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## Transforming Intimate Partner Violence

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## I. Introduction

Intimate partner violence (“IPV”) is the single largest cause of injury to womxn in the United States today.<sup>1</sup> Although IPV cuts across race, class, and gender lines, womxn from marginalized groups such as womxn of color, indigenous womxn, womxn in poverty, immigrant womxn, womxn with disabilities, and LGBTQIA2S+ individuals, are disproportionately at risk of IPV.<sup>2</sup> In 1994, the Violence Against Women Act (“VAWA”) was enacted to improve the criminal legal response to domestic violence.<sup>3</sup> VAWA was born out of carceral politics and has contributed to mass incarceration and state violence.<sup>4</sup> State responses to violence reproduce violence and often traumatize those who are exposed to it, especially marginalized communities who are already targeted by the state.<sup>5</sup> While many people choose not to call the police, many communities cannot call the police because of reasons such as fear of retribution, deportation,

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<sup>1</sup> This paper focuses on intimate partner violence, violence that occurs in the context of an intimate relationship, rather than other forms of family violence.; see Reva B. Siegel, *The Rule of Love: Wife Beating As Prerogative and Privacy*, 105 YALE L.J. 2117, 2171–72 (1996); M.C., Black et al., *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* (2011), available at [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf).

<sup>2</sup> The term “marginalized” will be used throughout this paper to represent the various axes of identity that a person may experience discrimination for. Although both men and women experience IPV, women’s experiences with IPV are centered in this paper because IPV is a gender issue that stems from heteropatriarchal norms. The term “womxn” is used throughout this paper to include cis-women, non-binary women, and people affected by misogyny, or women related issues. Finally, LGBTQIA2S+ refers to Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, Intersex, Asexual, Two spirit.; see generally Shannan Catalano et al., Bureau of Justice Statistics, U.S. Dep’t. of Justice, *Female Victims of Violence* 2-3 (2009), available at <https://bjs.ojp.gov/content/pub/pdf/fvv.pdf> (The Department of Justice found that Black women are more likely than white women to be victims of IPV and Black women are twice as likely to be killed by a spouse as white women.); see also, Meghan Condon, *Bruise of A Different Color: The Possibilities of Restorative Justice for Minority Victims of Domestic Violence*, 17 GEO. J. ON POVERTY L. & POL’Y 487, 488 (2010) (“African-American women experience domestic violence at a rate 35% higher than white women and 2.5 times the rate of women of other races, and Native American experience domestic violence at twice the rates of white women; 30 to 50% of Latina, South Asian, and Korean immigrant women of report sexual or physical abuse by an intimate partner.”).

<sup>3</sup> Violence Against Women Act, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994).

<sup>4</sup> LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* 3–4 (2018).

<sup>5</sup> *Id.* at 20.

harassment, sexual violence, or previous convictions.<sup>6</sup> Accordingly, there is a need for multi-dimensional and alternative responses to IPV, beyond the criminal legal system.<sup>7</sup>

This paper argues that transformative justice practices address IPV more effectively than criminalization because criminalization can further harm marginalized communities.<sup>8</sup>

Transformative justice is an abolitionist framework that seeks to respond to violence without creating more violence.<sup>9</sup> Violence does not happen in a vacuum and transformative justice works to connect violence to the conditions that create and perpetuate it.<sup>10</sup> Often this includes transforming harmful oppressive dynamics, our relationships to each other, and our communities at large.<sup>11</sup> A transformative justice approach to IPV is an important option for womxn at the margins of society, because often these womxn are disproportionately victimized by the police and our criminal legal system.<sup>12</sup>

This paper proceeds as follows. Part II outlines how our current legal system fails to address intimate partner violence. First, this Part lays out the historical shift in IPV from a private sphere issue to a public sphere matter. Next, a critical analysis examines the ways carceral feminism has shaped our current legal structures addressing IPV, and how this paradigm has failed.<sup>13</sup> Third, an overview of the Violence Against Women Act analyzes the various criminalization mechanisms currently in place in an effort, albeit failed effort, to remedy IPV.

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<sup>6</sup> Krishna de la Cruz, *Exploring the Conflicts Within Carceral Feminism: A Call to Revocalize the Women Who Continue to Suffer*, 19 ST. MARY'S L. REV. & SOC. JUST. 79, 97–98 (2017).

<sup>7</sup> Leigh Goodmark, *Law and Justice Are Not Always the Same: Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. 707, 725 (2015).

<sup>8</sup> Geneva Brown, *Ain't I A Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J.L. & GENDER 147, 148 (2012).

<sup>9</sup> Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. OF ETHNIC & CULTURAL DIVERSITY IN SOC. WORK, 219, 233 (2018).

<sup>10</sup> Mia Mingus, *Transformative Justice: A Brief Description* (2018) available at <https://transformharm.org/transformative-justice-a-brief-description/#:~:text=TJ%20works%20to%20build%20alternatives,that%20create%20and%20perpetuate%20them>.

<sup>11</sup> *Id.*

<sup>12</sup> Cruz, *supra* note 6, at 98.

<sup>13</sup> See discussion *infra* Part II Section B.

Finally, this Part presents the ways criminalization of IPV has detrimental effects on marginalized communities. Part III argues that in order to address IPV, solutions outside of the criminal legal system should be considered. This Part examines the ways transformative justice practices can be utilized in IPV situations. A transformative justice approach is better suited to address IPV than restorative justice practices, which seek to repair relationships damaged by conflict. Next, this Part examines the potential shortcomings of transformative justice to determine if such practices can facilitate substantive change for people subjected to harm.<sup>14</sup> Community-based efforts can address IPV; this paper provides an in-depth example of an effective transformative justice project. Ultimately, this paper concludes that transformative justice provides a better pathway to justice in IPV situations than criminalization and restorative justice because criminalization causes further harm to marginalized communities.

## **II. Current Legal System Responses to Intimate Partner Violence**

Our current legal system fails to address IPV because criminalization further harms marginalized communities.<sup>15</sup> Current responses to IPV are focused on retribution and punishment and often result in family disintegration.<sup>16</sup> The criminal legal response to IPV is reactive instead of preventive.<sup>17</sup> Leigh Goodmark argues that our current legal responses are essentialist in nature and subordinate womxn by presuming that “one set of solutions is appropriate for every woman subjected to abuse.”<sup>18</sup>

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<sup>14</sup> Throughout this paper, where possible I use the term “people subjected to abuse” to refer to a victim or survivor subjected to intimate partner violence.

<sup>15</sup> Goodmark, *supra* note 4, at 20.

<sup>16</sup> Sara Kershner et. Al., *Toward Transformative Justice: A Liberatory Approach to Child Sexual Abuse and other forms of Intimate and Community Violence—A Call to Action for the Left and the Sexual and Domestic Violence Sectors* 5 (2007).

<sup>17</sup> *Id.*

<sup>18</sup> LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 5 (2011); *see also* Erin Jacobsen, Esq., *Fixing What's Broken: Domestic Violence and the Law. A Troubled Marriage: Domestic*

This Part first lays out the historical shift in IPV discourse from the private realm to an issue of public concern regulated by the criminal legal system. Next is an explanation of the theory that supports our current carceral approach to IPV. Carceral feminism is a paradigm that recognizes the state and the criminal legal system as the primary response to IPV.<sup>19</sup> The current criminalization mechanisms in place to address IPV include VAWA, mandatory arrest policies, and no-drop prosecution. Finally, this part argues that there are collateral consequences to the criminalization of IPV, including its contributions to mass incarceration, the implications of mandatory arrests, and the resulting harm that these policies cause to marginalized communities.

#### **A. From the Private to Public Sphere**

Violent intimate relationships have always existed, but over the last fifty years, they have garnered public attention as serious issues.<sup>20</sup> Intimate partner violence is closely tied to the status of womxn in society and their roles within the home.<sup>21</sup> Historically, marital violence was justified by the husband's dominant role in the home.<sup>22</sup> Common law originally provided that a husband, as master of his household, could subject his wife to chastisement so long as he did not

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*Violence and the Legal System* by Leigh Goodmark New York University Press; 2013; 264 Pp.; \$24.00, 30 VT. B.J. (2014).

<sup>19</sup> Aparna Polavarapu, *Global Carceral Feminism and Domestic Violence: What the West Can Learn from Reconciliation in Uganda*, 42 HARV. J. L. & GENDER 123, 130 (2019).

<sup>20</sup> ELIZABETH M. SCHNEIDER ET. AL., DOMESTIC VIOLENCE AND THE LAW 4 (3d. 2013).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

inflict permanent injury upon her.<sup>23</sup> Courts recognized that the natural order required a wife to be subordinate to her husband in most aspects of the marital relationship.<sup>24</sup>

Until the nineteenth century, ideas of family relied on the concept that the family is private and the husband has conjugal rights over the wife which endure for life.<sup>25</sup> This notion of family contributed to societal reluctance to intervene in domestic violence situations.<sup>26</sup> In 1848, the woman's rights movement held its first convention and denounced the common law doctrines of chastisement and marital status.<sup>27</sup> As societal views towards marital violence began to shift, courts developed and invoked the doctrine of marital privacy as a supplementary rationale for chastisement.<sup>28</sup> The rationale relied on the belief that husbands who beat their wives should not

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<sup>23</sup> Siegel, *supra* note 1, at 2130; 1 William Blackstone, Commentaries \*444 ("For, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife."); *see e.g.*, *Bradly v. State*, 1 Miss. (1 Walker) 156, 158 (1824) (permitting the husband "to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehaviour, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned."); *but see* Siegel, *supra* note 1, at 2136 (Not all men enjoyed the privilege of permissible chastisement—Black and poor men could be punished for beating their wives. Although courts began to repudiate the chastisement doctrine, "the opinions seem more interested in controlling African-American men than in protecting their wives."); *see also*, Clark Bell, *Wife Beaters and Their Punishment*, 8 MEDICO-LEGAL STUD. 165, 172 (1996) ("I am unable to find any record of one white man who has ever come back to the whipping-post for beating his wife.").

<sup>24</sup> *Bradwell v. Illinois*, 83 U.S. 130 (1872) (Bradley, J., concurring) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband...The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. ").

<sup>25</sup> Schneider, *supra* note 19, at 15.

<sup>26</sup> *Id.*

<sup>27</sup> Report of the Woman's Rights Convention, Held at Seneca Falls, N.Y., July 19th & 20th, 1848, at 6 (Rochester, John Dick 1848); *see also* *Harris v. State*, 14 So. 266 (Miss. 1894) (holding [t]he suggestion in the evidence of . . . a fancied right in the husband to chastise the wife in moderation makes it proper for us to say that this brutality found in the ancient common law, though strangely recognized in *Bradley v. State* has never since received countenance; and it is superfluous to now say that the blind adherence shown in that case to revolting precedent has long been utterly repudiated, in the administration of criminal law in our courts.").

<sup>28</sup> Siegel, *supra* note 1, at 2151; *see, e.g.*, *State v. Rhodes*, N.C. (Phil. Law) 453 (1868) (concluding "however great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and

be charged with assault or battery because family matters were private and they should stay out of the public eye.<sup>29</sup> In other words, “judicial involvement in adjudicating complaints arising from the internal affairs of the household was injurious because it encroached upon the authority of its master.”<sup>30</sup>

Although wife beating was illegal in every state by 1920, when confronted with domestic violence complaints, courts were primarily concerned with keeping the family unit together rather than intervening.<sup>31</sup> It was not until the 1970s battered women's movement that domestic violence was transformed from a private sphere matter to a politically relevant issue regulated by the state, through the justice system.<sup>32</sup> A central tenet of the battered women's movement was the need for the state to address and intervene in IPV cases.<sup>33</sup> The movement developed an ideology that situated the family within a cultural paradigm, and challenged the social pathology that men are superior to women in the home.<sup>34</sup> To achieve this agenda, activists pushed states to implement service-based approaches to alter the social conditions that supported abuse, by focusing primarily on the development of shelters and safe houses for battered women.<sup>35</sup>

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criticism, the nursery and the bed chamber. Every household has and must have, a government of its own, modelled to suit the temper, disposition and condition of its inmates. Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive; and each member will find excuse for the other in his own frailties. But when trifles are taken hold of by the public, and the parties are exposed and disgraced, and each endeavors to justify himself or herself by criminating the other, that which ought to be forgotten in a day, will be remembered for life.”).

<sup>29</sup> Siegel, *supra* note 1, at 2154.

<sup>30</sup> *Id.*

<sup>31</sup> Polavarapu, *supra* note 14, at 130-31.

<sup>32</sup> *Id.*; see generally, Report of the United States Commission on Civil Rights, *Under the Rule of Thumb Battered Women and the Administration of Justice* (1982) (The United States Commission on Civil Rights sponsors the Consultation on Battered Women: Issues of Public Policy in Washington, DC. Over 100 nationally represented women come together to organize around the needs of the newly formed battered women's movement. The National Coalition Against Domestic Violence (NCADV) is formed during the US Commission on Civil Rights hearing.).

<sup>33</sup> *Id.*

<sup>34</sup> G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 249 (2005).

<sup>35</sup> Schneider, *supra* note 19, at 15.

In addition to state services, the movement recognized the law as a crucial tool for battered women to obtain safety and protection.<sup>36</sup> For activists, situating IPV as a legal issue illuminated the pervasive failure of law enforcement to protect battered women from assault.<sup>37</sup> In New York, for example, police were trained to believe domestic violence was due to “menopausal, domineering rage of women, and the appropriate course of action was mediation between the parties.”<sup>38</sup> Class-action lawsuits were filed in New York City and Oakland, California, challenging the policies’ failure to arrest batterers.<sup>39</sup> This litigation confirmed that domestic violence was a criminal activity against the public, and should be treated the same as an assault against a stranger.<sup>40</sup> As a result of these legal developments, police departments across the nation began to implement mandatory criminal justice policies to address domestic violence.<sup>41</sup> The battered women’s movement was designed to ensure that police could no longer ignore the plight of battered simply because they were being abused by their intimate partners.<sup>42</sup> As a result, mandatory interventions became a symbolic badge of freedom and safety for battered women.<sup>43</sup> Anti-violence advocates shifted IPV from the private to public sphere which laid a foundation solidifying criminalization as the primary response to violence.<sup>44</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; see *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1524 (D. Conn. 1984).

<sup>38</sup> Miccio, *supra* note 33, at 284 (“stating that “[t]he neutral scientific language of familial violence used by the dominant culture supplanted the political talk of male violence against women. The focus was how dysfunctional qualities within families and families of origin produced intimate violence. . . . The confluence of language and perspective by the dominant culture played a more pernicious role, however. It disconnected violence from its cultural roots while re-inscribing categories that sustain the gendered dominance-subordinate paradigm. And it left unexamined how systemic support of individual male intimate violence contributed to the perpetuation of such violence. Moreover, gendered conceptions of dominant-subordinate social roles and positions and how such conceptions structured social response were left uncritiqued: Collective accountability was not part of the political landscape.”).

<sup>39</sup> *Schneider*, *supra* note 19, at 17.; see *Bruno v. Codd*, 393 N.E.2d (N.Y. 1979); see also *Sorichetti* by *Sorichetti v. City of New York*, 65 N.Y.2d 461 (1985).

<sup>40</sup> *Schneider*, *supra* note 19, at 17.

<sup>41</sup> *Polavarapu*, *supra* note 14, at 130.

<sup>42</sup> Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 4–5 (2009).

<sup>43</sup> Miccio, *supra* note 33, at 272.

<sup>44</sup> *Polavarapu*, *supra* note 14, at 130.

## B. Criticisms of Carceral Feminism

Carceral feminism treats intimate partner violence as a criminal justice concern and ignores state inflicted violence on marginalized womxn.<sup>45</sup> Elizabeth Bernstein coined the term “carceral feminism” to describe the “law and order” agenda of second-wave feminism.<sup>46</sup> Second-wave feminism was a period of feminist activity that began in the 1960s that expanded the feminist focus from suffragism alone, to a wider range of issues including reproductive rights, family relations, and workplace discrimination.<sup>47</sup> Second wave feminism has been critiqued by Black feminists for reducing the feminist agenda to a white-washed and homogenized movement that ignores the contributions of poor, minority, and Queer womxn.<sup>48</sup>

Second wave feminism also shaped a carceral turn in feminist advocacy.<sup>49</sup> Carceral feminism is a set of theories and practices that seek to achieve feminist goals through the threat of incarceration.<sup>50</sup> This feminist approach relies on increased policing, prosecution, and imprisonment as the primary solution to violence against women.<sup>51</sup> Carceral feminism is a theoretical underpinning of the battered women’s movement.<sup>52</sup>

The battered women’s movement was a product of neoliberal globalization during the 1970s and 1980s, which saw a scaling back of the welfare state and an expansion of privatization and a new carceral regime.<sup>53</sup> The carceral feminist paradigm is grounded in a variant of liberal

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<sup>45</sup> Goodmark, *supra* note 41, at 4–5.

<sup>46</sup> Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism”* 18 DIFFERENCES 128, 137, 143 (2007).

<sup>47</sup> Susan Man & Douglas J. Huffman, *The Decentering of Second Wave Feminism and the Ride of the Third Wave*, 69 SCIENCE & SOCIETY, 56, 91 (2005).

<sup>48</sup> Gail Lewis, *Audre Lorde: Vignettes and Mental Conversations*, 80 FEMINIST REVIEW, 130, 145 (1990).

<sup>49</sup> Elizabeth Bernstein, *Carceral Politics as Gender Justice? The “Traffic in Women” and Neoliberal Circuits of Crime, Sex, and Rights*. 41 THEOR SOC. 233, 259 (2012).

<sup>50</sup> Sune Sandbeck, *Towards an Understanding of Carceral Feminism as Neoliberal Biopower* (2012) available at <http://www.cpsa-acsp.ca/papers-2012/Sandbeck.pdf> [<https://perma.cc/B3WM-GJ7R>].

<sup>51</sup> Victoria Law, *Against Carceral Feminism*, Jacobin (2014) available at <https://www.jacobinmag.com/2014/10/against-carceral-feminism> [<https://perma.cc/W62M-QF5M>].

<sup>52</sup> Polavarapu, *supra* note 14, at 130.

<sup>53</sup> Sandbeck, *supra* note 49, at 3; *see also*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 7 (2010) (Violent crime is not responsible for the prison boom. Rather, the ‘tough on

feminism that recognizes womanhood as white, able-bodied, cis-gendered, heterosexual, middle-class, and monogamous.<sup>54</sup> Sune Sandback argues that activists within the battered women’s campaign subscribe to a socially conservative paradigm of justice-seeking—one that avoids the “gender politics” of the family, and instead focuses efforts towards the behavior of the “racialized poor.”<sup>55</sup>

The battered women’s movement, stemming from second-wave feminism, encourages wide-spread assimilation of a liberal feminist ideology; a paradigm that relies on endorsing state policy rather than rejecting it.<sup>56</sup> Consequently, the battered women’s movement sought to “transform society while positioned within it.”<sup>57</sup> The movement recognizes that mandatory practices are necessary to make women safe because battered women are not capable of making “rational” decisions while being subjected to violence.<sup>58</sup> Cheryl Hanna asserts that the social benefits of state intervention are the punishment of criminal conduct and deterrence of future violence.<sup>59</sup> An underlying assumption of this claim is that the social benefits of mandatory intervention outweigh the costs to women’s autonomy because prosecution will “protect women overall.”<sup>60</sup>

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crime’ movement and War on Drugs, both waged against poor communities of color, spearheaded the explosion of incarceration in the United States).

<sup>54</sup> Sandbeck, *supra* note 49, at 4.; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1282 (1991) (“The effort to politicize violence against women will do little to address the experiences of Black and other nonwhite women until the ramifications of racial stratification among women are acknowledged. At the same time, the antiracist agenda will not be furthered by suppressing the reality of intraracial violence against women of color. The effect of both these marginalizations is that women of color have no ready means to link their experiences with those of other women.”).

<sup>55</sup> Sandbeck, *supra* note 49, at 3.

<sup>56</sup> Miccio, *supra* note 33, at 272.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1888-90 (1996).

<sup>60</sup> *Id.* at 1869–70.

Critics of carceral feminism argue that the campaign's focus on criminalizing IPV protects the welfare of privileged women, while imposing harms on marginalized womxn.<sup>61</sup> Assuming that mandatory state intervention will materially better womxn's lives negates how the state interacts differently with womxn based on race, ethnicity, gender identity, class, immigration status, and parenting status.<sup>62</sup> Carceral feminism advocates for increased policing and surveillance of communities of color, and puts marginalized womxn at risk for future violence at the hands of law enforcement and the family regulation system.<sup>63</sup> It further ignores the reality that police officers often perpetrate violence themselves, and disproportionately towards womxn of color.<sup>64</sup> For example, for many womxn, the state is not a source of security but rather a cause for skepticism and fear.<sup>65</sup> Black womxn confront a history of police brutality when the police are involved in domestic violence situation; this reality is intensified in communities with an excessive police presence.<sup>66</sup>

In addition, incarceration does not alter patterns of IPV in society because it does not address the broader problem of gender inequality that fosters said violence.<sup>67</sup> Rather, criminalization focuses on the individual: "the crime is a discrete crime against an individual

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<sup>61</sup> Polavarapu, *supra* note 14, at 134.

<sup>62</sup> Miccio, *supra* note 33, at 296.

<sup>63</sup> Cruz, *supra* note 5, at 97–98.

<sup>64</sup> *Id.*; see also Kimberly A. Lonsway, *Policies on Police Officer Domestic Violence: Prevalence and Specific Provisions Within Large Police Agencies*, 9 POLICE Q. 397, 399–400 (2006) ("Police officers are more likely than others to commit intimate partner abuse."); see also, Andrew H. Ryan, *The Prevalence of Domestic Violence in Police Families*, in DOMESTIC VIOLENCE BY POLICE OFFICERS 297, 300 ("Large numbers of officers report knowing someone in their department who has committed intimate partner abuse."); see e.g., Civil Rights Div., U.S. Dep't. Just., *Investigation of the Puerto Rico Police Department* 16 (2011), available at [http://www.justice.gov/crt/about/spl/documents/prpd\\_letter.pdf](http://www.justice.gov/crt/about/spl/documents/prpd_letter.pdf) (A United States Department of Justice investigation of the Puerto Rico Police Department found that "between 2005 and 2010, the department received 1,459 civilian complaints alleging domestic violence by officers. Ninety-eight officers were arrested more than once on domestic violence charges between 2007 and 2010; many of those officers remained employed by the Puerto Rico Police Department. Three Puerto Rico Police Department officers shot their spouses in 2010.")

<sup>65</sup> Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 292 (1997).

<sup>66</sup> *Id.*

<sup>67</sup> Bernstein, *supra* note 48, at 246-47.

woman and the remedy applies to her situation alone.”<sup>68</sup> Criminalization relies on a narrow and normative definition of IPV.<sup>69</sup> When police respond to a domestic dispute, they are merely responding to an event in progress or one that has recently happened. IPV is pattern of power and control over time—criminalization does not address the hetero-patriarchal norms which allows this violence to persist.<sup>70</sup>

Although criminalization is a response to state non-intervention, it has brought tangible benefits to only some people and has caused significant harm to others.<sup>71</sup> Carceral feminists lobbied scrupulously for the adoption of mandatory policies to combat IPV, and an attempt to further their criminalization agenda.<sup>72</sup>

### **C. Criminalizing IPV Through VAWA, Mandatory Arrests, and No-drop Prosecution**

By 1994, efforts of carceral feminism and the battered women’s movement culminated in the passage of VAWA.<sup>73</sup> VAWA was enacted to improve the criminal justice response to IPV by tying federal funding to the adoption of pro-arrest or mandatory-arrest policies which encouraged all fifty states to adopt such policies.<sup>74</sup> The \$30 billion legislation funded one-hundred thousand new police officers and nearly \$10 billion for prisons.<sup>75</sup> In addition to mandatory arrest policies, states also enacted pro-prosecution policies including no-drop prosecution, victimless prosecution, and mandatory victim participation policies.<sup>76</sup> These

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<sup>68</sup> Polavarapu, *supra* note 14, at 135.

<sup>69</sup> Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 85–86 (2017).

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

<sup>71</sup> Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J. L. & GENDER 53, 60 (2017).

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

<sup>73</sup> Cruz, *supra* note 5, at 96.

<sup>74</sup> Violence Against Women Act, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994).

<sup>75</sup> Cruz, *supra* note 5, at 96.; Goodmark, *supra* note 3, at 3 (In 1994, 62 percent of VAWA funds were allocated to the criminal legal system while 38 percent of funds were allocated to social services. By 2013, only 13 percent of VAWA’s funds were went to social services. In 2017, VAWA allocated \$266 million to criminal legal services and \$30 million to housing, despite studies showing that housing is the single greatest need identified by survivors of abuse.).

<sup>76</sup> Hanna, *supra* note 58, at 1857.

policies cemented the public's interest in prosecuting intimate partner violence, even when womxn subjected to the abuse had no interest in pressing charges against their offender.<sup>77</sup> For marginalized womxn however, reliance on the criminal legal system often resulted in further victimization and harm.<sup>78</sup>

### **i. Violence Against Women Act**

VAWA solidified the state's commitment to address IPV as a serious legal issue.<sup>79</sup> VAWA authorizes the expenditure of federal funding to support battered womxn's shelters and expand the range of services available to womxn and children subjected to violence.<sup>80</sup> VAWA also includes provisions to make restraining orders subject to the Constitution's Full Faith and Credit clause, meaning every state must grant full faith and credit to protection orders from all other states and enforce the order as if it were issued in-state.<sup>81</sup> A broad range of services are supported by VAWA such as grant programs to support police training, financial support for prosecutors, civil legal assistance, funding for transitional housing for victims, and services for the elderly and people with disabilities.<sup>82</sup> VAWA incentivizes law enforcement to treat IPV as a serious issue.<sup>83</sup> The legislation also encourages domestic violence nonprofit organizations to collaborate with the criminal legal system as a condition to federal funding.<sup>84</sup>

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<sup>77</sup> Goodmark, *supra* note 70, at 60.

<sup>78</sup> Geneva Brown, *Ain't I A Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J.L. & GENDER 147, 148 (2012).

<sup>79</sup> Schneider, *supra* note 19, at 24.

<sup>80</sup> *Id.*

<sup>81</sup> Violence Against Women Act, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994). *See*, Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827 (2004).

<sup>82</sup> Schneider, *supra* note 19, at 395.

<sup>83</sup> Goodmark, *supra* note 70, at 66.

<sup>84</sup> Goodmark, *supra* note 3, at 3.

VAWA has solidified the criminal legal system as the primary response to IPV, while simultaneously diverting funding away from social services.<sup>85</sup> Two years after VAWA's inception, President Clinton signed a welfare reform bill into law that gutted any economic safety net that allowed survivors to leave abusive relationships.<sup>86</sup> The act required recipients of welfare to seek child support, stay in school, and get a job after two years of receiving government assistance—all of which can be challenging for a survivor, who may face danger when seeking child support, or attempting to attend school or gain employment.<sup>87</sup> Stripping womxn's welfare benefits means stripping away an economic safety net that allows survivors of violence to escape abusive relationships.<sup>88</sup> The culmination of VAWA's "law and order" approach and the diversion of funding away from social welfare programs, has left womxn at the peripheries of society more vulnerable to both gender and state violence.<sup>89</sup>

## **ii. Mandatory Arrest Policies**

Through its mandatory policies, VAWA has increased arrest rates in IPV situations.<sup>90</sup> Battered womxn's advocates argue that police inaction is a result of police discretion in IPV situations.<sup>91</sup> Some advocates argue that IPV is treated as a serious criminal issue when police lack discretion to determine whether to arrest an abuser or not.<sup>92</sup> The justification for this rationale is that mandatory arrest will deter individual abusers by sending the warning that IPV is a criminal activity that will result in criminal legal intervention.<sup>93</sup> In 1984, the United State

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

<sup>86</sup> Personal Responsibility and Work opportunity Reconciliation Act, Pub.L. 104–193, 110 Stat. 2105 (1996); Polavarapu, *supra* note 14, at 135.

<sup>87</sup> Polavarapu, *supra* note 14, 135.

<sup>88</sup> Cruz, *supra* note 5, at 96.

<sup>89</sup> Goodmark, *supra* note 3, at 20.

<sup>90</sup> Elise Inouye, *Mandatory Arrests—A Double-Edged Sword*, 15 HOHONU 33 (2017).

<sup>91</sup> Goodmark, *supra* note 41, at 6.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

Attorney General recommended that arrest be the standard police response to IPV.<sup>94</sup> These recommendations were supported by research suggesting that mandatory arrest was linked to lower rate of recidivism amongst people who perpetrate IPV.<sup>95</sup> As a result, all fifty states now provide for warrantless misdemeanor arrest in IPV cases.<sup>96</sup>

The justification for mandatory arrest is that such policies will remove IPV from the home and subject it to public and state scrutiny.<sup>97</sup> Pro- and mandatory arrest policies either require or prefer the officer to make an arrest whenever the officer has probable cause to believe that an act of domestic violence has been committed.<sup>98</sup> As a result, these policies deprive officers of discretion when determining whether to arrest someone who may have committed a domestic violence act.<sup>99</sup>

Mandatory arrest serves a two-fold purpose: deterrence and an expression of society's condemnation of IPV.<sup>100</sup> Although studies show that mandatory arrest in IPV cases has little deterrent effect,<sup>101</sup> the state does not eliminate arrest for assault in non-IPV situations, simply because the arrest does not deter people from assaulting.<sup>102</sup> However, critical race feminists argue that because mandatory arrests present unique challenges for poor communities and

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<sup>94</sup> See U.S. Dept. of Just., *Attorney Gen.'s Task Force on Family Violence, Final Report*, 22-23 (1984); U.S. Comm'n on Civil Rights, *Under the Rule of Thumb: Battered Women and the Administration of Justice* 12-22 (1982).

<sup>95</sup> Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOCIOLOGICAL REV. 261, 270 (1984).

<sup>96</sup> Hanna, *supra* note 58, at 1859.

<sup>97</sup> Elizabeth M. Schneider, *The Violence of Privacy*, 23 Conn. L. Rev. 973, 989 (1991).

<sup>98</sup> Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 66 (1992).

<sup>99</sup> *Id.*

<sup>100</sup> Barbara Fedders, *Lobbying for Mandatory-arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. OF L. & SOC. CHANGE, 281 (1997).

<sup>101</sup> See, e.g., Franklyn W. Dunford et al., *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 CRIMINOLOGY 183 (1990); Lawrence W. Sherman et al., *From Initial Deterrence to Long-Term Escalation: Short Custody Arrest for Poverty Ghetto Domestic Violence*, 29 CRIMINOLOGY 821 (1991).

<sup>102</sup> *Id.*

communities of color, their implementation should be carefully scrutinized.<sup>103</sup> Given the criminal justice system’s differential impact on marginalized womxn and their communities, the IPV movement should not advance a mandatory arrest agenda without confirming that these policies support all womxn and reduce violence.<sup>104</sup>

Mandatory arrest policies are seemingly attractive because they relive an officer from having to determine whether a perpetrator’s violent action constitutes a crime.<sup>105</sup> However, once an officer decides that there is probable cause to arrest, “no party to the incident—abuser, officer, or victim—has the ability to preempt the involvement of the criminal system.”<sup>106</sup> Accordingly, calling the police during a domestic dispute triggers a series of events which can lead to the arrest of the person abusing, irrespective of whether the person subjected to abuse wants them arrested.<sup>107</sup> Thus, for some womxn, mandatory arrest can be overly paternalistic.<sup>108</sup> Although mandatory arrest may bring greater protection for some womxn, this is at the cost of other women’s autonomy to decide whether they want criminal legal intervention in the first place.<sup>109</sup>

### **iii. No-drop Prosecution**

Similarly to mandatory arrests, no drop prosecution policies have given some womxn more protection while simultaneously stripping others of their freedom to choose their own outcome.<sup>110</sup> Historically, prosecutors have refused to prosecute cases of IPV where the offender was arrested by the police.<sup>111</sup> A frequent justification for prosecutorial inaction in IPV cases is

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<sup>103</sup> Fedders, *supra* note 99, at 281.

<sup>104</sup> *Id.* at 294.

<sup>105</sup> Eve S. Buzawa, et. al., *Role of Victim Preference in Determining Police Response to Victims of Domestic Violence, in Domestic Violence: The Changing Criminal Justice Response*, 36 AM. BEHAV. SC. 255, 267 (1992).

<sup>106</sup> Goodmark, *supra* note 41, at 3–4.

<sup>107</sup> *Id.*

<sup>108</sup> Fedders, *supra* note 99, at 292.

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

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

<sup>111</sup> Goodmark, *supra* note 41, at 10.

that the prosecutor's star witnesses—the battered wife or girlfriend—is not a reliable witness.<sup>112</sup>

Conversely, some scholars argue that prosecutorial inaction stems from the patriarchal views of the prosecutor; a lack of evidence; doubting the seriousness of the crime; and skepticism that judges are not interested in adjudicating IPV cases.<sup>113</sup>

The justification for no-drop policies is that they are good for society because they deter offenders from committing acts of violence; they keep survivors safe; and they empower survivors by encouraging participation in prosecution process.<sup>114</sup> No-drop prosecution policies are characterized as either 'hard' or 'soft' no-drop policies.<sup>115</sup> 'Hard' no-drop policies proceed regardless of the survivor's wishes, if there is enough evidence to move forward with the case.<sup>116</sup> Under 'soft' no-drop policies, survivors are not forced to prosecute, rather, they are encouraged to continue the process and are given support services.<sup>117</sup> If a survivor wishes to drop domestic violence charges, under no-drop policies, prosecutors are able to replace a survivor's testimony with other evidence to prove domestic violence as a chargeable crime.<sup>118</sup> Victimless prosecution relies on police officers' responding to domestic violence cases more thoroughly than they would assault cases.<sup>119</sup> Police officers are trained to collect evidence and make thorough reports of domestic disputes, which in-turn allows prosecutors to carry-on with a case against a survivor's wishes.<sup>120</sup>

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<sup>112</sup> *Id.* at 11.

<sup>113</sup> JEFFREY FAGAN, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 15 (1996)

<sup>114</sup> Hanna, *supra* note 58, at 1849.

<sup>115</sup> Naomi R. Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview* in E.S. Buzawa & C.G. Buzawa, *Domestic Violence: The Changing Criminal Justice Response* 161, 162-77 (1992).

<sup>116</sup> Hanna, *supra* note 58, at 1863.; *see also*, Goodmark, *supra* note 17, at 5 (stating, "in hard no drop jurisdictions, prosecutors used whatever means necessary to make their cases, including subpoenaing unwilling witnesses, asking that subpoenas be enforced through arrest warrants or body attachments, and, in extreme cases, imprisoning complaining witnesses as material witnesses prior to trial.>").

<sup>117</sup> Hanna, *supra* note 58, at 1863.

<sup>118</sup> Goodmark, *supra* note 41, at 11.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

Some advocates express concern that no-drop policies deter womxn from seeking police assistance for fear of triggering an unwanted criminal case against their partner or deportation.<sup>121</sup> There is also concern that these policies enable prosecutors to more easily coerce survivors into cooperation, rather than working to keep her safe.<sup>122</sup> Similarly to mandatory arrest policies, no-drop prosecutions take control of the legal process and may strip a survivor of her autonomy.<sup>123</sup>

#### **D. The Collateral Consequences of Criminalization**

Enhancing the criminal legal response to IPV is the state's primary concern.<sup>124</sup> However, criminal convictions of IPV can have collateral consequences including social stigma, deportation, denial of the right to vote, ineligibility for public housing, barriers to employment and education, access to federal welfare benefits, and increased subjection to state surveillance.<sup>125</sup> Jonathan Simon argues that “[d]omestic violence has emerged over the last three decades as one of the clearest cases where a civil rights movement has turned to criminalization as a primary tool of social justice.”<sup>126</sup> For example, men of color have become more involved in the criminal legal system as a result of the criminalization of IPV, and arrest rates of womxn have also increased significantly.<sup>127</sup> One in three Black men, and one in seven Latino men, have been to prison.<sup>128</sup> Enforcing criminalization through mandatory policies has had widespread implications, particularly for marginalized communities.<sup>129</sup>

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<sup>121</sup> Schneider, *supra* note 19, at 356.

<sup>122</sup> *Id.* at 355

<sup>123</sup> *Id.*

<sup>124</sup> Goodmark, *supra* note 70, at 54.

<sup>125</sup> Jessica Miles, *We are Never Ever Getting Back Together: Domestic Violence Victims, Defendants and Due Process*, 25 CARDOZA LAW REVIEW, 142, 199 (2013).

<sup>126</sup> JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 141 (2007).

<sup>127</sup> Leigh Goodmark, *Reimagining VAWA: Why Criminalization Is a Failed Policy and What a Non-Carceral VAWA Could Look Like*, 27 VIOLENCE AGAINST WOMEN 84-101 (2021); Alesha Durfee, *Situational Ambiguity and Gendered Patterns of Arrest for Intimate Partner Violence*, 18 VIOLENCE AGAINST WOMEN 64, 75 (2012).

<sup>128</sup> Goodmark, *supra* note 70, at 54 (2017).

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

## i. Mass Incarceration

VAWA and the criminalization of IPV have contributed to mass incarceration and have had serious unintended consequences for its intended beneficiaries, particularly women.<sup>130</sup> Scholars have argued that the criminalization of IPV has contributed to the increase in mass incarceration, and disproportionately the incarceration of Black folk.<sup>131</sup> Most IPV cases are prosecuted as misdemeanor offenses, which are disproportionately prosecuted against men of color.<sup>132</sup> Between 1970 and 2010, the United States' prison population grew from 196,000 to 1.4 million people.<sup>133</sup> Incarceration rates have multiplied by five times since the battered women's movement began in the 1980s.<sup>134</sup> A major study based on 2,564 partner assaults reported in the National Crime Victimization Survey of 1992–2002, found that whether police arrested the suspect or not, their involvement did not have a strong deterrent effect on curbing violence.<sup>135</sup> To date, no reliable data supports the tie between the decline in rates of IPV with incarceration or criminalization.<sup>136</sup> In addition to a lack of deterrent power, incarceration may in

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<sup>130</sup> Goodmark, *supra* note 3, at 3–4.

<sup>131</sup> *Id.* (For example, as of 2014 in Vermont, 20 percent of the prison population is incarcerated as a result of IPV.); *see generally*, Beth Richie, *Arrested Justice: Black Women, Violence, and American's Prison Nation* 3 (2012); *see also*, Alexander, *supra* note 52, at 178 (arguing that mass incarceration is a vestige of Jim Crow era policies: “What has changed since the collapse of Jim Crow has less to do with the basic structure of our society than the language we use to justify it. In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. . . . Rather than rely on race, we use our criminal justice system to label people of color “criminals” and then engage in all the practices we supposedly left behind. . . . Once you’re labeled a felon, the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, and exclusion from jury service—are suddenly legal.”); *but cf.*, Ernest Drucker, *Drug Law, Mass Incarceration, and Public Health*, 91 OR. L. REV. 1097, 1098 (2013) (The criminalization of drug use and child support enforcement has also contributed to mass incarceration.).

<sup>132</sup> Goodmark, *supra* note 3, at 19.

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

<sup>134</sup> *Id.* (In the United States approximately 2.3 million people are incarcerated, and a further 5 million people are on parole or probation.).

<sup>135</sup> Schneider, *supra* note 19, at 329; *see generally*, Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J. L. & FEMINISM 3, 48 (1999) (“Perceptions of procedural justice have a statistically significant impact. The frequency of recidivist domestic abuse was lower for those perpetrators given only a warning than for those who were arrested, in cases where the arrested offenders perceived that they had been treated in a procedurally unfair manner. The frequency of subsequent abuse was far lower, however, when arrestees believed they had been treated fairly.”).

<sup>136</sup> Goodmark, *supra* note 3, at 3.

actually increase rates of IPV.<sup>137</sup> Incarceration as it is practiced in the United States, is a dehumanizing experience.<sup>138</sup> This experience reinforces conditions that lead to greater rates of recidivism, unemployment, and retaliation against and intimate partner.<sup>139</sup> As a result, incarceration disproportionately affects people of color, and perpetuates gender-based violence.

## ii. Impact of Mandatory Arrest Policies

The criminalization of IPV and its reliance on mandatory arrest increases state control over womxn. For example, since the inception of mandatory arrest policies, arrest rates for womxn have increased significantly.<sup>140</sup> Mandatory arrest laws have increased the number of womxn in U.S. prisons from 5,600 in 1970 to 111,300 in 2013.<sup>141</sup> Mandatory arrest laws have led to dual arrests, where both parties in a domestic dispute are arrested because they are both perceived to be assailants, or the “primary aggressor” cannot be identified.<sup>142</sup> As a result, a survivor may be arrested for merely defending themselves.<sup>143</sup> Studies show that a significant number of people who experience abuse attempt to defend themselves with violence, albeit less severe violence than their offender uses.<sup>144</sup> Consequently, “[w]omen marginalized by their identities, such as queers, immigrants, women of color, trans women, or even women who are perceived as loud or aggressive, often do not fit preconceived notions of abuse victims and

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<sup>137</sup> WILLIAM R. KELLY, CRIMINAL JUSTICE AT THE CROSSROADS: TRANSFORMING CRIME AND PUNISHMENT 56 (2015).

<sup>138</sup> Goodmark, *supra* note 70, at 84.

<sup>139</sup> *Id.*

<sup>140</sup> SUSAN L. MILLER, VICTIMS AS OFFENDERS: THE PARADOX OF WOMEN’S VIOLENCE IN RELATIONSHIPS, Rutgers University Press, (2005).

<sup>141</sup> See Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 817–18 (2000).

<sup>142</sup> Law, *supra* note 50, at 4.

<sup>143</sup> Miller, *supra* note 139, at 116-20.

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

are thus arrested.”<sup>145</sup> The risk of dual arrest leads womxn not to call the police or to refuse to press charges.<sup>146</sup>

Law enforcements’ retributive treatment can also cause survivors further trauma and threaten their safety.<sup>147</sup> The “primary aggressor” language in VAWA presents problems for Black womxn because of the stereotype that Black womxn are more aggressive and violent than white women.<sup>148</sup> Womxn of color experience arrest resulting from dual arrest at higher rates than white women.<sup>149</sup> Dual arrest policies have failed to acknowledge how Black womxn are stereotypically viewed in society and within the criminal legal system.<sup>150</sup> Critical race feminists argue that mandatory arrest laws may operate to surveille Black womxn.<sup>151</sup> For white survivors, “relinquishing privacy for safety may be a rational trade-off,” but for womxn of color who have little privacy to begin with, these policies may exacerbate their lack of privacy rights.<sup>152</sup> Theorists’ posit that Black womxn are more prone to hyper-visibility because of the stereotypes associated with Blackness and criminality.<sup>153</sup> For example, in New York seventy percent of the womxn affected by mandatory arrest or dual arrest policies were Black or Latinx.<sup>154</sup> Beth Richie posits that the increase in rates of arrest of Black womxn for using self-defense in IPV situations “is consistent with American criminal justice policies aimed at incarcerating large swaths of the

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<sup>145</sup>Law, *supra* note 50, at 4; *see also*, Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 43, 49 (E.S. Buzawa & C.G. Buzawa, eds. 1996) (Mandatory arrests also increase IPV amongst unemployed people, thus economically poor womxn are at greater risk of harm than working-class womxn.).

<sup>146</sup> Miller, *supra* note 139, at 116-20.

<sup>147</sup> Courtney Cross, *Reentering Survivors: Invisible at the Intersection of the Criminal Legal System and the Domestic Violence Movement*, 31 *BERKELEY J. GENDER L. & JUST.* 60, 70 (2016)

<sup>148</sup> Jacobs, *supra* note 68, at 89.

<sup>149</sup> Mary Haviland et al., *Urb. Just. Ctr., The Family Protection and Domestic Violence Intervention Act of 1995: Examining the Effects of Mandatory Arrest in New York City*, *Fam. Violence Project* 1, 7 (2001).

<sup>150</sup> *Id.*

<sup>151</sup> Schneider, *supra* note 19, at 333.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 27.

Black community.”<sup>155</sup> Although criminal intervention can remove a violent partner from the home, law enforcement interactions with marginalized communities, specifically Black communities, can lead to further violence and incarceration.<sup>156</sup> As a result, these womxn may be less willing to call the police in IPV situations if their prior experiences with law enforcement have been marred by malicious treatment.<sup>157</sup>

Furthermore, after a woman is arrested, reentry into society can be challenging.<sup>158</sup> Incarceration has lasting effects on a woman’s ability to seek employment, pay for housing, obtain childcare, or to get her child back from foster care.<sup>159</sup> Moreover, previously incarcerated womxn may struggle to reintegrate back into their communities as a result of a loss of independence, feelings of alienation, and heightened community supervision through state surveillance.<sup>160</sup> The collateral consequences of incarceration are lasting “because expungement of criminal convictions is unavailable in the federal system and extremely limited at the state level.”<sup>161</sup> As a result, incarceration can curtail womxn’s ability to make and effectuate decisions during their reentry process.<sup>162</sup>

### **iii. Harm to Marginalized Womxn**

Marginalized womxn, in general, do not benefit from criminal legal intervention when seeking protection from IPV.<sup>163</sup> Prior to the enactment of VAWA, advocates of color warned that mandatory arrest policies would increase rates of violence in their respective

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<sup>155</sup> Richie, *supra* note 130 at 124.

<sup>156</sup> Brown, *supra* note 77, at 148.

<sup>157</sup> Cross, *supra* note 146, at 70.

<sup>158</sup> *Id.* at 69.

<sup>159</sup> *Id.*

<sup>160</sup> BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* 6 (1996).

<sup>161</sup> Cross, *supra* note 146, at 76.

<sup>162</sup> *Id.* at 77.

<sup>163</sup> Brown, *supra* note 77, at 148.

communities.<sup>164</sup> Their concerns were often overlooked and devalued by white antiviolenace advocates.<sup>165</sup> Decades after VAWA’s inception, the data is clear that in some cases, IPV has increased as a result of mandatory arrest policies.<sup>166</sup> The data also shows that there are identifiable factors that predict retaliatory violence will occur as a result of these policies.<sup>167</sup>

The carceral preoccupation with punishment over prevention increasingly dehumanizes womxn, especially womxn of color, “without regard for the circumstances that lead to womxn's contact with the criminal punishment system.”<sup>168</sup> Additionally, the criminalization of IPV has left mothers vulnerable to the family regulation system through failure to protect allegations.<sup>169</sup> Mothers who experience IPV have a greater risk of being reported to child protective services for failing to protect their children from that violence.<sup>170</sup> A criminal legal response to IPV means survivors’ parenting is increasingly monitored by the state, leaving them more vulnerable to losing their children.<sup>171</sup>

Criminalizing IPV shifts the responsibility of policing IPV from the community to the state.<sup>172</sup> As a result, marginalized womxn, womxn of color, individuals with lower incomes, and their respective communities, are exposed to increased state violence and control.<sup>173</sup> A reliance on criminalization means communities have been precluded from investing in non-carceral

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<sup>164</sup> Jacobs, *supra* note 68, at 87.

<sup>165</sup> *Id.*

<sup>166</sup> Lawrence W. Sherman & Heather M. Harris, *Increased Death Rates of Domestic Violence Victims from Arresting vs. Warning Suspects in the Milwaukee Domestic Violence Experiment*, (MildVE), 11 J. EXPERIMENTAL CRIMINOLOGY 1, 1 (2015).

<sup>167</sup> Bushra Sabri et al., *Factors Associated With Increased Risk for Lethal Violence in Intimate Partner Relationships Among Ethnically Diverse Black Women*, 29 VIOLENCE & VICTIMS 719, 720 (2014).

<sup>168</sup> See Patricia Allard, *Crime, Punishment, and Economic Violence*, in THE COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 157, 157 (INCITE! Women of Color Against Violence ed., 2006).

<sup>169</sup> Goodmark, *supra* note 6, at 9.

<sup>170</sup> Goodmark, *supra* note 3, at 20

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 22.

<sup>173</sup> *Id.*

solutions to intimate partner violence.<sup>174</sup> These policies also absolve policy makers from addressing the structural socioeconomic factors that contribute to IPV.<sup>175</sup>

### III. Solutions Outside of the Criminal Legal System

The criminalization of IPV will not eradicate IPV, just like the criminalization of certain conduct has not eradicated such conduct.<sup>176</sup> A myopic pursuance of criminalization as a solution to IPV, diverts time and resources from other strategies that could better address this violence.<sup>177</sup> The criminal legal system alone has insufficiently responded to IPV and is inadequate public policy.<sup>178</sup> A criminal legal response maintains a focus on individual bad-acts, and renders IPV an aberrant crime against an individual person, thereby justifying remedies that only apply to that individual.<sup>179</sup> IPV is a product of heteropatriarchy and masculine identity.<sup>180</sup> Criminalizing IPV does not address these complex social conditions that construct the lives of survivors and those who cause harm.<sup>181</sup>

Naomi Cahn concludes that criminalization does not direct society's power to correct the social, political, and economic inequities that survivors' face, and is thus an incomplete social strategy.<sup>182</sup> Although our current carceral system may fulfill the perceived retributive needs of society and the survivor, it does not achieve its intended goals of deterrence and rehabilitation; nor does the system make survivors of violence safer or provide a pathway to healing.<sup>183</sup> The

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<sup>174</sup> Goodmark, *supra* note 6, at 9.

<sup>175</sup> Goodmark, *supra* note 3, at 22.

<sup>176</sup> Angele Davis, "Keynote." *The Color of Violence: Violence Against Women of Color*, Santa Cruz, CA, April 28, 2000.

<sup>177</sup> Goodmark, *supra* note 3, 5

<sup>178</sup> Cahn, *supra* note 140, at 817–18.

<sup>179</sup> Polavarapu, *supra* note 14, at 134–35.

<sup>180</sup> Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 799 (2000).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in A Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 57 (2011).

criminal justice approach undermines alternative programs that could better empower and protect survivors, and it fails to transform the societal structures that preserve IPV.<sup>184</sup>

Rather than addressing the social conditions that allow IPV to fester, criminalization is a form of state violence that aims to protect, secure, and maintain order.<sup>185</sup> Emphasis on criminalization negates the way the state preserves IPV through systems of domination.<sup>186</sup> For example, abolitionists argue that the prison industrial complex is fundamentally racist because it incarcerates on the basis of race and class.<sup>187</sup> The racial biases embedded in our carceral system may discourage survivors of abuse from engaging with the criminal legal system when they are subjected to violence.<sup>188</sup> Additionally, the state has historically guaranteed rights to individual men over womxn rather than addressing violations to a woman's personhood as a result of a man's harmful actions.<sup>189</sup> As a result, womxn live under conditions of unequal personal and structural power that affects all facets of their lives.<sup>190</sup> Critical race feminists argue this characterization of "security" and "order," illuminates the ways the state perpetuates gender-based violence and white supremacy.<sup>191</sup>

Feminists also argue that the criminal justice system, racism, and gender-based violence have become conflated because social norms are generated and preserved through social

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<sup>184</sup> Polavarapu, *supra* note 14, 134–35.

<sup>185</sup> *Id.*

<sup>186</sup> Angela P. Harris, *Beyond the Monster Factory: Gender Violence, Race, and the Liberatory Potential of Restorative Justice Dreams from the Monster Factory: A Tale of Prison, Redemption, and One Woman's Fight to Restore Justice to All by Sun*, 25 BERKELEY J. GENDER L. & JUST. 199, 212 (2010); *see also* Harris, *supra* note 182, at 57 (The existing criminal legal system functions as a "race- and gender-making' machine, imposing political and economic disabilities on black and brown communities, perpetuating destructive masculinity, and perpetuating racial stereotypes in much the same way as the old system of Jim Crow.").

<sup>187</sup> *Id.* at 218–19.

<sup>188</sup> Phyliss Craig-Taylor, *Lifting the Veil: The Intersectionality of Ethics, Culture, and Gender Bias in Domestic Violence Cases*, 32 RUTGERS L. REC. 31 (2008)

<sup>189</sup> *Id.*

<sup>190</sup> Donna Coker, *Transformative Justice: Anti-Subordination Practices in Cases of Domestic Violence*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 128, 150 (Heather Strang & John Braithwaite eds., 2002).

<sup>191</sup> *Id.*

institutions.<sup>192</sup> Accordingly, to eradicate gender-based violence, such as IPV, solutions should include legal rules and mechanisms to shift social norms around gender and race.<sup>193</sup> Although social norms are not innate, social constructionists have concluded that shifting norms is a difficult task.<sup>194</sup> Nevertheless, advocates should be skeptical towards state-led IPV reform because the state is committed to subordination.<sup>195</sup> In order to address IPV, alternative solutions should not aim to control marginalized communities.<sup>196</sup> These solutions should be concerned with not only the coercive power of people who cause violence, but also the coercive power of the state.<sup>197</sup> Accordingly, survivors should have the option to choose a transformative justice approach during their healing process.<sup>198</sup>

This Part argues that for marginalized communities targeted by state violence, transformative justice practices may better address IPV than criminalization. First, this Part outlines the differences between restorative and transformative justice and concludes that transformative justice is the preferred approach in IPV situations. Next, an overview of transformative justice in the IPV context suggests this approach is viable alternative for marginalized womxn who are at risk of state violence. This Part then presents an analysis of transformative justice and its potential shortcomings. Finally, this Part lays out an example of a successful transformative justice project that addresses IPV.

### **A. Transformative Justice and Restorative Justice**

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

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

<sup>195</sup> *Id.*

<sup>196</sup> See generally, Dorothy Roberts “Keynote” *Strengthened Bonds: Abolishing the Child Welfare System and Re-envisioning Child Well-being—How I Became a Family Policing Abolitionist* 461 (2021).

<sup>197</sup> Coker, *supra* note 189, at 149.

<sup>198</sup> Coker, *supra* note 189, at 143.

To address IPV, alternative processes and institutions grounded in transformative justice principles, should be developed. Transformative justice is distinguishable from other alternative justice practices like restorative justice. Although transformative and restorative justice share some core beliefs, they are distinct frameworks.<sup>199</sup> The goal of restorative justice is to repair and heal relationships damaged by conflict and violence through community dialogue and appeal to community values.<sup>200</sup> Restorative justice is a process of repairing harms through restoration of the victim, offender, and their respective communities.<sup>201</sup> This process brings victims and offenders together to inform one another about the harm that was caused and the victimization that was endured.<sup>202</sup> This dialogue is an opportunity to learn about each other's lived experiences, and provides an opportunity to agree on an acceptable sanction for the harmful actions.<sup>203</sup> The goal of restorative justice is to return autonomy to the victim and offender by allowing them to develop a penalty together.<sup>204</sup> Penalties are effectuated through rehabilitation and reparations, rather than through punishment or state intervention.<sup>205</sup>

Restorative justice practices are hotly contested in the IPV community.<sup>206</sup> Skeptics argue that restorative practices undermine the need for the offender to take accountability for their actions and thereby puts the survivor's safety at risk.<sup>207</sup> For example, a face-to-face interaction

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<sup>199</sup> Harris, *supra* note 185, at 213.

<sup>200</sup> Generation Five, *Toward Transformative Justice: A Liberatory Approach to Child Sexual Abuse and Other Forms of Intimate and Community Violence*, 1, 20 (2007), available at [http://www.generationfive.org/wp-content/uploads/2013/07/G5\\_Toward\\_Transformative\\_Justice-Documents.pdf](http://www.generationfive.org/wp-content/uploads/2013/07/G5_Toward_Transformative_Justice-Documents.pdf) [<https://perma.cc/C6EN-9VAH>]; see also, Frank Haldemann, *Another Kind of Justice: Transitional Justice As Recognition*, 41 CORNELL INT'L L.J. 675, 702 (2008).

<sup>201</sup> John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?* 46 UCLA L. REV. 1727, 1743 (1999).

<sup>202</sup> Condon, *supra* note 1, at 495.

<sup>203</sup> *Id.*

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

<sup>205</sup> C. Quince Hopkins et al., *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 294 (2004).

<sup>206</sup> *Id.*

<sup>207</sup> S. Willoughby Anderson, *The Past on Trial: Birmingham, The Bombing, and Restorative Justice*, 96 CAL. L. REV. 471, 474 (2008).

between a survivor and offender may traumatize a survivor, given her history of abuse at the hands of the offender.<sup>208</sup> These interactions may also provide the opportunity for further abuse, especially emotional abuse.<sup>209</sup> Critics' note that victim-offender dialogues pose a risk that traditional criminal proceedings do not.<sup>210</sup> Some critics are also concerned that restorative justice fails to address the patterns of power and control unique to IPV.<sup>211</sup> Critics argue that offenders exercise significant control over their intimate partners, which may lead to victims' accommodating the interests of their offenders as a protective mechanism.<sup>212</sup> Finally, those in opposition to restorative justice believe that such practices obscure the fact that IPV is a crime that should be regulated by the criminal legal system.<sup>213</sup>

Proponents of transformative justice also question the efficacy of restorative justice in IPV situations.<sup>214</sup> These scholars argue that restorative justice overly-relies on state institutions, like the community and family, to repair harms.<sup>215</sup> This reliance is problematic given the inherent power imbalances within these institutions.<sup>216</sup> Restorative practices suggest a return to a prior state of wholeness after a harm is committed which negates the structural forces that lead to the crime in the first place.<sup>217</sup> Transformative justice recognizes that systemic inequality makes restoration of harmony impossible through individual action of offenders and survivors alone, rather the conditions that allow violence to occur must be transformed.<sup>218</sup> Transformative

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<sup>208</sup> Julie Stubbs, *Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice*, RESTORATIVE JUS. & FAM. VIOLENCE, 1, 16(2002).

<sup>209</sup> *Id.*

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

<sup>211</sup> Leigh Goodmark, *Law and Justice Are Not Always the Same: Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. 707, 723 (2015).

<sup>212</sup> Stubbs, *supra* note 207, at 16.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*; Coker, *supra* note 189, at 150.

<sup>215</sup> Harris, *supra* note 82, at 57.

<sup>216</sup> Goodmark, *supra* note 210, at 724.

<sup>217</sup> Coker, *supra* note 189, at 143.

<sup>218</sup> *Id.*

practices are centered on principles of anti-subordination and they grapple with the ways gender, race, and other modes of domination intersect.<sup>219</sup> In other words, IPV should be understood in a larger context of structural violence.<sup>220</sup> Transformative justice takes a liberatory approach to violence, by acknowledging that modes of domination on the basis of identity is pervasive within institutions such as the state, market, civil society, and family.<sup>221</sup> Accordingly, the “transformation” of these institutions is the only way to address IPV in a substantive way.<sup>222</sup>

Furthermore, a transformative approach seeks safety and accountability without relying on state institutions, like incarceration and policing, which preserve conditions of structural violence.<sup>223</sup> Transformative justice is more aligned with the politics of prison abolition because it opposes the carceral regime, and reform measures that legitimize the existing carceral system.<sup>224</sup> As a result, transformative practices address both institutional and interpersonal violence.<sup>225</sup> These practices recognize that “no one vision of security will address the needs of all who suffer harm, rather transformative justice practices are deeply rooted in the time, place, and particular circumstances of the community seeking justice.”<sup>226</sup>

For example, if IPV is facilitated by societal norms of masculinity and womxn’s subordination, then these norms as they are taught and reinforced by institutions such as the family and criminal legal system, must be challenged.<sup>227</sup> While restoration envisions

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<sup>219</sup> Goodmark, *supra* note 210, at 724 (2015); *see also*, Erin Daly, *Transformative Justice: Charting a Path Towards Reconciliation*, 12 INT’L LEGAL PERSP. 73, 83(2002).

<sup>220</sup> Goodmark, *supra* note 210, at 724 (2015); *see also*, Daly, *supra* note 218, at 83.

<sup>221</sup> Harris, *supra* note 185, at 210.

<sup>222</sup> *Id.*

<sup>223</sup> *Toward Transformative Justice: A Liberatory Approach to Child Sexual Abuse and Other Forms of Intimate and Community Violence*, GENERATION FIVE 1, 20 (2007), [http://www.generationfive.org/wp-content/uploads/2013/07/G5\\_Toward\\_Transformative\\_Justice-Documents.pdf](http://www.generationfive.org/wp-content/uploads/2013/07/G5_Toward_Transformative_Justice-Documents.pdf) [<https://perma.cc/C6EN-9VAH>].

<sup>224</sup> Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-color Feminism and Alternatives to Incarceration*, 27 J. OF ETHNIC & CULT. DIV. IN SOC. WORK, 219, 231 (2018).

<sup>225</sup> Harris, *supra* note 185, at 211–12.

<sup>226</sup> Goodmark, *supra* note 210, at 724; *see also*, Daly, *supra* note 218, at 83.

<sup>227</sup> *Id.*

collaboration among state institutions, individuals involved in IPV cases, and civil society, transformative justice focuses on the anti-subordination work of critical race feminists.<sup>228</sup> These feminists argue that the state, and its progeny institutions, are too entangled in oppressive dynamics of domination, hierarchy, and violence, to be collaborated with.<sup>229</sup> Ultimately, transformative justice is a paradigm that expands the range of responses to IPV without exposing survivors to the violence and control inherent in state institutions and restorative practices.<sup>230</sup>

### **B. Transformative Justice in the Context of IPV**

IPV is a social practice preserved by multiple systems of subordination that operate in the lives of a survivor and the person who causes harm.<sup>231</sup> Transformative justice considers the relationship between an abusers' own subordination and their use of violence against their partner, without excusing the harm as result of the abuser's oppression.<sup>232</sup> For marginalized men, modes of discrimination such as race, class, and immigration status, operate in complex ways related to a man's choice to use violence against their intimate partner.<sup>233</sup> For example, the racist structures in a man's life; the economic policies that result in an inability to support his family; his potential substance abuse and mental health issues; and a history of childhood trauma, all relate to, but do not excuse, a man's use of violence.<sup>234</sup> The same intersecting systems of oppression also operate in the survivor's life.<sup>235</sup> For example, poverty increases a woman's susceptibility to IPV and also limits her ability to leave a violent relationship.<sup>236</sup> Subordinating experiences in the lives of both the offender and survivor relate to their decision to cause harm

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Coker, *supra* note 189, at 128.

<sup>232</sup> Goodmark, *supra* note 210, at 725.

<sup>233</sup> *Id.*

<sup>234</sup> Coker, *supra* note 189, at 145.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

and their ability to walk away from harm.<sup>237</sup> Inequality not only creates violence, violence also creates and maintains inequality.<sup>238</sup>

As a result, for many marginalized womxn who experience IPV, family and community are the preferred avenues of justice over the legal system.<sup>239</sup> In the context of IPV, transformative justice seeks to empower communities, defined not from the position of the state, but from the position of the person subjected to violence.<sup>240</sup> To achieve this goal, communities are tasked with supporting the autonomy of the survivor.<sup>241</sup> Unlike restorative justice which seeks to reintegrate a person who abuses into the community, in the transformative justice paradigm, reintegration is ancillary to the restoration of the survivor's autonomy.<sup>242</sup> From this standpoint, communities share accountability for IPV when they promote or fail to prevent violence, however the community focus always remains on safeguarding those who experience IPV.<sup>243</sup>

Transformative Justice relies upon the leadership of marginalized communities and recognizes that those most impacted by IPV best understand the underlying conditions that lead to violence.<sup>244</sup> Anti-violence activist, Dr. Mimi Kim, posits that because community members are directly impacted by violence and share collective space with survivors and perpetrators of violence, they are better equipped to invest in conditions that could prevent future harm.<sup>245</sup> The

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<sup>237</sup> *Id.* at 144.

<sup>238</sup> *Id.*

<sup>239</sup> Goodmark, *supra* note 210, at 725.

<sup>240</sup> *Id.*

<sup>241</sup> Coker, *supra* note 189, at 150.

<sup>242</sup> *Id.*

<sup>243</sup> Goodmark, *supra* note 210, at 725.

<sup>244</sup> Kim, *supra* note 223, at 230.

<sup>245</sup> *Id.*

community thereby becomes the locus for prevention, intervention, and transformation, of IPV.<sup>246</sup>

### **i. Potential Shortcomings of Transformative Justice**

There are longstanding concerns surrounding the decriminalization of IPV, and the implementation of alternative justice practices.<sup>247</sup> Some feminists have expressed concerns that alternative justice mechanisms may push IPV back into the private sphere, undoing the advocacy of the battered women's movement which was designed to make IPV a public responsibility.<sup>248</sup> Some scholars argue that alternative interventions tend to blur the role of the state and third parties, replacing these with a "particularly ambiguous appeal to 'community' ordering and individual choice."<sup>249</sup> They argue that only the state has the capacity and power to authorize resources to repair harm done to survivors.<sup>250</sup> Critics assert that alternative solutions assume that communities have the collective capacity to offer tangible support to survivors and control of offenders.<sup>251</sup>

Moreover, according to skeptics, community-based alternatives may fail to examine how cultural norms sustain gender power differences and privilege culture over gender equality.<sup>252</sup> For example, according to critics, transforming community norms is a difficult task when community members have a deep-seated ideology shaped by intersecting social norms.<sup>253</sup> If a given community facilitates violence, a key concern is that it will overrun the survivor's

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> Stubbs, *supra* note 207, at 56–58.

<sup>249</sup> *Id.*; L. Walgrave, L. (2000) *Extending the Victim Perspective Towards a Systemic Restorative Justice Alternative* in ADAM CRAWFORD & JO GOODEY (EDS.) INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE: INTERNATIONAL DEBATES 5 (2000).

<sup>250</sup> Walgrave, *supra* note 248, at 5.

<sup>251</sup> *Id.* at 19.

<sup>252</sup> *Id.* at 8.

<sup>253</sup> Polavarapu, *supra* note 14, at 142.

needs.<sup>254</sup> Additionally, these scholars claim that alternative justice projects may pressure victim's to reconcile, even if they are not ready to do so.<sup>255</sup> Julie Stubbs argues that anti-violence advocates should be cautious in assuming that marginalized groups of womxn do not wish to use the criminal legal system in IPV matters.<sup>256</sup> Accordingly, critics of transformative justice argue that the total rejection of the criminal legal system may limit womxn's options and threaten their safety.<sup>257</sup>

Much of the literature opposed to alternative solutions to IPV focuses on the shortcomings of restorative justice, which this paper previously addresses.<sup>258</sup> Critics are correct to assume that restorative justice may privatize violence and threaten a survivor's safety.<sup>259</sup> The participation, apology, and reparation framework of restorative justice may give rise to potential risks for survivors and does not address the structural gender norms that preserve IPV.<sup>260</sup> A transformative justice model does not rely on victim-offender dialogue, rather it focuses on identifying and addressing the subordinating systems that may operate in the life of the offender and survivor.<sup>261</sup> Rather than relying on community norms, transformative justice aims to transform and create communities that support survivors' autonomy.<sup>262</sup>

## ii. Transformative Justice in Practice

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 6.

<sup>258</sup> *Id.*; see generally, Harris, *supra* note 185, at 210; see also Md. Jahirul Islam et. al., *Challenges of Implementing Restorative Justice for Intimate Partner Violence: An Islamic Perspective*, Griffith University, Brisbane, Australia, J. OF REL. & SPIRITUALITY IN SOC. WORK (2018).

<sup>259</sup> Coker, *supra* note 189, at 149.

<sup>260</sup> Walgrave, *supra* note 248, at 20.

<sup>261</sup> Coker, *supra* note 189, at 143.

<sup>262</sup> *Id.* at 144.

Because transformative justice programs are deemed radical and lie within marginalized communities, these programs tend to be “informal, decentralized, and largely undocumented.”<sup>263</sup> There are, however, community-based programs that use transformative values in their models to redefine expectations and norms around IPV.<sup>264</sup> These programs rely on shifting an offender’s network, creating support for survivors, and developing mechanisms that link gender with other experiences of subordination on the basis of identity.<sup>265</sup>

In March 2000, INCITE! Women and Trans People of Color Against Violence issued a statement assessing the effects of the increased criminalization of IPV and the silence around the interplay between police and gender violence.<sup>266</sup> The organization acknowledged that relying on the carceral system discourages community-based responses and interventions to IPV.<sup>267</sup> INCITE! articulated a feminist, anti-gender violence and anti-criminalization agenda which led to a broad critique of criminalization amongst antiviolence advocates, legal scholars, policy makers, and grass roots organizers.<sup>268</sup> The statement challenged communities to develop programs and strategies to combat both gender and police violence, and to document their efforts as examples for other communities seeking solutions.<sup>269</sup> As a result, communities around the country began to create and implement alternative approaches to IPV.

**a. Institute for Family Services and the Cultural Context Model**

The Institute for Family Services (“IFS”) in Somerset, New Jersey works with families to dismantle the power dynamics connected to gender without collaborating with systems of

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<sup>263</sup> *Id.*

<sup>264</sup> Coker, *supra* note 189, at 150.

<sup>265</sup> *Id.*

<sup>266</sup> Law, *supra* note 50, at 4.

<sup>267</sup> *Id.*

<sup>268</sup> A. Bierria, et. al., Community Accountability: Emerging Movements to Transform Violence. 27 *Social Justice*, 11 (2011); N.J. SOKOLOFF, DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER, AND CULTURE. Rutgers University Press (2005).

<sup>269</sup> Law, *supra* note 50, at 4

institutional oppression.<sup>270</sup> The IFS uses a liberation-based healing approach to family therapy which facilitates transformative and intergenerational healing. Clients are not defined by the characteristics of their presenting problem, but rather by their complex identities.<sup>271</sup> The IFS acknowledges that patterns of male dominance vary across cultural groups.<sup>272</sup> Thus, IPV interventions confront broader social ailments such as the fractured family, loss of community, gender norms, community and religious norms, employment challenges, and substance abuse.<sup>273</sup> The goal of the program is for family members to make connections between their personal relationship with violence and broader social norms and cultural values.<sup>274</sup> The IFS recognizes that traditional approaches to IPV defer to white-centric theories and services which minimize the cultural differences in the lives of survivors and offenders.<sup>275</sup> Consequently, a reliance on dominant mechanisms may put womxn in marginalized communities at greater risk of violence.<sup>276</sup>

To address IPV, the IFS employs the Cultural Context Model (“CCM”), which is both a theoretical and practical paradigm.<sup>277</sup> The CCM is a holistic treatment that requires the person who abuses to take responsibility for their actions while supporting the empowerment of the survivor through a range of services.<sup>278</sup> The CCM identifies IPV as a universal pattern of domination and control, and acknowledges the impact that sociocultural forces can have on the family unit.<sup>279</sup> This model places gender, race, class, ethnicity, and sexual orientation at the

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<sup>270</sup> Coker, *supra* note 189, at 146.

<sup>271</sup> *Id.*

<sup>272</sup> Rhea v. Almeida & Ken Dolan-Delvecchio, *Addressing Culture in Batterers Intervention the Asian Indian Community as an Illustrative Example*, 5 VIOLENCE AGAINST WOMEN 654, 666 (1999).

<sup>273</sup> *Id.* at 654.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 667.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

center of family therapy.<sup>280</sup> A group of diverse therapists conduct every therapy session at the IVF.<sup>281</sup> One or two therapists meets with a client in a consulting room, while the rest of the team views from a one-sided mirror or video monitoring system.<sup>282</sup> Communication flows from the consultation room to the observing team via an audio earphone.<sup>283</sup> Both teams meet for short breaks throughout the session to share input.<sup>284</sup> The result is a collaborative discussion amongst a group of diverse practitioners, ensuring that judgment is never based on one individual therapist.<sup>285</sup> Therapists are able to develop therapeutic strategics that are less likely to be sexist, racist, or homophobic.<sup>286</sup> More specifically, the CCM is a transformative praxis that consists of seven interwoven components.<sup>287</sup> The seven components of the CCM are: (1) Sponsorship; (2) Socioeducation; (3) Men’s and womxn’s culture circles; (4) Couple, individual, family of origin, and family sessions; (5) Children’s and adolescents’ culture circles; (6) Graduation; and (7) Community outreach.

Each client of the program is given a sponsor of the same sex-whose job it is to connect the client to the collective experiences of their identity.<sup>288</sup> Sponsorship “transforms the boundary of men’s decision-making process,” by deconstructing the privacy that protects males’ right to use violence against their partners.<sup>289</sup> The process of linking men to a sponsor facilitates accountability for men.<sup>290</sup> Discussions encourage men to think about how differences of race and class affect the choices of womxn subjected to IPV, and encourages men to relate their own

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<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 668.

<sup>282</sup> *Id.* at 669.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 668.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 669.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

experiences of racism and classism to the issues of gender subordination.<sup>291</sup> Sponsors are clients who are at the end of their own transformative journey and are at the stage to “give back” to others, or they are volunteers from the community who have been trained for the role.<sup>292</sup> Survivors are also given a sponsor of the same sex.<sup>293</sup> For example, one Asian Indian woman told her story of abuse to a group of womxn being led by an Asian Indian therapist:

“Instead of emphasizing the broken bones and terror that she suffered as a result of her husband’s violence, she spoke of her strong feelings of wanting to protect and help him. She stated that despite the violence, her husband “permits” her to study and work out of the home. The beginning of her own transition toward empowerment occurred when her husband came into the room and joined the conversation. He described his own history of feeling entitled to control his wife before learning, through numerous conversations with other men in the program, how damaging this pattern was for all members of his family. He spoke about his current convictions, which included the need for all men to be held accountable for their violence and for men to be required to make safe and responsible choices within family life. The sponsors respectfully stated that the husband had no right to abuse her, regardless of whether or not their contract included her studying and working out of the home.”

This example highlights how sponsorship dialogue allows for conversations that may not be had in other contexts, such as a legal proceeding.<sup>294</sup> If a client is mandated by the courts to attend therapy as a result of his violence, each partner is seen separately within a same-gender subgroup for the initial visit.<sup>295</sup> After initial discussions, couples may choose to engage in sessions together if the survivor requests it, and after the offender accepts full responsibility for his abusive behavior—these meetings are attended by sponsors and therapists.<sup>296</sup>

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<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 670.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

The next component of the CCM is socioeducation.<sup>297</sup> Socioeducation is the presentation of material to clients in an effort to raise their consciousness around intersecting issues of gender, race, culture, and sexual orientation.<sup>298</sup> A combination of articles, books, songs, and video clips are presented to the client to stimulate discussions around cultural influences that shape their patterns in the home and community life.<sup>299</sup> These materials are tailored to the client's specific identity and lived experiences.<sup>300</sup> Therapists assist in the emotional process that ensues as result of these conversations by helping draw the connections between the cultural attitudes raised by the client and their decision to cause harm.<sup>301</sup> This process begins to shift the clients' consciousness by teaching them to balance personal, political, and social norms, while reflecting on the ways their actions impact others.<sup>302</sup>

The third component of the CCM is the cultural circle; this is the area where most of the therapy occurs.<sup>303</sup> Cultural circles are where clients, their same-sex sponsors, and a team of therapists work toward expanding definitions and experiences of the client's prescribed roles.<sup>304</sup> The socioeducation component takes places within the cultural circle for eight to ten weeks.<sup>305</sup> These initial sessions involve same-sex individuals; thereafter, clients are introduced to open-ended cultural circles.<sup>306</sup> The men's cultural circle focuses on accountability while the womxn's circle focuses on empowering members to prioritize their own needs and emotions.<sup>307</sup>

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<sup>297</sup> *Id.* at 671.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 677.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 678.

In addition to cultural circles, couple, individual, and family therapy sessions are also facilitated within the broader context of the cultural circle.<sup>308</sup> For example, couple and family sessions take place in a man's cultural circle with members of the woman's sponsors present as well.<sup>309</sup> The goal of this structure is to not fragment families by sending individual members to separate therapist, which is the traditional service delivery approach in other justice systems.<sup>310</sup> This structure also allows families to maintain unity and integrity; values that are important in many cultures.<sup>311</sup>

The CCM recognizes that the inclusion of children and adolescents in the therapeutic process is integral to the process of ending violence.<sup>312</sup> Similar to the cultural circles, circles for children and adolescents explore power and control dynamics, and engage with socioeducation materials.<sup>313</sup> Therapists show the young participants films such as *Beauty and the Beast*, *The Little Mermaid*, *Aladdin*, and *Mulan*, to facilitate discussions about the various "behavioral prescriptions children are given within the dominant culture," and how they relate to different axis of identity.<sup>314</sup>

Finally, upon completion of the CCM, clients "graduate" signifying a "transition from client status to other forms of connection."<sup>315</sup> This phase marks the point that clients are able to expand toward broader, community-based work, such as becoming a sponsor or working to educate others about the values needed for a nonviolent family life.<sup>316</sup> Clients may choose to

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<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 679.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 680.

<sup>316</sup> *Id.*

participate in antiviolence community projects, and often pursue new roles within their respective families and communities.<sup>317</sup>

The work of the Institute for Family Services and the CCM shows that alternative justice mechanisms, outside the criminal legal system, can address IPV.<sup>318</sup> This program demonstrates that strategies to end IPV are dynamic and require more than a single state action; they often require a long-term commitment from a couple's community, family, and a team of professionals.<sup>319</sup>

### **Conclusion**

Our criminal legal system has failed to address IPV, and it has led to collateral consequences for survivors, those who cause harm, and their respective communities.<sup>320</sup> Survivors should not be limited by the current systems of justice availed to them by the state. The transformative justice model is an attempt to broaden strategies and interventions to address IPV.<sup>321</sup> Transformative justice projects can better address the needs of all survivors, not just white-cis women.<sup>322</sup>

IPV is a form of gender-based violence that is supported by social norms and institutions.<sup>323</sup> A punitive approach will not address the complex ways that a person's identity and structural oppression intersect in the lives of those who cause harm and those who are subjected to it.<sup>324</sup> Survivors should have the option to choose a path of healing and justice that is conducive to their needs and lived experiences. Furthermore, accessing justice should not lead to

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> Miles, *supra* note 24, at 199.

<sup>321</sup> Almeida & Delvecchio, *supra* note 271, at 670.

<sup>322</sup> Harris, *supra* note 182, at 57.

<sup>323</sup> Coker, *supra* note 189, at 150.

<sup>324</sup> *Id.*

further violence or state control. For womxn in marginalized communities, reliance on state intervention in IPV situations, is not always the safest option.<sup>325</sup> Transformative justice programs may better serve the interests of womxn who feels that a call to the police may put her or her family at greater risk of harm. Such a system need not displace the current state response to IPV, but alternative solutions should be available to those who choose not to engage with the criminal legal system.

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<sup>325</sup> Goodmark, *supra* note 3, at 20.