



University of Kentucky  
UKnowledge

---

Office for Policy Studies on Violence Against  
Women Publications

Policy Studies on Violence Against Women

---

6-2015

## Encouraging Victims: Responding to a Recent Study of Battered Women Who Commit Crimes

Andrea L. Dennis  
*University of Georgia*

Carol E. Jordan  
*University of Kentucky, carol.j@uky.edu*

Follow this and additional works at: [https://uknowledge.uky.edu/ipsvaw\\_facpub](https://uknowledge.uky.edu/ipsvaw_facpub)



Part of the [Domestic and Intimate Partner Violence Commons](#), and the [Law and Gender Commons](#)

[Right click to open a feedback form in a new tab to let us know how this document benefits you.](#)

---

### Repository Citation

Dennis, Andrea L. and Jordan, Carol E., "Encouraging Victims: Responding to a Recent Study of Battered Women Who Commit Crimes" (2015). *Office for Policy Studies on Violence Against Women Publications*. 41.

[https://uknowledge.uky.edu/ipsvaw\\_facpub/41](https://uknowledge.uky.edu/ipsvaw_facpub/41)

This Article is brought to you for free and open access by the Policy Studies on Violence Against Women at UKnowledge. It has been accepted for inclusion in Office for Policy Studies on Violence Against Women Publications by an authorized administrator of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

---

## Encouraging Victims: Responding to a Recent Study of Battered Women Who Commit Crimes

### Notes/Citation Information

Published in *Nevada Law Journal*, v. 15, issue 1, p. 1-41.

The copyright holder has granted the permission for posting the article here.

# ENCOURAGING VICTIMS: RESPONDING TO A RECENT STUDY OF BATTERED WOMEN WHO COMMIT CRIMES

Andrea L. Dennis\* and Carol E. Jordan\*\*

## TABLE OF CONTENTS

|   |    |
|---|----|
| INTRODUCTION.....   | 2  |
| I. EVOLUTION OF REMEDIES FOR DOMESTIC VIOLENCE VICTIMS.....   | 4  |
| A. <i>From Nonintervention to Intervention</i> .....  | 5  |
| B. <i>The Present-Day Comprehensive, Interrelated Remedial<br/>        Framework</i> .....          | 7  |
| 1. <i>Social Services</i> .....   | 7  |
| 2. <i>Civil Laws</i> .....  | 8  |
| 3. <i>Criminal Laws</i> .....   | 9  |
| 4. <i>Criminal Procedures</i> .....   | 10 |
| 5. <i>Specialized Government Structures</i> .....   | 11 |
| II. DISCOURAGING DOMESTIC VIOLENCE VICTIMS FROM USING<br>REMEDIES .....                             | 12 |
| A. <i>Earlier Empirical Research on Victim Non-Reporting of<br/>        Domestic Violence</i> ..... | 13 |
| B. <i>The Recent Qualitative Study of Battered Women Who<br/>        Commit Crimes</i> .....        | 15 |
| 1. <i>Prior Empirical Research Regarding Victimization and<br/>            Criminality</i> .....    | 16 |
| a. <i>Women Who Kill Abusive Intimates</i> .....  | 16 |

---

\* Associate Professor, University of Georgia School of Law. This article benefited from the insights of many, including Diane Amann, Dan Coenen, Erica Hashimoto, Joan Prittie, and the Mid-Atlantic Criminal Law Research Collective. Additional thanks are owed to the faculty of Seattle University School of Law for inviting me to present this work during the school's faculty colloquium series and to the Southeastern Association of Law Schools for providing a forum for exchange of ideas. Jean Goetz Mangan and Acacia Wilson provided valuable research assistance. Thanks for everything, Plum.

\*\* Executive Director, University of Kentucky Office for Policy Studies on Violence Against Women. Thanks to my colleague Adam Pritchard, University of Central Florida, for our continuing collaboration in this field. And great thanks and respect to the incarcerated women whose life experiences are reflected in the studies summarized in this paper. Their lives serve as inspiration for the systematic changes this manuscript urges.

|  |    |
|--|----|
| <i>b. The Correlation Between Abuse Victimization and Criminal Offending</i> .....     | 17 |
| 2. <i>Methodology of the Qualitative Study</i> .....                                   | 18 |
| 3. <i>Results of the Qualitative Study: Discouraged Victims</i> .....                  | 21 |
| <i>a. Fear of Arrest</i> .....   | 21 |
| <i>b. Mistrust of Government Actors</i> .....  | 22 |
| <i>c. Social Service Ineligibility</i> .....   | 23 |
| 4. <i>Confirming Victims' Experiences and Feelings</i> .....                           | 24 |
| <i>a. Legally Based Eligibility Limitations on Receipt of Social Services</i> .....    | 25 |
| <i>b. Arrest and Prosecution Rules</i> .....   | 27 |
| 5. <i>Sourcing the Problem: The Rare Ideal Victim</i> .....                            | 28 |
| III. IMPROVING REMEDIES FOR DOMESTIC VIOLENCE VICTIMS .....                            | 29 |
| A. <i>Strengthening Existing Remedies</i> .....  | 30 |
| 1. <i>Cognizable Duress Defense</i> .....  | 30 |
| 2. <i>Expanded Mental Health and Substance Abuse Counseling and Advocacy</i> .....     | 31 |
| 3. <i>Removal of Criminal History Bars</i> .....                                       | 33 |
| 4. <i>Elimination of Mandatory Arrest, Prosecution, and Cooperation Policies</i> ..... | 34 |
| B. <i>A New Prescription: Immunizing Victims</i> .....                                 | 35 |
| 1. <i>The Proposal</i> .....   | 35 |
| 2. <i>Precedential Support</i> .....   | 35 |
| CONCLUSION.....  | 40 |

## INTRODUCTION

Over many decades, domestic violence statistics have consistently revealed that women from a wide variety of backgrounds are victimized, though the rate of victimization varies depending on a woman's particular characteristics.<sup>1</sup> Despite this consistency, past and present approaches to domestic violence have failed to attend to the diverse realities of victims. Advocates and researchers first devoted their efforts toward conveying the message that while any woman could potentially become a victim of domestic violence, no woman should become a victim. They then focused on creating laws and policies granting victims greater access to the legal system and making the justice system less intimidating to victims. Legal scholars, however, have argued that not all victims have felt successes in these areas uniformly.

<sup>1</sup> See SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES 6–18 (Dec. 19, 2007), available at <http://www.bjs.gov/content/pub/pdf/ipvus.pdf>.

Almost fifteen years ago, Professor Michelle Jacobs complained that the domestic violence movement had excluded female prostitutes, drug users, and thieves from victimhood status. She opined that while these women comprised the largest category of domestic violence victims, they received little attention from scholars and advocates—unlike those few women who killed their abusers. Jacobs urged feminist legal scholars who focused on criminal law to turn their attention to this category of invisible women.<sup>2</sup> Some five years later, Professor Leigh Goodmark questioned whether domestic violence law—civil or criminal—is useful for female victims of domestic violence generally.<sup>3</sup> She concluded that the emphasis on legal remedies has created unintended consequences for victims.<sup>4</sup> As well, she expressed concern that the turn to legal remedies discouraged policymakers from developing non-legal options.<sup>5</sup> Goodmark suggested that deployment of non-legal remedies might be more effective for some victims, and called on victims' lawyers to counsel their clients about such relief.<sup>6</sup>

In the last few years, similar complaints are still being raised in legal literature. Professor Kimberly Bailey offered that domestic violence victims are rational individuals and that their motivations for not accessing the criminal justice system to stop the violence should be identified and studied in order to improve the system for their benefit.<sup>7</sup> She recommended that these criminal justice reforms should be part of a larger social, political, and economic plan to address domestic violence. Finally, Professors Jane Aiken and Katherine Goldwasser argued that emphasis on the creation of legal solutions to domestic violence, particularly the civil protection order, placed the burden for ending violent relationships on victims and unintentionally undermined victim empowerment. They proposed that solving the domestic violence problem requires conceiving of the problem as a community—rather than individual—problem and employing non-legal strategies to shift social norms.<sup>8</sup>

This article amplifies these earlier works. The current system for remedying domestic violence relies heavily on strong state intervention in the form of government-backed social service programs, civil and criminal laws specific-

---

<sup>2</sup> Michelle S. Jacobs, *Prostitutes, Drug Users, and Thieves: The Invisible Women in the Campaign to End Violence Against Women*, 8 TEMP. POL. & CIV. RTS. L. REV. 459, 460 (1999); see also Shelby A.D. Moore, *Understanding the Connection Between Domestic Violence, Crime, and Poverty: How Welfare Reform May Keep Battered Women from Leaving Abusive Relationships*, 12 TEX. J. WOMEN & L. 451, 456 (2003).

<sup>3</sup> Leigh Goodmark, *Law Is the Answer? Do We Know that for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 8 (2004).

<sup>4</sup> *Id.* at 9, 18–19.

<sup>5</sup> *Id.* at 9, 40–45.

<sup>6</sup> *Id.* at 9, 45–48.

<sup>7</sup> Kimberly D. Bailey, *Lost in Translation: Domestic Violence, "The Personal is Political," and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255, 1257–58 (2010).

<sup>8</sup> Jane Aiken & Katherine Goldwasser, *The Perils of Empowerment*, 20 CORNELL J.L. & PUB. POL'Y 139, 169 (2010).

ly regulating intimate partner violence, and special procedures and structures to address the influx of these cases into the legal system. Over time, however, a developing body of data has shown that victims are unable or unwilling to report violence to the government because of their particular background or past experiences. In particular, one of this article's co-authors was closely involved in a recent qualitative study documenting that women who are both victims of intimate partner violence and currently or previously engaged in criminal activity are deterred from seeking the assistance of government-sponsored relief from violence. Due to their criminal backgrounds, these women avoid contact with the justice system at all costs. Furthermore, they often find themselves ineligible to take advantage of supportive social service programs. In response to this newly available empirical evidence, this article offers solutions specifically designed to address these victims' worries, but that may also resolve concerns held by victims more broadly.

Part I recounts the evolution of social services and legal remedies for domestic violence. Over time, society has shifted from nonintervention to private, community-based intervention and finally to an interrelated, comprehensive framework of public legal remedies. Part II begins with a review of previous research on victim non-reporting of domestic violence by describing reporting statistics and motivations underlying the failure of victims to complain and next reviews prior research on the connection between intimate partner victimization and criminal behavior. Part II then describes the methodology and results of the recently published qualitative study of battered women revealing how their criminal backgrounds dissuade them from reaching out to publicly available remedies.

Part III offers measures to address the concerns raised in Part II. Over the last several decades, advocates and scholars addressing domestic violence have worked continuously to improve outcomes for victims of intimate partner violence who pursue relief through the justice and social services systems. While the present-day solutions have helped many victims and are a critical improvement over the past, they have proven to have their limits. Thus, Part III begins by joining earlier calls for the adoption of reforms that firm up existing helpful measures and repeal of ineffectual mechanisms and rules. Part III concludes by offering a new proposal targeted toward women who both suffer violence and have a criminal history: victim immunity from arrest and prosecution when reporting domestic violence.

#### I. EVOLUTION OF REMEDIES FOR DOMESTIC VIOLENCE VICTIMS

Beginning in the 1970s, a grassroots movement of women's advocates pushed a tide of reform of policies and laws regarding domestic violence.<sup>9</sup> Ear-

---

<sup>9</sup> "The push to reform the laws pertaining to rape, domestic violence, and stalking did not begin with the judges who interpreted the law, the police who enforced it, or the attorneys who prosecuted violators of it. Rather, it began in the women's movement of the 1970s."

ly efforts focused on drawing national attention to the long ignored issue and creating a bedrock of social support systems that would allow battered women to physically escape and find shelter from violence. The movement then turned its attention to transforming the justice system. Initial measures sought to ensure that police and prosecutors would effectively “use existing laws to protect victims and hold offenders accountable for their crimes.”<sup>10</sup> Eventually, a more aggressive strategy of legal reform was adopted. Advocates sought and obtained formal recognition of domestic violence in civil law, criminal law, and criminal procedure.<sup>11</sup> As well, over time, special structures were put in place to deal with domestic violence cases. Thus, today’s victims of domestic violence have available many options for obtaining relief from violence.

*A. From Nonintervention to Intervention*

Historically, domestic violence was a private matter unacknowledged in public spheres and not addressed by law.<sup>12</sup> Society at large deemed partner violence a familial matter to be resolved between husband and wife.<sup>13</sup> Early statutes, court opinions, and government actors established a veil of privacy around all families, in effect giving immunity to batterers.<sup>14</sup> Victims desiring help had to rely on their own internal strengths to survive, and on the willingness of family and community to facilitate escape or provide some semblance of protection.<sup>15</sup>

Feminist advocates came along in the seventies and challenged the concept of family privacy, insisting that the epidemic of violence against women be thrust onto the collective conscience of the national community.<sup>16</sup> These feminist voices declared that what happened behind closed doors between husbands and wives was not private, but rather deeply political, and that the private sphere of the family and the public sphere of social and work life should not be separate.<sup>17</sup>

In the early phases of developing programs for battered women, advocates for women and children created a framework of protective social services, in-

---

CAROL E. JORDAN, *VIOLENCE AGAINST WOMEN IN KENTUCKY: A HISTORY OF U.S. AND STATE LEGISLATIVE REFORM* 99 (2014).

<sup>10</sup> *Id.* at 103.

<sup>11</sup> For fuller summaries of the history of the legal approach to domestic violence, see *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498 (1993); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1661–74.

<sup>12</sup> *See State v. Rhodes*, 61 N.C. (Phil.) 453, 456–57 (1868).

<sup>13</sup> *See id.* The recognition and redress of violence between cohabitants and same-sex intimates would not come until much later.

<sup>14</sup> JORDAN, *supra* note 9.

<sup>15</sup> ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 20 (2000).

<sup>16</sup> SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN’S MOVEMENT* 29–43 (1982).

<sup>17</sup> *Id.* at 317–18.

cluding emergency shelters and other community-based support systems. Toward the latter part of the 1970s, there were only two-dozen emergency shelters for battered women, but a decade later approximately 1,200 shelters in the United States were housing 300,000 women annually.<sup>18</sup> These initial efforts were built outside the traditional service and justice systems because, as Deborah Epstein has written, “activists perceived violence against women as integrally linked to gender inequality and viewed the political and legal establishment with suspicion, maintaining that it perpetuated institutional forms of sexism.”<sup>19</sup>

Advocates next focused on persuading police and prosecutors to enforce existing state laws against batterers in order to protect victims and creating new laws criminalizing domestic violence more particularly. Traditionally, government actors assumed a stance of nonintervention. Decades of research showed that even when statutory legal actions were available, such laws were little utilized on behalf of women who sought help.<sup>20</sup> Data revealed low arrest rates<sup>21</sup> and low rates of prosecution<sup>22</sup> in disputes between domestics. Eventually, through advocates’ efforts, government agencies adopted policies and programs to better handle these cases.<sup>23</sup>

It was not until the 1990s that the federal government seriously focused on intimate violence. Until then, states had primarily led the way in developing innovations. In 1994, Congress enacted the Violence Against Women Act (“VAWA”), which Congress has repeatedly reauthorized in subsequent years.<sup>24</sup> The initial 1994 enactment criminalized interstate domestic violence and inter-

---

<sup>18</sup> EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 34–35 (2007).

<sup>19</sup> Deborah Epstein, *Redefining the State’s Response to Domestic Violence: Past Victories and Future Challenges*, 1 GEO. J. GENDER & L. 127, 128 (1999).

<sup>20</sup> See generally Carol E. Jordan, *Intimate Partner Violence and the Justice System: An Examination of the Interface*, 19 J. INTERPERSONAL VIOLENCE 1412 (2004) (discussing the challenges women face when entering the court system).

<sup>21</sup> E.g., Martha L. Coulter et al., *Police-Reporting Behavior and Victim-Police Interactions as Described by Women in a Domestic Violence Shelter*, 14 J. INTERPERSONAL VIOLENCE 1290, 1296 (1999); Kathleen J. Ferraro, *Policing Woman Battering*, 36 SOC. PROBS. 61, 71–72 (1989).

<sup>22</sup> E.g., Jeffrey Fagan, *Cessation of Family Violence: Deterrence and Dissuasion*, 11 CRIME & JUST. 377, 384–85 (1989).

<sup>23</sup> E.g., IACP NAT’L LAW ENFORCEMENT POLICY CTR., DOMESTIC VIOLENCE: CONCEPTS AND ISSUES PAPER (2006), available at <http://www.theiacp.org/portals/0/pdfs/DomesticViolencePaper0606.pdf>.

<sup>24</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464; Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54. Notably though, the most recent passage of VAWA was delayed due to controversy over new provisions related to immigrant battered women and women battered by female partners. See Editorial, *Delay on Domestic Violence*, N.Y. TIMES, July 24, 2012, at A20.



Fall 2014]

## ENCOURAGING VICTIMS

7

state violations of protective orders.<sup>25</sup> Batterers were also prohibited from possessing firearms.<sup>26</sup> Institutionally, the legislation created the U.S. Department of Justice Office on Violence Against Women and devoted significant financial resources to the creation and implementation of social and legal remedies for domestic violence in the form of grants to states for law enforcement, civil legal services, and shelter services.<sup>27</sup>

Thus, by the mid-1990s, advocates were able to move the issue of domestic violence into the national consciousness, create a system of social services for battered women, and convince legislators and enforcers to provide civil and criminal relief. Overall, the shift from nonintervention to intervention served an expressive purpose as well as offered a means of social control. In terms of the expressive function, the creation of legal and non-legal relief for victims and reinforcement of criminal arrest, prosecution, and penalties for offenders demonstrated that the domestic violence problem was to be taken seriously and publicly empowered victims.<sup>28</sup> With respect to social control, the new regime not only punished perpetrators of domestic violence, but also incapacitated, deterred, and rehabilitated them.<sup>29</sup>

*B. The Present-Day Comprehensive, Interrelated Remedial Framework*

Early state-level advocates successfully moved the topic of intimate partner violence into the mainstream, created non-legal support for victims, improved existing enforcement mechanisms, and garnered federal support. They continued their success in the next wave of reforms that created civil remedies for victims, criminalized domestic violence, and fashioned procedural rules and institutional structures to encourage arrest and prosecution. These legal reforms built upon and connected to an even larger system of social support, such that today battered women potentially have available to them an all-inclusive system of social and legal remedies that are designed to work in tandem.

*1. Social Services*

Since the first battered women's shelters were established in the 1970s, there has been an exponential increase in public and private social services for

---

<sup>25</sup> 18 U.S.C. § 2261 (2012) (interstate travel to commit domestic violence); 18 U.S.C. § 2262 (2012) (interstate travel to violate an order of protection).

<sup>26</sup> 18 U.S.C. § 922(g)(8) (2012) (possession of firearm while subject to order of protection); *id.* § 922(g)(9) (possession of firearm after conviction of misdemeanor crime of domestic violence).

<sup>27</sup> See LISA N. SACCO, CONG. RESEARCH SERV., REPORT NO. 42499, THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING 4 (2014).

<sup>28</sup> See Aiken & Goldwasser, *supra* note 8. For fuller discussions of "expressivism," see Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT'L CRIM. L. REV. 93, 117–18 (2002); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2048 (1996).

<sup>29</sup> See *Developments in the Law*, *supra* note 11, at 1547–51.

victims. In the late 1970s, the few shelters that existed were privately operated, with little funding, by volunteers out of their own homes.<sup>30</sup> Eventually public shelters sprung up, and by 2012, the National Network to End Domestic Violence reported that 86 percent of the nation's 1,924 domestic violence shelters served almost 65,000 victims on a single day.<sup>31</sup> Today's shelters—which can be found nationwide—comprehensively address the needs of domestic violence victims by providing outreach services; legal, financial, and medical advocacy; job and career counseling; substance abuse services; children's programming; transitional housing; and prevention efforts.<sup>32</sup>

## 2. Civil Laws

Today, all fifty states and the District of Columbia have enacted some form of civil protection order (“CPO”) legislation.<sup>33</sup> CPO laws grant courts the authority to promote victim safety by tailoring relief based on the particular circumstances of each case, victim, or offender. Uniformly, and at a minimum, judges are permitted to order the cessation of the violence. Additionally, courts commonly are authorized to prohibit batterers from being in the home; order treatment for violence or alcohol abuse; set rules for child custody, support, or visitation; and grant economic relief such as income support and residential maintenance.<sup>34</sup> CPOs can result in an arrest when the order is violated.<sup>35</sup>

In addition to creating CPOs, some states have modified child custody laws to address domestic abuse. Specifically, courts may factor domestic abuse into the “best interests of the child” determination in custody proceedings.<sup>36</sup> More stringently, some states have established a rebuttable presumption against granting custody to the batterer.<sup>37</sup>

---

<sup>30</sup> Amy J. Saathoff & Elizabeth Ann Stoffel, *Community-Based Domestic Violence Services*, FUTURE CHILD., Winter 1999, at 97, 98 (1999).

<sup>31</sup> See NAT'L NETWORK TO END DOMESTIC VIOLENCE, DOMESTIC VIOLENCE COUNTS: 2012, at 1 (2012), available at [http://www.nnedv.org/downloads/Census/DVCounts2012/DVCounts12\\_NatlReport\\_Color.pdf](http://www.nnedv.org/downloads/Census/DVCounts2012/DVCounts12_NatlReport_Color.pdf) (reporting results of organization's annual 24-hour census of adults and children seeking domestic violence services on a single day in the United States).

<sup>32</sup> See NAT'L COAL. AGAINST DOMESTIC VIOLENCE, NATIONAL DIRECTORY OF DOMESTIC VIOLENCE PROGRAMS: A GUIDE TO COMMUNITY SHELTER, SAFE HOMES AND SERVICE PROGRAMS (2008); NAT'L NETWORK TO END DOMESTIC VIOLENCE, *supra* note 31.

<sup>33</sup> See ABA COMM'N ON DOMESTIC VIOLENCE, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOs) BY STATE (2009), available at [http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/dv\\_cpo\\_chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/dv_cpo_chart.authcheckdam.pdf); Helen Eigenberg et al., *Protective Order Legislation: Trends in State Statutes*, 31 J. CRIM. JUST. 411, 414 (2003).

<sup>34</sup> *E.g.*, GA. CODE ANN. § 19-13-4 (West 2010).

<sup>35</sup> *E.g.*, *id.* § 19-13-6.

<sup>36</sup> *E.g.*, N.Y. DOM. REL. LAW § 240 (McKinney 2010 & Supp. 2015); see ABA COMM'N ON DOMESTIC VIOLENCE, *supra* note 33.

<sup>37</sup> *E.g.*, DEL. CODE ANN. tit. 13, § 705A (West 2006).

### 3. Criminal Laws

Presently, to protect victims and punish offenders, criminal repercussions for domestic violence exist in several forms. First, abuse of an intimate may constitute a distinct criminal offense. In the past, violence against intimates was theoretically cognizable under criminal laws punishing disorderly conduct, assault and battery, or burglary regardless of the offender's relationship to the victim. Police, however, usually declined to arrest those who perpetrated violence against intimates rather than strangers.<sup>38</sup> Further, it had been argued that the repetitive nature of domestic violence made traditional assault statutes less effective, for the reason that those statutes are traditionally directed at discrete, isolated criminal acts.<sup>39</sup> In response, today many states have specifically criminalized spousal abuse.<sup>40</sup> The justification underpinning the specification of a new crime was that domestic violence is rarely a singular act; rather, it is a patterned offense with high rates of recidivism.<sup>41</sup> Additionally, some states that did not create new, specific crimes instead enacted sentencing enhancements for traditional offenses committed against domestic partners.<sup>42</sup> Finally, in most jurisdictions, a criminal penalty also now attaches itself to civil orders of protection. Over thirty states have mandated arrest for the violation of a civil protective order and made incarceration an available punishment.<sup>43</sup>

Substantive criminal law defenses have also incorporated protections for abuse victims, particularly those who commit violent acts against their alleged abusers. Beginning in the late 1970s, courts began to recognize battered woman syndrome ("BWS") in cases involving a victim's violent act against an abusive partner.<sup>44</sup> BWS was based on the work of psychologist Lenore Walker,<sup>45</sup> whose research helped to contextualize a woman's emotional, cognitive, and behavioral reactions to abuse, and also promoted an understanding that victimization experiences were the cause, not the result, of subsequent mental health prob-

---

<sup>38</sup> See, e.g., Martha L. Coulter & Ronald A. Chez, *Domestic Violence Victims Support Mandatory Reporting: For Others*, 12 J. FAM. VIOLENCE 349, 351 (1997) (finding that around half of the women in their study contacted police, but only about one-fourth of the offenders were arrested); Nan Oppenlander, *Coping or Copping Out: Police Service Delivery in Domestic Disputes*, 20 CRIMINOLOGY 449, 450 (1982).

<sup>39</sup> Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 960-61 (2004).

<sup>40</sup> JORDAN, *supra* note 9, at 108.

<sup>41</sup> *Id.* at 115.

<sup>42</sup> E.g., KY. REV. STAT. ANN. § 508.032 (West Supp. 2014).

<sup>43</sup> DAVID HIRSCHL ET AL., EXPLAINING THE PREVALENCE, CONTEXT, AND CONSEQUENCES OF DUAL ARREST IN INTIMATE PARTNER CASES 22-23 tbl.3.4 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf>.

<sup>44</sup> E.g., *Smith v. State*, 277 S.E.2d 678, 678 (Ga. 1981); *Ibn-Tamas v. United States*, 407 A.2d 626, 631 (D.C. 1979).

<sup>45</sup> See generally LENORE E. WALKER, *THE BATTERED WOMAN* (1979).

lems for a battered woman.<sup>46</sup> Courts incorporated this information in a variety of ways in cases. Some jurisdictions permitted the admission of evidence of abuse to inform juror decision-making about victim culpability, while others utilized evidence of abuse to modify definitional elements of crimes or defenses, when supported by sufficient evidence.<sup>47</sup> For victim-defendants who were convicted, some states accepted evidence of abuse in sentencing as a mitigating factor.<sup>48</sup> Over time, use of the battered woman syndrome has been heavily critiqued.<sup>49</sup> Nonetheless, it is still often allowed as a defense and used to educate jurors and judges.<sup>50</sup> In light of critiques, however, some experts have begun to use a more traditional and scientifically recognized concept, post-traumatic stress disorder, when characterizing the behaviors of a battered woman.<sup>51</sup>

#### 4. Criminal Procedures

Restrictive procedural rules, law enforcement and prosecutorial discretionary decisions, and victim non-cooperation, have all been identified as possible barriers to effective enforcement of domestic violence laws.<sup>52</sup> Consequently, legislatures and government agencies have adopted measures designed to affect the behavior of government actors and victims, with an eye toward strengthening legal protections. The changes focus on three distinct phases of the criminal process: arrest, charging, and adjudication.

Arrest removes an alleged perpetrator from the scene—usually the home—affording the suspect a “cooling off” period and giving the victim the time and space to take safety measures. For domestic violence cases, the traditional warrantless arrest standard often required that officers actually observe an offense before having authority to arrest an alleged batterer.<sup>53</sup> However, since 2000 all states have authorized warrantless arrest of domestic violence offenders based

---

<sup>46</sup> MARY P. KOSS ET AL., NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY 77–80 (1994).

<sup>47</sup> Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 220–32 (2002).

<sup>48</sup> E.g., KY. REV. STAT. ANN. § 439.3401(5) (West 2013) (providing exemption from violent offender statute requiring service of 85 percent of a sentence prior to parole consideration for offenders the court determines are victims of domestic violence and abuses).

<sup>49</sup> See Burke, *supra* note 47, at 232–47; Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1198–1200 (1993) (critiquing battered woman syndrome and questioning turn to post-traumatic stress disorder).

<sup>50</sup> Kathleen J. Ferraro, *The Words Change, but the Melody Lingers: The Persistence of the Battered Woman Syndrome in Criminal Cases Involving Battered Women*, 9 VIOLENCE AGAINST WOMEN 110, 110 (2003).

<sup>51</sup> E.g., State v. Ciskie, 751 P.2d 1165, 1169 (Wash. 1988); CAROL E. JORDAN ET AL., INTIMATE PARTNER VIOLENCE: A CLINICAL TRAINING GUIDE FOR MENTAL HEALTH PROFESSIONALS 29 (2004).

<sup>52</sup> See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857–65 (1996).

<sup>53</sup> E.g., MD. CODE ANN., CRIM. PROC. § 2-202 (West 2011) (warrantless arrests, generally).

on probable cause that an assault has been perpetrated; officer presence is no longer strictly required.<sup>54</sup> Moreover, to alleviate concerns that officers were declining to arrest perpetrators even though arrest may have been appropriate or necessary, by 2000, twenty-one states and the District of Columbia enacted mandatory arrest rules that removed discretion from on-scene officers.<sup>55</sup> Now, law enforcement is authorized to make a warrantless arrest in either of two circumstances: (1) a misdemeanor or felony committed in an officer's presence, or (2) a felony offense for which probable cause exists to make the arrest.

With respect to charging and adjudication, jurisdictions have embraced rules constraining the ability of prosecutors and victims to forgo adjudication in order to ensure that cases are routinely and successfully prosecuted rather than abandoned. These policies have come in several forms. Many prosecutors today operate under "no-drop" policies that restrict their traditional authority to solely determine whether to file charges and pursue cases. Hard "no-drop" policies require prosecutors to pursue a case even over the objection of the complaining victim.<sup>56</sup> Soft "no-drop" policies recognize the complexity of cases, express a preference for prosecution, and direct prosecutors to encourage complainants to continue with a case, but still allow prosecutors to decline prosecution.<sup>57</sup> Additionally, some prosecution agencies have embraced non-cooperation policies that, in the extreme, result in the arrest on contempt charges of a complaining victim reluctant or unwilling to testify against an alleged offender.<sup>58</sup>

### 5. *Specialized Government Structures*

The civil and criminal remedies discussed above create a doctrinal and procedural scheme allowing victims to access the legal system for protection ensuring that victims who seek protection receive it. Other changes have expanded the capacities and capabilities of legal systems to handle these new and demanding cases. Two examples include the creation of separate entities for handling these cases: specialized courts, also known as problem-solving courts, and specialized prosecution units. Specialized courts, such as mental health courts, family courts, and substance abuse courts, have proliferated over the last

---

<sup>54</sup> *E.g.*, *id.* § 2-204; VA. CODE ANN. § 19.2-81.3 (West Supp. 2014); NEAL MILLER, INST. L & JUST., DOMESTIC VIOLENCE: A REVIEW OF STATE LEGISLATION DEFINING POLICE AND PROSECUTION DUTIES AND POWERS 27 (2004), available at [http://www.ilj.org/publications/docs/Domestic\\_Violence\\_Legislation.pdf](http://www.ilj.org/publications/docs/Domestic_Violence_Legislation.pdf).

<sup>55</sup> MILLER, *supra* note 54, at 28; see discussion at Part II.B.4.b.

<sup>56</sup> *E.g.*, FLA. STAT. ANN. § 741.2901(2) (West 2010).

<sup>57</sup> *E.g.*, WIS. STAT. ANN. § 968.075(7) (West 2014).

<sup>58</sup> *E.g.*, Betty Adams, *Battered Wife Jailed After Refusing to Testify Against Husband*, PORTLAND PRESS HERALD (June 3, 2014), <http://www.pressherald.com/2014/06/03/maine-domestic-violence-victim-jailed-after-refusing-to-testify/>; Hanna, *supra* note 52, at 1866 (describing the experience of Maudie Wall, who was jailed for contempt for failure to testify against her husband).

several decades, and domestic violence courts have been part of that growth.<sup>59</sup> Studies show that the number of domestic violence courts across the United States has now grown to between two hundred and three hundred.<sup>60</sup> Domestic violence courts link justice and social service agencies, address the unique needs of the battered victims, and implement court orders or conditions tailored to hold offenders accountable and decrease recidivism.<sup>61</sup>

Similarly, specialized prosecution offices—which are afforded significant discretion and resources—were established to provide experienced, highly trained, and strong prosecutors, and facilitate prosecution efforts.<sup>62</sup> Today, “[m]ost large prosecutors’ offices have specialized domestic violence units, allowing for . . . vertical prosecution . . . , improved case preparation, greater contact with victims, reduced caseloads and more malleable court scheduling.”<sup>63</sup>

## II. DISCOURAGING DOMESTIC VIOLENCE VICTIMS FROM USING REMEDIES

Given the robust public system created to help women successfully leave violent intimate relationships, one might expect that the vast majority of abuse victims utilize the system, including by calling the police who are designated first-responders to reports of violence. Nonetheless, it has long been accepted that reporting data, documenting how many women report their victimization to law enforcement, fail to accurately capture the actual number of women who experience domestic violence.<sup>64</sup> While the number of unrecognized victims is unknown, researchers have identified some common motivations for victim non-reporting. Review of the current state of knowledge regarding victim reporting, though, reveals a gap in the available information: whether and how an abuse victim’s criminal behavior influences reporting of violence. While significant attention has been devoted to those victims who kill or seriously injure

---

<sup>59</sup> See Greg Berman & John Feinblatt, *Problem Solving Courts: A Brief Primer*, 23 LAW & POL’Y 125, 126 (2001).

<sup>60</sup> SUSAN KEILITZ, SPECIALIZATION OF DOMESTIC VIOLENCE CASE MANAGEMENT IN THE COURTS: A NATIONAL SURVEY 3 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/186192.pdf>; MELISSA LABRIOLA ET AL., A NATIONAL PORTRAIT OF DOMESTIC VIOLENCE COURTS, at v (2010), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/229659.pdf> (California and New York account for almost half of all programs).

<sup>61</sup> Angela R. Gover, *Domestic Violence Courts: A Judicial Response to Intimate Partner Violence*, in PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY? 115, 115 (Paul Higgins & Mitchell B. Mackinem eds., 2009).

<sup>62</sup> See, e.g., FLA. STAT. ANN. § 741.2901 (West 2010).

<sup>63</sup> ANDREW R. KLEIN, NAT’L INST. OF JUSTICE, NCJ 225722, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 51 (2009).

<sup>64</sup> Prevalence studies, however, provide important estimates on the actual number of victims of domestic violence, rape, and stalking. See MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 39–40 (2011), available at [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf).

their abusers, far less attention has been paid to other law-breaking by victims and the impact of this criminal behavior on continued victimization. This lapse is partially addressed by the recently published qualitative study examining the impact of criminal background on a domestic violence victim's perceptions of the social and legal mechanisms for ameliorating domestic violence. This part describes the study's methodology and results as well as explains the doctrine, policy, and system design choices giving rise to the outcomes.

*A. Earlier Empirical Research on Victim Non-Reporting of Domestic Violence*

More than a decade of research has made clear that the majority of female domestic violence victims do not report their victimization to law enforcement officers.<sup>65</sup> In addition to documenting low reporting rates, empirical studies have also identified the key factors that appear to influence whether or not a victim will report domestic violence committed by a partner. The National Crime Victimization Survey ("NCVS") compiles information regarding reporting of domestic violence, including reasons for not reporting.<sup>66</sup> The effects of victim age, marital status, race, socio-economic status, and seriousness of the violence are unclear.<sup>67</sup> However, consensus has been reached regarding the negative impact of other factors, such as desire to maintain privacy, fear of reprisal, and dissatisfaction with law enforcement.

A federal report using data from the NCVS documented that 22 percent of women indicated that they did not report the matter because it was private or personal,<sup>68</sup> and 8 percent of women chose not to report because it was a minor crime.<sup>69</sup> Approximately 14 percent and 12 percent of female victims chose not to report in order to protect the offender or due to fear of reprisal, respectively.<sup>70</sup> Women also expressed concerns about police as reasons for non-reporting.

---

<sup>65</sup> See SHANNAN CATALANO ET AL., U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENCE 2 (2009), available at <http://www.bjs.gov/content/pub/pdf/fvv.pdf>; PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, at v (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf>; SHARON D. HERZBERGER, VIOLENCE WITHIN THE FAMILY: SOCIAL PSYCHOLOGICAL PERSPECTIVES 5-7 (1996); RONEE BACHMAN, VIOLENCE AGAINST WOMEN: SYNTHESIS OF RESEARCH FOR CRIMINAL JUSTICE POLICYMAKERS 19-20 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/199579.pdf>.

<sup>66</sup> See CATALANO, *supra* note 1, at 38-39.

<sup>67</sup> See Laura J. Hickman & Sally S. Simpson, *Fair Treatment or Preferred Outcome? The Impact of Police Behavior on Victim Reports of Domestic Violence Incidents*, 37 LAW & SOC'Y REV. 607, 608-09 (2003). Beth Richie has explained that African American women do not necessarily view the legal system as helpful and may view cooperation with government officials as disloyal to African American men. As well, African American women may be suspicious of a system that now recognizes intra-racial violence given that this was not always the case. Beth Richie, *Battered Black Women a Challenge for the Black Community*, BLACK SCHOLAR, Mar./Apr. 1985, at 40, 42-43 (1985).

<sup>68</sup> See CATALANO, *supra* note 1, at 38.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

Some victims believed the police would do nothing (approximately 8 percent), would be ineffective (approximately 3 percent), or would be biased (approximately 1 percent), although the concern about bias was cited in only ten or fewer instances.<sup>71</sup> Finally, it is worth noting that some female victims did not report because it would be inconvenient (3 percent) or because it was reported to another official (3 percent).<sup>72</sup>

Other research confirms the victim-reported NCVS numbers. For example, studies have found that victims are less likely to report a crime when it is committed by a partner rather than by a stranger.<sup>73</sup> In fact, the odds that victims will notify the police are approximately five times lower if the offender is an intimate partner.<sup>74</sup> Domestic violence victims also report to law enforcement at lower levels than victims of other violent crimes because of privacy concerns, fear of reprisal, a desire to protect offenders, a desire to avoid being stigmatized as a domestic violence victim, or a belief that nothing will be done if they do report.<sup>75</sup>

Additionally, preliminary social science research on how police behavior influences victim reporting indicates that satisfaction with police response makes victims more likely to call the police in future violent situations.<sup>76</sup> Counter-intuitively, however, in at least one study, “victims who felt unfairly treated by the police were *more likely* to call [police] in the future, compared to victims who felt fairly treated.”<sup>77</sup> Finally, researchers have demonstrated that, in addition to other concerns, an abused immigrant woman may choose not to call law enforcement for assistance due to fear that she will be arrested and deported.<sup>78</sup>

Knowledge of the above data is important to advocates’ continuing efforts to refine the approach to solving the domestic violence problem. This data allows for improvement of legal and non-legal programs and policies designed to empower victims to seek help in leaving an abusive relationship. However, despite all the currently available information, the influence of criminal history on

---

<sup>71</sup> *Id.* at 38–39.

<sup>72</sup> *Id.* at 39.

<sup>73</sup> TJADEN & THOENNES, *supra* note 65; BACHMAN, *supra* note 65; RICHARD FELSON & PAUL-PHILIPPE PARÉ, THE REPORTING OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT BY NONSTRANGERS TO THE POLICE 22 (2005), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/209039.pdf>.

<sup>74</sup> FELSON & PARÉ, *supra* note 73, at 17–18.

<sup>75</sup> JOANNE BELKNAP, THE INVISIBLE WOMAN: GENDER, CRIME, AND JUSTICE 215–18, 291–92 (2d ed. 2001); see also MATTHEW R. DUROSE ET AL., U.S. DEP’T OF JUSTICE, NCJ 207846, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 2 (2005), available at <http://www.bjs.gov/content/pub/pdf/fvs02.pdf>; Richard B. Felson et al., *Reasons for Reporting and Not Reporting Domestic Violence to the Police*, 40 CRIMINOLOGY 617, 617 (2002).

<sup>76</sup> Hickman & Simpson, *supra* note 67, at 628.

<sup>77</sup> *Id.* at 629.

<sup>78</sup> Leslye E. Orloff et al., *Battered Immigrant Women’s Willingness to Call for Help and Police Response*, 13 UCLA WOMEN’S L.J. 43, 46–47, 67–68 (2003). Other identified deterrents include culture, distrust of law enforcement, and language barriers. *Id.*



Fall 2014]

## ENCOURAGING VICTIMS

15

victim reporting of domestic violence remains understudied empirically. Until recently, scant information concerning the role of criminal background in the life of an abuse victim was available. The next section describes a new effort to fill this gap.

*B. The Recent Qualitative Study of Battered Women Who Commit Crimes*

Historically, empirical researchers have not focused on the full range of crimes that may be committed by a battered woman. Instead, the bulk of work has focused on homicides committed by battered women against their abusive partners. In this context, researchers have contended that a battered woman who kills her offender is highly unlikely to have a criminal history, such that the lethal offense against her batterer is the domestic violence victim's first criminal act.<sup>79</sup> The lack of literature on the presence and breadth of criminal histories has left the advocacy system unprepared to address the totality of battered women's needs and unable to fully understand their reticence to reach out to the justice system for aid.

In order to address this gap in the literature two studies were recently conducted. The first was a quantitative study of women incarcerated for murder, manslaughter, or felony assault when the victim was an abusive partner.<sup>80</sup> Among the goals of the study was an effort to provide insight into the circumstances under which females kill or seriously assault intimate partners and, in particular, to assess whether the widely accepted assumption that "true" battered women do not have criminal histories is, in fact, accurate.<sup>81</sup> Study results included a finding that over two-thirds of women incarcerated for these crimes did have a criminal history, primarily consisting of property and drug offenses. The authors opined that perpetuating a stereotype that battered women have never committed a prior criminal offense disregards the presence of such criminal histories and overlooks the realities of women's experiences, including the factors that place them at risk of committing crimes and being incarcerated. Additionally, for those women whose acts place them in the criminal justice system, the authors raised the concern that being unfavorably compared with a caricature of a battered woman who kills her partner but is otherwise "innocent" may even make courts inclined to discount a woman's prior victimization.<sup>82</sup> This study provided a first step in understanding criminal histories

---

<sup>79</sup> See Maura O'Keefe, *Incarcerated Battered Women: A Comparison of Battered Women Who Killed Their Abusers and Those Incarcerated for Other Offenses*, 12 J. FAM. VIOLENCE 1, 16 (1997); cf. Carolyn Rebecca Block & Antigone Christakos, *Intimate Partner Homicide in Chicago over 29 Years*, 41 CRIME & DELINQ. 496, 507-08 (1995) (characterizing violent arrest records of victims as consistent with self-protection and neglecting to discuss non-violent arrest histories of victims).

<sup>80</sup> Carol E. Jordan et al., *Lethal and Other Serious Assaults: Disentangling Gender and Context*, 58 CRIME & DELINQ. 425, 430 (2012).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 436 tbl.1, 442 tbl.2, 450.

among battered women, but, because it included only women already incarcerated for violent or lethal crimes, a second study was conducted.

The second study undertook a qualitative examination of the perceptions of battered women who were either at risk of incarceration, incarcerated, or recently released from incarceration.<sup>83</sup> The study was part of a larger effort to “contribute[] to a clearer understanding of the processes that entrap some women in a cycle of victimization and incarceration.”<sup>84</sup> The study had three aims: (1) examine how the chance of incarceration or incarceration itself affects actual or perceived access to services among these women, (2) examine whether service needs and barriers to obtaining help differ depending upon a woman’s stage of involvement in the criminal justice process, and (3) clarify the relationship between victimization and incarceration.<sup>85</sup> This part presents the background of information leading up to the qualitative study, the study methodology, and the results. This part then confirms the results by explaining the extant legal rules that lead battered women who commit crimes to have negative experiences with relief systems, and exploring why those rules came to be.

### *1. Prior Empirical Research Regarding Victimization and Criminality*

#### *a. Women Who Kill Abusive Intimates*

Female abuse victims who kill or seriously injure their abusers have received much attention in the empirical academic literature. Empirical studies demonstrate the frequency of such violence, as well as the motivations and characteristics of such offenders. Generally, statistical data indicate that women are less likely to commit acts of homicide compared to men, but, when women do kill, an abusive partner is most often the target.<sup>86</sup> Women who kill their abusive intimate partner generally do so as a means of self-preservation.<sup>87</sup> Women and men who kill their intimates significantly differ in their background characteristics. Men are more likely to have been previously arrested than women.<sup>88</sup>

---

<sup>83</sup> Adam J. Pritchard et al., *A Qualitative Comparison of Battered Women’s Perceptions of Service Needs and Barriers Across Correctional and Shelter Contexts*, 41 CRIM. JUST. & BEHAV. 844, 845 (2014).

<sup>84</sup> *Id.* at 848.

<sup>85</sup> *Id.*

<sup>86</sup> DeAnn K. Gauthier & William B. Bankston, *Gender Equality and the Sex Ratio of Intimate Killing*, 35 CRIMINOLOGY 577, 587 (1997) (stating approximately 44 percent of female homicide offenders killed their intimate partner; in contrast, only 7 percent of male homicide offenders killed their female intimate partner); *see also* LAWRENCE A. GREENFELD & TRACY L. SNELL, U.S. DEP’T OF JUSTICE, NCJ 175688, WOMEN OFFENDERS (1999).

<sup>87</sup> PATRICK A. LANGAN & JOHN M. DAWSON, U.S. DEP’T OF JUSTICE, NCJ 153256, SPOUSE MURDER DEFENDANTS IN LARGE URBAN COUNTIES, at iv (1995).

<sup>88</sup> Block & Christakos, *supra* note 79, at 508 (stating 40 percent of men and 18 percent of women who killed their intimate partner had previously been arrested for a violent crime).

Fall 2014]

ENCOURAGING VICTIMS

17

Men have substance abuse histories more often than women.<sup>89</sup> Men are more likely than women to have been using drugs and alcohol at the time of the killing.<sup>90</sup>

b. *The Correlation Between Abuse Victimization and Criminal Offending*

Empirical researchers have begun to illustrate the link between a woman's history of victimization and her criminal offending.<sup>91</sup> Although statistics identifying the number of female victims with a criminal history do not appear to be readily available, it is indisputable that some battered women have a criminal history. Studies reveal that prior experiences of victimization can be influential factors affecting women's involvement in a variety of non-violent criminal activities including drug use, prostitution, and property offenses.<sup>92</sup> As to the type of past abuse experienced by victims, these studies reveal that a history of domestic violence was significantly more common than prior experiences of child maltreatment.<sup>93</sup>

How or why intimate partner victimization contributes to criminal offending is not well understood. Research of any sort explaining the motivations for criminal behavior among victims of domestic violence is scant.<sup>94</sup> Legal and social science scholars, though, have been able to provide a glimpse into the minds of some victims. Four categories of motivation emerge from a review of the research. These nonexclusive, non-exhaustive categories may be labeled as follows: (1) coercion, (2) agency, (3) coping, and (4) revenue-raising. First, some female offenders are coerced—unintentionally or intentionally—by their abusers into committing crimes. In her work, law professor Michelle Jacobs relayed the story of a woman who engaged in prostitution in order to avoid violence at home. Working as a prostitute allowed the woman to be out of the

<sup>89</sup> LANGAN & DAWSON, *supra* note 87, at 4 (stating 9 percent of women who killed their husbands had a drug abuse history as compared to 31 percent of men who killed their wives).

<sup>90</sup> *Id.* (stating 22 percent of husbands and 3 percent of women had been using drugs at the time of the killing; 66 percent of husbands and 37 percent of wives had been consuming alcohol at the time of the murder).

<sup>91</sup> Dana D. DeHart, *Pathways to Prison: Impact of Victimization in the Lives of Incarcerated Women*, 14 VIOLENCE AGAINST WOMEN 1362, 1362 (2008); Jordan et al., *supra* note 80, at 429; Joycelyn M. Pollock et al., *Violent Women: Findings from the Texas Women Inmates Study*, 21 J. INTERPERSONAL VIOLENCE 485, 500–01 (2006).

<sup>92</sup> Kathleen Daly, *Women's Pathways to Felony Court: Feminist Theories of Lawbreaking and Problems of Representation*, 2 S. CAL. REV. L. & WOMEN'S STUD. 11, 47–48 (1992); DeHart, *supra* note 91; Jordan et al., *supra* note 80, at 429; Mary E. Gilfus, *Women's Experiences of Abuse as a Risk Factor for Incarceration*, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN (Dec. 2002), [http://www.vawnet.org/applied-research-papers/print-document.php?doc\\_id=412](http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=412).

<sup>93</sup> Jordan et al., *supra* note 80, at 448–49.

<sup>94</sup> There is significant literature on motives for women to commit domestic violence. *See generally* Daniel G. Saunders, *Are Physical Assaults by Wives and Girlfriends a Major Social Problem?: A Review of the Literature*, 8 VIOLENCE AGAINST WOMEN 1424 (2002).

home and away from her abuser, and it allowed her to earn money so that he would be placated and not beat her.<sup>95</sup> In another study, social scientist Beth Richie set out the story of a woman who worked as a maid. The woman's family needed money, so she stole clothing and food from her clients. One day, the woman's husband came to her work site, saw money and jewelry lying around, and stole it. She began moving quickly from job to job. Her husband would beat her, and force her to steal from her jobs so that he could sell the items and keep the proceeds.<sup>96</sup>

Second and closely related to the first motivation is an agency-type motivation, meaning there are some victims who commit crime alongside their abusers in order to have a sense of, what Richie called, "mutuality and shared power."<sup>97</sup> Third, female offenders may engage in criminal activity as a coping mechanism. It is not uncommon for victims to use illicit substances—and so to violate narcotics laws—in order to self-medicate the physical and emotional pain of domestic abuse.<sup>98</sup> Finally, victims may commit crime in order to generate income for daily living and/or to raise funds to eventually escape the violence. For example, one study wrote of women who sold drugs in order to earn money to leave the relationship.<sup>99</sup>

Overall, legal and empirical research regarding domestic violence victims who are offending or who have a history of doing so remains sparse. This is a major omission in the literature considering that studies find that prior victimization and other contextual factors actually place a woman at risk of criminal offending and that—as stated previously—women with criminal histories are especially likely to experience violence from intimates.<sup>100</sup> The prior quantitative study earlier described and the recently published qualitative study discussed in the next section contribute to the small but growing literature on the link between intimate partner victimization and criminal offending by victims.

## 2. *Methodology of the Qualitative Study*

For the qualitative study, the research team of Adam Pritchard, Carol Jordan, and Letonia Jones created a research design composed often focus group interviews with battered women grouped into four categories: (1) those at risk of incarceration (defined for the purpose of the study as women in shelter), (2) those incarcerated in jail, (3) those incarcerated in prison, and (4) those who

---

<sup>95</sup> Jacobs, *supra* note 2, at 467–68.

<sup>96</sup> BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* 120 (1996).

<sup>97</sup> *Id.* at 122.

<sup>98</sup> MEDA CHESNEY-LIND, *THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME* 135, 177–78 (1997).

<sup>99</sup> RICHIE, *supra* note 96, at 126–27 (detailing the story of a woman who could not work in mainstream economy because her husband would abuse her and steal her income so she turned to dealing drugs, which he was unaware).

<sup>100</sup> DeHart, *supra* note 91, at 1365; Jordan et al., *supra* note 80, at 429.

Fall 2014]

## ENCOURAGING VICTIMS

19

were formerly incarcerated.<sup>101</sup> The interviews were conducted in domestic violence shelters, a statewide domestic violence coalition office, and correctional institutions including jails and prisons. These groups and locations were chosen to reflect stages in the criminal justice process, i.e., arrest, short and long-term incarceration, and post-release.

A total of ninety-six women in ten groups of six to fifteen participated in the focus groups.<sup>102</sup> Fourteen women were domestic violence shelter residents considered at risk of incarceration, thirty-two women were in jail, forty-two women were in a prison, and eight women had been released from incarceration after committing a violent act against an abusive partner.<sup>103</sup> Domestic violence victim advocates recruited at-risk and formerly incarcerated women to participate in the study, reimbursing transportation costs and, if needed, child-care.<sup>104</sup> All of these women were known to be battered women.

Incarcerated women were recruited by the posting of flyers in correctional facilities. The flyers asked women to participate in a focus group on “services that women received or tried to receive in the year before they were incarcerated.”<sup>105</sup> Victimization was not mentioned out of concern for identifying abuse victims in the prison setting.<sup>106</sup> Thus, it was possible that some of these women may not have been actual victims of domestic violence, though in light of other data the researchers anticipated that the majority of these women would have experienced intimate violence because of generally accepted rates of abuse among incarcerated women.<sup>107</sup> Ultimately, all of the incarcerated women who participated in the focus groups reported experiencing at least one instance of domestic violence.

Semi-structured interviews using a standard instrument created by the researchers and state-level domestic violence advocates were conducted. One facilitator conducted the interview and another took notes. Both the facilitator and note-taker were victim advocates trained for these roles. The interviews were audio-recorded and transcripts were prepared. Participants were not individually identified.

Generally, researchers queried the participants regarding the impact that their criminal histories and any fear of incarceration had on the likelihood that they would call the police or seek other protection from the justice system.<sup>108</sup> After each focus group interview, participants were asked to complete an exit

---

<sup>101</sup> Pritchard et al., *supra* note 83, at 848.

<sup>102</sup> *Id.* at 848 tbl.1.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 848.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Jordan et al., *supra* note 80, at 433, 451 (stating 52 percent of the incarcerated women had a previous experience with domestic violence while only 1 percent of incarcerated males reported being a domestic violence victim).

<sup>108</sup> Pritchard et al., *supra* note 83, at 848–49.

survey to gather demographic data and data on their experiences with violence.<sup>109</sup> Ninety-four of ninety-six participants completed the survey.<sup>110</sup> Table 1 below provides a brief description of the characteristics of the women interviewed as revealed by the survey results.

TABLE 1: DEMOGRAPHICS OF WOMEN INTERVIEWED FOR THIS STUDY<sup>111</sup>

|                       | At Risk of<br>Incarceration<br>(n=14) | Jailed<br>(n=32) | In Prison<br>(n=40) | Post-<br>Incarceration<br>(n=8) |
|-----------------------|---------------------------------------|------------------|---------------------|---------------------------------|
| Average Age (years)   | 32.14                                 | 35.19            | 38.12               | 47.50                           |
| Average Num. Children | 3.71                                  | 2.34             | 2.70                | 2.38                            |
| White                 | 12                                    | 15               | 29                  | 4                               |
| African American      | 2                                     | 13               | 8                   | 3                               |
| American Indian       | 0                                     | 1                | 0                   | 1                               |
| Mixed Race            | 0                                     | 1                | 3                   | 0                               |
| Hispanic              | 0                                     | 3                | 2                   | 0                               |
| Single                | 7                                     | 13               | 17                  | 4                               |
| Cohabiting            | 1                                     | 6                | 3                   | 1                               |
| Married               | 1                                     | 3                | 2                   | 0                               |
| Separated/Divorced    | 5                                     | 10               | 13                  | 2                               |
| Widowed               | 0                                     | 0                | 5                   | 1                               |

During analysis of the interview transcripts, responses were sorted into four overarching themes: service needs; perceptions of service or responses by service providers; barriers to meeting needs; and desperation, trust, and frustration.<sup>112</sup> The research team collectively agreed upon themes after each preliminarily reviewed the transcripts.<sup>113</sup> At least two members of the research team then independently evaluated and coded the transcripts using these subject groupings.<sup>114</sup> Answers were coded by theme and further subdivided to reflect whether the response was from a woman at risk, in jail, in prison, or following release.<sup>115</sup> Reactions could be coded into multiple topics. Any discrepancies were resolved by agreement. In addition, specific references to the impact of incarceration on a woman's life were also identified and analyzed.<sup>116</sup>

<sup>109</sup> *Id.* at 849.

<sup>110</sup> *Id.* at 850.

<sup>111</sup> Unpublished data collected for Pritchard et al., *supra* note 83 (on file with author). For published table, see Pritchard et al., *supra* note 83, at 851 tbl.3.

<sup>112</sup> *Id.* at 849.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 852.

### 3. *Results of the Qualitative Study: Discouraged Victims*

Broadly, the study revealed the complex relationship between incarceration status and victimization. The research confirms earlier studies concluding that experiencing domestic violence either exacerbates or contributes to criminal behavior by women.<sup>117</sup> The study disclosed that battered women feel victimized by the criminal justice and social services systems.<sup>118</sup> And finally, the research exposed the need for holistic, preventive services addressing intimate violence, substance abuse, and criminality.<sup>119</sup>

More narrowly, the study offered insights into the negative effect of criminal history on reporting violence and on actual or perceived access to social services. The study data provided a stirring account of these women's perceptions of and experiences with the available remedies for domestic violence. Several factors repeatedly arose with respect to victim reporting: fear of arrest, mistrust of government actors, and inability to access social services.<sup>120</sup> Responses related to these subjects reveal the significantly negative influence of criminal history on a battered woman's life. From either perspective, the study showed how it is that a woman may remain trapped in a violent relationship and in criminal offending.

#### a. *Fear of Arrest*

Of the fourteen women at risk of incarceration (i.e., women in shelter), ten feared future incarceration because either they were presently involved in criminal activities or past experiences led them to believe they might be arrested for domestic violence or non-cooperation. As a result of their fears, these women were deterred from calling the police for assistance.

Mistrust of the police arose because of past instances in which officers either threatened to arrest the woman instead of her abuser, or actually arrested her. Explaining her suspicion of the police, a woman described a past encounter she had with law enforcement:

[T]hey threatened to put me in jail if I didn't do something about it. So that was my first encounter with the law with that deal because I remember like I said I would take it and just keep on going and it made me mad because they was going to put me in jail if I didn't do nothing [sic].<sup>121</sup>

---

<sup>117</sup> *Id.* at 857.

<sup>118</sup> *Id.* at 855 (finding that incarcerated women frequently expressed the view that the criminal justice system "had done more to hurt than help them" on account either of the system's failure to listen to and address the woman's needs, or of the violent partner's "direct manipulation of the court system").

<sup>119</sup> *Cf. id.* at 858–59 (discussing specific service needs sought by study participants).

<sup>120</sup> *Id.* at 857–59.

<sup>121</sup> Interview with study participant for Pritchard et al., *supra* note 83 (unpublished quotation on file with author). For published excerpt, see Pritchard et al., *supra* note 83, at 852.

The comments describe the victim's first experience with calling the police for help. Rather than receiving protection from her abuser, she was threatened with arrest for non-cooperation. Her comments also seem to indicate that before that first call, she would just suffer the abuse in silence. One can imagine that the next time this woman was assaulted she would not again call the police for help.

Another participant described her interaction with police on an earlier occasion: she was "covered in blood you know, they was just worried about the smell of alcohol; they wasn't even worried about my kids down the road."<sup>122</sup> Her remarks suggest that in her mind law enforcement that responded to her call were more concerned with whether she was intoxicated, or maybe disorderly, than whether she was injured or her children needed assistance.

With respect to criminal behavior, some women who had prior drug offenses expressed the belief that if they contacted law enforcement to stop the battering, they would be rearrested on drug charges or probation violations.<sup>123</sup> Particularly with respect to her drug activity, one woman commented:

I think for me one reason why I was hesitant toward police is because maybe we had drugs in the house or something like that and so I didn't want to get the police involved because I was scared they were going to find those things and I was going to go to jail on some, you know, worse charges than just the domestic violence.<sup>124</sup>

Here, the statements indicate that the participant knew not only that she might be arrested for domestic violence if she called the police for help but also that she faced the possibility of being arrested on drug charges which she believed would be more serious. While she does not explain why a drug arrest would be worse, she may be alluding either to the possibility of being arrested for two offenses rather than one and being sentenced to a long period of incarceration, or to the fact that a drug offense alone usually results in a harsher penalty than a domestic violence charge (i.e., a felony versus a misdemeanor offense). Thus, she could avoid these outcomes by not contacting the police.

#### *b. Mistrust of Government Actors*

Women in the prison focus groups were also skeptical of criminal justice system actors. Many women in prison felt as if the criminal justice system had been more hurtful than helpful because either the system did not listen to and address her needs, or her abuser was able to manipulate the system to his benefit. Concerning the lack of assistance provided by government actors in the criminal justice system, one woman remarked: "[R]ight before I was arrested, I called 911 . . . I knew that I was in a bad place in my head . . . it's just, the

<sup>122</sup> Interview with study participant for Pritchard et al., *supra* note 83 (unpublished quotation on file with author). For published excerpt, see Pritchard et al., *supra* note 83, at 852.

<sup>123</sup> Pritchard et al., *supra* note 83, at 852, 855.

<sup>124</sup> *Id.* at 852.



Fall 2014]

## ENCOURAGING VICTIMS

23

woman completely ignored me. No one came.” And another commented: “[T]hey brought up the fact that there was an [emergency protective order] on other abusive males in my life and they used that against me and the judge just laughed it off.”<sup>125</sup>

Respecting the ability of abusers to manipulate the system, a woman explained that after going to court-ordered counseling, her abuser was able to “better hide what he was because then he learned what everybody was talking about. So he learned in some ways how to maneuver around better. So, and not only that, it made him more sneakier, more deadlier.”<sup>126</sup> Others claimed that when they used violence in self-defense against their abusers, their abusers were able to obtain protective orders against them.<sup>127</sup> Thus, these women were deterred from calling the police for fear of being arrested for violating court-ordered conditions imposed upon them or being arrested as an aggressor rather than victim.

*c. Social Service Ineligibility*

Finally, women in the jail and prison focus groups commonly believed that they were ineligible to receive social services thus preventing them from leaving their abusive relationships and/or causing them to commit violence against their abusers. Many women in jail indicated that they could have avoided arrest if they had been able to secure substance abuse treatment, housing, employment assistance, or financial assistance, but they were unable to do so.<sup>128</sup> Ironically, some women had hoped that being in jail would make resources available to them; however, they were frustrated to find that they were not getting many services while in custody.<sup>129</sup> Others, though, did not like being coerced into participating in drug abuse programs.<sup>130</sup>

Some of the women in jail during the study had previously been incarcerated. These women perceived that their criminal histories—especially felony criminal convictions—prevented them from securing employment, shelter, housing, and food assistance which in turn led to more criminal behavior and arrests: “And you keep getting discouraged. Why not go back to doing those things? You try to do good and the system won’t let you.”<sup>131</sup>

Like the women in jail, many women in the prison group perceived that their criminal backgrounds prevented them from leaving their abusers because they could not obtain services. For example, one participant commented:

---

<sup>125</sup> *Id.* at 855.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 853.

<sup>129</sup> *Id.*

<sup>130</sup> Interview with study participants for Pritchard et al., *supra* note 83 (women in jail remarked they “were not ready” or felt the treatment was “imposed upon you” at a time preventing full benefit from the services) (unpublished quotations on file with author).

<sup>131</sup> Pritchard et al., *supra* note 83, at 853–54.

But it's hard to get housing for people with drug crimes, even if you have completed any type of treatment. It's hard to get any type of like financial or like Section 8 [housing assistance], anything like that. So I always just kind of felt like I was stuck there with my batterer.<sup>132</sup>

Because they could not get necessary services to escape the violence, many women were emotionally traumatized and some became desperate enough to kill their abusive partner, resulting in incarceration.<sup>133</sup>

Women who had been released from custody (i.e., the post-incarceration group) made observations about access to services that mirror those of other women in the study. Most of these women found that social services were aimed at drug addicts or women with minor children, not those with criminal histories.<sup>134</sup> Because these women did not meet either criterion, they had difficulty finding services. These women prioritized their needs to include counseling, housing, employment assistance, transportation, and health insurance.<sup>135</sup>

In sum, this recent study tells us that the majority of battered women who are either at risk of incarceration or actually incarcerated do not benefit from the current construct of legal and social remedies for victims of domestic violence. Women who are both abuse victims and have a criminal background experienced rejection from potentially helpful social service programs and chose not to call the police for help because they were aware of and feared the possibility of arrest either for domestic violence related charges or other possible offenses. In turn, these women either remained trapped in violent relationships or engaged in criminal behavior or both.

#### 4. *Confirming Victims' Experiences and Feelings*

This section explains the doctrine and practice that leads to the above-documented perceptions and experiences of abused women with a criminal background. At the beginning of the movement against violence between intimates, advocates were confronted with the arduous task of convincing both society and government to recognize and become involved in addressing the problem. Society was inattentive to the issue and the government assumed a stance of nonintervention. During the evolution of domestic violence law and policy, advocates creditably managed to create a robust social and legal framework for remediating domestic violence. Nonetheless, a handful of legal and social science scholars eventually realized that the emphasis placed on utilizing government intervention and legal structures created a system that cannot meet the totality of needs of most victims. Women of color, immigrant women, poor women, and drug-addicted women, the vast majority of whom lack substantial

---

<sup>132</sup> *Id.* at 854 (brackets in original).

<sup>133</sup> *Id.*

<sup>134</sup> Interview with study participants for Pritchard et al., *supra* note 83 (unpublished responses on file with author).

<sup>135</sup> Pritchard et al., *supra* note 83, at 856.

Fall 2014]

ENCOURAGING VICTIMS

25

personal resources, are particularly troubled by this deficit.<sup>136</sup> The qualitative study discussed herein adds women with a criminal background to this list and poignantly pinpoints two policies and practices that are particularly unhelpful: social service eligibility limitations, and strong criminal justice practices relying on police as responders to calls for help.

*a. Legally Based Eligibility Limitations on Receipt of Social Services*

In the early decades of the movement, battered women's shelters were just that: programs focused on providing temporary life-saving, protective shelter for women and children. As these programs evolved, however, they expanded their missions to address more comprehensively the needs of domestic violence victims. Shelters expanded outreach services: legal, financial, and medical advocacy; job and career counseling; substance abuse services; mental health treatment; children's programming; transitional housing; and prevention efforts. This expansion has been driven primarily by an improved understanding of the needs of battered women and supported by a dramatic increase in federal funding.<sup>137</sup>

There is evidence to suggest that the totality of these efforts, in conjunction with the state and federal legal reforms discussed earlier, has reduced the incidence of domestic violence. In 1993, the annual rate of nonfatal domestic violence victimization was 5.8 per 1,000 persons. By 2005, the rate had dropped to 2.3 per 1,000.<sup>138</sup> These decreases can be attributed in part to the addition of resources and support services for battered women (e.g., shelter, advocacy services); the availability of legal protection from a previously reticent justice system; and the ability of women lacking a personal network to access economic resources to increase their independence and their ability to escape violence successfully.

However, along with federal attention and resources came federal requirements that limited the accessibility of social remedies. Now, because of their backgrounds and legal requirements, some victims cannot access such programs, and it follows that women who cannot access these types of services are less likely to escape violence and are more likely to be trapped in its destructive

---

<sup>136</sup> See Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1007 (1995); Goodmark, *supra* note 3, at 35–39; Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 77 (2008); Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1068 (2006).

<sup>137</sup> See discussion *supra* Part I.B.1.

<sup>138</sup> CATALANO, *supra* note 1, at 3. However, research documenting the decline has also shown that being young, black, poor, and divorced or separated all increase the likelihood of being a domestic violence victim. See CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, NCJ 178247, INTIMATE PARTNER VIOLENCE (rev. 2002), available at <http://www.bjs.gov/content/pub/pdf/ipv.pdf>.

cycle. This specifically includes women with criminal histories, as this article demonstrates.

One instance in which a victim with a criminal history may face barriers concerns access to housing programs. Individuals with criminal histories are excludable from publicly funded housing.<sup>139</sup> Additionally, while transitional shelters for domestic violence victims cannot conduct background checks that interfere with victim safety,<sup>140</sup> some shelters could have exclusionary shelter policies based on criminal history. For example, individuals can be denied access to residential programs if they cannot make food stamp contributions to the shelter.<sup>141</sup> An individual convicted of a state or federal felony drug offense involving possession, use, or distribution of drugs, is permanently ineligible to receive food stamps.<sup>142</sup> Thus, a shelter policy requiring food stamp contributions from residents can prevent victims with felony drug conviction histories from accessing shelter services.

Abuse victims with a criminal background may be excluded not just from safe housing options but also from government-funded programs offering education and employment assistance. As part of the 1998 Anti-Drug Abuse Act, Congress enacted the Denial of Federal Benefits Program in an effort to deter individuals from using and trafficking drugs.<sup>143</sup> The legislation prevents individuals convicted of drug offenses from receiving more than 750 benefits from about fifty federal agencies—including educational assistance and employment assistance.<sup>144</sup> For example, individuals may be ineligible to receive federal educational grants and loans,<sup>145</sup> and engage in certain employment activities.<sup>146</sup>

---

<sup>139</sup> *E.g.*, 24 C.F.R. § 982.553(a)(2)(ii) (2013) (stating that an individual who is a lifetime sex offender registrant must be banned and an individual may be excluded if he or she has or is currently engaged in drug related or violent criminal behavior or other unspecified offenses).

<sup>140</sup> *See* 42 U.S.C. § 13975(g)(3)(D)(ii) (Supp. 2014) (prohibiting grant applications for transitional housing for domestic violence victims from requiring victim background checks).

<sup>141</sup> Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 250 (2003).

<sup>142</sup> 21 U.S.C. § 862a(a) (2012) (making felony drug convicts ineligible for "assistance under any State program funded under part A of title IV of the Social Security Act" or "benefits under the food stamp program or any State program carried out under the Food Stamp Act of 1977"). While states have the power to opt out of the ban or restrict its scope, as of 2004, twenty-four states had adopted the ban. Sabra Micah Barnett, *Collateral Sanctions and Civil Disabilities: The Secret Barrier to True Sentencing Reform for Legislatures and Sentencing Commissions*, 55 ALA. L. REV. 375, 376–77 (2004).

<sup>143</sup> Robert W. Musser, Jr., *Denial of Federal Benefits to Drug Traffickers and Drug Possessors: A Broad-Reaching but Seldom Used Sanction*, 12 FED. SENT'G REP. 252, 252 (2000).

<sup>144</sup> *Id.*

<sup>145</sup> *See Students with Criminal Convictions*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/eligibility/criminal-convictions> (last visited Nov. 22, 2014).

<sup>146</sup> *E.g.*, 48 C.F.R. § 337.103-70(c) (2013) (ineligible for employment providing child-care services).

*b. Arrest and Prosecution Rules*

Many mandatory arrest laws require officers responding to a domestic disturbance call to identify the “primary aggressor” of the violence. As of late, twenty-four states have adopted statutes stipulating identification of a primary aggressor.<sup>147</sup> Studies evaluating mandatory arrest policies have evidenced the apparent success of these policies, as arrest rates, once in the single digits, have now increased to three-fourths of domestic violence cases.<sup>148</sup> The success, however, is not without question. Closer examination of the arrest data reveals the disturbing—likely unintended—finding of a “disproportionate increase in the number of women being arrested.”<sup>149</sup> One study documented that arrests of battered women increased more than three-fold subsequent to implementation of mandatory arrest laws.<sup>150</sup> One explanation for the increase is that preferred- and mandatory-arrest policies have been unable to manage the complexity of actual incidents of violence in which a woman may strike out against an offender as a means of protecting herself or her children. Said another way, these policies have been unable to “differentiate between the use of violence to harm or terrorize a partner and the use of violence to self-protect.”<sup>151</sup>

Not unlike mandatory arrest policies, implementation of no-drop policies created serious, unintended consequences. Studies have found an increase in prosecution duration, decreased satisfaction among victims, and an increase in pre-trial violence against the victim.<sup>152</sup> The policies have also led to women being pressured to participate in criminal proceedings against their wishes, resulting in an increase in the number of victims who recant their testimony.<sup>153</sup> At the most extreme, some victims have been jailed for refusal to participate in prosecution.<sup>154</sup>

Arguably, many victims of domestic violence may be subject to the possibility of arrest or prosecution as a result of these rules, which are supposed to benefit victims. For a woman with a criminal history, however, this concern is

<sup>147</sup> HIRSCHTEL ET AL., *supra* note 43, at 29 & tbl.3.7.

<sup>148</sup> JORDAN, *supra* note 9, at 109; *see also* HIRSCHTEL ET AL., *supra* note 43, at iv.

<sup>149</sup> JORDAN, *supra* note 9, at 109.

<sup>150</sup> *See generally* William DeLeon-Granados et al., *Arresting Developments: Trends in Female Arrests for Domestic Violence and Proposed Explanations*, 12 VIOLENCE AGAINST WOMEN 355 (2006).

<sup>151</sup> JORDAN, *supra* note 9, at 109. The “increase is not a reflection of women’s escalating use of violence, as data do not show a corresponding increase in victimization rates for men.” *Id.* For an explanation of mandatory arrest rules, *see supra* Part I.B.4.

<sup>152</sup> Robert C. Davis et al., *Increasing the Proportion of Domestic Violence Arrests That Are Prosecuted: A Natural Experiment in Milwaukee*, 2 CRIMINOLOGY & PUB. POL’Y 263, 278–79 (2003).

<sup>153</sup> Leigh Goodmark, *State, National, and International Legal Initiatives to Address Violence Against Women: A Survey*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 191, 202 (Claire M. Renzetti et al. eds., 2d ed. 2011).

<sup>154</sup> *E.g.*, Adams, *supra* note 58; Hanna, *supra* note 52, at 1866 (describing experience of Maudie Wall who was jailed for contempt for failure to testify against her husband).

magnified because a new arrest may violate current conditions of government supervision or add to future sentencing enhancements. For example, a woman on community-based supervision (i.e., deferred prosecution terms, probation, or parole) who commits any new violations of the law may have community supervision modified or revoked.<sup>155</sup> Additionally, for a woman convicted of a crime, her history of arrests and convictions may lead to an increased sentence.<sup>156</sup> Thus, aware of these possibilities, women engaged in criminal activities or having criminal histories are unlikely to call the police for help with domestic violence.

### 5. *Sourcing the Problem: The Rare Ideal Victim*

Before considering solutions to the problems identified, a brief explanation is warranted regarding how a feminist-led movement, which one would expect to be inclusive, ended up designing a system of remedies that operated to the detriment of such large numbers of abused women. Such knowledge may help design potential fixes. The answer is that the system's creators failed to fully acknowledge and grapple with the reality that law is not always the most effective remedy for all victims. As Professor Kimberle Crenshaw opined in 1991, the initial designers of domestic violence law and policy premised their work on the ideal of a victim who was female, white, married, and stay-at-home, as well as disease, drug, and criminal history-free.<sup>157</sup> She was constructed to be a helpless and sympathetic victim worthy of assistance if she could make her problems known to the outside world.<sup>158</sup> And although a victim, she was sufficiently privileged in that she would have no reason to fear or reject government—or court—offered protections and services. This pristine image of the domestic violence victim excluded women of color, poor women, and, as we now know, women with criminal backgrounds.<sup>159</sup>

---

<sup>155</sup> 24 C.J.S. *Criminal Law* § 2158 (2006 & Supp. 2014).

<sup>156</sup> *Id.* § 2104.

<sup>157</sup> See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243, 1259–60 (1991) (applying the concept of intersectionality to reveal the ways in which women of color experience violence—both domestic violence and rape); see also Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 532 (1992) (recognizing that the experiences of white women shaped research on domestic violence, although it was understood at the time that most victims were poor and/or women of color). Also in 1991, Professor Nilda Rimonte asserted that some Asian women declined to seek help from the government because they wanted to avoid shaming their family and community. Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1319–20 (1991).

<sup>158</sup> Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 774–75 (2007) (drawing parallels between the victims' rights movement and the domestic violence movement and discussing essentialized characters in the victims' rights movement).

<sup>159</sup> See Crenshaw, *supra* note 157, at 1259–60.

Since then, scholars of domestic violence law have explored various implications of this framework.<sup>160</sup> Notably, in 2006, Professor Adele Morrison probed both theoretically and practically the role of whiteness in domestic violence legal discourse.<sup>161</sup> Morrison called on domestic violence legal scholars to employ a multicultural survivor identity rather than a white female victim identity as a means to reformulate domestic violence law and policy.

Envisioning a highly sympathetic, pristine victim as the ultimate beneficiary of reforms had significant ramifications for the design of prophylactic and remedial laws, policies, and programs. It meant advocates did not have to worry about whether primary funding sources for social services programs were private or public. Both communities would unhesitatingly support ideal victims. Additionally, proponents of reform did not have to overly concern themselves with whether this victim would hesitate to call the police or go to the courthouse. So long as she was given information on the potential assistance available to her, and the assistance actually existed and was effective, then she was probably expected to access public relief.

Only after a new preventive and remedial system was in place did what might have been predicted with a different design lens manifest itself. Over time, it became apparent that some women would hesitate to use government-backed services and judicially-based intervention for social and cultural reasons, such as previous experience with insensitive law enforcement or judicial officers, loyalty to community, or language barriers. And, as seen herein, some women, such as immigrants and those with a criminal history, might refuse to use these programs and services so as to avoid being detected by law enforcement.

In short, turning to the government for help does not work for many victims of domestic violence, but especially for victims of color, poor victims, immigrant victims, and those who are engaged in or have engaged in criminal offending. If the justice system is to be maximally effective in remediating domestic violence, the unique needs of the total population of battered women need to be considered, including the needs of women with criminal histories.

### III. IMPROVING REMEDIES FOR DOMESTIC VIOLENCE VICTIMS

This article helps to fill the gap of information about women who are victims of domestic violence and criminal offenders. Recently published qualitative research makes known that because of their criminal histories, some victims of domestic violence are reticent about or fearful of using the legal system for protection and support. Additionally, some victims with criminal backgrounds feel resigned to their abusive relationships because their criminal backgrounds objectively disqualify them from accessing potentially helpful so-

---

<sup>160</sup> *E.g.*, Ammons, *supra* note 136, at 1006; Goodmark, *supra* note 3, at 35–39; Goodmark, *When Is a Battered Woman Not a Battered Woman?*, *supra* note 136, at 76.

<sup>161</sup> Morrison, *supra* note 136, at 1068–71.

cial services. As part of a continuous review of system design, more research should be conducted on the general subject of victim use of protective measures as well as the sub-population of intimate abuse victims with criminal histories. Meanwhile, based on the current state of knowledge, this part proposes solutions that may be effective in responding to the needs of this particularly vulnerable group of domestic abuse victims as well as victims more generally.

#### A. *Strengthening Existing Remedies*

This article joins earlier calls to allow appropriately evidenced coercion and duress defenses to criminal activity committed by victims of domestic violence, and to expand counseling services. Additionally, it echoes efforts to eliminate social services prohibitions based on criminal history and mandatory arrest, prosecution, and cooperation policies.

##### 1. *Cognizable Duress Defense*

Fifteen years ago, Professor Jacobs suggested victims of intimate violence who commit crimes due to the violence be permitted to claim a defense of duress or coercion.<sup>162</sup> Since Jacobs's call, only Professor Sarah Buel has devoted significant attention in the legal literature to the non-homicidal criminality of abused women.<sup>163</sup> In 2003, Buel wrote extensively about defense representation of abused women. She argued that attorneys had failed to present defenses incorporating abuse issues, and that courts had failed to apply the law to abused defendants. She provided an exhaustive account of the ways in which criminal defense attorneys could improve representation competency throughout the entire case process, particularly for poor women and women of color.<sup>164</sup> In doing so, Buel reiterated Jacobs's reminder that although much attention had been focused upon abused women who kill their abusive partners, a substantial number of criminal cases involve abuse victims charged with drug, property, and prostitution crimes, or failure to protect children.<sup>165</sup>

Undoubtedly, the possibility of successfully raising an affirmative defense does not eliminate the problem of arrest, which deters some victims from calling the police for assistance. Whether an individual has a viable defense is determined by prosecutors and legal decision-makers such as judges and jurors, not on the scene by law enforcement who suspect a crime has been committed. And presumably the likelihood is remote that a victim is aware of the defense,

---

<sup>162</sup> See Jacobs, *supra* note 2, at 475–76 (discussing need for domestic violence theory to incorporate law-breaking abuse victims).

<sup>163</sup> See Buel, *supra* note 141, at 311–14 (providing suggestions to improve attorney representation of abused criminal defendants); see also Moore, *supra* note 2, at 457–70 (discussing how welfare reform may eliminate connection between economic necessity, criminality, and domestic violence).

<sup>164</sup> See Buel, *supra* note 141, at 311–14.

<sup>165</sup> See *id.*



anticipates a successful defense, and will call the police despite the risk of arrest. Nevertheless, if the ability to argue such a defense becomes generally known, victims may indirectly be encouraged to report battering. Domestic violence organizations and legal volunteers should engage in a campaign of public education regarding domestic violence law, and attorneys working for individual clients in cases should continue to advocate for recognition of the defense.

2. *Expanded Mental Health and Substance Abuse Counseling and Advocacy*

The tendency of late has been to develop legal-centric measures that will encourage reporting, by victims or others. Some women, however, want to end the abuse but do not at all want to become involved with the justice system. Thus, legal solutions—while potentially helpful—are not fully responsive to some victims’ particular needs and autonomy aims. Accordingly, other systems and disciplines should play a greater role in preventing and resolving problems.<sup>166</sup>

Consistent with this notion and longstanding educational offerings by the domestic violence movement, advocates within nongovernmental domestic violence programs, as well as mental health professionals in a variety of community-based programs, are encouraged to expand their services to and tailor programs for abuse victims with criminal backgrounds. More specifically, counselors should address the issues that can arise for this population, including substance abuse, post-traumatic stress disorder, and depression.<sup>167</sup> Counselors likewise should address the self-image issues that many victims report after the experience of victimization, followed by arrest, prosecution, and incarceration.<sup>168</sup>

Community-based programming is one potential service model while corrections-based programs offer another. Legal scholars lately have discussed the need for re-entry programs providing education, employment, and training opportunities, along with substance abuse counseling.<sup>169</sup> Yet few have focused on

---

<sup>166</sup> See also Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal*, 31 WASH. U. J.L. & POL’Y 39, 56 (2009).

<sup>167</sup> See Pritchard et al., *supra* note 83, at 845–47 (summarizing research regarding domestic violence and mental health).

<sup>168</sup> See *id.* at 847.

<sup>169</sup> See generally Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213 (2010) (exploring initiatives of legislators, the American Bar Association, state bar associations, and the National Conference of Commissioners on Uniform State Laws to overcome problems in reentry); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006) [hereinafter Pinard, *An Integrated Perspective*] (describing collateral consequences and the reentry issues faced in connection with collateral consequences); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255 (2004) (discussing the barriers that many ex-offenders face and the need for a comprehensive reentry

the particular needs of female offenders compared to male offenders.<sup>170</sup> To the extent that female offenders are targeted, programming is substantially similar to that of males, with the small exception of some focus on matters related to parenting.<sup>171</sup> Educating and counseling female offenders regarding domestic violence as part of corrections or re-entry programs offers an opportunity to empower victims to leave abusive relationships without having to rely on the justice system. Such programming could be one aspect of the many services that should be provided to female offenders.<sup>172</sup>

Finally, a recommendation to expand mental health and substance abuse counseling is meaningless without increased funding with which those services can be provided. Generally, this is not a population with private means to pay for therapy. Thus, government resources must be brought to bear. Admittedly, there is an inherent challenge in increasing the financial burden on federal agencies that, in fact, have been cutting resources to shelters and domestic violence programs. The recent sequestration engaged in by federal government officials, for example, meant 5-percent cuts from the fiscal year 2013 budget of domestic violence programs. In addition to cuts in federal funding, a 2011–12 survey by the Washington, D.C.-based National Network to End Domestic Violence found that 80 percent of domestic violence programs had experienced reductions in funding from their state and local governments, and 90 percent were experiencing decreases in private donations.<sup>173</sup> Nevertheless, lessons from the federal Violence Against Women Act should be remembered. Financial investments in domestic violence interdiction, advocacy, and treatment appear to have resulted in reduced incidents of domestic violence and a reduction in the homicide rate in these cases.<sup>174</sup> To the extent that cuts to domestic violence programs will continue, social services providers should look to work with

---

program, involving lawyers, courts, and politicians); Christy A. Visher, *Returning Home: Emerging Findings and Policy Lessons About Prisoner Reentry*, 20 FED. SENT'G REP. 93 (2007) (describing the issues in prisoner reentry, along with several policy responses, such as case management, post-release services, social focus, reinvented parole supervision, and more comprehensive and coordinated responses overall).

<sup>170</sup> But see, e.g., Geneva Brown, *The Wind Cries Mary—The Intersectionality of Race, Gender, and Reentry: Challenges for African-American Women*, 24 ST. JOHN'S J. LEGAL COMMENT. 625, 625–29 (2010) (examining the particular issues faced by African-American women affecting reentry (health, education, abuse, etc.) and addressing ways to prevent recidivism).

<sup>171</sup> Thompson, *supra* note 169, at 283 (noting that female offenders face particular issues as primary caregivers and custodians of children).

<sup>172</sup> Greenhope Services for Women, Inc. is a representative model. Greenhope offers comprehensive services primarily to African American and Latina ex-offenders through its residential, day, and outpatient programs. See *About Us*, GREENHOPE SERVS. FOR WOMEN, INC., <http://www.greenhope.org/about/about.shtml> (last visited Nov. 22, 2014).

<sup>173</sup> See analysis by the National Network to End Domestic Violence for more information. *Funding and Appropriations*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, <http://www.nnedv.org/policy/issues/funding.html> (last visited Nov. 22, 2014).

<sup>174</sup> See CATALANO, *supra* note 1, at 3 (documenting steady reduction in violence since 1993).

government-backed re-entry programs and aggressively seek to create or revive alternative, private funding streams.

Understandably, there is a concern that the risk of turning away from the law invites a return to an era in which domestic violence was unrecognized, to the detriment of individuals and society. Nevertheless, it may be time to move beyond the single-dimension, public, legal approach to solving domestic violence. The problem of limited victim use of the justice system and exclusion of subpopulations of victims from justice-based remedies cannot be denied. The question is how to solve the concerns.

### 3. *Removal of Criminal History Bars*

Legislators and regulators should reconsider laws and policies that prevent battered women from accessing critically needed services. The recent qualitative study highlighted herein reveals that victims viewed social services as vital to leaving their abusive relationships, and that they were dismayed to learn that criminal history or criminal offending prevented them from being eligible for some social services.<sup>175</sup> At the beginning of the movement against domestic violence, advocates recognized that in order to leave abusive relationships, victims would need financial support and access to temporary and permanent housing. As explained, this recognition was grounded in the adoption of an iconic female victim who was financially dependent upon her abuser. Thus, emergency shelter services were developed and substantive legal reforms mandating financial support of victims by perpetrators and awards of long-term residential maintenance were enacted. While helpful for victims whose abusers were able to offer such support, these reforms could not benefit those with a criminal history. Rather, these victims needed available to them other options for housing and money. Some of these services were provided specifically for victims of domestic violence, and turn to the public social services system was also an obvious option. Both avenues, however, presented problems for female victims with a criminal history.

Some funding to support domestic abuse victims was made available through victim compensation funds administered by government agencies such as prosecutor offices and courts. Receipt of funds was premised on a victim's use of the justice system to escape the violence. That is, those who cooperated in criminal cases against their abusers were eligible to receive services and compensation through victim-witness funds.<sup>176</sup> Given some victims' unwillingness to turn to the justice system for help, though, such compensation funds are ineffective at meeting their needs.

The federal grants that predominantly support domestic violence and other community-offered social services programming come with many require-

---

<sup>175</sup> Pritchard et al., *supra* note 83, at 853–54.

<sup>176</sup> Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 246–47 (2008).

ments, including some that may exclude potential clients who are engaged in criminal behavior. Likewise, more broadly available public and government social services agencies are often unavailable to victims with criminal backgrounds.<sup>177</sup> In short, housing, welfare, substance abuse, and financial aid are often unavailable for those who also have criminal histories.

These concerns and eligibility barriers have not gone unnoticed. Domestic violence scholars have proposed eliminating criminal history prohibitions for domestic violence victims. Professor Jacobs proposed the removal of federal spending restrictions preventing shelters from accepting those with a criminal or drug history.<sup>178</sup> Outside of the domestic violence context, scholars are working to eliminate the collateral impacts of criminal history including on employment and access to housing.<sup>179</sup> While not focused particularly on women or domestic violence survivors, these reforms will also aid our victims of concern.

#### 4. *Elimination of Mandatory Arrest, Prosecution, and Cooperation Policies*

Mandatory arrest, prosecution, and cooperation policies can result in a criminal case proceeding without a victim's consent. Some studies of no-drop prosecution policies find an increase in the time it takes for a case to be prosecuted, an increase in pre-trial crime against the victim, an increase in the number of victims who recant their testimony, and decreased satisfaction among victims.<sup>180</sup> Additionally, a victim's arrest for domestic violence or failure to cooperate with a prosecution may even result in criminal penalties. Victims who are presently on criminal justice supervision at the time of arrest may face an added burden of probation or parole violations for the earlier offenses. To the extent that victims do not call the police because they want to avoid incurring new charges or violations, eliminating strong arrest, prosecution and cooperation policies may alleviate that concern. For those concerned that elimination of such policies would affect a return to the old government practice of nonintervention, this concern can be offset by continuing to improve education and training for police officers, prosecutors, and judges. Better education and training can prepare officials to exercise discretion appropriately in cases, while not allowing the justice system to re-victimize or penalize victims.<sup>181</sup>

---

<sup>177</sup> See *supra* Part II.B.4.a (discussing social program ineligibility for victims with criminal histories).

<sup>178</sup> See Jacobs, *supra* note 2, at 476.

<sup>179</sup> E.g., Pinard, *An Integrated Perspective*, *supra* note 169 (describing collateral consequences and the reentry issues faced in connection with collateral consequences).

<sup>180</sup> Davis et al., *supra* note 152, at 278; Goodmark, *supra* note 153.

<sup>181</sup> Jacobs, *supra* note 2, at 475; Kohn, *supra* note 176, at 247; Sack, *supra* note 11, at 1722.

*B. A New Prescription: Immunizing Victims*

To specifically target abuse victims' concerns about arrest on other crimes, law enforcement and prosecutors should adopt immunity policies allowing them to decline to arrest or charge victims of intimate partner violence whose relatively minor or victimless criminal offending comes to the attention of officials responding to the scene of an alleged violent incident against her. Such a policy would directly respond to the concerns of domestic abuse victims engaged in criminal offending or having a criminal background who do not call for help due to a fear of facing criminal allegations and bring victims' violent situations to the attention of the legal system without penalizing them in the process. Though potentially viewed as a provocative proposal, there is evidence that police and prosecutors are willing to offer immunity if they conclude the circumstances warrant it.

*1. The Proposal*

A written policy could take the form illustrated in Form 1, on page 36.

*2. Precedential Support*

This immunity recommendation may seem radical and politically infeasible.<sup>182</sup> Yet victim immunity is not without persuasive precedent. The criminal justice system both informally and formally grants immunity to all sorts of individuals. Support for immunity inheres in the relatively broad and unchallengeable law enforcement and prosecutorial authority over arrest and charging decisions that is part of the justice system.<sup>183</sup> Law enforcement officers and prosecutors routinely make decisions in individual cases and categories of cases regarding arrest or prosecution, respectively, based on such matters as the facts of the case known to them, offender background, extenuating pragmatic circumstances, and other valid considerations. Such charging decisions are free from judicial or regulatory challenge absent extraordinary circumstances.<sup>184</sup> Immunizing victims of domestic violence for their criminal behavior can be understood simply as a routine aspect of the investigatory charging process. However, the adoption of a formal written policy is preferable so that victims have a clear statement of the policy and some level of trust it will be followed, as well as to provide a means to informally hold government actors accountable for uniformly and fairly applying the policy.

---

<sup>182</sup> See Gruber, *supra* note 158, at 827 (opining that prosecutors would be unlikely to drop charges against immigrants to avoid deportation).

<sup>183</sup> Some legislatures have mandated arrest or prosecution when a minimum amount of evidence exists or for specific alleged offenses, such as domestic violence. See *id.* at 760 n.90. Nevertheless, on the whole police and prosecutors have wide-ranging discretion to perform their functions.

<sup>184</sup> See *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 761 (2005) (police discretion); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (limitations on prosecutorial discretion); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (prosecutorial discretion).

## FORM 1: PROPOSED SAMPLE VICTIM IMMUNITY POLICY

## LAW ENFORCEMENT POLICY NOT TO ARREST/CHARGE/REPORT A DOMESTIC VIOLENCE VICTIM

When taking part in the on-scene investigation of an alleged domestic violence incident, law enforcement officers will not arrest or charge an alleged victim of violence with illegal possession of any contraband either observed in plain view or discovered as a result of a lawful search. Officers may, however, seize any contraband either observed in plain view or discovered as a result of a lawful search.

As part of an on-scene investigation of domestic violence, officers will not inquire about or investigate potential criminal offenses by an alleged victim, except perjury, false statement, or obstruction arising during the investigation of the alleged domestic violence incident, for which officers were called to the scene.

As part of this on-scene investigation of domestic violence, officers will not report to or contact officials who are presently supervising the alleged domestic violence victim on probation, parole, or other community-based release.

## PROSECUTION DECISION NOT TO CHARGE A DOMESTIC VIOLENCE VICTIM

Prosecutor offices will neither pursue charges against nor seek to revoke the community supervision of a complaining domestic violence victim based on alleged criminal offenses detected by law enforcement during on-scene investigation of an allegation of domestic violence, except perjury, false statement, or obstruction.

## EXCEPTION

Officers may arrest any individual, including a domestic violence victim, for serious crimes of violence or any crime involving a child.

## COMMENTARY

These policies are expected to extend primarily to non-violent prostitution, drug, and property offenses. The exception avoids concerns that granting immunity will encourage or facilitate criminality, particularly of a serious nature or involving children. It is intended that victims will not be immune from charges involving vulnerable victims such as children and trafficked individuals or serious crimes of violence such as homicide and aggravated assault. The exceptions do not prevent victims charged with such crimes from defending on the grounds of abuse, coercion, or duress.

The policy does not require that the complaining victim agree to cooperate with prosecution of the domestic violence case being investigated.

Even if the general authority to offer immunity from arrest and prosecution is unconvincing, several instances in which government has made the decision to offer immunity to victims of domestic violence and other vulnerable offenders offer justification for the immunity proposal. When an abused immigrant woman comes to the attention of immigration officials and potentially faces deportation, two federal laws may prevent deportation. First, VAWA permits abused immigrant women to obtain legal immigration status based on the abuse.<sup>185</sup> Prior to VAWA, immigration laws had the unfortunate effect of shielding abusers with immunity because the citizen spouse had to assist the foreign spouse in obtaining lawful status. Thus, an abuser who is a citizen or legal permanent resident could threaten his foreign spouse with deportation to deter her from seeking legal protection.<sup>186</sup> Congress sought to rectify this situation by providing an avenue for battered immigrants to self-petition for legal status without the abusive spouse's knowledge or consent.<sup>187</sup>

Second, the Battered Immigrant Women Protection Act ("BIWPA"), contained in Title V of the Victims of Trafficking and Violence Protection Act of 2000,<sup>188</sup> provides that a married or unmarried abuse victim who cannot demonstrate extreme hardship if deported as required by VAWA may receive a crime victim visa called the "U-visa" if willing to cooperate with government officials in the investigation or prosecution of criminal activity.<sup>189</sup> The four requirements under BIWPA are that: (1) the petitioner suffered substantial mental or physical abuse as a result of a qualifying crime; (2) the petitioner has knowledge and information concerning the crime; (3) the petitioner has been helpful, currently is helpful, or is likely to be helpful in the future to the investigation or prosecution of the crime; and (4) the crime occurred in the United States, or a federal court has jurisdiction to prosecute.<sup>190</sup> The rules promulgated by the U.S. Citizenship and Immigration Services ("USCIS") guide implementation of the statute.<sup>191</sup> The USCIS produced interim rules regarding each of the four requirements.<sup>192</sup> With respect to whether the petitioner has met the requirement of substantial abuse, the USCIS adopted a flexible standard mandat-

---

<sup>185</sup> 8 U.S.C. § 1154(a)(1)(A)(iii)-(iv) (1994) (when abuser was US citizen or lawful permanent resident and spouse or parent); *but see* 8 U.S.C. § 1154(a)(1)(A)(iii)-(v) (2000) (immigration status regardless of current citizenship status of abuser or whether spouse or parent).

<sup>186</sup> Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 104 (2002).

<sup>187</sup> *Id.* at 105-06.

<sup>188</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of U.S.C.).

<sup>189</sup> *Id.* § 1513, 114 Stat. 1533; Anna Hanson, Note, *The U-visa: Immigration Law's Best Kept Secret?*, 63 ARK. L. REV. 177, 185 (2010).

<sup>190</sup> Victims of Trafficking and Violence Protection Act of 2000 § 1513.

<sup>191</sup> Hanson, *supra* note 189, at 186-87.

<sup>192</sup> Jamie Rene Abrams, *Legal Protections for an Invisible Population: An Eligibility and Impact Analysis of U Visa Protections for Immigrant Victims of Domestic Violence*, MODERN AM., Spring 2008, at 26, 26.

ing a showing of “injury or harm to the victim’s physical person, or harm to or impairment of the emotional or psychological soundness of the victim.”<sup>193</sup> Under this rule, the victim must produce credible evidence, including a written personal statement describing the abuse.<sup>194</sup> The rule covers a wide range of criminal activity.<sup>195</sup> While victims who are culpable for the qualifying criminal activity that is the basis of their petition are barred from relief under BIWPA, victims who have committed other crimes still fit into the statutory definition of a “victim” for purposes of self-petition.<sup>196</sup> Thus, through VAWA and the BIWPA, the government may overlook the unlawful immigration status of an abuse victim who reports the abuse to police.

In addition to federal immunity from deportation, one locality has informally granted deportation immunity to abused women who are non-U.S. citizens. In light of evidence that some immigrant women may not report abuse to the police because of fear of arrest and deportation, in a 2003 article, attorney Leslye Orloff proposed that police adopt policies forbidding officers from asking victims about their immigration status and also from reporting victims to immigration authorities.<sup>197</sup> In 2003, New York City Mayor Michael Bloomberg signed an executive order adopting this proposal.<sup>198</sup>

Finally, jurisdictions have provided immunity from arrest and charging for gun possession violations. Police agencies periodically offer individuals the opportunity to turn in illegally possessed firearms, sometimes in exchange for compensation.<sup>199</sup> More aggressively, in the past some police agencies have created policies by which they enter into homes to remove firearms illegally possessed by youth and agree not to pursue any criminal charges that could result from such removal. The prime models for so-called consent-to-search programs

---

<sup>193</sup> *Id.* at 27 (quoting 8 C.F.R. § 214.14(a)(8) (2008)).

<sup>194</sup> *Id.*

<sup>195</sup> See 8 C.F.R. § 214.14(a)(9) (2013) (listing “[r]ape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes”).

<sup>196</sup> New Classifications for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,017–18 (Sept. 17, 2007).

<sup>197</sup> Orloff et al., *supra* note 78, at 87.

<sup>198</sup> Exec. Order No. 41 from Michael R. Bloomberg, Mayor, N.Y.C. 3 (Sept. 17, 2003) (“It shall be the policy of the Police Department not to inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance.”). Additionally, federal immigration officials have adopted a policy of not removing from the country victims of domestic violence or human trafficking. Memorandum from John Morton, Director, U.S. Immigration & Customs Enforcement (June 17, 2011).

<sup>199</sup> E.g., Meghan E. Irons, *‘Piece for Peace’ Revives Firearm Buyback Program; Police Initiative Has \$100,000 Budget*, BOSTON GLOBE, Mar. 22, 2014, at B1.



are the St. Louis Firearm Suppression Program and the Boston Safe Homes Initiative.<sup>200</sup>

The St. Louis Firearm Suppression Program (“FSP”) was conceived in an effort to decrease the number of guns in the hands of youth and thereby decrease the rates of youth violence.<sup>201</sup> The pioneers of the FSP sought to forgo arrest and prosecution in exchange for the opportunity to gain consent to enter homes and remove guns.<sup>202</sup> Police would knock on doors and ask parents for permission to search the home for guns. The police would provide a consent-to-search form, which stated that the purpose of the search was to seize illegal firearms and that there would be no prosecution for possession of illegal firearms.<sup>203</sup> Officers believed that this promise of no prosecution and the willingness to ignore “all but the most serious crimes” was essential to the success of the program.<sup>204</sup> The program was markedly successful in that police gained consent in 98 percent of the cases and found guns in half of these.<sup>205</sup> Scholars attribute the success of this phase of the FSP to the “soft” cooperative approach and the grant of immunity.<sup>206</sup> As with many grants of immunity, there is the criticism that the approach allows criminals to roam free. However, the FSP creators believed that the loss of arrest opportunities was a worthwhile trade for getting guns out of the hands of the youth.<sup>207</sup>

The Boston Safe Homes Initiative (“SHI”) began as a plan, modeled after the St. Louis FSP, to combat gun violence.<sup>208</sup> The program provided immunity from prosecution for possession of illegal firearms but stopped short of “blanket immunity,” leaving individuals vulnerable to other consequences.<sup>209</sup> The District Attorney explicitly backed the program’s promise of immunity by agreeing to refrain from prosecuting juveniles for possession of an illegal firearm.<sup>210</sup> However, the program did not go so far as to provide “blanket immuni-

---

<sup>200</sup> Washington, D.C., Oakland, and Philadelphia used the St. Louis and Boston programs as models in their attempts to reduce gun violence in their cities, but programs were never implemented in those jurisdictions.

<sup>201</sup> SCOTT H. DECKER & RICHARD ROSENFELD, FROM PROBLEM SOLVING TO CRIME SUPPRESSION TO COMMUNITY MOBILIZATION: AN EVALUATION OF THE ST. LOUIS CONSENT-TO-SEARCH PROGRAM 5–7 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/188291.pdf>.

<sup>202</sup> *Id.* at 6.

<sup>203</sup> U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, NCJ 191332, REDUCING GUN VIOLENCE: THE ST. LOUIS CONSENT-TO-SEARCH PROGRAM 9 (2004).

<sup>204</sup> *Id.* at 3.

<sup>205</sup> *Id.* at 12.

<sup>206</sup> *See id.* at 8, 25 n.6.

<sup>207</sup> DECKER & ROSENFELD, *supra* note 201, at 34.

<sup>208</sup> Jaclyn M. Essinger, Note, *Making Homes Safer with Safe Homes: A Look at the Controversial Way Boston Attempted to Reduce Youth Violence*, 43 SUFFOLK U. L. REV. 983, 987 (2010).

<sup>209</sup> *Id.* at 987–88.

<sup>210</sup> *Id.* at 987.

ty.”<sup>211</sup> Under the SHI, the police department had the power to seize illegal firearms and other contraband found in the home.<sup>212</sup> Though the District Attorney explicitly agreed not to prosecute adolescents for possession of an illegal firearm, other criminal charges could follow if the firearm was linked to a crime.<sup>213</sup> The promise regarding other illegal items found in the home was merely that most cases would not result in prosecution.<sup>214</sup> The police department expressed its reluctance to provide “blanket immunity” on the grounds that it would constitute “an invitation to use Safe Homes to absolve criminals from all kinds of charges.”<sup>215</sup>

#### CONCLUSION

For more than four decades, advocates for victims of domestic violence have worked to develop an effective, heavily utilized system of remedies—both legal and non-legal. Many gains have been made but a continuous process of improvement based on empirical data should always be underway. To that end, recently published qualitative data reveals that abused women who have a criminal background are discouraged from calling on law enforcement for assistance because they fear being arrested either for domestic violence or other criminal behavior police discover while on the scene, investigating a complaint. In turn, arrest can result in prosecution on new charges, or become the basis for probation or parole violations for old charges. The data also reveals that these same victims find themselves ineligible to participate in social service programs that might help them leave an abusive relationship. Ultimately, these women explained that inability to obtain help led them to both remain in abusive relationships and continue on a path of criminal offending.

Jurisdictions nationwide should take notice of this data and respond accordingly; and at least one locality may need to immediately respond to the evidence. In March 2013, the chief of detectives of the New York City Police Department (“NYPD”) reportedly issued a memo instructing officers investigating intimate partner violence cases to check the criminal history, warrant status, driving history, and abuse complaint history of accusers.<sup>216</sup> It was further reported that the purpose of the check was to provide the government with information that could be used to persuade the complainant to continue to press charges if she ever became non-cooperative.<sup>217</sup> Police officers and advocates for victims of domestic violence warned that the policy was misguided and

---

<sup>211</sup> *Id.* at 988.

<sup>212</sup> *Id.* at 987.

<sup>213</sup> David Hinson, Note, *Pressure Points: How a Combination of Methods Employed to Reduce Urban Firearm Crime Threatens the 4th Amendment and Proposed Solutions*, 43 NEW ENG. L. REV. 869, 876–77 (2009).

<sup>214</sup> *Id.* at 892.

<sup>215</sup> Essinger, *supra* note 208, at 988.

<sup>216</sup> Jamie Schram, *NYPD: Nab the Victim*, N.Y. POST, Mar. 15, 2013, at 4.

<sup>217</sup> Jamie Schram, *Squeeze on Abuse Victims*, N.Y. POST, Mar. 16, 2013, at 12.

Fall 2014]

*ENCOURAGING VICTIMS*

41

would discourage victims from reporting violence because of fear of arrest, in turn leading to increased fear, non-reporting, and violence.<sup>218</sup> The police department spokesman later responded to the report stating:

While it is standard practice and policy for detectives to investigate victims' backgrounds to help lead them to the victims' assailants, the NYPD—contrary to a published report—has no 'must arrest' policy that applies to domestic violence victims . . . . In fact, the discovery of open warrants on domestic violence victims often results in their warrants being vacated.<sup>219</sup>

While the recent qualitative study forming the basis for the proposals herein was not conducted in response to the alleged NYPD policy, the study and discussion herein resoundingly evidence why it should be abandoned and positively reinforcing measures adopted.

Improving the existing options for remediating domestic violence can encourage women to seek out governmental and non-governmental remedies for intimate partner violence, rather than discourage them. Thus, this article suggests that the existing system of relief should embrace application of the coercion and duress defenses to the criminal cases of intimate abuse victims as well as expansion of non-governmental and community-based mental health and substance abuse programs to specifically address the needs of female offenders. Additionally, it supports repealing eligibility prohibitions based on criminal background for domestic violence social services programs and eliminating policies mandating arrest, prosecution, and cooperation would help victims with a criminal background obtain relief. Finally, the article proposes that victims who call the police for assistance should be granted immunity from arrest and prosecution for non-serious criminal offenses in order to specifically counteract concerns about calling the police. This approach to the exercise of discretion during on-scene investigation of and subsequent prosecution of domestic violence is an evidence-based strategy targeted to battered women engaged in criminal activity or having a criminal history. Hopefully, in time, it will prove to be broadly effective in encouraging all victims of domestic violence to report their abuse to government officials.

---

<sup>218</sup> Schram, *supra* note 216; Joe Coscarelli, *NYPD Ordered to Look into Abuse Victims*, N.Y. MAG. (Mar. 15, 2013, 9:55 AM), <http://nymag.com/daily/intelligencer/2013/03/nypd-ordered-to-look-into-domestic-abuse-victims.html>.

<sup>219</sup> Coscarelli, *supra* note 218 (quoting NYPD spokesman Paul Browne).