

SHOULD DOMESTIC VIOLENCE BE DECRIMINALIZED?

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*In 1984, the United States started down a path towards the criminalization of domestic violence that it has steadfastly continued to follow. The turn to the criminal legal system to address domestic violence coincided with the rise of mass incarceration in the United States. Levels of incarceration have increased by five times during the life of the anti-domestic violence movement. The United States incarcerates approximately 2.2 million people, with another 5 million under the scrutiny of parole and probation officers. While the criminalization of domestic violence did not have “a significant causal role” in the increase in mass incarceration in the United States, scholars have argued that the turn to criminal law to address domestic violence has contributed to the phenomenon of mass incarceration. Given the current focus on overcriminalization and decreasing mass incarceration, the time may be ripe to consider alternatives to criminalization of intimate partner violence. In her 2007 article, *The Feminist War on Crime*, law professor Aya Gruber wrote, “Although I am skeptical about the ability of criminal law to solve social inequality problems, there may be good reasons to keep domestic violence crimes solidly on the books.” Professors Cecelia Klingele, Michael Scott and Walter Dickey have called for the development of scholarship addressing “crime problems for which arrest, prosecution, and conviction are the most appropriate responses to crime, along with instances in which invocation of traditional response is particularly fruitless or counter-productive.” Both generally and specifically in the context of intimate partner violence, these articles ask about the continued utility of criminal interventions. This article takes up those questions and asks: should domestic violence be decriminalized?*

TABLE OF CONTENTS

<i>Introduction</i>	54
I. <i>Criminalizing Domestic Violence: History, Benefits, and Critiques</i>	60
A. <i>A Brief Modern History of Criminalization Type</i>	61
B. <i>The Benefits of Criminalization</i>	65
C. <i>Critiques of Criminalization</i>	67

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1.	<i>Criminalization Generally</i>	68
2.	<i>Criminalization of Domestic Violence</i>	70
3.	<i>What's the Solution?</i>	74
II.	<i>The Theoretical Basis for (De)Criminalization</i>	75
A.	<i>The Theorists</i>	75
B.	<i>Applying the Theories</i>	76
1.	<i>Harm</i>	76
2.	<i>Deterrence</i>	77
3.	<i>Cost/benefit Analysis</i>	82
a.	<i>The Costs of Criminalization</i>	83
b.	<i>The Benefits of Criminalization</i>	89
c.	<i>Who Bears the Cost? Who Derives the Benefit?</i>	91
4.	<i>Alternatives to Criminalization</i>	92
III.	<i>Decriminalization versus Rethinking the Criminal Legal Response</i>	101
A.	<i>Ending Mandatory Policies</i>	102
B.	<i>Reconsidering Punishment</i>	103
1.	<i>A Graduated Response to Intimate Partner Violence</i>	103
2.	<i>Alternatives to Incarceration</i>	107
3.	<i>Reduce the Trauma of Incarceration</i>	108
	<i>Conclusion</i>	111

INTRODUCTION

In 1984, the United States Attorney General's Task Force on Domestic Violence called for strengthening the criminal legal response to domestic violence in the United States. Former prosecutor Jeanine Pirro, a member of the task force, explained, "We believe [domestic violence] is a criminal problem and the way to handle it is with criminal justice intervention."¹ Since that time, enhancing the criminal legal system's response to intimate partner violence has become the primary focus of domestic violence² law and policy. This concentration on expanding the criminal legal response resulted from a number of factors, including the historical failure of the criminal legal system to respond to allegations of domestic violence, the belief that domestic violence was a public problem requiring a state response, and an increasing tendency to address all social problems by "governing through

¹ WILLIAM L. HART ET AL., ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 11 (1984), <http://files.eric.ed.gov/fulltext/ED251762.pdf> [<https://perma.cc/G6FT-733P>].

² Although it is possible to distinguish between them, I have used the terms "domestic violence" and "intimate partner violence" interchangeably in this article.

crime.”³ When they were slow to embrace their new roles in responding to domestic violence, policy innovations like mandatory arrest and no drop prosecution⁴ forced police and prosecutors to use the criminal law to address domestic violence. Later, funding through the Violence Against Women Act, originally enacted in 1994 and reauthorized several times since, created powerful incentives for police, prosecutors, and courts to seriously invest in criminal legal interventions. Today, the criminal legal system is the primary system used to respond to domestic violence in the United States.

Although criminal laws that could have been used to address intimate partner violence existed prior to that time, in 1984 the United States started down a path towards the criminalization of domestic violence⁵ that it has steadfastly continued to follow. That dogged persistence might be justified if the criminal legal response had proved successful. But there is reason to question whether criminal legal interventions are having an appreciable impact on intimate partner violence. Since 1994, rates of domestic violence in the United States have fallen—but so has the overall crime rate. From 1994 to 2000, rates of domestic violence and the overall crime rate decreased by the same amount.⁶ From 2000 to 2010, rates of domestic violence dropped less than the overall crime rate.⁷ The reason for the decline in the overall crime rate is unclear, and is probably the result of a number of forces, including income growth, changes in alcohol consumption, aging population, decreased unemployment, and the number of police on the streets.⁸ Higher incarceration rates had some impact on the drop in the crime rate during the 1990s, but have not appreciably affected the crime rate since that time.⁹ No

³ Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 803–04 (2001).

⁴ Mandatory arrest policies require police to make arrests in domestic violence cases whenever they have probable cause to do so. No drop prosecution policies require prosecutors to pursue domestic violence cases whenever they have sufficient evidence, regardless of whether the person subjected to abuse willingly participates in prosecution. These policies are explained further at text accompanying notes 44–52, *infra*.

⁵ “Criminalization of domestic violence refers to efforts to address domestic violence through the passage and enforcement of criminal and civil laws.” Darrell Payne & Linda Wermeling, *Domestic Violence and the Female Victim: The Real Reason Women Stay!*, 3 J. MULTICULTURAL, GENDER & MINORITY STUD. 1, 1 (2009), <http://www.scientificjournals.org/journals2009/articles/1420.pdf> [<https://perma.cc/F5SF-C760>].

⁶ See SHANNON CATALANO, U.S. DEPT’ OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993–2010 1 (2012, rev’d 2015).

⁷ *Id.*

⁸ See Inimai M. Chettiar, *The Many Causes of America’s Decline in Crime*, ATLANTIC (Feb. 11, 2015) <http://www.theatlantic.com/politics/archive/2015/02/the-many-causes-of-americas-decline-in-crime/385364/> [<https://perma.cc/3W4S-BMCG>]. For other theories on what caused the reduction in crime rates, see Dana Goldstein, *THE MARSHALL PROJECT, 10 (Not Entirely Crazy) Theories Explaining the Great Crime Decline* (Nov. 24, 2014, 12:10PM), <https://www.themarshallproject.org/2014/11/24/10-not-entirely-crazy-theories-explaining-the-great-crime-decline#.XyUVA7QVg> [<https://perma.cc/DQZ6-ZFBN>].

⁹ OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? 4 (2015), http://www.brennancenter.org/sites/default/files/publications/What_Caused_The_Crime_Decline.pdf [<https://perma.cc/W9EW-3QNY>]. As William Kelly

reliable social science data ties the drop in the rates of intimate partner violence to criminalization or to the increased funding and criminal legal system activity spurred by the Violence Against Women Act.

The turn to the criminal legal system to address domestic violence coincided with the rise of mass incarceration in the United States. As criminologist Beth Richie explains, “Right alongside of our evolution as an anti-violence movement came the conservative apparatus that was deeply committed to building a prison nation. That buildup fell right into the open arms, as if we were waiting for it, of the anti-violence movement that had aligned itself with the criminal legal system.”¹⁰ Since 1980, the incarceration rate in the United States has increased exponentially.¹¹ Levels of incarceration have increased by five times during the life of the anti-domestic violence movement.¹² The United States incarcerates approximately 2.2 million people, with another 5 million under the scrutiny of parole and probation officers.¹³ While the criminalization of domestic violence may not have been the primary cause of the increase in mass incarceration in the United States, scholars have argued that the turn to criminal law to address domestic violence has contributed to the phenomenon of mass incarceration.¹⁴ Richie notes, “They took our words, they took our work, they took our people, they took our money and said, ‘You girls doing your anti-violence work are right, it is a crime, and we have got something for that.’”¹⁵

Overcriminalization has become major news in the United States.¹⁶ The conversation about overcriminalization and decriminalization has largely fo-

writes, “[L]ooking at the evidence from a variety of vantage points, the unmistakable conclusion is that any public safety impact of crime control, sentencing reform, and the correctional boom is quite modest. . . . [T]he crime reductions that realistically can be attributed to crime control are relatively underwhelming.” WILLIAM R. KELLY, *CRIMINAL JUSTICE AT THE CROSSROADS: TRANSFORMING CRIME AND PUNISHMENT* 56 (2015). See also Chettiar, *supra* note 8.

¹⁰ Beth E. Richie, *Keynote: Reimagining the Movement to End Gender Violence: Anti-Racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 257, 268 (2015).

¹¹ TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA* 18 (2014).

¹² Mimi E. Kim, *Challenging the Pursuit of Criminalisation in an Era of Mass Incarceration: The Limitations of Social Work Responses to Domestic Violence in the USA*, 43 BRIT. J. SOC. WORK 1, 3 (2012).

¹³ CLEAR & FROST, *supra* note 11, at 18–19.

¹⁴ Kim, *supra* note 12, at 6. Moreover, given that intimate partner violence accounts for 15% of all violent victimizations in the United States, it is hard to imagine that prosecuting such violence played no role in the increase in the prison population. JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP’T OF JUSTICE, *NONFATAL DOMESTIC VIOLENCE, 2003-2012* 1 (2014). For a discussion of the factors driving (and not driving) the increase in the prison population, see generally John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth is Wrong, and Where We Can Go From Here*, 26 FED. SENT’G REP. 265 (2014).

¹⁵ Richie, *supra* note 10, at 268.

¹⁶ Erik Eckholm, *How to Cut the Prison Population (See for Yourself)*, N.Y. TIMES, (August 11, 2015), http://www.nytimes.com/2015/08/12/upshot/how-to-cut-the-prison-population-see-for-yourself.html?_r=0 [<https://perma.cc/2BTH-RK5X>]; Washington Examiner, *America’s experiment in mass incarceration must end*, WASH. EXAMINER, (Au-

cused on quality of life policing, the increase in the number of regulatory crimes, and the potential for decriminalizing recreational drug use. More recently, bipartisan sentencing reform initiatives in Congress have spurred conversation about the overwhelming number of Americans who are currently incarcerated.¹⁷ Efforts to reduce the prison population have centered on releasing non-violent criminals, primarily drug users. It will be impossible, however, to make a significant dent in the prison population without reconsidering the prosecution and punishment of violent criminals.¹⁸

Discussions of how domestic violence could be (or has been) decriminalized, by contrast, are most frequently about how law enforcement's failure to adequately police or prosecute crimes of intimate partner violence undermines attempts to use the criminal law to prevent or deter instances of violence.¹⁹ They are arguments for more criminal legal intervention, not less. But in the United States, activists and scholars concerned about the disproportionate impact of law enforcement interventions on marginalized communities and skeptical about the achievements of forty years of prioritizing the criminal legal response have begun to consider

gust 10, 2015), <http://www.washingtonexaminer.com/americas-experiment-in-mass-incarceration-must-end/article/2569838> [<https://perma.cc/T9Y4-J8RS>]. This debate was spurred in part by the death of Eric Garner. New York City police apprehended Garner for selling loose cigarettes, a crime in the state of New York. Garner died after police used an illegal chokehold technique on him. In the wake of Garner's death, commentators from across the political spectrum have decried the vast array of behaviors that are subject to criminal justice intervention. See, e.g., George F. Will, *Eric Garner, Criminalized to Death*, WASH. POST, (December 10, 2014), https://www.washingtonpost.com/opinions/george-will-eric-garner-criminalized-to-death/2014/12/10/9ac70090-7fd4-11e4-9f38-95a187e4c1f7_story.html [<https://perma.cc/TZG3-29K6>].

¹⁷ See Carrie Johnson, *Despite Bipartisan Effort, Window to Pass Sentencing Reform May Be Closing*, NAT'L PUB. RADIO (Dec. 31, 2015, 2:57PM), <http://www.npr.org/2015/12/31/461607863/despite-bipartisan-effort-window-to-pass-sentencing-reform-may-be-closing> [<https://perma.cc/2BTH-RK5X>].

¹⁸ See Marc Mauer & David Cole, *How to Lock Up Fewer People*, N.Y. TIMES (May 23, 2015), <http://www.nytimes.com/2015/05/24/opinion/sunday/how-to-lock-up-fewer-people.html> [<https://perma.cc/26AE-GRDW>].

¹⁹ See generally Heather Douglas & Lee C. Godden, *The Decriminalisation of Domestic Violence: Examining the Interaction Between the Criminal Law and Domestic Violence*, 27 CRIM. L. J. 32 (2003) (advocating for increased use of the criminal law to address instances of domestic violence in Queensland, Australia). In 2011, Topeka, Kansas effectively decriminalized domestic violence, but not as a response to mass incarceration. The Topeka City Council repealed its local domestic violence law in order to force the Shawnee County District Attorney to prosecute such cases under state law, rather than handing the prosecution—and the cost of the prosecution—to the city's municipal courts. The District Attorney had previously claimed he could not prosecute the cases (largely misdemeanors) because the County Commission had cut his prosecution budget, which required him to focus his resources on felony prosecutions. A.G. Sulzberger, *Facing Cuts, a City Repeals Its Domestic Violence Law*, N.Y. TIMES (Oct. 11, 2011), http://www.nytimes.com/2011/10/12/us/topeka-moves-to-decriminalize-domestic-violence.html?_r=0 [<https://perma.cc/LT84-457H>]. In response to the repeal, the District Attorney agreed to resume prosecution of the domestic violence cases. Colleen Curry, *Topeka DA Will Prosecute Domestic Violence After All*, ABC NEWS (Oct. 12, 2011), <http://abcnews.go.com/US/kansas-da-prosecute-domestic-violence/story?id=14720962> [<https://perma.cc/QL2E-5B7T>].

whether the criminal legal system should continue to play a primary role in responding to domestic violence. Over the last several years, the criminal legal response has been critiqued on a number of fronts: it is ineffective,²⁰ it focuses disproportionately on people of color and low income people,²¹ it ignores the larger structural issues that drive intimate partner violence,²² it robs people subjected to abuse of autonomy and it ignores the pressing economic and social needs of people subjected to abuse.²³ Critics of the criminal legal system are committed to ending domestic violence and ensuring accountability for those who abuse, but through a system that meets the justice needs of people subjected to abuse and does not exacerbate the conditions that contribute to violence.

As questions are being raised about how best to address the problem of mass incarceration and criticism of the criminal legal response to intimate partner violence increases, the time may be ripe to consider alternatives to the criminalization of intimate partner violence. Longtime anti-violence advocates have begun to question the continued utility of investing in the criminal legal system. Some have begun to ask whether decriminalizing domestic violence might not only be possible, but necessary, if other responses to intimate partner violence are to be explored. As law professor Angela Harris has asked, “[i]f reliance on the criminal justice system to address violence against women and sexual minorities has reached the end of its usefulness, to where should advocates turn next?”²⁴ Reducing or eliminating the use of

²⁰ See generally LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* (2011) (arguing generally that the legal system’s response to domestic violence is not effective in stopping violence or addressing the needs of people subjected to abuse). One rejoinder to that contention is that the United States has never fully implemented the criminal justice response; in some jurisdictions with mandatory arrest laws, for example, advocates continue to decry the failure of police to make arrests notwithstanding the requirement that they do so.

²¹ See Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1046–47 (2000) (contending that poor women of color may be disproportionately affected by the criminal legal response to domestic violence); BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* 99–125 (2012) (highlighting the ways that Black women are harmed by the criminal legal system).

²² See Deborah M. Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 DUKE J. GENDER L. & POL’Y 221, 223–24 (2013) (arguing that structural economic forces contribute to domestic violence) [hereinafter Weissman, *Law, Social Movements*]; Deborah M. Weissman, *The Personal is Political—and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387, 389 (2007) (contending that global economic conditions contribute to violence against women).

²³ See Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 32–43 (2009) (explaining that mandatory interventions deprive people subjected to abuse of agency); Margaret E. Johnson, *Balancing Liberty, Dignity and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 557–74 (2010) (contending that inappropriate use of lethality screening fails to honor the dignity of people subjected to abuse).

²⁴ Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL’Y. 13, 38 (2011); see also Aya Gruber, *The*

incarceration or creating alternatives to incarceration is one possibility; employing other justice strategies, like restorative justice, to address intimate partner violence is another. Decreasing the use of the criminal legal system and addressing the unintended consequences of criminalizing domestic violence without abandoning criminalization altogether are also potential responses to Professor Harris' question.

In her 2007 article, *The Feminist War on Crime*, law professor Aya Gruber argued that feminists should stop supporting increased criminalization of domestic violence and incarceration of those convicted of domestic violence offenses. But, she writes, "This is not to say that feminist scholars should necessarily argue for de-criminalizing domestic violence. Although I am skeptical about the ability of criminal law to solve social inequality problems, there may be good reasons to keep domestic violence crimes 'solidly on the books.'"²⁵ Professors Cecelia Klingele, Michael Scott and Walter Dickey have called for the development of scholarship addressing "crime problems for which arrest, prosecution, and conviction are the most appropriate responses to crime, along with instances in which invocation of traditional response is particularly fruitless or counterproductive."²⁶ Both generally and specifically in the context of intimate partner violence, these articles ask about the continued utility of criminal interventions. This article takes up those questions and asks: should domestic violence be decriminalized?²⁷

Part I of this article offers a brief history of the criminalization of domestic violence, explaining why criminalization seemed a logical response to the state's traditional failure to address intimate partner violence. Part I then surveys the critiques of criminalization, focusing on the harms done to individuals and communities by the criminal legal system. In Part II, the article considers the theoretical justifications for criminalization and explores whether and how these theories support the decriminalization of do-

Feminist War on Crime, 92 IOWA L. REV. 741, 826 (2007) (arguing that feminists should no longer advocate for or support the criminalization of domestic violence).

²⁵ Gruber, *supra* note 24, at 824.

²⁶ Cecelia Klingele, Michael S. Scott & Walter J. Dickey, *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 988–89 (2010).

²⁷ By criminalization, I mean not just the operation of the specific process-oriented policies (mandatory arrest, no-drop prosecution) developed in the context of domestic violence, but the deployment of the criminal legal system to address acts of domestic violence that violate the criminal law, using both general statutes (e.g., assault statutes) and statutes specifically enacted to cover intimate partner violence (crimes of domestic violence statutes). By decriminalization, then, I mean the cessation of enforcement of these same statutes of general application in cases of intimate partner violence and the repeal of statutes specifically targeting domestic violence. I recognize that such a proposal could raise equal protection concerns (as anti-domestic violence advocates argued in cases like *Bruno v. Codd*, 396 N.Y.S.2d 974, 975–76 (N.Y. Sup. Ct. 1977), and *Scott v. Hart*, No. c-76-2395 (N.D. Cal. 1976)). See *infra* text accompanying notes 38–41. Deborah Tuerkheimer has made a similar argument in the context of rape law. See Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1299–1309 (2016).

mestic violence. In Part III, the article observes that although there is a credible, even strong, theory-based case to be made for the decriminalization of domestic violence, complete decriminalization is unlikely, and possibly unwise. Instead, the article suggests changes to domestic violence law and policy that might address some of the worst harms of criminalization and suggests reconsidering the way punishment is meted out in cases involving intimate partner violence.

I. CRIMINALIZING DOMESTIC VIOLENCE: HISTORY, BENEFITS, AND CRITIQUES

While some scholars are now sharply critical of the criminal legal response to domestic violence, that response must be understood against the historical backdrop of state non-intervention into what were considered private, family matters. Ensuring that the state treated domestic violence like any other crime was a cornerstone of the early anti-domestic violence movement. When police and prosecutors were slow to exercise their power to protect women²⁸ subjected to abuse, the anti-violence movement used litigation, research, and the political process to leverage state engagement via the criminal legal system. Criminalization brought tangible benefits to some people subjected to abuse. But some scholars, advocates, and activists believe that the harms of criminalization are significant enough to justify curtailing the use of the criminal legal system in cases of intimate partner violence.

²⁸ The anti-domestic violence movement (originally the “battered women’s movement”) began as a response to violence against women, and early law and policy actions were intended to benefit women specifically. As the field of anti-violence research matured, researchers found that domestic violence was a significant problem in the relationships of lesbian, gay, bisexual, and transgender (LGBT) individuals and that both men and women were subjected to abuse. See generally Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.C.L. L. REV. 51 (2013) (discussing intimate partner abuse in the transgender community); BETH LEVENTHAL & SANDRA E. LUNDY, *SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE* (1999) (addressing the specific needs of victims of same-sex domestic violence); CLAIRE RENZETTI, *VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS* (1992) (presenting a study of violence in lesbian relationships). As a result, the movement has become more inclusive in its language and its policy stances since its inception. In this article, I will refer to “people subjected to abuse” whenever possible, in order to capture the violence done to both men and women in intimate relationships. See GOODMARK, *supra* note 20, at 199 n.1 (describing the reasons for using the construction “subjected to abuse”). In those sources where comments or research describe women, however, women will be specifically referenced.

A. *A Brief Modern History of Criminalization*

Although levels of state intervention in domestic violence cases have varied over time,²⁹ by the 1960s and 1970s, the criminal legal system was loath to intervene into what it saw as private family disputes.³⁰ Police officers were trained not to make arrests in domestic violence cases. Police officers often instead told men who had abused their partners to take a walk around the block to cool down.³¹ Even if police had probable cause to make an arrest, police officers in most states could not make a warrantless arrest in a domestic violence case.³² If an arrest was made, the likelihood of prosecution was low.³³ The federal effort to support law enforcement work in domestic violence cases via the Law Enforcement Assistance Administration was completely defunded in 1980; new funding for the criminal legal system would not be authorized until the passage of the Violence Against Women Act in 1994.³⁴

Anti-domestic violence advocates sought to shift the public perception of domestic violence, making the case that domestic violence should be treated like any other crime.³⁵ New criminal laws were not, strictly speaking, necessary to realize this goal; those who abused could be arrested and prose-

²⁹ While domestic violence was criminalized as early as 1641 in the Massachusetts Bay Colony, state intervention has varied. See Elizabeth Felter, *A History of the State's Response to Domestic Violence*, in *FEMINISTS NEGOTIATE THE STATE: THE POLITICS OF DOMESTIC VIOLENCE* 5, 9 (Cynthia R. Daniels ed., 1997); see generally Carolyn B. Ramsey, *Domestic Violence and State Intervention in the American West and Australia, 1860-1930*, 86 *IND. L.J.* 185, 189–236 (2011) (discussing the relatively high levels of enforcement and punishment for violence against women in the American West and Australia in late 19th and early 20th century); Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880-1920*, 77 *U. COLO. L. REV.* 101 (2006) (discussing the higher punishment for men who committed intimate homicide than women who did).

³⁰ See Carolyn B. Ramsey, *The Exit Myth: Family Law, Gender Roles, and Changing Attitudes Toward Female Victims of Domestic Violence*, 20 *MICH. J. GENDER & L.* 1, 6 (2013).

³¹ See SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE* 158 (1982).

³² See *id.* at 159.

³³ See FRANK W. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* 266 (1970).

³⁴ See GOODMARK, *supra* note 20, at 18–19. The Law Enforcement Assistance Administration (LEAA) was created by the Safe Streets Act of 1968. LEAA's mandate was to provide block grant funding to the states to reduce crime. OFFICE OF JUSTICE PROGRAMS, U.S. DEPT OF JUSTICE, *LEAA/OJP RETROSPECTIVE: 30 YEARS OF FEDERAL SUPPORT TO STATE AND LOCAL CRIMINAL JUSTICE* 2 (1996). In the 1970s, LEAA created model projects and protocols to train officers to better respond to domestic violence calls, though its efforts were later criticized by feminist scholars for failing to appreciate that domestic violence should be treated as a crime. See, e.g., G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 *HOUS. L. REV.* 237, 275–76 (2005).

³⁵ See Coker, *supra* note 3, at 803; RICHIE, *supra* note 21, at 78. Lauren Snider contends that early second wave feminists opposed state punishment, but anti-violence advocates shifted their stance as the research revealed the extent of intimate partner violence in the United States and as government funding became available. Lauren Snider, *Towards Safer Societies: Punishment, Masculinities and Violence Against Women*, 38 *BRIT. J. CRIMINOLOGY* 1, 9 (1998).

cuted under existing assault laws, for example.³⁶ The real problem was the failure of police and prosecutors to enforce such laws.³⁷ In the late 1970s, frustrated with police inaction, feminist lawyers sued police departments in New York City and Oakland, California to reverse their “arrest avoidance” policies.³⁸ As a result of *Bruno v. Codd*, police in New York City promised to respond swiftly to domestic violence calls, to make an arrest whenever they had reasonable cause to believe that a felony had been committed or a protective order had been violated, and to remain on the scene to prevent further violence against the person³⁹ seeking protection.⁴⁰ In response to *Scott v. Hart*, the Oakland Police Department rescinded its arrest-avoidance policy and agreed to treat domestic violence like other crimes.⁴¹

In 1984, Tracy Thurman won a \$2.3 million dollar judgment against the city of Torrington, Connecticut after being stabbed by her husband following numerous complaints to police.⁴² Concerned about similar litigation, jurisdictions throughout the United States looked for innovative police policies that would shield them from liability. They found a model in Oregon’s 1977

³⁶ See Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217, 240, 253 (2014). Nonetheless, between 1997 and 2003, states passed 700 new statutory provisions responding to domestic violence. Thirty-eight states passed laws creating a new crime of domestic violence during that time period. NEAL MILLER, DOMESTIC VIOLENCE: A REVIEW OF STATE LEGISLATION DEFINING POLICE AND PROSECUTION DUTIES AND POWERS 1 (2004).

³⁷ As Mimi Kim explained, the first stage of feminist engagement with the state was “contestation. You, law enforcement, are doing nothing. You had better do something.” Mimi Kim et al., *Plenary 3—Harms of Criminalization and Promising Alternatives*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 369, 379 (2015).

³⁸ Pauline W. Gee, *Ensuring Police Protection for Battered Women: The Scott v. Hart Suit*, 8 SIGNS 554, 554 (1983) (discussing *Scott v. Hart*, No. C-76-2395 (N.D. Cal. filed Oct. 28, 1976) and *Bruno v. Codd*, 396 N.Y.S.2d 974 (N.Y. Sup. Ct. 1977). Both suits settled prior to trial).

³⁹ At that time, the vast majority of those seeking protection were women involved in heterosexual relationships, primarily marriages. Recognizing that domestic violence is endemic in all sorts of relationships, however, I have attempted to use gender-neutral language wherever possible.

⁴⁰ *Bruno v. Codd*, 396 N.Y.S.2d 582, 590 (Sup. Ct. 1977). Laurie Woods, the lawyer who filed *Bruno*, believed strongly that arrest and prosecution were necessary to challenge the social conditions that permitted domestic violence to flourish and saw criminalization as preferable to any other response to domestic violence. Houston, *supra* note 36, at 257–58.

⁴¹ See Gee, *supra* note 38, at 561–62. Gee saw state intervention as neutralizing the power imbalances between men and women, making the criminal system a “path to women’s liberation.” Houston, *supra* note 36, at 259.

⁴² *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984). A fourth class action suit, *Raguz v. Chandler*, No. C74-1064 (N.D. Ohio filed Nov. 24, 1975), challenged inaction in domestic violence cases by the Cleveland District Attorney’s Office. A 1975 settlement in that case established that district attorneys would consider each case on the merits, inform people of their right to review decisions not to prosecute, investigate non-frivolous complaints in cases where warrants were not issued, and inform police of their intent to prosecute domestic violence cases. See Gee, *supra* note 38, at 566; see also Consent Judgment, *Raguz v. Chandler*, No. C74-1064 (N.D. Ohio filed Nov. 24, 1975).

law requiring police to make arrests in domestic violence cases when the officer had probable cause to believe that an assault had been committed or when a person holding a protective order feared imminent serious harm—the precursor to mandatory arrest laws.⁴³

Research seemed to support the intuition that changes to arrest policy in cases involving domestic violence would prevent further lawsuits. In studies in 1981 and 1982, researchers Lawrence Sherman and Richard Berk found that arrest was associated with lower rates of recidivism by men who abused their partners in Minneapolis, Minnesota.⁴⁴ Other municipalities quickly adopted the mandatory arrest policy studied by Sherman and Berk, despite Sherman's warning that the results of the research would need to be replicated before conclusions could be drawn about the policy's effectiveness.⁴⁵ Nonetheless, anti-domestic violence advocates lobbied hard for the adoption of such policies.⁴⁶ Mandatory arrest policies would later be bolstered by the passage of the Violence Against Women Act, which initially required that

⁴³ See Anne Sparks, *Feminists Negotiate the Executive Branch: The Policing of Male Violence*, in *FEMINISTS NEGOTIATE THE STATE: THE POLITICS OF DOMESTIC VIOLENCE*, *supra* note 29, at 42.

⁴⁴ See generally Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984) (finding that suspects arrested for domestic violence were less likely to commit subsequent violence as compared to those who were ordered to leave). This research validated the recommendation from the Police Executive Research Forum that law enforcement arrest in cases of domestic violence involving serious injuries or use of a deadly weapon. See NANCY LOVING, *RESPONDING TO SPOUSE ABUSE & WIFE BEATING: A GUIDE FOR POLICE* (1980). *But see id.* at 62 (noting the report did not advocate for mandatory arrest policies, as it would be counterproductive to insist on arrests in cases “involv[ing] victims who adamantly refuse to press charges”).

⁴⁵ See Lawrence W. Sherman et al., *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOC. REV. 680, 680 (1992) (citing Richard A. Berk & Lawrence W. Sherman, *Police Responses to Domestic Violence Incidents: An Analysis of an Experimental Design with Incomplete Randomization*, 83 J. AM. STAT. ASS'N 70, 76 (1988); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 64 (1992)).

⁴⁶ By 2014, twenty states and the District of Columbia had enacted mandatory arrest policies. See A.B.A. COMMISSION ON DOMESTIC & SEXUAL VIOLENCE, *DOMESTIC VIOLENCE ARREST POLICIES* (Mar. 2014), http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/statutorysummarycharts/2014%20Domestic%20Violence%20Arrest%20Policy%20Chart.authcheckdam.pdf [<https://perma.cc/2WMM-YGGM>]. Sherman's warning was prescient. Later research was more equivocal about the effect of arrest policies. Replication studies found that mandatory arrest laws had deterrent effects in some locations, no effect in other locations, and contributed to increases in violence in others. See Richard A. Berk et al., *A Bayesian Analysis of the Colorado Springs Spouse Abuse Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 170, 198 (1992); Franklyn W. Dunford, *System-Initiated Warrants for Suspects of Misdemeanor Domestic Assault: A Pilot Study*, 7 JUST. Q. 631, 631–32 (1990); Franklyn W. Dunford et al., *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 CRIMINOLOGY 183, 204 (1990); Joel Garner et al., *Published Findings from the Spouse Assault Replication Program: A Critical Review*, 11 J. QUANTITATIVE CRIMINOLOGY 3, 5–7 (1995); J. David Hirschel et al., *The Failure of Arrest to Deter Spouse Abuse*, 29 J. RES. CRIME & DELINQ. 7, 29 (1992); Antony M. Pate & Edwin E. Hamilton, *Formal and Informal Deterrents to Domestic Violence: The Dade County Spouse Assault Experiment*, 57 AM. SOC. REV. 691, 691 (1992).

states enact mandatory arrest policies as a condition of receiving federal funding under the Act.⁴⁷

Anti-domestic violence advocates next turned their attention to low prosecution rates. Prosecutors complained that they could not prove their cases without the cooperation of those who had been abused, but who often refused to testify. Prosecutors, therefore, would not bring domestic violence cases to court.⁴⁸ No drop prosecution was among the policies designed to address this problem. In no drop prosecution jurisdictions, prosecutors did not rely on the victim's cooperation to make their cases. Instead, they pursued any case where the evidence was strong enough to litigate, even without the willing assistance of the person subjected to abuse.⁴⁹ In soft no drop jurisdictions, prosecutors provided inducements (like support services) for people to testify, but did not compel their participation.⁵⁰ By contrast, in hard no drop jurisdictions, prosecutors used whatever means necessary to make their cases,⁵¹ including subpoenaing unwilling witnesses, asking that subpoenas be enforced through arrest warrants or body attachments, and, in extreme cases, imprisoning complaining witnesses as material witnesses prior to trial.⁵² By 1996, two-thirds of prosecutors' offices had adopted (primarily soft) no-drop policies.⁵³

Anti-domestic violence advocates did not advance the carceral agenda in a vacuum. Efforts to increase the criminalization of domestic violence paralleled the ascendancy of neo-liberalism as the guiding philosophy for U.S. social policy and the rejection of the welfare state and embrace of criminalization as a response to social problems.⁵⁴ Reformers took advantage of the growing interest in and funding for carceral responses.⁵⁵ As law pro-

⁴⁷ That requirement later changed to allow states with either preferred or mandatory arrest policies to apply. Violence Against Women and Department of Justice Reauthorization Act, Pub. L. No. 109-162, § 102, 119 Stat. 2960, 2975 (2005) (amending 42 U.S.C. § 3796hh) ("Grants to encourage arrest and enforce protection orders improvements . . .").

⁴⁸ See GOODMARK, *supra* note 20, at 110.

⁴⁹ See *id.* at 111.

⁵⁰ See *id.* at 112.

⁵¹ See *id.*

⁵² See *id.* at 126–28.

⁵³ See Andrea J. Nichols, *No-Drop Prosecution in Domestic Violence Cases: Survivor-Defined and Social Change Approaches to Victim Advocacy*, 29 J. INTERPERSONAL VIOLENCE 2011, 2014 (2013).

⁵⁴ Neo-liberalism, narrowly defined, is a system of economic ideas and policies that emphasizes small government and market-based solutions to social and economic problems. In the context of the criminal law, neo-liberalism has (perhaps counter-intuitively) spurred increased enforcement of criminal law, as the state uses mass incarceration rather than social welfare policy to address structural economic and political issues. Aggressive policing and prosecution "reflect[] the neoliberal turn in which the government gets out of the way except in the penal sphere." Jeremy Kaplan-Lyman, *A Punitive Bind: Policing, Poverty, and Neoliberalism in New York City*, 15 YALE HUM. RTS. & DEV. L.J. 177, 179 (2012).

⁵⁵ See, e.g., NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 17 (2014). Aya Gruber, Amy Cohen, and Kate Mogulescu have called the tendency to provide needed social services through the criminal justice system "penal

fessor Naomi Murakawa explains, “Acting within existing institutional arrangements, mainstream anti-violence movements . . . pursued restraining orders, specialized domestic violence courts, and mandatory arrest policies that fortified existing institutions.”⁵⁶

By the time VAWA was adopted in 1994, the anti-domestic violence movement’s embrace of the criminalization agenda was clear. VAWA, though, provided the funding incentives that firmly entrenched that agenda. VAWA allocated hundreds of millions of dollars for training and support of courts, police, and prosecutors,⁵⁷ creating a powerful motivation for law enforcement to take the helm of anti-domestic violence efforts. VAWA also created monetary incentives for anti-domestic violence advocates to collaborate with law enforcement,⁵⁸ committing the anti-domestic violence movement itself more firmly to the criminal legal response. By 2003, when George W. Bush stated,

Government has got a duty to treat domestic violence as a serious crime, as part of our duty. If you treat something as a serious crime, then there must be serious consequences, otherwise it’s not very serious. . . . Our prosecutors are doing their job. They’re finding the abusers, and they’re throwing the book at them. And that’s important,⁵⁹

many in the anti-domestic violence movement would have agreed.

B. *The Benefits of Criminalization*

Criminalizing domestic violence did offer benefits to some people subjected to abuse. Intervention by the criminal legal system can give people “time and space” away from abuse.⁶⁰ Police intervention can stop a violent incident in the moment. Courts can issue criminal stay away orders to prevent unwanted contact between people subjected to abuse and their partners

welfare.” Aya Gruber, Amy J. Cohen & Kate Mogulescu, *An Experiment in Penal Welfare: The New Human Trafficking Intervention Courts*, FLA. L. REV. (forthcoming 2016).

⁵⁶ MURAKAWA, *supra* note 55, at 17.

⁵⁷ In fiscal year 2016, the Office on Violence Against Women requested \$243 million for its two largest programs, the Service-Training-Officers-Prosecutors (STOP) program and the Improving Criminal Justice Responses to Sexual Assault, Domestic Violence, Dating Violence and Stalking Program (formerly known as the Grants to Encourage Arrests Program). U.S. DEP’T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, FY 2016 CONG. BUDGET SUBMISSION, 12–14 (FEB. 2015), https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/30_office_on_violence_against_women_ovw.pdf [<https://perma.cc/96GE-57PX>]. Approximately 60% of VAWA funding is allocated directly to law enforcement. Kim, *supra* note 37, at 378.

⁵⁸ Leigh Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 2015 BYU L. REV. 1183 (2015).

⁵⁹ Gruber, *supra* note 24, at 799.

⁶⁰ Margaret E. Bell et al., *Battered Women’s Perceptions of Civil and Criminal Court Helpfulness: The Role of Court Outcome and Process*, 17 VIOLENCE AGAINST WOMEN 71, 77 (2011).

both before and after prosecution.⁶¹ Successful prosecution can ensure that those who use violence enter batterer intervention programs as a condition of their sentences, which may lead to change in the behavior of the abusive partner.⁶² Prosecution can send the message that people are serious about ending the abuse; even the threat of prosecution can give a person subjected to abuse some leverage with their partners.⁶³ The criminal legal system can provide resources, including victim-witness advocates and crime victim compensation funds, to people subjected to abuse. Incarceration and other forms of monitoring can provide a respite from abuse that gives people “peace of mind” and the ability to implement short- and long-term safety plans.⁶⁴

Ensuring accountability for illegal behavior is another goal of criminal interventions. Batterer accountability—the belief that those who abuse should be held accountable for their abusive behavior by experiencing negative consequences through punishment, preferably via the criminal legal system—is one of the central tenets of the anti-domestic violence movement.⁶⁵ Arrest, prosecution, conviction, and incarceration are all employed to that end. Using the criminal legal system to address domestic violence can also serve to underscore the state’s condemnation of domestic violence, which both vindicates the experiences of the individual person subjected to abuse and could help change community norms around the acceptability of domestic violence.

Finally, criminalization can satisfy the desire for retribution of those who define justice through punishment.⁶⁶ Retribution requires that a wrongdoer receive a punishment befitting the crime; wrongs are righted through

⁶¹ See Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 16 (2006). Criminal stay away orders can be a condition of bail or pretrial release, can remain in force while prosecution is pending, and can be part of a sentence after prosecution. *See id.* The key is ensuring that the contact is, in fact, unwanted. Criminal stay away orders that are imposed over the objections of the person subjected to abuse operate as a form of “state-imposed *de facto* divorce.” *Id.* at 42; *see also* Lambert v. State of Maryland, 209 Md. App. 600 (Ct. Sp. App. 2013) (upholding probation condition forbidding contact between the parties over objection of wife who the order was meant to protect).

⁶² The evidence on the effectiveness of such programs is equivocal, however. *See* GOODMARK, *supra* note 20, at 148–50.

⁶³ *See generally* David A. Ford, *Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships*, 25 L. & SOC’Y REV. 313 (1991) (arguing that battered women can use the threat of criminal prosecution to deter abuse by their partner).

⁶⁴ *See* Bell et al., *supra* note 60, at 77.

⁶⁵ *See* Eric S. Mankowski et al., *Collateral Damage: An Analysis of the Achievements and Unintended Consequences of Batterer Intervention Programs and Discourse*, 17 J. FAM. VIOLENCE 167, 174 (2002).

⁶⁶ *See* Leigh Goodmark, “Law and Justice Are Not Always the Same”: *Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. 707, 714–15 (2015).

the perpetrator's suffering.⁶⁷ Punishment expresses society's condemnation of the act being punished and reinforces norms around society's unwillingness to tolerate such behavior. Retributive justice delivered through the state prevents individuals from assuming the right to mete out justice themselves.⁶⁸ Assuming that a perpetrator of violence is arrested, convicted, and given some punishment that the person subjected to abuse deems proportionate to the harm suffered, retribution can meet a person's justice needs.⁶⁹ Because the state has a monopoly on legal punishment in the United States, only the criminal legal system has the potential to meet the justice goals of those who define justice retributively.

C. Critiques of Criminalization

Social work professor Mimi Kim has described the attempts of anti-domestic violence advocates to harness the power of the criminal system as "the carceral creep"—"a dance of contentious politics initially engaged, provocatively and boldly, by feminist social movement actors with clear intentions to dominate law enforcement, oft times by subversive means."⁷⁰ Some of those feminists understood that engaging the criminal system posed real dangers, particularly for communities of color.⁷¹ They nonetheless believed that they could control law enforcement's actions and use the criminal system to their own ends. But, Kim notes, those hopes were naïve:

As law enforcement targets engage in this dance, first as recalcitrant partners and eventually as more active participants, they be-

⁶⁷ See Amy Gutmann & Dennis Thompson, *The Moral Foundations of Truth Commissions*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 25 (Robert I. Rotberg & Dennis Thompson eds., 2000).

⁶⁸ See Harvey M. Weinstein & Eric Stover, *Introduction: Conflict, Justice, and Recalibration*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 1, 14 (Eric Stover & Harvey M. Weinstein eds., 2004).

⁶⁹ Goodmark, *supra* note 66, at 715. But see Beth E. Richie, *Who Benefits and Who Loses in the Criminalization of IPV: Considering the Logic of Punishment and Impact of Legal Intervention as a Tertiary Prevention Strategy* 8 (May 14-16, 2016) (draft discussion paper, Nat'l Inst. Justice Workshop), <http://uknowledge.uky.edu/cgi/viewcontent.cgi?filename=1&article=1007&context=ipv&type=additional> [<https://perma.cc/A7KR-BN96>] (explaining that "[p]unishment, when it is applied, therefore focuses on individual incidents out of context and seldom reaches a level that responds to the level of the true, felt violation. Research suggests that most women do not feel satisfied with incidence-based criminal justice responses.").

⁷⁰ Mimi E. Kim, *Dancing the Carceral Creep: The Anti-Domestic Violence Movement and the Paradoxical Pursuit of Criminalization, 1973-1986*, 24 (ISSI Graduate Fellows Working Paper Series No. 2013-2014.70, Oct. 14, 2015), <https://escholarship.org/uc/item/804227k6> [<https://perma.cc/M4FX-7CMD>].

⁷¹ See *id.* at 22 (discussing some feminists' "[w]ariness regarding race and class implications of increasing criminalization."). Early feminist advocates were also skeptical of the "male" state's ability to promote women's interests, concerned about using the "oppressive criminal justice system given their own anti-oppression agenda," and worried that focusing on the criminal legal system would divert attention from other needs, including housing and childcare. Houston, *supra* note 36, at 219.

gin to find confidence and legible roles in their position as law enforcement in this new dance of contention. . . . Social movement actors and institutions in civil society, once the lead in this dance of contention, eventually become the subordinate partner in a dance now directed and dominated by the goals, political logics and institutions of law enforcement.⁷²

The consequences of the evolution of the carceral creep are described below.

1. *Criminalization Generally*

The criminalization policies of the last forty years have been called a “remarkable” failure, “perhaps the greatest in American history.”⁷³ There are numerous critiques of criminalization, but the most relevant for the purposes of this article are three: first, that overcriminalization has led to disproportionately high incarceration rates in the United States; second, that excessive criminalization renders criminal penalties meaningless; and third, that criminalization cannot solve America’s social problems.

Hyperincarceration is a relatively new phenomenon in America. Spurred by “tough on crime” rhetoric, legislators have both significantly increased the number of crimes and the duration of sentences over the past forty years.⁷⁴ Between 1970 and 2010, the state and federal prison population grew from 196,000 to 1.4 million people.⁷⁵ As of 2015, 2.2 million Americans were incarcerated, and more than 8 million were under some form of state control (for example, in jail or prison, on probation or parole, or serving community sanctions).⁷⁶ The United States incarcerates 730 of every 100,000 people, the highest rate in the world.⁷⁷ One in three African American men, one in seven Latino men, and one in seventeen white men spend time in prison.⁷⁸ Lesbian, gay, bisexual and transgender or gender-

⁷² Kim, *supra* note 70, at 24.

⁷³ KELLY, *supra* note 9, at 1.

⁷⁴ *See id.*

⁷⁵ MURAKAWA, *supra* note 55, at 5. Those figures do not include the populations of local jails.

⁷⁶ MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 1 (2015). That figure increases to 2.3 million when all state prisons, federal prisons, juvenile correctional facilities, local jails, Indian country jails, military prisons, immigration detention facilities, and similar facilities are included. *See* Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2015*, Prison Policy Initiative (Dec. 8, 2015), <http://www.prisonpolicy.org/reports/pie2015.html> [<https://perma.cc/4GA4Y-SVEC>].

⁷⁷ GOTTSCHALK, *supra* note 76, at 8.

⁷⁸ JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 141 (2007) (citing THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT 197976, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001 (2003)). Todd Clear and Natasha Frost stress the impact of hyperincarceration on young black men—“almost nine in ten [prisoners] are under 45. Over 90 percent are men, and nearly half are African American.” CLEAR & FROST, *supra* note 11, at 26. One in eleven African American men

nonconforming people are jailed at disproportionate rates.⁷⁹ The impact of hyperincarceration ripples out into families and communities, as political scientist Marie Gottschalk explains:

The carceral state directly shapes, and in some cases deforms, the lives of tens of millions of people who have never served a day in jail or prison or been arrested. An estimated eight million minors—or one in ten children—have had an incarcerated parent. . . . Millions of people reside in neighborhoods and communities that have been depopulated and upended as so many of their young men and women have been sent away to prison during what should be the prime of their lives.⁸⁰

Hyperincarceration is problematic not just because of the sheer number of people it affects, but also because of the many problematic consequences of incarceration, a subject that will be discussed further in Part III, *infra*.

Criminalization can make lawmakers feel as though they have done something to address a problem, but rarely do legislators analyze the effectiveness of that action in any meaningful way.⁸¹ Criminalization is, instead, a “one-way ratchet,”⁸²—lawmakers are unlikely to revisit or rescind criminal laws that have already been passed.⁸³ As a result, we are “criminalizing, recriminalizing, and overcriminalizing all forms of conduct, much of it innocuous, to the point of erasing the line between tolerable and intolerable behavior.”⁸⁴

The final critique is that criminalization is being used to address intractable social problems in the United States. In recent years, the political system has failed to allocate resources to pressing social problems like poverty, homelessness, and mental illness.⁸⁵ The neo-liberal turn in American public policy, and the resulting dismantling of the welfare state, left many communities struggling and under-resourced.⁸⁶ Rather than provide low-income

is under some form of correctional control—imprisonment, probation, parole, or other correctional supervision. *Id.* at 63.

⁷⁹ See CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN CRIMINAL SYSTEM FAILS LGBT PEOPLE iii (2016), <http://www.lgbtmap.org/file/lgbt-criminal-justice.pdf> [<https://perma.cc/6EER-FTQF>].

⁸⁰ GOTTSCHALK, *supra* note 76, at 1–2; see also KELLY, *supra* note 9, at 6. Seven percent of minority children have a parent in prison. KELLY, *supra* note 9, at 6. Hyperincarceration “has disrupted the gender balance and marriage rates” in some communities. Chettiar, *supra* note 8.

⁸¹ See Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal*, 31 WASH. U. J.L. & POL’Y 39, 55–56 (2009).

⁸² Erik Luna, *Overextending the Criminal Law*, in GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING 1, 5 (Gene Healy ed., 2004).

⁸³ See *id.*

⁸⁴ *Id.* at 1. Note, however, that Luna’s analysis applies mainly to regulatory crimes, not to crimes of violence.

⁸⁵ See GOTTSCHALK, *supra* note 76, at 46–47.

⁸⁶ See ELIZABETH COMACK & GILLIAN BALFOUR, THE POWER TO CRIMINALIZE: VIOLENCE, INEQUALITY AND THE LAW 39–44 (2004).

communities with social services, the U.S. government has increasingly poured resources into the criminal legal system, using that system to address the consequences of unresolved social problems including poverty, lack of employment, lack of housing, mental illness, and drug use.⁸⁷ Incarceration is like magic, making societal problems seem to disappear.⁸⁸ But the criminal law is poorly suited to solve these types of problems, rooted as they are in both individual social circumstances and larger systemic contexts.⁸⁹

2. *Criminalization of Domestic Violence*

Activist Angela Davis linked the general critique of criminalization with the specific critique of the criminalization of domestic violence at the first Incite! Women of Color Against Violence⁹⁰ conference in 2000. Davis stated, “The major strategy relied on by the women’s anti-violence movement of criminalizing violence against women will not put an end to violence against women—just as imprisonment has not put an end to ‘crime’ in general.”⁹¹

The critique of the criminalization of domestic violence tracks the general critique in a number of ways. Criminalizing domestic violence is one example of the increasing tendency described by law professor Jonathan Simon to address social problems by “governing through crime.”⁹² As Simon explains, “Domestic violence has emerged over the last three decades as one of the clearest cases where a civil rights movement has turned to criminalization as a primary tool of social justice.”⁹³ Moreover, both critiques are concerned with the disproportionate impact of criminalization on men of

⁸⁷ See GOTTSCHALK, *supra* note 76, at 46–47, 278–79; KELLY, *supra* note 9, at 1–4; SIMON, *supra* note 78, at 6. In such a system, Ta-Nehisi Coates argues, police are substituted for social workers, a role that is particularly problematic for communities of color. Ta-Nehisi Coates, *The Myth of Police Reform*, ATLANTIC (Apr. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-myth-of-police-reform/390057/> [<https://perma.cc/ZRR2-2THL>].

⁸⁸ See MAYA SCHENWAR, LOCKED DOWN, LOCKED OUT: WHY PRISON DOESN’T WORK AND HOW WE CAN DO BETTER 3 (2014) (citing Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES, (Sep. 10, 1998), <http://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex> [<https://perma.cc/RE69-B2UE>]).

⁸⁹ See SIMON, *supra* note 78, at 158–59. Simon explains that “waste management prisons” do not “penetrate and influence the mentality or will of criminal offenders”—they simply warehouse them. As a result, the criminal law does little to address the underlying causes of crime or to transform the behavior of offenders. *Id.* at 153.

⁹⁰ Incite! Women of Color Against Violence is a grassroots activist network of feminists of color working to end violence directed at women of color and within the communities of women of color. *About Incite!*, INCITE!, <http://www.incite-national.org/page/about-incite> [<https://perma.cc/AC3N-U4BR>].

⁹¹ Angela Davis, Opening Keynote Address at Color of Violence: Violence Against Women of Color Conference 5 (Apr. 28, 2000), http://www.incite-national.org/sites/default/files/incite_files/resource_docs/5573_coviproceedings.pdf [<https://perma.cc/KGB4-H3XC>].

⁹² SIMON, *supra* note 78, at 159.

⁹³ *Id.* at 180.

color. Men of color have become exponentially more involved with the criminal legal system due to the criminalization of social issues like domestic violence.⁹⁴ In a study of Milwaukee County, Wisconsin, for example, men of color represented 24% of the population, but 66% of the defendants in domestic violence cases, a disparity attributed in part to policing practices.⁹⁵ Arrest and conviction may have particularly negative consequences for men of color.⁹⁶

There are, additionally, a number of concerns that are specific to the criminalization of domestic violence. First, critics note the harm criminalization has done to women, originally the intended beneficiaries of these policies. Since the inception of more stringent arrest policies, for example, arrest rates among women have increased significantly. At least part of that increase “is directly attributable to the implementation of mandatory arrest policies and not simply an increased use of violence by women in intimate relationships.”⁹⁷ Dual arrests—the arrest of both a woman and her partner—have also increased substantially, again without evidence that women’s use of violence has increased.⁹⁸ Many women who are arrested have been subjected to abuse, and are less likely than males who are also arrested to have physically assaulted, injured, or threatened to kill their partner.⁹⁹ If women were committing acts of violence at rates commensurate to the rates of arrest, these policies might be justified by formal equality arguments—women and men should face the same consequences for their use of violence. But the research suggests that women are being penalized by arrest policies without justification.¹⁰⁰

Criminalization has also led to increased state control over women, most notably through the intervention of the child abuse and neglect system.¹⁰¹ Increased police involvement in families experiencing domestic violence leaves mothers subjected to abuse at greater risk of being reported to

⁹⁴ See Ms. FOUND. FOR WOMEN, SAFETY AND JUSTICE FOR ALL: EXAMINING THE RELATIONSHIP BETWEEN THE WOMEN’S ANTI-VIOLENCE MOVEMENT AND THE CRIMINAL LEGAL SYSTEM 12 (2003); Snider, *supra* note 35, at 9–10.

⁹⁵ David Doege, *Police Practices Are Behind Racial Disparities, Panel Suspects*, MILWAUKEE J. SENTINEL (Aug. 20, 2001), <https://news.google.com/newspapers?nid=1683&dat=20010820&id=Ue4eAAAIBAJ&sjid=Pz0EAAAIBAJ&pg=6655,10388619&hl=en> [<https://perma.cc/52MV-YY2S>]; see also Coker, *supra* note 3, at 808–09 n.31 (summarizing multiple other studies); ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 157 (2005) (citing a New York statistic).

⁹⁶ Coker, *supra* note 3, at 854–55.

⁹⁷ Alesha Durfee, *Situational Ambiguity and Gendered Patterns of Arrest for Intimate Partner Violence*, 18 VIOLENCE AGAINST WOMEN 64, 75 (2012); see also SUSAN MILLER, VICTIMS AS OFFENDERS: THE PARADOX OF WOMEN’S VIOLENCE IN RELATIONSHIPS 56–67, 73–76 (2005); Ms. FOUND. FOR WOMEN, *supra* note 94, at 13 (citing increased arrest rates in New Hampshire, Vermont and Colorado).

⁹⁸ Durfee, *supra* note 97, at 67.

⁹⁹ See *id.* at 68.

¹⁰⁰ See generally Durfee, *supra* note 97 (discussing the effect of the policies on the criminalization of women).

¹⁰¹ See Coker, *supra* note 3, at 837; see also DONNA COKER ET AL., RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING 25 (2015) (finding

child protective services agencies for failing to protect their children from exposure to domestic violence.¹⁰² Some police departments require officers to make a report to child protective services whenever a child is present at the scene of an incident of domestic violence.¹⁰³ Coupled with state laws and policies that hold mothers accountable for their inability to prevent their partners from being violent in the presence of their children, the increased involvement of the criminal legal system means greater scrutiny of parenting and an increased likelihood that mothers will lose their children.

Enforcing criminalization through the use of policies like mandatory arrest and no drop prosecution has been disempowering for some people subjected to abuse. Mandatory policies deprive people of the ability to determine whether and how the state will intervene into their relationships, shifting power from the individual to the state.¹⁰⁴ Aya Gruber recounts her days as a public defender: “I observed government actors systematically ignore women’s desires to stay out of court, express disdain for ambivalent victims, and even infantilize victims to justify mandatory policies while simultaneously prosecuting the victims in other contexts.”¹⁰⁵ M. Joan McDermott and James Garofalo identify unwanted intrusion by the criminal legal system, as well as the deployment of mandatory policies against the wishes of affected women, as sources of disempowerment for women subjected to abuse.¹⁰⁶ Meghan Novisky and Robert Peralta have found that mandatory arrest may be reducing reporting of domestic violence among women subjected to

that 89% of survey respondents reported that police intervention “sometimes” or “often” resulted in child welfare intervention).

¹⁰² See COKER ET AL., *supra* note 101, at 25.

¹⁰³ See Coker, *supra* note 3, at 833. As one woman noted, “[T]he call to the police opened up so many doors. Then I had three different services watch me and with the kids. Child protective put me at risk for losing my children; they said, next time they’ll take the kids! I always thought the police were there to help me.” *Id.* at 834 (quoting New York mother).

¹⁰⁴ GOODMARK, *supra* note 20, at 130.

¹⁰⁵ Aya Gruber, A “Neo-Feminist” Assessment of Rape and Domestic Violence Law Reform, 15 J. GENDER, RACE & JUST. 583, 583–84 (2012).

¹⁰⁶ M. Joan McDermott & James Garofalo, *When Advocacy for Domestic Violence Victims Backfires: Types and Sources of Victim Disempowerment*, 10 VIOLENCE AGAINST WOMEN 1245, 1251 (2004); see also Edna Erez & Joanne Belknap, *In Their Own Words: Battered Women’s Assessment of the Criminal Processing System’s Responses*, 13 VIOLENCE & VICTIMS 251, 264 (1998) (explaining that women “want to retain choice and wish to be treated as autonomous individuals in the attempt to stop the abuse”). Even when women are interested in prosecuting, their voices often get lost. See Bell et al., *supra* note 60, at 79 (quoting one woman: “The prosecutor doesn’t want to rock the boat, wouldn’t ask for things I think she should ask for. She doesn’t want to anger the judge but because she’s not in the situation she can’t relate to what I’m saying.”).

abuse who oppose mandatory arrest policies.¹⁰⁷ Criminalization empowers law enforcement and courts, not women.¹⁰⁸

Marginalized women are most harmed by overreliance on the criminal legal system.¹⁰⁹ Because women of color are less likely to voluntarily engage the criminal legal system, a response that relies primarily on criminalization is more likely to exclude them.¹¹⁰ Since the inception of the anti-violence movement, anti-domestic violence advocates of color have warned that overreliance on the criminal legal system would not serve people of color well.¹¹¹ A number of scholars have argued that criminalization has a disproportionately negative impact on women of color, exposing them to greater risk of state violence and control.¹¹² Arrest rates among women of color for domestic violence are higher in mandatory arrest jurisdictions.¹¹³ And women of color have negative, even abusive, experiences with police when they call for assistance with domestic violence.¹¹⁴ State intervention cannot guarantee safety for women of color so long as those women both fear and are actively harmed by engaging with the state.¹¹⁵

Critics of criminalization point to the macro level consequences of overreliance on the criminal legal system as well. Criminalization shifts responsibility for policing domestic violence from the community to the state.

¹⁰⁷ Meghan A. Novisky & Robert L. Peralta, *When Women Tell: Intimate Partner Violence and the Factors Related to Police Notification*, 21 VIOLENCE AGAINST WOMEN 65, 77–79 (2015).

¹⁰⁸ See generally Laureen Snider, *Criminalising Violence Against Women: Solution or Dead End?*, 74 CRIM. JUST. MATTERS 38 (2008) (exploring ramifications of criminalization of domestic violence).

¹⁰⁹ Richie, *supra* note 69, at 14.

¹¹⁰ See Tameka L. Gillum, *Community Response and Needs of African American Female Survivors of Domestic Violence*, 23 J. INTERPERSONAL VIOLENCE 39, 45 (2008); Richie, *supra* note 10, at 271; Richie, *supra* note 69, at 15. Sara Sternberg Greene has found that negative perceptions of the criminal legal system make African Americans less likely to use the civil justice system as well. See generally Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016) (presenting research showing racial disparities in which groups trust legal institutions enough to seek them out for help). Only 22% of the African American respondents in Greene’s study said that they trusted courts. *Id.* at 1302.

¹¹¹ Davis, *supra* note 91, at 2–3; Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, 25 SIGNS 1133, 1136 (2000). This argument is complicated, however, by the need to ensure that women of color are able to access protection from the state when they want it, rather than “abandoning poor women of color to a continuum of violence that extends from the sweatshops through the prisons, to shelters, and into bedrooms at home.” Davis, *supra* note 91, at 3.

¹¹² See Coker, *supra* note 3, at 807; Gruber, *supra* note 24, at 805–06; RICHIE, *supra* note 21, at 83; SMITH, *supra* note 95, at 139, 144.

¹¹³ INCITE! *Police Violence and Domestic Violence*, http://www.incite-national.org/sites/default/files/incite_files/resource_docs/2883_toolkitrev-domesticviolence.pdf [<https://perma.cc/Y8TC-WFC8>].

¹¹⁴ See *id.*; see also SMITH, *supra* note 95, at 161 (citing Communities Against Rape and Abuse—a Seattle-based model intervention—finding that the majority of officers involved in police brutality complaints in Seattle were responding to domestic violence complaints in low income communities of color).

¹¹⁵ See SMITH, *supra* note 95, at 154.

While that initial move grew out of community failures to sufficiently protect people from abuse, the result has been to relieve communities of any responsibility for or ability to hold citizens accountable without resorting to the criminal legal system.¹¹⁶ Criminologist Nils Christie has argued that conflicts provide the “*potential for activity, for participation*. Modern criminal control systems represent one of the many cases of lost opportunities for involving citizens in tasks that are of immediate importance to them.”¹¹⁷ As a result of this diversion of responsibility from community to state through criminalization, community responses to domestic violence are undertheorized and underdeveloped.¹¹⁸

Criminalization directs resources and attention away from people’s other, sometimes more pressing, needs. Government funding is often a zero sum game; money dedicated to policing, prosecution, and punishment cannot be used to provide other, more welcome types of services and supports for people subjected to abuse.¹¹⁹ Resources that are focused on the criminal legal system could be spent providing economic and housing support or civil legal assistance to people subjected to abuse.¹²⁰ Criminalization also ignores the larger structural economic and political factors that contribute to domestic violence.¹²¹

3. *What’s the Solution?*

There are a number of potential responses to the criminalization critique. Moving away from mandatory policies would address some of the problems with criminalization.¹²² Redirecting resources away from the criminal legal system or creating parallel community based systems without fundamentally changing the structure of the criminal legal response to domestic

¹¹⁶ One could argue, however, that communities *chose* to hold citizens accountable through the criminal legal system, rather than passively losing that ability through criminalization. My thanks to Helen Rave for this insight.

¹¹⁷ Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 7 (1977).

¹¹⁸ See Kim, *supra* note 37, at 378. But see Goodmark, *supra* note 66, at 731.

¹¹⁹ As Beth Richie writes, “[p]unishment of offenders does not help victims regain custody of their children, it does [not] give them another opportunity to get an education, they do not regain credibility or respect from their peers, and they are not afforded the opportunity to control the sphere of their lives that matters most to them, their intimate partnerships.” Richie, *supra* note 69, at 10.

¹²⁰ See *Statement on Gender Violence and the Prison Industrial Complex*, INCITE! WOMEN OF COLOR AGAINST VIOLENCE & CRITICAL RESISTANCE, http://mail.incite-national.org/sites/default/files/incite_files/resource_docs/5848_incite-cr-statement.pdf [<https://perma.cc/HM3N-DXLG>]; see also Coker, *supra* note 3, at 804–05; SMITH, *supra* note 95, at 168.

¹²¹ See Richie, *supra* note 10, at 270–71; Weissman, *Law, Social Movements*, *supra* note 22, at 222.

¹²² As Holly Maguigan notes, “[r]esort to criminal interventions need not include making those interventions mandatory.” Holly Maguigan, *Wading into Professor Schneider’s “Murky Middle Ground” Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER, SOC. POL’Y & L. 427, 430 (2003).

violence is another option.¹²³ As noted in the Introduction, law professor Aya Gruber has called for a moratorium on further criminalization of domestic violence.¹²⁴ Prison abolitionists argue for a change in punishment, replacing incarceration with other sanctions, but not necessarily for jettisoning the criminal legal response altogether.¹²⁵ No theorist has proposed the complete decriminalization of domestic violence, but the leading theories of criminalization and decriminalization might provide support for such a proposal.

II. THE THEORETICAL BASIS FOR (DE)CRIMINALIZATION

A. *The Theorists*

Although much has been written about justifications for punishment, criminalization itself has been less comprehensively theorized. Motivated by concerns about overcriminalization, however, a number of scholars have grappled with the question of whether and under what conditions conduct should be designated criminal. Over the past fifty years, Herbert Packer,¹²⁶ Joel Feinberg,¹²⁷ John Braithwaite & Philip Pettit,¹²⁸ Jonathan Schonsheck,¹²⁹ and Douglas Husak¹³⁰ have all developed theories of criminalization that provide lenses for considering the utility of criminalizing domestic violence.¹³¹ Notably, all of these theorists accept, on some level, that the crime of assault, the basis of most domestic violence prosecutions, should be criminalized.¹³²

¹²³ See generally Goodmark, *supra* note 66 (suggesting the development of community-based forums to respond to domestic violence); see also *Statement on Gender Violence and the Prison Industrial Complex*, *supra* note 120, at 3.

¹²⁴ Gruber, *supra* note 24, at 823.

¹²⁵ See Davis, *supra* note 91, at 6 (“Can we, for example, link a strong demand for remedies for women of color who are targets of rape and domestic violence with a strategy that calls for the abolition of the prison system?”); see also Richie, *supra* note 10, at 272.

¹²⁶ HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

¹²⁷ JOEL FEINBERG, *HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW* (1984).

¹²⁸ JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* (1990).

¹²⁹ JONATHAN SCHONSHECK, *ON CRIMINALIZATION: AN ESSAY IN THE PHILOSOPHY OF THE CRIMINAL LAW* (1994).

¹³⁰ DOUGLAS HUSAK, *OVERCRIMINALIZATION* (2008).

¹³¹ Theories of criminalization and theories of punishment are linked and grounded in some of the same principles (i.e., deterrence), but they are not the same. While a number of scholars have debated the appropriate philosophical underpinnings for punishment—retribution, deterrence, incapacitation, or rehabilitation—that is not the concern addressed in this article.

¹³² See, e.g., BRAITHWAITE & PETTIT, *supra* note 128, at 94 (“We would still want to criminalize offences against the person such as homicide, assault”); FEINBERG, *supra* note 127, at 10 (“Willful homicide, forcible rape, aggravated assault, and battery are crimes (under one name or another) everywhere in the civilized world, and no reasonable person could advocate their ‘decriminalization.’”); HUSAK, *supra* note 130, at 136 (arguing that the prevention of physical harm is a compelling state interest and explain-

The theorists share four central concerns. First, only those acts that have the potential to cause harm should be criminalized. Second, there must be some reason to believe that criminalization will deter the harmful behavior. Third, criminalization of the behavior must do more good than harm. Finally, criminalization should occur only when no less intrusive alternative for preventing the behavior exists. The next section applies the social science data on domestic violence collected over the last forty years to the shared core features of these theories. Notwithstanding their consensus that assault should be criminalized, the work of these theorists supports the case for decriminalizing domestic violence.

B. Applying the Theories

1. Harm

Schonscheck explicitly adopts John Stuart Mill's harm principle, allowing the state to exercise its power over a citizen only to prevent harm to others;¹³³ the other theorists all incorporate the notion of harm in their theories to greater or lesser extents. Some of the theorists, including Feinberg and Husak, specifically restrict criminalization to harms that are serious, non-trivial, or substantial.¹³⁴ Feinberg would further require that the harm be

ing, "[c]learly, the whole community has a stake in reducing violence, even when violence involves domestic partners behind closed doors."); PACKER, *supra* note 126, at 297, 300–01 (listing aggravated assault as among the crimes for which "[t]here is no reasonable alternative to the use of the criminal sanction No other kind of legal control is even remotely relevant The abandonment of the criminal sanction (or its counterpart under a different name) for dealing with these most basic of threats to human security would be tantamount to the dissolution of society."); SCHONSHECK, *supra* note 129, at 26 (assuming that there are "actions we are all confident ought to be criminally prohibited—for example, murder, rape, assault, robbery, arson."); *see also* Stuart P. Green, *Is There Too Much Criminal Law?*, 6 OHIO ST. J. CRIM. L. 737, 742 (2009) ("For example, everyone can agree that the state has a legitimate interest in preventing physical harms (such as those found in murder, rape and assault)").

¹³³ SCHONSHECK, *supra* note 129, at 40; *see also* Gideon Yaffe, *Book Review: Harmfulness, Wrongfulness, Lesser Evils and Risk-Creation: A Comment on Husak's Overcriminalization*, 1 JERUSALEM. REV. LEGAL STUD. 35, 36 (2010) (summarizing Husak's conception of various harm principles as follows: "We should use state punishment only to minimize behaviors that make the world worse in some way that human beings care about, either because those behaviors are intrinsically bad (they are 'evils') or because they cause bad things (they are 'harms.').").

¹³⁴ *See, e.g.*, FEINBERG, *supra* note 127, at 11, 188 (arguing that the state may prohibit serious harm); HUSAK, *supra* note 132, at 66 (restricting criminal liability to the punishment of non-trivial harm); *see also* SCHONSHECK, *supra* note 129, at 40 (referencing John Stuart Mill's position that the only way in which the state can rightfully intervene to punish is when preventing harm to others).

both avoidable and probable.¹³⁵ For others, like Braithwaite and Pettit, the requirement of some form of harm seems implicit.¹³⁶

To justify the criminalization of domestic violence, then, the law must be either addressing or preventing a serious harm. The law of assault clearly does both. While not every assault actually causes serious harm to the victim,¹³⁷ the types of behavior covered by assault law have the potential to do substantial damage to victims. Moreover, whether prosecuted as misdemeanors or felonies, domestic violence assaults do, in fact, seriously harm some victims, with physical injuries ranging from bruising to broken bones to brain damage.¹³⁸ A number of laws targeting specific forms of assault have been proposed and passed over the last several years as researchers have identified particularly harmful forms of intimate partner violence. States have increased penalties for strangulation, for example, as the medical evidence on the damage caused by strangulation and the dangerous role it plays in intimate partner violence has accumulated.¹³⁹ Even when imperfectly or inconsistently enforced, the criminal laws targeting domestic violence are intended to prevent and address potentially serious harm.

2. Deterrence

Deterrence—the belief that there is a relationship between criminalizing an act and the decreased likelihood that that act will be committed as a result of criminalization¹⁴⁰—is central to a number of the theories. For Packer, deterrence is “the primary purpose of the criminal law.”¹⁴¹ In Packer’s view, only the utilitarian goal of preventing or reducing bad behavior by declaring to society that some actions are not permissible is a sufficient justification for criminalization.¹⁴² And deterrence can only be effective

¹³⁵ FEINBERG, *supra* note 127, at 12, 190. Feinberg contends, though, that one can assume the probability of harm resulting from most of the acts that are forbidden by criminal codes, as “their harmful consequences are immediate and certain.” *Id.* at 190.

¹³⁶ BRAITHWAITE & PETTIT, *supra* note 128, at 2 (arguing that criminal justice is a response to “harm,” which is defined as behavior that diminishes the dominion of another).

¹³⁷ The variation in the seriousness of assaults, which can range from threats to life-threatening injuries, reinforces the case for graduated sanctions. *See infra* Part IIIB.

¹³⁸ Rachel Louise Snyder, *No Visible Bruises: Domestic Violence and Traumatic Brain Injury*, NEW YORKER (Dec. 30, 2015), <http://www.newyorker.com/news/news-desk/the-unseen-victims-of-traumatic-brain-injury-from-domestic-violence> [<https://perma.cc/MW8W-A9TE>]. *But see* EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 367 (2007) (explaining that the “typical abuse incident” involves “minor violence”).

¹³⁹ *See* Snyder, *supra* note 138; *see, e.g.*, Marie Coronel, *New Law Makes Strangulation a Felony in Virginia*, WTKR (July 18, 2012), <http://wtkr.com/2012/07/18/new-law-makes-strangulation-a-felony-in-virginia> [<https://perma.cc/3MDD-RPDB>].

¹⁴⁰ *See* Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 181 (2008).

¹⁴¹ PACKER, *supra* note 126, at 16.

¹⁴² *Id.* at 16, 19.

if the punishment imposed is sufficiently severe that it significantly reduces the likelihood that a perpetrator will engage in the forbidden behavior.¹⁴³

Feinberg, too, sees preventing, eliminating and reducing harm as the reason for enacting criminal statutes.¹⁴⁴ Husak identifies deterrence as one of the state interests justifying criminalization.¹⁴⁵ Deterrence is implicit in Braithwaite and Pettit's presumption of reprobation—making people believe that a crime is shameful is intended (in part) to prevent them from committing the crime.¹⁴⁶ Similarly, Schonscheck's "presumptions filter" rests on the belief that the state is justified in seeking to reduce the incidence of particular behaviors.¹⁴⁷

But as Husak notes, simply citing deterrence as motivation should not be sufficient justification for criminalizing behavior.¹⁴⁸ Instead, there must be some reason to believe that the statute actually does or will deter the targeted conduct,¹⁴⁹ even in instances where the law is enacted to serve an expressive function.¹⁵⁰ Husak would require "empirical evidence rather than unsupported speculation" that the statute is effectuating its purpose, evidence that, he acknowledges, might be difficult to get.¹⁵¹ According to law professor Paul H. Robinson and psychology professor John M. Darley, despite the assumptions made by those who make and adjudicate the law, the existing social science data does not support the contention that enacting criminal laws deters perpetrators from engaging in the behavior prohibited by those laws.¹⁵² Robinson and Darley explain that the criminal law fails to

¹⁴³ *Id.* at 16.

¹⁴⁴ FEINBERG, *supra* note 127, at 26.

¹⁴⁵ HUSAK, *supra* note 132, at 145.

¹⁴⁶ As Braithwaite and Pettit note, however, the intention is not just to deter or change behavior, but to make people understand that the intended action is morally wrong. BRAITHWAITE & PETTIT, *supra* note 128, at 88–89.

¹⁴⁷ SCHONSHECK, *supra* note 129, at 68. For an action to be criminalized, Schonscheck explains, the proposal must pass through three filters: the principles filter (does the state have the moral authority to criminalize the act?); the presumptions filter (can the incidence of the act be sufficiently reduced by some action less coercive or intrusive than criminalization?); and the pragmatics filter (what are the costs and benefits of enacting and enforcing a criminal statute?). *Id.* at 16–17.

¹⁴⁸ HUSAK, *supra* note 132, at 145.

¹⁴⁹ *See id.*

¹⁵⁰ *See, e.g.,* N.J. STAT. ANN. § 2C:25-18 (2015) ("The Legislature further finds and declares that even though many of the existing criminal statutes are applicable to acts of domestic violence, previous societal attitudes concerning domestic violence have affected the response of our law enforcement and judicial systems, resulting in these acts receiving different treatment from similar crimes when they occur in a domestic context. . . . It is further intended that the official response to domestic violence shall communicate the attitude that violent behavior will not be excused or tolerated. . . .").

¹⁵¹ HUSAK, *supra* note 132, at 145 ("Although this condition may seem trivial, it jeopardizes an enormous amount of criminal legislation."). This rigorous standard is essential to Husak's project. *Id.* ("It is hard to think of a single innovation that would have a more profound impact on the phenomenon of overcriminalization.").

¹⁵² Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 173 (2004). *See also* Fagan & Mearns, *supra* note 140, at 181–82 ("Empirical evidence on the deterrent effects of punishment remains speculative and inconclusive, and the ability of formal punishment alone

deter in part because perpetrators are generally unaware of the legal rules designed to prevent them from engaging in criminal conduct.¹⁵³ Moreover, even if they do know the rules, the cost-benefit analysis perpetrators engage in usually leads them to believe that violation of those rules is only minimally risky, because the potential for punishment seems slight or remote.¹⁵⁴ Finally, even if a perpetrator both knows the rules and believes that the costs of violating those rules outweigh the benefits, that perpetrator may still be unable to employ that knowledge to deter criminal behavior.¹⁵⁵ Because the evidence shows how unlikely it is that a perpetrator will meet each of these requirements, Robinson and Darley conclude, “it will be the unusual instance in which the doctrine can ultimately influence conduct.”¹⁵⁶

The evidence that criminalizing domestic violence has had a deterrent effect is equivocal. The last forty years have afforded the conditions for a kind of natural experiment testing the hypothesis that criminalization deters domestic violence. As noted above, prior to the late 1970s, police largely declined to charge violations of the law in assaults and other crimes involving intimate partners.¹⁵⁷ Beginning in the 1980s, states began both to utilize existing criminal laws (like assault) in cases involving intimate partner violence and to pass laws specifically intended to target domestic violence.¹⁵⁸ While rates of domestic violence dropped between 1994 and 2000, that decrease coincided with an overall decrease in the crime rate and cannot be specifically attributed to the more stringent policing of domestic violence.¹⁵⁹ From 2000 to 2010, rates of domestic violence fell less than the decrease in the overall crime rate, suggesting that perpetrators of domestic violence were less deterred than criminals committing other types of crimes.¹⁶⁰ Why rates have stayed high is unclear; it is certainly possible that reporting of domestic violence increased, for instance, leading to higher rates. Whatever the reason, studies have failed to find that the existence of laws specifically targeting domestic violence deters the behavior.¹⁶¹ Studies have found that arrest

to deter crime appears to be quite limited.”); KELLY, *supra* note 9, at 330. There is a difference, of course, between asking whether the criminal law itself deters and whether criminal punishment deters; that question will be considered in Part III, *infra*.

¹⁵³ Robinson & Darley, *supra* note 152, at 174.

¹⁵⁴ *See id.*

¹⁵⁵ *See id.* Robinson and Darley explain that the inability to use information about costs and benefits may be related to “social, situational, or chemical influences.” *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *See supra* text accompanying notes 30–37.

¹⁵⁸ *See supra* text accompanying notes 39–53.

¹⁵⁹ CATALANO, *supra* note 6, at 1.

¹⁶⁰ *Id.*; *see generally* Sylvia Walby et al., *Is Violent Crime Increasing or Decreasing? A New Methodology to Measure Repeat Attacks Making Visible the Significance of Gender and Domestic Relations*, BRIT. J. CRIMINOLOGY (2015), <http://bjc.oxfordjournals.org/content/early/2015/12/31/bjc.azv131.full.pdf> [<https://perma.cc/8RCZ-BCL2>] (arguing that notwithstanding claims that the violent crime rate has fallen, violent crime and domestic violence against women in England and Wales has been increasing since 2009 and that current methods of measurement do not capture crime rates accurately).

¹⁶¹ *See* Frank A. Sloan et al., *Deterring Domestic Violence: Do Criminal Sanctions Reduce Repeat Offenders?*, 46 J. RISK & UNCERTAINTY 51, 53 (2013). The failure to

in cases of domestic violence has effects on recidivism ranging from modest to nonexistent,¹⁶² and that for some groups of people, arrest can exacerbate violence.¹⁶³ One study found that the relationship between arrest for domestic violence and future violence was attributable entirely to pre-arrest differences in risk of offending.¹⁶⁴ Studies on the deterrent effect of prosecution on future violence are equivocal. At least one study has found that conviction has some effect on recidivism, but notes that the deterrent value may disappear when ongoing monitoring and other provisions to ensure accountability are not part of the sentence.¹⁶⁵ While some studies find that jail time or other sentencing options have no effect on recidivism,¹⁶⁶ others have found that the imposition of more severe sanctions (jail time plus continued monitoring post-incarceration) may deter future violence.¹⁶⁷ The failure to find a strong deterrent effect as a result of the criminalization of domestic violence could be attributed to a number of sources. First, inconsistent enforcement of domestic violence laws could make it difficult to detect deterrent effects.¹⁶⁸ Even in jurisdictions that have adopted laws mandating arrest in domestic violence cases, those laws are inconsistently enforced.¹⁶⁹ One study attributes criminalization's lack of a deterrent effect to the combination of the low probability of arrest for domestic violence and the high probability that pros-

deter may be a result of inconsistent enforcement of criminal domestic violence statutes; that issue will be addressed in Part III, *infra*.

¹⁶² See, e.g., Richard B. Felson et al., *Police Intervention and the Repeat of Domestic Assault*, 43 CRIMINOLOGY 563, 580 (2005); CHRISTOPHER D. MAXWELL ET AL., U.S. DEPT' OF JUSTICE, NAT'L INST. OF JUSTICE, THE EFFECTS OF ARREST ON INTIMATE PARTNER VIOLENCE: NEW EVIDENCE FROM THE SPOUSE ASSAULT REPLICATION PROGRAM 2 (2001), <http://www.ncjrs.gov/pdffiles1/nij/188199.pdf> [<https://perma.cc/GJ6D-EEVX>]; Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 139 (1992); see generally Lois A. Ventura & Gabrielle Davis, *Domestic Violence: Court Case Conviction and Recidivism*, 11 VIOLENCE AGAINST WOMEN 255 (2005) (summarizing research).

¹⁶³ See Sherman et al., *supra* note 45, at 680.

¹⁶⁴ See N. Zoe Hilton et al., *The Effect of Arrest on Wife Assault Recidivism: Controlling for Pre-Arrest Risk*, 34 CRIM. JUST. & BEHAVIOR 1334, 1340 (2007).

¹⁶⁵ See Ventura & Davis, *supra* note 162, at 273.

¹⁶⁶ See Melissa Gross et al., *The Impact of Sentencing Options on Recidivism Among Domestic Violence Offenders: A Case Study*, 24 AM. J. CRIM. JUST. 301, 309 (2000); Sloan et al., *supra* note 161, at 77.

¹⁶⁷ See Amy Thistlethwaite et al., *Severity of Dispositions and Domestic Violence Recidivism*, 44 CRIME & DELINQ. 388, 396 (1998); see also Christopher M. Murphy et al., *Coordinated Community Intervention for Domestic Abusers: Intervention System Involvement, and Criminal Recidivism*, 13 J. FAM. VIOLENCE 263, 273 (1998). Note, however, that the Murphy study did not find statistically significantly lower rates of recidivism among those who were convicted and placed on probation. *Id.*

¹⁶⁸ The three "essential elements" of deterrence are "(1) certainty of apprehension, (2) celerity of prosecution, and (3) severity of sanctions imposed." EVE BUZAWA ET AL., RESPONSE TO DOMESTIC VIOLENCE IN A PRO-ACTIVE COURT SETTING 1 (1999), <http://www.ncjrs.gov/pdffiles1/nij/grants/181427.pdf> [<https://perma.cc/MHJ2-3Z8J>].

¹⁶⁹ See Victoria Frye et al., *Dual Arrest and Other Unintended Consequences of Mandatory Arrest in New York City: A Brief Report*, 22 J. FAM. VIOLENCE 397, 398 (2007).

ecutors will decline to bring the case forward.¹⁷⁰ Without the credible threat of punishment as a result of violation of the law, deterrence is unlikely.¹⁷¹

Second, the main measure of deterrence in cases of domestic violence is problematic. Deterrence and prevention have traditionally been measured through recidivism.¹⁷² Studies of recidivism generally ask whether an offender has been re-arrested rather than determining whether intimate partner violence has recurred in the relationship.¹⁷³ Because the criminal law defines domestic violence almost exclusively as physical violence and threats of physical violence,¹⁷⁴ new arrests for intimate partner violence may capture only a fraction of the violence within a relationship. Using re-arrest as a proxy for re-abuse misses non-criminal forms of violence like emotional abuse that may be as or more debilitating than physical violence.¹⁷⁵ Moreover, people subjected to intimate partner violence may choose not to report new offenses to police or prosecutors if their initial interactions with the criminal legal system were not positive.¹⁷⁶ Although recidivism can also be measured through victim report, intimate partner violence is routinely under-reported,¹⁷⁷ particularly when the victim does not want further involvement with formal systems. Nonetheless, at least one study concludes that even in a jurisdiction that aggressively enforces domestic violence laws, recidivism rates were high, in large measure because criminalization failed to deter “hard-core offenders.”¹⁷⁸

¹⁷⁰ See Sloan et al., *supra* note 161, at 75–76; see also BUZAWA ET AL., *supra* note 168, at 29 (explaining that “[i]f batterers are only *sporadically* arrested and arrest is in turn followed by the virtual certainty of rapid case dismissal, we would predict little sustained impact on future violence of hard core offenders with a prior criminal record.”).

¹⁷¹ See Sloan et al., *supra* note 161, at 77; see also COKER ET AL., *supra* note 101, at 16 (quoting survey respondent: “Last time they arrested him, he was released within a week because the jail was too full. He came home, still furious with me about calling 911, and he beat me bloody. Why would I call again?”).

¹⁷² See generally, Gross et al., *supra* note 166; Sloan et al., *supra* note 161; Ventura & Davis, *supra* note 162, at 255 (all measuring deterrence through recidivism).

¹⁷³ In one study, researchers found recidivism rates of 22.1% when using official reports and 49.2% when asking victims whether there had been any new violence. See BUZAWA ET AL., *supra* note 168, at 146.

¹⁷⁴ See GOODMARK, *supra* note 20, at 40.

¹⁷⁵ *Id.* at 41–42. One potential solution to this problem would be to criminalize these other forms of abuse as well. This article, not surprisingly, makes no such call. In 2015, however, England criminalized controlling or coercive behavior, which covers forms of abuse that seriously limit the daily activities of the victim. See HOME OFFICE, CONTROLLING OR COERCIVE BEHAVIOR IN AN INTIMATE OR FAMILY RELATIONSHIP: STATUTORY GUIDANCE, 2015, at 4 (2015).

¹⁷⁶ See BUZAWA ET AL., *supra* note 168, at 117, 133, 152–53.

¹⁷⁷ See *id.* at 136; see also LYNN LANGTON ET AL., U.S. DEP’T OF JUSTICE, Victimizations Not Reported to Police, 2006–2010, at 4 (2012), <http://www.bjs.gov/content/pub/pdf/vnrp0610.pdf> [<https://perma.cc/6PUC-6MSD>] (finding that 46% of incidents of intimate partner violence are not reported to police).

¹⁷⁸ BUZAWA ET AL., *supra* note 168, at 164–65. But see *id.* at 166 (arguing that the system may have deterred potential offenders, resulting in the overrepresentation of “hard-core recidivists” in the sample).

Finally, criminalization may not deter because criminal punishment “does not target the reasons individuals engage in crime, and therefore punishment does not alter behavior.”¹⁷⁹ This lack of understanding of why offenders engage in crime is a particular problem in the context of domestic violence. The battered women’s movement has long assumed that men abuse in order to exert power and control over their partners, building this belief into the intervention programs it created to address men’s use of violence.¹⁸⁰ But as pioneering advocate Ellen Pence noted shortly before her death, whether men actually intend to exert power and control, or whether power and control is instead a byproduct of abuse, is an open question. Pence noted that neither the women nor the men with whom she worked identified power and control as the goal of abuse.¹⁸¹ By assuming that obtaining power and control is the reason men engage in domestic violence, anti-violence advocates have failed to probe the other potential causes of that violence, leading to ineffective interventions.¹⁸²

3. *Cost/benefit Analysis*

Many of the theories require a cost/benefit analysis to establish that criminalization of a particular action would do more good than harm. Packer, for example, would require that the social gains of preventing the criminalized conduct (discounted by the likelihood of successful prevention) be balanced against the moral and practical costs of criminalization.¹⁸³ Feinberg would permit criminalization only when no other means of preventing harm exists “that is equally effective at no greater cost to other values.”¹⁸⁴ Schonsheck’s “pragmatics filter” similarly requires that the social benefits

¹⁷⁹ KELLY, *supra* note 9, at 65.

¹⁸⁰ Ellen Pence, *Some Thoughts on Philosophy*, in COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND 25, 28–29 (Melanie F. Shepard & Ellen L. Pence eds., 1999).

¹⁸¹ *Id.*

¹⁸² See, e.g., Goodmark, *supra* note 58 (arguing that men’s generalized entitlement to use violence rather than a focus on their partners specifically may be responsible for intimate partner abuse); Kate Walker et al., *Desistance from Intimate Partner Violence: A Conceptual Model and Framework for Practitioners Managing the Process of Change*, 30 J. INTERPERSONAL VIOLENCE 2, 11 (2014) (offering other triggers for abuse); Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender*, 11 VIOLENCE AGAINST WOMEN 38, 43 (2005) (identifying alternative intersections of systemic power that potentially inform and motivate intimate partner violence). For a parallel critique of the under-theorizing of intimate partner violence in LGBT relationships, see generally Nicola Brown, *Stories from Outside the Frame: Intimate Partner Abuse in Sexual-Minority Women’s Relationships with Transsexual Men*, 17 FEMINISM & PSYCH. 373 (2007); see also Adele M. Morrison, *Queering Domestic Violence to “Straighten Out” Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law’s Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN’S STUD. 81 (2003); Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender*, 11 VIOLENCE AGAINST WOMEN 38, 43 (2005).

¹⁸³ PACKER, *supra* note 126, at 250.

¹⁸⁴ FEINBERG, *supra* note 127, at 26.

of enforcing a criminal law outweigh the social costs.¹⁸⁵ And while Husak does not explicitly incorporate a cost/benefit analysis into his theory, he does require that criminalization not make a problem worse.¹⁸⁶ Stuart P. Green argues that a cost/benefit analysis can be read into Husak's theory via his requirement that the proposed statute directly advance a substantial state interest.¹⁸⁷ Those costs, he argues, can be direct or indirect—for example, “when family members suffer because a parent or spouse is in prison, or when an offender has difficulty finding a job after release from prison.”¹⁸⁸ Green's example may be inapposite here, however. The costs of criminalization are distinct from the costs of incarceration. Put differently, this facet of the inquiry should first be focused on the costs of *any* consequence of criminalization versus on the specific consequence of incarceration.

a. *The Costs of Criminalization*

Although criminalization and incarceration are often conflated, criminalization has its own particular set of costs. Being labeled as a criminal brings both social stigma and a host of restrictions, including, for example, denial of the right to vote; ineligibility for public housing, federal welfare benefits, military service, and education grants; and barriers to finding employment.¹⁸⁹ For undocumented people, convictions can result in deportation.¹⁹⁰ Just being arrested for a domestic violence offense can create a record that is easily accessible by the public at large through on-line court information systems.¹⁹¹ Criminalization invites surveillance of offenders

¹⁸⁵ SCHONSHECK, *supra* note 129, at 26. Schonsheck notes that the costs of criminalization, including the costs of law enforcement, are often “ignored, or are assumed to be negligible, and then neglected.” *Id.* at 8. He argues that the proponents of criminal law must answer questions like, “[w]hat ‘side-effects’ will result from criminalization—and will the ‘costs’ of these side effects be so high that they exceed the expected ‘benefits’ of criminalization? . . . What social resources will be devoted to enforcement efforts—and will this be a wise expenditure of scarce criminal-justice dollars?” *Id.* at 10–11. Aya Gruber calls for critical theorists to employ a similar type of analysis, which she calls a distributional analysis, when considering proposals that would expand the reach of the criminal law. Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 *FORDHAM L. REV.* 3211, 3214 (2015).

¹⁸⁶ HUSAK, *supra* note 132, at 147. Husak uses the example of drug criminalization to argue this point, explaining that “drug prohibitions may cause more crime, violence, and overall disutility than drug use itself.” *Id.* I will make the same argument about the criminalization of domestic violence in Part III, *infra*.

¹⁸⁷ “A proposed criminal statute might directly advance a substantial state interest and be no more extensive than necessary to achieve such purpose, and yet its costs might still outweigh its benefits.” Green, *supra* note 110, at 744.

¹⁸⁸ *See id.*

¹⁸⁹ *See* Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 *N.Y.U. REV. L. & SOC. CHANGE* 585, 586–87 (2006); *see also* GOTTSCHALK, *supra* note 76, at 242–43 (calling these penalties “acts of ‘civil death’ that push [offenders] further to the political, social, and economic margins.”).

¹⁹⁰ *See* Pinard & Thompson, *supra* note 189, at 587.

¹⁹¹ For an example of such a database, see MARYLAND JUDICIARY CASE SEARCH, <http://casesearch.courts.state.md.us/casesearch/> [https://perma.cc/L4M7-9FP3].

through community monitoring and probation, even if offenders are not incarcerated—and sometimes, even if they are not ultimately convicted. Diversion programs and other conditions imposed in lieu of adjudication allow the state to monitor offenders' behavior in exchange for a dismissal of charges if offenders meet enumerated conditions.¹⁹²

When using incarceration as the benchmark, however, the costs of criminalization are exponentially higher. Not only does incarceration not deter future violence, time in prison may actually drive further offending.¹⁹³ Incarceration, particularly as practiced in the United States, has significant costs. Incarceration creates or reinforces conditions that lead to greater recidivism: dehumanization of inmates, decreased employment, destruction of communities, and prevention of structural investment.

Penal facilities in the United States are dehumanizing institutions, utilizing practices of punishment and control eschewed by most developed nations.¹⁹⁴ Law professor Jonathan Simon refers to these facilities as “waste management prison[s],” arguing that such facilities are not intended to transform prisoners in any way, but are meant only to warehouse criminal offenders.¹⁹⁵ Incarceration in these kinds of facilities reinforces the bitterness of those subjected to such treatment.¹⁹⁶

Incarceration helps to explain “why ex-prisoners earn less, are employed less, and toil at ‘bad jobs characterized by high turnover and little chance of moving up the income ladder’ than people from the same demo-

¹⁹² Diversion was famously used in the case of former NFL football player Ray Rice, who was permitted to enter a pre-trial diversion program after knocking his then-fiancée, Janay Palmer, unconscious in an Atlantic City, New Jersey casino elevator. Rice successfully completed the diversion program and the charges against him were dropped. Aaron Wilson, *Ray Rice's Domestic Violence Charges Dismissed by New Jersey Judge*, BALTIMORE SUN (May 21, 2015), <http://www.baltimoresun.com/sports/ravens/ravens-insider/bal-ray-rice-completes-pretrial-intervention-in-domestic-violence-case-in-new-jersey-charges-being-dismi-20150521-story.html> [<https://perma.cc/ES2Z-43CL>].

¹⁹³ See KELLY, *supra* note 9, at 330; see also GOTTSCHALK, *supra* note 76, at 177 (discussing longer sentences potentially increasing likelihood of further offending). But see William Rhodes et al., *Following Incarceration, Most Released Offenders Never Return to Prison*, 62 CRIME & DELINQ. 1003, 1020 (2014) (arguing that most offenders never return to prison). A woman subjected to abuse raised this issue in a recent case in the United Kingdom, asking that her partner not be incarcerated because prison would be “destructive” for him. Geoff Bennett, *Woman who Suffered Domestic Violence Urges Judge to Give Her Former Partner Help Instead of Prison*, BRISTOL POST (Feb. 14, 2016), <http://www.bristolpost.co.uk/Woman-suffered-domestic-violence-urges-judge/story-28723483-detail/story.html> [<https://perma.cc/J9FL-HJYL>].

¹⁹⁴ See GOTTSCHALK, *supra* note 76, at 135; see also Mary Bosworth & Sophie Palmer, *Prisons: Securing the State*, in ROUTLEDGE HANDBOOK OF CRITICAL CRIMINOLOGY 488, 496 (Walter S. DeKeseredy & Molly Dragiewicz eds., 2012) (“Prisons are places of suffering, punishment and confinement.”). Among the “demeaning and degrading” practices are the use of attack dogs to remove inmates from their cells, regular (and often unnecessary) strip and body cavity searches, serious overcrowding within cells, and providing inmates only with inedible “food bricks” for sustenance. GOTTSCHALK, *supra* note 76, at 135–36.

¹⁹⁵ SIMON, *supra* note 78, at 142.

¹⁹⁶ See COMACK & BALFOUR, *supra* note 86, at 149 (citation omitted).

graphic and socioeconomic background who have never been sent to prison.”¹⁹⁷ Prior to being jailed, two-thirds of male inmates are employed, and half of them serve as the primary source of support for their families. The children of incarcerated fathers are more likely to experience homelessness; their mothers are more likely to receive public assistance.¹⁹⁸ Upon release, formerly imprisoned men both work and earn less.¹⁹⁹ Having been incarcerated poses a significant impediment to finding employment for white men and a “nearly insurmountable barrier” for men of color.²⁰⁰ Incarceration depresses both the wages and annual income of former inmates.²⁰¹ As criminologist Elliott Currie concludes,

[T]he experience of incarceration, especially in a society that already suffers from a hollowed opportunity structure and thin social supports, is often a disabling one that sharply reduces the number of prospects of a good job and decent earnings—and thus serves in practice to cement great numbers of former offenders into a condition of permanent marginality.²⁰²

Former inmates are frequently released into communities whose stability is challenged by the loss of their members to prison. In communities already challenged by poverty and high unemployment rates, social networks are essential in providing support.²⁰³ But the disappearance of significant numbers of individuals who should be raising children and contributing to the local economy undermines community strength.²⁰⁴ “[T]hese ongoing removals, isolations and relocations can prove a formidable barrier to building a stable, close community in which people look out for their neigh-

¹⁹⁷ GOTTSCHALK, *supra* note 76, at 91.

¹⁹⁸ See NATIONAL RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 234, 267–68 (Jeremy Travis et al. eds., 2014).

¹⁹⁹ See KELLY, *supra* note 9, at 64. Sixty percent of former prisoners experience long-term unemployment, and employed former prisoners earn 40% less than those who have not been incarcerated. Chettiar, *supra* note 8.

²⁰⁰ GOTTSCHALK, *supra* note 76, at 244. One study found that only 5% of African American applicants for employment with criminal records received callbacks for interviews. *Id.* See generally DEVAH PAGER, *MARKED: RACE, CRIME AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007) (discussing post-incarceration unemployment, race, and recidivism).

²⁰¹ See GOTTSCHALK, *supra* note 76, at 251.

²⁰² Elliott Currie, *Violence and Social Policy*, in *ROUTLEDGE HANDBOOK OF CRITICAL CRIMINOLOGY*, *supra* note 194, at 465, 472.

²⁰³ See Donna Coker & Ahjané Macquoid, *Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 585, 607–08 (2015).

²⁰⁴ *Id.* at 608. Some communities contain “million dollar blocks”—places in which taxpayers spend more than a million dollars in total investments to incarcerate the residents of one city block. Emily Badger, *How Mass Incarceration Creates “Million Dollar Blocks” in Poor Neighborhoods*, WASH. POST (July 30, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/07/30/how-mass-incarceration-creates-million-dollar-blocks-in-poor-neighborhoods/> [https://perma.cc/T9KN-TTAQ].

bors.”²⁰⁵ When members of communities know less about each other, their capacity for understanding each other’s behavior decreases. Given that lack of familiarity, the community is less able to address conflicts when they occur. The state, however, is ready and able to take these conflicts out of the community’s hands, and when community relationships are frayed, the community is open to allowing the state to assume responsibility.²⁰⁶ In such communities, informal social controls are undermined, creating conditions that are ripe for violence.²⁰⁷ By ceding responsibility for conflict resolution, communities lose the opportunity to discuss and recalibrate the norms by which members of the community should live²⁰⁸—including norms around non-violence.

Moreover, investment in prisons diverts resources away from the economically disadvantaged communities that many offenders are released into, depriving those communities of funding for education, health care, employment assistance, housing, and other services that could benefit ex-offenders and stabilize communities.²⁰⁹ Such services are more likely to prevent further violence than doing time in a “waste management prison.”

The costs of incarceration are similarly high in the specific context of domestic violence. As noted above, incarceration depresses employment opportunities for former offenders. Rates of domestic violence correlate with male unemployment; the more often a man is unemployed, the higher the rate of violence.²¹⁰ Researchers have found a strong relationship between both subjective reports and objective measures of economic strain and intimate violence against women.²¹¹ Moreover, rates of domestic violence are higher in economically disadvantaged neighborhoods,²¹² which researchers

²⁰⁵ SCHENWAR, *supra* note 88, at 48.

²⁰⁶ *See* Christie, *supra* note 117, at 6.

²⁰⁷ *See* Currie, *supra* note 202, at 472.

²⁰⁸ *See* Christie, *supra* note 117, at 8.

²⁰⁹ *See* Currie, *supra* note 202, at 472. In theory, justice reinvestment efforts, which sought to decrease the prison population and invest the savings in communities devastated by mass incarceration, were intended to address the kinds of community needs that lead to criminal behavior. In practice, Marie Gottschalk writes, “Most of the money that has been saved has been channeled into community corrections and law enforcement agencies.” GOTTSCHALK, *supra* note 76, at 99.

²¹⁰ *See* MICHAEL L. BENSON & GREER L. FOX, CONCENTRATED DISADVANTAGE, ECONOMIC DISTRESS, AND VIOLENCE AGAINST WOMEN IN INTIMATE RELATIONSHIPS II-3-5 to II-3-6 (2004); *see also* Jennifer E. Copp et al., *Neighborhood Disadvantage, Strain, and Intimate Partner Violence: Linking Structural Context to Emotional Response* (Bowling Green Univ. Ctr. for Family & Demographic Res., Working Paper No. 2014-004, 2014), <http://papers.ccpr.ucla.edu/papers/PWP-BGSU-2014-004/PWP-BGSU-2014-004.pdf> [<https://perma.cc/M89S-Y2QX>] (citing studies).

²¹¹ *See* BENSON & FOX, *supra* note 210, at II-3-5; *see also* Greer Litton Fox & Michael L. Benson, *Household and Neighborhood Contexts of Intimate Partner Violence*, 121 PUB. HEALTH REP. 419, 425 (2006).

²¹² *See* BENSON & FOX, *supra* note 210, at II-3-5; *see also* Coker & Macquoid, *supra* note 203, at 611 n.157 (summarizing studies); ERIKA HARRELL ET AL., U.S. DEPT OF JUSTICE, HOUSEHOLD POVERTY AND NONFATAL VIOLENT VICTIMIZATION, 2008-2010 3 (2014) (finding that rates of intimate partner violence for households at or below the poverty level are twice that of households at 101-200% of the poverty level).

believe may be “a product of the loss of social controls in a community and the weakening of social ties. When residents have weak ties with their neighbors, they are unlikely to effectively shape social norms in the neighborhood.”²¹³

Most important, though, is how the violence that offenders experience in prison is recycled in their interpersonal relationships. The irony of incarceration is that individuals being punished for violence are sent to places where they are likely to be perpetrators or victims of, or witnesses to, violence.²¹⁴ 10 to 20% of prisoners report being physically abused in prison.²¹⁵ 10% of state prisoners report being sexually abused.²¹⁶ The trauma of victimization has serious consequences, including post-traumatic stress disorder (PTSD) and other mental health issues.²¹⁷ Witnessing violence in prison can also trigger symptoms of trauma.²¹⁸ Former prisoners bring this trauma with them into their relationships in the community, with harmful consequences; perpetration of domestic violence and PTSD are strongly correlated.²¹⁹

Moreover, as law professor Angela Harris has argued, “relying on criminal justice to punish the perpetrators of violence against women and sexual minorities in the long run perpetuates more gender violence.”²²⁰ Prisons reinforce and magnify some of the destructive ideologies that drive inti-

²¹³ Coker & Macquoid, *supra* note 203, at 612 (citations omitted). My thanks to Donna Coker for linking this research.

²¹⁴ As Mark Kleiman writes, “[F]ew criminals avoid victimization, and most were victims before becoming perpetrators. Victimization is criminogenic.” MARK A. R. KLEIMAN, *WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT* 3–4 (2009).

²¹⁵ Nancy Wolff et al., *Physical Violence Inside Prisons: Rates of Victimization*, 34 *CRIM. JUST. & BEHAV.* 588, 589 (2007).

²¹⁶ ALLEN J. BECK & CANDACE JOHNSON, U.S. DEP’T OF JUSTICE, *SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS*, 2008, at 8 (2012), <http://www.bjs.gov/content/pub/pdf/svrfsp08.pdf> [<https://perma.cc/Z9AB-G7XK>]. Two hundred nine thousand inmates were subjected to rape and/or sexual abuse in 2008. GOTTSCHALK, *supra* note 76, at 137.

²¹⁷ Coker & Macquoid, *supra* note 203, at 603–04. “Criminologists have long maintained that men who are victimized by sexual assault in prison often leave prison far more violent and anti-social than when they went inside.” M. Dyan McGuire, *The Impact of Prison Rape on Public Health*, 3 *CAL. J. HEALTH PROMOTION* 72, 76 (2005). Exposure to trauma has implications for physical health as well. See generally Wendy D’Andrea et al., *Physical Health Problems After Single Trauma Exposure: When Stress Takes Root in the Body*, 17 *J. AM. PSYCHIATRIC NURSES ASS’N* 378 (2011) (discussing how exposure to trauma has implications for physical as well as mental health).

²¹⁸ Coker & Macquoid, *supra* note 203, at 602.

²¹⁹ See Coker & Macquoid, *supra* note 203, at 612–13. See generally Casey T. Taft et al., *Posttraumatic Stress Disorder and Intimate Relationship Problems: A Meta-Analysis*, 79 *J. CONSULTING & CLINICAL PSYCHOL.* 22 (2011) (discussing meta-analysis of empirical studies revealing associations between PTSD on the one hand and intimate relationship discord and intimate partner physical and psychological aggression perpetration on the other).

²²⁰ Harris, *supra* note 24, at 64; see also SUSAN STARR SERED & MAUREEN NORTON-HAWK, *CAN’T CATCH A BREAK: GENDER, JAIL, DRUGS, AND THE LIMITS OF PERSONAL RESPONSIBILITY* 159 (2014) (“The choice to leave an abusive boyfriend or husband does not preclude a subsequent abusive relationship in a community in which large numbers of men have spent time in the hypermasculine incubators of jails and prisons.”).

mate partner violence. Prison culture reflects the values and norms of the outside society, including norms around the construction of masculinity.²²¹ Inmates, like other men, often construct masculinity in opposition to the feminine or feminized.²²² The need to be seen as powerful (and therefore not feminine) is an essential component of hegemonic masculinity.²²³ Violence against women, or those perceived as feminine, reinforces the hegemonic masculine identity.²²⁴ Prison violence, particularly sexual violence, is an assertion of masculinity; sexual assault “redefines [the victim] as a ‘female’ in this perverse subculture.”²²⁵ Prisoners bring these problematic notions of masculinity into the prison, have experiences that further shape, warp, and reproduce those norms, and return to their communities with those ideas—a process that SpearIt has called “cycles of destructive masculinity.”²²⁶ Those notions of masculinity, in turn, color the relationships that former prisoners have on the outside, “putting women at great risk of becoming the victims of the rage and frustration of men immersed in prison culture.”²²⁷ Incarceration does not help offenders to value others or create empathy—the necessary preconditions to preventing further harm.²²⁸ Instead, offenders report that prisons create an atmosphere where offenders can ignore or repress the effects of one’s actions on others,²²⁹ making future violence more likely.

²²¹ See SpearIt, *Gender Violence in Prison & Hyper-masculinities in the ‘Hood: Cycles of Destructive Masculinity*, 37 WASH. U. J.L. & POL’Y 89, 98 (2011); see also COMACK & BALFOUR, *supra* note 86, at 149 (arguing that prison reinforces patriarchal and misogynist attitudes).

²²² See SpearIt, *supra* note 221, at 106, 119 (explaining that inmates maintain their masculine image by avoiding being defined as feminine).

²²³ See Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in SEX, GENDER AND SEXUALITY: THE NEW BASICS, AN ANTHOLOGY 58, 61 (Abby L. Ferber et al. eds., 2009); Ann C. McGinley, *Ricci v. DeStefano: A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 586 (2010).

²²⁴ See Walter S. DeKeseredy & Martin D. Schwartz, *Masculinities and Interpersonal Violence*, in HANDBOOK OF STUDIES ON MEN AND MASCULINITIES 353, 357–58 (Michael S. Kimmel et al. eds., 2005); see also Tracy Xavia Karner, *Engendering Violent Men: Oral Histories of Military Masculinity*, in MASCULINITIES AND VIOLENCE 197, 198 (Lee H. Bowker ed., 1998) (citing study of veterans showing that “masculinity appears intertwined with violence and aggressive domination”).

²²⁵ Gordon James Knowles, *Male Prison Rape: A Search for Causation and Prevention*, 38 HOW. J. CRIM. JUST. 267, 273 (1999); see also SpearIt, *supra* note 221, at 113–14.

²²⁶ SpearIt, *supra* note 221, at 89, 133.

²²⁷ SERED & NORTON-HAWK, *supra* note 220 at 154; see also Harris, *supra* note 24, at 32 (discussing SpearIt, *supra* note 221, at 131–34). Rigid conceptions of gender and masculinity are also often underlie violence against gender non-conforming people. See, e.g., Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 393 (2001); Tarynn M. Witten & A. Evan Eyler, *Hate Crimes and Violence Against the Transgendered*, 11 PEACE REV. 461, 461 (1999).

²²⁸ KELLY, *supra* note 9, at 84 (explaining how lack of empathy can be criminogenic).

²²⁹ SCHENWAR, *supra* note 88, at 67 (quoting Lacino Hamilton, an inmate in Michigan).

b. The Benefits of Criminalization

Weighed against these costs are the actual and potential benefits of criminalization. Criminalization brought vast resources to the anti-violence movement. In 1980, federal funding for programs designed to improve the legal system's response to domestic violence ended.²³⁰ The Family Violence Prevention and Services Act continued to allocate funding for shelter and social services programs designed to raise awareness of and deliver training on domestic violence, but that funding did not benefit law enforcement.²³¹ With the re-casting of domestic violence as criminal problem through the Violence Against Women Act, however, millions of dollars became available to police, prosecutors, courts, and community advocacy agencies. In its 2016 budget submission, the Office on Violence Against Women, which administers VAWA, requested \$473,500,000²³²; its 2015 appropriation was \$430,000,000.²³³ The majority of that funding flows to the criminal legal system, primarily through VAWA's two largest grant programs, the Service-Training-Officers-Prosecutors (STOP) program and Improving Criminal Justice Responses to Sexual Assault, Domestic Violence, Dating Violence, and Stalking, or Improving Criminal Justice Response for short.²³⁴ Additional funding is allocated to law enforcement through other VAWA programs (for example, through grants funding services to victims of sexual assault and grants improving the systemic response to intimate partner violence for various marginalized communities).²³⁵ Anti-violence advocates receive significant amounts of funding through the criminal system provisions of VAWA as well. Encouraging collaboration between anti-violence advocates and law enforcement is an explicit goal under VAWA, and many of VAWA's grants require the participation (and funding) of community partners.²³⁶ Prioritizing the criminal legal response to domestic violence is directly responsible for bringing significant funding to the anti-violence movement.²³⁷

Criminalization could deter an individual offender from engaging in future violence (a claim addressed above) or serve as a general deterrent by

²³⁰ See GOODMARK, *supra* note 20, at 18–19.

²³¹ See *id.*

²³² U.S. DEP'T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, FY 2016 CONG. BUDGET SUBMISSION 12 (Feb. 2015).

²³³ *Id.* at 11.

²³⁴ The Office on Violence Against Women requested \$193,000,000 for the STOP program and \$50,000,000 for the Grants to Encourage Arrests program. *Id.* at 12, 14.

²³⁵ See generally *id.* (laying out budget requests of VAWA programs).

²³⁶ I have argued elsewhere that the collaboration required by VAWA has co-opted the anti-violence movement in ways that impair effective advocacy for some populations of women subjected to abuse, notably the partners of police officers. Goodmark, *supra* note 58, at 1223–28.

²³⁷ One could see this as a cost of criminalization as well, given the ways in which federal funding has transformed the nature of the anti-domestic violence movement. See, e.g., G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 282–93 (2005).

sending the message that society will not condone intimate partner violence. On the individual level, criminal laws forbidding intimate partner violence validate the experiences of people subjected to abuse by clearly and unequivocally stating that what has been done to them is wrong. Moreover, criminalization provides a process through which individuals (through the state) can pursue retributive justice and the possibility of vindication, if their claims of abuse are believed.

Criminalization could also increase safety for people subjected to abuse. To the extent that arrest incapacitates their partners, prosecution and conviction result in incarceration, or the criminal court issues an order for the offender to stay away from the victim of a crime of intimate partner violence, immediate safety could be increased.²³⁸ Some people subjected to abuse believe that intervention by the criminal legal system will provide them with protection.²³⁹ People subjected to abuse report that punishments like jail time and probation give them the opportunity to put short- and long-term safety measures into place.²⁴⁰ Regardless of the sentence imposed, some people report experiencing less fear after their partners are convicted.²⁴¹ Although criminalization may have no society-wide impact on safety²⁴², individuals' safety may be enhanced through criminalization.

Ensuring that offenders are held accountable for their actions has long been a central goal of the anti-domestic violence movement.²⁴³ Accountability is often referenced and rarely defined,²⁴⁴ but could require that those who abuse "experience negative consequences of their behavior through punishment, particularly through the authority of the criminal justice system."²⁴⁵ Criminalization provides this sort of accountability. Prosecution and conviction rates for domestic violence have increased significantly over the last twenty years. Recent research suggests that although rates vary among jurisdic-

²³⁸ See *supra* text accompanying notes 60–65. *But see* GOODMARK, *supra* note 20, at 84–88 (describing cases in which criminal intervention failed to provide safety).

²³⁹ See Paula C. Barata, *Abused Women's Perspectives on the Criminal Justice System's Response to Domestic Violence*, 31 *PSYCHOL. WOMEN Q.* 202, 208–09 (2007); Erez & Belknap, *supra* note 106, at 263.

²⁴⁰ See Bell et al., *supra* note 60, at 77; *see also* Ruth E. Fleury, *Missing Voices: Patterns of Battered Women's Satisfaction with the Criminal Legal System*, 8 *VIOLENCE AGAINST WOMEN* 181, 199 (2002) (explaining that women whose partners were convicted were more satisfied with the court system).

²⁴¹ See R. EMERSON DOBASH ET AL., *CHANGING VIOLENT MEN* 144 (2000).

²⁴² See McDermott & Garofalo, *supra* note 106, at 1262; Snider, *supra* note 35, at 2.

²⁴³ See, e.g., BARBARA J. HART, *SAFETY AND ACCOUNTABILITY: THE UNDERPINNINGS OF A JUST JUSTICE SYSTEM* 3 (1998), http://www.ncdsv.org/images/PCADV_SafetyAndAccountabilityTheUnderpinningsOFAJustJusticeSystem_5-1998.pdf [<https://perma.cc/WK6R-JW66>].

²⁴⁴ Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 *KY. L.J.* 613, 617 (2004–05).

²⁴⁵ Eric S. Mankowski et al., *Collateral Damage: An Analysis of the Achievements and Unintended Consequences of Batterer Intervention Programs and Discourse*, 17 *J. FAM. VIOLENCE* 167, 174 (2002). Offender accountability is also said to contribute to victim empowerment by validating the truthfulness of the victim's claims. See McDermott & Garofalo, *supra* note 106, at 1246.

dictions, about one third of reported domestic violence offenses result in charges (three-fifths in cases where an arrest is made) and that more than half of those prosecutions result in conviction.²⁴⁶ To the extent that accountability correlates with prosecution and conviction²⁴⁷, criminalization increases accountability.

Finally, criminalizing domestic violence has expressive value. As Danielle Citron writes,

Law creates a public set of meanings and shared understandings between the state and the public. It clarifies, and draws attention to, the behavior it prohibits. Law's expressed meaning serves mutually reinforcing purposes. Law educates the public about what is socially harmful. This legitimates harms, allowing the harmed party to see herself as harmed. It signals appropriate behavior. In drawing attention to socially appropriate behavior, law permits individuals to take these social meanings into account when deciding on their actions. Because law creates and shapes social mores, it has an important cultural impact that differs from its more direct coercive effects.²⁴⁸

The early efforts of anti-violence advocates to raise awareness and condemnation of domestic violence centered on ensuring that domestic violence would be treated as a crime like any other.²⁴⁹ Enacting new laws against domestic violence was an important component of that strategy. For better or worse, the social importance of domestic violence has been equated with the level of punishment meted out for the crime.²⁵⁰ Moving away from criminalization, some fear, would signal tacit acceptance of domestic violence and a waning of the state's commitment to protecting people subjected to abuse.

c. Who Bears the Cost? Who Derives the Benefit?

The costs of criminalization are most obviously, but not exclusively, borne by those who commit crimes of intimate partner violence. Those costs

²⁴⁶ Joel H. Garner & Christopher D. Maxwell, *Prosecution and Conviction Rates for Intimate Partner Violence*, 34 CRIM. JUST. REV. 44, 56 (2009).

²⁴⁷ Some would argue that the criminal legal system provides punishment, but not the kind of accountability that results in men taking responsibility for their actions. For discussion addressing that claim, see *infra* text accompanying note 297.

²⁴⁸ Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 407 (2009) (citations omitted). But, as Donna Coker has argued in the context of mandatory arrest, the message sent by criminalizing domestic violence is complex, contested, contextual, and linked to the hearer's attitudes about policing. Coker, *supra* note 3, at 853.

²⁴⁹ See, e.g., HART ET AL., *supra* note 1, at 11 (explaining that the Attorney General's Task Force on Family Violence was focused on developing a "strong, coordinated response to family violence").

²⁵⁰ See McDermott & Garofalo, *supra* note 106, at 1262. They explain, "It is thought that domestic violence is being downplayed as a problem unless it receives responses that are at least as punitive as the ones received for similar types of harm" *Id.*

are disproportionately borne by people of color and low income people, who are most likely to become enmeshed in the criminal legal system and lack the resources to secure private representation or engage services that might prevent them from being incarcerated. The partners of those who abuse also bear the costs, particularly when intervention by the criminal legal system is not the intervention that the person subjected to abuse would have chosen or when they are themselves arrested and prosecuted. Children are both emotionally and economically harmed by parental involvement in the criminal legal system.²⁵¹ Communities bear the costs of lost economic contributions and the weakening of societal bonds. The taxpayer bears the cost of arresting, prosecuting, monitoring, and incarcerating those who are subject to the criminal legal system.

Criminalization most benefits those who feel safer as a result of the intervention but are immune from most of its costs. For those who equate justice with punishment by the criminal legal system, criminalization is the only means of achieving justice.²⁵² Incapacitation (assuming conviction and incarceration) is a benefit in cases where a perpetrator is undeterred by civil protection orders and other non-criminal interventions. Given the funding priorities in this area, criminalization also benefits law enforcement and the non-profits who collaborate with law enforcement.

4. *Alternatives to Criminalization*

All of the theories of criminalization require proponents of criminal legislation to consider whether the state could reduce the incidence of undesirable conduct through means short of criminalization. As Packer recognized in the 1960s, and as is still true today, alternatives to criminalization are under-theorized, making criminalization the default response to bad behavior.²⁵³ Nonetheless, Feinberg explains, “For every criminal prohibition designed to prevent some social evil, there is a range of alternative techniques for achieving, at somewhat less drastic cost, the same purpose.”²⁵⁴ Similarly, when considering whether criminalization is warranted, Braithwaite and Pettit ask “whether the problem is better dealt with by informal social control outside the criminal justice system.”²⁵⁵ Schonscheck’s presumptions filter is also intended to analyze alternatives to criminalization.

²⁵¹ See generally THE ANNIE E. CASEY FOUND., A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES AND COMMUNITIES (2016) (arguing that parental incarceration imposes a substantial financial burden on families, increases risk of housing instability and child homelessness, and negatively affects children’s mental and physical health).

²⁵² Leigh Goodmark, “*Law and Justice Are Not Always the Same*”: *Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. STATE U. L. REV. 707, 715 (2015).

²⁵³ PACKER, *supra* note 126, at 251.

²⁵⁴ FEINBERG, *supra* note 127, at 22; see also PACKER, *supra* note 126, at 250.

²⁵⁵ BRAITHWAITE & PETTIT, *supra* note 132, at 98.

The filter tests whether some form of social control could reduce the incidence of the behavior to a societally acceptable rate through “less intrusive, less coercive” means.²⁵⁶ Alternatively, the presumptions filter probes whether there is some action that the state can take that reduces the negative consequences of the proscribed conduct, even if it fails to reduce the incidence of the conduct.²⁵⁷ Husak comes at the alternatives question differently, asking whether a proposed criminal law is more extensive than necessary to achieve the state’s objective.²⁵⁸ Making a determination that the law is more extensive than necessary implies that some lesser intervention would be sufficient to address the harm in question.

Given that the majority of people subjected to abuse do not seek assistance from the criminal legal system every time that they need help, developing alternatives to the criminal legal system should be a priority for policymakers.²⁵⁹ And some alternatives do exist.²⁶⁰ People subjected to abuse can seek civil protective orders requiring that their partners refrain from abuse, stay away, and provide various other forms of relief.²⁶¹ Those who abuse may be able to access batterer intervention counseling without being ordered to do so in a criminal case, although many such programs are court-affiliated.²⁶²

In terms of programs designed to replace state control with community or other forms of informal social control, however, both policymakers and anti-violence advocates have been leery of experimentation. Anti-violence advocates have opposed the idea of using alternative dispute resolution in cases involving domestic violence.²⁶³ Concerns have been raised about

²⁵⁶ SCHONSHECK, *supra* note 132, at 68.

²⁵⁷ *Id.*

²⁵⁸ HUSAK, *supra* note 132, at 153.

²⁵⁹ See Ruth E. Fleury et al., “Why Don’t They Just Call the Cops?”: Reasons for Differential Police Contact Among Women with Abusive Partners, 13 VIOLENCE & VICTIMS 333, 343–44 (1998).

²⁶⁰ The focus here is on alternatives that serve to control or deter the behavior. Other kinds of services for people subjected to abuse, including shelter, counseling, and other advocacy services, are offered in most communities.

²⁶¹ See generally Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993) (detailing legal remedies that victims of domestic violence may seek).

²⁶² Fernando Mederos, *Batterer Intervention Programs: The Past, and Future Prospects*, in COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE, *supra* note 180, at 127. But see Andy Klein, *Batterer Intervention Programs. . .Not*, NAT’L BULL. ON DOMESTIC VIOLENCE PREVENTION, Nov. 2008, at art. no. 4.

²⁶³ On concerns about mediation, see generally Sara Cobb, *The Domestication of Violence in Mediation*, 31 L. & SOC’Y REV. 397, 398 (1997) (summarizing the concern of critics of mediation that the process does not suitably address violence); Karla Fischer et al., *Procedural Justice Implications of ADR in Specialized Contexts: The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993) (arguing that mediators wrongly assume that battering involves interpersonal conflict rather than a “context of domination and control”); Nancy E. Johnson et al., *Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect*, 11 VIOLENCE AGAINST WOMEN 1022 (2005) (arguing that victims of domestic violence are greatly disadvantaged by mediation); Douglas D. Knowlton & Tara Lea

whether such processes can be made sufficiently safe and whether they will actually hold offenders accountable for their actions.²⁶⁴ Moreover, having worked for forty years to have domestic violence treated as a crime, advocates are unwilling to risk diluting the power of the criminal legal response by creating parallel or alternative justice systems.²⁶⁵

Nonetheless, models for delivering justice and addressing harm outside of the criminal system do exist. Restorative justice focuses on harm rather than crime, allowing victims to define the harm done to them, requiring offenders to acknowledge the harm, and bringing victims, offenders, and their supporters together to craft a plan that holds offenders accountable for and addresses the harm.²⁶⁶ Restorative processes allow victims the opportunity to confront their perpetrators directly and to speak to them openly about how they have been affected, a much more direct form of accountability than that which is available through the criminal legal system.²⁶⁷ Restorative justice engages community members in supporting people subjected to abuse and developing solutions that hold perpetrators accountable, making intimate partner violence more visible within the community.²⁶⁸ Restorative justice has been widely used in criminal cases, most often with juvenile offenders, with very positive results. Both victims and offenders report high levels of satisfaction with both restorative processes and outcomes.²⁶⁹ Victims who opt for restorative justice

Muhlhauser, *Mediation in the Presence of Domestic Violence: Is It the Light at the End of the Tunnel or is a Train on the Track?*, 70 N.D. L. REV. 255 (1994) (considering mediation as both problematic for victims of domestic violence because bargaining power is unequal, and also as potentially empowering). On concerns about restorative justice, see generally, e.g., Rashmi Goel, *Aboriginal Women and Political Pursuit in Canadian Sentencing Circles: At Cross Roads or Cross Purposes?*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 60 (James Ptacek ed., 2010) (surveying restorative justice practices used in an attempt to end violence against women); Julie Stubbs, *Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 42 (Heather Strang & John Braithwaite eds., 2002) (analyzing claim that restorative justice yields better outcomes for victims of domestic violence). *But see* Joanne Belknap & Courtney McDonald, *Judges' Attitudes About and Experiences with Sentencing Circles in Intimate-Partner Abuse Cases*, 2010 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 369, 373 (2010) (noting the growing feminist support for restorative processes).

²⁶⁴ James Ptacek, *Resisting Co-Optation: Three Feminist Challenges to Antiviolence Work*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, *supra* note 263, at 5, 19–20.

²⁶⁵ *Id.* at 20. For a description of what such a system might look like, see Goodmark, *supra* note 66.

²⁶⁶ See *Introduction*, in A RESTORATIVE APPROACH TO FAMILY VIOLENCE: CHANGING TACK 1–2 (Anne Hayden et al. eds., 2014); Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE & ABUSE 242, 246 (2014).

²⁶⁷ See Ken McMaster, *Restoring the Balance: Restorative Justice and Intimate Partner Violence*, in A RESTORATIVE APPROACH TO FAMILY VIOLENCE: CHANGING TACK, *supra* note 266, at 93, 94–95.

²⁶⁸ See Belknap & McDonald, *supra* note 263, at 370.

²⁶⁹ See HEATHER STRANG ET AL., THE CAMPBELL CORP., RESTORATIVE JUSTICE CONFERENCING (RJC) USING FACE-TO-FACE MEETINGS OF OFFENDERS AND VICTIMS: EFFECTS

have more information, are more likely to meet with and confront their perpetrator, are more likely to have some understanding of the reasons behind the offending, are more likely to receive some kind of repair for the harm done. . . are more likely to be satisfied with the agreements reached, are more likely to feel better about their experience and are less likely afterwards to feel angry or fearful than those victims whose perpetrators were dealt with by the courts.²⁷⁰

Perpetrators, in turn, are more likely to understand the impact of their actions, be held accountable in meaningful ways, and provide the kinds of redress requested by victims.²⁷¹

Restorative justice has been used to address gendered harms. In December 2014, for example, female students at the Dalhousie University Faculty of Dentistry learned that a number of male dental students had started a private “Gentlemen’s Club” on Facebook, where they posted sexist, misogynistic, and homophobic material about female dental students.²⁷² The women filed a claim under the university’s sexual harassment policy and opted to have the claim resolved through a restorative justice process.²⁷³ Twenty-nine students (twelve of the men involved in the Facebook group, fourteen female students, and three other male students) participated in the restorative process.²⁷⁴ The women students explained their decision to opt for a restorative process:

Restorative justice provided us with a different sort of justice than the punitive type most of the loudest public voices seemed to want. We were clear from the beginning, to the people who most needed to hear it, that we were not looking to have our classmates expelled as 13 angry men who understood no more than they did the day the posts were uncovered. Nor did we want simply to forgive and forget. Rather, we were looking for a resolution that would allow us to graduate alongside men who understood the harms they caused, owned these harms, and would carry with them a responsibility and obligation to do better.²⁷⁵

ON OFFENDER RECIDIVISM AND VICTIM SATISFACTION: A SYSTEMATIC REVIEW 47 (2013); see also *Introduction*, *supra* note 266, at 2 (explaining benefits of restorative processes for both victims and offenders).

²⁷⁰ *Introduction*, *supra* note 266, at 2.

²⁷¹ *Id.* In one study of respondents in intimate partner violence cases, researchers found that 87% of perpetrators completed the tasks required by their agreements with the victims. McMaster, *supra* note 267, at 100.

²⁷² See JENNIFER J. LLEWELLYN, JACOB MACISAAC, & MELISSA MACKAY, REPORT FROM THE RESTORATIVE JUSTICE PROCESS AT THE DALHOUSIE UNIVERSITY FACULTY OF DENTISTRY 2, 4 (2015). One of the posts, for example, was a poll entitled, “Who would you hate f[uc]k?” *Id.* at 19.

²⁷³ *Id.* at 20.

²⁷⁴ *Id.* at 2.

²⁷⁵ *Id.* at 9.

Over five months, the process examined the specific events that gave rise to the complaint as well as the culture within the Faculty of Dentistry and the wider society that allowed such attitudes to flourish.²⁷⁶ Members of the faculty of the dental school, the university community, the Nova Scotia Dental Association, and the wider community joined in the process.²⁷⁷ The restorative process involved a thorough investigation of the claims, regular meetings between facilitators and participants in the process, restorative circles²⁷⁸ with various groups of participants, and participation in a Day of Learning at the end of the process, during which the male students presented what they had learned as a result of the process.²⁷⁹

At the outset of the process, the male students noted, “when we realized the hurt and harm our comments caused for our classmates, faculty and staff we wanted to convey our overwhelming regret.” During the restorative process, however,

we learned that saying sorry is too easy. Being sorry, we have come to see, is much harder. It takes a commitment to hear and learn about the effects of your actions and an ongoing and lasting commitment to act differently in the future. We have hurt many of those closest to us. We do not ask for our actions to be excused. They are not excusable.²⁸⁰

By the end of the process, the male students involved in the Facebook group stated that they

[saw] the world through a different lens now. We recognize more clearly the prejudice and discrimination that exists inside and outside of dentistry. We understand we have contributed to this through our actions and by failing to stand up when we saw it happening. It may be impossible to undo the harms but, we commit, individually and collectively to work day by day to make positive changes in the world. The problems extend far beyond us, and we will work to ensure the lessons we have learned will as well.²⁸¹

By the end of the process, the men involved took responsibility for their actions, understood how their actions created and reinforced gender-based harms and stereotypes, and committed to addressing those issues. The stu-

²⁷⁶ *Id.* at 9.

²⁷⁷ *Id.* at 10.

²⁷⁸ Restorative circles bring together those who have done harm, those who have been harmed, supporters, and members of the community for facilitated discussions about the event, the impact of the event, and what the person harmed requires to be made whole. KAY PRANIS, *THE LITTLE BOOK OF CIRCLE PROCESSES: A NEW/OLD APPROACH TO PEACEMAKING* 9 (2005).

²⁷⁹ LLEWELLYN ET AL., *supra* note 272, at 35–38.

²⁸⁰ *Id.* at 10.

²⁸¹ *Id.* at 11.

dents have gone on to present their experiences in a number of forums. The learning and change that occurred in this case would most likely not have happened in a punitive process. The justice goals of the female students who had been harmed were met because the process was deliberately designed to help the male students understand the harm caused, rather than simply punishing the behavior.

Although few communities have provided restorative options in cases involving domestic violence,²⁸² there are promising examples. Joan Pennell and Gale Burford piloted a restorative justice project with families in the Canadian child welfare system that experienced domestic violence. Pennell and Burford used family group decision-making, a form of restorative justice conferencing, to help participants create plans to address the abuse in the family, drawing upon the support and input of community resources.²⁸³ Pennell and Burford found that no new violence occurred either during or as a result of the conferences,²⁸⁴ both adult abuse and child maltreatment declined in the participant families,²⁸⁵ and two-thirds of the families reported being better off following the conference.²⁸⁶ In New Zealand, studies have found that many people subjected to abuse who opt into restorative practices are satisfied with the process, are glad that they chose to take part, felt positive about their perpetrators taking responsibility for their actions, and would recommend the process to others.²⁸⁷ An Australian study found that Aboriginal women preferred using restorative justice to address intimate partner violence, but non-Aboriginal women opted for the traditional court system.²⁸⁸

Holding offenders accountable in the community is another alternative to criminalization. Community-based transformative justice²⁸⁹ efforts em-

²⁸² Belknap & McDonald, *supra* note 263, at 374 (noting that little empirical evidence on using restorative justice in domestic violence cases exists and citing studies).

²⁸³ Joan Pennell, *Safety for Mothers and Their Children*, in WIDENING THE CIRCLE: THE PRACTICE AND EVALUATION OF FAMILY GROUP CONFERENCING WITH CHILDREN, YOUTHS, AND THEIR FAMILIES (Joan Pennell & Gary Anderson eds., 2005). *See generally* Joan Pennell & Gale Burford, *Family Group Decision Making: Protecting Children and Women*, 79 CHILD WELFARE 131 (2000) (discussing study conducted by Family Group Decision Making Project).

²⁸⁴ Pennell, *supra* note 283.

²⁸⁵ Pennell & Burford, *supra* note 283, at 145–50.

²⁸⁶ Pennell & Burford, *supra* note 283, at 144.

²⁸⁷ Venezia Kingi, *The Use of Restorative Justice in Family Violence: The New Zealand Experience*, in A RESTORATIVE APPROACH TO FAMILY VIOLENCE, *supra* note 266, at 145, 149–53.

²⁸⁸ Heather Nancarrow, *In Search of Justice for Domestic and Family Violence: Indigenous and Non-Indigenous Australian Women's Perspectives*, 10 THEORETICAL CRIMINOLOGY 87, 95–96 (2006).

²⁸⁹ Transformative justice is “a liberatory approach to violence . . . [which] seeks safety and accountability without relying on alienation, punishment, or State or systemic violence, including incarceration and policing.” GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE AND OTHER FORMS OF INTIMATE AND COMMUNITY VIOLENCE 5 (2007), http://www.usprisonculture.com/blog/wp-content/uploads/2012/03/G5_Toward_Transformative_Justice.pdf [<https://perma.cc/K34S-GETQ>]; *see also* Goodmark, *supra* note 66, at 724–26 (describing transformative justice).

power communities to determine what the appropriate responses to violence are and to keep their communities safe without police intervention.²⁹⁰ Organizations like Creative Interventions enlist community members to confront and respond to interpersonal violence.²⁹¹ Creative Interventions' Community-Based Interventions Project was designed to "develop, pilot test, evaluate, document and distribute a replicable comprehensive alternative community-based approach to violence intervention," intended to expand the capacity of "family, friends, neighbors, co-workers and others toward whom persons in need first turn. . . with the model and tools to effectively intervene."²⁹² Creative Interventions' materials include tools to use in identifying and understanding violence, thinking about how to stay safe and reduce harm during an intervention, finding allies and identifying barriers to addressing violence, determining goals or outcomes, supporting people subjected to abuse, helping abusers accept accountability, forging strong collaborations, and staying on track during the process.²⁹³ Using those tools, communities can craft individualized interventions that meet the needs of people subjected to abuse. For example, a woman subjected to abuse who was married to a police officer, and therefore felt she could not turn to the criminal legal system for protection, brought together a number of friends and supporters to help her brainstorm options after her partner's verbal abuse and stalking made her feel unsafe. Her friends helped her to identify her goals and thought about ways to help her feel safe in her home. Friends then set up a schedule to ensure that she was not home alone, which helped to restore her feeling of safety. The group identified people who could talk with her partner in an attempt to calm him down; her mother took on that role. They created a phone list so that she always had someone to call for assistance. The group approached the abuse as a community, rather than an individual, problem,

²⁹⁰ Jennifer Polish, *Transformative Justice Transforming Mass Incarceration?*, LAW STREET (June 25, 2015), <http://lawstreetmedia.com/issues/law-and-politics/transformative-justice-transforming-mass-incarceration/> [<https://perma.cc/U7CH-FKQK>]; see also Snider, *supra* note 35, at 13 ("[A]t the community level, social control is sought through processes ranging from verbal disapproval to ostracism and banishment. Punishment is an important component of social control, a shaming and socializing device with symbolic as well as instrumental functions. But penalty . . . is not the same thing, it has never been shown to be necessary to achieve social control and may well be counterproductive.").

²⁹¹ Mimi Kim, *Alternative Interventions to Intimate Violence: Defining Political and Pragmatic Challenges*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, *supra* note 263, at 193, 195.

²⁹² *Id.* at 207. The Creative Interventions Toolkit is available online at <http://www.creative-interventions.org/wp-content/uploads/2012/06/CI-Toolkit-Complete-Pre-Release-Version-06.2012-.pdf> [<https://perma.cc/L438-MUWH>].

²⁹³ CREATIVE INTERVENTIONS, CREATIVE INTERVENTIONS TOOLKIT: A PRACTICAL GUIDE TO STOP INTERPERSONAL VIOLENCE 11–13 (2012), <http://www.creative-interventions.org/wp-content/uploads/2012/06/CI-Toolkit-Complete-Pre-Release-Version-06.2012-.pdf> [<https://perma.cc/L438-MUWH>].

asking “How are we going to make sure that there’s not harm happening in our community?”²⁹⁴

The Friends Are Reaching Out (FAR Out) program, developed by the Northwest Network in Seattle, starts from the premise that perpetrators of domestic violence are more likely to listen to the people they love than courts²⁹⁵ and that people subjected to abuse are more likely to disclose to a friend or family member than anyone else.²⁹⁶ The anti-violence movement has nonetheless failed to mobilize friends and families to hold perpetrators accountable for their actions²⁹⁷ and has not provided them with concrete tools to assist those who are abused.²⁹⁸ FAR Out provides these kinds of resources to enable friends and family to provide needed support.²⁹⁹ The Far Out website includes tools to help people subjected to abuse repair relationships with friends and family, identify and set appropriate boundaries in relationships, and work with family and friends to match the support needed by the person subjected to abuse with what friends and family are able to offer.³⁰⁰ The Northwest Network has also been conducting Relationship Skills Classes in the community. The goal of those classes is both to help people think about how they want their relationships to be and to encourage them to reach out if their relationships are not meeting those expectations.³⁰¹ Margaret Hobart of the Northwest Network notes, however, that programs like FAR Out are most effective before the violence becomes acute; the more dangerous the relationship, the harder it may be to develop effective community-based solutions.³⁰²

Safe Streets Baltimore deploys community outreach workers to interrupt potentially violent situations.³⁰³ Safe Streets workers are from the communities they canvass and often have been involved with the criminal legal system.³⁰⁴ Although Safe Streets’ mandate is violence prevention more gen-

²⁹⁴ *Id.* at 17–20. Similarly, working in the child sexual abuse context, Generation Five uses the transformative justice framework to mobilize residents to address violence and to inculcate non-violent norms within marginalized communities. GENERATION FIVE, *supra* note 289, at 27–31.

²⁹⁵ SMITH, *supra* note 95, at 163.

²⁹⁶ Connie Burk, *How Zombies Could Save Your Life*, FRIENDS HELP FRIENDS SURVIVE, <https://farout.org/2013/12/22/zombie-apocalypse-by-connie-burk/> [<https://perma.cc/3U2N-A6ED>].

²⁹⁷ SMITH, *supra* note 95, at 163.

²⁹⁸ Burk, *supra* note 296.

²⁹⁹ For example, FAR Out has developed a Support Planning Checklist, which allows survivors to identify their needs and friends and family to respond with what they can offer. *See Safety and Support Planning*, FAR OUT (2013), <http://faroutdotorg.files.wordpress.com/2013/12/safety-support-planning-activity-sheet.pdf> [<https://perma.cc/GX5L-FET9>].

³⁰⁰ Those tools are available on the FAR Out website: <https://farout.org> [<https://perma.cc/GX5L-FET9>].

³⁰¹ Email from Margaret Hobart, Ph.D., (Aug. 8, 2016) (on file with author).

³⁰² *Id.*

³⁰³ *Safe Streets*, BALT. CITY HEALTH DEP’T (2016), <http://health.baltimorecity.gov/safestreets> [<https://perma.cc/XXV6-BK4T>].

³⁰⁴ *Id.*

erally, workers report that many of the potentially violent incidents they disrupt begin as intimate partner violence.³⁰⁵ Safe Streets works with both perpetrators and victims to intervene before violence occurs and to connect those involved with services and supports, including employment training, mental health care, and substance abuse treatment.³⁰⁶

These kinds of community-based accountability mechanisms can have a profound impact on those who abuse. As one Tlingit man explained,

First one must deal with the shock and then the dismay on your neighbors' faces. One must live with the daily humiliation, and at the same time seek forgiveness not just from victims, but from the community as a whole. . . . [A prison sentence] removes the offender from the daily accountability, and may not do anything towards rehabilitation, and for many may actually be an easier disposition than staying in the community.³⁰⁷

There are, of course, challenges to developing meaningful and effective community-based alternatives. Given the fragmentation and lack of connection within communities in the United States, one could question whether sufficient community structure exists to support such programs³⁰⁸ and whether communities will, in fact, hold abusers accountable for their actions.³⁰⁹ But there is some research to suggest that when communities believe in their capacity to organize and execute concrete actions to reduce intimate partner violence (collective efficacy), the risk of violence decreases.³¹⁰ Resources are always scarce for community-based services, and, as is clear from the criticisms of the justice reinvestment movement, redirecting resources from the criminal legal system into communities has been difficult to accomplish.³¹¹ Community-based options do not appeal to all those subjected to abuse, particularly if their goals involve achieving retributive jus-

³⁰⁵ Interview with James Tipton, Site Director, Safe Streets Baltimore (Feb. 9, 2016). Tipton explained that often, a situation starts when a perpetrator abuses his partner, then escalates when members of her family retaliate against the perpetrator on her behalf. *Id.*

³⁰⁶ BALT. CITY HEALTH DEP'T, *supra* note 303.

³⁰⁷ SMITH, *supra* note 95, at 140 (alteration in original) (quoting RUPERT ROSS, RETURN TO THE TEACHINGS (1997)) (discussing restorative justice).

³⁰⁸ Goodmark, *supra* note 66, at 758.

³⁰⁹ SMITH, *supra* note 95, at 158.

³¹⁰ Sonia S. Jain et al., *Neighborhood Predictors of Dating Violence Victimization and Perpetration in Young Adulthood: A Multilevel Study*, 100 AM. J. PUB. HEALTH 1737, 1739 (2010); see also Copp et al., *supra* note 210, at 20.

³¹¹ CLEAR & FROST, *supra* note 11, at 178. Critics have argued that justice reinvestment programs have failed to divert meaningful amounts of funding into the low income minority communities most affected by mass incarceration, instead returning savings to states' general funds or using those savings to bolster other law enforcement programs, including community corrections efforts. See JAMES AUSTIN ET AL., ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT 4 (2013). Moreover, the political tradeoffs necessary to enact justice reinvestment legislation (for example, agreeing to reducing the growth of prisons but not restricting the number of inmates) may contribute to, rather than abate, high incarceration rates.

tice.³¹² And alternatives to the criminal legal system must prioritize redressing the harm to the victim over reintegrating offenders.³¹³ Nonetheless, while neither restorative justice nor community accountability programs are currently viable options in most communities, they could, if properly developed, provide an alternative to criminalization.

Other alternatives to prevent and address the harms of domestic violence also exist. Economic interventions could relieve some of the conditions that spur domestic violence. As noted above, domestic violence correlates with male unemployment. Job training and employment provision programs might do more to prevent intimate partner violence than criminalization has.³¹⁴ If prevention is the goal, public health initiatives might serve that function more effectively than criminalization. Criminalization, however, hampers the development, implementation, and evaluation of these types of alternatives. So long as criminal laws continue to exist, criminalization will be the default response that policymakers and anti-violence advocates are loath, even afraid, to abandon. And so long as funding for anti-domestic violence efforts remains focused on the criminal legal system, criminalization will deprive efforts to develop alternatives of needed resources.

III. DECRIMINALIZATION VERSUS RETHINKING THE CRIMINAL LEGAL RESPONSE

One could make a credible, even a strong, theory-based case for the decriminalization of domestic violence. There is limited to no evidence that criminalization deters domestic violence and reason to believe that criminalization helps to create conditions that stimulate domestic violence. The costs of criminalization, particularly when prosecution leads to incarceration, are quite high. Criminalization undermines the economic and social structures of marginalized neighborhoods, depressing ex-offenders' employment opportunities and destroying relationships within communities. The traumatic effects of the inhumane conditions and exposure to violence within prisons set into motion a destructive cycle of violence when those who abuse are released into the community and resume their intimate relationships. The costs of incarceration particularly, and criminalization generally, far outweigh the

³¹² Goodmark, *supra* note 66, at 715. *But see* Geoff Bennett, *Woman Who Suffered Domestic Violence Urges Judge to Give Her Former Partner Help Instead of Prison*, BRISTOL POST (Feb. 14, 2016), <http://www.bristolpost.co.uk/Woman-suffered-domestic-violence-urges-judge/story-28723483-detail/story.html> [<https://perma.cc/46RS-8C3Y>]; Gia Vang, *Girlfriend of Man Shot, Killed by Tempe Police Wonders If There Was Another Option*, KPNX (Ariz.) (Dec. 28, 2015).

³¹³ SMITH, *supra* note 95, at 158.

³¹⁴ The White House Council of Economic Advisers issued a report in April 2016 arguing that raising wages is a more effective method of reducing crime than increased incarceration. JASON FURMAN, *ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM* 10 (2016).

limited benefits criminalization provides. And the focus on criminalization is preventing the development of alternatives that could provide justice for people subjected to abuse without the harms associated with the carceral system.

But complete decriminalization of domestic violence is unlikely, and probably unwise. Assault is one of the early common law crimes, and assault statutes cover a range of behaviors from minor incidents to serious injuries. It is unrealistic to believe that there would be widespread support for repealing these laws; the ratchet of criminalization tends only to move in one direction.³¹⁵ Politicians and many anti-violence advocates are committed to the criminalization of domestic violence and unlikely to turn away from it completely. Arrest and prosecution play an important role in securing safety and justice for some people subjected to abuse. Whatever one thinks of the choice to criminalize as a means of making the private public, or expressing society's interest in stemming intimate partner violence, the message sent by repealing such statutes at this point would be problematic. While the prosecution of each and every individual act of intimate partner violence, however small, may not appreciably benefit society, the need still exists to ensure that serious, repeat offenders (who are not deterred by current sanctions) are prevented from continuing to do harm to their partners. Even those who are most concerned about the detrimental aspects of criminalization have experience with offenders who they believe should be isolated from the greater society.

Instead of decriminalizing domestic violence, then, we could rethink two aspects of the current criminal legal regime. First, the criminal legal system should respond to serious intimate partner violence without doing harm to those it was intended to benefit. Second, the punishment meted out for intimate partner violence should address the harm done without creating the potential for increased violence. Rather than viewing punishment for domestic violence as a binary—a perpetrator is either found guilty and incarcerated or not—we should conceptualize criminalization and punishment as a spectrum, with a range of possible responses.³¹⁶

A. *Ending Mandatory Policies*

Mandatory policies have been controversial among anti-violence advocates since the first mandatory arrest policy was adopted in 1977. From their inception, some anti-violence advocates, particularly women of color, questioned both the effectiveness of mandatory interventions and the disproportionate impact these policies would have on communities of color.³¹⁷ By 2003, law professor Holly Maguigan would conclude, “The claimed benefits

³¹⁵ See *supra* text accompanying note 82.

³¹⁶ My thanks to Professor J. Amy Dillard for this insight.

³¹⁷ Richie, *supra* note 111, at 1136.

[of mandatory policies] have not even been demonstrated; and in light of the burdens imposed, they do not support an argument for maintaining current levels of criminal justice intervention.”³¹⁸

Research over the past forty years has continually borne out these concerns. Mandatory arrest and prosecution policies are responsible for a significant portion of the harm done to women subjected to abuse when they become involved with the criminal legal system. Dual arrests and arrests of women increased as a result of mandatory arrest.³¹⁹ People are forced to testify despite their own assessments of whether participation meets their goals and are punished for their failure to testify or for giving testimony inconsistent with prior statements.³²⁰ Both mandatory arrest and no drop prosecution policies deprive people subjected to abuse of the power to choose how the violence in their lives should be addressed.³²¹ The desire to avoid mandatory reporting statutes may prevent some from seeking assistance.³²² Although the two are often conflated, criminalizing domestic violence does not require the implementation of mandatory policies.³²³ Repealing mandatory policies could prevent a substantial amount of harm to people subjected to abuse.

B. *Reconsidering Punishment*

1. *A Graduated Response to Intimate Partner Violence*

As Jonathan Simon writes, “[T]he criminal justice system in most states now reflects a new consensus that domestic violence of any kind is a crime, and one best deterred by quick sanctions against the violator.”³²⁴ But

³¹⁸ Maguigan, *supra* note 122, at 435.

³¹⁹ See COMACK & BALFOUR, *supra* note 86, at 176; Melissa E. Dichter, “*They Arrested Me—and I Was the Victim*”: *Women’s Experiences with Getting Arrested in the Context of Domestic Violence*, 23 *WOMEN & CRIM. JUST.* 81, 82 (2013); Durfee, *supra* note 97, at 78.

³²⁰ GOODMARK, *supra* note 20, at 126–29; see also Leigh Goodmark, *Mandatory Domestic Violence Prosecution May Traumatize Victims*, *BALT. SUN* (Oct. 16, 2015), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-dv-judge-20151017-story.html> [<https://perma.cc/JXG7-GS3S>] (describing the case of a Seminole County, Florida woman who was jailed after she failed to appear in court to testify against the father of her son, despite her explanation that she was suffering from anxiety and depression and was homeless and caring for a young child).

³²¹ GOODMARK, *supra* note 20, at 132–34.

³²² Novisky & Peralta, *supra* note 107, at 79; see also Belknap & McDonald, *supra* note 270, at 373 (arguing that backlash against “tough on crime” policies is driving increased feminist support for restorative justice in cases involving intimate partner violence).

³²³ Indeed, a substantial minority of states has never enacted mandatory arrest laws, and others have moved from mandatory to preferred arrest laws, which strongly encourage but do not require police to make arrests in cases of domestic violence. Similarly, the majority of prosecutors have not adopted hard no-drop policies, the form of the policy most responsible for harm to women.

³²⁴ SIMON, *supra* note 78, at 183.

given the social science research discussed earlier, whether the criminal legal system is best placed to administer those sanctions in all cases of intimate partner violence should be an open question. Rather than starting from the premise that all cases require the punitive intervention of the criminal legal system, we might envision a system in which sanctions are graduated and where punishment is secondary to changing behavior and stimulating empathy.

John Braithwaite outlines such a system in *Restorative Justice and Responsive Regulation*.³²⁵ Braithwaite's initial response to harm would be restorative, giving the perpetrator and victim of harm the opportunity to engage in the type of restorative dialogue described above.³²⁶ If restorative approaches to fixing the harm are unsuccessful, Braithwaite advocates moving through a number of levels of intervention before reaching the top of what he calls the regulatory pyramid—incapacitation.³²⁷ While Braithwaite concedes that immediate criminal system intervention may be necessary at times, the goal is to “always . . . start at the base of the pyramid, then escalate to somewhat punitive approaches only reluctantly and only when dialogue fails, and then to escalate to even more punitive approaches only when the more modest forms of punishment fail.”³²⁸

Using “less costly, less coercive, more respectful” options before resorting to incarceration serves several goals.³²⁹ Restorative approaches engage offenders in thinking about the impact of their actions on their victims, helping to engender empathy; punishment-focused interventions make it difficult for perpetrators to think about anything but avoiding that punishment.³³⁰ Starting with restorative approaches also underscores the importance of treating citizens with dignity and respect. As Braithwaite writes, “[I]f we want a world with less violence and less dominating abuse of others, we need to take seriously rituals that encourage approval of caring behavior so that citizens will acquire pride in being caring and nondominating.”³³¹

In 1994, Braithwaite and Kathleen Daly developed a regulatory pyramid specific to the context of intimate partner violence. The pyramid begins at the bottom with a number of restorative interventions: self-sanctioning, social disapproval, and confrontation with family.³³² If those interventions are unsuccessful, police are called, a warrant may be issued, and advocates

³²⁵ JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* 30 (2002).

³²⁶ *Id.*

³²⁷ *Id.* at 32.

³²⁸ *Id.* at 30.

³²⁹ *Id.* at 32.

³³⁰ *Id.* at 35–36.

³³¹ *Id.* at 80.

³³² John Braithwaite & Kathleen Daly, *Masculinities, Violence and Communitarian Control, in JUST BOYS DOING BUSINESS? MEN, MASCULINITIES, AND CRIME* 189, 197 (Tim Newburn & Elizabeth A. Stanko eds., 1994).

become involved.³³³ Next is community conferencing, with escalated levels of intervention if conference agreements are not kept.³³⁴ Finally, the criminal legal system is invoked if all else fails, beginning with arrest and imposition of strict probation conditions and, at the pyramid's apex, incarceration.³³⁵ Braithwaite and Daly understand that

Some may recoil at the thought of one conference failing, more violence, another failed conference, more violence still, being repeated in a number of cycles before the ultimate sanction of incarceration is invoked. But there can be considerable intervention into a violent man's life when moving from one failed conference to another. For example, there could be escalation from weekly reporting by all family members of any violent incidents to the man's aunt or brother-in-law (conference 1), to a relative or other supporter of the woman moving into the household (conference 2), to the man moving to a friend's household (conference 3).³³⁶

Braithwaite and Daly's is just one vision of how sanctions could be graduated from restorative to retributive; others could be developed as well.³³⁷ But their model provides a starting point for conversations about expanding our conceptions of the appropriate societal response to intimate partner violence. Historically, the criminal legal system was used strategically, as one option among many for dealing with conflict.³³⁸ Developing a range of options beyond the criminal legal system would allow for the consideration of goals other than punishment and avoid some of the harms of criminalization.

³³³ *Id.* Note that in Australia, where Braithwaite and Daly reside, police are involved in both the civil and criminal legal system responses to intimate partner violence, and police can therefore become involved without invoking the criminal legal system. See *Queensland (Australia)—Protection Orders*, NAT'L COUNCIL FOR SINGLE MOTHERS AND THEIR CHILDREN, http://www.ncsmc.org.au/wsas/legal_system/avo_qld.htm [https://perma.cc/F2D8-46CF]. A regulatory pyramid developed specifically for the United States would look somewhat different.

³³⁴ *Id.* Entering into restorative agreements correlates with the prevention of further violence. Researchers found that 87% of the perpetrators involved in a New Zealand study completed the tasks required by their restorative agreements and were less likely to re-offend; the five participants who did not complete their agreements all incurred further charges. McMaster, *supra* note 267, at 100.

³³⁵ Braithwaite & Daly, *supra* note 332, at 197.

³³⁶ *Id.* at 200. Of course, one could also ask why we don't recoil at the thought that arrest and incarceration fail to deter further violence, leading to further cycles of violence. My thanks to Aya Gruber for this observation.

³³⁷ In the 1970s, for example, the American Bar Association supported a graduated punishment system "beginning with fines, restitution, and criminal forfeiture, jumping to community supervision and intermittent incarceration, and finally, only 'if all other conditions fail,' a term of imprisonment." MURAKAWA, *supra* note 55, at 97.

³³⁸ See Renée Zauberman, *Victims as Consumers of the Criminal Justice System?*, in INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE 37, 43–44 (Adam Crawford & Jo Goodey eds., 2000).

Advocating for graduated sanctions rests in part on the belief that perpetrators of domestic violence can and will desist from intimate partner violence. Although the research on desistance is limited, there is reason to believe that some perpetrators recognize the need to change their behavior and do, in fact, stop using violence.³³⁹ That process of change involves the interaction between an external structural factor (a negative consequence of using violence) and an internal negative emotional response to that consequence.³⁴⁰ And while the trigger could be intervention by the criminal legal system, it could also be community intervention.³⁴¹ Desistance does not require incarceration; it requires that a perpetrator recognize, for whatever reason, that change is needed. Moreover, perpetrators are more likely to maintain the change when they have support and encouragement from family, friends, and partners,³⁴² the kind of networks created through restorative practices.

Criminal legal interventions should target habitual domestic violence offenders.³⁴³ Focusing on habitual offenders focuses resources where they are most needed. In their study of the Quincy, Massachusetts domestic violence court, Eve Buzawa and her colleagues found that serial offenders were responsible for a substantial amount of intimate partner violence.³⁴⁴ That research is consistent with findings among the general population—a small percentage of offenders is responsible for a disproportionate amount of offending.³⁴⁵ Moreover, focusing on habitual offenders prevents those who otherwise would not recidivate from being exposed to the collateral consequences of criminal intervention³⁴⁶ and the potentially criminogenic effect of spending time in prison.³⁴⁷

³³⁹ See Walker et al., *supra* note 182, at 2.

³⁴⁰ *Id.* at 13–14.

³⁴¹ In High Point, North Carolina, police are using “focused deterrence” to identify and intervene with high-risk, chronic offenders. Researchers have argued that targeted interventions by law enforcement that call attention to and hold abusers accountable for their behavior are responsible for a reduction in recidivism rates. See John Buntin, *How High Point, N.C., Solved Its Domestic Violence Problem*, GOVERNING (March 2016), <http://www.governing.com/topics/public-justice-safety/gov-domestic-violence-focused-deterrence.html> [<https://perma.cc/PS5N-A7RX>]. It is not clear, however, that such interventions must be conducted by law enforcement to be successful; community interventions could have a similar effect.

³⁴² See Walker et al., *supra* note 182, at 17.

³⁴³ Braithwaite and Pettit suggest that police target “dangerous offenders” who “have offended at a high rate, and who have persisted in offending over a considerable period.” BRAITHWAITE & PETTIT, *supra* note 132, at 113.

³⁴⁴ BUZAWA ET AL., *supra* note 168, at 164–65.

³⁴⁵ See *id.* at 165.

³⁴⁶ See *supra* text accompanying note 189.

³⁴⁷ See KELLY, *supra* note 9, at 62 (“There is sufficient evidence to give scientific credibility to the common assertion that criminals who go to prison typically come out even worse.”).

2. *Alternatives to Incarceration*

Probation and other forms of community monitoring are usually touted as the most promising alternatives to incarceration. Programs like Hawaii's HOPE project promise "less crime and less punishment"—decreased recidivism without the use of long periods of incarceration.³⁴⁸ They achieve these results by marrying intensive monitoring with swift and certain penalties.³⁴⁹ In the HOPE project, for example, probationers are closely monitored by probation officers. Each time a probationer violates the terms of probation, the judge is immediately notified; the probationer is arrested on the spot and sentenced to a short term of incarceration.³⁵⁰ With each additional violation, the penalty escalates.³⁵¹ By imposing short, immediate terms of imprisonment for violations of conditions of probation, programs like HOPE are intended to show probationers that judges are serious about their compliance; in response, probationers are more likely to comply with the terms of probation.³⁵²

Programs like HOPE beg the question of the purpose of community sanctions. Traditionally, community supervision was intended to ease an offender's post-incarceration adjustment to the community.³⁵³ Currently, however, probation is often used as a punishment and a stepping-stone to incarceration. Studies suggest that treatment-based supervision strategies targeting a probationer's particular risk factors are more effective than sanctions in reducing recidivism,³⁵⁴ yet most probation officers spend their time in "control" related activities—taking urine samples, searching homes.³⁵⁵ Given the focus on catching probationers in bad behavior, it is not surprising that failure rates among probationers are high and that the impact of probation on recidivism is insignificant.³⁵⁶

The numerous conditions probationers must meet undoubtedly contribute to high failure rates. Probationers are often required to pay the costs of

³⁴⁸ CLEAR & FROST, *supra* note 11, at 174 (citation omitted).

³⁴⁹ See KLEIMAN, *supra* note 214, at 3.

³⁵⁰ *Id.* at 39.

³⁵¹ See *id.* at 37.

³⁵² See CLEAR & FROST, *supra* note 11, at 123.

³⁵³ See *id.* at 122.

³⁵⁴ See *id.* at 124.

³⁵⁵ See *id.* at 122–24. Probation officers recognize the need to "change probation offices from places of control and enforcement to places of support and encouragement." As one probation officer writes, "The goal should be to transform probation officers from overseers into advocates, from rigid authoritarians into compassionate navigators who walk their probationers through the system, offering support, connecting people to needed resources, encouraging them to change and maintain the change that will keep them from returning to the system." Jeff Deeney, *Making Overseers into Advocates*, THE MARSHALL PROJECT (Feb. 18, 2015, 1:00 PM), <https://www.themarshallproject.org/2015/02/18/making-overseers-into-advocates#hf6bIWVnv> [<https://perma.cc/9R4F-KS3D>].

³⁵⁶ See KELLY, *supra* note 9, at 211–12. Intensive supervision programs have exacerbated this problem; violation rates are high, and 35% of the probationers who return to prison do so as a result of technical violations. CLEAR & FROST, *supra* note 11, at 92.

monitoring, as well as fees for any other programs that they are required to attend as a condition of probation.³⁵⁷ Some judges impose their own special conditions—for example, a prohibition on changing residences without court permission.³⁵⁸ Conditions of probation may conflict; maintaining employment can become difficult when probationers are also required to attend counseling and other meetings and regularly visit their probation officers. The required services may not be responsive to the needs of the probationer; as of 2005, only 19% of community corrections agencies had domestic violence intervention services, for example.³⁵⁹ And the consequences of minor violations of probation can be severe. For her failure to provide written documentation of all of the AA meetings she had attended, one Baltimore woman ultimately spent 34 days in jail.³⁶⁰

Probation and other community-based services are viable alternatives to incarceration only to the extent that they don't serve to relocate state control from prisons to the community, thus "widening the net of social control."³⁶¹ Such methods, as Angela Davis has argued, simply create "prisonlike substitutes for the prison."³⁶²

3. *Reduce the Trauma of Incarceration*

There are some perpetrators of domestic violence who are so dangerous that they must be incapacitated. But incarceration should not increase the likelihood of their use of violence upon their release.

The conditions in many U.S. prisons are horrific.³⁶³ Overcrowding is the norm.³⁶⁴ Violence is rampant.³⁶⁵ Programming and treatment are scarce.³⁶⁶ As

³⁵⁷ See Shaila Dewan, *Probation May Sound Light, but Punishments Can Land Hard*, N.Y. TIMES (Aug. 2, 2015), <http://www.nytimes.com/2015/08/03/us/probation-sounding-light-can-land-hard.html> [https://perma.cc/Q9J8-CR5M].

³⁵⁸ See *id.*

³⁵⁹ KELLY, *supra* note 9, at 214.

³⁶⁰ *Id.* Other alternatives to criminalization pose similar problems. A number of states are "decriminalizing" by imposing fines in lieu of jail time. But the failure to pay the fine can result in incarceration, and such statutes disproportionately impact low income people, who are less able to afford such fines. Decriminalization by fine is "a way of repackaging punishment for poor people." Moreover, even when an offense is non-arrestable, police may still make arrests, often resulting in racial disparities. See Leon Neyfakh, *Does Decriminalization Work? Or Does Replacing Jail Time with Fines Just Mean More People Get Punished?*, SLATE (Feb. 17, 2015), http://www.slate.com/articles/news_and_politics/crime/2015/02/decriminalization_why_reducing_the_punishments_for_misdeemeanors_doesn_t.html [https://perma.cc/9SMB-C27C].

³⁶¹ See CLEAR & FROST, *supra* note 11, at 24.

³⁶² MURAKAWA, *supra* note 55, at 155. *But see* KLEIMAN, *supra* note 214, at 99 (arguing that although intensive probation could "amount to a prison without walls," such measures are preferable to incarceration).

³⁶³ See Donald Specter, *Making Prisons Safe: Strategies for Reducing Violence*, 22 WASH. U. J.L. & POL'Y 125, 126 (2006) ("American prisons promote violence and abuse by their design and operation.").

³⁶⁴ See GOTTSCHALK, *supra* note 76, at 40–42.

³⁶⁵ See *supra* text accompanying note 194.

³⁶⁶ See GOTTSCHALK, *supra* note 76, at 40.

Donna Coker and Ahjane Macquoid have argued, “these negative effects of hyper-incarceration increase the risks for domestic violence.”³⁶⁷

But incarceration need not be inhumane. In Germany, for example, prisons are open and sunny, full of fresh air.³⁶⁸ Prisoners live in rooms and sleep in beds.³⁶⁹ They cook their own meals.³⁷⁰ “There is little to no violence—including in communal kitchens where there are knives and other potentially dangerous implements.”³⁷¹ The correctional system is designed to restrict inmates’ freedom as little as necessary.³⁷² Norway’s prisons are similarly open, because “[t]he punishment is that you lose your freedom. If we treat people like animals when they are in prison they are likely to behave like animals. Here we pay attention to you as human beings.”³⁷³ The Norwegian Correctional Service works to ensure housing, employment, and access to a support network for each prisoner pre-release.³⁷⁴ Norway’s prisons operate from a restorative philosophy, with a focus on repairing the harms of crime.³⁷⁵ Although almost half of the prisoners in one Norwegian prison are incarcerated for violent offenses, violent incidents within the prison are rare.³⁷⁶ The approach that correctional officers take to their work can make a tremendous difference as well. In Ada County, Iowa, corrections officials recognize the loss of humanity that comes with incarceration and treat prisoners with empathy and respect.³⁷⁷ Correctional officers talk to inmates rather than giving them orders and give inmates reasons for the requests that they make. The Ada County jail uses steel mesh rather than bars and features open dorms. The guards’ office windows allow guards to monitor the dorms—and enable inmates to see what the guards are doing. Guards maintain an open door policy, encouraging inmates to come and talk with them. As a result, use of force incidents are rare and the prison is less chaotic.³⁷⁸

³⁶⁷ Coker & Macquoid, *supra* note 203, at 587.

³⁶⁸ See Maurice Chammah, *Germany’s Kinder, Gentler, Safer Prisons*, THE MARSHALL PROJECT (June 17, 2015), <https://www.themarshallproject.org/2015/06/17/germany-s-kinder-gentler-safer-prisons> [<https://perma.cc/4B6F-BFF2>].

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² See *id.*

³⁷³ Christina Sterbenz, *Why Norway’s Prison System Is So Successful*, BUS. INSIDER (Dec. 11, 2014), <http://www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12> [<https://perma.cc/QY3C-3F4H>] (quoting Arne Wilson, the prison governor of Bastoy Prison).

³⁷⁴ See Jessica Benko, *The Radical Humaneness of Norway’s Halden Prison*, N.Y. TIMES (Mar. 26, 2015), <http://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html> [<https://perma.cc/WYR7-HLXJ>]. Although spending per prisoner is much higher in Norway, the impact on the recidivism rate is so striking that the U.S. could spend similar amounts per prisoner and still save more than \$45 billion annually. *Id.*

³⁷⁵ See Sterbenz, *supra* note 373.

³⁷⁶ See Benko, *supra* note 374.

³⁷⁷ See N.K. Napier, *The Jail Without Bars*, THE HUMAN TOLL OF JAIL, <http://humantollofjail.vera.org/the-jail-without-bars> [<https://perma.cc/N9JX-AACW>].

³⁷⁸ See *id.*

Honoring the dignity of prisoners could help to prevent the violence that traumatizes inmates and that they take back to their communities.

Enforcement of measures intended to protect prisoners from violence is also essential.³⁷⁹ Although institutional rules, laws, and constitutional precedent to protect prisoners all exist, prison authorities routinely ignore these guidelines.³⁸⁰ The Prison Rape Elimination Act (PREA), for example, is designed to protect prisoners from rape or sexual assault by guards or other inmates during their incarceration.³⁸¹ National commissions have documented preventive measures prisons could take, consistent with PREA's mandate, to eliminate violence.³⁸² Nonetheless, rates of sexual assault remain high in many prisons and jails.³⁸³ Holding individual prison authorities accountable for the failure to comply with PREA has been a challenge, despite the Supreme Court's finding that rape and sexual assault are not simply unfortunate consequences of being incarcerated.³⁸⁴ Congress' failure to enforce PREA by reducing the funding available to states that fail to comply with PREA's mandates further underscores the ambivalence around protecting prisoners from violence.³⁸⁵

Disrupting the cycle of destructive masculinity is also essential if incarceration is to remain an option for addressing intimate partner violence. Law cannot do this work on its own; change requires the interplay of law and culture.³⁸⁶ Changing the cultural norms around gender and violence that start the cycle is just as important as preventing violence and abuse within prisons. Cultural change requires educating boys and girls on destructive masculinity in schools, churches, and other institutions and encouraging them to

³⁷⁹ See Specter, *supra* note 363, at 131.

³⁸⁰ See Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender, and the Rule of Law*, 20 YALE J.L. & POL'Y 1, 5 (2010).

³⁸¹ Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003) (codified as amended at 42 U.S.C. §§ 15601–15609 (2012)). *But see* SpearIt, *supra* note 221, at 138–39 (cataloging strengths and weaknesses of PREA).

³⁸² Those measures include decreasing overcrowding, direct supervision of inmates by guards, ensuring that security classifications reflect the level of risk posed by an inmate, investigation of all allegations of abuse, and the use of modern surveillance technology within prisons. See Buchanan, *supra* note 380, at 21–22; see also Specter, *supra* note 363, at 134 (arguing that violence in prisons is a function of prison culture, effectiveness of management, and willingness to excuse mistreatment of prisoners).

³⁸³ See Buchanan, *supra* note 380, at 21.

³⁸⁴ See *id.* at 7. In *Farmer v. Brennan*, 511 U.S. 825, 826 (1994), the Court considered whether a transgender woman could sue prison officials under the Eighth Amendment for their deliberate indifference in placing her in the general population of a men's penitentiary that was known to be violent. The Court held that prison officials could be held liable for the failure to remedy a known risk to inmate safety. See *id.* at 837. The Court explained, "Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" *Id.* at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

³⁸⁵ See Alysia Santo, *Pulling the Teeth from the Prison Rape Elimination Act*, THE MARSHALL PROJECT (Dec. 2, 2014), <https://www.themarshallproject.org/2014/12/02/delay-defy-defang#.cbMA2UtDE> [<https://perma.cc/ZW65-VXN3>].

³⁸⁶ See SpearIt, *supra* note 221, at 142.

develop respectful and egalitarian relationships; rejecting destructive masculinity and promoting respect for women in popular culture; and resocializing institutions that reward hypermasculine attitudes. The failure to address both law and culture will undermine any effort to decrease the damage done by imprisonment.

When incarceration is used, it should be used with a clear understanding of its limitations. Incarceration has only a limited impact on decreasing the rate of serious crime.³⁸⁷ Keeping those who commit intimate partner violence in prison for long periods of time is unlikely to deter further violence. Studies have found that longer sentences do not have a greater deterrent effect on perpetrators.³⁸⁸ Moreover, incarceration is unlikely to change the behavior of those who commit intimate partner violence. “Even the staunchest advocates of incarceration do not argue that prisons are successful [correctional] institutions, only that they punish well.”³⁸⁹

CONCLUSION

Since 1984, the United States has developed a robust response to intimate partner violence. That response relies heavily on the effective operation of the criminal legal system in domestic violence cases. But the social science evidence does not support the proposition that intervention by the criminal legal system deters domestic violence. Moreover, the costs of criminalization, particularly when criminal system intervention results in incarceration, significantly outweigh its benefits. Given those realities, a persuasive argument could be made for decriminalizing domestic violence.

Decriminalizing domestic violence could be a first step towards reversing the damage that has been done by hyperincarceration. To decrease the unacceptably high number of individuals currently incarcerated in the United States, policymakers must rethink responses to violent crimes. Decriminalization of domestic violence could provide valuable data as to whether alternative approaches can, in fact, be effective in preventing the harms criminalization seeks to control. If such approaches can work in the realm of intimate partner violence, they might also be effective in addressing other forms of crime.

³⁸⁷ See CLEAR & FROST, *supra* note 11, at 139.

³⁸⁸ See Tony Fabelo & Michael Thompson, *Reducing Incarceration Rates: When Science Meets Political Realities*, ISSUES IN SCIENCE & TECH. (Fall 2015), <http://issues.org/32-1/reducing-incarceration-rates-when-science-meets-political-realities/> [<https://perma.cc/HGJ8-Y2RP>]; Mauer & Cole, *supra* note 18. Longer sentences for domestic violence could also mean greater overcrowding in prisons. Kathie Obradovich, *Curb Domestic Violence But Don't Forget Prison Crowding*, DES MOINES REGISTER (Jan. 18, 2015, 1:22 AM), <http://www.desmoinesregister.com/story/opinion/columnists/kathie-obradovich/2015/01/18/curb-domestic-violence-forget-prison-crowding/21943657/?from=global&sessionKey=&autologin=> [<https://perma.cc/6YWG-LN9Y>].

³⁸⁹ Snider, *supra* note 35, at 11. See also SMITH, *supra* note 95, at 144 (citing studies showing that incarceration fails to reduce serious crime, including assault).

Nonetheless, the current trend in domestic violence law and policy is towards greater criminalization, not less, notwithstanding the impact such policies have on the prison population and the wider community. For reasons sound and unsound, decriminalization of domestic violence is certainly unlikely, and probably impossible.³⁹⁰ Those who are concerned about the negative effects of criminalization, then, should focus their efforts on ending policies that hurt people subjected to abuse and rethinking punishment for intimate partner violence. Recognizing the lack of evidentiary support for their effectiveness, anti-violence advocates should turn away from mandatory policies. Although the current political and funding climate makes such efforts difficult, advocates should explore interventions that would more effectively address the harms created by intimate partner violence and deter further violence and abuse. Rather than continuing to partner with the criminal legal system, anti-violence advocates should ally themselves with community activists to conceptualize, pilot, and evaluate community-based alternatives to criminal interventions, saving the most intrusive punishments for repeat or habitual offenders. Anti-violence advocates should work to alleviate the criminogenic effects of imprisonment³⁹¹ and should advocate against hyperincarceration,³⁹² rather than using prison to “disappear” the problem of intimate partner violence.³⁹³ Anti-violence advocates should play an active role in movements to address the structural causes of violence and crime, working for racial, economic, and social justice in addition to gender justice.

907,000 incidents of intimate partner violence were reported in the United States in 2010.³⁹⁴ Arresting, trying, convicting, and incarcerating each perpetrator of those incidents would substantially increase the already overwhelming number of inmates in U.S. prisons and jails. The United States is not going to arrest and prosecute its way out of its problem with

³⁹⁰ As Professor Angela Harris has observed, the U.S. is very good at giving problems to the criminal justice system, but not at all good at taking them back. E-mail from Angela Harris, Professor of Law, UC Davis School of Law (March 7, 2016) (on file with author).

³⁹¹ The anti-violence movement should oppose efforts to weaken PREA’s enforcement provisions, for example. See Deborah M. Weissman & Leigh Goodmark, *We Can’t Breathe: Domestic Violence Advocacy and the Criminal Justice System*, HUM. RIGHTS AT HOME BLOG (Dec. 9, 2014), http://lawprofessors.typepad.com/human_rights/2014/12/we-cant-breathe-domestic-violence-advocacy-and-the-criminal-justice-system.html [https://perma.cc/66XX-GK85].

³⁹² See generally Coker & Macquoid, *supra* note 203 (advocating opposition to hyper-incarceration as central to the anti-domestic violence movement).

³⁹³ SCHENWAR, *supra* note 88, at 3.

³⁹⁴ CATALANO, *supra* note 6, at 1.

intimate partner violence;³⁹⁵ as Anne Sparks asked in 1997, “How many prisons are we willing to build for batterers?”³⁹⁶

The U.S. policy experiment with criminalization as a primary response to intimate partner violence is neither an unqualified success nor a total failure. What it has revealed is the need for a more graduated response to intimate partner violence and a response that does not unintentionally harm those it was intended to protect. The next phase of the anti-domestic violence movement should be dedicated to developing and implementing those policies.

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³⁹⁵ Jane Ryan, *Governor Warns Society Can Not ‘Arrest Its Way Out’ of Domestic Violence Problem*, ABC (Austl.) (Sept. 1, 2015, 7:45 PM), <http://www.abc.net.au/news/2015-09-02/governor-uses-lecture-to-urge-domestic-violence-change/6741762> [<https://perma.cc/76NP-5LYW>] (“We are not able to arrest our way out of the problem, nor is punishment the answer.”)

³⁹⁶ Sparks, *supra* note 43, at 52; *see also* SMITH, *supra* note 95, at 154 (“[T]he prison system is not equipped to address a violent culture in which an overwhelming number of people batter their partners, unless we are prepared to imprison hundreds of millions of people.”); Snider, *supra* note 35, at 12 (“Labelling every person who aggresses against another a ‘criminal’ is epistemologically absurd; locking them all up is fiscally impossible.”).

