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

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“The disconnect between battering as it is practiced and battering as it is criminalized is vast and it is significant” (Turkheimer, 2004)

Introduction

The goal of this paper is to present an overview of the research on and raise questions about the use of the criminal legal system as a strategy to prevent gender violence. More specifically, the paper will respond to the question, “who benefits and who loses in the criminalization of intimate partner violence?” I will begin by presenting a brief history of the activities that have been aimed at criminalization of gender violence, locating them within the larger context of activism, advocacy, and institutional change that has characterized the evolution of the work to end violence against women in the U.S. I will then turn to a discussion of the “punishment logic” of the criminal legal system and where that logic is aligned and misaligned with conventional understandings of the dynamics of IPV. The historical perspective and discussion of the logic behind state-sanctioned punishment for gender violence will serve as the background to the review of the research that speaks directly to the primary question that this paper is attempting to answer. The paper concludes with a set of recommendations and challenges for re-consideration of the strategic role that criminalization plays in tertiary prevention of gender-based violence.¹

The timeliness of this question is noteworthy. While there has been a significant shift in public opinion that is beginning to question the use of incarceration and other

¹ Readers will note that I use IPV, gender-based violence, and violence against women interchangeably throughout this paper. I do so to reflect that relationship between the specific experiences of battering and sexual assault within the context of intimate relationships and the broader structural manifestations of power abuse that particularly impact women but also target those who are gender non-conforming.
strategies to incapacitate those who violate the law, there continues to be a profound ideological commitment to and subsequent allocation of resources to legal strategies aimed at controlling social behavior that is understood to be problematic as a way to sanction those engaged in it. ² That is, despite ebbs and flows in public policy and public opinion, it is still the case that the main tactic used for dealing with problems associated with law-breaking and related norm violations is to criminalize them (Clear, 2009, Drucker, 2013, Jacobson, 2006, Puryear, 2013). The work to try to prevent or at least reduce gender violence follows this same pattern; while there are important discussions among anti-violence advocates, researchers, and program administrators about the effectiveness of arrest, prosecution, incarceration, and other legal strategies to protect victims of gender violence, national, state, and local policy continues to steer resources towards legal intervention and legislative actions (Incite, 2001). It could be argued that no subject is more highly contested among anti-violence community than the extent to which the criminal legal system continues to be used as the primary (and in many instances singular) response to women who are in danger. This discussion is critically important as we consider the ways that IPV can be prevented and I look forward to the discussion at the NSF/NIJ Workshop to refine and deepen the analysis presented in this paper.

History of Criminalization of IPV

“Criminalization of domestic violence refers to efforts to address domestic violence through the passage and enforcement of criminal and civil laws” (Payne, 2009).

² Here I reference the ways that issues like truancy, addiction, breaking rules related to welfare, and loitering have been made into crimes and how resources have been diverted towards detection, enforcement and sanctioning these and related behaviors.
Broadly speaking, the term includes three general spheres of criminal and civil legal work: criminal punishment and deterrence of batterers, treatment mandated by the legal system, and court orders to limit contact between those who use violence and those who are harmed. Surrounding these basic approaches are a range of systematic initiatives and activities that include: 1) the development of new laws, 2) the creation of specialized courts, 3) the provision of incentives to encourage state sanctions and monitor state agencies who are responsible to protect victims, 4) the creation of victim advocacy programs within criminal legal agencies, and 5) the creation of pro-prosecution statutes and inter-agency collaborations that require other state agencies to bring their power and authority to bear in cases of IPV (such as child protective services and immigration enforcement agencies). Taken together, these criminalization activities assume a primacy in the work the end gender violence, consuming the lion’s share of resources (both financial, political, intellectual, and programmatic) available to responders; some would say to the detriment of other activities and approaches.  

The move to criminalize gender violence began in the late 1970s when self-help groups began the grassroots social justice work that lead to making what was once a private problem a public one (Schechter, 1982). A central tenant of this work was the argument that women who were hurt by intimate partners had “rights” and that those

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3 It is noteworthy that the tension between those who supported investment in alternatives to criminalization and those who advocated for it as a primary intervention strategy has a long history in the anti-violence movement. There have been important causalities of that schism. One of the positive outcomes is the creation of autonomous political formations that focus on state-sanctioned violence as central to the work to end IPV. Many of the most successful of these formations have been led by women of color activists, including INCITE! Women of Color Against Violence. The extent to which they have not been evaluated as part of the prevention fabric is important to note and remedy.
categorical rights deserved to be protected by the same state agencies that offered protection as other groups when the law was violated. The political work that went into the demand that IPV be taken seriously by social institutions must be understood as difficult work, consuming nearly two decades of strategic action aimed at cultural, political, and legislative change. And despite considerable success with relation to creation a culture of intolerance of IPV, there continues to be many examples where violence against women is trivialized or ignored. 4 This notion of success on the one hand and lack of progress in other arenas is significant to the discussion of the effect of criminalization and will be discussed later in the paper. Here it is important to note that the demand that IPV be treated “like any other crime” did ultimately resonate with policy makers and hence it has emerged as one of the most important continuous tenants of the modern anti-violence movement in the US (Richie, 2012).

The demand that battering, marital rape, sexual assault, incest, emotional abuse, and later stalking, human trafficking, and other forms of gender violence be treated as “crimes” informed a range of programmatic developments and deeply influenced the anti-violence work in the 1980s and 1990s. A number of important reforms were put in places that attempted to increase the certainty that IPV would be taken seriously as a crime and that the legal responses with be consistent and fair (Fagan, 1996). Fueled by emerging feminist jurisprudence, creative legislative initiatives, federal funding and the leadership of women’s legal organizations the work to create new laws, to hold police (understood to be gatekeepers to protection) accountable for enforcing the laws, to reform

4 This is one of the places where I am calling attention to the ways that changes in how social institutions respond to IPV must be understood from within the context of how violence against women, broadly speaking, is still more generally tolerated.
court procedures to reflect a commitment to holding batterers accountable and to increase sanctions, including incarceration was significant (Danis, 2003).  

The passage of the Violence Against Women Act figured centrally here. Following the initial passage of the law in 1994, states enacted 1,500 new domestic violence laws from 1997 to 2003 (Miller, 2005). With each subsequent re-authorization, the emphasis on legal responses as the primary strategy (and the basic funding criteria) to addressing violence against women expanded. The 2005 reauthorization, for example, included a new law enforcement tool focusing on DNA testing. Later, the legislation was expanded to include new populations. State funding has mirrored the emphasis on criminalization of IPV to such an extent that the clear priorities for governmental responses was to train police, to encourage arrest, to promote prosecution and to expand sanctions that include both mandatory treatment and incarceration (Weissman, 2013). In this way, criminalization became the mainstay of efforts to respond to the problem of gender violence, bringing with it a series of unintended consequences, which will be discussed in the next section of this paper.

It is important to note first that criminalization had a symbolic intent and impact as well as the material one. To the extent that feminist theoretical analyses served as the initial impetus to this work, it was assumed that providing women access to justice via the criminal legal system would challenge patriarchal assumptions about women’s “place” as wives who could be controlled or hurt by their husbands with impunity. The symbolic intention was to connect the horrific suffering associated with IPV to other

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5 The range of legal and legislative proposals (marriage license tax, law suits against police departments, use of expert testimony, etc.) deserves a deeper discussion than this paper will allow. Together, they constitute an important set of initiatives that characterized a particular era in legal and feminist history.
forms of gender degradation and to expose the ways that the patriarchal state is complicit when it does not respond in protective ways. (Erez, 2002) By extension, this challenge could include reinforcing the law’s obligation to protect children from abusive parents, young women who should be protected from the acquaintance they were dating, and other women who are in subordinate positions to men, like employees. These early analyses, with noteworthy exceptions, were limited by their heteronormative assumptions about relationships and did not include attention to queer or trans* issues or other non-normative gender arrangements. This becomes important later when it became apparent that the law was limited in its ability to protect those who are most vulnerable. Still, they provided an important argument for advancing the notion of women’s rights by linking those rights to criminalization of IPV (Danis, 2003).

Some legal scholars argue that by the year 2000, the domestic violence movement was well on its way to being principally a legal movement embedded with the criminal justice system (Weissman, 2013). The evolution was a rapid one, augmented by policy changes in the broader society that saw an even deeper shift towards criminal legal responses to many social problems including but not limited to gender violence. This era is what I and others call “the buildup of a prison nation” or “the rise of the prison industrial complex”. Those broader changes facilitated the solidification of a particular form of carceral logic that surrounded, institutionalized, and justified the criminalization of IPV.6

The Logic of Criminalization of IPV

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6 I develop this argument more fully in Arrested Justice: Black Women, Violence and America’s Prison Nation.
In this section of the paper, I will briefly present the logic that has emerged as prevalent to justify criminalization as the primary strategy to respond to IPV. I do so to raise two points. First, what began as a decidedly feminist logic (that women deserved the same rights to protection as other citizens) was co-opted by what I will call here a punishment logic that has its roots in more conservative values. Ironically, the cooptation was made possible by the vehement attachment by anti-violence activists to legal and legislative remedies, to the exclusion of other options to ensure women’s safety (Bumiller, 2008). I will return to that point later.

Here I want to briefly outline what I mean by punishment logic and relate it specifically to IPV on six related dimensions. I do so to prepare for the discussion in the next section of this paper regarding who benefits and who loses in the criminalization of IPV.

First, the law is basically designed to respond to isolated behaviors or actions that are defined as crimes. It is difficult, in the legal sense, for these behaviors to be considered within the feminist context that understands IPV as a pattern of coercive control. Most battered women and their legal advocates will testify, for example, to the difficulty of getting police officers, prosecutors, judges, or others to understand that what might have happened immediately preceding an arrest is less important than the overall pattern of danger and harm that typically lasts over time (Turkheimer, 2004). Punishment, 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.
A second, related problem with legal responses that emerge from criminalization is that while laws can prohibit physical and possibly emotional and economic abuse, the law is ill-equipped to deal with the social control and disenfranchisement that characterizes most abusive relationships, let alone in society. That is, even though IPV is best understood as a pattern of behavior in the private sphere that reflects broader patterns of oppression in the public sphere, the law is not equipped to respond to the larger social and cultural dynamics that enable it. Instead, it isolates a focus on the private (incidence-based) violations and does nothing to respond to the larger social and cultural dynamics that enable it (Weissman, 2013). Even when we get systems to respond to abuse more effectively (as in the case of getting police to arrest) we do little to change the permission that men get to abuse power more generally. Most victims who experience IPV report other experiences of discrimination, disregard, or danger. Criminal legal responses in the form of punishment do not address these other, reinforcing problems.

In this way, the “crimes” of IPV are often taken out of context, which is a third limiting characteristic of criminal legal interventions that focus on punishment. In fact, punishment logic dictates that for the most part each individual illegal offense are considered a separate infraction and context is not introduced as important. 7 This logic is best exemplified by recent trends in criminal legal practices that require mandatory or so-called truth in sentencing approaches. While these policies are important aspects of legal reforms to decrease bias in sentencing, in the case of IPV, context matters deeply and is seldom introduced as a matter of course. Many people who turn to the criminal legal system end up disappointed because it is rare that the person who harmed them will

7 There are, of course, exceptions to this. Here I am referring to the practice rather than specific legal policy.
be held accountable for the full context of abuse and, instead, the victim can be held accountable.

Even those women for whom punishment logic brings some relief from the criminal legal system, their lives are not restored to pre-violence satisfaction or stability. Punishment of offenders does not help victims regain custody of their children, it does 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. This is because the crime of IPV is based on a retributive justice logic. Punishment neither address victims’ larger needs nor does it offer the victim control over the criminal legal process. The advent of no-drop clauses and the like leaves those who use the criminal legal system potentially in legal peril themselves if they do not cooperate with the mandates of the system.

There is clear evidence that women who turn to the criminal legal system looking for relief are a) not looking only for punishment, but for the IPV to end and b) more likely to feel the danger escalate than diminish. The research that supports this is clear. Post-intervention and post-separation violence is a very significant problem that the criminal legal system simply cannot fully account for. In fact, the creation of risk by criminalization is such a paradox to the logic that sees punishment as a deterrent, that post-separation violence almost goes unmentioned in the daily reality of criminal legal responses. What is the responsibility of the criminal legal system to protect women who, because they turn to it, face increased danger?

8 Here is where discussions of restorative or transformative justice responses to IPV become important alternatives to consider.
Finally, it bears repeating that work within the criminal legal system consumes so much of the resources in the work to prevent or respond to IPV, that the punishment logic almost stands above empirical analyses or substantive critique of criminalization as a response to gender-based violence. IPV is not a lone example. Criminologists and others argue vehemently that few social problems are actually ameliorated because they are criminalized alone. In fact, evidence suggests that sometimes criminalizing problems makes them worse by bringing more harm to those hurt by the problems in the first place. Drug abuse, prostitution, and abortion are key examples that have particular impact on women. Still, there is a kind of anti-empirical momentum that has taken over the work that means that despite qualitative data, evaluation studies, economic analysis and political considerations, it is almost impossible to divest from the commitment to reliance on criminalization as the principle response to gender based violence. As a result, few other intervention strategies are explored as fully or evaluated for their effectiveness.

**Who Benefits and Who Loses from Criminalization of IPV?**

The previous section was intentionally written in such a way to suggest that this might actually be the wrong question. Instead, I propose we ask “does anyone benefit from criminalization of IPV and who loses the most when we rely too much on the criminal legal system?” This reframing is more than a rhetorical maneuver. By asking a different question, we can slow the momentum of uncritical over-reliance on the criminal legal system as we seriously engage in discussions about alternative primary, secondary, and tertiary prevention strategies. Furthermore, it serves to disrupt what I consider an overly simplistic narrative in anti-violence work that implies that only poor, queer,
immigrant, women of color who have problematic relationships with the criminal legal system are harmed by criminalization of IPV. In the remainder of this paper, I will address these points.

The punishment logic described in the previous section results in a number of problems that makes criminalization problematic for most women who turn to it as remedy for IPV. Here I will draw upon eight areas of research that support this claim.\(^9\) First, because the punishment logic sees law enforcement as the gateway to the criminal legal system, the problem of police discretion continues to plague responses to IPV) and, by extension, leads to dual arrest of women (Erez, 2002, Weissman, 2013). A second, related area of research show that police fatigue (my word) has a desensitizing effect. Since law enforcement is the gateway to the criminal legal system and because services often begin their intervention with statements like “if you are trouble, call 911” women at most risk, who might be most inclined to seek the remedy of immediate arrest and therefore have more exposure to the police, paradoxically get less effective responses (Danis, 2003)\(^10\) and hence are left in greater danger, hardly a benefit (Payne, 2009).

Third, the typical legal tools that are intended to create safety (protection orders, for example) have not been shown to keep women safe from IPV and there has been limited work to show that courts do much better (Danis, 2003). Most of this research looks at

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\(^9\) In the final paper, I will describe the particular studies referenced here in more detail. Here I am presenting the body of work in a more aggregate form in order to stimulate the broader discussion at the workshop. My hope is that general review of the research presented here will enable a more theoretical discussion among the participants. I welcome feedback on the ideas as well as references to other research that confirms or refutes the arguments presented in this draft.

\(^10\) There is an interesting discussion that is taking place among national advocates to consider ways that services might rephrase that standard response. Interestingly, there is quite a bit of resistance to considering alternatives and few that seem to be acceptable to advocates working with women in crisis.
long-term effects and change over time. What these interventions do accomplish is the creation of a temporary separation whereby a person in danger can, if other things are in place, remove her/himself from harm’s way. That “if other things are in place” phrase is an important one. Most studies show that what keeps women safe is the opportunity to physically distance themselves from the person hurting them, which is only possible with resources and support (Goodkind, 2004). Punishment logic does not typically account for what women need beyond the temporary separation of the parties mandated by the law.

Fourth, on the issue of batterer intervention programs, meta-analyses show mixed results. Some research shows that court-mandated treatment deters battering for a while, but that is more often the case when it is combined with other responses that are more about restoring equilibrium to victims’ lives (Danis, 2003). Other evidence suggests that batterer programs have a neutral or even negative effect, especially those that are run by the courts (Stover, 2009). One of the reasons for this lack of effectiveness is that many aspects of the criminal legal system require victims be involved (to a greater or lesser extent) in the process. As previously stated, this can be both undesirable and dangerous (Danis, 2003).

The overall picture of the effectiveness of criminalization suggests that while there may be a short term protective benefit, there is very little conclusive evidence that criminalization in and of itself “works” or is beneficial for the majority of women who experience IPV in the long run. Complicating this picture is a sense that the research itself is characterized by a number of flaws which continue to plague our ability to show what works. Some critiques look at the design flaws and the ways that evaluation studies have not and cannot be replicated (Fagan, 1996). Others have been dismissed because,
like the punishment logic that informs the intervention, they do not look seriously at various typologies of batterers or contexts within which they use violence (Tuerkheimer, 2004). For obvious ethical reasons, there is little experimental research and some of the effects being investigated (safety, power, non-violence) are hard to measure (Fagan, 1996, Goodkind, 2004).

Turning now to respond to the second part of the question, “who loses the most when we rely too much on the criminal legal system”; there is overwhelming evidence to suggest that women with less social privilege lose the most. Predictably, the protective function of the state mirrors other institutional responses which are fraught with discriminatory and disproportionate negative effects on groups with less power (Ritchie, 2006, Bell and Mattis, 2000). In the case of IPV, there are two related conclusions from the research on the effectiveness of criminalization. First, most studies show that women with less privilege are less protected both because they are treated differently and because they are therefore less likely to turn to the criminal legal system for assistance (Nicolaidis, 2010). This point is significant in and of itself. Equally important, however, is the growing concern that as criminalization becomes the expected and routine response upon which most programs base their intervention approaches, those women who cannot or do not rely on the criminal legal system are understood to be “less victim-like” and ultimately underserving of state protection. A circuitous pattern of disempowerment results whereby 1) women are hurt by IPV, 2) they aren’t helped when they attempt to get relief from the criminal legal system, 3) so they are hurt more, 4) then they avoid turning to the system that has not helped them, and 5) since they don’t engage with what has become the expected trajectory to safety they are understood to be non-victims (Slote,
Complicating this pattern and effect are the fact that those women who are both under-served and dis-served by the process of criminalization are also more likely to experience more violence from multiple contexts of their lives. In effect, the over-reliance on the criminal legal system has not only had a neutral effect, but it creates disadvantage for already marginalized groups, turning victims into deviants or criminals.

I argue that this punishment logic uncritically suggests that women should rely on the criminal legal system for help despite the evidence suggesting that it won’t help them actually harms women (Richie, 2012).

Take, for example, the case of Black women who turn to the criminal legal system for help. Study after study shows that women are hesitant to use the police, police are less apt to intervene, women are therefore put at greater risk and ultimately then blamed for the abuse they experience (Gillum, 2014, Raphel and Ashley, 2008). A similar kind of dynamic can be seen with immigrant women who do not have legal status in this country. Calling police, going to court, or even confiding in a social service work can put the victim in peril given the current policy around immigrant detention and deportation (Ingram, 2007). Studies of lesbians, Asian women, Indian women, and other women of color show similar problematic effects (Crossland, et al, 2013, Hardesty, et all, 2011, Lee, 2013).

The issue of class, often conflated with race, is also important to examine with regard to the question of “who is hurt by criminalization?” Despite the fact that the

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11 This negative consequence of criminalization is critical and is being looked at as a form of structural violence by a sub-group of anti-violence researchers.
12 Here I am referring to the ways that IPV is related to community violence and abuse from other non-intimate sources like landlords, employers, police officers and other people who disadvantaged women are dependent upon outside of their households.
criminal legal system is part of the state apparatus of rights, there is clear evidence that people with fewer economic resources have a more difficult time accessing their rights (Hutchinson, 1998, Moe, 2007). In the case of IPV survivors from low-income communities, the ability to get services is clearly limited by their subordinate class status. Studies show their victimization is taken less seriously, they do not have the means to access the system for protection or representation, they are more likely to be economically tied to the person harming them, and hence less likely to reach out for help. They may also be more likely to be involved in “illegal survival crimes” to provide resources to care for their families and hence unlikely to turn to the criminal legal system for support (Richie, 2006). The punishment logic cannot accommodate this reasoning. Other people who fall outside of what is called the normative gaze will also face difficulty accessing the criminal legal system for IPV. In fact, doing so may cause harm to them. This is the case of queer people whose very personhood is questioned by normative tendencies of the punishment logic (Pattavina, et al, 2007)

Conclusion and Recommendations

The purpose of this paper is to reframe the questions about the benefit and harm of criminalization in the case of IPV. To do so, I have argued that we must consider the research that suggests that not only do women not benefit in very significant ways from criminalization, but data that points to ways that some groups of women are actually hurt by anti-violence strategies that result in a monolithic over-reliance on the criminal legal system in cases of IPV. Much more research needs to be conducted to document the specifics of these “non-benefits” and harms. This will only be possible with a significant re-imagining what prevention of IPV would entail and a reallocation of resources away
from perpetuating the momentum of what I have called here a punishment logic towards investment in strategies that will address the broader structural disadvantages that women face. This would be re-contextualizing IPV as part of the continuum of violence that disproportionately impacts those with less social privilege, paying particular attention to race and class dynamics within that, resourcing alternatives to the formal criminal legal system, and evaluating alternatives seriously. 13 At the core of this re-imagining would be making space to think about how responses to IPV that are based on punishment logic leave little promise of long term benefits for anyone. Criminalization of IPV is not the prevention tool it is assumed to be and has not advanced our ultimate goal of ending violence against women and others who are harmed by it.

13 I am opening up the discussion here, rather than concluding it, with a nod towards the discussion at the workshop on restorative justice as an alternative strategy. I do so with the hopes that we might even move towards a consideration of the possibility of transformative justice/prison abolition politic.
References


