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Gender Violence, the Carceral State, and the Politics of Solidarity

Deborah M. Weissman*

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INTRODUCTION

Although gender violence issues are deemed significant social concerns with far-reaching consequences, legal epistemologies have largely ignored these issues, in part because the law itself has been implicated in the normative arrangements through which gender harms are sustained.¹ Gender violence, including the enslavement, subjugation, and rape of women, has a long history of legal sanction and political “authorization.”² State violence against women was practiced as a facet integral to colonial expansion. Chattel slavery and Jim Crow laws legalized all forms of abuse of Black women.³ Forced sterilization and the eugenics movement impacted all women, but especially poor women and almost always women without representation, including Black, brown, and immigrant women.⁴ Rape laws favored male propertied interests over women’s rights.⁵ The signatories of the 1951 International Refugee Convention and the 1967 Protocols omitted gender as a category eligible for refugee protection, thus creating often insurmountable obstacles for persons fleeing gruesome gender violence.⁶ These examples demonstrate a few of the myriad ways gender violence has been explicitly authorized by various governments throughout history, leaving women, the principal victims of gender violence, without legal protection or sufficient recourse.

¹ In this article, the term gender violence may relate to and be identified as “gender violence,” “domestic violence,” and “intimate partner violence” as the specific context requires. As Julie Goldscheid has noted, “the ideal frame will depend on context.” Julie Goldscheid, *Gender Neutrality and the “Violence Against Women” Frame*, 5 U. MIA. RACE & SOC. JUST. L. REV. 307, 323 (2015). But all terms endeavor to refer to abuses based on “a focus on the gendered impact of abuse without inscribing the problem as tied to women alone.” *Id.* at 322.

² See Catherine Burnette, *Historical Oppression and Intimate Partner Violence Experienced by Indigenous Women in the United States: Understanding Connections*, 89 SOC. SERV. REV. 531, 534, 558 (2015) (discussing this issue as it relates to indigenous women, specifically).

³ Jasmine Sankofa, *Mapping the Blank: Centering Black Women’s Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform*, 59 HOW. L.J. 651, 673-75 (2016).

⁴ Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL’Y 71, 83 (2011). But see Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 831 (2020) (arguing that eugenics was primarily concerned with “protect[ing] and perfect[ing] white racial stock”).

⁵ See Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 587 (2009).

⁶ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

Indeed, women obtained virtually no remedy from gender violence harms until feminist mobilizations confronted the problem. A movement to advance claims for legal parity of gender violence with other crimes began in the United States as a result of feminist demands, in an effort to resituate the problem from the margins of social concerns into mainstream public debate. This movement found a receptive political environment in the law-and-order climate of the 1970s and 1980s. The issue of gender violence provided occasion for the criminal legal system to expand networks of carceral responses, manipulate the narrative of the victim, and encourage punitive interventions with little regard for actually ending the complex problem of gender violence. These developments thus situated the issue of gender violence within the U.S. criminal legal system, but simultaneously produced pernicious outcomes that resulted in new forms of harm.⁷

These failures, as well as the more general shortcomings of the criminal legal system, have garnered widespread recognition.⁸ Skepticism and mistrust of the efficacy of policing, prosecution, and incarceration as a response to crime has increased among advocates and scholars.⁹ Anti-carceral advocates have urged a shift away from criminal system responses and have campaigned to curb police violence within newly imagined strategies to achieve public safety. Scholars and advocates recognize that the criminal legal system has tended to produce and reproduce patterns of racism and poverty.¹⁰ That the

⁷ Donna Coker & Ahjané D. Macquoid, *Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement*, 5 U. MIA. RACE & SOC. JUST. L. REV. 585, 591-92 (2015).

⁸ For example, the Koch brothers, known for conservative views, have established a project to promote criminal justice reform. *Criminal Justice*, CHARLES KOCH INST., <https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/> (last visited Sept. 6, 2021) [<https://perma.cc/P4H4-XARV>]; see also Amy Cohen, *Restorative Justice and Moral Neoliberalism*, LPE PROJECT (May 10, 2019), <https://lpeproject.org/blog/restorative-justice-and-moral-neoliberalism/> [<https://perma.cc/BRE4-HB4A>]. Similarly, Republican Senator Charles Grassley “has become a stubborn and vocal defender of sentencing reform,” along with hundreds of former federal prosecutors. Justin George, *Is the “First Step Act” Real Reform?*, MARSHALL PROJECT (May 22, 2018, 8:53 PM), <https://www.themarshallproject.org/2018/05/22/is-the-first-step-act-real-reform> [<https://perma.cc/FF46-9QBT>].

⁹ See *infra* Part IV.

¹⁰ See, e.g., DUY PHAM, KISHA BIRD & SHAE HARRIS, CTR. FOR L. & SOC. POL’Y, RECONNECTING, REALIZING AND REIMAGINING JUSTICE: ADVANCING ECONOMIC JUSTICE FOR INDIVIDUALS AND COMMUNITIES IMPACTED BY THE CRIMINAL JUSTICE SYSTEM 4 (2020), <https://www.clasp.org/publications/report/brief/reconnectingjustice> [<https://perma.cc/R9AT-YQ7A>].

system functions in similar fashion towards gender violence has received less attention.

These considerations provide the framework of this Article: to examine the ways that crimes of gender violence can be accommodated within criminal legal system reform campaigns and included in the broader struggle for social justice, all at a time of a shifting cultural response to crime. This Article argues that anti-carceral proponents must consider responses to gender violence within the larger criminal legal reform movement. These proponents must also remain mindful that the critique of the legal system regarding gender violence must offer, as Amna Akbar has enjoined, “practical ladders to radical visions.”¹¹ Stated otherwise, “[a]ll theory must end in practice or come to nothing in theory.”¹²

Part I of this Article examines gender violence committed by the State. It does so within the context of recent initiatives to address abusive police practices to demonstrate that issues of gender violence have been omitted from reform efforts.¹³ To that end, it provides a critical review of anti-carceral campaigns, including recent challenges to “stop-and-frisk” practices. Litigation addressing abusive police conduct has failed to identify stop-and-frisk as a particular form of gender violence. Similarly, community campaigns to oversee police body-worn camera policies have overlooked the differential ways in which survivors of gender violence are impacted by these police devices. This Part demonstrates how issues of gender violence committed by state actors have been omitted from and thus have weakened anti-carceral efforts generally.

Part II examines the persisting exclusion of gender violence from criminal justice reform initiatives in the context of the State’s response to gender violence committed by an intimate partner. Recently, anti-carceral social movements have launched reform initiatives designed to end pre-trial detention and challenge the State’s predilection for detention and incarceration. Other similar reform efforts have sought compassionate release of incarcerated persons from jails and prisons related to COVID-19. Gender violence-related crimes, however, have been categorically omitted from these initiatives. Certainly, crimes of domestic violence raise a different set of concerns than offenses committed by strangers. The dangers victims face are indeed significant

¹¹ Amna A. Akbar, *The Left Is Remaking the World*, N.Y. TIMES (July 11, 2020), <https://www.nytimes.com/2020/07/11/opinion/sunday/defund-police-cancel-rent.html> [https://perma.cc/C23P-WVSA].

¹² Lisandro Otero, *Utopia Revisited*, 96 S. ATL. Q. 17, 28 (1997).

¹³ See *infra* Part I.

and must be addressed. But detention and incarceration practices have failed to provide substantive mitigation from acts of violence.¹⁴ This Part argues that the exclusion of gender violence offenses from decarceration efforts ignores the destructive effects of the criminal legal system while failing to produce the social remedies desired.

Part III analyzes the structural framework of gender violence as a way to advocate for the inclusion of intimate partner violence within the parameters of progressive criminal legal reform initiatives. Anti-carceral reform advocates have demonstrated that criminal behavior is the product of socio-political economic environmental contingencies beyond the remedial capacities of the criminal legal system.¹⁵ To that end, this Part examines the relationship between poverty and inequality, on one hand, and criminal behavior, on the other, as outcomes of a State-sanctioned political economy. These are structural conditions, of course, but conditions which are commonly experienced as personal harms in the form of trauma associated with domestic violence. This Part argues that the structuralist paradigm that situates criminal behavior within a political economic framework must also include acts of gender violence. To exclude intimate partner violence from decarceration efforts is ill-informed and ill-conceived.

Part IV proposes a “politics of solidarity.” That is, a broad lens through which to address gender-based violence as a social problem conditioned by the failures of a political economy that acts to perpetuate inequality and racism.¹⁶ It reviews the ways that anti-carceral strategies that center gender violence may help to strengthen the demands for a more progressive political economy, which then mitigates the determinants of transgressive behaviors. It points to new ways of addressing gender violence that can contribute to anti-carceral and political economic-related organizing. These endeavors often emerge from the lived experiences of those who have suffered gender violence and who have been harmed by the criminal legal system.¹⁷

¹⁴ See *infra* pp. 827-28.

¹⁵ DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 199 (2001); John Hagan, *Introduction: Crime in Social and Legal Context*, 27 L. & SOC'Y REV. 255, 255 (1993); see also Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 186 (2008).

¹⁶ See JULIET HOOKER, *RACE AND THE POLITICS OF SOLIDARITY* 4 (2009) (“Political solidarity refers to the reciprocal relations of trust and obligation established between members of a political community that are necessary in order for long term egalitarian political projects to flourish.”).

¹⁷ See Clifford Geertz, *Making Experiences, Authoring Selves*, in *THE ANTHROPOLOGY OF EXPERIENCE* 373, 373-74 (Victor W. Turner & Edward M. Bruner eds., 1986) (noting

This Article concludes by asserting that in this present “moment of agitation” in the United States,¹⁸ it is both timely and urgent that scholars and advocates contemplate strategies that incorporate gender violence issues within a progressive anti-carceral agenda, and also acknowledge the connection between harmful acts within personal relationships and the failure of the State. Drawing connections between the determinants of crime as a general category and domestic violence as a specific subset invites a deeper understanding of transgressive behavior and the need for structural changes to prevent and humanely intervene in such acts.

I. GENDER VIOLENCE BY THE STATE

In recent years, excessive law enforcement tactics have resulted in a number of initiatives to prohibit abusive policing practices. These efforts include litigation strategies, legislative campaigns, and policy initiatives, among others. This Part reviews two initiatives: litigation strategies to halt abusive stop-and-frisk practices, and the resulting policy development to deploy police body-worn cameras as a means to curb police misconduct. Crimes of gender violence are generally omitted from these developments.

A. *Curtailing Stop-and-Frisk Abuses*¹⁹

Between 2008 and 2012, several landmark lawsuits (“the N.Y. *Floyd* litigation”) were filed on behalf Black and Latino²⁰ city residents,

the importance and challenges of engaging “some sort of felt life, which might as well be called experience”).

¹⁸ Adam Tooze, *How ‘Big Law’ Makes Big Money*, N.Y. REV. BOOKS (Feb. 13, 2020) (reviewing KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* (2019)), <https://www.nybooks.com/articles/2020/02/13/how-big-law-makes-big-money/> [<https://perma.cc/3NTS-NRUX>] (“For fifty years the law and economics movement has had a huge influence But today it faces a challenge from a new cohort of radical legal thinkers who gather under the banner of ‘law and political economy.’”).

¹⁹ Stop-and-frisks, also known as “*Terry* stops,” were authorized by the Supreme Court in *Terry v. Ohio* under those circumstances where “reasonable suspicion” of an individual suspect justifies a stop and frisk. *Terry v. Ohio*, 392 U.S. 1, 20-27 (1968).

²⁰ The term “Latino” was used in the litigation. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013); *Davis v. City of New York*, 959 F. Supp. 2d 324, 332 (S.D.N.Y. 2013); *Ligon v. City of New York*, 925 F. Supp. 2d 478, 483-84 & n.4 (S.D.N.Y. 2013). This author notes that there is much dialogue and debate about terminology to describe persons of Latin American descent. Daniel Hernandez, *The Case Against ‘Latinx,’* L.A. TIMES (Dec. 17, 2017, 4:00 AM PT), <https://www.latimes.com/opinion/op-ed/la-oe-hernandez-the-case-against-latinx-20171217-story.html> [<https://perma.cc/3JNK-FVYE>].

particularly Black males, who were targeted by the New York City police department (“NYPD”) and suffered harassment, unlawful stops, and searches as they conducted their day-to-day activities.²¹ The plaintiffs raised important constitutional claims under the Fourth Amendment and Equal Protection Clause and demonstrated that the NYPD had engaged in “suspicionless and racially pretextual stop and frisks” causing them to “suffer irreparable physical, mental and emotional pain and suffering, mental anguish, embarrassment, and humiliation.”²² Communities of color suffered a range of deleterious consequences as a result of these practices. Abusive police stops interfere with school achievement and impair mental health, among other social harms.²³ The

²¹ *Floyd*, 959 F. Supp. 2d at 556; *Davis*, 959 F. Supp. 2d at 332; *Ligon*, 925 F. Supp. 2d at 483-84 & n.4; see also Post-Trial Memorandum of Law in Support of Plaintiff’s Claims at 14, *Floyd*, 959 F. Supp. 2d 540 (No. 08-cv-1034), <https://ccrjustice.org/sites/default/files/assets/Plaintiffs%20Post%20Trial%20Brief.pdf> [<https://perma.cc/X92M-HMFA>]; *Floyd, et al. v. City of New York, et al.: Case Timeline*, CTR. FOR CONST. RTS., <https://ccrjustice.org/ourcases/current-cases/floyd-et-al> (last updated Sept. 1, 2021) [<https://perma.cc/V7MZ-NHTJ>] [hereinafter *Floyd Timeline*]. In 1999, Plaintiffs’ lawyers filed and settled a similar suit; however, the NYPD’s failure to implement the terms of the settlement required the filing of a new case. Second Amended Class Action Complaint for Declaratory & Injunctive Relief & Individual Damages at 3, ¶ 5, *Floyd*, 959 F. Supp. 2d 540 (No. 08-cv-1034), [https://ccrjustice.org/sites/default/files/assets/2nd%20Am%20Complaint%20\(ECF%20Version\).pdf](https://ccrjustice.org/sites/default/files/assets/2nd%20Am%20Complaint%20(ECF%20Version).pdf) [<https://perma.cc/MVF2-ETDT>]. The *Floyd* case was combined for purposes of remedy and monitoring with the related cases. Opinion & Order at 1-2, *Floyd*, 959 F. Supp. 2d 540 (No. 08-cv-1034), <https://ccrjustice.org/sites/default/files/assets/Floyd-Remedy-Opinion-8-12-13.pdf> [<https://perma.cc/923U-UPPH>] [hereinafter *Floyd Order & Opinion*]; PETER L. ZIMROTH, FIRST REPORT OF THE INDEPENDENT MONITOR 1-3 (2015), <https://ccrjustice.org/sites/default/files/attach/2015/07/Floyd%20Monitors%20Report%207%209%202015.pdf> [<https://perma.cc/Y9B7-NQLJ>].

²² First Amended Class Action Complaint for Declaratory & Injunctive Relief & Individual Damages at 19-35, *Floyd*, 959 F. Supp. 2d 540 (No. 08-cv-1034), https://ccrjustice.org/sites/default/files/assets/Floyd_AmendedComplaint_08.04.15.pdf [<https://perma.cc/D7TS-5NN6>] [hereinafter First Amended *Floyd* Complaint]; see also *Ligon*, 925 F. Supp. 2d at 523 (noting that, for the purpose of granting a preliminary injunction, an infringement on a constitutional right constitutes irreparable harm).

²³ Amanda Geller, Jeffrey Fagan, Tom Tyler & Bruce G. Link, *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2323-25 (2014); Joscha Legewie & Jeffrey Fagan, *Aggressive Policing and the Educational Performance of Minority Youth*, 84 AM. SOCIO. REV. 220, 224, 239 (2019); Andrew Bacher-Hicks & Elijah de la Campa, Social Costs of Proactive Policing: The Impact of NYC’s Stop and Frisk Program on Educational Attainment 27-28 (Feb. 26, 2020) (unpublished manuscript), <https://drive.google.com/file/d/1sSxhfmDY3N1VAN5XwyRObE65tmAZzhTj/view> [<https://perma.cc/8WGQ-FNJW>]; see also Philip V. McHarris, *Should Mike Bloomberg’s Stop and Frisk Record Disqualify Him?*, WASH. POST (Feb. 16, 2020), <https://www.washingtonpost.com/outlook/2020/02/16/should-mike-bloombergs-stop-and-frisk-record-disqualify-him/> [<https://perma.cc/3W7N-5UWN>].

plaintiffs challenged the NYPD's racially motivated practices and its failure to train, supervise, and discipline police officers guilty of constitutional violations.²⁴ The cases resulted in a favorable ruling by a federal court judge who entered a permanent injunction. Furthermore, the judge appointed an independent Monitor to oversee implementation of the ordered reforms to police practices and to obtain community input:

The communities most affected by the NYPD's use of stop and frisk have a distinct perspective that is highly relevant to crafting effective reforms. No amount of legal or policing expertise can replace a community's understanding of the likely practical consequences of reforms in terms of both liberty and safety.²⁵

The case continues as of this writing. Attorneys for the plaintiffs have diligently monitored reform efforts following the trial court's order, appellate processes, and post-litigation monitoring and implementation activities.²⁶

The compelling facts adjudicated in these cases, however, omitted reference to the gendered nature of police stop-and-frisk.²⁷ These practices are inherently transgressive of bodily privacy. Indeed, in 1968, the Supreme Court, while approving of stop-and-frisk practices, acknowledged that such intrusions into the genital areas of a "suspect" by police officers inflicted "great indignity"²⁸:

[I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.²⁹

Beyond the "great indignity" associated with stop-and-frisk practices, police routinely and deliberately carry out so-called bodily pat-downs in ways that often rise to the level of gender violence and sexual assault.

²⁴ First Amended *Floyd* Complaint, *supra* note 22, at 24-26.

²⁵ *Floyd v. City of New York*, 959 F. Supp. 2d 668, 686 (2013).

²⁶ *Floyd Timeline*, *supra* note 21. At the time of this writing, the most recent activity took place in early September 2021.

²⁷ See First Amended *Floyd* Complaint, *supra* note 22, at 11-28.

²⁸ *Terry v. Ohio*, 392 U.S. 1, 16-17 (1968).

²⁹ *Id.* at 17 (footnotes omitted).

Andrea Ritchie has written extensively about the history of gendered police stop-and-frisk practices that are clearly abusive, including forced, traumatic vaginal searches, often performed in plain view of passersby.³⁰ Gendered police assaults are not a new phenomenon and did not begin with NYPD's stop-and-frisk policy at the heart of the 2008 litigation.³¹ Citing a 2000 Government Accountability Office report issued before the litigation, Ritchie notes that "Black, Asian-American and Hispanic women . . . were almost three times as likely as men of the same race to be subject to humiliating strip-searches."³² Her research reveals that victims of domestic violence who summon police intervention are often targeted for abusive stop-and-frisk police practices.³³ According to the Cato Institute's National Police Misconduct Reporting Process, sexual assault-related misconduct was the second most frequently reported form of police misconduct after excessive force.³⁴ Moreover, these types of violations persist almost daily.³⁵ Other studies regarding sexualized

³⁰ ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* 8, 48-49, 121 (2017); Andrea J. Ritchie, *A Warrant to Search Your Vagina*, N.Y. TIMES (July 21, 2017, 12:00 PM ET), <https://www.nytimes.com/2017/07/21/opinion/sunday/black-women-police-brutality.html> [<https://perma.cc/U6QA-4GFH>]; see also Deborah M. Weissman, *Rethinking a New Domestic Violence Pedagogy*, 5 U. MIA. RACE & SOC. JUST. L. REV. 635, 646 (2015) [hereinafter *Rethinking DV Pedagogy*]; Deborah M. Weissman, *The Community Politics of Domestic Violence*, 82 BROOK. L. REV. 1479, 1520-21 (2017) [hereinafter *Community Politics of DV*].

³¹ See AMNESTY INT'L, UNITED STATES OF AMERICA: STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN THE U.S. 78-80 (2005), <https://www.amnesty.org/en/documents/AMR51/122/2005/en/> [<https://perma.cc/9TUU-5R54>] (describing inappropriate touching of genitalia by police during stop-and-frisk incidents); MAKE THE ROAD N.Y., *TRANSGRESSIVE POLICING: POLICE ABUSE OF LGBTQ COMMUNITIES OF COLOR IN JACKSON HEIGHTS* 11 (2012), https://maketheroadny.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf [<https://perma.cc/PYA6-RKSU>]; see also David Kocieniewski, *Success of Elite Police Unit Exact a Toll on the Streets*, N.Y. TIMES (Feb. 15, 1999), <https://www.nytimes.com/1999/02/15/nyregion/success-of-elite-police-unit-exacts-a-toll-on-the-streets.html> [<https://perma.cc/M95L-Z5F7>] (noting that the Street Crime Unit which carried out abusive stops-and-frisk was first established in 1971); Stephanie Smith, *Sexual Attacks by Police*, SUN SENTINEL (Mar. 27, 1994), <https://www.sun-sentinel.com/news/fl-xpm-1994-03-27-9403260545-story.html> [<https://perma.cc/PF5W-HZTF>] (reviewing accusations of sexual misconduct against police officers).

³² Ritchie, *supra* note 30 (describing airport searches).

³³ RITCHIE, *supra* note 30, at 116, 189.

³⁴ David Packman, *2010 NPMSRP Police Misconduct Statistical Report*, MARSHAL LITERARY SOC'Y (Apr. 5, 2011), <https://taodannguyensuy.wordpress.com/2017/05/19/2010-npmsrp-police-misconduct-statistical-report-draft-by-author-david-packman-posted-on-april-5-2011/> [<https://perma.cc/J72W-QJE3>].

³⁵ See Jonathan Blanks, *National Police Misconduct Newsfeed Daily Recap*, UNLAWFUL SHIELD (July 13, 2017), <https://www.unlawfulshield.com/tag/police-misconduct-news->

contact between the NYPD and young people described the study's findings as "most alarming."³⁶ These reports demonstrate that, as with abusive stop-and-frisk generally, incidents involving sexual abuse most often target people of color, including men, women, and LGBTQ persons.³⁷

Notwithstanding the pervasiveness of gendered police violations, these types of transgressions were omitted from the campaign to end abusive stop-and-frisk practices.³⁸ The explanations for this omission are troublesome and challenging to identify. While it is difficult and dangerous for victims to report sexual violations committed by police, as suggested in the studies and reports described above, the facts concerning these types of gendered abuse were well known at the time of the campaign. One possible explanation concerns the composition of community organizations that supported the litigation. The NYC lawsuits had the support of Communities United for Police Reform

review/ [https://perma.cc/CJH4-L3NW]; John Kelly & Mark Nichols, *Tarnished Brass: We Found 85,000 Cops Who've Been Investigated for Misconduct. Now You Can Read Their Records*, USA TODAY (June 11, 2020, 6:48 AM PDT), <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/> [https://perma.cc/R5AX-9WQZ]. In 2015, Associated Press found that over 1,000 police officers nationwide lost their badges over a six-year period for sexual offenses, but that the actual number could be higher. Matt Ford, *A Guilty Verdict for Daniel Holtzclaw*, ATLANTIC (Dec. 11, 2015), <https://www.theatlantic.com/politics/archive/2015/12/daniel-holtzclaw-trial-guilty/420009/> [https://perma.cc/P2T8-D4U4]. One infamous case involved Daniel Holtzclaw, a former Oklahoma police officer who was convicted of multiple rapes of Black women. *Id.*; Dave Philipps, *Former Oklahoma Police Officer Found Guilty of Rapes*, N.Y. TIMES (Dec. 10, 2015), <https://www.nytimes.com/2015/12/11/us/former-oklahoma-city-police-officer-found-guilty-of-rapes.html> [https://perma.cc/6TNL-Z7YZ].

³⁶ Brett G. Stoudt, Michelle Fine & Madeline Fox, *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y. L. SCH. L. REV. 1331, 1344 (2012).

³⁷ See Kristen Gwynne, *How 'Stop and Frisk' Is Too Often a Sexual Assault by Cops on Teenagers in Targeted NYC Neighborhoods*, ALTERNET (Jan. 21, 2013), <https://www.alternet.org/2013/01/how-stop-and-frisk-too-often-sexual-assault-cops-teenagers-targeted-nyc/> [https://perma.cc/U8LS-UQ7W]; MAKE THE ROAD N.Y., *supra* note 31, at 11-12. Men too have suffered sexually violative searches. In 2007, seven years before he was killed by the police, Eric Garner's abusive encounters with law enforcement included an incident where, as he described in his written complaint, an officer performed a "cavity search on me by . . . 'digging his fingers in my rectum in the middle of the street'" and "unzipped his shorts and inspected his genitals while people passed by on the street." Soraya Nadia McDonald, *Friends: Eric Garner Was a 'Gentle Giant'*, WASH. POST (Dec. 4, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/12/04/friends-eric-garner-was-a-gentle-giant/> [https://perma.cc/SAM4-FBNK].

³⁸ See RITCHIE, *supra* note 30, at 11, 125 (noting that inappropriate police practices are rarely punished even when they come to light).

“CUPR”), a coalition organization that succeeded in elevating the issue of stop-and-frisk policy to one of great urgency among city residents and city politicians alike.³⁹ At the time of the lawsuit, CUPR represented the broad and intersecting concerns of Blacks, Asians, Latino/as, Muslims, LGBTQs, working families, youth activists, immigrants’ rights groups, and health workers.⁴⁰ Although some member organizations addressed a wide range of needs specific to women, no mainstream domestic violence or sexual assault organization had joined the CUPR effort to end NYC racial profiling practices.⁴¹ Andrea Ritchie observed that the absence of such groups is part of the problem related to the omission of gender-based crimes from criminal justice reform and described her experience when attending a White House summit to address violence against women: “As far as I know, I was . . . the only person to speak on the issue of police sexual violence While waiting in line to enter, I was asked what I would be speaking about; when I answered, I was met with blank stares from mainstream antiviolence advocates.”⁴²

Ritchie further argued persuasively that police abuse is generally imagined as a “white officer beating a Black or Brown [heterosexual, cisgender] man with a baton.”⁴³ Data and media attention to police abuses have centered the experiences on males, and particularly Black males who are disproportionately targeted through racial profiling.⁴⁴ This is not to propound a diminished attention to and outrage about police abuses of men. It does, however, suggest the need to identify the

³⁹ J. David Goodman, *As Critics United, Stalled Battle Against Frisking Tactic Took Off*, N.Y. TIMES (Aug. 13, 2013), <https://www.nytimes.com/2013/08/14/nyregion/in-a-crescendo-the-citys-crime-policy-changed.html> [<https://perma.cc/75X8-V4LF>]. The Black, Latino, and Asian Caucus of the Council of the City of New York filed an amicus brief. Brief of Amicus Curie the Black, Latino and Asian Caucus of the Council of the City of New York in Further Support of Plaintiffs’ Request to Include the Community in a Collaborative Process Towards Reform, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08-cv-1034), <https://ccrjustice.org/sites/default/files/attach/2015/02/BLAC%20amicus%20brief%20March%202013.pdf> [<https://perma.cc/8BXP-9CSZ>].

⁴⁰ At the time of the lawsuit, at least twenty-four social justice organizations comprised CUPR, along with thirty-nine additional organizational supporters. Currently, there are at least thirty-two members. See *Campaign Members*, CMTYS. UNITED FOR POLICE REFORM, <https://www.changethenypd.org/campaign/intro-members> (last visited Sept. 15, 2021) [<https://perma.cc/F252-24ST>].

⁴¹ See *id.*

⁴² RITCHIE, *supra* note 30, at 125.

⁴³ Andrea J. Ritchie, *#SayHerName: Racial Profiling and Police Violence Against Black Women*, 41 HARBINGER 187, 189 (2016).

⁴⁴ See Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 63 (2017).

intersectional issue of racial and sexual profiling as a way to include gender in the larger discourse on police harm.

There have been at least fifty-seven subsequent and substantive court filings since the entry of the court's order related to the stop-and-frisk litigation.⁴⁵ Briefs, legal arguments, and monitoring reports have been submitted both to the oversight Monitor and to the court, processes that enabled further review and debate of abusive stop and frisk practices. During this period, the problem of sexual violations inherent in many stop-and-frisk encounters has surfaced.⁴⁶ Yet these issues have not been included in the post-litigation processes.⁴⁷ These violations remain excluded from the dominant stop-and-frisk narratives, thus diminishing opportunities for awareness about the resulting harms and reducing the likelihood of meaningful changes.⁴⁸

B. *Body-Worn Cameras and Gender Violence*

The use of body worn cameras ("BWCs") has become increasingly common in the aftermath of recent high-profile police murders of Black men, and has been the subject of much commentary.⁴⁹ The N.Y. *Floyd* case provides an opportunity to review BWC developments in depth. In its remedial order, the court noted that the "subject of police officers wearing [BWCs] was inadvertently raised during the testimony of the

⁴⁵ See *Floyd Timeline*, *supra* note 21.

⁴⁶ This was particularly the case during the 2020 democratic presidential primary campaigns which focused on then-Mayor Bloomberg's legacy of stop-and-frisk. E.g., Ishmael Reed, *Bloomberg Condoned Sexual Assault by NYPD*, COUNTERPUNCH (Dec. 9, 2019), <https://www.counterpunch.org/2019/12/09/bloomberg-condoned-sexual-assault-by-nypd/> [<https://perma.cc/HV62-8P5A>]; Alanna Vagianos, *Bloomberg's Stop-And-Frisk Was 'State-Sanctioned Sexual Assault' of Men of Color*, HUFFPOST (Mar. 2, 2020), https://www.huffpost.com/entry/bloomberg-stop-and-frisk-sexual-assault_n_5e56d9aac5b68f79fdc45404?ncid=NEWSSTAND0005 [<https://perma.cc/8HZC-ZMUV>].

⁴⁷ One exception relates to criticism of NYPD's draft disciplinary matrix, which included among a list of concerns, that the proposal was not sufficiently attentive to "issues of excessive force, sexual abuse and harassment, and domestic violence" Public Comment, Ctr. for Const. Rts. & Beldock, Levine, & Hoffman, LLP (Sept. 30, 2020), https://ccrjustice.org/sites/default/files/attach/2020/09/Public%20Comment_NYPD%20Discipline%20Matrix%20CCR%20%2B%20BLH_FINAL.pdf [<https://perma.cc/ETR3-JV37>].

⁴⁸ Andrea J. Ritchie, *Black Lives over Broken Windows: Challenging the Policing Paradigm Rooted in Right-Wing "Folk Wisdom"*, POL. RSCH. ASSOCS. (July 6, 2016), https://www.politicalresearch.org/2016/07/06/black-lives-over-broken-windows-challenging-the-policing-paradigm-rooted-in-right-wing-folk-wisdom#_edn46 [<https://perma.cc/B52F-KDKC>].

⁴⁹ Ronald J. Coleman, *Police Body Cameras: Go Big or Go Home?*, 68 *BUFF. L. REV.* 1353, 1355 (2020).

City's policing expert"⁵⁰ Although it was not requested as relief by the plaintiffs, the court ordered the NYPD to initiate a BWC pilot program. The Monitor would review the program and make further recommendations based on its success in mitigating unconstitutional police actions.⁵¹

A number of police accountability groups and victim advocacy organizations, as well as courts, have urged support for BWCs as a way to improve police conduct, to identify and discipline officers who engage in unlawful behavior, and to improve prosecutorial outcomes.⁵² In the N.Y. *Floyd* case, the plaintiffs' lawyers recognized: "Cameras are not a panacea. But with proper policy and oversight, they can bring new transparency and accountability to policing."⁵³ Along with other civil rights groups, they emphasized the importance of community input while police departments contemplate BWC policies, especially as

⁵⁰ *Floyd Order & Opinion*, *supra* note 21, at 25.

⁵¹ *Id.* at 27.

⁵² E.g., *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 576 (2d Cir. 2003) (noting that BWCs can curb police abuse); JAY STANLEY, AM. CIV. LIBERTIES UNION, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL 2 (2015), https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf [<https://perma.cc/BU2B-5XN6>] ("Although we at the ACLU generally take a dim view of the proliferation of surveillance cameras in American life, police on-body cameras are different because of their potential to serve as a check against the abuse of power by police officers."); Heather Douglas & Leigh Goodmark, *Beware the Unintended Consequences of Police-Worn Body Cameras*, CONVERSATION (Sept. 28, 2015, 11:41 PM EDT), <https://theconversation.com/beware-the-unintended-consequences-of-police-worn-body-cameras-47882> [<https://perma.cc/36XJ-85F3>] (noting that BWCs might help to avoid trials, persuade reluctant witnesses to testify against perpetrators, and increase guilty pleas); Elizabeth Joh, *Police Surveillance Machines: A Short History*, LPE PROJECT (June 13, 2018), <https://lpeproject.org/blog/police-surveillance-machines-a-short-history/> [<https://perma.cc/P4V9-Y6AV>] (noting that some families of victims of police abuse favor BWCs in hopes that they will improve transparency and accountability). Most of those who support BWCs note the concomitant need for training and other policy changes. STANLEY, *supra*, at 2-9; *Civil Rights, Privacy, and Media Rights Groups Release Principles for Law Enforcement Body Worn Cameras*, LEADERSHIP CONF. ON HUM. & CIV. RTS. (May 15, 2015), <https://civilrights.org/2015/05/15/civil-rights-privacy-and-media-rights-groups-release-principles-for-law-enforcement-body-worn-cameras/#> [<https://perma.cc/95Z6-6KPE>] [hereinafter *Principles for BWCs*] (providing commentary on behalf of dozens of national civil rights groups, but notably no mainstream anti-domestic violence or sexual assault organizations); see also Douglas & Goodmark, *supra*; Joh, *supra*.

⁵³ Ian Head & Darius Charney, *Don't Let the N.Y.P.D. Co-opt Body Cameras*, N.Y. TIMES (Apr. 27, 2017), <https://www.nytimes.com/2017/04/27/opinion/dont-let-the-nypd-co-opt-body-cameras.html> [<https://perma.cc/5858-FEJJ>].

departments develop rules and guidelines for the use of BWCs.⁵⁴ Some studies show that reports of police misconduct significantly decreased once officers were required to wear BWCs.⁵⁵ At the same time, however, other groups who have analyzed the effectiveness of police “reforms” argue that BWCs will simply become another tool for police to deploy to inflict greater harm on communities of color.⁵⁶ Indeed, scholars predict that BWCs are likely to lead to increased surveillance of Black communities that are already over-surveilled.⁵⁷

BWCs are particularly problematic in cases of gender-based violence. They interfere with victims’ privacy interests and intrude upon uniquely personal and highly traumatic moments. The video recordings serve to override a survivor’s decision about proceeding with the criminal justice process.⁵⁸ Indeed, those who promote the use of BWCs often argue that it will be easier for police and prosecutors to proceed with criminal charges independent of survivors’ wishes.⁵⁹ BWCs are thus more likely to augment carceral approaches to domestic violence, and diminish community efforts to transfer responses to gender-based harms from the criminal legal system to alternative, non-carceral responses.

⁵⁴ *The Use of Body-Worn Cameras by Law Enforcement Officials: Hearing Before the N.Y. State Assemb. Comms. on Codes, Judiciary, & Gov’t Operations*, 2015 Leg., 201st Sess. (N.Y. 2015) [hereinafter *N.Y. BWC Hearing*] (testimony of Ian Head, Ctr. for Const. Rts.); *Principles for BWCs*, *supra* note 52; see also CONST. PROJECT, GUIDELINES FOR THE USE OF BODY-WORN CAMERAS BY LAW ENFORCEMENT: A GUIDE TO PROTECTING COMMUNITIES AND PRESERVING CIVIL LIBERTIES 8 (2016), <https://archive.constitutionproject.org/wp-content/uploads/2016/12/BodyCamerasRptOnline.pdf> [<https://perma.cc/8CEB-EVPC>].

⁵⁵ Barak Ariel, William A. Farrar & Alex Sutherland, *The Effect of Police Body-Worn Cameras on Use of Force and Citizens’ Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509, 525 (2015).

⁵⁶ CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS IN POLICING, https://static1.squarespace.com/static/59ead8f9692ebee25b72f17ft/5b65cd58758d46d34254f22c/1533398363539/CR_NoCops_reform_vs_abolition_CRside.pdf (last visited Sept. 16, 2021) [<https://perma.cc/V9AM-WVRJ>].

⁵⁷ Joh, *supra* note 52; see also CONST. PROJECT, *supra* note 54, at 15-16 (reviewing constitutional and other legal violations that might be caused by BWCs).

⁵⁸ See Robert C. Davis, *Body-Worn Cameras Effect on Victim Reactions to Police on Interviews*, 6 J. FORENSIC, LEGAL & INVESTIGATIVE SCIS. 1, 30-31 (2020) (noting the coercive effect on victims who do not wish to prosecute); CONST. PROJECT, *supra* note 54, at 35 (recognizing domestic violence victims’ privacy, and noting that “giving individuals authority to opt out of recordings . . . better allows officers to perform their duties”).

⁵⁹ See THE LEADERSHIP CONF. ON CIV. & HUM. RTS. & UPTURN, POLICE BODY WORN CAMERAS: A POLICY SCORECARD 120, 272, 276, 296 (2017), <https://www.bwccscorecard.org/static/pdfs/LCCHR%20and%20Upturn%20-%20BWC%20Scorecard%20v.3.04.pdf> [<https://perma.cc/4TCK-FSP9>] [hereinafter *BWC SCORECARD*] (identifying jurisdictions which directed officers to “record interviews of domestic violence victims to facilitate future prosecution efforts and discourage later recanting of statements”).

Notwithstanding these concerns, throughout the five-year BWC monitoring process, the impact of these recordings on domestic violence and progressive criminal legal reform efforts was not considered an issue of import. In fact, it was barely mentioned.⁶⁰ Little, if any, attention was paid to the effect of this technology on victims of gender-based crimes.⁶¹ The NYU Policing Project, which was tasked with soliciting public input on the proposed BWC policy, failed to include a single question in their survey about police videotaping of gender-based crimes.⁶² Nor were anti-domestic violence groups invited to testify before the New York State Assembly committees charged with reviewing BWCs.⁶³ The November 2020 report submitted by the Monitor reveals that the problem of BWCs and domestic violence was not addressed.⁶⁴ The only reference to gender-based crimes in the

⁶⁰ No reference was made to this issue in the Final Report and Recommendations Regarding Joint Remedial Process. N.Y.C. STOP & FRISK JOINT REMEDIAL PROCESS, FINAL REPORT AND RECOMMENDATIONS (2018), <https://ccrjustice.org/sites/default/files/attach/2019/12/Joint-Remedial-Process-Final-Report.pdf> [<https://perma.cc/DP7U-Q7BU>]. Only two references were made in the ninety-one page written submission of stakeholders that addressed any aspect of gender violence and police abuse. Written Submissions from Stakeholders at 34, 77, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08-cv-1034), <https://ccrjustice.org/sites/default/files/attach/2018/05/Dkt%20594-1%20JRP%20Report%20Appendix%20A.pdf> [<https://perma.cc/7VH6-MMLY>]. The organization Make the Road called attention to the practice of illegal groping of LGBTQ persons by police. *Id.* at 33-34. A consultant psychologist who reviewed five of the focus group transcripts also raised the issue of wrongful sexual groping of opposite sex and transgendered individuals by police. *See id.* at 71, 77. The Brennan Center referenced the issue of domestic violence and BWCs, at the hearing before the NY State Assembly. *N.Y. BWC Hearing, supra* note 54 (testimony of Michael Price, Brennan Ctr. for Just.). Testimony submitted by the Bronx Defenders referenced privacy interests of domestic violence victims. *See id.* (testimony of Sarah Lustbader, Bronx Defs.).

⁶¹ *See, e.g., N.Y. BWC Hearing, supra* note 54 (testimony of Ian Head, Ctr. for Const. Rts.) (giving no indication that plaintiffs' lawyers addressed the issues of BWCs and gender violence-related crimes). The New York Civil Liberties Union also provided testimony about BWCs. It noted that they should be maximized to reduce abusive behavior by the police, but urged that individuals be given the right to refuse videotaping. Domestic violence issues were not raised; moreover, the problems of interviewing a victim of sexual assault received minimal attention. *See id.* (written testimony of Johanna E. Miller, Advocacy Director, NYCLU).

⁶² *See* POLICING PROJECT, N.Y.U. SCH. OF L., REPORT TO THE NYPD SUMMARIZING PUBLIC FEEDBACK ON ITS PROPOSED BODY-WORN CAMERA POLICIES 37-41 (2016), <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/59ce7edfb0786914ba448d82/1506705121578/Report+to+the+NYPD+Summarizing+Public+Feedback+on+BWC+Policy.pdf> [<https://perma.cc/PZR8-HNMS>].

⁶³ *See N.Y. BWC Hearing, supra* note 54 (notice of public hearing) (showing that only three organizational representatives were invited to testify).

⁶⁴ *See* PETER L. ZIMROTH, TWELFTH REPORT OF THE INDEPENDENT MONITOR: THE DEPLOYMENT OF BODY WORN CAMERAS ON NEW YORK CITY POLICE DEPARTMENT (NYPD)

November 2020 report was an observation that domestic violence reports to police did not appear to decrease with the implementation of the BWC policy; however, the report offered no information about survivors' experiences with BWCs once police arrived on the scene.⁶⁵

Community groups have offered important critical commentary about the ways in which poorly developed BWC policies further contribute to abusive law enforcement practices.⁶⁶ But the minimal attention paid to the problems that BWCs pose for gender violence specifically has had problematic consequences. The NYC policy does not address domestic violence.⁶⁷ The guidance accompanying the policy is perhaps more troublesome for what it does include: it suggests that incidents of domestic violence may constitute an exception for providing notice of video recording, thereby removing agency and decision making from the survivor.⁶⁸

The NYPD BWC policy is not the only law enforcement policy that favors carceral responses to domestic violence. The New York State Assembly enacted sweeping legislation requiring BWCs without any specific attention to the issues faced by domestic violence survivors.⁶⁹ In other jurisdictions, exceptions to general privacy protections apply when police respond to domestic violence and enter the home.⁷⁰ In fact, some jurisdictions require video recordings of domestic violence incidents without the exceptions offered in other types of police

OFFICERS app. 6 (2020), <http://nypdmonitor.org/wp-content/uploads/2020/12/12th-Report.pdf> [<https://perma.cc/95UF-87PV>] (showing no questions about domestic violence in the community survey).

⁶⁵ *Id.* at 2.

⁶⁶ E.g., Press Release, Cmty. United for Police Reform, CPR Criticizes Mayor de Blasio and Commissioner O'Neill for Advancing Inferior Body Camera Policy that Undermines Transparency (Apr. 17, 2017), <https://www.changethenypd.org/releases/cpr-criticizes-mayor-de-blasio-and-commissioner-o%E2%80%99neill-advancing-inferior-body-camera> [<https://perma.cc/A9AQ-HH6J>].

⁶⁷ The only reference says that officers should turn off their cameras when “[i]nterviewing the victim of a sex crime, as soon as the nature of the offense becomes apparent.” N.Y. POLICE DEP'T, PATROL GUIDE: USE OF BODY-WORN CAMERAS 4 (2020), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/212-123.pdf [<https://perma.cc/Z5BT-NQ9A>].

⁶⁸ N.Y. POLICE DEP'T, NYPD RESPONSE TO PUBLIC AND OFFICER INPUT ON THE DEPARTMENT'S PROPOSED BODY-WORN CAMERA POLICY 6-7 (2017), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf [<https://perma.cc/JY3J-FSNC>].

⁶⁹ See Press Release, Carl E. Heastie, Assembly Passes Legislation to Require Body Cameras for All New York State Police Officers (June 9, 2020), <https://nyassembly.gov/Press/files/20200609b.php> [<https://perma.cc/T8LC-RKHM>].

⁷⁰ BWC SCORECARD, *supra* note 59, at 73-77 (describing the Cleveland police policy).

investigations.⁷¹ BWC policies are often enacted with the stated purpose of preventing victims from exercising their autonomy — denying them the opportunity to discontinue the criminal case — thereby allowing prosecutors to increase conviction rates.⁷² One telling police protocol required officers to “record interviews of domestic violence victims to facilitate future prosecution efforts and discourage later recanting of statements.”⁷³ Prosecutors similarly encourage police to record domestic violence incidents to improve prosecution of these cases.⁷⁴ One study of the Phoenix, Arizona, police department revealed domestic violence matters were the most likely type of incident to be recorded by law enforcement — an outcome that cannot be considered helpful by those concerned about privacy, agency, oversurveillance, and carceral interventions.⁷⁵ Such policies ignore received wisdom that many domestic violence victims, even after requesting police intervention, decide that pursuing criminal charges is not in their best interests.⁷⁶

In the aftermath of the N.Y. *Floyd* case (notwithstanding calls for community input of police practices), the problems that BWCs posed in gender violence situations went unaddressed.⁷⁷ The failure to include

⁷¹ *Id.* at 103, 126, 196, 236, 272, 276, 309 (identifying the policies of police departments in Fayetteville, Houston, New Orleans, Portland, San Bernardino, San Diego, and Tulsa).

⁷² *Id.* at 120, 272, 276, 296 (identifying the policies of police departments of Fresno, San Bernardino, San Diego, and St. Louis).

⁷³ *Id.* at 120 (quoting Fresno police department policies); *see also* POLICE EXEC. RSCH. F. & CMTY. ORIENTED POLICING SERVS., IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 9 (2014), <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf> [<https://perma.cc/743K-9JPN>] (citing policies of the Daytona and Topeka police departments).

⁷⁴ POLICE EXEC. RSCH. F. & CMTY. ORIENTED POLICING SERVS., *supra* note 73, at 9 (2014).

⁷⁵ CHARLES M. KATZ, DAVID E. CHOATE, JUSTIN R. READY & LIDIA NUÑO, EVALUATING THE IMPACT OF OFFICER BODY WORN CAMERAS IN THE PHOENIX POLICE DEPARTMENT 3 (2015), http://cvpcs.asu.edu/sites/default/files/content/projects/PPD_SPL_Final_Report%204_28_15.pdf [<https://perma.cc/J5ND-C4WH>]. This finding is particularly troublesome given that police often turn off their cameras to avoid any capture of their own abusive behavior. *See* Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REV. BOOKS (June 15, 2020), <https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands/> [<https://perma.cc/7C8L-ABZZ>].

⁷⁶ *See* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 32-33 (2009).

⁷⁷ *See Attorneys Challenge NYPD Body Camera Policy, Ask Judge to Order Changes: Current Policy Will Undermine Accountability*, CTR. FOR CONST. RTS. (Apr. 20, 2017), <https://ccrjustice.org/home/press-center/press-releases/attorneys-challenge-nypd-body->

these issues within the BWC debate represents a type of epistemic injustice characterized by a lack of knowledge of the impacts that cameras might have on survivors.⁷⁸ BWCs have garnered greater attention in the aftermath of numerous recordings of police confrontations which have enabled viewers to document police abuse.⁷⁹ Given heightened attention to these devices, the failure to examine BWCs in relation to domestic violence is particularly problematic. Moreover, this oversight has served to obscure the way in which BWCs empower law enforcement to double down on the carceral responses to intimate partner violence — an outcome inimical to anti-carceral reform efforts.

II. DECARCERATION EFFORTS: BAIL REFORM, COMPASSIONATE RELEASE, AND GENDER VIOLENCE

The phenomenon of mass incarceration has drawn the attention of a non-partisan cohort.⁸⁰ This alliance has formed around a self-evident logic. The harms visited by the criminal legal system — especially upon Black, brown, and poor communities — have been known for decades.⁸¹ National campaigns have sought to restrict incarceration, many of which have focused on bail and related pretrial release reforms.⁸² This Part examines the degree to which crimes related to gender violence are excluded from decarceration efforts, including bail reform efforts and compassionate release campaigns related to COVID-19.

camera-policy-ask-judge-order-changes [https://perma.cc/SVP6-UTVZ] (discussing concerns about “surveilling and criminalizing New Yorkers” but not gender violence).

⁷⁸ See generally M. Eve Hanan, *Invisible Prisons*, 54 UC DAVIS L. REV. 1185, 1213-25 (2020), for an excellent review of theories of epistemic injustice.

⁷⁹ Steve Zansberg, *Public Access to Police Body-Worn Camera Recordings (Status Report 2020)*, AM. BAR ASS'N (Jan. 22, 2021), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/fall2020/public-access-police-bodyworn-camera-recordings-status-report-2020/ [https://perma.cc/56AC-LL2X].

⁸⁰ See sources cited *supra* note 8.

⁸¹ See Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1579, 1582-84 (2019) (“The claim that American justice system engages in ‘mass incarceration’ is now a cliché . . .”). See generally MARC MAUER, *RACE TO INCARCERATE* 118, 119, 121, 126, 129, 131, 140, 170 (1999) (discussing statistics about the increasing frequency of incarceration of Black, brown, and poor communities over the years).

⁸² See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLY INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [https://perma.cc/JT8A-VBQG]; see also *Symposia: Money Bail*, LPE PROJECT, <https://lpeproject.org/symposia/money-bail/> (last visited Sept. 24, 2021) [https://perma.cc/T9UH-V285] (giving an excellent overview of bail reform).

It is important to acknowledge that domestic violence is a different type of offense from other types of violence. Domestic violence involves persons in intimate relationships where a victim's autonomy may be undermined in pernicious ways.⁸³ Victims often face a number of obstacles when seeking to withdraw from an abusive relationship that are unique to the circumstances of intimate partner violence.⁸⁴ The arguments in this Part challenging the exclusion of gender violence-related offenses from anti-carceral initiatives do not minimize these concerns. Rather, this Part recognizes and adheres to the well-developed and extensive field of scholarly research that has demonstrated the failure of criminal legal approaches to address gender-violence.⁸⁵ Indeed, criminal remedies are frequently rejected by victims themselves and often perpetuate more gender violence.⁸⁶

A. *Bail Reform and Gender Violence*

Bail reform has captured the nation's political imagination. After decades of recognition that bail is an unfair "tax on poor people," a number of courts have determined that bail practices may violate constitutional protections.⁸⁷ Bail hearings are replete with due process violations and often occur without defense counsel.⁸⁸ The consequences for those who either cannot afford bail or have limited opportunities for pretrial release are far reaching. Detained persons are often at risk of losing employment, being evicted, and suffering bodily harm from jail violence.⁸⁹ They have diminished opportunities to consult with counsel

⁸³ Andrew King-Ries, *Teens, Technology, and Cyberstalking: The Domestic Violence Wave of the Future?*, 20 TEX. J. WOMEN & L. 131, 135-36 (2011).

⁸⁴ E.g., Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5-6 (1991).

⁸⁵ E.g., Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J. L. & GENDER 53, 87-88 (2017) [hereinafter *Should DV Be Decriminalized?*]; see also *infra* note 210 and accompanying text.

⁸⁶ See Goodmark, *Should DV Be Decriminalized?*, *supra* note 84, at 72-74.

⁸⁷ *ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1078-84, 1160-67 (S.D. Tex. 2017), *aff'd as modified* by 882 F.3d 528 (5th Cir. 2018); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 526-30 (Cal. Ct. App. 2018) (holding that a failure to assess defendant's ability to post bail violated due process and equal protection). See generally Jenny E. Carroll, *The Due Process of Bail*, 55 WAKE FOREST L. REV. 757 (2020), for a helpful review of due process and bail issues.

⁸⁸ Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 720-21 (2017).

⁸⁹ Lorelei Laird, *The Bail Project Pays Defendants' Bail as Part of a Plan to End Money Bail Entirely*, A.B.A. J. (Nov. 1, 2019, 2:40 AM CDT), <https://www.abajournal.com/>

and are more likely to plead guilty or receive more punitive sentences.⁹⁰ Jennifer Laurin notes that “whether a defendant is detained after her first appearance is often practically determinative of the outcome.”⁹¹ Detained persons regularly incur additional fines and fees that directly relate to the costs of pretrial detention.⁹² If they are unable to pay, upon release they risk the loss of their driver’s license, garnishment of bank accounts and wages, and extended supervision, if not (re)incarceration.⁹³

Recognizing these widespread issues, a number of states, counties, and cities have enacted statutes to reduce the number of detained arrestees and reliance on bail money.⁹⁴ The reforms are designed to reduce jail populations and respond to the fact that people who do not pay cash bail or post bonds are overwhelmingly poor.⁹⁵ Nonetheless, bail reform efforts have been contentious. On one hand, they have been opposed by the \$2 billion-per-year bail industry.⁹⁶ On the other, many

magazine/article/the-bail-project-pays-defendants-bail-as-part-of-a-plan-to-end-money-bail-entirely [https://perma.cc/4P5K-NPPL].

⁹⁰ See PRETRIAL DET. REFORM WORKGROUP, PRETRIAL DETENTION REFORM: RECOMMENDATIONS TO THE CHIEF JUSTICE 54 (2017), <https://www.courts.ca.gov/documents/PDRReport-20171023.pdf> [https://perma.cc/U9YZ-AMYT].

⁹¹ Jennifer E. Laurin, *Justice in Wonderland*, 97 TEX. L. REV. ONLINE 25, 37 (2019) (reviewing ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018)); see also Heaton et al., *supra* note 88, at 717-18.

⁹² Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 879 (2018); Olivia C. Jerjian, *The Debtors’ Prison Scheme: Yet Another Bar in the Birdcage of Mass Incarceration of Communities of Color*, 41 N.Y.U. REV. L. & SOC. CHANGE 235, 246 (2017); see also MITALI NAGRECHA, MARY FAINSOD KATZENSTEIN & ESTELLE DAVIS, *WHEN ALL ELSE FAILS, FINING THE FAMILY* 4 (2013), <https://www.communityalternatives.org/fining-the-family/> [https://perma.cc/4YY6-32GM].

⁹³ NAGRECHA ET AL., *supra* note 92, at 6; Baughman, *supra* note 92, at 879.

⁹⁴ Tiana Herring, *Bail Reform: Reducing Pretrial Detention and Protecting Public Safety*, CRIME REPORT (Nov. 17, 2020), <https://thecrimereport.org/2020/11/17/bail-reform-reducing-pretrial-populations-and-public-safety/> [https://perma.cc/RT4X-JJ2H]; see also Hannah Bloch-Wehba, *Access to Algorithms*, 88 FORDHAM L. REV. 1265, 1284 (2020) (noting legislative activity related to bail reform).

⁹⁵ BERNADETTE RABUY & DANIEL KOPF, PRISON POL’Y INITIATIVE, *DETAINING THE POOR* 2 (2016), https://www.prisonpolicy.org/reports/incomejails.html?gclid=CjwKCAjw4KD0BRBUeIwA7MFNTbBCTQNcrSquo3zMJ4269DOumE3HS5xmvIJmjv-owkoo4mA3jAyCFxoCgFsQAvD_BwE [https://perma.cc/V3UV-HQQJ].

⁹⁶ Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX (Oct. 17, 2018, 7:30 AM EDT), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality> [https://perma.cc/KFH6-M7X7]; see also PRANITA AMATYA, SHELBY KING, SHELBY MCNABB & HEIDI SCHULTHEIS, *BAIL REFORM IN CALIFORNIA* 48 (2017), <https://university.pretrial.org/>

advocates have indicated dismay with reform initiatives, judging them to be half-way measures that fail to implement meaningful changes.⁹⁷ For example, some reform policies substitute money bail with mandatory pretrial risk assessment tools (“RATs”), which use computer algorithms to make release decisions.⁹⁸ Described by some as “actuarial justice,”⁹⁹ these methods have been soundly criticized by bail reform advocates, who note that they are likely infected with racial biases and, according to experts, “are virtually useless for identifying who will commit violence if released pretrial.”¹⁰⁰ They emphasize that “[a]t every step of criminal justice involvement, there are massive racial and economic disparities . . . that cannot be separated from the data that’s used in statistical models.”¹⁰¹ Community groups, such as the Bail

HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=835f283a-e9fc-9c56-28bb-073a9bcb1dbf [https://perma.cc/2HD7-8APR].

⁹⁷ See Abbie Vansickle, *So Much for the Great California Bail Celebration*, MARSHALL PROJECT (Aug. 30, 2018), <https://www.themarshallproject.org/2018/08/30/so-much-for-the-great-california-bail-celebration> [https://perma.cc/J77Y-822U] (articulating concerns that detention was still preferred and that judges had too much power).

⁹⁸ Heaton et al., *supra* note 88, at 772 n.165.

⁹⁹ Actuarial justice is defined as the turn in penology to assess “‘risk’ — and, in particular, its expression as a quantitative prediction of future criminal behavior.” Gil Rothschild Elyassi, Johann Koehler & Jonathan Simon, *Actuarial Justice*, in *THE HANDBOOK OF SOCIAL CONTROL* 194, 195 (Mathieu Deflem ed., 2018).

¹⁰⁰ Kay Whitlock & Nancy A. Heitzeg, *Billionaire-Funded Criminal Justice Reform Actually Expands Carceral System*, TRUTHOUT (Nov. 21, 2019), <https://truthout.org/articles/billionaire-funded-criminal-justice-reform-actually-expands-carceral-system/> [https://perma.cc/3G5A-RTVD] (quoting Chelsea Barabas, Karthik Dinakar & Colin Doyle, *The Problems with Risk Assessment Tools*, N.Y. TIMES (July 17, 2019), <https://www.nytimes.com/2019/07/17/opinion/pretrial-ai.html> [https://perma.cc/A94U-TBXC]); see also Heaton et al., *supra* note 88, at 772; Jed S. Rakoff, *Sentenced by Algorithm*, N.Y. REV. BOOKS (June 10, 2021) (reviewing KATHERINE B. FORREST, *WHEN MACHINES CAN BE JUDGE, JURY, AND EXECUTIONER: JUSTICE IN THE AGE OF ARTIFICIAL INTELLIGENCE* (2021)), <https://www.nybooks.com/articles/2021/06/10/prison-terms-sentenced-by-algorithm/> [https://perma.cc/VK2J-RXDF]; Patrick McGreevy, *Prop. 25, Which Would Have Abolished California’s Cash Bail System, Is Rejected by Voters*, L.A. TIMES (Nov. 4, 2020, 8:49 AM PT), <https://www.latimes.com/california/story/2020-11-03/2020-california-election-prop-25-results> [https://perma.cc/Q6CZ-8CFQ] (describing concerns by various civil rights groups opposing bail reform measures that will rely “on racially biased risk assessment tools”).

¹⁰¹ Laird, *supra* note 89 (quoting Camilo Ramirez, Director of the Bail Project); see also Ben Green, *Algorithmic Imaginaries: The Political Limits of Legal and Computational Reasoning*, LPE PROJECT (Apr. 21, 2021), <https://lpeproject.org/blog/algorithmic-imaginaries-the-political-limits-of-legal-and-computational-reasoning/> [https://perma.cc/7RZZ-8CCH] (“[Algorithmic-based risk assessments] have indeterminate impacts, rely on individualistic notions of reform, and ultimately serve to legitimize oppressive policies and institutions.”). In one study, judges selectively ignored algorithm outcomes and no fewer detainees were released despite so-called bail reforms. Wykstra, *supra* note 96.

Project, “worr[y] that risk assessments will replace bail with a system that creates exactly the same harms” as advocates seek to reform.¹⁰² Jurisdictions that rely on RATs purchase them from private vendors who refuse to disclose methodologies, thus scaling up criminal justice budgets and diminishing transparency about bail release determinations.¹⁰³ In fact, opposition to RATs resulted in the defeat of California’s Proposition 25, which would have abolished money bail in California and mandated the use of these assessment instruments in its place.¹⁰⁴ These concerns demonstrate some of the complexity of bail reform issues.

Additionally, criticism of bail reform includes concerns that reducing or eliminating bail will result in the release of offenders who will endanger communities and public safety.¹⁰⁵ While nonviolent and lower-level drug offenders are able to take advantage of statutes that establish a presumption of release or non-monetary bail, those who have committed violent crimes — often a vague and confusing category of offenses — are excluded from such reforms.¹⁰⁶

Persons accused of gender violence-related crimes are most often barred from the benefits of bail reform at the state and federal level. Exclusions may explicitly apply to gender violence, or they may indirectly apply because these crimes are categorized as violent, whether charged as felonies or misdemeanors.¹⁰⁷ “Progressive

¹⁰² Laird, *supra* note 89.

¹⁰³ See Bloch-Wehba, *supra* note 94, at 1286.

¹⁰⁴ See McGreevy, *supra* note 100.

¹⁰⁵ David J. Reimel III, Comment, *Algorithms & Instruments: The Effective Elimination of New Jersey’s Cash Bail System and Its Replacement*, 124 PA. ST. L. REV. 193, 216-17 (2019).

¹⁰⁶ Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 974 (2020); PHAM ET AL., *supra* note 10, at 14; see MARIEL ALPER, MATTHEW R. DUROSE & JOSHUA MARKMAN, U.S. DEP’T OF JUST., 2018 UPDATE ON PRISONER RECIDIVISM 17 (2018), <https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf> [<https://perma.cc/5SQH-596Y>] (defining violent offenses).

¹⁰⁷ RAFAEL A. MANGUAL, MANHATTAN INST., REFORMING NEW YORK’S BAIL REFORM 5 (2020), https://www.manhattan-institute.org/reforming-new-yorks-bail-reform?utm_source=google&utm_medium=cpc&gclid=CjwKCAjw4KD0BRBUEiwA7MFNTUcnpTsAhjNfNZFEzlpjKnJmxCSWn4sJ3gi7_29Kk2UciQBvazum4xoC2WlQAvD_BwE [<https://perma.cc/V2NQ-E8PY>]; KRYSTAL RODRIGUEZ & MICHAEL REMPEL, CTR. FOR CT. INNOVATION, BAIL REFORM AND DOMESTIC VIOLENCE: IMPLICATIONS OF NEW YORK’S NEW PRETRIAL STATUTE 1, 2 (2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/nys_bail_domestic_violence2.pdf [<https://perma.cc/DPN7-FC24>]; Baughman, *supra* note 106, at 974; Alexi Jones, *Reforms Without Results: Why States Should Stop Excluding Violent Offenses from Criminal Justice Reforms*, PRISON POL’Y INITIATIVE (Apr. 2020), <https://www.prisonpolicy.org/reports/violence.html> [<https://perma.cc/TT5X-SQ6A>]; see Lucia Bragg, *Federal Criminal Justice Reform in 2018*, NCSL (Mar.

prosecutors” who have campaigned on decarceration platforms typically omit those accused of domestic violence from bail reform efforts.¹⁰⁸ In some places, jail officials may cite and release those charged with misdemeanors with the exception of domestic violence cases.¹⁰⁹ Some jurisdictions set bail for misdemeanor domestic violence offenses twenty times higher than other misdemeanor crimes.¹¹⁰ In fact, individuals charged with gender violence-related offenses historically have faced greater pre-trial release obstacles than persons charged with other crimes.¹¹¹

Some courts insist on using particular forms of RATs, known as lethality assessments, specifically designed for domestic violence offenses.¹¹² These instruments are a collaborative tool between domestic

2018), <https://www.ncsl.org/research/civil-and-criminal-justice/federal-criminal-justice-reform-in-2018.aspx> [https://perma.cc/8YE8-TNDF]. One study found that of seventy-five criminal justice reforms enacted in forty states and at the federal level, domestic violence crimes would be omitted. *Id.*; see also NCSL, TRENDS IN PRETRIAL RELEASE: STATE LEGISLATION UPDATE 1 (2018), https://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialEnactments_2017web_v02.pdf [https://perma.cc/E3N4-YDAV] [hereinafter TRENDS IN PRETRIAL RELEASE]; Richard Williams, *Bail or Jail*, NCSL (May 2012), <https://www.ncsl.org/research/civil-and-criminal-justice/bail-or-jail.aspx> [https://perma.cc/SJB4-FMJJ] (describing the obstacles to Connecticut’s bail reform measures due to advocates opposing reforms relating to domestic violence offenses). Many domestic violence offenses are charged as assaults without reference to domestic violence. See Rachel B. Polan, *The Context of Violence: The Lautenberg Amendment & Interpretive Issues in the Gun Control Act*, 83 BROOK. L. REV. 1441, 1451 (2018).

¹⁰⁸ See, e.g., David Brand, “We Are Not There Yet” — Queens D.A. Not Ready to End Cash Bail Without Stronger Pretrial Resources, QUEENS DAILY EAGLE (Jan. 17, 2020), <https://queenseagle.com/all/queens-da-katz-bail-better-pretrial-resources> [https://perma.cc/6Q7U-KS43] (reporting that the newly elected Queens D.A. who campaigned with the promise of bail reform was not ready to enact it); see also Brett Davidson, Elisabeth Epps, Sharlyn Grace & Atara Rich-Shea, *Moving from Ending Money Bail to Demanding Pretrial Freedom*, LPE PROJECT (Feb. 12, 2020), <https://lpeproject.org/blog/moving-from-ending-money-bail-to-demanding-pretrial-freedom/> [https://perma.cc/R2CZ-3P]4]; Joshua Vaughn, *Massachusetts Prosecutors Are Using “Dangerousness” Holds to Keep People Incarcerated Pretrial*, APPEAL (Oct. 23, 2019), <https://theappeal.org/massachusetts-prosecutors-pretrial-incarceration/> [https://perma.cc/WG4V-T7XP]. San Francisco District Attorney Chesa Boudin, who campaigned on a commitment to end money bail, has replaced it, as have other “reform prosecutors,” with RATs that make use of racist historical data. See Davidson et al., *supra*.

¹⁰⁹ PRETRIAL DET. REFORM WORKGROUP, *supra* note 90, at 25, 46.

¹¹⁰ Baughman, *supra* note 92, at 878-79; see also Hayley E. Miller, *Taming the Wild West: Using Unsecured Bail Bonds in Nevada’s Pretrial-Release Program*, 16 NEV. L.J. 1239, 1247 (2016).

¹¹¹ NCSL, TRENDS IN PRETRIAL RELEASE, *supra* note 107, at 2.

¹¹² Amelia Cramer, Jon Eliason & Elizabeth Ortiz, *How Arizona Prosecutors Implemented a Statewide Domestic Violence Risk Assessment*, 2018 PROSECUTOR 21, 22-24; D. Kelly Weisberg, *Lethality Assessment: An Impressive Development in Domestic Violence*

violence agencies and law enforcement.¹¹³ They are most often administered by police officers who are authorized to rely on subjective criteria, including whether “the officer has a gut feeling that the victim-survivor is in danger.”¹¹⁴ Thus RATs may be compromised with untested assumptions, stereotypes, and racial biases often associated with police activity. The accuracy of these assessments has been questioned in studies and by courts.¹¹⁵ While intentions may be to provide a survivor with services and enhance safety for victims, RATs also come with consequences that may undermine that goal and often act to deny survivor agency.¹¹⁶ These tools focus on forging relationships with law enforcement, a process that further serves to embed domestic violence programs within the carceral state without addressing any of the conditions known to produce domestic violence.¹¹⁷

Monetary bail burdens expose the political economy of pretrial detention, particularly as it impacts families and women, including — if not especially — domestic violence survivors. As noted above, the \$2 billion-per-year bail industry exploits the poor, especially Blacks and Latinos who bear disproportionate bail-related expenditures.¹¹⁸ The

Law in the Past 30 Years, 30 HASTINGS WOMEN’S L.J. 211, 215-16 (2019). See Margaret E. Johnson, *Balancing Liberty, Dignity and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 523 (2010), for a critical review of domestic violence lethality assessments.

¹¹³ Jill Theresa Messing, Jacquelyn Campbell & Janet Sullivan Wilson, *Research Designs in the Real World: Testing the Effectiveness of an IPV Intervention*, 275 NAT’L INST. JUST. J. 1, 1, 7 (2015) (noting, however, that an effective efficacy measure of these instruments was not possible to achieve).

¹¹⁴ *A Closer Look at the Lethality Assessment Program*, NAT’L INST. JUST. (Sept. 1, 2015), <https://nij.ojp.gov/topics/articles/closer-look-lethality-assessment-program> [https://perma.cc/8K8T-ZMAS].

¹¹⁵ *Petriciolet v. State*, 442 S.W.3d 643, 653 (Tex. App. 2014) (holding that lethality assessment testimony was not sufficiently reliable to be admissible expert testimony); Tom Douglas, Jonathan Pugh, Ilna Singh, Julian Savulescu & Seena Fazel, *Risk Assessment Tools in Criminal Justice and Forensic Psychiatry: The Need for Better Data*, 42 EUR. PSYCHIATRY 134, 135 (2017) (noting that on some measures, false positives may be common with certain minority groups).

¹¹⁶ Johnson, *supra* note 112, at 561-62.

¹¹⁷ See JILL THERESA MESSING, JACQUELYN CAMPBELL, JANET SULLIVAN WILSON, SHERYLL BROWN, BEVERLY PATCHELL & CHRISTINE SHALL, POLICE DEPARTMENTS’ USE OF THE LETHALITY ASSESSMENT PROGRAM: A QUASI-EXPERIMENTAL EVALUATION 24 (2014), <https://www.ojp.gov/pdffiles1/nij/grants/247456.pdf> [https://perma.cc/K9GF-6LF9]; see also *infra* Part III.B.

¹¹⁸ See ISAAC BRYAN, TERRY ALLEN, KELLY LYTLE HERNANDEZ & MARGARET DOOLEY-SAMMULI, THE PRICE FOR FREEDOM: BAIL IN THE CITY OF L.A. 2 (2017), http://milliondollarhoods.org/wp-content/uploads/2017/10/MDH_Bail-Report_Dec-4-

financial strain is borne by families who endeavor to pay bail fees they cannot afford, often resulting in long term household debt.¹¹⁹ The monetary impact of bail falls especially hard on women, who are most likely to bear the financial burdens related to release of an arrestee.¹²⁰ This is no less true in cases where domestic violence charges have been lodged.¹²¹ In fact, one recent study found that domestic violence survivors disproportionately pay the costs of cash bail.¹²² Bail industry agents have acknowledged that “domestic violence cases helped backfill their ledgers.”¹²³

Accounts of the devastating impacts of pretrial detention have contributed to bail reform efforts.¹²⁴ In the case of domestic violence, however, the dominant narratives about bail and domestic violence crimes are shaped by opponents of bail reform. These opponents often use gender violence as a pretext to impede modifications to harsh detention practices, possibly while perpetuating inaccurate and sensationalistic claims.¹²⁵ These circumstances serve as a reminder that women’s safety has often been deployed as a racialized contrivance through which to expand the carceral state, including bail

2017.pdf [https://perma.cc/9BEM-76DT]; see also *supra* notes 95–96 and accompanying text.

¹¹⁹ NAGRECHA ET AL., *supra* note 92, at 19; PRETRIAL DET. REFORM WORKGROUP, *supra* note 90, at 36, 39; Nicole Lewis & Beatrix Lockwood, *How Families Cope with the Hidden Costs of Incarceration for the Holidays*, N.Y. TIMES (Dec. 17, 2019, 12:31 EST), <https://www.nytimes.com/2019/12/17/us/incarceration-holidays-family-costs.html> [https://perma.cc/AW5Y-KL3H].

¹²⁰ BRYAN ET AL., *supra* note 118, at 1.

¹²¹ Jason Pohl, *California’s Far-Left Activists Shocked They Beat Prop. 25. What’s the Future of Bail Now?*, SACRAMENTO BEE (Nov. 6, 2020, 2:40 PM), <https://www.sacbee.com/news/politics-government/election/article246968937.html#storylink=cpy> [https://perma.cc/L7MJ-WRA9].

¹²² *Id.*

¹²³ Jason Pohl, *‘Unconscionable.’ How a Surge in Domestic Violence Is Saving the Bail Bond Industry*, SACRAMENTO BEE (Oct. 12, 2020), <https://www.sacbee.com/news/politics-government/article246124355.html> [https://perma.cc/YVR9-KGGT].

¹²⁴ Rachel Smith, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEO. J. ON POVERTY L. & POL’Y 451, 466 (2018) (noting how the death of Kalief Browder and other cases influenced legislators to support bail reform).

¹²⁵ E.g., Zoë Carpenter, *Will Concerns About Domestic Violence Derail Sentencing Reform in Oklahoma?*, NATION (Oct. 30, 2020), <https://www.thenation.com/article/society/oklahoma-domestic-violence-state-question-805/> [https://perma.cc/P6UE-HE4F] (describing how prosecutors have used domestic violence as a justification for opposing reforms to the criminal legal system); Jocelyn Simonson, *What Comes After Money Bail? An LPE Perspective on Pretrial Detention*, LPE PROJECT (Feb. 10, 2020), <https://lpeproject.org/blog/what-comes-after-money-bail-an-lpe-perspective-on-pretrial-detention/> [https://perma.cc/S23J-BK96].

assessments.¹²⁶ Opposition to bail reform has been lodged vehemently, sometimes in the form of personal threats of harm to those who propose reform measures without categorical exclusions.¹²⁷

There are few, if any, commentators who remark on the bail system's pernicious impact on individuals accused of gender violence crimes. These individuals, too, are entitled to the presumption of innocence, due process, and equal protection of the laws. Persons accused of domestic violence who remain in jail due to lack of financial means face the same potential consequences — unemployment, debt, violence, or death — as any accused. These consequences are unlikely to mitigate domestic violence.¹²⁸

The silence is understandable — up to a point. No one wishes to be perceived as minimizing the dangers of intimate partner violence. Concerns about the dangers to victims of domestic violence are well-founded, of course. Domestic violence is different in ways that bear on the safety and well-being of victims.¹²⁹ Such violence may be more likely to continue when parties separate.¹³⁰ Victims have been killed by their offenders upon release on bail.¹³¹ When victims are seeking to exit abusive relationships, circumstances must accommodate her efforts to

¹²⁶ Sean Allan Hill II, *Reading Bail Reform Through a Critical Race Lens*, LPE PROJECT (Feb. 14, 2020), <https://lpeproject.org/blog/reading-bail-reform-through-a-critical-race-lens/> [<https://perma.cc/QW92-D5L7>].

¹²⁷ Adam Hochron, *Free to Kill? NJ Bail Reform Can Leave Victims Exposed*, N.J. 101.5 (Feb. 9, 2018), <https://nj1015.com/free-to-kill-nj-bail-reform-can-leave-victims-exposed/> [<https://perma.cc/KF8A-RZXC>] (quoting a spokesperson for the New Jersey Coalition to End Domestic Violence); Laird, *supra* note 89.

¹²⁸ See JASON TAN DE BIBIANA, THERESE TODD & LEAH POPE, VERA INST. OF JUST., *PREVENTING SUICIDE AND SELF-HARM IN JAIL: A SENTINEL EVENTS APPROACH 1* (2019) (noting that suicide is the leading cause of death in jails, often occurring within a short period of time after detention); Laird, *supra* note 89 (“Domestic violence . . . will not be resolved by keeping people in jail, after a judge has already deemed them eligible for release, just because they can’t afford cash bail”); Vaughn, *supra* note 108 (describing the murder of a transgender woman arrested and held without bail related to domestic violence charges).

¹²⁹ Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 566-67 (2007).

¹³⁰ Mahoney, *supra* note 84, at 5-6.

¹³¹ E.g., Weisberg, *supra* note 112, at 228 (noting the murder of a woman in Ohio by her former husband out on bail); Laird, *supra* note 89 (reporting on the murder of a St. Louis woman by her husband who was out on bail); see also Xinge He, Emma Johnson, Lauren Katz, Blake Pescatore, Alexandra Rogers & Eva Schlitz, *Domestic Violence*, 21 GEO. J. GENDER & L. 253, 283 (2020).

gain and maintain safety. But such goals are rarely achieved by incarceration as “a first-line response to social problems.”¹³²

The absence of a coherent critical narrative advancing alternative means of safety for survivors and mitigation intervention for offenders has impacted both bail reform efforts and the exploration of ways to keep survivors safe without detention. Some domestic violence agencies that serve survivors have failed to engage in pretrial detention reform conversations.¹³³ Others have collaborated with politicians, sheriffs, and prosecutors to oppose to bail reform legislation.¹³⁴ The arguments in support of domestic violence exclusions from bail reform rely on the debunked notions that carceral approaches help keep victims safe.¹³⁵ The criminal justice system, however, has failed to reduce gender violence.¹³⁶

The anti-bail rationale, moreover, ignores the voices of many victims who seek a different response to the violence to which they have been subjected and who especially eschew jail as a remedy.¹³⁷ Mallory

¹³² Sandra G. Mayson, *After Money Bail: Lifting the Veil on Pretrial Detention*, LPE PROJECT (Feb. 15, 2020), <https://lpeproject.org/blog/after-money-bail-lifting-the-veil-on-pretrial-detention/> [<https://perma.cc/J98R-XQLC>].

¹³³ See, e.g., PRETRIAL DET. REFORM WORKGROUP, *supra* note 90, app. A (noting the failure of domestic violence providers to attend a convening although invited); CIVILRIGHTS.ORG, THE USE OF PRETRIAL “RISK ASSESSMENT” INSTRUMENTS: A SHARED STATEMENT OF CIVIL RIGHTS CONCERNS 10 (2018), <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf> [<https://perma.cc/JU3T-USVL>] [hereinafter SHARED CIVIL RIGHTS CONCERNS] (showing that no mainstream domestic violence or sexual assault coalitions signed this statement).

¹³⁴ See Patrick M. Gallivan, *Senators Sound the Alarm on Dangerous Bail Reform Law*, N.Y. STATE SENATE (Nov. 7, 2019), <https://www.nysenate.gov/newsroom/press-releases/patrick-m-gallivan/senators-sound-alarm-dangerous-bail-reform-law> [<https://perma.cc/5VDB-DQC6>].

¹³⁵ *Id.*

¹³⁶ Goodmark, *Should DV Be Decriminalized?*, *supra* note 85, at 55-56; see also Joel H. Garner, Christopher D. Maxwell & Jina Lee, *The Specific Deterrent Effects of Criminal Sanctions for Intimate Partner Violence: A Meta-Analysis*, 111 J. CRIM. L. & CRIMINOLOGY 227, 259 (2021) (“[T]here is a marginal deterrent effect for prosecution, no effect for conviction, and a large escalation effect among incarcerated offenders.”).

¹³⁷ AM. CIV. LIBERTIES UNION, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING 29 (2015), https://www.aclu.org/sites/default/files/field_document/2015.10.20_report_-_responses_from_the_field.pdf [<https://perma.cc/6YL7-F9FG>]; DANIELLE SERED, VERA INST. OF JUST., ACCOUNTING FOR VIOLENCE: HOW TO INCREASE SAFETY AND BREAK OUR FAILED RELIANCE ON MASS INCARCERATION 9, 12, 17, 22 (2017), <https://www.vera.org/publications/accounting-for-violence> [<https://perma.cc/UK55-JT8D>]; Melissa Jeltsen, *Don't Use Domestic Violence Victims to Derail Police Reform*, HUFFPOST (June 5, 2020, 6:23 PM ET), https://www.huffpost.com/entry/domestic-violence-defund-police_n_5eda8fe1c5b692d897d2de13?ped [<https://perma.cc/UK55-JT8D>].

Hanora, executive director of Families for Justice as Healing, an organization “led by incarcerated women, formerly incarcerated women, and women with incarcerated loved ones”¹³⁸ has criticized the categorical exclusion of domestic violence from bail reform efforts: “What is that really solving, how is that contributing to public safety, and how else could we do this instead? That conversation never happens. The conversation stops at these are bad, dangerous people and they have to be away from society.”¹³⁹ Similarly, Survived & Punished NY, a prison abolitionist organization dedicated to ending the criminalization of survivors of gender-based violence, has criticized bail reform efforts that “divide[d] people into categories of deserving/not deserving.”¹⁴⁰

Efforts to end the problems associated with pretrial detention cannot be limited to nonviolent crimes; indeed, there can be little success “without taking on the issue that most of these campaigns avoid: the question of violence.”¹⁴¹ Campaigns that distinguish between those whose pretrial release they will support and those they will not will “constrain the content of justice” and impede decarceration efforts generally.¹⁴² Civil rights groups that promote bail reform indicate that input from community groups focused on racial justice is a required element for any salutary outcome.¹⁴³ Just as importantly, the inclusion of anti-carceral feminist justice theories would enhance progressive outcomes.¹⁴⁴ These theories recognize that “policing and incarceration are major issues for social justice feminism” and further demonstrate that the harms occasioned by carceral practices are inherently violent, especially for women who have suffered gender violence, and further reduce community resources upon which families depend.¹⁴⁵ Anti-

cc/ZS5P-VHRE] (“There are survivors in many communities who don’t see law enforcement as a viable option for themselves and their families . . .”).

¹³⁸ *About Us*, FAMS. FOR JUST. AS HEALING, <https://www.justiceashealing.org/about-us> (last visited Sept. 12, 2021) [<https://perma.cc/C5KZ-APKS>].

¹³⁹ Vaughn, *supra* note 108.

¹⁴⁰ Survived & Punished NY, “*Bail Reform*” & *Carceral Control: A Critique of New York’s New Bail Laws*, LPE PROJECT (Feb. 11, 2020), <https://lpeproject.org/blog/bail-reform-carceral-control-a-critique-of-new-yorks-new-bail-laws/> [<https://perma.cc/BB9N-4CT2>].

¹⁴¹ SERED, *supra* note 137, at 7.

¹⁴² See David Wiens, *Motivational Limitations on the Demands of Justice*, 15 EUR. J. POL. THEORY 333, 346 (2016).

¹⁴³ See SHARED CIVIL RIGHTS CONCERNS, *supra* note 133, at 3.

¹⁴⁴ *Feminist Anti-Carceral Studies*, UCLA CTR. FOR STUDY WOMEN, <https://csw.ucla.edu/cswresearch/feminist-anti-carceral-studies/> (last visited Sept. 12, 2021) [<https://perma.cc/2HXY-MF7Q>].

¹⁴⁵ *Id.*

carceral feminism enhances the possibility of structural reforms and would, as Catherine Powell and Camille Gear Rich have observed in a related context, probe the mutually constitutive nature of gender and racial subordination.¹⁴⁶

As Jocelyn Simonson has written, “The goal is not to put forth model reform proposals, but rather to push for a larger vision of how the state provides safety and security in the face of both harm and structural neglect, and to connect that vision to our systems of money bail and pretrial detention.”¹⁴⁷ Simonson adds that “grassroots organizations are pushing back against the dominant ideas of ‘public safety’ and ‘community’ that sustain pretrial detention, in part through the collective act of posting of bail via bail and bond funds.”¹⁴⁸ Considerations of alternative approaches, as described in Part IV below, may contribute to bail reform goals and assist arrestees with their obligations to appear in court. Moreover, these approaches may begin a more effective process of reducing threats of violence and find better ways to achieve offender accountability and restorative justice for survivors.

B. COVID-19 and Compassionate Release Campaigns

The effect of the 2020 pandemic crisis was both drastic and widespread. Shelter-in-place orders, the closing of businesses, social isolation, and fear dramatically transformed realities for almost everyone. Many predicted that United States prisons would become a site of devastating health crises. Public health and other experts warned about the impact of COVID-19 on prisons, noting that many incarcerated persons have pre-existing health problems that are exacerbated by dismal medical services and toxic, unsanitary conditions in jails and prisons.¹⁴⁹ Infections in prisons where hand sanitizers have been considered contraband have been rampant, causing some

¹⁴⁶ Catherine Powell & Camille Gear Rich, *The “Welfare Queen” Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions*, 108 GEO. L.J. 105, 108 (2020). Catherine Powell & Camille Gear Rich provide a beautiful acknowledgement to scholars who have “established intersectionality as a methodological framework in law and related disciplines.” *Id.* at 108-09 n.3. I would like to adopt such an acknowledgement in this article.

¹⁴⁷ Simonson, *supra* note 125.

¹⁴⁸ *Id.*; see also Akbar, *supra* note 75.

¹⁴⁹ Mary Price, *The Compassionate Release Clearinghouse, COVID-19, and the Future of Criminal Justice*, 35 CRIM. JUST. 37, 40 (2020).

researchers to describe the circumstances “a ticking time bomb.”¹⁵⁰ As one journalist observed, detention “comes with a price: As jail and prison staff get infected, they’ll bring the virus home and infect the surrounding community.”¹⁵¹ It has been difficult to arrive at an accurate count of the number of incarcerated persons who have been infected with the virus, but soon after the outbreak, the numbers have continued to soar.¹⁵² As of June 2021, the Marshall Project estimated that more than a half-million people living and working in prisons were sick with COVID-19.¹⁵³ Studies document that, compared to the general public, infection rates among incarcerated persons are more than five times higher and the death rate is three times higher.¹⁵⁴ Prisons, along with nursing homes, have had the highest clusters of COVID-19 cases.¹⁵⁵

¹⁵⁰ Keri Blakinger & Beth Schwartzapfel, *How Can Prisons Contain Coronavirus When Purell is a Contraband?*, A.B.A. J. (Mar. 13, 2020, 1:10 PM CDT), <https://www.abajournal.com/news/article/when-purell-is-contraband-how-can-prisons-contain-coronavirus> [https://perma.cc/Y9GD-ABG2]; Jimmy Jenkins & Matt Katz, ‘A Ticking Time Bomb’: Advocates Warn COVID-19 is Spreading Rapidly Behind Bars, NPR (Apr. 28, 2020, 5:00 AM ET), <https://www.npr.org/2020/04/28/846678912/a-ticking-time-bomb-advocates-warn-covid-19-is-spreading-rapidly-behind-bars> [https://perma.cc/4VG7-GWS4].

¹⁵¹ Radley Balko, *Stopping Covid-19 Behind Bars Was an Achievable Moral Imperative. We Failed.*, WASH. POST (May 1, 2020), https://www.washingtonpost.com/opinions/2020/05/01/stopping-covid-19-behind-bars-was-an-achievable-moral-imperative-we-failed/?utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpisrc=nl_most [https://perma.cc/X8G7-A8M4].

¹⁵² Chiquisha R. Robinson, *Defense Attorneys Are the Best Line of Defense Against the COVID-19 Pandemic for Incarcerated People*, 35 CRIM. JUST. 32, 32 (2020); see also Elizabeth A. Blackwood, *Compassionate Release: NACDL and Partners Launch the COVID-19 Compassionate Release Clearinghouse*, CHAMPION, Apr. 2020, at 51.

¹⁵³ Katie Park, Keri Blakinger & Claudia Lauer, *A Half-Million People Got COVID-19 in Prison. Are Officials Ready for the Next Pandemic?*, MARSHALL PROJECT (June 30, 2021), <https://www.themarshallproject.org/2021/06/30/a-half-million-people-got-covid-19-in-prison-are-officials-ready-for-the-next-pandemic> [https://perma.cc/M2KF-833J].

¹⁵⁴ Brendan Saloner, Kalind Parish, Julie A. Ward, Grace DiLaura & Sharon Dolovich, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 JAMA 602, 602-03 (2020). The Marshall Project tracked rates of infection in prisons through June 2021, finding steep weekly increases in rates. *A State-by-State Look at 15 Months of Coronavirus in Prisons*, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last updated July 1, 2021) [https://perma.cc/MDQ9-B6CL].

¹⁵⁵ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last updated Aug. 27, 2020) [https://perma.cc/K979-V5HD]. One study found that “US jails, prisons, and ICE facilities have become the world’s most effective incubators of COVID-19.” Eric Reinhart, *Mass Incarceration Has Worsened the COVID-19 Pandemic for Everyone*, JACOBIN (June 2, 2021), <https://jacobinmag.com/2021/06/mass-incarceration-covid-19-pandemic-decarceration-safety-health-prisons> [https://perma.cc/6L7R-QNL7].

Said one prison doctor, “The only meaningful public health intervention here is to depopulate the jails dramatically.”¹⁵⁶ Public health experts, attorneys, and other advocates appealed to public officials and the courts to release those held in state and federal prisons and jails.¹⁵⁷ They cited dangerous and unsanitary conditions that characterize prisons and the inability to implement social distancing practices.¹⁵⁸

Advocacy efforts have principally focused on those near the end of their sentence, pregnant individuals or those with underlying health conditions, and others who might qualify for compassionate release.¹⁵⁹ Some legal claims were made pursuant to the federal compassionate release statute, which was first enacted in 1984 and was later amended several times to authorize courts to grant sentence reductions whenever warranted by “extraordinary and compelling reasons.”¹⁶⁰ Courts were inundated with requests for relief as a result of coordinated legal action, the creation of training programs, and a number of clearinghouses to track filings and results.¹⁶¹ In the federal system alone, as of June 2021, at least 31,000 prisoners sought COVID-related compassionate release, yet only thirty-six cases were granted.¹⁶² Furthermore, as time went on

¹⁵⁶ Jan Ransom & Alan Fleuer, ‘A Storm Is Coming’: Fears of an Inmate Epidemic as the Virus Spreads in the Jails, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/03/20/nyregion/nyc-coronavirus-rikers-island.html> [<https://perma.cc/B66Q-ZGVT>].

¹⁵⁷ Blackwood, *supra* note 152, at 51-52.

¹⁵⁸ E.g., Price, *supra* note 149, at 40 (describing conditions as set out in a lawsuit filed on behalf of persons held in Butner federal prison).

¹⁵⁹ See, e.g., *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POLY INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> (last updated May 18, 2021) [<https://perma.cc/7UNZ-Z8SJ>] [hereinafter *Significant COVID-19 Criminal Justice Changes*] (describing various policymakers’ advocacy of releasing those near the end of their sentences, are pregnant, or have underlying health conditions); *RAPP Public Health Letter — 150 Public Health Professionals Urge Gov. Cuomo to Release Elders, Others Vulnerable to COVID-19*, JUST. ROUNDTABLE (Apr. 2, 2020), <https://justiceroundtable.org/news-item/rapp-public-health-letter-150-public-health-professionals-urge-gov-cuomo-to-release-elders-others-vulnerable-to-covid-19/> [<https://perma.cc/B274-FRT5>] (asking Governor Cuomo to grant emergency clemencies to prisoners who are “older, sick, pregnant, have serious respiratory conditions, or who have otherwise compromised immune systems”).

¹⁶⁰ 18 U.S.C. § 3582(c)(1)(A) (2018). See Blackwood, *supra* note 152, at 51, for a thorough review of the evolution of the compassionate release statute and guidance issued by the U.S. Sentencing Commission. See generally Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, 87 U. CHI. L. REV. ONLINE 4 (2020), for an excellent overview of COVID-19-related responses in prisons in the United States.

¹⁶¹ See Blackwood, *supra* note 152, at 51-52; Price, *supra* note 149, at 41.

¹⁶² Keri Blakinger & Joseph Neff, *31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36.*, MARSHALL PROJECT (June 11,

and the pandemic worsened, federal officials became less likely to grant release for reasons related to the pandemic.¹⁶³

It has been difficult to ascertain the numbers of persons granted Covid-related compassionate release; however, the data suggests that those released fit a narrow set of criteria, generally limited individuals with a short time left on their sentences for nonviolent offenses.¹⁶⁴ For the most part, however, the stringent legal standards and the specter of recidivism prevented the release of the overwhelming majority of incarcerated persons.¹⁶⁵ In fact, requests for release were often accompanied by assurances that “[n]o one is asking for the indiscriminate release of offenders.”¹⁶⁶

Notwithstanding the circumstances of the pandemic, objections to releasing those designated as violent offenders obstructed meaningful efforts to address mass incarceration and the impact of COVID-19 on persons held in prisons.¹⁶⁷ Fear of increased crime rates limited release, although the data about recidivism is unclear at best.¹⁶⁸ Some studies suggest that those convicted of violent offenses are unlikely to

2021, 6:00 AM), <https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36> [<https://perma.cc/SJ9D-L2XD>].

¹⁶³ *Id.*

¹⁶⁴ Emily Widra, *How Much Have COVID-19 Releases Changed Prison and Jail Populations?*, PRISON POL’Y INITIATIVE (Feb. 3, 2021), <https://www.prisonpolicy.org/blog/2021/02/03/january-population-update/> [<https://perma.cc/93U2-HHXN>] (noting the challenges in collecting release data due to the disjointed nature of the criminal legal system and provides examples of jurisdictions that have only released “certain nonviolent detainees” jailed for “low-level charges”). The Report notes that “the early reforms instituted to mitigate COVID-19 have largely been abandoned.” *Id.*

¹⁶⁵ Lee Kovarsky, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71, 72 (2020). See generally *id.*, for an overview of the legal challenges in remedying the risks of the virus faced by persons held in jails and prisons.

¹⁶⁶ Ned Barnett, *Protect NC Prisoners from Virus*, RALEIGH NEWS & OBSERVER (May 12, 2020, 12:00 AM), <https://www.newsobserver.com/opinion/article242645876.html> [<https://perma.cc/6K75-273G>].

¹⁶⁷ See J.J. Prescott, Benjamin Pyle & Sonja B. Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1644-45 (2020).

¹⁶⁸ *Id.* at 1645 (noting conflicting findings and methodological problems in studying recidivism); *Recidivism and Reentry*, PRISON POL’Y INITIATIVE, https://www.prisonpolicy.org/research/recidivism_and_reentry/ (last updated Aug. 24, 2021) [<https://perma.cc/H8TL-LSDE>] (noting that recidivism rates may be unreliable because the data are “skewed by inconsistencies in policing, charging, and supervision”); see also Stephanie Bazell, *The ‘False Dichotomy’ of Violent vs. Non-Violent Crimes*, CRIME REP. (Feb. 3, 2021), <https://thecrimereport.org/2021/02/03/the-false-dichotomy-of-violent-vs-non-violent-crimes/> [<https://perma.cc/495P-CS7L>].

reoffend.¹⁶⁹ As Lee Kovarsky has written in the context of COVID-19-related release efforts, “Individual acts of violent reoffending might be evocative political arguments, but the actual risks are simply too lopsided.”¹⁷⁰

Persons accused or convicted of gender violence-related offenses are excluded from release campaigns.¹⁷¹ Jail personnel, while announcing that they would cease the admission of persons charged with or convicted of misdemeanors, declared that domestic violence offenses would be excluded from such policies.¹⁷² Prosecutors who called for reducing jail and prison populations due to the virus nevertheless publicized their decision to detain those charged with domestic violence.¹⁷³ Although there have been a few decisions where courts have

¹⁶⁹ See, e.g., Prescott et al., *supra* note 167, at 1698 (focusing on homicide convictions).

¹⁷⁰ Kovarsky, *supra* note 165, at 76-77.

¹⁷¹ See, e.g., Cliff Collins, *Bring in the Jury: Conducting Jury Trials During Covid-19 Pandemic Requires Achieving a Tricky Balance*, 80 OR. ST. BAR BULL. 26, 29-30 (2020) (noting that jails often categorically exclude persons charged with certain crimes including domestic violence from consideration for release); Kimberly Kindy, Emma Brown & Dalton Bennett, ‘Disaster Waiting to Happen’: *Thousands of Inmates Released as Jails and Prisons Face Coronavirus Threat*, WASH. POST (Mar. 25, 2020), https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc_story.html?utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpisrc=nl_most [<https://perma.cc/2L5B-EVUG>] (describing policies to “stop accepting all new prisoners except those accused of violent felonies or of misdemeanor crimes, such as domestic violence, that pose a threat to public safety”); *Significant COVID-19 Criminal Justice Changes*, *supra* note 159 (noting states who limited release efforts to those convicted of “nonviolent” offenses).

¹⁷² Stephanie Czekalinski, *County Jail Releasing People Convicted of Misdemeanors Because of COVID-19 Pandemic*, CLEVELAND 19 NEWS (Dec. 15, 2020, 4:04 PM PST) <https://www.cleveland19.com/2020/12/14/county-jail-releasing-people-convicted-misdemeanors-because-covid-pandemic/> [<https://perma.cc/434R-82ZZ>] (noting that convicted domestic violence misdemeanants would not be released); Cory Shaffer, *Cuyahoga County Jail Stops Accepting New Inmates Charged with Most Misdemeanors to Prevent ‘Explosion’ of Coronavirus Cases amid Historic Surge*, CLEVELAND (Nov. 17, 2020, 4:59 PM), <https://www.cleveland.com/court-justice/2020/11/cuyahoga-county-jail-stops-accepting-new-inmates-charged-with-most-misdemeanors-to-prevent-explosion-of-coronavirus-cases-amid-historic-surge.html> [<https://perma.cc/S2RA-YMYU>]; Christopher Zoukis, *Coronavirus: A Nationwide Survey of the Push for Early Release as Pandemic Fears Grow*, PRISON LEGAL NEWS (May 1, 2020), <https://www.prisonlegalnews.org/news/2020/may/1/coronavirus-nationwide-survey-push-early-release-pandemic-fears-grow/> [<https://perma.cc/7B86-DB8L>] (reporting that the states including California, Massachusetts, Alaska, Hawaii, Tennessee, Wisconsin, as well as several counties and cities have excluded domestic violence arrestees or offenders from COVID-related release).

¹⁷³ Collins, *supra* note 171, at 29.

released defendants with histories of domestic violence offenses, very few of these cases are likely to appear before a court in the first place.¹⁷⁴ In fact, some public defenders report that none of the compassionate release cases they have submitted to the courts or prosecutors include domestic violence offenses.¹⁷⁵

The issue of intimate partner violence persists at the margins of the debates that have swirled around incarceration versus release.¹⁷⁶ Advocacy groups submitted COVID-related decarceration recommendations to Congress supporting proposed legislation that would exclude domestic violence offenders from consideration for early release and further omitted such offenses from the category of crimes for which charges of probation violation would not be lodged.¹⁷⁷ As with bail reform, “progressive prosecutors” categorically exclude domestic violence offenders from release eligibility.¹⁷⁸ Some established

¹⁷⁴ See, e.g., *United States v. Jacobs*, 470 F. Supp. 3d 969, 977 (S.D. Iowa 2020) (noting that the defendant had a history of convictions, including for domestic violence but expressed concerns regarding the lack of medical attention he would receive if he remained incarcerated); *United States v. Millage*, 464 F. Supp. 3d 1218, 1225 (D. Or. 2020) (noting that the defendant had served 90 percent of his sentence and his request for relief included eight months of home confinement).

¹⁷⁵ See *Coronavirus Resources*, NAT'L ASS'N CRIM. DEF. LAWS. (Mar. 19, 2020), <https://www.nacdl.org/content/coronavirusresources> [<https://perma.cc/6VTB-J9FG>] (including an entry by the Calcasieu Public Defender's office noting that none of the 250 people submitted for judicial release consideration were charged with “sex offenses[] or serious domestic violence offenses”).

¹⁷⁶ See, e.g., *United States v. Scparta*, No. 18-CR-578, 2020 WL 1910481, at *8-9 (S.D.N.Y. Apr. 19, 2020) (considering compassionate release motion during the COVID-19 pandemic for a non-violent, non-domestic violence-related offense); *Significant COVID-19 Criminal Justice Changes*, *supra* note 159 (noting many governors' decisions to grant release to “nonviolent” offenders or those accused of “low-level misdemeanors”).

¹⁷⁷ *Recommendations to Save Lives by Protecting Incarcerated Youth and Adults During the Covid-19 Pandemic*, JUST. ROUNDTABLE (May 29, 2020), <https://justiceroundtable.org/news-item/may-29-2020-justice-roundtable-covid-19-updated-summary-recommendations-to-congress/> [<https://perma.cc/9Y9V-73A8>]. The recommendations supported the HEROES Act. *Id.* This proposed legislation (specifically section 3062, “Immediate Release of Vulnerable and Low-Risk Individuals” and section 3065, “Pretrial Citation and Release”) excluded persons charged with intimate partner offenses. See Heroes Act, H.R. 6800, 116th Cong. (2020).

¹⁷⁸ See Akela Lacy, *The Coronavirus Pandemic Makes the Case for Criminal Justice Reform*, INTERCEPT (Mar. 28, 2020, 4:00 AM), <https://theintercept.com/2020/03/28/coronavirus-criminal-justice-reform-jails/> [<https://perma.cc/2457-8KEP>] (noting that for example, “Maryland State's Attorney Mosby ordered staff to dismiss pending criminal charges including sex work, possession and distribution of drugs including heroin, trespassing, and other nonviolent offenses”); Malik Neal, *What the Pandemic Revealed About 'Progressive' Prosecutors*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/02/04/opinion/prosecutors-bail-reform.html> [<https://perma.cc/EEC3-HLBP>].

civil rights groups urged police to “cease arrests for low-level offenses and issue citations or desk-tickets in lieu of other arrests so that people can return home;” however, their definition of “low-level offenses” did not include domestic violence, but rather, “mere drug possession and traffic code violations absent an imminent threat to the driver or the public.”¹⁷⁹

Advocates warn that COVID-19 has created a situation where “[t]his is life and death now. It is not about criminal justice policy and whether you believe in second chances.”¹⁸⁰ Yet nearly all early release initiatives have been limited to low-level, non-violent offenses. The progressive line appears to begin and end thusly: “We should not have people in prisons and jails who aren’t a violent threat.”¹⁸¹

Journalist Justine van der Leun observed that “[t]he fixation on ‘nonviolent criminals’ [is] politically shrewd, since the public is generally opposed to the liberation of people they perceive as

Similarly, Philadelphia’s prosecutor, Larry Krasner, “asked the city’s police department to prioritize dangerous offenses over nonviolent arrests in response to the spread of the coronavirus pandemic in the United States.” Lacy, *supra*.

¹⁷⁹ Letter from ACLU, to State and Local Officials, on COVID-19 and the Iowa Criminal Justice and Legal Systems (Mar. 20, 2020), https://www.aclu-ia.org/sites/default/files/covid19_and_iowa_criminal_justice.pdf [<https://perma.cc/9N8E-AMEW>]; Letter from ACLU, to State and Local Officials, on COVID-19 and the Nevada Criminal Justice System (Nevada) (Mar. 26, 2020), https://www.aclunv.org/sites/default/files/field_documents/aclunv_covid-19_ndoc_letter.pdf [<https://perma.cc/X2UJ-D3BD>]. What appears to be the ACLU National’s template letter also recommends that law enforcement “cease arrests for low-level offenses” which would not include domestic violence-related offenses. See Letter from ACLU, to State and Local Officials, on COVID-19 and the Criminal Justice System, (Mar. 16, 2020), <https://www.aclu.org/letter/aclu-letter-state-and-local-officials-covid-19-and-criminal-justice-system> [<https://perma.cc/9JNL-U9XZ>]; see also *Reducing Jail and Prison Populations During the COVID-19 Pandemic*, BRENNAN CTR., <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic> (last updated Aug. 23, 2021) [<https://perma.cc/FD9E-U6GK>] (limiting categorical recommendations to releasing the elderly, the sick, and those incarcerated for parole violations).

¹⁸⁰ Kindy et al., *supra* note 171. The state of New Jersey is one exception: it ordered the release of persons detained for convictions in municipal courts as well as probation violations, and allowed prosecutors to challenge a release if it “might pose a safety risk.” Tracey Tully, *1,000 Inmates Will Be Released from N.J. Jails to Curb Coronavirus Risk*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/nyregion/coronavirus-nj-inmates-release.html> [<https://perma.cc/C39F-LRZV>]; see also *Significant COVID-19 Criminal Justice Changes*, *supra* note 159.

¹⁸¹ Morgan Simon, *San Francisco DA Chesa Boudin Says COVID-19 Won’t End Without Criminal Justice Reform*, FORBES (Mar. 24, 2020, 10:07 AM EDT), <https://www.forbes.com/sites/morgansimon/2020/03/24/san-francisco-da-chesa-boudin-says-covid-19-wont-end-without-criminal-justice-reform/#114ea36f5c34> [<https://perma.cc/U3AG-R9ZF>].

dangerous. But seen as part of the larger conversation on mass incarceration, it [makes] little sense.”¹⁸² Release advocates presumably choose politically expedience as may be necessary to achieve any success in decarceration efforts. This practice, however, perpetuates unconfirmed and problematic views about recidivism, and thus limits progress toward new approaches and understandings. Similarly, on the detention of individuals held for mental health commitment hearings during the pandemic, Susan McMahon writes, “[J]udges, like most people, harbor deep-seated fears of individuals with mental illness, and they are reluctant to release individuals who they suspect may be dangerous, even if that suspicion is founded on stigma instead of fact.”¹⁸³ She offers a remedy: “The solution to this problem is simple: release defendants.”¹⁸⁴

In this pandemic, where scholars raise Eighth Amendment considerations and argue that a failure to release vulnerable prisoners constitutes cruel, inhuman, and degrading treatment, the decision to omit certain persons from consideration is unsettling.¹⁸⁵ Indeed, punishment that is likely to result in illness or death cannot be considered a civilized form of retribution. As of April 16, 2021, 2,990 incarcerated persons have died from COVID-19, exceeding the total number of prisoners executed in the last decade.¹⁸⁶ A poignant sign posted in the window of the Cook County jail, “Help, We Matter 2,” may not apply to all incarcerated people.¹⁸⁷ As Lorna Finlayson has

¹⁸² Justine van der Leun, *Confinement and Contagion*, N.Y. REV. BOOKS (Oct. 8, 2020), <https://www.nybooks.com/articles/2020/10/08/confinement-and-contagion/> [https://perma.cc/V9EF-8CG3].

¹⁸³ Susan A. McMahon, *Pandemic as Opportunity for Competence Restoration Decarceration*, 2 ARIZ. ST. L.J. ONLINE 207, 208 (2020).

¹⁸⁴ *Id.*

¹⁸⁵ See Kovarsky, *supra* note 165, at 78-79; Francis Tom Temprosa & Darwin Simpelo, *Rights Under Lockdown: Not Releasing Vulnerable Prisoners in the Time of a Pandemic Is a Cruel, Inhuman or Degrading Treatment or Punishment*, MICH. J. INT’L L. ONLINE (Oct. 13, 2020), <http://www.mjilonline.org/rights-under-lockdown-not-releasing-vulnerable-prisoners-in-the-time-of-a-pandemic-is-a-cruel-inhuman-or-degrading-treatment-or-punishment/> [https://perma.cc/8L4U-J7DD].

¹⁸⁶ *Covid-19’s Impact on People in Prisons*, EQUAL JUST. INITIATIVE (Apr. 16, 2021), <https://eji.org/news/covid-19s-impact-on-people-in-prison/> [https://perma.cc/9GGL-37HW]; Douglas A. Berman, *The New Death Penalty: COVID Has Now Killed More US Prisoners in Weeks than the US Death Penalty Has in over a Decade*, SENT’G L. & POL’Y (May 11, 2020, 11:56 AM), https://sentencing.typepad.com/sentencing_law_and_policy/2020/05/the-new-death-penalty-covid-has-now-killed-more-us-prisoners-in-ten-weeks-that-the-us-death-penalty-.html [https://perma.cc/765J-9TL3].

¹⁸⁷ See Ashish Prashar, *If Politicians Are Serious About Fighting the Pandemic, There’s a Clear Way to Do It: Release People from Jail*, INSIDER (May 10, 2020, 5:33 AM),

observed about the pandemic, “judgements about what is possible are rarely fully distinguishable from judgements about what — and who — matters, and how much.”¹⁸⁸

It bears repeating that it is, of course, imperative to recognize the differentiated risk that domestic violence poses to victims compared to other crimes, especially in these times. The pandemic has wrought unexpected havoc in all aspects of daily life, perhaps most notably within the most intimate household spaces in which people are required to remain. Some are homebound with family members whose presence provides comfort. Others are confined at home in relationships that are frayed, tense, and marked by emotional and physical violence. Indeed, as one report noted, “It’s Hard When You Can’t Go Anywhere.”¹⁸⁹ Since the inauguration of shelter-in-home regimes, headline news and magazine accounts across the globe have chronicled the problem of domestic violence — a social ill exacerbated by all of the social and economic calamities associated with the pandemic.¹⁹⁰ Some studies indicate that the data showing rising rates of domestic violence during the pandemic are derived principally from increased hotline calls.¹⁹¹ A Marshall Project report reveals that information about increased incidents of domestic violence is based on anecdotal evidence and “fragmented data points.”¹⁹² These authors noted that, like all other

<https://www.businessinsider.com/politicians-must-release-prisoners-people-in-jail-to-stem-pandemic-2020-5> [<https://perma.cc/KNF4-LWH6>].

¹⁸⁸ Lorna Finlayson, *Everyday Emergencies*, CAMBRIDGE BLOG (May 18, 2020), <http://www.cambridgeblog.org/2020/05/everyday-emergencies/> [<https://perma.cc/3M5F-2JFP>].

¹⁸⁹ Elliot Ross & Amelia Nierenberg, *It’s Hard when You Can’t Go Anywhere’: Life Inside an Assisted Living Facility*, N.Y. TIMES (May 9, 2020), <https://www.nytimes.com/interactive/2020/05/09/style/assisted-living-coronavirus.html> [<https://perma.cc/Q7H3-2VZ8>].

¹⁹⁰ Candace Forbes Bright, Christopher Burton & Madison Kosky, *Considerations of the Impacts of COVID-19 on Domestic Violence in the United States*, 2 SOC. SCIS. & HUMANS. OPEN 1, 1-2 (2020) (noting that social isolation exacerbates domestic violence).

¹⁹¹ *Id.* at 3; see also Julie Bosman, *Domestic Violence Calls Mount as Restrictions Linger: ‘No One Can Leave,’* N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/05/15/us/domestic-violence-coronavirus.html> [<https://perma.cc/L89W-PBJK>]; *No Where to Go: Intimate Partner Abuse in the COVID-19 Pandemic*, LAW PROFESSOR BLOGS NETWORK: HUM. RTS. HOME BLOG (Apr. 8, 2020), https://lawprofessors.typepad.com/human_rights/2020/04/intimate-partner-abuse-in-the-covid-19-pandemic.html [<https://perma.cc/8F3W-ZURN>].

¹⁹² Weihua Li & Beth Schwartzapfel, *Is Domestic Violence Rising During the Coronavirus Shutdown? Here’s What the Data Shows*, MARSHALL PROJECT (Apr. 22, 2020), <https://www.themarshallproject.org/2020/04/22/is-domestic-violence-rising-during-the-coronavirus-shutdown-here-s-what-the-data-shows> [<https://perma.cc/8UW7-VSJN>].

crimes, 911 reports of domestic violence appeared to be decreasing during the study period from March 8, 2020 to April 12, 2020, though at a lower rate. There is one notable exception to the study: rates of serious domestic violence appear to have increased.¹⁹³ Other studies have found an increase in officially reported domestic violence during the coronavirus pandemic, both abroad and in the United States.¹⁹⁴

These data alone cannot capture the full dimension of the problem of domestic violence. For reasons unrelated to the conditions of quarantine, as demonstrated by many studies,¹⁹⁵ victims who may initially seek the intervention of law enforcement to obtain an immediate halt to the violence may nevertheless be reluctant to pursue criminal legal sanctions once an arrest is made.¹⁹⁶ Scholars have noted that “legal interventions increase victim trauma and inadequately impact re-offending.”¹⁹⁷ In this time of COVID-19, survivors report that

But see Beth Schwartzapfel, *Probation and Parole Officers Are Rethinking Their Rules as Coronavirus Spreads*, MARSHALL PROJECT (Apr. 3, 2020), <https://www.themarshallproject.org/2020/04/03/probation-and-parole-officers-are-rethinking-their-rules-as-coronavirus-spreads> [<https://perma.cc/646V-WU69>].

¹⁹³ Li & Schwartzapfel, *supra* note 192.

¹⁹⁴ Alex R. Piquero, Wesley G. Jennings, Erin Jemison, Catherine Kaukinen & Felicia Marie Knaul, *Domestic Violence During the COVID-19 Pandemic: Evidence from a Systematic Review and Meta-Analysis*, 74 J. CRIM. JUST. 1, 2-3 (2021) (finding an average of an average 8.1 percent increase in the U.S.).

¹⁹⁵ Racism is the most prominent reason that the criminal justice system fails to provide a measure of safety for victims of color. Beyond an inability to provide protection, individuals convicted are most likely to be legally denied access to public housing, certain benefits, employment opportunities, and the right to vote, assuring the weakening of communities disproportionately victimized by racist policing. *See* Coker & Macquoid, *supra* note 7, at 591-92; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991) (noting that women of color choose not to call the police for fear of suffering the reaction of a hostile police force); Alexandra Grant, *Intersectional Discrimination in U Visa Certification Denials: An Irremediable Violation of Equal Protection?* 3 COLUM. J. RACE & L. 253, 262 (2013); Radha Vishnuvajjala, Note, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent*, 32 B.C. J.L. & SOC. JUST. 185, 208-09 (2012).

¹⁹⁶ SERED, *supra* note 137, at 11; *see also* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 260 (2020) (explaining, in the context of having to choose between violence and incarceration, that “it is inaccurate to say that black people ‘support’ mass incarceration or ‘get tough’ policies”). Barbara Hart has explained that victims of domestic violence may call the police for the immediate purpose of stopping the violence. Barbara J. Hart, *Arrest: What’s the Big Deal*, 3 WM. & MARY J. WOMEN & L. 207, 208 (1997).

¹⁹⁷ Mary P. Koss & Jacquelyn W. White, *VAWA Reauthorization Presents an Opportunity for Bold Transformation*, GENDER POL’Y REP. (May 20, 2021), <https://genderpolicyreport.umn.edu/vawa-reauthorization-presents-an-opportunity-for-bold-transformation/> [<https://perma.cc/8YYG-D93V>]; *see also* Eleanor J. Bader,

the legal system has failed to provide relief or remedy.¹⁹⁸ The pandemic has added new reasons why domestic violence victims are reluctant to rely on law enforcement and the criminal legal system: many victims do not wish to send the person they accused to jail for fear that they will contract COVID-19 and die.¹⁹⁹ This is particularly true for Black victims, many of whom decline to rely on the police, and whose communities have been disproportionately ravaged by the virus due to structural racism and its manifestations in day-to-day life.²⁰⁰ The pandemic has laid bare the racial inequities and hardships. Persons incarcerated who are Black have been particularly impacted by COVID.²⁰¹ Victims of domestic violence thus may confront a difficult dilemma: the incarceration of an intimate partner as a way to halt further harms while exposing the partner to a potentially fatal illness — the latter a result that is likely unintended.

The pandemic has also exposed the complexity of the dynamic of domestic violence as a consequence of the quotidian aspects of the current political economy. Domestic violence, like the pandemic, often exploits “the vulnerabilities that people have based on the social conditions that they live in.”²⁰² Researchers have observed that “[t]his pandemic has reinforced important truths: inequities related to social determinants of health are magnified during a crisis, and sheltering in place does not inflict equivalent hardship on all people.”²⁰³ The historic and structural conditions of sexism, poverty, racism, and exploitation

‘Criminalization Makes the Situation Worse’: *Victoria Law on Incarceration*, PROGRESSIVE MAG. (Mar. 31, 2021, 11:45 AM), <https://progressive.org/dispatches/victoria-law-incarceration-bader-210331/> [<https://perma.cc/33MA-AQRS>].

¹⁹⁸ ADRIENNE ADAMS, LAUREN VOLLINGER & SARA WEE, CTR. FOR SURVIVOR AGENCY & JUST., A VIRTUAL SUMMIT: THE ECONOMIC IMPACT OF COVID-19 ON SURVIVORS OF DOMESTIC/SEXUAL VIOLENCE 26, 39 (Dec. 17, 2020), <https://drive.google.com/file/d/1-j92rDZFR9mRCsOHkd0Q-XdBjHlhfUF/view> [<https://perma.cc/3RX6-WN4S>].

¹⁹⁹ Li & Schwartzapfel, *supra* note 192; *see also* SERED, *supra* note 137, at 10 (noting the likelihood that victims of violence do not report because of their views of jails and prisons).

²⁰⁰ *See supra* note 195; *see also* Amy Krosch, *The Pandemic Could Lead to More Discrimination Against Black People*, SCI. AM. (Apr. 23, 2020), <https://blogs.scientificamerican.com/voices/the-pandemic-could-lead-to-more-discrimination-against-black-people> [<https://perma.cc/S2MK-C8ET>].

²⁰¹ Price, *supra* note 149, at 42.

²⁰² *See* Isaac Chotiner, *How Racism Is Shaping the Coronavirus Pandemic*, NEW YORKER (May 7, 2020), <https://www.newyorker.com/news/q-and-a/how-racism-is-shaping-the-coronavirus-pandemic> [<https://perma.cc/N69K-RYX8>].

²⁰³ Megan L. Evans, Margo Lindauer & Maureen E. Farrell, *Pandemic Within a Pandemic — Intimate Partner Violence During Covid-19*, 383 NEW ENG. J. MED. 2302, 2302 (2020).

currently stand in sharp relief and reveal that poor and economically unstable families are more likely to suffer domestic violence.²⁰⁴ Most survivors do not perceive criminal responses as a remedy to their pandemic-related hardships.²⁰⁵ Indeed, survivors report that their greatest challenges were economic, often related to government agencies' failures to pay traditional and COVID-19-related unemployment benefits, creditors' unwillingness to be flexible with debt payments, and landlords' threats of evictions.²⁰⁶

Gender-related offenses have often served as "stalking horses"²⁰⁷ for those who are wedded to the criminal legal system and incarceration practices. In fact, many survivors report that their experiences should not be used to promote carceral mechanisms.²⁰⁸ They reject what the criminal legal system offers.²⁰⁹ Current scholarly and advocacy trends have increasingly called into question the resort to imprisonment as a

²⁰⁴ *Raise Your Glass at Home: Celebrating Local Law-Related Charities*, ORANGE CNTY. BAR ASS'N (Aug. 2020), <https://www.ocbar.org/All-News/News-View/ArticleId/3887/August-2020-Cover-Story-Raise-Your-Glass-at-Home-Celebrating-Local-Law-Related-Charities> [<https://perma.cc/H5UG-URQX>] (noting the impact of economic and social challenges on rates of domestic violence). See generally Deborah M. Weissman, *The Personal is Political — and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387 (2007) (providing an overview of the relationship between economic uncertainty and inequality and domestic violence).

²⁰⁵ See ADAMS ET AL., *supra* note 198.

²⁰⁶ *Id.*; see also CAROLYN CARTER, NAT'L CONSUMER L. CTR., NO FRESH START 2020: WILL STATES LET DEBT COLLECTORS PUSH FAMILIES INTO POVERTY IN THE WAKE OF A PANDEMIC? 10 (2020), <https://www.nclc.org/images/NoFreshStart-Rpt-2020.FINAL102920pdf.pdf> [<https://perma.cc/3YJT-BP5D>].

²⁰⁷ Stalking horse refers to "anything put forward to mask plans or efforts; pretext." *Stalking horse*, DICTIONARY.COM, <https://www.dictionary.com/browse/stalking-horse> (last visited Oct. 27, 2021) [<https://perma.cc/3B8A-SQH4>].

²⁰⁸ E.g., Alison Turkos & Shivana Jorawar, *We Survived Rape. Don't Use Us to Support the Police.*, COSMOPOLITAN (July 8, 2020), <https://www.cosmopolitan.com/politics/a33216997/sexual-assault-survivors-police-abolition/> [<https://perma.cc/C6BQ-JT48>].

²⁰⁹ Aviva Stahl, *We Have Already Stopped Calling the Cops*, BUSTLE (July 21, 2020), <https://www.bustle.com/rule-breakers/police-abolition-domestic-violence> [<https://perma.cc/S2GE-T7XX>]; see also AM. CIV. LIBERTIES UNION, *supra* note 137, at 1-2 (surveying advocates, survivors, attorneys, and other members of anti-gender violence advocacy organizations about the troubling consequences of the anti-domestic violence-criminal justice nexus). In one poll, a majority of respondents indicated that police bias against particular groups of people or with regard to gender violence created problems for their community. SERED, *supra* note 137, at 14 (showing over two thirds of survivors of violence surveyed indicated a preference for holding offenders accountable by means other than prison); see also Michelle Alexander, *Reckoning with Violence*, N.Y. TIMES (Mar. 3, 2019), <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html> [<https://perma.cc/B9PT-NPME>] (noting that in New York City, approximately 90 percent of survivors would have opted for restorative justice practices as a way to deal with the offense).

means of relief and remediation for gender violence.²¹⁰ Danielle Sered of Common Justice, an organization that focuses on community accountability has observed:

[O]ur decade of working with survivors has led us to what may seem like a counterintuitive understanding: we believe crime victims are among the constituencies with the greatest stake in ending mass incarceration. Why? Most simply, because their safety, well-being, and sometimes even survival depend on the efficacy of responses to violence, and incarceration is a largely ineffective response. Incarceration is inadequate even in the limited number of cases in which it produces some concrete benefit — and it is often devastating to survivors when its impact is directly contrary to the aims of safety, healing, and justice that their lives depend on. Survivors know this. They have paid the price for prison’s failure with their pain.²¹¹

The categorical exclusion of those accused or convicted of domestic violence from COVID-19 release efforts serves as a rejection of progressive initiatives to de-link this form of social harm from the criminal legal system. Studies suggest that there is rarely any justification for jail, and further, that even short periods of jail detention inflicts harms as severe as those wrought by serious crimes.²¹² In this way the pandemic further reveals “a deficit in the deep structure of American discharge remedies” and the crisis wrought by reliance on the criminal legal system to address social problems.²¹³

III. THE POLITICAL ECONOMY OF STATE AND INTIMATE PARTNER VIOLENCE

This Part serves to synthesize Parts I and II through an analysis of the State’s relationship to gender violence with a focus on intimate partner violence in order to reveal the shortcomings in domestic violence exceptionalism. It suggests new approaches to understanding the determinants of these offenses and seeks to include the study of domestic violence within the realm of theoretical analyses applied to

²¹⁰ See, e.g., ALEXANDER, *supra* note 196, at 59; MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 78 (2006); see also *supra* notes 195, 209.

²¹¹ SERED, *supra* note 137, at 10.

²¹² MEGAN T. STEVENSON & SANDRA G. MAYSON, PRETRIAL DETENTION AND THE VALUE OF LIBERTY 34 (2021).

²¹³ Kovarsky, *supra* note 165, at 72, 88-89 (observing that COVID revealed “a mismatch between pandemic risks that were systemic and remedies that were not”).

other types of crimes. As emphasized throughout this Article, domestic violence survivors are situated differently than other crime victims.²¹⁴ The person who has harmed them often shares the same physical and emotional space. Violence may be experienced more acutely when the victim attempts to separate.²¹⁵ Victims are subjected to economic disempowerment and loss of agency as a result of the violence they endure.²¹⁶

Despite these differences, developing an anti-carceral/progressive legal framework requires that the phenomenon of domestic violence be considered within the same theoretical framework as other types of violence. That is to say, in order to address effectively gender violence as social problem, researchers and advocates must interrogate the determinants in much the same way as when considering other types of harmful behavior. This analysis should inform progressive reform efforts and promote a conceptual shift to help to inscribe gender violence within anti-carceral activism that follows in Part IV.

This Part reviews the research addressing the structural determinants of crime as they apply to domestic violence offenses. It then provides a close examination of two particular systemic circumstances: first, the political economy of socio-economic inequality and uncertainty, and second, the failure of the State *ex ante* and *ex post* with regard to childhood exposure to hardship, subordination, and trauma. These analyses serve to deepen the understanding of criminal behavior writ large and as a way to contemplate constructive approaches to addressing social problems, including domestic violence.

A. *The Structural Determinants of Crime*

Criminologists have long explored the complicated structural determinants of criminal conduct, which include historical circumstances, macro political conditions, and economic forces.²¹⁷

²¹⁴ See *supra* notes 125–127, 129–131 and accompanying text.

²¹⁵ See Mahoney, *supra* note 84, at 64–65.

²¹⁶ Judy L. Postmus, Gretchen L. Hoge, Jan Breckenridge, Nicola Sharp-Jeffs & Donna Chung, *Economic Abuse as an Invisible Form of Domestic Violence: A Multicountry Review*, 21 *TRAUMA, VIOLENCE, & ABUSE* 261, 262 (2018); Deborah M. Weissman, *In Pursuit of Economic Justice: The Political Economy of Domestic Violence Laws and Policies*, 2020 *UTAH L. REV.* 1, 9–11 (2020).

²¹⁷ DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 199 (2001); John Hagan, *Introduction: Crime in Social and Legal Context*, 27 *L. & SOC'Y REV.* 255, 255 (1993); see also Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 *OHIO ST. J. CRIM. L.* 173, 173 (2008).

Scholars have successfully theorized the causal relationship of crime, economic insecurity, and the failure of the state to provide adequate subsistence to its citizens, and have argued that poverty must be introduced as a condition germane to the calculus of the criminal justice system.²¹⁸ Scarcity and income inequality are often predictable indicators of violence.²¹⁹ Socio-economic inequalities disrupt and disorganize communities, resulting in crime.²²⁰

An interdisciplinary group of scholars has posited that the concept of crime as a function of individual failings or idiosyncratic behaviors is “never very clearly articulated, nor is it supported by carefully assembled social science evidence.”²²¹ Rather, violence is a function of poverty, inequality, and the quotidian experiences and conditions wrought by systemic degradation.²²² The research confirms that “it is not just a few pieces of recent research that make these links between deprivation (or joblessness) and crime. By now, most serious criminologists agree that these links are undeniable and enormously important.”²²³ Over time, the evidence demonstrating that criminal behavior is often predicated on inequality and racism has mounted.²²⁴ Importantly, as civil rights lawyer Alec Karakatsanis has written, “what

²¹⁸ GARLAND, *supra* note 217, at 200-01; Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 501-02 (2013) (quoting Richard Delgado’s study on the correlation between extreme poverty and crime).

²¹⁹ Bruce P. Kennedy, Ichiro Kawachi, Deborah Prothrow-Stith, Kimberly Lochner & Vanita Gupta, *Social Capital, Income Inequality, and Firearm Violent Crime*, 47 SOC. SCI. & MED. 7, 8 (1998).

²²⁰ Bebonchu Atems, *Identifying the Dynamic Effects of Income Inequality on Crime*, 82 OXFORD BULL. ECON. & STATS. 751, 759-60, 767-68, 779 (2020).

²²¹ MICHAEL K. BROWN, MARTIN CARNOY, ELLIOTT CURRIE, TROY DUSTER, DAVID B. OPPENHEIMER, MARJORIE M. SHULTZ & DAVID WELLMAN, *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 153 (2003).

²²² 1 NAT’L RSCH. COUNS., *UNDERSTANDING AND PREVENTING VIOLENCE* 70, 132-133, 138 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993); SERED, *supra* note 137, at 4.

²²³ BROWN ET AL., *supra* note 221, at 156; *see also* KRISTIN ANDERSON MOORE, BRANDON STRATFORD, SELMA CAAL, CARL HANSON, SHELBY HICKMAN, DEBORAH TEMKIN, HANNAH SCHMITZ, JOY THOMPSON, S. HORTON & A. SHAW, *PREVENTING VIOLENCE: A REVIEW OF RESEARCH, EVALUATION, GAPS, AND OPPORTUNITIES* 100 (2015), https://s3.amazonaws.com/fwvcorp/wp-content/uploads/20160121112511/Preventing-Violence_Full-Report.pdf [<https://perma.cc/P3XG-FTYN>].

²²⁴ David Cole, *What’s Criminology Got to Do with It?*, 48 STAN. L. REV. 1605, 1607 (1996) (reviewing MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995) and *CRIME AND INEQUALITY* (John Hagan & Ruth D. Peterson eds., 1995)).

constitutes a ‘crime’ in the United States is divorced from what causes harm.”²²⁵ He states:

What constitutes violence? True violence is more than physical assault and murder: there’s the everyday violence of structural poverty, lack of access to health care, forced homelessness, children forced to drink water poisoned with lead, a pregnant woman unable to afford proper nutrition, or a family (often illegally) evicted from their home.²²⁶

Beyond criminology, other areas of research have demonstrated a causal link between grave social harms and structural deficits affecting particular communities.²²⁷ Trends in fields of critical knowledge related to human rights, public health, and family well-being have examined racism, economic strain, and inequality as a way to understand and respond to transgressive behaviors.²²⁸ Advocates working in community-based organizations have recognized that “[a]ny time people’s basic needs are met, violence goes down.”²²⁹ These findings counter the narratives about the inherent danger and unworthiness of those who commit wrongful acts and point to a more empathetic way of approaching perpetrators of crimes without simply resorting to mass incarceration. Furthermore, these findings suggest that it is hardly a bold leap to consider the political economic determinants of intimate partner violence; in fact, much of the research specifically establishes this connection.²³⁰ The deleterious consequences of economic inequality and racism explain most acts of violence, including domestic violence.²³¹

²²⁵ Alec Karakatsanis, *Why “Crime” Isn’t the Question and Police Aren’t the Answer*, CURRENT AFFS. (Aug. 10, 2020), <https://www.currentaffairs.org/2020/08/why-crime-isnt-the-question-and-police-arent-the-answer> [https://perma.cc/CJG9-JYQN].

²²⁶ *Id.*

²²⁷ Deborah M. Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 DUKE J. GENDER L. & POL’Y 221, 238-39 (2013); *About ClassCrits*, CLASSCRITS, https://www.classcrits.org/content.aspx?page_id=22&club_id=459418&module_id=275558 (last visited Oct. 31, 2021) [https://perma.cc/4NR9-7E4Y] (describing a recent network of scholars and activists who seek to engage in a critical analysis of law and the economy).

²²⁸ Weissman, *supra* note 227, at 239.

²²⁹ Emily Badger, *The Unsung Role that Ordinary Citizens Played in the Great Crime Decline*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/upshot/the-unsung-role-that-ordinary-citizens-played-in-the-great-crime-decline.html> [https://perma.cc/44US-FFLZ].

²³⁰ *See infra* Part III.B.

²³¹ *See* MOORE ET AL., *supra* note 223, at iv-v.

B. Political Economic Determinants of Domestic Violence

This Section examines the effects that economic uncertainty and strain have on families and reveals the ways in which these circumstances may give rise to acts of domestic violence. Next, it reviews the literature on Adverse Childhood Experiences (“ACEs”) to demonstrate the duality of victim/offender characteristics of those who have committed gender violence. A review of ACEs-related practices further demonstrates the failure of the State to effectively prevent or intervene in these circumstances.

1. Economic Inequality and Domestic Violence

Research on the effects of economic strain and declining economic opportunities has long demonstrated their social cost to individuals, families, and communities.²³² These same social forces apply equally to domestic violence offenses.²³³ Indeed, decades of research demonstrate the causal relationship between economic inequality and instability, and domestic violence.²³⁴ Economic strain is particularly experienced

²³² See Benedict Sheehy, *Corporations and Social Costs: The Wal-Mart Case Study*, 24 J.L. & COM. 1, 3 (2004) (defining social costs as those problems that result from economic activity and cause uncompensated harm to society); see also CLIFFORD R. SHAW & HENRY D. MCKAY, *JUVENILE DELINQUENCY AND URBAN AREAS* 315 (rev. ed. 1969) (identifying structural factors that produce social disruption leading to high crime rates); Jennie E. Brand, *The Far-Reaching Impact of Job Loss and Unemployment*, 41 ANN. REV. SOCIO. 359, 365 (2015) (describing the psychological and physical stress affecting families as a result of unemployment); Tracey L. Meares, *Praying for Community Policing*, 90 CALIF. L. REV. 1593, 1603 (2002); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1285 (2004); William Julius Wilson, *When Work Disappears*, 111 POL. SCI. Q. 567, 580 (1996) (demonstrating the “cumulative process of economic and social dislocation” resulting social problems due to structural forces).

²³³ See Michael L. Benson, Greer L. Fox, Alfred DeMaris & Judy Van Wyk, *Violence in Families: The Intersection of Race, Poverty, and Community Context*, in 2 FAMILIES, CRIME AND CRIMINAL JUSTICE 91, 91 (Greer Litton Fox & Michael L. Benson eds., 2000); Rebecca Miles-Doan, *Violence Between Spouses and Intimates: Does Neighborhood Context Matter?*, 77 SOC. FORCES 623, 623-25 (1998); Judy A. Van Wyk, Michael L. Benson, Greer Litton Fox & Alfred DeMaris, *Detangling Individual-, Partner-, and Community-Level Correlates of Partner Violence*, 49 CRIME & DELINQ. 412, 413-14 (2003). A National Institute of Justice study demonstrated the role that different neighborhood conditions (particularly those conditions that relate to poverty and economic stress) play in producing domestic violence. Greer Litton Fox & Michael L. Benson, *Household and Neighborhood Contexts of Intimate Partner Violence*, 121 PUB. HEALTH REPS. 419, 425-26 (2006).

²³⁴ See Gary L. Bowen, Natasha K. Bowen & Patricia G. Cook, *Neighborhood Characteristics and Supportive Parenting Among Single Mothers*, in 2 FAMILIES, CRIME AND CRIMINAL JUSTICE, *supra* note 233, at 183, 184-85; Mahoney, *supra* note 84, at 48-49;

within the realm of families and households and is associated with increased rates of domestic violence.²³⁵ Situating domestic violence in a larger analytical frame of dysfunctional political economic arrangements provides a way of addressing the issue through socio-economic justice.

Downward mobility has a “staggering” impact on mental health with repercussions that reverberate in households — a phenomenon revealed in sharp relief in headlines about rising incidents of domestic violence during the COVID-19 pandemic.²³⁶ Similarly, during the 2008–2009 recession, financial strain was been reported to be the cause of a documented rise of domestic violence.²³⁷ The National Domestic Violence Hotline reported that the national increase in telephone calls in 2009 resulted from the decline in household finances and the resulting financial strain.²³⁸

The reduction of government subsistence programs, privatization of benefits, and austerity-related policies that slash funding for programs that address social problems have resulted in what Jacob Hacker describes as the “great risk shift” that has transferred the burden of a punitive economy to households.²³⁹ Families live with insecurity and fear of unemployment. Many are unable to create stability and routine

Daniel Schneider, Kristen Harknett & Sara McLanahan, *Intimate Partner Violence in the Great Recession*, 53 *DEMOGRAPHY* 471, 471 (2016).

²³⁵ Michael L. Benson, Greer L. Fox, Alfred DeMaris & Judy Van Wyk, *Neighborhood Disadvantage, Individual Economic Distress and Violence Against Women in Intimate Relationships*, 19 *J. QUANTITATIVE CRIMINOLOGY* 207, 227-28 (2003); *Economic Distress and Intimate Partner Violence*, *NAT'L INST. JUST.* (Jan. 4, 2009), <https://nij.ojp.gov/topics/articles/economic-distress-and-intimate-partner-violence> [<https://perma.cc/PNN3-HGWU>].

²³⁶ See *supra* notes 192, 233 and accompanying text.

²³⁷ *Domestic Abuse on Rise as Economy Sinks*, *NBC NEWS* (Apr. 10, 2009, 1:20 PM PDT), <https://www.nbcnews.com/health/health-news/domestic-abuse-rise-economy-sinks-1na1C9465262> [<https://perma.cc/M55P-C8ZU>].

²³⁸ *Id.*; see also MARY KAY, “MARY KAY TRUTH ABOUT ABUSE” SURVEY: NATIONAL FINDINGS FROM THIRD SURVEY OF DOMESTIC VIOLENCE SHELTERS IN THE UNITED STATES 2-4 (2011), http://www.ncdsv.org/images/marykay_truthaboutabusesurvey_2011.pdf [<https://perma.cc/T7M9-7BLT>]; Ian Urbina, *Philadelphia to Handle Abuse Calls Differently*, *N.Y. TIMES* (Dec. 30, 2009), <https://www.nytimes.com/2009/12/31/us/31philadelphia.html> [<https://perma.cc/4HHQ-S9BN>] (noting an increase in domestic violence calls due to the recession after a fifteen-year decrease).

²³⁹ JACOB S. HACKER, *THE GREAT RISK SHIFT: THE ASSAULT ON AMERICAN JOBS, FAMILIES, HEALTH CARE AND RETIREMENT AND HOW YOU CAN FIGHT BACK* 7-9 (2006); see also Cynthia A. Williams & John M. Conley, *The Social Reform of Banking*, 39 *J. CORP. L.* 101, 127 (2014) (“[A]usterity programs are draining resources from addressing critical social and environmental problems, such as increasing economic inequality in the United States or addressing climate change.” (citations omitted)).

due to a job market that thrives on part-time employment, flexibilization of the labor market, and a lack of real wage growth.²⁴⁰ To make ends meet, many families must borrow money. Consumer debt has become a pervasive way of life, if not a means for life.²⁴¹ Credit has become a substitute for a living wage, and those who are underemployed and unemployed, especially Blacks and Latinos, are often targets of a predatory credit industry which further exacerbate family tensions and domestic violence.²⁴² Recent studies document that mortgage foreclosures result in an increase in family violence.²⁴³ Efforts to improve financial stability by pursuing a college education lead to more debt and additional financial pressure on households.²⁴⁴ As Sarah

²⁴⁰ See Katherine V.W. Stone, *Flexibilization, Globalization, and Privatization: The Three Challenges to Labor Rights in Our Time*, 44 OSGOOD HALL L.J. 77, 77 (2006) (“Flexibilization refers to the changing work practices by which firms no longer use internal labour markets or implicitly promise employees lifetime job security, but rather seek flexible employment relations that permit them to increase or diminish their workforce, and reassign and redeploy employees with ease.”); Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RSCH. CTR. (Aug. 7, 2018), <http://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/> [https://perma.cc/KV6P-8TFU]; Jocelyn Mangan, *How Employers Can Attract the Best Workers in the New Flexible Labor Market*, FORBES (Mar. 23, 2018, 8:30 AM EDT), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2018/03/23/how-employers-can-attract-the-best-workers-in-the-new-flexible-labor-market/#2ca7e6b13c39> [https://perma.cc/MN6G-W5EP].

²⁴¹ See Kristin Wong, *Does Personal Finance Still Work in Our Changing Economy?*, N.Y. TIMES (Jan. 23, 2020), <https://www.nytimes.com/2020/01/23/smarter-living/does-personal-finance-still-work-in-our-changing-economy.html> [https://perma.cc/G9KL-2WNG] (noting that in 2018, Americans borrowed \$88 billion to cover the costs of health care).

²⁴² SUSANNE SOEDERBERG, *DEBTFARE STATES AND THE POVERTY INDUSTRY* 1-2, 30 (2014); Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071, 1073-74, 1119-22 (2017); see also HANNAH APPEL, SA WHITLEY & CAITLIN KLINE, INST. ON INEQ. & DEMOCRACY & SHUTTLEWORTH FOUND., *THE POWER OF DEBT: IDENTITY & COLLECTIVE ACTION IN THE AGE OF FINANCE* 11, 15-16 (2019), <https://challengeinequality.luskin.ucla.edu/wp-content/uploads/sites/16/2019/03/Appel-Hannah-THE-POWER-OF-DEBT.pdf> [https://perma.cc/2AUV-3Q5G]; Whitney A. Brown, *The Illegality of Sex Discrimination in Contracting*, 32 BERKELEY J. GENDER L. & JUST. 137, 175 (2017); Latonia Williams, *African American Homeownership and the Dream Deferred: A Disparate Impact Argument Against the Use of Credit Scores in Homeownership Insurance Underwriting*, 15 CONN. INS. L.J. 295, 319-20 (2008).

²⁴³ April Pattavina, Kelly M. Socia & Malgorzata J. Zuber, *Economic Stress and Domestic Violence: Examining the Impact of Mortgage Foreclosures on Incidents Reported to the Police*, 16 JUST. RSCH. & POL'Y, 147, 155-56 (2016).

²⁴⁴ Sarah Quinn, *When All Social Problems Become Financial Problems*, LPE PROJECT (Nov. 20, 2019), <https://lpeproject.org/blog/when-all-social-problems-become-financial-problems/> [https://perma.cc/UGN8-XFCS] (noting that families “are being crushed

Quinn observes, “when governments meter access to social goods through loan support, this produces debt for families and communities” in ways that disproportionately imperil non-white families.²⁴⁵

Economic stress diminishes self-esteem and contributes to a sense of worthlessness.²⁴⁶ These strains are the result of structural forces, yet they are experienced as individual burdens and personal failures.²⁴⁷ Social norms and economic realities may be shifting; however, it is still largely true that in the context of heterosexual relationships, economic insecurity within the family is equated with the failure of the male breadwinner and perceived as a blow against the duty of the male associated with the mandate to provide for family and household.²⁴⁸ These prescribed norms are pervasive and enduring. Job insecurity often translates into decreased sense of agency, leading to physical violence as an alternative socially inscribed facet of manhood.²⁴⁹ Similarly, in same-sex relationships, inequality and discrimination create stresses that have sometimes been shown to cause intimate partner violence.²⁵⁰ Notwithstanding various anti-discrimination laws, gays, lesbians, and transgender people lack adequate state and federal

under the burden of school loans,” citing Tressie McMillan Cottom and Caitlin Zaloom).

²⁴⁵ *Id.*

²⁴⁶ CLIFFORD L. BROMAN, V. LEE HAMILTON & WILLIAM S. HOFFMAN, STRESS AND DISTRESS AMONG THE UNEMPLOYED 16, 70 (2001); BRIAN PHILLIPS, GLOBAL PRODUCTION AND DOMESTIC DECAY 85-86 (1998).

²⁴⁷ Helaine Olen, *How the Democrats Should Talk About the Economy*, WASH. POST (Feb. 7, 2020), <https://www.washingtonpost.com/opinions/2020/02/07/how-democrats-should-talk-about-economy/> [https://perma.cc/8BXY-H2XT].

²⁴⁸ See Robert Akerlof & Luis Rayo, Narratives and the Economics of the Family 28 (Aug. 6, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3671894> [https://perma.cc/KC75-HPDM] (describing a “crisis of masculinity” due to the loss of manufacturing jobs that allowed men to serve as the providers for their family); see also Katharine T. Bartlett, *Gender Law: After Twenty-Five Years*, 27 DUKE J. GENDER L. & POL’Y 1, 17-18 (2020) (noting masculinities scholarship and its focus on “the intersection of masculinity norms and work”).

²⁴⁹ Miles-Doan, *supra* note 233, at 627-28; see also Barbara H. Chasin, *Inequality and Violence*, in TEACHING ECONOMIC INEQUALITY AND CAPITALISM IN CONTEMPORARY AMERICA 183, 193 (Kristin Haltiner & Leontina Hormel eds., 2018) (noting that male violence is often the product of a socialization process that suggests that physical force is an acceptable means to resolve problems).

²⁵⁰ See Luca Rollè, Giulia Giardina, Angela M. Caldarera, Eva Gerino & Pierna Brustia, *When Intimate Partner Violence Meets Same Sex Couples: A Review of Same Sex Intimate Partner Violence*, 9 FRONTIERS PSYCH. 1, 2, 4 (2018) (explaining that the LGBTQ population experiences particular and often greater difficulties than the heterosexual population in areas including health, employment, poverty, and that such difficulties create stress that contributes to domestic violence).

workplace protections based on their sexual and gender identities.²⁵¹ These individuals suffer anxiety related to workplace hostility and employment uncertainty, often resulting in aggressive spillover within households.²⁵²

These stresses are derived from systemic failures, yet the dominant narrative attributes the problem to the weaknesses of individuals.²⁵³ These explanations “put[] the burden and the onus of stress on individuals and take[] other explanatory narratives off the table.”²⁵⁴ Ronald Purser is critical of the recent wave of wellness trends that emphasize individual solutions to ameliorate stress and anxiety. He observes:

This turning inward, basically then, is exactly where the neoliberal political system would like us to [go] — not to really come out and form solid bonds with other people, start to organise, collectively start to push back and resist a lot of these unjust social systems and so forth. . . . Treating stress as an individual problem is a “get out of jail” card for corporations.²⁵⁵

That is to say, suggested remedies have been privatized without consideration of structural forces.

²⁵¹ The Supreme Court recently issued a decision in the case of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which held that Title VII prohibits employment discrimination against sexual and gender minorities. Yet as scholars have noted, the decision failed to “seriously acknowledge[] what is at stake.” Ann C. McGinley, Nicole Buonocore Porter, Danielle Weatherby, Ryan H. Nelson, Pamela Wilkins & Catherine Jean Archibald, *Feminist Perspectives on Bostock v. Clayton County, Georgia*, 53 CONN. L. REV. ONLINE 1, 12 (2020). Others express concern that *Bostock* is likely to be the object of ongoing contestation due to the unanswered arguments raised in the dissent. Andrew Koppelman, *Bostock, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 3 (2020).

²⁵² Rollè et al., *supra* note 250, at 4-5.

²⁵³ *How Mindfulness Became the New Capitalist Spirituality*, RNZ (Feb. 15, 2020, 8:35 AM), <https://www.rnz.co.nz/national/programmes/saturday/audio/2018734278/how-mindfulness-became-the-new-capitalist-spirituality> [<https://perma.cc/55PR-JH96>] (interview with Ronald Purser about his book, *McMindfulness: How Mindfulness Became the New Capitalist Spirituality*).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

2. Structural Failures: Victimization and Offending

a. *Failures Ex Ante: Trauma, Cycles of Violence, and Prevention*

Research on child well-being reveals the deleterious consequences that follow childhood trauma: pervasive health problems, difficulties engaging in social relationships, and a host of other harmful behaviors, particularly intimate partner violence.²⁵⁶ Childhood and adolescent victimization replicates itself, often damaging intimate partner relationships later in life.²⁵⁷ Studies have found that:

Because the correlation between victimization and offending is so strong, criminologists have considered that *victims and offenders share similar characteristics*, that models of victimization must include measures of offending to accurately capture the variation in the longitudinal propensity for victimization (and vice versa) and that the same factors that explain criminal behavior may also explain victimization.²⁵⁸

These findings have been incorporated into a number of policy and legislative initiatives, as well as advocacy projects, particularly with regard to women who have been involved with the criminal legal system.²⁵⁹ A number of organizations, perhaps most notably Survived & Punished, have engaged in campaigns to support criminalized survivors of gender violence and emphasize the “need to challenge the idea that ‘survivors’ and ‘criminals’ are two diametrically opposed groups.”²⁶⁰ In 2019, New York State enacted the Domestic Violence Survivors Justice Act (“DVSJA”), in an effort to effectuate behavioral science findings recognizing the duality of survivor/offender experiences and characteristics.²⁶¹ The Act allows judges to impose alternative sentences for defendants who were themselves victims of

²⁵⁶ Kathleen Kendall-Tackett, *The Health Effects of Childhood Abuse: Four Ways by Which Abuse Can Influence Health*, 26 CHILD ABUSE & NEGLECT 715, 715-16, 719 (2002).

²⁵⁷ Amaia Iratzoqui, *Domestic Violence and the Victim/Offender Overlap Across the Life Course*, 62 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 2801, 2803 (reporting that child abuse strongly predicts domestic violence perpetration).

²⁵⁸ *Id.* (emphasis added) (citing additional studies).

²⁵⁹ See Emma DeCourcy, *The Injustice of Formal Gender Equality in Sentencing*, 47 FORDHAM URB. L.J. 395, 412 (2020) (noting that incarcerated women, disproportionately women of color, often have histories of physical and sexual abuse).

²⁶⁰ SURVIVED & PUNISHED & LOVE & PROTECT, #SURVIVEDANDPUNISHED: SURVIVOR DEFENSE AS ABOLITIONIST PRAXIS 7 (2007), <https://view.publitas.com/survived-and-punished/toolkit/page/1> [<https://perma.cc/8SW4-NDKT>].

²⁶¹ N.Y. PENAL LAW § 60.12 (2021).

domestic violence, where such abuse was determined to be a “significant contributing factor to the defendant’s criminal behavior.”²⁶² The DVSJA also has a corollary provision which allows judges to resentence certain victims of domestic abuse.²⁶³ These reforms reflect the findings of those who work with offenders and victims and who assert that “[n]early everyone who commits violence has also survived it.”²⁶⁴

The sequelae of childhood trauma and its relationship to domestic violence has been captured in a public health study measuring “Adverse Childhood Experiences” (“ACEs”).²⁶⁵ The study demonstrated a direct connection between childhood trauma (including abuse, neglect, household or community dysfunction, and incarceration of a parent) with poor health, inability to engage in productive activity, and transgressive behaviors.²⁶⁶ ACEs evaluations suggest that children suffering from extreme forms of abuse are at risk of committing acts of violence as a result of the disturbances they have experienced.²⁶⁷

Identifying the determinants of problematic social behaviors allows courts, social service agencies and other providers to empathize with offenders and shift the inquiry from “‘What’s wrong with you?’ to ‘What’s happened to you?’”²⁶⁸ It further allows offenders to shift from “‘There’s something wrong about me’ to ‘I’m not a bad person, I’m like this because bad things happened to me.’”²⁶⁹ ACEs studies have influenced the field of criminology as well as policymakers who are urged to consider childhood trauma — particularly witnessing or

²⁶² *Id.* See generally Alan Rosenthal, *The Complexity of Sentencing Under the DVSJA: A Challenge for Judges and Defense Counsel*, 32 ATTICUS 39, 40 (2020), for a helpful overview of the DVSJA.

²⁶³ N.Y. PENAL LAW § 440.47.

²⁶⁴ SERED, *supra* note 137, at 6.

²⁶⁵ *Adverse Childhood Experiences*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/aces/> (last visited Sept. 14, 2021) [<https://perma.cc/TB2L-PXQT>].

²⁶⁶ *Preventing Adverse Childhood Experiences*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/aces/fastfact.html> (last visited Sept. 17, 2021) [<https://perma.cc/DA63-7AMR>].

²⁶⁷ James Garbarino, *ACEs in the Criminal Justice System*, 17 ACAD. PEDIATRICS S32, S32 (2017).

²⁶⁸ Karen Bateson, Michelle McManus & Georgia Johnson, *Understanding the Use, and Misuse, of Adverse Childhood Experiences (ACEs) in Trauma-Informed Policing*, 93 POLICE J.: THEORY, PRAC. & PRINCIPLES 131, 133 (2019).

²⁶⁹ *Id.*

exposure to intimate partner violence — as a factor when responding to harmful behavior.²⁷⁰

ACEs studies contribute to a more nuanced understanding of gender violence and may lead to responses other than incarceration. Some courts are adopting a trauma-based approach, by which the legal processes and disposition possibilities are informed through an understanding of how ACEs affect litigants.²⁷¹

ACEs-related factors also feature prominently in contested family law matters and inform arguments opposing custody for abusive parents. Lawyers representing non-abusive parents have relied on experts in the field to demonstrate the likelihood that a child's exposure to a parent who has committed domestic violence will perpetuate a familial cycle of abuse.²⁷² Indeed, the evidence is compelling: “[A] child's exposure to domestic violence significantly increases the risk that the child's emotional, behavioral, social and academic well-being will be significantly impaired even if the child is not the direct target of such violence.”²⁷³

ACEs studies have not offered remedies to address the evidence that children who experience domestic violence are at risk of perpetrating abuse later in their own intimate relationships. Most ACEs studies often disaggregate the experience of domestic violence into idiosyncratic ‘case studies,’ a practice that tends to efface the importance of causal structural forces. Poverty and inequality exacerbate the risk of ACEs and create ongoing difficulties affecting how children function throughout their childhood and in later life.²⁷⁴ As some scholars report,

²⁷⁰ Melissa S. Jones, Meredith G.F. Worthen, Susan F. Sharp & David A. McLeod, *Life as She Knows It: The Effects of Adverse Childhood Experiences on Intimate Partner Violence Among Women Prisoners*, 85 *CHILD ABUSE & NEGLECT* 68, 69 (2018) (describing the links between women prisoners' criminal behavior and the effects of their earlier experiences with childhood abuse and adult victimization).

²⁷¹ See, e.g., Cynthia G. Hawkins & Taylor Scribner, *Serving-Up the ACE: Understanding Adverse Childhood Experiences (“ACE”) in Dependency Adoption Through the Lens of Social Science*, 54 *U. MICH. J.L. REFORM CAVEAT* (2020) (examining revised court procedures based on trauma informed practices).

²⁷² E.g., Brief for Dean Jeffrey L. Edleson, Ph.D et al. as Amici Curiae Supporting Defendant-Appellee at 8-9, *Davies ex rel. K.D. v. Davies*, No. 17-466 (2d Cir. Sept. 21, 2017) (signed by notable child behavioral experts replete with citations to studies). The experts note that “children from homes in which domestic violence occurs are at greater risk of perpetuating the cycle of violence, and are more likely to exhibit violent and criminal behavior as adults.” *Id.* at 11.

²⁷³ *Id.* at 6-7.

²⁷⁴ See Clare Huntington, *Early Childhood Development and the Replication of Poverty*, in *HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY* 130, 130 (Ezra Rosser ed., 2019).

[A] substantial body of research . . . confirms the unsurprising point that family disruption is itself often generated by structural forces, notably high levels of long-term joblessness. Similarly, it is clear that, even more than to family structure, violent crime is also related to some problems of family functioning. But once again, economic insecurity and disadvantage strongly predict whether, and how badly, families will be afflicted by these problems. Severe child abuse and neglect, for example, is one of the most potent sources of later violent offending. The risk of severe abuse and neglect, however, is much greater in communities suffering from endemic joblessness and dire poverty.²⁷⁵

While ACEs studies provide important insights about transgressive behaviors and may be used to train professionals, including judges, they tend to minimize the structural conditions related to childhood trauma. Proposed policies and intervention methodologies focus on improving individual familial and other personal relations, but offer few, if any, recommendations as to how best to address systemic issues.²⁷⁶ Recommended prevention strategies emphasize individualized therapeutic family intervention to address family dysfunction. This may include everything from developing “loving, consistent, and nurturing relationships” and maintaining a “safe home environment” to following car seat safety precautions and providing meals at home.²⁷⁷ There is little recognition of the pernicious reach of a political economy that discriminates against some communities, exploits workers, underfunds schools, and degrades the environment, ultimately creating deep tension within families that may lead to damaging behaviors.²⁷⁸ Treating trauma and building resiliency through supportive personal relationships is undoubtedly beneficial, but evidence-based studies suggest that providing direct economic assistance is better for preventing ACEs.²⁷⁹ Material support, cash to families, and other

²⁷⁵ BROWN ET AL., *supra* note 221, at 155 (citations omitted).

²⁷⁶ Sue White, Rosalind Edwards, Val Gillies & David Wastell, *All the ACEs: A Chaotic Concept for Family Policy and Decision-Making?*, 18 SOC. POL'Y & SOC'Y 457, 458 (2019).

²⁷⁷ Aditi Srivastav, Mindi Spencer, Melissa Stropolis, James F. Thrasher, Elizabeth Crouch, Eylon Palamaro-Munsell & Rachel E. Davis, *Exploring Practitioner and Policymaker Perspectives on Public Health Approaches to Address Adverse Childhood Experiences (ACEs) in South Carolina*, 102 CHILD ABUSE & NEGLECT 1, 6-8 (2020).

²⁷⁸ See BROWN ET AL., *supra* note 221, at 155; Huntington, *supra* note 274, at 130-31.

²⁷⁹ Srivastav et al., *supra* note 277, at 1-2; White, *supra* note 276, at 461-62; see also Noa Ben-Asher, *Trauma-Centered Social Justice*, 95 TUL. L. REV. 95, 131-35 (2020)

systemic anti-poverty strategies have been identified as effective prevention mechanisms, yet they are not included in the ACEs agenda.²⁸⁰ Policies aiming to prevent housing discrimination and employment-related exploitation — both additional contributors to childhood trauma — are not offered as a way to reduce the threat of cyclical violence. Trauma outcomes cannot be deemed a function of individual choices without first addressing the ways in which social injustices shape behaviors and influence actions.²⁸¹

When structural inequality is acknowledged as an ACEs determinant, researchers consciously exclude such issues from a programmatic agenda, citing to pragmatic concerns. Instead, researchers turn to interventions that seem more immediately “realistic.”²⁸² Additionally, researchers are reluctant to blame the State for failing to implement systemic and primary prevention strategies aimed at improving health, housing, and family well-being.²⁸³ These omissions translate into failures of state action:

Though ACEs are receiving steady recognition within public health in the U.S., specific policies that promote protective factors to prevent and mitigate ACEs have been limited and fragmented. Most existing state policies are limited to increasing awareness of ACEs. While these efforts are important, they are likely not enough to foment considerable social and environmental changes that promote healthy outcomes for children. Of the few policy actions that have been attempted to address ACEs on the state level, most are resolutions that reinforce statewide commitments to addressing ACEs with no funding or mandates for implementation. There is an urgency to explore comprehensive state-level policy options that more effectively address ACEs through public health programs that promote protective factors.²⁸⁴

(critiquing trauma-centered responses for their failure to address social injustices in the realm of gender and race).

²⁸⁰ White et al., *supra* note 276, at 462.

²⁸¹ Christina D. Bethell, Michele R. Solloway, Stephanie Guinosso, Sandra Hassink, Aditi Srivastav, David Ford & Lisa A. Simpson, *Prioritizing Possibilities for Child and Family Health: An Agenda to Address Adverse Childhood Experiences and Foster the Social and Emotional Roots of Well-Being in Pediatrics*, 17 *ACAD. PEDIATRICS* S36, S40 (2017) (calling for cross-collaboration to address structural inequalities).

²⁸² MOORE ET AL., *supra* note 223, at 100.

²⁸³ Srivastav et al., *supra* note 277, at 8.

²⁸⁴ *Id.* at 2 (citations omitted).

Strategies that might prevent childhood trauma are not sufficiently acknowledged and remain unaddressed. The failure to provide resources to mitigate the impact of ACEs that so often presents as gender violence in later years is a feature of a political economy that places blame and solutions on individuals. It represents the failure of the State to provide systemic relief and socio-economic transformations to create greater opportunities to interrupt and avoid the consequences of ACEs.

b. Failures Ex Post: Punitive Intervention Following Childhood ACEs

The State does, of course, intervene when there is evidence of childhood trauma, particularly when related to domestic violence — child welfare investigations commence after the fact and children may be removed from their homes.²⁸⁵ New York City faced well-publicized litigation in federal court for the notorious practice of removing children from non-abusive parents.²⁸⁶ While this practice purported to remove children who were neglected or abused, this sometimes occurred solely due to acts of domestic violence directed at a parent.²⁸⁷ In his decision enjoining the practices of the City’s Administration for Children Services (“ACS”), Senior District Court Judge Jack Weinstein wrote:

The evidence reveals widespread and unnecessary cruelty by agencies of the City of New York towards mothers abused by their consorts, through forced unnecessary separation of the mothers from their children on the excuse that this sundering is necessary to protect the children. The pitiless double abuse of these mothers is not malicious, but is due to benign indifference, bureaucratic inefficiency, and outmoded institutional biases.²⁸⁸

The court found that ACS had failed to articulate any justifiable rationale for removing a child under these circumstances and had unjustly presumed a class of people as unfit.²⁸⁹ Further, the court

²⁸⁵ *Nicholson v. Williams*, 203 F. Supp. 2d 153, 163-64 (E.D.N.Y. 2002) (reviewing challenges to the Administration for Children Services’ widespread practice of summarily removing children from abused parents in New York City).

²⁸⁶ *Id.* at 203, 250-51.

²⁸⁷ *Id.* at 252.

²⁸⁸ *Id.* at 163.

²⁸⁹ *Id.* at 240-41.

determined that in executing removals, parents were denied substantive and/or procedural due process.²⁹⁰

New York City was not the only jurisdiction to implement punishing policies against mothers who were abused, and Judge Weinstein's efforts to enjoin such practices were unsuccessful. The problem remains widespread. Many states bring charges against non-abusive parents, alleging neglect or failure to protect, when a child has witnessed intimate partner violence. This often results in the child's removal into the custody of the State and subsequent placement within the foster care system.²⁹¹

It may be understandable to consider removal of a child where it appears that a parent is incapable of understanding how the abuse they suffer is harmful to the children in the home.²⁹² Foster care placements, however, are likely to produce even greater trauma and result in transgressive behaviors.²⁹³ Investigations reveal that children in state custody are often cycled through multiple homes, forced to remain in unsafe housing, subjected to sexual abuse, and otherwise repeatedly harmed by various actors who have control and custody.²⁹⁴ Foster care agencies are woefully underfunded and often lack the ability to provide the basic needs of foster children.²⁹⁵

Dorothy Roberts has written about the parallel relationship between the criminal legal system and child welfare systems.²⁹⁶ She observes that coercive state intervention in families who experience domestic violence is a function of the state's policy to ignore ways to improve an abused parent's economic circumstances.²⁹⁷ Similarly, Cynthia Godsoe has critiqued the child welfare system as one that privatizes dependency

²⁹⁰ *Id.* at 237, 240-41.

²⁹¹ Margo Lindauer, *Damned if You Do, Damned if You Don't: Why Multi-Court-Involved Battered Mothers Just Can't Win*, 20 J. GENDER, SOC. POL'Y & L. 797, 805 (2012); see also Suzanne Hirt, *Florida Blames Mothers when Men Batter Them — Then Takes Away Their Children*, USA TODAY (Dec. 17, 2020, 3:30 AM PST), <https://www.usatoday.com/in-depth/story-series/2020/12/16/florida-blames-mothers-when-men-batter-them-then-takes-their-children/6507973002/> [<https://perma.cc/9LC9-Y4E3>].

²⁹² Lynn Hecht Schafran, *Domestic Violence, Developing Brains, and the Lifespan: New Knowledge from Neuroscience*, 53 JUDGES' J. 32, 35 (2014).

²⁹³ Dan Levin, *New Mexico Agrees to Revamp Its 'Broken' Foster Care System*, N.Y. TIMES (Mar. 26, 2020), <https://www.nytimes.com/2020/03/26/us/new-mexico-foster-care-lawsuit.html> [<https://perma.cc/UJT7-587R>] (describing the horrendous state of foster care systems in New Mexico and across the country).

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1476 (2012).

²⁹⁷ *Id.* at 1489-90.

and fails to provide adequate state support for families.²⁹⁸ She details the high rates of physical and sexual abuse that children suffer in the foster care system, and the resulting likelihood that they will suffer ongoing harms, including involvement with carceral systems.²⁹⁹ As noted above, many children come into state custody as a result of domestic violence in their homes, only to be churned out of foster care to repeat the very behavior that resulted in their separation from their families in the first place. The failure to address the structural determinants of family violence, and thus to prevent childhood trauma and its aftermath, replicates the damage through the ineffective and harmful mechanisms of intervention.

The political economic determinants of domestic violence, and the systemic failure to prevent and address trauma at a personal and familial level are manifested in acts of gender violence that are criminalized and punished. A clearer understanding of these relationships demonstrates that treating this type of violence as exceptional and exempted from anti-carceral reform efforts is misguided. Moreover, a structural analysis of domestic violence can lead to a deeper understanding of criminal behavior writ large and can identify a range of progressive means to address the oppressive mechanisms of the carceral state.

IV. GENDER VIOLENCE AND THE POLITICS OF SOLIDARITY

This Part offers recommendations to establish a “politics of solidarity,” by which political community members may develop mutual ties and commitments to achieve social justice outcomes.³⁰⁰ It suggests that a range of broad social movement initiatives can expand the legal-political economic terrain for addressing these related issues. The link between the carceral system and structural deficits on one hand, and transgressive behavior on the other, suggests a need to include gender violence in progressive reform efforts.

There is no shortage of scholarship, policy papers, and community organization toolkits, albeit sometimes siloed, that offer direction to accomplish these goals.³⁰¹ Progressive initiatives demonstrate that

²⁹⁸ Cynthia Godsoe, *An Abolitionist Horizon for Child Welfare*, LPE PROJECT (Aug. 6, 2020), <https://lpeproject.org/blog/an-abolitionist-horizon-for-child-welfare/> [<https://perma.cc/ULZ5-F22C>]; see also Roberts, *supra* note 296, at 1491-92 (noting especially the punishment of Black mothers).

²⁹⁹ Godsoe, *supra* note 298.

³⁰⁰ See HOOKER, *supra* note 16, at 4.

³⁰¹ Given the richness of these sources that are described elsewhere, a comprehensive list and evaluation of these resources is beyond the scope of this article. For a short sampling of these resources, see generally ANGELA Y. DAVIS, *ARE PRISONS*

organizers seek to build on a shared vision and scholar-activists acknowledge that successful social movements should not operate independently from one another.³⁰² This Part presents a brief description of the categories within which social justice movements work together to pursue their shared needs and common aspirations. The presented strategies demonstrate that abusive criminal system practices can best be reformed by addressing the systemic risk factors related to crime without treating gender violence as an exceptional transgression to be omitted from progressive efforts. Understanding gender violence specifically can contribute to a broader understanding of systemic issues of crime generally. At the same time, it can shed light on meaningful ways to respond to or prevent such crimes without sole

OBSOLETE? (2003) (arguing that the prison system is more akin to modern-day slavery than a system of criminal justice); GENERATIONFIVE, ENDING CHILD SEXUAL ABUSE: A TRANSFORMATIVE JUSTICE HANDBOOK (2017), <http://www.generationfive.org/wp-content/uploads/2017/06/Transformative-Justice-Handbook.pdf> [<https://perma.cc/Y6C8-3TYM>] (providing information for communities seeking to remedy child abuse); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007) (examining the growth of the carceral system in California and its ties to local economies and social identities); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020) (“[A] structural critique of police violence demands [a serious] abolitionist horizon for reform projects.”); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019) (stating a need for an approach “where punishment is abandoned in favor of accountability and repair, and where discriminatory criminal law enforcement is replaced with practices addressing the systemic bases of inequality, poverty, and violence”); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019) (focusing on “the movement to abolish the prison industrial complex, conceived of as rooted in chattel slavery in the United States, as a starting point to examine the potential for a new abolition constitutionalism”); Beth E. Richie, Keynote Address at the University of Miami Race and Social Justice Law Review Symposium: Reimagining the Movement to End Gender Violence: Anti-Racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice (July 1, 2015) (reimagining prison abolition and reframing “the work to end gender violence as work against the patriarchal carceral state, and in particular the architecture of racism and related forms of oppression upon which the carceral state is built”); Mariame Kaba, *Opinion, Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/MN3A-S7XH>] (arguing that police department funding should be redirected “toward providing health care, housing, education and good jobs”); *Restorative Justice Movement Building*, AHIMSA COLLECTIVE, <https://www.ahimsacollective.net/resources> (last visited Sept. 14, 2021) [<https://perma.cc/5776-J6X9>] (providing a list of resources in restorative justice and peacemaking for advocates); *Toolkit*, CREATIVE INTERVENTIONS (2012), <https://www.creative-interventions.org/tools/toolkit/> [<https://perma.cc/74H7ZCZB>] (providing “a practical guide to stop interpersonal violence”).

³⁰² CINZIA ARRIZZA, TITHI BHATTACHARYA & NANCY FRASER, FEMINISM FOR THE 99 PERCENT: A MANIFESTO 54 (2019) (“Feminists for the 99% do not operate in isolation from other movements of resistance and rebellion.”).

reliance on the carceral system. The recommendations that follow are meant to mitigate gender violence through systemic shifts and alternative practices that can best prevent gender violence offenses, address survivor needs, and provide offenders an opportunity for accountability.

A. *Anti-Carceral Strategies, Gender Violence, and the Importance of Narrative*

The challenges to police abuse and detention practices are ongoing.³⁰³ The important gains made as a result of the NYC stop-and-frisk litigation, bail reform initiatives, and compassionate release campaigns have yet to be fully realized.³⁰⁴ They will be shaped by those who engage them in day-to-day practice. To that end, advocates must include stories of gender violence, particularly those of Black and brown women, as well as LGBTQ individuals, to shape the narrative as these reforms develop practical meaning.

Civil rights attorneys have rich resources at their disposal. The authors of the #SayHerName project have explained: “[O]ur goal is simply to illustrate the reality that Black women are killed and violated by police with alarming regularity. Equally important, our hope is to call attention to the ways in which this reality is erased from our demonstrations, our discourse, and our demands to broaden our vision of social justice.”³⁰⁵ Black Women’s Blueprint has called attention to the erasure of the stories of reports of gender violence and Black women.³⁰⁶ Michelle Jacobs has written compellingly about the indifference to Black

³⁰³ E.g., *Terry v. Ohio*, 392 U.S. 1, 10 (1968); Ritchie, *supra* note 43, at 198-99.

³⁰⁴ RITCHIE, *supra* note 30, at 11, 125; see also *Floyd Timeline*, *supra* note 21 (noting the ongoing post-litigation challenges related to bringing about the cessation of abusive police practices).

³⁰⁵ AFR. AM. POL’Y F., SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN 4 (2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf [<https://perma.cc/NBC3-9NUZ>].

³⁰⁶ BLACK WOMEN’S BLUEPRINT, WHEN TRUTH IS JUSTICE AND NOT ENOUGH: EXECUTIVE SUMMARY TO THE BLACK WOMEN’S TRUTH AND RECONCILIATION COMMISSION REPORT 27 (2016), https://d6474d13-2b53-4643-b862-e78077ee7880.filesusr.com/ugd/f0223e_59bbcc47c9084087be7966b2b92c3bfe.pdf [<https://perma.cc/24YX-9V4H>] (seeking to “expose[] the systematic rape of women and girls of African descent over the last four centuries as [] intentionally suppressed”). The report is a collection of stories, commentary, documents, and art obtained through public testimony during the Commission hearings. It is important to acknowledge that those who contributed to the writing of the report described being “engulfed [] in profound states of grief and desolation” as a result of “the act of examining and translating the stories, the terrifying experiences of survivors.” *Id.*

women's accounts of police brutality.³⁰⁷ She reminds readers of the media's focus on white women murdered by the police and the failure to tell the stories of police killings of Black women.³⁰⁸ Similarly, Andrea Ritchie has regularly commented on the faulty narratives offered by civil rights groups who neglect the gendered nature of police abuse.³⁰⁹

Story-telling is crucial for many survivors and is often an integral part of restorative justice and accountability processes.³¹⁰ But the misuse and manipulation of these stories to categorize a group of individuals as unworthy of reform initiatives undermines anti-carceral efforts and often conflicts with the interests and expressed wishes of survivors.³¹¹ Indeed, anti-violence community organizers have warned about the ways in which narratives can result in survivors being "objectified or minimized as a symbol of an idea instead of an actual person."³¹² The failure to include accounts about the harms of incarceration silences the voices of many survivors of intimate partner violence who object to their attacker's incarceration for compelling reasons.³¹³

Community organizers focusing on Black and poor women have shared these narratives, which are worthy of inclusion in decarceration campaigns. For example, women, and particularly Black women, have formed their own bail reform projects, including the National Bail Out

³⁰⁷ Jacobs, *supra* note 44, at 52-53 (noting that Gwen Ifill coined the phrase "missing White woman syndrome" to identify this phenomenon).

³⁰⁸ *Id.*

³⁰⁹ See RITCHIE, *supra* note 30, at 125 and accompanying text. The campaign for justice for Breonna Taylor marks a turn in this regard. See generally Richard A. Opiel, Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/5AXY-DGRM>], for a discussion about Breonna Taylor.

³¹⁰ Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1291-92 (2008) (exploring how, through a restorative justice model, "storytelling can facilitate the cycle of intimacy that leads to healing for victim and offender alike").

³¹¹ Weissman, *Community Politics of DV*, *supra* note 30, at 1501-02 (describing the unwanted public narratives of victimhood that often create more harm for the victim).

³¹² Alisa Bierria, Onion Carrillo, Eboni Colbert, Xandra Ibarra, Theryn Kigvamasud Vashti & Shale Maulana, *Taking Risks: Implementing Grassroots Community Accountability Strategies*, in *THE REVOLUTION STARTS AT HOME: CONFRONTING PARTNER ABUSE IN ACTIVIST COMMUNITIES* 64, 65 (Ching-In Chen, Jai Dulani & Leah Lakshmi Piepzna-Samarasinha eds., 2006).

³¹³ SERED, *supra* note 137, at 9-12; see also AM. CIV. LIBERTIES UNION, *supra* note 137, at 30; ISSUU, *POLICE ABOLITION 101: MESSAGES WHEN FACING DOUBTS* 15 (2021), https://issuu.com/projectnia/docs/policeabolition101_zine_digital_singlepages [<https://perma.cc/4NPS-GKT3>] (noting that imprisonment of offenders leads to greater instances of gender violence).

Project. ³¹⁴ *Survived & Punished* focuses on survivors detained on domestic violence related charges.³¹⁵ As scholars have observed, there has been a sharp increase in the incarceration of women, particularly Black women, due to mandatory arrest policies that eliminate police discretion by requiring arrests when they determine there is probable cause that such an offense has occurred.³¹⁶ Survivors have consistently pointed to trauma recovery, mental health care, restorative justice, and workforce development programs as the most effective strategies to reduce violent crimes.³¹⁷ These projects offer stories about the harm to survivors of domestic violence, their families, and communities, and suggest the need to include gender violence-related offenses in bail reform and COVID-19 release campaigns.

Anti-domestic violence advocates and domestic violence attorneys share complementary obligations for developing a fuller narrative to align gender violence issues with progressive anti-carceral reforms. Domestic violence attorneys have a wealth of knowledge about the needs and wishes of survivors and can introduce these accounts within other realms of law by closing the gap between traditional domestic violence legal projects and civil rights work. Attorneys must recognize the points of convergence and develop legal literacy and social advocacy skills in the fields of racial justice, police abuse, and systems of punishment that dehumanize and exacerbate harms that are relevant to state-created gender violence. They must have the legal knowledge to participate with other civil rights organizations to challenge discriminatory practices.³¹⁸ By deepening their expertise and expanding

³¹⁴ Luz Herrera & Louise G. Trubek, *The Emerging Legal Architecture for Social Justice*, 44 N.Y.U. REV. L. & SOC. CHANGE 355, 376-77 (2020); see NAT'L BAIL OUT COLLECTIVE, <https://www.nationalbailout.org/about/> (last visited Sept. 15, 2021) [<https://perma.cc/7KB5-R38R>] (organizing to release Black mothers from jail). Mandatory arrest policies are carceral tools used to address domestic violence and have resulted in a sharp increase in the arrests of women victims who are often erroneously deemed to be mutual combatants or detained as material witnesses. Gruber, *supra* note 5, at 649 & n.381 (2009).

³¹⁵ SURVIVED & PUNISHED & LOVE & PROTECT, *supra* note 260, at 8.

³¹⁶ Amy M. Zelcer, *Battling Domestic Violence: Replacing Mandatory Arrest Laws with a Trifecta of Preferential Arrest, Officer Education, and Batterer Treatment Programs*, 51 AM. CRIM. L. REV. 541, 550 (2014); see Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171, 171 n.3 (1994) (explaining mandatory arrests).

³¹⁷ Lenore Anderson & Robert Rooks, *No, Crime Survivors Don't Want More Prisons. They Want a New Safety Movement*, WASH. POST (Mar. 16, 2021), <https://www.washingtonpost.com/opinions/2021/03/16/prisons-public-safety-trauma/?arc404=true> [<https://perma.cc/PD6K-PVYU>].

³¹⁸ Weissman, *Rethinking DV Pedagogy*, *supra* note 30, at 654-56.

the type of legal claims associated with domestic violence law, anti-domestic violence attorneys can include stories of gender violence into the broader social justice projects.

Advocacy of progressive criminal system reforms must transcend current epistemological approaches that act to inform anti-carceral campaigns. In sum: scholars and activists must incorporate precepts from all progressive social justice movements, thereupon to expand collaborations for a fuller understanding of the nature of the harms of the carceral state and extend the reach of their efforts.³¹⁹ The stories set forth in litigation and policy advocacy often reappear in mainstream public accounts and can thus reframe the issues.³²⁰ The intellectual work produced by those who think, act, and write from their lived experiences helps to shift the efforts to mitigate violence beyond the particularity of gender violence and toward broader structural issues related to class and race.

These strategies mirror what Amna Akbar, Sameer Ashar, and Jocelyn Simonson describe as “movement law,” a methodology for scholars to fully engage with grassroots organizations to pursue broad transformative goals.³²¹ By embedding gender violence narratives in police abuse litigation, bail reform, and compassionate release campaigns, social justice actors can avoid a type of epistemic injustice that would otherwise result from the failure to include critical voices and information.³²²

B. Anti-Carceral Strategies: Defunding the Carceral State and Funding Systemic Reform to Ameliorate Gender Violence

A reimagined political economy that privileges families and communities over profits by providing resources and support to families will ameliorate transgressive behavior. Progressive criminal system reform can help to accomplish these ends by achieving the reallocation of funds and engaging with allies focused on economic reform — all of which will ameliorate gender violence. Ending the abuses of the carceral state cannot focus solely on ending policing and prisons. Rather, as

³¹⁹ Amber Baylor, *Centering Women in Prisoners’ Rights Litigation*, 25 MICH. J. GENDER & L. 109, 116 (2018) (arguing for including narratives of women’s experiences in prisoners’ rights litigation).

³²⁰ JoAnne Sweeny & Dan Canon, *The Language of Love v. Beshear: Telling a Client’s Story While Creating a Civil Rights Case Narrative*, 17 LEGAL COMM’N & RHETORIC: JALWD 129, 132-33 (2020).

³²¹ Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 825 (2021).

³²² See Hanan, *supra* note 78, at 1185.

Mariame Kaba has stated with regard to the abolition movement, “[P]rison abolition is two things: It’s the complete and utter dismantling of prison and policing and surveillance as they currently exist within our culture. And it’s also the building up of new ways of intersecting and new ways of relating with each other.”³²³ New approaches require funding that might come from divestment/investment strategies, including the transfer of funds from police and prisons to social justice programs.³²⁴ A paradigm shift from funding the carceral apparatus to instead funding community-based needs provides the resources to address the political economy of violence, including domestic violence.³²⁵

Popular support exists for such a shift: a FiveThirtyEight poll conducted in the summer of 2020 found support for the reallocation of funds from police departments to social services, including programs to address domestic violence.³²⁶ Proposals to divest from policing and detention costs include financing programs that mitigate economic strain and insecurity, such as housing subsidies, childcare, job training programs, and better paying employment.³²⁷ These strategies have been applied in a number of locations.³²⁸ In Durham, North Carolina, and Oakland, California, communities have succeeded in transferring funds earmarked for police functions to community-led safety programs and well-being entities and related social services.³²⁹

³²³ Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOS. REV. (Aug. 1, 2017), <http://bostonreview.net/law-justice/tracey-l-meares-policing-public-good-gone-bad> [<https://perma.cc/9ECY-AFJG>] (quoting Mariame Kaba).

³²⁴ See Akbar, *supra* note 75 (describing “invest-divest” campaigns).

³²⁵ See *id.* (describing the amount of funds taken from mental health services, housing assistance, youth programs, and food programs that is diverted to police, jails, and prisons).

³²⁶ Nathaniel Rakich, *How Americans Feel About ‘Defunding the Police,’ FIVETHIRTYEIGHT* (June 19, 2020, 5:58 AM), <https://fivethirtyeight.com/features/americans-like-the-ideas-behind-defunding-the-police-more-than-the-slogan-itself/> [<https://perma.cc/K96R-8TGU>].

³²⁷ See Melissa Gira Grant, *End the Cops’ Cannibalization of Our Budgets*, NEW REPUBLIC (Dec. 23, 2020), <https://newrepublic.com/article/160652/defund-police-reallocate-law-enforcement-budgets> [<https://perma.cc/K425-8F2E>].

³²⁸ Akbar, *supra* note 75.

³²⁹ Laura Anthony, *Some Oakland Officials Worry About Timing of Police Budget Cuts Amid Spike in Crime*, ABC7 NEWS (June 25, 2021), <https://abc7news.com/oakland-police-funding-city-council-cuts-opd/10832163/> [<https://perma.cc/D9U7-CK35>] (noting the transfer of some police funds to youth employment projects); Charles Duncan, *Durham Pulls Jobs from Police to Fund New Community Safety Department*, SPECTRUM NEWS (June 22, 2021, 4:30 PM ET), <https://spectrumlocalnews.com/nc/charlotte/politics/2021/06/22/durham-pulls-jobs-from-police-to-fund-new-community-safety-department> [<https://perma.cc/V2KA-YHHT>].

Anti-carceral organizers have additional allies in movements that focus on issues outside of police abuses and prisons, but whose goals may also alleviate the political economic determinants of all forms of violence. Labor struggles, for example, include a range of progressive demands, including living wages, health care, and a methodology for achieving collective well-being.³³⁰ The value of anti-carceral advocates and the labor movement joining forces is apparent. Studies show that the carceral state shores up the exploitative power of employers over workers and disincentivizes labor organizing by leveraging power over those who have had interaction with the criminal legal system.³³¹ Scholars note that “[a]dvocates of ‘social movement unionism’ have long argued that labor unions ought to connect their struggles for economic justice to other social movement issues and targets.”³³² Some labor unions have organized against police brutality and other forms of racial injustice.³³³ Organized labor is often at the center of improving the economic circumstances of families and communities. Organized labor helps to create stable and safe employment, living wages, health benefits, and other conditions that yield security and social cohesion, all factors in reducing the risk of intimate partner violence.³³⁴

Anti-carceral advocates must expand their alliance with anti-poverty activists who endeavor to shift resources to meet community needs.³³⁵ As a central part of criminal reform initiatives, advocates should join together to demand a universal basic income, the urgency of which has never been greater as a result of the economic hardships attending the

³³⁰ Amanda Jaret & Sandeep Vaheesan, *The Case for Universal Labor and Employment Rights*, LPE PROJECT (Mar. 5, 2020), <https://lpeblog.org/2020/03/05/the-case-for-universal-labor-and-employment-rights/> [<https://perma.cc/L79E-8ENA>] (arguing that the struggle for labor rights assists with democratizing politics and society); Alexis Walker, *Want to Kick-Start a Progressive Agenda? Start with Public-Sector Labor Law Reform*, AM. PROSPECT (Jan. 17, 2020), <https://prospect.org/economy/progressive-agenda-public-sector-labor-reform/> [<https://perma.cc/S6BV-7YYP>].

³³¹ See Adam D. Reich & Seth J. Prins, *The Disciplining Effect of Mass Incarceration on Labor Organization*, 125 AM. J. SOCIO. 1303, 1304, 1336 (2020).

³³² *Id.* at 1337 (citation omitted).

³³³ Brandon M. Terry & Jason Lee, *Rethinking the Problem of Alliance: Organized Labor and Black Political Life*, 26 NEW LAB. F. 16, 20 (2017).

³³⁴ See *Domestic and Intimate Partner Violence and COVID-19*, AFL-CIO, <https://aflcio.org/covid-19/domestic-and-intimate-partner-violence-and-covid-19> (last visited Sept. 17, 2021) [<https://perma.cc/YXE7-VS4G>].

³³⁵ *About the Poor People’s Campaign: A National Call for Moral Revival*, POOR PEOPLE’S CAMPAIGN, <https://www.poorpeoplescampaign.org/about/> (last visited Sept. 15, 2021) [<https://perma.cc/UDK2-3QQ3>] (including a range of demands such as building voter participation and addressing poverty and inequality).

pandemic.³³⁶ Unrestricted direct cash payments to families would reduce family poverty with a particular positive outcome on children — all with a salutary effect on reducing on all forms of violence, including intimate partner violence.³³⁷ When asked to identify their most pressing needs during the pandemic, 64 percent of domestic violence survivors said unrestricted cash, 41 percent said utility bill relief, 35 percent said debit and credit relief, and 31 percent said safe employment.³³⁸ Notwithstanding the studies that demonstrate the effectiveness of such a strategy, achieving this type of economic reform is a political challenge that requires strong movement allies. Some coalitions have already been established through participatory budgeting practices by which citizens participate and engage in decision-making about the allocation of public funds, and that link anti-carceral divestment demands with community investment allocations.³³⁹

Mariame Kaba voices the very link between abolitionism and political economic reform that can address transgressive behaviors such as gender violence:

People like me who want to abolish prisons and police, however, have a vision of a different society, built on cooperation instead of individualism, on mutual aid instead of self-preservation. What would the country look like if it had

³³⁶ Chris Hughes, *Why Americans Need a Guaranteed Income*, N.Y. TIMES (May 1, 2020), <https://www.nytimes.com/2020/05/01/opinion/universal-basic-income-coronavirus.html> [<https://perma.cc/MB4S-842A>].

³³⁷ See Jason DeParle, *How to Fix Child Poverty*, N.Y. REV. BOOKS (July 23, 2020) (reviewing JEFF MADRICK, *INVISIBLE AMERICANS: THE TRAGIC COST OF CHILD POVERTY* (2020) and NAT'L ACADS. OF SCIS., ENG'G, & MED., *A ROADMAP TO REDUCING CHILD POVERTY* (Greg Duncan & Suzanne Le Menestrel eds., 2019)), <https://www.nybooks.com/articles/2020/07/23/how-to-fix-child-poverty/> [<https://perma.cc/7T2H-6XUG>]; John Lanchester, *Good New Idea*, LONDON REV. BOOKS (July 18, 2019), <https://www.lrb.co.uk/the-paper/v41/n14/john-lanchester/good-new-idea> [<https://perma.cc/G6GP-QDBE>].

³³⁸ FREEFROM, *SURVIVORS KNOW BEST: HOW TO DISRUPT INTIMATE PARTNER VIOLENCE DURING COVID-19 AND BEYOND 12* (2020), <http://freefrom.org/s/Survivors-Know-Best-Report.pdf> [<https://perma.cc/FU83-WD3D>].

³³⁹ See INTERRUPTING CRIMINALIZATION, *THE DEMAND IS STILL #DEFUNDTHEPOLICE #FUNDTHEPEOPLE #DEFENDBLACKLIVES 13* (2021), <https://static1.squarespace.com/static/5ee39ec764dbd7179cf1243c/t/60806839979abc1b93aa8695/1619028044655/%23DefundThePolice%2BUpdate.pdf> [<https://perma.cc/9XE5-VZN9>]; PARTICIPATORY BUDGETING PROJECT, <https://www.participatorybudgeting.org/> (last visited Sept. 17, 2021) [<https://perma.cc/VZ5J-MD3W>].

billions of extra dollars to spend on housing, food and education for all?³⁴⁰

The benefits of alliances and mutual aid projects between anti-carceral movements and those engaged in shifting the political economy to provide for individuals and families must also extend to those who have been categorized as undeserving and dangerous.

C. *Rethinking Anti-Domestic Violence Work*

Gender violence persists unabated. There seems to have been little progress toward its mitigation. Indeed, in recent years, “an entire culture developed promulgating mass acts of indiscriminate violence against women.”³⁴¹ Federal data has demonstrated a steep increase in attacks on gender-motivated violence committed against LGBTQ persons, particularly transgender people.³⁴²

Until recently, anti-violence advocacy interventions have been dominated by a carceral feminist ideology that frames the issue as “an adversarial female-defined survivor and male-defined perpetrator binary with the latter subject to interventions firmly rooted in law enforcement.”³⁴³ The mainstream analysis circumscribed by a narrow focus on individual circumstances posits that unmediated patriarchy is the source of domestic violence. A new approach is needed. The failure to improve outcomes through the carceral system is irrefutable.³⁴⁴ A number of state coalitions whose work focuses on gender violence have agreed that a new approach is required — one that repudiates prevailing

³⁴⁰ Kaba, *supra* note 301.

³⁴¹ Zoe Williams, *All-Out Wars*, *TIMES LITERARY SUPPLEMENT* (Dec. 20, 2019), <https://www.the-tls.co.uk/articles/all-out-wars/> [<https://perma.cc/XDV8-6KCU>].

³⁴² Elliott Kozuch, *HRC Responds to New FBI Report Showing Spike in Reported Hate Crimes Targeting LGBTQ People*, *HUM. RTS. CAMPAIGN* (Nov. 12, 2019), <https://www.hrc.org/press-releases/hrc-responds-to-new-fbi-report-showing-spike-in-reported-hate-crimes-target> [<https://perma.cc/D49M-6PDF>].

³⁴³ Mimi E. Kim, *Anti-Carceral Feminism: The Contradictions of Progress and the Possibilities of Counter-Hegemonic Struggle*, 35 *J. WOMEN & SOC. WORK* 309, 315 (2020).

³⁴⁴ See Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 *TEX. TECH L. REV.* 147, 205 (2016); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 *UCLA L. REV.* 1, 71-73 (1999); Coker & Macquoid, *supra* note 195, at 587 (describing the destructive consequences of the criminal justice system and over-incarceration on domestic violence); Garner et al., *supra* note 136, at 228; Goodmark, *Should DV Be Decriminalized?*, *supra* note 85, at 54-55; Symposium, *Harms of Criminalization and Promising Alternatives*, 5 *U. MIA. RACE & SOC. JUST. L. REV.* 369, 372 (2015); see also BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION* 163 (2012).

carceral solutions driven by white persons who have failed to heed the voices of Black organizers.³⁴⁵

The “reckoning” undertaken by anti-violence advocates requires careful implementation of alternative anti-carceral strategies that constructively address the needs of survivors and hold offenders accountable, to allow for healing while also addressing the determinants of violent behavior. To that end, scholars and legal and community activists, including anti-violence advocates, have turned their attention to restorative justice (“RJ”) practices in lieu of carceral approaches.³⁴⁶ Survivors often prefer RJ to achieve justice and accountability, citing the unfettered opportunity for survivors to tell their stories and for offenders to acknowledge the impact they have had — none of which occurs during a criminal prosecution.³⁴⁷ The literature describing these practices is expansive, and thus a brief summary suffices for the purposes of this article. Mimi Kim describes RJ as “[p]ositioning itself in opposition to retributive or punitive forms of justice,” and explains that it “generally aims to (1) elevate the perspectives and voice of victims, (2) define accountability as a form of responsibility to harmed parties as opposed to punishment meted out by the state, and (3) leverage stakeholder and broader community relationships toward accountability and restoration for those impacted by harm.”³⁴⁸

Increasing numbers of anti-violence programs that have incorporated restorative practices as a way to reduce reliance upon the criminal legal system — all to the good.³⁴⁹ The trend away from front-line punitive approaches notwithstanding, however, programs that include RJ practices may not be sufficiently independent from carceral systems as demonstrated by their continued collaboration and partnerships with law enforcement.³⁵⁰ Persisting relationships with the criminal justice

³⁴⁵ Elise Buchbinder, *Moment of Truth*, END DOMESTIC ABUSE (July 14, 2020, 4:50 PM), <https://www.endabusewi.org/moment-of-truth/> [https://perma.cc/A5XL-J6MK] (setting forth a resolution signed by a number of state coalitions as a means to reckon with past carceral and racist approaches).

³⁴⁶ Kim, *supra* note 343, at 316; *see also* *Resources for Organizing*, CMTY. ACCOUNTABILITY, <https://communityaccountability.wordpress.com/resources/> (last visited Sept. 17, 2021) [https://perma.cc/4S7E-LP2A].

³⁴⁷ SERED, *supra* note 137, at 16 (noting the ways that incarceration impedes meaningful accountability).

³⁴⁸ Kim, *supra* note 343, at 316 (citation omitted).

³⁴⁹ *E.g.*, *Restorative Justice and Intimate Partner Violence*, CTR. FOR CT. INNOVATION, <https://www.courtinnovation.org/programs/restorative-justice-IPV> (last visited Sept. 17, 2021) [https://perma.cc/FG67-D8UV].

³⁵⁰ Kim, *supra* note 343, at 316.

system invite concerns about the dangers of co-optation of RJ practices which may remain embedded within paradigms of incarceration.³⁵¹

Advocates seeking to explore non-carceral approaches to domestic violence must be attentive to the “watering-down’ of radical initiatives” as a way to make themselves more palatable to conventional practitioners, a pattern to which social justice initiatives are subject “while going through a process of changing institutions.”³⁵² To this end, a number of anti-carceral advocates have focused on developing community-based solutions known as transformative justice (“TJ”) as a way to build on and enrich RJ.³⁵³ TJ practices originated among people of color within paradigms of abolitionist social movements.³⁵⁴ This approach seeks to enhance both individual justice and advance collective liberation; that is, to address the conditions that contribute to violence and disavow carceral, punitive approaches to transgressive behavior.³⁵⁵ TJ processes are embedded in local communities and eschew reliance on the state.³⁵⁶ TJ functions within an anti-state and anti-institutional framework, and thus, as Kim observes, “remains subject to the advantages and constraints of its subaltern character.”³⁵⁷ The challenge to implementing meaningful approaches through RJ and/or TJ requires that advocates develop practices based on shared

³⁵¹ *Id.* Kim also notes the danger of cooptation because of the possibilities of RJ’s legal codification. *Id.* at 317-18.

³⁵² Amara Haydée Pérez, *What Does CRT Have to Do with a Roof?: Critical Race Spatial Praxis — an Equity Approach to Institutional Planning, College Design, and Campus Space* 206 (2020) (Ph.D. dissertation, University of North Carolina at Greensboro), http://libres.uncg.edu/ir/uncg/f/Perez_uncg_0154D_13004.pdf [<https://perma.cc/DR68-5XF5>].

³⁵³ Angela P. Harris, *Beyond the Monster Factory: Gender Violence, Race, and the Liberatory Potential of Restorative Justice*, 25 *BERKELEY J. GENDER L. & JUST.* 199, 200 (2010) (reviewing SUNNY SCHWARTZ WITH DAVIS BOODELL, *DREAMS FROM THE MONSTER FACTORY: A TALE OF PRISON, REDEMPTION, AND ONE WOMAN’S FIGHT TO RESTORE JUSTICE TO ALL* (2009)); see also Kim, *supra* note 343, at 319.

³⁵⁴ Kim, *supra* note 343, at 314.

³⁵⁵ GENERATIONFIVE, *TOWARD TRANSFORMATIVE JUSTICE* 5 (2007), https://www.transformativejustice.eu/wp-content/uploads/2010/11/G5_Toward_Transformative_Justice.pdf [<https://perma.cc/Q28J-F63N>].

³⁵⁶ Kim, *supra* note 343, at 319.

³⁵⁷ *Id.*; see also Melissa Gira Grant, *Andrew Cuomo Didn’t Do This Alone*, *N.Y. TIMES* (Aug. 11, 2021), https://www.nytimes.com/2021/08/11/opinion/andrew-cuomo-resignation-metoo.html?campaign_id=39&emc=edit_ty_20210811&instance_id=37628&nl=opinion-today®i_id=71789197&segment_id=65917&te=1&user_id=fdbf4358692ef0ec3b1a2ee14aca1c45 [<https://perma.cc/YVX3-LW4E>] (remarking how established anti-domestic violence groups with close relations with state entities will “overshadow” community-based groups with more progressive agendas).

decision making with community groups focused on anti-carceral responses and social justice writ large.³⁵⁸

Domestic violence advocates must also address socioeconomic conditions in ways that center the specific needs of survivors as well as offenders. Programs must engage in cross-advocacy and intersectional practices to challenge the conditions that often precipitate interpersonal violence, including affordable housing, employment exploitation, and racial injustice.³⁵⁹ For example, community benefits agreements (“CBAs”) promise one way to address structural concerns and attend to issues pertaining to domestic violence. CBAs are enforceable contracts that are negotiated between a prospective developer and community coalitions, which include conditions relating to social justice issues, including those pertaining to gender violence.³⁶⁰ Participation in CBA efforts strengthens social justice movement alliances and assists communities to obtain material resources to serve survivor needs.³⁶¹

As noted above, labor rights groups have recognized their reciprocal interests with anti-carceral movements, and in particular, their shared agenda with anti-domestic violence work.³⁶² In addition to bargaining for a living wage, unions can otherwise improve the economic circumstances for families by negotiating contract terms that are beneficial to domestic violence survivors, including time off, child care, and employee assistance plans that cover domestic violence issues.³⁶³ Unions have made domestic violence a labor matter and have developed

³⁵⁸ K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, LPE PROJECT (May 20, 2020), <https://lpeblog.org/2020/05/20/the-institutional-design-of-community-control/#more-3543> [https://perma.cc/R66F-4WVL] (describing the dimensions of true power sharing among community groups and institutions); see also Grant, *supra* note 357 (identifying how anti-gender violence groups may be compromised when relying on elected officials as opposed to their own communities).

³⁵⁹ Shanti Kulkarni, *Domestic Violence Services Must Renew Their Social Change Roots*, GENDER POL’Y REP. (June 21, 2020), <https://genderpolicyreport.umn.edu/domestic-violence-services-must-renew-their-social-change-roots/> [https://perma.cc/35G2-VCEK].

³⁶⁰ Weissman, *supra* note 227, at 251-53. For an overview of CBAs, see generally Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5 (2010).

³⁶¹ Weissman, *supra* note 227, at 252.

³⁶² The Coalition of Labor Women (“CLUW”) and AFSCME have urged economic remedies for victims of domestic violence. *Resolution No. 7: Stopping Domestic Violence at Work*, AFSCME (June 24, 2002), <https://www.afscme.org/about/governance/conventions/resolutions-amendments/2002/resolutions/7-stopping-domestic-violence-at-work> [https://perma.cc/R4Z9-MJEN]; *About CLUW*, COAL. LAB. UNION WOMEN, http://www.cluw.org/?zone=/unionactive/view_page.cfm&page=About20CLUW (last visited Sept. 17, 2021) [https://perma.cc/52A3-N8BA].

³⁶³ See *Domestic and Intimate Partner Violence and COVID-19*, *supra* note 334.

resources to educate their members about the issue, pursuant to their social justice and political agendas.³⁶⁴ Unions also have an obligation to assist members who are accused of domestic violence and may provide counseling as an alternative to the criminal legal system, all while also establishing the norm that domestic violence is unacceptable.³⁶⁵ These measures may avoid carceral mechanisms altogether and provide a cheaper and more effective solution.

The convergence of interests between anti-carceral groups, anti-domestic violence groups, and labor groups is apparent in other ways. For example, frontline domestic violence program workers often do not earn a livable wage.³⁶⁶ The failure to fund programs assuring fair wages thus has an impact on the degree and quality of services provided to victims. Moreover, exploitative wages are likely to create employee turnover and program instability.³⁶⁷ And as others have written, mass-membership organizations can address social issues because “they aggregate the political resources and political power of people who, acting as individuals, are disempowered relative to wealthy individuals and institutions.”³⁶⁸

These recommendations are not comprehensive; they are simply meant to suggest ways for anti-violence advocates to remain focused on gender violence mitigation. This can best be done by expanding relationships between and among various social justice groups, broadening areas of advocacy expertise, and developing new strategies to address shared community concerns. This also requires a willingness to humanize those who have historically been categorized as dangerous and undeserving of interventions other than incarceration. And it demands a commitment to attending to the structural forces that often cause gender violence.

³⁶⁴ *Union Responses to Domestic and Sexual Violence, and Stalking*, WORKPLACES RESPOND TO DOMESTIC & SEXUAL VIOLENCE, <https://www.workplacesrespond.org/resource-library/can-unions-prevent-respond-workplace-violence/> (last visited Sept. 15, 2021) [<https://perma.cc/RM9V-GQH6>].

³⁶⁵ Deborah M. Weissman, *Countering Neoliberalism and Aligning Solidarities: Rethinking Domestic Violence Advocacy*, 45 SW. L. REV. 915, 953 (2016).

³⁶⁶ *Id.* at 953-54.

³⁶⁷ NAT'L NETWORK TO END DOMESTIC VIOLENCE, 12TH ANNUAL DOMESTIC VIOLENCE COUNTS REPORT 1, 8 (2017), <https://nnedv.org/resources-library/12th-annual-census-full-report/> [<https://perma.cc/7ZZA-5H6X>] (noting the number of unfilled positions and inability to meet survivor needs).

³⁶⁸ Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 552 (2021).

CONCLUSION

This Article has demonstrated that issues of gender violence, whether committed by state actors or intimate partners, have been excluded from criminal legal reform initiatives and decarceration efforts — omission which have weakened anti-carceral efforts generally. It has endeavored to persuade that gender violence offenses, as with other forms of transgressive behavior, are most often attributed to socio-political economic environmental contingencies. Thus, it has argued that the structuralist paradigm that situates criminal behavior within a political economic framework must also include acts of gender violence. The Article offers proposals by which to include gender violence within anti-carceral strategies that may help to strengthen the demands for a more progressive political economy, which in turn helps to mitigate the determinants of transgressive behaviors.

This Article concludes by suggesting that a change in the framework of anti-carceral work to include gender violence and its connection to State structures will create greater opportunities for solutions that value human dignity. It also proposes that meaningful anti-gender violence strategies cannot be excluded from progressive criminal justice work or movements against racism and economic inequality.

The failure to include gender-based crimes within progressive initiatives reflects what JoAnn Wypijewski refers to as “poisoned solidarity”³⁶⁹ — a form of social discipline that invites us to engage in mutual identification of villainous types.³⁷⁰ That is, “habits of thoughts [that] reinforce and sustain the habits of power,”³⁷¹ or put differently, a problem of “cops in our heads and hearts” that often motivate people to turn to carceral systems notwithstanding the harms they cause.³⁷² Responses to gender violence have been fixed within the carceral state. The changes that might be politically possible are, in turn, precluded.

³⁶⁹ This term was first coined in ROGER N. LANCASTER, *SEX PANIC AND THE PUNITIVE STATE* 21 (2011).

³⁷⁰ JOANN WYPIJEWSKI, *WHAT WE DON'T TALK ABOUT WHEN WE TALK ABOUT #MeToo* 5 (2020).

³⁷¹ JoAnn Wypijewski, *Habits of Thought*, BOOKFORUM (Oct. 13, 2020), <https://www.bookforum.com/syllabi/habits-of-thought-24222> [<https://perma.cc/ZBW2-Z3KS>] (quoting James Baldwin).

³⁷² Paula X. Rojas, *Are the Cops in Our Heads and Hearts?*, in *THE REVOLUTION WILL NOT BE FUNDED 197, 197-98* (INCITE! WOMEN OF COLOR AGAINST VIOLENCE ed., 2009), <https://sfonline.barnard.edu/navigating-neoliberalism-in-the-academy-nonprofits-and-beyond/paula-rojas-are-the-cops-in-our-heads-and-hearts/> [<https://perma.cc/CSP5-PPRF>] (observing the default position of resorting to the criminal legal system and police).

Marie Gottschalk has commented on these circumstances. She observes,

[M]ajor national organizations committed to social and economic justice are vexed with subtle biases that keep them from mobilizing on behalf of the most marginalized groups in the United States, including offenders and ex-offenders . . . These national organizations will not lead the way out of the carceral state without pressure from a more radical flank.³⁷³

This Article seeks to contribute to that radical flank.

³⁷³ MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 275-76 (2015).