walls-guide/>.

³⁵Female juvenile arrests were 21% of total female arrests for simple assault in 2010 and 12% of female arrests for aggravated assault (Table 5). *Arrests in the United States, 1990-2010*, Bureau of Justice Statistics, October 2012; at <https://bjs.gov/content/pub/pdf/aus9010.pdf>.

women's *actual* use of violence. Rather, the increase in female arrest rates is “due as much or more to the unintended consequences of recent statutory amendments, emphasizing arrests, and how these have been applied in practice” (Buzawa, Buzawa, and Stark, 2017). Additionally, when drug war policies interconnect with women's experiences of battering, more women are arrested, charged, and sentenced as an accomplice—the “girlfriend problem”—often with a more severe sentence than those directly involved in drug sales.

Following the widespread adoption of mandatory arrest laws in the 1980s and 1990s, various investigations and research showed significant increases in arrests of women and indicators that those arrested were victims of battering.³⁶ Chesney-Lind (2002) provides examples of communities where arrests of women for domestic violence increased significantly, such as Prince William County Maryland (from 12.9% of domestic violence arrests to 21% in 1996) and California (from 6% in 1988 to 16.5% in 1998).

Research from 2000 to 2009 which included multiple jurisdictions provides examples of female defendant rates in domestic violence cases of 13.7% (Smith and Farole, 2009) and 17.7% (Hirschel et al., 2007). Wisconsin provides a more recent example, with a female arrest rate holding around 24% between 2013 and 2017.³⁷ Calculations of 2016 data from the National Incident Based Reporting System show a female arrest rate of 23% for adult intimate partner incidents “cleared by arrest.”³⁸ A multi-year study (1987–2000) of all counties in California found that “where law enforcement intervention increased in domestic abuse situations, women experienced dramatically larger percentage increases in arrest, prosecution, and conviction than men” (Wells and DeLeon-Granados, 2005). One examination of mandatory arrest policies concluded that officers in states with mandatory arrest were more than twice as likely to make a female-only arrest (Durfee, 2012).

Dual arrest (where both parties to an incident are arrested) is not necessarily the most likely way that victims/survivors end up arrested in intimate partner violence incidents, although it is often assumed to be the primary path. The national dual arrest rate is low—2%—but there are significant local and regional differences, as well as much higher rates for same-sex couples. The state of Connecticut, for example, has long had a

³⁶ Intimate partner violence-related arrests overall increased following introduction of police warrantless arrest and mandatory and preferred arrest laws and policies, from a 7% to 15% range in the 1970s-1980s to about 50% more recently (see overview in Hirschel, McCormack, and Buzawa, 2017).

³⁷ <https://www.doj.state.wi.us/dles/bjia/domestic-abuse-data>

³⁸ Getting to this data is an example of the challenges in getting a clear picture of intimate partner data from criminal legal system sources. It requires filtering NIBRS victim-offender relationship categories that include parents, siblings, children, and other family members to reflect the most likely intimate partner relationships (spouse, boyfriend/girlfriend, homosexual relationship, and ex-spouse). See the Victims of Domestic Violence tool at Easy Access to NIBRS: <https://www.ojdp.gov/ojstatbb/ezanibrsdv/asp/selection.asp>.

high dual arrest rate in comparison to the national level. Its rate is high enough to drive the regional rate for the Northeast from 1.8% to 9.1% (Hirschel and McCormack, 2019). The Connecticut dual arrest rate averaged 18% between 2011 and 2015, with local dual arrest rates varying from 20% to 37% (Smith, 2017). Dual arrest is far more likely in cases involving same-sex couples: 39 times more likely for female couples and 53 times more likely for male couples (Hirschel, McCormack, and Buzawa, 2017).

For immigrant women who are arrested – and particularly women who are undocumented – there are significant risks of deportation, economic loss, separation from or permanent loss of children, and greater violence in their home country if deported. Undocumented women can face these same consequences if their abusive partner is arrested or prosecuted, regardless of their partner’s status. For poor women and women of color, police involvement, particularly when a call automatically triggers a report to child protective services, is often a pathway to child welfare system involvement and increased risk of losing children.

The consequences of arrest—regardless of prosecution or conviction—can be significant and life-altering. Spending even a weekend in jail can lead to the loss of a job. Being jailed for weeks or months pretrial when cash bail can’t be paid is likely to lead to losing employment, custody of children, and stable housing. While a felony conviction and prison incarceration expand the list and severity of collateral consequences, it takes very little contact with the criminal legal system to derail a victim/survivor’s life.

[5] Has criminal legal system reform in response to domestic violence contributed to mass incarceration?

Short answer: no, and yes; the impact of domestic violence laws, policies, and practices on mass incarceration and hyper-criminalization is not in numbers of people incarcerated for domestic violence-related crimes but in the deep impacts on people and communities that magnify the risks for domestic violence victims/survivors.

“Mass incarceration” refers to the current and historically extreme rates of imprisonment and other forms of correctional control that are overwhelmingly concentrated among young African American men and women and other people of color from communities facing significant disadvantages in employment, housing, education, health, and other aspects of a secure, stable life. The term was brought to wider public attention with the publication of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* by Michelle Alexander. Alexander emphasizes mass incarceration as the foundation of “the new caste system . . . of racial stigmatization and permanent marginalization.” The term refers not only to the criminal legal system “but

also to the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison. Once released, former prisoners enter a hidden underworld of legalized discrimination and permanent social exclusion.”³⁹ Other commentators, such as Coker and Macquoid (2015) prefer the term “hyper-incarceration,” arguing that it more accurately captures the targeted versus generalized nature of an explosion in incarceration that is shaped by race, class, and place. A 2012 UCLA Law Review symposium—Overlooked and Underprotected: Women, Race, and Criminalization—addressed the ways in which “in the context of mass incarceration, race-centered and gender-centered frames are largely silent about the hyperpresence of women of color in the system” (Crenshaw, 2012). A growing body of scholarship and activism addresses the distinct ways in which systems of mass/hyper-incarceration impact the lives of women of color and survivors of gender-based violence.⁴⁰

There is significant case attrition in domestic violence-related arrests and prosecution and sentencing. In terms of numbers alone, it does not appear that large numbers of people are being incarcerated for domestic violence-related crimes, although the data to examine this question is not easily compiled. There’s no single federal-level source of domestic violence-related incarceration rates. While some state-by-state comparisons can be made, states do not have uniform definitions and classifications; to draw any conclusions first requires a separate analysis for each state.

The absence of large numbers of prison sentences for domestic violence-related crimes does not mean, however, that hyper-incarceration has not shaped the response to battering and domestic violence, nor that domestic violence reforms are entirely disconnected from issues of hyper-incarceration. Jail populations, for example, have tripled in the last thirty years and while driven by increases in pretrial detention and money bail, increasing rates of arrest for domestic violence-related charges, particularly in jurisdictions with mandatory or pro-arrest laws or policies, mean that some of the jail population increase is probably related to domestic violence charges. Mandatory arrest policies and laws have resulted in increasing arrests of women, and poor women are

³⁹ Alexander (2010), pages 12 and 13.

⁴⁰ For example, see Bibliography for the work of organizations such as INCITE!, Prison Policy Initiative, Survived & Punished, and the African American Policy Forum and the following commentators: Chesney-Lind (2002); Coker and Macquoid (2015); Crenshaw (2012); Crenshaw (with Ocen, and Nanda, 2015); Crenshaw and Ritchie (with Anspack, Gilmer, and Harris, 2015); Goodmark (2018); Kajstura (2019); Kim (2015 and 2018); Richie (2012); Ritchie (2017); Robinson and Chandek (2000); Sherman (2016); Sherman and Balck (2015). Also, the National Clearinghouse’s Ending Mass Incarceration webinar series and the Reentry series include presentations that examine the impacts of mass/hyper incarceration on survivors marginalized by structural racism and poverty: <https://www.ncdbw.org/webinars>.

most likely to get stuck in jail without being convicted of a crime.⁴¹ Analysis by the Prison Policy Initiative shows that over half of the people in jail who could not make bail were parents of children under 18. Two-thirds of the women who could not meet bail conditions were mothers of minor children; just over half of the men were fathers.⁴²

Beth E. Richie and Donna Coker are among the advocate scholars who are examining and articulating the broad and more specific connections between domestic violence policy and hyper-incarceration.⁴³ The consequences of hyper-incarceration are devastating for poor women of color and their families and communities, they argue. Richie writes: “I am also using the notion of a prison nation metaphorically to represent the ways that public policy leads to punitive state intervention that targets Black women in ways that leave them vulnerable to male violence . . . In the end, Black women in vulnerable positions within disadvantaged communities fall so far from the gaze that is now sympathetic to some women who experience violence that they have virtually no right to safety, protections, or redress when they are victimized. At best, they are relegated to the status of undeserving. More often, those Black women with the least privilege, who live in the most dangerous situations, are criminalized instead of being protected or supported (2012, 20-22).”

Coker and Macquoid (2015) highlight four negative impacts of hyper-incarceration that contribute to increased risk, vulnerability, and harm for many victims/survivors and their communities. The impacts include: “collateral consequences of conviction; prison trauma and the deepening of destructive masculinities; economic and emotional harms to the families of those incarcerated, especially children; and harms of hyper-incarceration to communities.”

⁴¹ “The criminal justice system punishes poverty, beginning with the high price of money bail: The median felony bail bond amount (\$10,000) is the equivalent of 8 months' income for the typical detained defendant. As a result, people with low incomes are more likely to face the [harms of pretrial detention](#). Poverty is not only [a predictor](#) of incarceration; it is also frequently the outcome, as a criminal record and time spent in prison [destroys wealth](#), creates debt, and [decimates job opportunities](#). It's no surprise that people of color — who face much greater rates of poverty — are dramatically overrepresented in the nation's prisons and jails. These racial disparities are particularly stark for Black Americans, who make up 40% of the incarcerated population despite representing only 13% of U.S residents. The same is true for women, whose incarceration rates have for decades risen faster than men's, and who are often behind bars because of financial obstacles such as an inability to pay bail.” Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie – 2019*, Prison Policy Initiative, March 19, 2019; at <https://www.prisonpolicy.org/reports/pie2019.html>.

⁴² Wendy Sawyer, *How does unaffordable money bail affect families?* Prison Policy Initiative, August 15, 2018; at <https://www.prisonpolicy.org/blog/2018/08/15/pretrial/>.

⁴³ The 2017-2019 NCDBW webinar series on ending mass incarceration provides an introduction to analysis of hyper-incarceration and domestic violence: <https://www.ncdbw.org/webinars-end-mass-incar-series-list>.

Two surveys published in 2015 illustrate the complex nature of victims/survivors' experiences when the criminal legal system becomes involved in their lives as they seek help or are drawn into it by someone else's actions.

Who Will Help Me? Domestic Violence Survivors Speak Out About Law Enforcement Responses

A survey conducted by the National Domestic Violence Hotline with 637 survivors who used its chat services (*Hotline Survey*) reports a strong reluctance to turn to police for help, even among women who had called police. Participants were an average of thirty years old and mostly white (56%), Hispanic (15%), and African American (11%).⁴⁴ More than half of all participants said calling the police would make things worse and two-thirds or more said they were afraid the police would not believe them or would do nothing.⁴⁵

A closer look at the nature of the fear related to police response shows that there was no single reason for that fear. For some women, the fear was based in experience that the police response is influenced by race, ethnicity, immigration status, income, disability, sexual identity, and/or gender. For some, it was related to how police might treat their partner or police violence toward those involved. For many, the fear was related to police *not* believing them or the police doing nothing.⁴⁶

Hotline Survey participants who had called the police identified the following actions as among the most helpful things police did: provided information about options, including specific safety suggestions and referrals; provided tangible help, such as getting a protective order, transportation to safety, or connection with an advocate; arrested or charged the abuser; and believed or validated that what had happened was a crime. Because participants in the Hotline survey identified these kinds of actions as helpful doesn't mean that they were or are universally helpful, however, just as there was no universal reason for fear of involving the police.

⁴⁴ TK Logan and Roberta Valente, *Who Will Help Me? Domestic Violence Survivors Speak Out About Law Enforcement Responses* (2015), National Domestic Violence Hotline; at <http://www.thehotline.org/wp-content/uploads/2015/09/NDVH-2015-Law-Enforcement-Survey-Report.pdf>. The authors emphasize that the survey results "are not generalizable." Responses came from women who used the hotline during a one-month period and the sample "likely under-represents a number of individuals (e.g., those with sexual assault experiences, disabilities and those from specific racial/ethnic groups)." While useful as part of the larger picture, the results do not represent all victim/survivors or all interactions with police.

⁴⁵ Of the 309 women who had called the police, 207 (67%) were "somewhat or extremely afraid" to call the police in the future. One in four had been arrested or threatened with arrest after reporting to police.

⁴⁶ For example, of the 207 women in the Hotline survey who had contacted the police and were somewhat or extremely afraid to call in the future, 80% were afraid police would not believe them or would do nothing. Of the 262 participants who had never called the police and were somewhat or extremely afraid to call in the future, 59% were afraid the police would not believe them or would do nothing.

Responses from the Field: Sexual Assault, Domestic Violence, and Policing

An ACLU-sponsored survey of over 900 advocates, service providers, attorneys, and others working with victims/survivors (*Responses from the Field*) identified significant problems in police response to domestic violence and sexual assault.⁴⁷ Along with widespread concern about police bias were concerns about police inaction: i.e., doing nothing, failing to investigate, or dismissing victim/survivors' claims. Police inaction, hostility, and dismissiveness were key issues raised by the survey participants.⁴⁸

Over half of the participants in the *Responses from the Field* survey (55%) identified police bias against certain groups or victims of domestic violence or sexual assault as a significant problem and 80% believed that police relations with marginalized communities influenced people's willingness to call the police. Participants reported that survivors frequently shared fears about or experiences with collateral consequences related to police involvement, citing action by child protective services, the impact of immigration status/deportation, and loss of income, housing, and employment as widespread problems. *Responses from the Field* highlighted gaps between survivors' goals and how the criminal legal system operates. Survivors often want options other than the kind of punishment typical of the criminal legal system, fear the loss of control over what happens in the system, and find involvement with it complicated, lengthy, and traumatic.

The two surveys illustrate the complex nature of victims/survivors' experiences with the criminal legal system. For some, the very actions that police take are harmful; for others, it is police inaction that is harmful or the harm of persistent, widespread bias by police and weak accountability for police misconduct.

⁴⁷ *Responses from the Field: Sexual Assault, Domestic Violence, and Policing* (2015). Published by the ACLU Foundation, the report is a collaboration between Donna Coker, Sandra Park, Julie Goldscheid, Tara Neal, and Valerie Halstead: at <https://www.aclu.org/feature/responses-field>.

⁴⁸ Eighty-eight percent (88%) reported that police sometimes or often do not believe victims or blamed victims for the violence and 83% reported that police sometimes or often do not take allegations of sexual assault and domestic violence seriously.

WHAT IS A COMMUNITY OR COALITION TO DO?

The “tentacles of mass incarceration” are real and far-reaching and have devastating impacts, particularly communities of color and poor communities. Gender-based violence is persistent and deep; it is real and far-reaching, with devastating impacts on communities.

We know that this paper leaves more questions than it answers. It provides an update on some of what we know and don’t know about the criminal legal system’s impact on domestic violence, particularly the impact of arrest and police response. It suggests where and how to begin or continue creating advocacy that confronts gender-based violence *and* hyper-incarceration, as many advocates have been doing. It also encourages us to keep a critical eye on research and on the complex and often contradictory nature of victims/survivors’ experiences with the criminal legal system, particularly as those experiences are shaped by the ways in which people and communities are marginalized by danger, discrimination, and injustice. We can take the following kinds of actions to learn what is happening in our communities.

- ✓ Find out what is happening in your state and local systems of incarceration and criminal legal system control.

Community research

- Find out what is happening in your state and local systems of incarceration and criminal legal system control.
- Construct a “whole pie” for women’s mass incarceration in your community.
- Find out what is happening for victims/survivors who end up in the criminal legal system as defendants.
- Survey and talk with a wide range of victims/survivors in your community and learn about their experiences with the criminal legal system.
- Survey and talk with a wide range of victims/survivors in your community and learn about their experiences with the criminal legal system.

- Where are people being incarcerated (state prisons, local jails, federal facilities)? Have rates of imprisonment changed over time? Who is being incarcerated by race/ethnicity? How wide are the disparities by race/ethnicity in your state’s prisons and jails? How many people in your state are under state control (including incarceration, probation, and parole)? See state-specific data compiled by the Prison Policy Initiative: <https://www.prisonpolicy.org/profiles/>. Find state population data at Census QuickFacts: <https://www.census.gov/quickfacts/fact/table/US/PST045218>.

- Are you able to find this kind of population and criminal legal system information for your community? If so, how does it compare to what is going on statewide?
- ✓ Construct a “whole pie” for women’s mass incarceration in your community.
 - Most women who are incarcerated or otherwise under the control of the criminal legal system are survivors of intimate partner violence and/or childhood abuse. Understanding this bigger picture helps understand the full scope and impact of gender-based violence and mass incarceration. The Prison Policy Initiative provides a model for the kinds of information to seek and questions to ask. <https://www.prisonpolicy.org/reports/pie2018women.html>
- ✓ Find out what is happening for victims/survivors who end up in the criminal legal system as defendants.
 - As part of its toolkit for systems advocacy on behalf of victims of battering charged with crimes, the National Clearinghouse provides a range of tools to help gather basic criminal legal system data, learn from diverse victims/survivors, review cases, and analyze current practices. See the tools in Appendix 4 (4A-4E) at <https://www.ncdbw.org/pubs-toolkit>.
 - Construct a “whole pie” for domestic violence-related incarceration in your community. Who is being arrested, charged, convicted, and sentenced? Who ends up in jail without being convicted of a crime and for how long and with what consequences?
- ✓ Survey and talk with a wide range of victims/survivors in your community and learn about their experiences with the criminal legal system.
 - Seek out victims/survivors who have been involved with the criminal legal system (whether they sought help or police were called because of an abusive partner, neighbor, family member, or other third-party) *and* those who avoid it. The National Clearinghouse provides a guide for learning from survivors in its systems advocacy toolkit; see Appendix 4-C at <https://www.ncdbw.org/pubs-toolkit>. Or use the kinds of topics and questions that frame the Hotline Survey (*Who Will Help Me?*) and conduct a local version for your community: <http://www.thehotline.org/wp-content/uploads/2015/09/NDVH-2015-Law-Enforcement-Survey-Report.pdf>.

- What are the experiences of victims/survivors most marginalized by identity and life circumstances, including gender identity, sexual orientation, race, immigration status, language, age, poverty, drug and alcohol use?
- ✓ Conduct an advocate survey, exploring current conditions, alternatives, and next steps.
 - Use a local version of *Responses from the Field* to learn about policing and domestic violence in your community. The report's analysis suggests possible topic areas, including attention to police response and bias, and its appendix includes examples of possible survey questions:
https://www.aclu.org/sites/default/files/field_document/2015.10.20_report_-_responses_from_the_field.pdf.

These kinds of actions help further the goals of addressing gender-based violence in ways that also seek to end mass incarceration, centralize racial justice, and craft restorative and transformative justice alternatives. The National Clearinghouse will continue to link anti-violence advocates with discussions, tools, and resources to support this work.

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Archived Webinars and Other Online Resources

National Clearinghouse for the Defense of Battered Women: <https://www.ncdbw.org/>

The National Clearinghouse is a resource and advocacy center for victims of battering charged with crimes related to their experiences of battering. Its resources include practice papers, guides, amicus briefs, and webinars, including two archived webinar series related to issues of the criminal legal system as a response to gender-based violence, criminalization of survivors, and mass incarceration.

- 2017-2019 webinar series: Ending Mass Incarceration, Centralizing Racial Justice, and Developing Alternatives: The Role of Anti-Domestic Violence and Sexual Assault Programs
<https://www.ncdbw.org/webinars-end-mass-incar-series-list>
 - *Centering Our Work on Historically Marginalized Communities*
Presented by Kelly Miller and Jennifer Martinez; May 2, 2017.
 - *Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement*
Presented by Donna Coker; May 16, 2017.
 - *Dancing the Carceral Creep: The Feminist Anti-Violence Movement and the Pursuit of Criminalization, 1973-1986*
Presented by Mimi Kim; May 23, 2017.
 - *But How Do We “DO” Racial Justice?*
Presented by Kate McCord; May 31, 2017.
 - *Eliminating Racial Inequality Throughout the Criminal Justice System*
Presented by Marc Mauer and Nazgol Ghandnoosh; November 14, 2017.
 - *Exploring Restorative Justice to Address Sexual and Intimate Partner Violence: Centering the Wisdom, Needs, and Safety of Survivors*
Presented by sujatha baliga; April 24, 2018 (Part 1) and July 10, 2028 (Part 2).
 - *Invisible No More: Police Violence Against Black Women and Women of Color*
Presented by Andrea Ritchie; June 27, 2019.
- 15-part NCDBW webinar series run 2013–2016: When Survivors Reenter Their Communities after Jail or Prison
<https://www.ncdbw.org/webinars-reentry-series-list>

Battered Women's Justice Project: <https://www.bwjp.org/>

BWJP is a national resource center on civil and criminal legal system responses to intimate partner violence. It partners with the National Clearinghouse and manages the National Center on Protection Orders and Full Faith and Credit. The BWJP online resource center includes archived webinars and papers that address promising practices in criminal legal system interventions, such as community safety assessment, criminal justice system and interagency coordination ("CCR"), and batterer intervention. Archived webinars also address issues related to mandatory arrest policies and the criminalization of survivors.

From the resource center, select Webinar Recordings under Resource Type and either browse or search by key words, such as "unintended consequences" or "arrest."

<https://www.bwjp.org/resource-center.html>

- *Family Based Violence and Young Women: Unintended Consequences*
Presented by Francine Sherman; published October 2019.
- *Nuisance Ordinances: How They Work, Who They Harm, and How to Fight Them*
Presented by Sandra Park and Linda Morris; published September 2019.
- *The Results of a 10-Year Study of the Impact of Intimate Partner Violence Primary Aggressor Laws on Single and Dual Arrest*
Presented by David Hirschel and Philip D. McCormack; published April 2018.
- *Arresting Victims: The Unintended Consequences of Pro-arrest Policies for Women and Girls*
Presented by Shabnam Javdani; published June 2016.

Prison Policy Initiative: <https://www.prisonpolicy.org/>

PPI is an independent research and advocacy organization that documents, analyzes, and publicizes how mass criminalization impacts society. It pulls data from many national, state, and tribal sources to provide reports and graphics that help to uncover and explain the impacts and harm of mass incarceration. PPI is known for its report, *Mass Incarceration: The Whole Pie*, that assembles data on everyone who is incarcerated or confined in different kinds of prisons, jails, and other correctional and detention facilities. It is a source of state-level comparison data and gender-specific national and state data.

- PPI reports, briefings, and data on women and gender
<https://www.prisonpolicy.org/women.html>
- PPI Data Toolbox, including state-level comparison data
<https://www.prisonpolicy.org/data/>

African American Policy Forum: <https://aapf.org/>

The AAPF brings together academics, activists, and policymakers to study and promote efforts to dismantle structural inequality. Its work includes attention to the ways in which Black women and girls have often been missing in attention to issues of mass incarceration and state violence and the ways in which they are at once overpoliced and under protected.

AAPF campaigns and reports include:

- *Say Her Name*
<https://aapf.org/shn-campaign>
- *Black Girls Matter: Pushed Out, Overpoliced, and Underprotected*
<https://aapf.org/blackgirlsmatter>

INCITE! <https://incite-national.org/>

INCITE! is a network of feminists of color “organizing to end state violence and violence in our homes and communities.” It is the publisher of *Color of Violence: The INCITE! Anthology* (originally published in 2006 and again in 2016) plus a variety of online tools.

INCITE! resources related to gender-based violence, criminalization of survivors, and mass incarceration:

- *Gender Violence & Race Reader*
<https://incite-national.org/gender-violence-race/>
- *Law Enforcement Violence Toolkit*
<https://incite-national.org/stop-law-enforcement-violence/>
- *Community Accountability Toolkit*
<https://incite-national.org/community-accountability/>

Survived & Punished: <https://survivedandpunished.org/>

Survived & Punished is a national coalition that organizes to end criminalization of survivors, support and free criminalized survivors, and abolish gender violence, policing, prisons, and deportations. S&P publications include a community-based research guide: *Research Across the Walls: A Guide to Participatory Research Projects and Partnerships to Free Criminalized Survivors* (January 2019).

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