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# Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement


Donna Coker

*University of Miami School of Law*, [dcoker@law.miami.edu](mailto:dcoker@law.miami.edu)

Ahjané D. Macquoid

*University of Miami School of Education and Human Development*

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# Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement

Donna Coker & Ahjané D. Macquoid\*

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\* Donna Coker, co-chair of the CONVERGE! Conference, is a Law Professor at the University of Miami School of Law. Her research concerns the connection between economic vulnerability and gender violence; restorative justice and other alternative criminal justice interventions; and gender and racial justice in criminal law doctrine and practices. Ahjane Macquoid, MA, is a Rosen Doctoral Fellow in the Community Well-Being Program at the University of Miami's School of Education and Human Development. Her research interests include gender-based violence, transformative justice, intersectionality, and critical participatory action research. The authors wish to thank Deborah Weissman and Leigh Goodmark for their support and useful comments; Robin Schard, Nicole Downing, and Carlos Espinoza for invaluable research; Ravika Rameshwar for her significant thoughtful contributions as a Research Assistant; Tara Lora for her helpful assistance. Ahjane is grateful to Patrick Macquoid for his unwavering support. Finally, we wish to thank Caitlin Griffin and Lauren Gonzalez, whose extraordinary work as RSJLR Symposium Editor and Editor-in-Chief, respectively, not only made our article stronger, but made the entire CONVERGE! issue possible. For the full CONVERGE! issue, please visit UNIVERSITY OF MIAMI RACE & SOCIAL JUSTICE LAW REVIEW, *Volume 5: Issue 2*, <http://race-and-social-justice-review.law.miami.edu/>.

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## I. INTRODUCTION

The number of people in U.S. prisons and jails has experienced an astounding six-fold increase since the 1970s.<sup>1</sup> This growth in the number of people imprisoned is unprecedented in U.S. history and outstrips the current incarceration rates of any other country.<sup>2</sup> The reach of the criminal justice system is far wider and deeper than that experienced by the two million who are imprisoned.<sup>3</sup> Another five million people are under the supervision of the criminal justice system—on parole or probation.<sup>4</sup> Approximately 35,000 people are held in immigration detention on any given day,<sup>5</sup> and more than 400,000 were detained and removed from the country in 2013.<sup>6</sup> As we describe in detail below, this hyper-incarceration<sup>7</sup> has devastating effects on those under criminal

<sup>1</sup> Marie Gottschalk, *The Past, Present, and Future of Mass Incarceration in the United States*, 10 CRIMINOLOGY & PUBLIC POL'Y 483 (2011).

<sup>2</sup> ROY WALMSLEY, INT'L CENTRE FOR PRISON STUDIES, WORLD PRISON POPULATION LIST (TENTH EDITION), [http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wpp1\\_10.pdf](http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wpp1_10.pdf) (last visited Apr. 11, 2015) (The U.S. prison population rate of 716 per 100,000 is the highest among the 222 independent countries and dependent territories included in the study.).

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

<sup>4</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (revised ed., 2012). The growth in the number of people who are incarcerated or otherwise under the control of the criminal justice system is the result of the intersection of a series of government policy decisions: (1) drug crime policies that focused on surveillance and control in urban communities of color; (2) mandatory minimums and “three-strikes” legislation that dramatically increased the years served for convictions; (3) expansive drug conspiracy charging that resulted in lengthy terms of incarceration for minor players, including a number of women in abusive relationships. INTRODUCTION TO CRIMINAL LAW STORIES 3 (Donna Coker & Robert Weisberg eds., 2013).

<sup>5</sup> ALISON SISKIN, CONG. RESEARCH SERV., IMMIGRATION-RELATED DETENTION 13 (2013), available at [www.fas.org/irp/crs/RL32369.pdf](http://www.fas.org/irp/crs/RL32369.pdf). The average size of the noncitizen detention population has increased 75% since 2002. *Id.* at 12.

<sup>6</sup> ALISON SISKIN, CONG. RESEARCH SERV., ALIEN REMOVALS AND RETURNS: OVERVIEW AND TRENDS (2015), available at <http://fas.org/sgp/crs/homesec/R43892.pdf>.

<sup>7</sup> See discussion *infra* Part II defining the term “hyper-incarceration.”

justice system control and those close to them and weakens the social structures of entire communities.

We demonstrate that these negative effects of hyper-incarceration increase the risks for domestic violence. We argue that the movement to end domestic violence should therefore focus attention on efforts to stop hyper-incarceration. In Part I, we describe the growth of hyper-incarceration and its racial, class, and gender disparate character. This growth in criminalization has been fueled by racist ideologies and is part of a larger neoliberal project that also includes disinvestment in communities, diminishment of the welfare state, and harsh criminalization of immigration policy. We place the dominant crime-centered approach to domestic violence in this larger neoliberal context. Anti-domestic violence advocates have responded to neoliberal anti-poor and anti-immigrant policies with two strategies: exceptionalizing domestic violence victims and expanding the reach of VAWA, both of which are likely to become less tenable in the current political climate. We argue for a more inclusive political alignment with justice organizations that addresses the larger structural inequalities that fuel violence. A key part of that alignment is opposition to hyper-incarceration. In Part II, we describe four of the negative impacts of hyper-incarceration: collateral consequences of conviction; prison trauma and the deepening of destructive masculinities; economic and emotional harms to the families of those incarcerated, especially children; and harms of hyper-incarceration to communities. In Part III, we demonstrate the risks for domestic violence that are the result of the effects of hyper-incarceration on the economic and mental well-being of individuals and on the social structure of communities. We conclude with a description of opportunities to join the work against hyper-incarceration. For the most part, anti-domestic violence organizations have not been at the forefront of this work, but there are notable exceptions which we describe.

#### A. *The Rise of the Carceral State*<sup>8</sup>

The police shooting in Ferguson, Missouri<sup>9</sup> of an unarmed African American man and the related Department of Justice report,<sup>10</sup> the racial

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<sup>8</sup> We borrow the term from Marie Gottschalk. See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA I* (2006).

<sup>9</sup> See, e.g., Monica Davey, *Fatal Encounter in Ferguson Took Less Than 90 Seconds, Police Communications Reveal*, N.Y. TIMES, Nov. 16, 2014, [http://www.nytimes.com/2014/11/16/us/ferguson-shooting-michael-brown-darren-wilson.html?\\_r=1](http://www.nytimes.com/2014/11/16/us/ferguson-shooting-michael-brown-darren-wilson.html?_r=1).

<sup>10</sup> See U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* (Mar. 4, 2015), available at [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

disparities in the application of “stand your ground” law,<sup>11</sup> and the racially discriminatory “stop-and-frisk” practice in New York City<sup>12</sup> have (re)focused popular attention on the racial nature of the growth in criminalization. African American men and women make up an extraordinarily disproportionate number of those arrested and incarcerated, representing nearly 40% of male prisoners and 25% of female prisoners.<sup>13</sup> They are incarcerated at rates six times higher than that of white men and women.<sup>14</sup>

While much of the attention on hyper-incarceration has focused on African American men,<sup>15</sup> the biggest growth in incarceration numbers has been among *women* whose imprisonment rates have grown over 800% since the late 1970s,<sup>16</sup> with the biggest increase among African American women.<sup>17</sup> George Lipsitz describes the ways in which racial discrimination in housing and employment, gender norms in the structure of caretaking responsibilities, vulnerability to male abuse, and the resulting economic vulnerability of African American women and Latinas, combine to make poor women of color particularly vulnerable to incarceration.<sup>18</sup>

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<sup>11</sup> See Donna Coker, “Stand Your Ground” In Context: Race, Gender, and Politics, 68 U. MIAMI L. REV. 943 (2014) (describing Florida’s self-defense law and the trials of George Zimmerman for killing Trayvon Martin, Michael Dunn for killing Jordan Davis, and Marissa Alexander who claimed to have fired a “warning shot” in self-defense against her abusive husband).

<sup>12</sup> See, e.g., *Stop and Frisk Data*, N.Y. CIVIL LIBERTIES UNION, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Apr. 11, 2015) (finding that the majority of those stopped and frisked in New York were people of color and innocent of any wrong doing); see also Deborah M. Weissman, *Rethinking a New Domestic Violence Pedagogy*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 635 (2015) (describing the absence of anti-domestic violence activists in negotiating the end of stop and frisk with New York City).

<sup>13</sup> PAUL GUERINO, PAIGE M. HARRISON & WILLIAM J. SABOL, PRISONERS IN 2010, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BJS 26, tbl.12 (2011), [www.bjs.gov/content/pub/pdf/p10.pdf](http://www.bjs.gov/content/pub/pdf/p10.pdf).

<sup>14</sup> Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1437 n.52, tbl.2 (2012).

<sup>15</sup> As Kimberlé Crenshaw notes, “race has become a central feature in the growing understanding of mass incarceration[.]” but the impact on women is largely ignored, while the feminist discourse on women and the criminal justice system has “replicate[d] the race-neutral framing of gender that is characteristic of the wider field of feminist criminology.” *Id.* at 1423–24.

<sup>16</sup> See Priscilla A. Ocen, *Unshackling Intersectionality*, 10 DU BOIS REV. 471 (2013).

<sup>17</sup> Crenshaw, *supra* note 14; PAUL GUERINO, PAIGE M. HARRISON, & WILLIAM J. SABOL, U.S. DEP’T OF JUSTICE, OJP, BJS, NCJ 236096, PRISONERS IN 2010 1 (2011).

<sup>18</sup> George Lipsitz, “In an Avalanche Every Snowflake Pleads Not Guilty”: *The Collateral Consequences of Mass Incarceration and Impediments to Women’s Fair Housing Rights*, 50 UCLA L. Rev. 1746 (2012).

The relationship between women's incarceration and their violent victimization is often overlooked. A significant number of women in prison are there as a result of their attempts to escape, survive, or ameliorate their violent victimization.<sup>19</sup> The strict limitations of duress law, the limits on courts' abilities to lessen sentences on the basis of coercion, and the broad sweep of conspiracy law, result in long prison sentences for women who were coerced into criminal offending by an abusive partner or who played a minor role in a drug crime in which an abusive partner played a more significant role.<sup>20</sup>

The growth in incarceration is one aspect—a particularly alarming aspect—of a larger phenomenon of what Jonathan Simon refers to as “governing through crime”<sup>21</sup> and what Beth Richie calls “America’s prison nation.”<sup>22</sup> Simon describes the growth of the use of crime technologies, crime metaphors, and crime paradigms to address a wide range of social ills and perceived (often exaggerated) risks. “[C]rime and the forms of knowledge historically associated with it . . . [have become] powerful tools with which to interpret and frame all forms of social action areas as a problem for governance.”<sup>23</sup> Richie’s focus is on the ratcheting up of punitive state controls directed at those who are marginalized as a function of race, class, sexual identity, sexual orientation, and other oppressed identities. “Prison nation” refers to “the ideological and public policy shifts that have led to the increased criminalization of disenfranchised communities of color, more aggressive law enforcement strategies for norm-violating behavior, and an undermining of civil and human rights of marginalized groups.”<sup>24</sup>

This dramatic criminalization occurred during a period in which the already meager U.S. welfare state was dismantled and “underpaid,

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<sup>19</sup> Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 696 (2006) (“Female offenders report very high instances of physical and sexual abuse . . . ranging from 69% to 80%” and many enter the criminal system as juveniles running away from abusive homes); see Lillian Hewko’s remarks in Sara Ainsworth et al., *Panel on Beyond the Rape Exception: Using Law and Movement Building to Ensure Reproductive Health and Justice to All Gender Violence Survivors*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 535 (2015).

<sup>20</sup> Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 834 (2003); Crenshaw, *supra* note 14 at 1430–40 (describing the case of Kemba Smith).

<sup>21</sup> See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

<sup>22</sup> BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* (2012).

<sup>23</sup> SIMON, *supra* note 21, at 17.

<sup>24</sup> RICHIE, *supra* note 22, at 3.

precarious work” became the norm.<sup>25</sup> It is important to see the link between these phenomena—the increase in hyper-incarceration, the disinvestment in communities, and the diminishment of the welfare state. As Dorothy Roberts writes, “The welfare, prison, foster care, and deportation systems have all become extremely punitive mechanisms for regulating residents of the very neighborhoods most devastated by the evisceration of public resources.”<sup>26</sup>

Racism is deeply embedded in the growth in incarceration, the diminishment of the welfare state, and the increasing criminalization of immigration enforcement. As Michelle Alexander documents, overt white supremacist rhetoric in opposition to Civil Rights gains gave way, over time, to the concealed racism imbedded in anti-crime rhetoric.<sup>27</sup> The intent and racial outcomes of the resulting hyper-incarceration lead Alexander to describe the current circumstance as “The New Jim Crow.”<sup>28</sup> Political attacks on the welfare state used similar racist rhetoric, illustrated by Ronald Reagan’s thinly disguised racial trope of the “welfare queen” in his campaign rhetoric.<sup>29</sup> Similar racist imagery fuels the incredible criminalizing of immigration policy.<sup>30</sup>

The increase in punitiveness and the diminishment of the welfare state are rooted in a global neoliberal project. By neoliberal, we refer to

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<sup>25</sup> LOIC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 5 (2009); *see also*, Deborah M. Weissman, *The Personal is Political—and Economic: Rethinking Domestic Violence*, 2007 B.Y.U. L. REV. 387 (2007) (describing the negative impact of factory closings on individuals and families, resulting in family distress and domestic violence.)

<sup>26</sup> Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1478 (2012).

<sup>27</sup> ALEXANDER, *supra* note 4.

<sup>28</sup> *Id.* *See also*, Lipsitz, *supra* note 18 at 1760 (“Massive prison building projects and mandatory sentencing laws . . . were fueled by race- and gender-inflected rounds of blaming and shaming that targeted the ‘underclass,’ immigrants, welfare recipients, the homeless, inner city youth, and single mothers.”).

<sup>29</sup> ALEXANDER, *supra* note 4, at 49.

<sup>30</sup> *See* Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and It’s Possible Undoing*, 49 AM. CRIM L. REV. 105, 165 (2012) (the criminalization of immigration policy is the result, in part, of suppressed racial anxiety which, rather than view migration as “a complex global problem [of] regulating migration flows and integrating immigrant populations” instead views it as a crime problem and non-white immigrants as deviant threatening criminals); Kevin Johnson & Joanna E. Cuevas Ingram, *Anatomy of a Modern-Day Lynching: The Relationship Between Hate Crimes Against Latina/os and the Debate Over Immigration Reform*, 91 N.C. L. REV. 1613 (2013). Rebecca Sharpless criticizes the strategy of immigrant rights activists to use the slogan, “I am a worker, not a criminal,” arguing that doing so reinforces the racist practices of mass incarceration. *See* Rebecca Sharpless, “Immigrants Are Not Criminals”: *Respectability, Immigration Reform, and Mass Incarceration*, \_\_ HOUSTON LAW REV. \_\_ (forthcoming 2015).

an ideology of “hyper-liberalism,”<sup>31</sup> characterized by antagonism to the very concept of “society,”<sup>32</sup> and the promotion of policies that privatize government functions, glorify “markets,” promote the unfettered movement of global capital, and diminish the welfare state.<sup>33</sup> Increasing economic inequality is one of several serious negative consequences of neoliberal policies.<sup>34</sup>

*B. The U.S. Movement to End Domestic Violence and the Criminalization Agenda.*

This historical context allows us a perspective on the current moment in the movement to end domestic violence. As Beth Richie<sup>35</sup> and Mimi Kim<sup>36</sup> describe in this volume, this growth in criminalization occurred during the same time period as significant public gains were made in understanding violence against women as a national priority. Feminists had long argued that a false public-private distinction served to insulate “private” violence from public interdiction.<sup>37</sup> To underscore the public nature of the violence—and hence the rationale for public action—feminist activists turned to both criminalization rhetoric and policy. “Domestic violence is a crime” was intended to mark the violence as serious and worthy of public attention. Many activists were frustrated at the pernicious sexism and racism that shaped police response to domestic violence and sexual assault and saw “policing the police” as critical to progress for women’s civil and human rights.<sup>38</sup> To be clear, criminal

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<sup>31</sup> Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIAMI L. REV. 961, 1017 (2014) (Neoliberalism may be described as “hyper-liberalism [in which] . . . the conception of individuals as autonomous economic actors is . . . a moral paradigm.”).

<sup>32</sup> We refer, of course, to the famous statement by Margaret Thatcher: “There is no such thing as society.” See Jessica Elgot, *Margaret Thatcher Dead: The Former Prime Minister’s Most Controversial Moments*, HUFFINGTON POST UK (Aug. 8, 2013), [http://www.huffingtonpost.co.uk/2013/04/08/margaret-thatcher-dead-controversial\\_n\\_3037335.html](http://www.huffingtonpost.co.uk/2013/04/08/margaret-thatcher-dead-controversial_n_3037335.html) (quoting Thatcher’s remarks to WOMEN’S OWN magazine).

<sup>33</sup> See generally DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005). Neoliberalism terminology arises from adherents’ stated commitment to ideal of personal freedom—hence the “liberal”—combined with their adherence to free market principles associated with neo-classical economics—hence “neo.” *Id.* at 20.

<sup>34</sup> See WACQUANT, *supra* note 25.

<sup>35</sup> Beth E. Richie, *Keynote—Reimagining the Movement to End Gender Violence: Anti-racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 257 (2015).

<sup>36</sup> See Mimi Kim’s remarks in Mimi Kim et al., *Plenary 3—Harms of Criminalization and Promising Alternatives*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 369 (2015).

<sup>37</sup> See ELIZABETH SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000).

<sup>38</sup> G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservativization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237 (2005).



justice responses were never the only subject of feminist activism. Activists argued for services and economic opportunities as well, but the focus on changing the criminal justice response, unlike claims for social goods, resonated with the bi-partisan congressional support for “tough on crime” legislation.<sup>39</sup>

The Violence Against Women Act (VAWA) of 1994, re-authorized and amended in 2000, 2005, and 2013,<sup>40</sup> grew directly from this criminal framing. Most of VAWA funding is focused on improving the criminal justice response and much of the change in law made by VAWA has been to advance criminal penalties.<sup>41</sup> VAWA was part of the 1994 Violent Crime Control and Law Enforcement Bill (“Crime Bill”) of the Clinton administration. This legislation did much to ratchet up hyper-incarceration: allocating nearly ten billion dollars for new prison construction, expanding the death penalty, adding mandatory life sentences for federal offenders with three violent priors, requiring states to maintain sex offender registries or risk losing federal dollars, and making admissible evidence of prior sex abuse to prove a defendant’s character in both criminal and civil cases involving charges of sex abuse.<sup>42</sup>

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<sup>39</sup> See Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001). This is not to say that feminist ideology did not play an important role in the development of the crime-centered response to domestic violence. As Deborah Weissman describes, feminism’s move from an intersectional focus on structural inequality to an identity focus on “women,” unburdened by class or race oppression, was the bridge to law-and-order feminism. Deborah Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 DUKE J. GENDER L. & POL’Y 221, 230–232 (2003).

<sup>40</sup> See LISA N. SACCO, CONGRESSIONAL RESEARCH SERVICE, THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING (March 6, 2014), available at <https://fas.org/sgp/crs/misc/R42499.pdf>. In 2000, the House passed the Victims of Trafficking and Violence Protection Act of 2000 (P.L. 106-386) with a 371-1 vote and the Senate unanimously passed the bill. In 2005, the House passed the Violence Against Women and Department of Justice Reauthorization Act of 2005 (P.L. 109-162) with a 415-4 vote, and the Senate again unanimously passed the bill. In 2013, the Senate passed the Violence Against Women Reauthorization Act of 2013 (P.L. 113-4) with a 78-22 vote, and the House passed the bill with a 286-138 vote.

<sup>41</sup> More than 50% of the funding is allocated to the criminal justice response and a significant number of the federal law changes were to create new criminal laws and penalties. See Caroline Bettinger-Lopez, Donna Coker, Julie Goldscheid, Leigh Goodmark, Val Kalei Kanuha, James Ptacek, & Deborah Weissman, *VAWA is Not Enough: Academics Speak Out About VAWA*, FEMINIST LAW PROFESSORS (Feb. 27, 2012), [www.feministlawprofessors.com/2012/02/academics-speak-about-vawa-reauthorization/](http://www.feministlawprofessors.com/2012/02/academics-speak-about-vawa-reauthorization/) (describing the funding breakdown in VAWA 2013 bill).

<sup>42</sup> H.R. 3355, 103rd Cong. (1994) (sections 6001-22 expanded the death penalty, sections 60023-7002 added mandatory life sentences to federal offenders with three violent priors, section 170101 required states to keep registries, and section 320935 added Fed. R. Evid. 413-15). Subsequent VAWA legislation continued to expand the reach of

Framing violence against women as a criminal issue rather than, for example, a civil rights, human rights, or public health issue, inevitably narrows the framework for understanding the scope, causes, consequences, and remedies for violence against women. A crime-centered frame focuses on interpersonal (individualistic) violence – a perpetrator harms a victim.<sup>43</sup> It makes invisible the ways in which structural inequalities—many of which are the product of state action – make some women and men more vulnerable to violence and some more likely to use violence.<sup>44</sup> Further, violence perpetrated by the state is hidden when “violence against women” is made co-extensive with intimate partner violence, sexual assault, and stalking – as is the case with VAWA.<sup>45</sup>

### *C. The Anti-Domestic Violence Movement Response to Neoliberal Policies*

In the face of increasingly anti-poor and anti-immigrant policies and dramatic cuts in human services and public assistance, service providers and advocates for victims of domestic violence have employed two prevailing strategies. The first is to carve out exceptions for victims of domestic violence, such as occurred in the changes to the welfare reform bill.<sup>46</sup> While benefitting some victims, this “exceptionalizing” of domestic violence victims may harden a distinction between “deserving” domestic violence victims, who should receive protection from harsh policies, in contrast to the mass of presumed “undeserving” poor, many of whom are equally trapped by circumstance

To some extent, the very success of the political effort on behalf of domestic violence victims is dependent on maintaining the boundaries of

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the criminal justice system including, for example, the DNA Fingerprint Act of 2005, 42 U.S.C. § 14135a (2014). See Weissman *supra* 12.

<sup>43</sup> Madelaine Adelman, *The Battering State: Towards a Political Economy of Domestic Violence*, 8 J. POVERTY 45, 49 (2004) (“the criminalization model has carved out a deviant rather than normative stance toward battering—it is something criminals do, not otherwise respectable citizens”).

<sup>44</sup> See Weissman, *supra* note 39, at 223 (“When proponents of VAWA address structural theories, the discourse has been limited principally to the failure of law enforcement agencies to arrest and of the courts to punish perpetrators[,]” rather than to address structural inequalities such as class.)

<sup>45</sup> As Andrea Smith writes, the state is “not simply. . . flawed in its ability to redress violence, but [is]. . . a primary perpetrator of violence against women.” Andrea Smith, *Beyond Restorative Justice: Radical Organizing Against Violence*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 255, 261 (James Ptacek ed., 2009).

<sup>46</sup> Personal Responsibility & Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 408(a)(7)(C)(i), 110 Stat. 2105, 2137-2138 (1996) (allowing states to waive certain program requirements, including time limits, for those individuals identified as having a history of domestic violence).

the category, “violence against women.”<sup>47</sup> Efforts to expand the category to include, for example, shackling incarcerated women while they are giving birth,<sup>48</sup> threaten the political gains in the response to a more narrowly defined “violence against women” agenda. The result, when coupled with the need to draw bi-partisan support for services at the state and national level, has been to conservatize the movement and its claims.<sup>49</sup> Anti-domestic violence service providers have found it necessary to distance themselves from justice concerns such as abortion rights and racial equality in housing and education that would alienate right wing legislators who would otherwise support funding for shelters and services.<sup>50</sup> Similarly, the domestic violence movement has been largely silent in the work to end hyper-incarceration.<sup>51</sup>

The second strategy employed to resist the harsh consequences of neoliberal policies has been to incorporate within VAWA increasing attention to structural inequality.<sup>52</sup> Each iteration of VAWA has included provisions that respond to structural inequalities, beginning with

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<sup>47</sup> See, e.g., RICHIE, *supra* note 22 at 160 (“it could be argued that the very success of the anti-violence movement is predicated on its adoption of conservative positions within a growing conservative state”); JOSHUA M. PRICE, *STRUCTURAL VIOLENCE: HIDDEN BRUTALITY IN THE LIVES OF WOMEN* (2012) (describing the ways that mainstream responses to “violence against women” hide structural violence and violence perpetrated by the state, particularly against “social outsiders” including “[w]omen who work as prostitutes, lesbians, women racialized as nonwhite, immigrant, undocumented, and working-class”).

<sup>48</sup> See INTERNATIONAL HUMAN RIGHTS CLINIC UNIVERSITY OF CHICAGO SCHOOL OF LAW ET AL., *THE SHACKLING OF INCARCERATED PREGNANT WOMEN: A HUMAN RIGHTS VIOLATION COMMITTED REGULARLY IN THE UNITED STATES* (2013), <https://ihrcclinic.uchicago.edu/sites/ihrcclinic.uchicago.edu/files/uploads/Report%20-%20Shackling%20of%20Pregnant%20Prisoners%20in%20the%20US.pdf>.

<sup>49</sup> See, e.g., Miccio, *supra* note 38, at 282.

<sup>50</sup> Private conversations of one of the authors with domestic violence service providers (arguing against the state coalition against domestic violence publicly opposing anti-abortion legislation because it would antagonize conservative legislators who support shelters and service programs).

<sup>51</sup> See Weissman *supra* 12 (criticizing anti-domestic violence advocates support for the DNA Fingerprint Act and the failure to be involved in other litigation efforts against racist police practices); Richie, *supra* note 35 (criticizing the movement against domestic violence for supporting criminalizing practices).

<sup>52</sup> See Marcia Olivo & Kelly Miller, *VAWA@20: Raising the Visibility of the Margins and the Responsibility of Mainstream*, CUNY L. REV. (Dec. 8, 2014), <http://www.cunylawreview.org/vawa-20-raising-the-visibility-of-the-margins-and-the-responsibility-of-mainstream-by-marcia-olivo-and-kelly-miller/> (arguing that each VAWA reauthorization “broadened the law to reach more communities” and that the 2013 VAWA was a “critical course correction” because of its provisions assisting Native American women, immigrant women, and prohibiting discrimination on the basis of sexual orientation or sexual identity).

protections for immigrant victims in the first VAWA,<sup>53</sup> and including most recently the expansion of Tribal Court jurisdiction in domestic violence cases.<sup>54</sup> VAWA grants include money targeted to assist “underserved” populations, a term expanded in VAWA 2013 to include individuals who may experience discrimination on the basis of religion, sexual orientation, or gender identity.<sup>55</sup> VAWA 2013 also enacted anti-discrimination language that prevents service providers who receive VAWA funds from discriminating on the basis of sexual identity or sexual orientation.<sup>56</sup> While some of these provisions have been with the express purpose to ease criminal prosecution,<sup>57</sup> others improve access to services or to civil or immigration remedies without regard to criminal prosecution. For the first time, the most recent VAWA legislation includes a specific provision that addresses *state* violence, requiring that immigration detention facilities adopt the national standards to prevent prison rape that currently apply to other custodial settings, and providing other protections against sexual assault in custody.<sup>58</sup>

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<sup>53</sup> See Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 1370-13726c (2012); Title IV, Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, § 40701 (1994) (allowing an abused spouse of a citizen or lawful permanent resident to self-petition); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 § 107, 1513 (2000) (Section 107 created the T-Visa, which allows victims of human trafficking to stay in the United States, and Section 1513 created the U-Visa, which allows victims of mental or physical abuse to live in the United States; however, both visas require the victim to cooperate with law enforcement in the investigation or prosecution of the crime.).

<sup>54</sup> SACCO, *supra* note 40; see Sarah Deer’s remarks in Sarah Deer et al., *Panel on Colonization, Culture, and Resistance*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 325 (2015).

<sup>55</sup> Before the amendment, “underserved” was defined as “populations underserved because of geographic location, underserved racial and ethnic populations, populations underserved because of special needs (such as language barriers, disabilities, alienage status, or age), and any other population determined to be underserved by the Attorney General or by the Secretary of Health and Human Services, as appropriate.” 42 U.S.C. § 13925 (2012) (current version at 42 U.S.C. § 13925 (2013)). See Terra Slavin’s remarks in Caroline Bettinger-Lopez et al., *Plenary 4—Mobilization*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 487 (2015).

<sup>56</sup> See Terra Slavin’s remarks in Bettinger-Lopez et al., *Plenary 4—Mobilization*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 487 (2015) (describing the activism around having LGBT included in the list of “underserved” and the inclusion of the anti-discrimination language in VAWA 2013).

<sup>57</sup> See, e.g., Violent Crime Control and Law Enforcement Act of 1994, *supra* note 53 (providing the statutory basis for the U Visa and T Visa).

<sup>58</sup> The provisions of the Prison Rape Elimination Act of 2003 are codified at 42 U.S.C. § 15607 (2013) (mandating that immigration detention facilities must meet the same standards for preventing, detecting, and responding to sexual abuse in custody as are required for all other custodial relationships).

The strategy of expanding VAWA's reach may be reaching a political limit. In the fight for the latest reauthorization of VAWA, supporters held strong against right wing House Republican's fierce opposition to the provisions that addressed structural inequalities – increased protections for Native American, undocumented immigrant victims, and lesbian, gay, bi-sexual, and trans individuals.<sup>59</sup> Though the bill passed, 138 House Republicans voted against it,<sup>60</sup> making this first time that VAWA received significant partisan opposition.

If the extreme right continues to assert significant political influence, we are likely to see even greater resistance to the current strategies of exceptionalizing domestic violence victims from punitive systems of welfare, criminal justice, child welfare, and immigration, or expanding responses to structural inequalities through otherwise crime-focused legislation such as VAWA. We argue that what is needed, now more than ever, is a broad-based coalition that understands gender violence as deeply connected to structural inequalities of race, class, immigration status, homophobia, and other oppressions.<sup>61</sup> This requires coalitions across social justice movements of the range involved in CONVERGE!, including the prison abolition movement<sup>62</sup> and other work to stop hyper-incarceration.

As one example of re-focused priorities, we argue that activists opposing gender violence should make the end of hyper-incarceration a central part of their platform. To make the case, we focus on one aspect of gender violence—domestic violence.<sup>63</sup> Our focus on domestic

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<sup>59</sup> The vote for the 2013 VAWA was 78-22 in the Senate and 268-138 in the House. This compares with the votes in prior years: in 2000, VAWA passed by 371-1 in the House and by a unanimous Senate vote; in 2005, it passed the House 415-4 and the Senate unanimously. SACCO, *supra* note 40, at n.51.

<sup>60</sup> OFFICE OF THE CLERK OF THE HOUSE OF REPRESENTATIVES, *Final Vote Results for Roll Call 55* (Feb. 28, 2013, 11:56 AM), <http://clerk.house.gov/evs/2013/roll055.xml> (last visited Apr. 11, 2015). The House passed the Senate version of the Bill, containing the benefits for Native American, immigrant, and LGBTQ victims with a vote of 286-138, with 100% of Democrats voting for the Bill and only 87 Republicans voting for it. *Id.*

<sup>61</sup> As Angela Harris writes, “anti-violence theorizing and advocacy must take an integrated approach, understanding the interplay of race, sexuality, class, and gender and taking into account of the places where, and the means by which, gender violence is perpetrated.” Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J. L. & POL’Y 13 (2011).

<sup>62</sup> Richie, *supra* note 35.

<sup>63</sup> We use the term “domestic violence” to refer to violence between sexual or former sexual intimates. We choose to use the term “domestic violence” rather than “intimate partner violence” both because it is the more common term used to describe the U.S. movement that originated in the 1970s and because it remains the term used in law. We recognize that “intimate partner violence” may be a preferred term because “domestic” may seem relegated to those who live or who have lived together or understood to include all familial or household violence, and because “domestic violence” has come to

violence is not because we believe that domestic violence is coextensive with “violence against women.” As described above, some of the most significant forms of violence against women are perpetrated by state actors and much of the state perpetrated violence occurs in the criminal justice system. Furthermore, we ascribe to a broad definition of “gender violence” that includes both state and interpersonal violence that is directed at maintaining gender hierarchy and punishing gender non-conforming behavior.<sup>64</sup>

Our choice to focus on domestic violence arises because it is in the U.S. responses to domestic violence that we see the most significant law and service infrastructure, the most significant networks, and the most well-organized and (relatively) well-funded federal and state response. There are many advocates, service providers, and lawyers whose work is focused exclusively, or nearly so, on assisting victims of domestic violence.

## II. HARMS OF HYPER-INCARCERATION

In this section, we describe the harms of hyper-incarceration on individuals, on family members of those who are directly targeted, and on entire communities.<sup>65</sup> The term “hyper-incarceration” highlights that the tremendous growth in incarceration is concentrated in particular geographic locations (low-income neighborhoods of color) and has concentrated effects felt disproportionately by African Americans. We include within our definition the related problem of hyper-surveillance—that is, the targeted surveillance that occurs primarily in communities of color, much of it focused on drug interdiction, but also includes the hyper-surveillance that purports to be a part of “broken-windows”

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be associated with heterosexual relationships. See Julie Goldscheid, *Gender Neutrality and the “Violence Against Women” Frame*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 307 (2015).

<sup>64</sup> As Angela Harris describes, gender violence includes not only male violence against women, but also “violence motivated by the desire to protect, defend, or enhance the actor’s gender identity, typically masculinity.” Angela P. Harris, *Beyond the Monster Factory: Gender Violence, Race, and the Liberatory Potential of Restorative Justice*, 25 BERKELEY J. GENDER L. & JUST. 199, 207 (2010). See Andrea Ritchie’s remarks in Andrea Ritchie et al., *Plenary 2—Redefining Gender Violence*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 289 (2015).

<sup>65</sup> For a thorough review of the harms of mass incarceration, see NATIONAL RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING THE CAUSES AND CONSEQUENCES* (Jeremy Travis, Bruce Western & Steve Redburn eds. 2014) [hereafter “NRC”].

policing<sup>66</sup>—that is, that focuses arrest on low-level offenses such as was the case in the death of Eric Garner when an officer arrested him for selling untaxed cigarettes.<sup>67</sup> Hyper-incarceration is also felt in the myriad other ways in which criminalization has become a standard method of control of poor communities, mostly communities of color,<sup>68</sup> and in the unprecedented number of people held in immigration detention. We describe four of the harms associated with hyper-incarceration: collateral consequences of conviction to the individual; trauma experienced by those incarcerated in inhumane prison conditions; effects of parental incarceration on families, especially children; and effects of hyper-incarceration on neighborhoods. Social science research demonstrates that many of the negative results of hyper-incarceration are linked to increased risks for domestic violence. In Part III, we describe three mechanisms by which hyper-incarceration likely increases the risk for domestic violence: (1) hyper-incarceration dramatically decreases the economic well-being of the incarcerated individual as well as his or her family, results that are linked to a substantially increased risk for domestic violence; (2) the trauma experienced by significant numbers of incarcerated men creates or worsens mental health problems including posttraumatic stress disorder (“PTSD”), results that are linked to worsening economic prospects and to an increase in the use of violence; and (3) hyper-incarceration decreases neighborhood social controls and weakens support systems, creating neighborhood disorganization that is linked to higher risks for domestic violence.

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<sup>66</sup> See Bernard Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, The Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Lipsitz, *supra* note 18 at 1762 (The adoption of zero tolerance policies for petty crimes was not accompanied by similar efforts to arrest “the predatory lenders, slum landlords, or environmental polluters responsible for . . . broken people and communities.”).

<sup>67</sup> See Andrew Siff, Jonathan Dienst, & Jennifer Millman, *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Death*, NBC N.Y. (Dec. 4, 2014, 1:59 PM), <http://www.nbcnewyork.com/news/local/Grand-Jury-Decision-Eric-Garner-Statens-Island-Chokehold-Death-NYPD-284595921.html>. For a description of the ways in which hyper-surveillance is an invasion of privacy, see Kimberly D. Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. 1539 (2014).

<sup>68</sup> For example, Kaaryn Gustafson’s research regarding the increasing use of criminal fraud prosecutions for violations of welfare rules found that many of those prosecuted did not realize they were violating the law, while others did so out of necessity or for morally compelling reasons such as a mother providing housing to the unemployed father of her child. KAARYN S. GUSTAFSON, *CHEATING WELFARE* 165 (2011). See also LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009).

### A. Collateral Consequences

One result of hyper-incarceration is that the United States now has an unprecedented number of men and women with criminal convictions who are therefore subject to a laundry list of collateral consequences. For example, those convicted of a drug crime may be ineligible for financial aid for school, ineligible for food stamps, and barred from public housing.<sup>69</sup> Even a misdemeanor conviction can make a person ineligible to get certain professional licenses in a number of states.<sup>70</sup> In many states, a criminal conviction results in a significant loss of civil rights. The National Research Council notes that in 2010, nearly six million people had lost their right to vote because of a felony conviction.<sup>71</sup> In three states, the result is that more than one-fifth of African Americans are disenfranchised, and in two states, 9 to 10% of Latino citizens are disenfranchised.<sup>72</sup> Those who are on probation or parole lose their Fourth Amendment protections against unreasonable searches.<sup>73</sup> Some states do not allow former felons to sit on juries or even to get a driver's license.<sup>74</sup> Non-citizens may face deportation as a result of their conviction,<sup>75</sup> risking separation from family and work.

Those with children who are fortunate enough to have not had their parental rights terminated,<sup>76</sup> are likely to leave prison with considerable child support debt<sup>77</sup>—a debt that cannot be discharged in bankruptcy and was not tolled while they were in prison. Many are burdened with

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<sup>69</sup> ALEXANDER, *supra* note 4, at 94.

<sup>70</sup> NRC, *supra* note 65, at 306 (states bar former prisoners receiving professional licenses in a range of professions including plumbing, food catering, and haircutting.) The American Bar Association Criminal Justice Section database identifies 38,000 punitive provisions that apply to those convicted of a crime. American Bar Association Criminal Justice Section (2011). ABA NATIONAL INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <http://www.abacollateralconsequences.org/map/>.

<sup>71</sup> NRC, *supra* note 65, at 308 (“As of 2010, nearly 6 million people were disenfranchised because of a felony conviction . . . represent[ing] about 2.5 percent of the total U.S. voting-age population, or 1 in 40 adults.”).

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

<sup>73</sup> ALEXANDER, *supra* note 4, at 94. It is also difficult to pursue an education while behind bars. Federal law prohibits inmates from receiving Pell grants and there have been deep cuts in budgets for prison education programs. NRC, *supra* note 65, at 190.

<sup>74</sup> NRC, *supra* note 65, at 306.

<sup>75</sup> 8 U.S.C. 1227(a) (2) (A) (i) & (ii) (certain aliens convicted for a crime involving moral turpitude or an aggravated felony are rendered deportable).

<sup>76</sup> Roberts, *supra* note 26 (describing the barriers incarcerated parents face to retaining child custody). Incarcerated mothers are more likely to have their children placed in foster care than are incarcerated fathers. MEDA CHESNEY-LIND & LISA PASKO, *THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME* 136 (3rd ed. 2013).

<sup>77</sup> See Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. POVERTY L. & POL'Y 127 (2011).



significant court fines.<sup>78</sup> Parole and probation requirements that require no contact with other ex-felons may limit the reach of support systems of friends and families as do public housing rules that make families risk eviction if they allow an ex-offender relative to visit.<sup>79</sup> Those who are convicted of a sex offense—offenses that may include consensual sex between teenagers and other non-violent offenses<sup>80</sup>—face particular barriers. They may be prohibited from living near a school, resulting in homelessness.<sup>81</sup> Indeed, the social isolation and limited employment opportunities created by sex offender registries are likely to increase the risk of re-offending.<sup>82</sup>

In addition to these collateral consequences enacted by law, ex-felons face a number of negative social consequences, including high levels of job discrimination,<sup>83</sup> an increased risk for wrongful conviction,<sup>84</sup> and potential exclusion from college.<sup>85</sup> In addition to

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<sup>78</sup> See Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319 (2014).

<sup>79</sup> Lipsitz, *supra* note 18, at 1776.

<sup>80</sup> Amy E. Halbrook, *Juvenile Pariahs*, 65 HASTINGS L.J. 1, 18–50 (2013) (detailing states who require juveniles to register as sex offenders for having consensual sex as minors).

<sup>81</sup> See Wendy Koch, *Many Sex Offenders Are Often Homeless*, USA TODAY (Nov. 19, 2007, 7:46 AM), [http://usatoday30.usatoday.com/news/nation/2007-11-18-homeless-offenders\\_N.htm](http://usatoday30.usatoday.com/news/nation/2007-11-18-homeless-offenders_N.htm); see, e.g., Greg Allen, *ACLU Challenges Miami Law on Behalf of Homeless Sex Offenders*, NPR (Oct. 23, 2014, 5:29 PM) <http://www.npr.org/2014/10/23/358354377/aclu-challenges-miami-law-on-behalf-of-homeless-sex-offenders>.

<sup>82</sup> See Allegra McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1556 (2014) (Sex crime offender registries and restrictions on housing create social isolation and limit employment prospects despite “the substantial body of sociological and criminological scholarship that suggests that social engagement and institutional involvement. . . reduce[s] criminal offending.”).

<sup>83</sup> See, e.g., HOLZER, HARRY J., STEPHEN RAPHAEL & MICHAEL A. STOLL, THE EFFECT OF AN APPLICANT’S CRIMINAL HISTORY ON EMPLOYER HIRING DECISIONS AND SCREENING PRACTICES: EVIDENCE FROM LOS ANGELES, THE NAT’L POVERTY CTR. (2004), <http://www.npc.umich.edu/publications/workingpaper04/paper15/04-15.pdf> (in a study of 3,000 employers in Atlanta, Boston, Detroit and Los Angeles, respondents self-reported being less than half as likely (about 40% versus 80 to 90%) to hire people with criminal records as people with other stigmatizing characteristics, such as little recent work experience); DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007) (in-person audit study of entry-level job hiring at multiple sites found a 30 to 60% reduction in callbacks for applicants with a criminal record, an impact that was much more significant for African American applicants).

<sup>84</sup> See discussion *infra* pp. 608-09.

<sup>85</sup> See CENTER FOR COMMUNITY ALTERNATIVES: INNOVATIVE SOLUTIONS FOR JUSTICE, THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS RECONSIDERED (2010), <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf> (The majority of colleges surveyed reported that they ask applicants to

prompting job discrimination, a history of incarceration may diminish the skills required to hold a job. The combination of lost human capital and market discrimination results in ex-offender unemployment so pervasive that it lowers the national employment rate for males by 1.5 to 1.7%.<sup>86</sup>

*B. Prison Violence, Mental Health, and Destructive Masculinities*

For decades, incarceration has wrought violence and trauma on those within its walls. Prisoners in U.S. prisons and jails experience a significant level of deprivation and violence, including sexual assault. A national survey of recently released prisoners conducted by the Bureau of Justice Statistics found that nearly 10% reported they were sexually victimized while incarcerated.<sup>87</sup> In men's prisons, those identified as gay or bisexual suffer rates of sexual assault 10 times that of other men.<sup>88</sup> Incarcerated women suffer higher rates of sexual abuse than do men.<sup>89</sup> Women are more likely to report that sex with staff was coerced than are male inmates and women report significantly higher rates of sexual victimization by other inmates than do male inmates.<sup>90</sup>

Sexual victimization has severe health consequences, both psychological and physical.<sup>91</sup> Common reactions include somatic problems, interrupted eating and sleeping patterns, and increased risks of

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disclose criminal convictions, a practice that discourages some from even applying to college and that prevents others from attendance.).

<sup>86</sup> See John Schmitt & Kris Warner, *Ex-offenders and the Labor Market*, 14 WORKINGUSA 87, 88 (2011). While many prisoners struggled to find work before conviction, incarceration can further reduce their capacity through diminishing human capital, including education, experience, and skills and simultaneously replace their social networks with ones less likely to help them find employment and more likely to engender criminal activity.

<sup>87</sup> See ALLEN J. BECK & CANDACE JOHNSON, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS, 2008, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS 8 (2012) (5.4% of prisoners were sexually victimized by inmates and overlapping with 5.3% reported staff sexual misconduct during their most recent period of incarceration.).

<sup>88</sup> *Id.* at 226.

<sup>89</sup> NRC, *supra* note 65, at 225.

<sup>90</sup> *Id.* (citing research findings that 82% of women who reported sex with male staff said they were coerced compared to 55% of men, and 14% of women inmates reported being sexually assaulted by an inmate compared to only 4% of male inmates). Kim Shayo Buchanan argues that prison rape scholars fail to acknowledge the number of male prisoners sexually abused by female guards and the high rates of female-on-female inmate sexual abuse because these facts contravene gender expectations. Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630 (2012).

<sup>91</sup> See Tess Neal & Carl B. Clements, *Prison Rape and Psychological Sequelae: A Call for Research*, 16 PSYCHOL. PUB. POL'Y & L. 284, 287 (2010).

depression and suicidality.<sup>92</sup> Sexually victimized prisoners have roughly double the rate of HIV infection compared to those who have not been victimized.<sup>93</sup> Sexual victimization rates increase with the length of time an inmate serves, and with the number of facilities an inmate serves in,<sup>94</sup> two factors which make long, mandatory-minimum sentences all the more destructive.

U.S. prisons also have significantly high levels of physical violence. Estimates based on inmate reports find that 10% to 20% of inmates report being the victim of physical abuse.<sup>95</sup> Research finds that incarcerated men and women suffer significantly higher rates of assault. In one study of 14 prisons, male inmates reported assault rates that were eighteen times higher than that of the general male population and incarcerated women had rates twenty-seven times higher.<sup>96</sup> Not only do survivors of assault experience trauma, *witnesses* to assault report trauma symptoms, as well. As one former prisoner describes:

I can still see the murders I witnessed. I still see the image of a person being hit at the base of his skull with a baseball bat on a warm, sunny afternoon during recreation hours . . . . He is smashed in the back of his head, crumbles, and falls to the ground. While he lays helpless on the ground, his head is smashed again and again until the sight of blood seems to satisfy his attacker. I watch as the perpetrator then calmly returns the baseball bat to the location where he had retrieved it and just walks away as if nothing had happened, while others entering the yard area walk around the lifeless body.<sup>97</sup>

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<sup>92</sup> *Id.* at 288.

<sup>93</sup> See BECK & JOHNSON, *supra* note 87, at 33.

<sup>94</sup> *Id.* at 18; see also Tawandra L. Rowell-Cunsolo, Roderick J. Harrison & Rahwa Haile, *Exposure to Prison Sexual Assault Among Incarcerated Black Men*, 18 J. AFR. AM. STUD. 54, 54–62 (2014).

<sup>95</sup> See Nancy Wolff et al., *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM. JUST. & BEHAV. 588, 589 (2007).

<sup>96</sup> *Id.* at 595. The researchers found significant differences in self-reported assault rates between the different prisons studied, pointing to the importance of institutional factors. Assault rates in poor communities from which most prisoners come are higher than in more affluent communities, but even when researchers control for demographic factors associated with higher assault rates, prison rates remain much higher with adjusted rates of ten times higher in prison. *Id.*

<sup>97</sup> Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 257, 265 (2013).

In addition to experiencing and witnessing violence, solitary confinement and inhumane physical conditions can have devastating effects on the mental well-being of prisoners.<sup>98</sup>

The impact of living in a climate of violence is evident in inmates' fear and reactive behaviors, including being constantly on guard to minimize their risk for assault, and carrying improvised self-defense weapons.<sup>99</sup> Prison life is redolent with powerful psychological stressors including high levels of interpersonal uncertainty, danger, and fear, amidst a nearly total absence of personal privacy.<sup>100</sup>

Male prisons can become a hyper-masculine space where a brutal form of masculinity (inside) echoes the dominant forms of masculinity (outside).<sup>101</sup> Both guards and inmates construct a “hyper” masculinity whose degradation of those men identified as the “wives” or “boys” of other men echoes the larger societal degradation of women who are deemed to be “[t]he receptacle of violence, . . . a degraded subject.”<sup>102</sup>

Those imprisoned are more likely to have suffered serious trauma *before* incarceration.<sup>103</sup> The exposure to repeated trauma—both inside and outside prison—increases their likelihood of experiencing PTSD and other psychological disorders.<sup>104</sup> Prisoners are two to three times more likely to suffer from serious mental health problems than are community

<sup>98</sup> See Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY & LAW 104 (2010).

<sup>99</sup> Nancy Wolff et al., *supra* note 95, at 219–20.

<sup>100</sup> See NRC, *supra* note 65, at 174–175.

<sup>101</sup> SpearIt, *Gender Violence in Prison & Hyper-Masculinities in the ‘Hood: Cycles of Destructive Masculinity*, 37 WASH. U.J. L. & POL’Y 89 (2011) [hereafter *Destructive Masculinity*]. See also, SpearIt’s remarks in Andrea Ritchie et al., *Plenary 2—Redefining Gender Violence*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 289 (2015). It should be remembered that women suffer higher rates of sexual assault and that much of that assault is by other female inmates. See Buchanan, *supra* note 90.

<sup>102</sup> SpearIt, *Destructive Masculinity*, *supra* note 101, at 106. As Angela Harris describes, the dominant form of masculinity is defined by “two negative identities—not being a woman, and not being gay.” Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in A Prison Nation*, 37 WASH. U. J. L. & POL’Y 13, 16 (2011).

<sup>103</sup> Nancy Wolff, Jessica Huening, Jing Shi & B. Christopher Fruehy, *Trauma Exposure and Posttraumatic Stress Disorder Among Incarcerated Men*, 91 J. URB. HEALTH 707, 717 (2014) (lifetime assaultive rate for a large random sample of adult male prisoners was 96%; the lifetime rape rate was 15% compared to 1% to 3% in the general population).

<sup>104</sup> See Sharai Suliman, Siyabulela G. Mkabile, Dylan S. Fincham, Rashid Ahmed, Dan J. Stein & Soraya Seedat, *Cumulative Effect of Multiple Trauma on Symptoms of Posttraumatic Stress Disorder, Anxiety, and Depression in Adolescents*, 50 COMPREHENSIVE PSYCHIATRY 121 (2009).

members,<sup>105</sup> and prison treatment for these conditions is often inadequate.<sup>106</sup> Men who have been in prison are much more likely to suffer from severe PTSD than men who have not been incarcerated.<sup>107</sup> One study of a large random sample of incarcerated men found that 30% to 60% had current PTSD symptoms and had received a diagnosis of PTSD at some point in their lives, as compared with only 3% to 6.3% in the general male population.<sup>108</sup>

In addition to PTSD, some social scientists believe that some prisoners suffer from Post-Incarceration Syndrome (PICS), a subset of PTSD that results from prolonged incarceration. This unique cluster of psychosocial problems experienced by incarcerated and released prisoners includes personality traits such as distrust, social disorientation, and alienation.<sup>109</sup>

Given the criminal justice focus on drug enforcement, it should not be surprising that a significant number of prisoners enter prison with a substance abuse problem.<sup>110</sup> Indeed, the National Research Council concludes that “drug dependence remains left largely in the hands of the criminal justice system instead of the health care system.”<sup>111</sup> The overwhelming bulk of prisoners who need drug or alcohol treatment do

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<sup>105</sup> Some studies estimate 10 to 25% of prisoners suffer from serious mental health problems compared with an estimated 5% of the general population. See NRC, *supra* note 65, at 205. In a national study in 1995, both jails and state prisons had estimated incidents (6 month and lifetime, respectively) that ranged much higher than the population at large for all six mental diseases examined, including Schizophrenia/Psychosis, Major Depression, Bipolar (Manic), Dysthymia, PTSD, and (other) Anxiety. For example, PTSD prevalence (6 month) in jails was 4.0 to 8.3% versus 3.4% in the total US population, and in state penitentiaries was 6.2 to 11.7% compared to 7.2%, and anxiety was 22.0 to 30.1% (same measure not available for population at-large). See NAT'L COMM'N ON CORR. HEALTH CARE, HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES VOL. 1 24–31 (2002).

<sup>106</sup> NRC, *supra* note 65, at 22.

<sup>107</sup> See Wolff et al., *supra* note 103, at 715–18 (where only 5% of men in community samples have experienced PTSD, 33% of male former prisoners had severe PTSD symptoms, and another 27% had moderate PTSD symptoms.)

<sup>108</sup> See *id.* at 715.

<sup>109</sup> See Marieke Liem & Maarten Kunst, *Is There a Recognizable Post-incarceration Syndrome Among Released “Lifers”?*, 36 INT'L J.L. & PSYCHIATRY 333 (2013) (in study of 25 released homicide offenders who served an average of nineteen years in Massachusetts State Prisons, narrative analysis revealed PICS as a specific cluster of mental health symptoms).

<sup>110</sup> NRC, *supra* note 65, at 206 (citing research findings that upwards to 68% of jail inmates are drug or alcohol dependent, with somewhat lower rates in prison populations).

<sup>111</sup> *Id.* at 206; Robert J. White, Edward W. Gondolf, Donald U. Robertson, Beverly J. Goodwin, & L. Eduardo Caraveo, *Extent and Characteristics of Woman Batterers Among Federal Inmates*, 46 INT'L J. OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 412, 416–17 (2002) (sample of U.S. federal inmates in a low-security prison found 61% tested positive for alcoholism and 27% had elevated scores on a drug dependence scale).

not receive it,<sup>112</sup> with one study finding that fewer than 10% of inmates have access to a drug treatment program.<sup>113</sup>

The circumstances for released prisoners may be even worse. Mental health services, including substance abuse treatment, are largely absent.<sup>114</sup> Rather than suspend enrollment while a person is incarcerated, many states terminate Medicaid enrollment, thus ensuring a substantial delay in coverage when a prisoner is released.<sup>115</sup> While the situation is improving, the majority of state prisoners who need discharge planning upon their release do not receive it.<sup>116</sup>

### C. Harms to Families

The incarceration of a family member, especially a parent, can create a dramatic emotional and economic strain on family members. The loss of the incarcerated person's wages, the court costs and legal fees incurred, coupled with the cost of maintaining a relationship with someone locked up in a distant location, can have devastating financial effects.<sup>117</sup>

Incarceration has gender-specific impacts on the economic and social well-being of family members. Most incarcerated fathers report having been the primary earner in the family prior to incarceration,<sup>118</sup> thus it is not surprising that children with incarcerated fathers, more than 80% of whom live with their mothers,<sup>119</sup> suffer increased rates of homelessness

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<sup>112</sup> NRC, *supra* note 65, at 217 (“By one estimate, 70 to 85% of state prisoners were in need of drug treatment, while only 13 percent received care.”).

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

<sup>114</sup> *Id.* at 227.

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

<sup>116</sup> *Id.* at 228 (citing one estimate that only 10% of state prisoners in need of discharge planning receive it, but noting that a number of newer programs may be improving the situation).

<sup>117</sup> See Phillip M. Genty, *Damage To Family Relationships As A Collateral Consequence of Parental Incarceration*, 30 *FORDHAM URB. L.J.* 1671 (2003); see also, NRC, *supra* note 65, at 267. It is extremely difficult for an incarcerated parent to maintain regular contact with her or his children as many prisons are in remote rural locations, far from the urban homes of most prisoners, and frequent phone calls can be prohibitively expensive because of exorbitant collect call fees. CHRISTOPHER MUMOLA, U.S. DEP'T OF JUSTICE, BJS, NCJ 182335, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN (2002), <http://www.bjs.gov/content/pub/pdf/iptc.pdf>.

<sup>118</sup> See LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, BJS, NCJ 222984, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 1–2 (2008), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf>.

<sup>119</sup> *Id.* at 5.

and are more likely to require public assistance.<sup>120</sup> Most incarcerated women are mothers<sup>121</sup> and they are more likely than incarcerated fathers to have been the primary caretaker of their children prior to incarceration.<sup>122</sup> When a mother is imprisoned, care for children is often passed onto female family members or friends rather than to the children's father.<sup>123</sup> Incarcerated mothers are much more likely to lose their children to foster care than are incarcerated fathers.<sup>124</sup>

Children with a parent in prison experience increased rates of depression, anxiety, problems in school, and feelings of rejection, shame, anger, and guilt.<sup>125</sup> Parental imprisonment is associated with a 20% increase in the odds a child will later be convicted of a crime, especially if at the time of the parent's incarceration the child is under twelve or if it is the mother who is incarcerated.<sup>126</sup> More than 70% of children with an incarcerated parent are children of color,<sup>127</sup> many of whom end up in foster care.<sup>128</sup>

Children's prospects may continue to suffer once a parent is released as the economic and psychological harms to the parent of incarceration affect the child's well-being. For example, those who serve long prison sentences suffer reduced marriage rates, hampered job prospects,

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<sup>120</sup> NRC, *supra* note 65, 267–68 (reviewing several studies that find that families of incarcerated men are at increased risk of experiencing homelessness and other types of housing insecurity and that a father's incarceration increases the likelihood that the mother will receive public assistance.)

<sup>121</sup> NRC, *supra* note 65, at 171 (In 2004, 62% of female state and federal inmates were mothers, while only 51 percent of male inmates were fathers.)

<sup>122</sup> GLAZE & MARUSCHAK, *supra* note 118, at 5.

<sup>123</sup> See, e.g., Holly Foster & John Hagan, *Supportive Ties in The Lives Of Incarcerated Women: Gender, Race/Ethnicity, And Children's Human Rights*. 17 J. GENDER RACE & JUST. 257 (2014) (Study examining the support networks of women prisoners, found that most of the support persons were women and that a common form of support was assisting with childrearing and child visitation.); see also Roberts, *supra* note 26, at 1481–82. About 37% of the children whose mothers are incarcerated live with their father, while about 45% live with a grandparent. See GLAZE & MARUSCHAK, *supra* note 118, at 5. Approximately 2.3% of all U.S. children have a parent in prison. *Id.* at 2.

<sup>124</sup> CHESNEY-LIND & PASKO, *supra* note 76, at 137.

<sup>125</sup> See Roberts, *supra* note 26, at 1481.

<sup>126</sup> See NRC, *supra* note 65, at 272–74.

<sup>127</sup> See SARAH SCHIRMER ET AL., THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991–2007 2 (2009), available at [http://www.sentencingproject.org/doc/publications/inc\\_incarceratedparents.pdf](http://www.sentencingproject.org/doc/publications/inc_incarceratedparents.pdf).

<sup>128</sup> Roberts describes the ways in which systems of foster care, criminal justice, and child welfare intersect to create reinforcing controls in the lives of Black women. See Roberts, *supra* note 26, at 1477.

increased economic strain, damaging school prospects, and are at an increased risk for suffering mental illness.<sup>129</sup>

#### D. Harms to Communities

The geographic concentration of hyper-incarceration is a geography “contingent on race and concentrated poverty, with poor African American communities bearing the brunt of high rates of imprisonment.”<sup>130</sup> As noted previously, much of the acceleration in incarceration rates is directly tied to drug enforcement focused in communities of color. In fact, drug arrests are the single largest contributor to the growth in incarceration rates for African Americans.<sup>131</sup> The racial differences in drug arrests and convictions are not explained by differences in offending: African Americans do not have higher rates of drug use or drug dealing than do whites.<sup>132</sup> Further, contrary to popular belief, drug arrests are not focused primarily on violent “kingpins,” but rather are focused on low-level users and sellers.<sup>133</sup> The truth is that illegal drug use is ubiquitous, therefore whether someone is arrested for a drug crime is highly contingent on police practice: *drug crimes are wherever police choose to focus enforcement*.<sup>134</sup> The choice to focus law enforcement in urban, low-income communities of color is therefore a *political* choice. In addition to racial differences in the focus of drug enforcement, racial bias throughout the system—in judge’s decisions to grant warrants or allow pre-trial release; in prosecutors’ plea-bargain offers and charging decisions; in jury decision making<sup>135</sup>—contributes to the disproportionate conviction and sentencing of African Americans.

The geographic/class/racial nature of hyper-incarceration is critical to understanding the effects on neighborhoods. The communities that are targeted for hyper-incarceration are communities that already have “high rates of poverty, unemployment, and racial segregation.”<sup>136</sup> Thus it is difficult for researchers to tease out the *relative* importance of hyper-incarceration to negative neighborhood outcomes as compared to the

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<sup>129</sup> See Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97 (2008); see also TODD R. CLEAR ET AL., PREDICTING CRIME THROUGH INCARCERATION: THE IMPACT OF RATES OF PRISON CYCLING ON RATES OF CRIME IN COMMUNITIES (2014).

<sup>130</sup> NRC, *supra* note 65, at 283.

<sup>131</sup> ALEXANDER, *supra* note 4, at 102.

<sup>132</sup> *Id.* at 99 (describing research on illegal drug use and dealing that finds that “[p]eople of all races use and sell illegal drugs at remarkably similar rates”).

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

<sup>134</sup> Coker, *supra* note 20; ALEXANDER, *supra* note 4, at 104.

<sup>135</sup> See, e.g., Coker, *supra* note 20.

<sup>136</sup> NRC, *supra* note 65 at 283.



many other forms of discrimination and subordination suffered by residents of the same neighborhood.<sup>137</sup> Nonetheless, a significant body of research finds that concentrated incarceration weakens social controls in a neighborhood, threatens social ties, and depresses the overall economic vitality of a neighborhood.

When significant numbers of people who are in the prime years for child-raising and income-production are removed from a neighborhood, the economic and social consequences are felt throughout the neighborhood.<sup>138</sup> Less income is generated in the community. The concentration of the formerly incarcerated “further stigmatize[s] areas and deters businesses from hiring locally or locating in such areas,”<sup>139</sup> spreading economic harms to the larger community.

The responsibility for caretaking and economic support for children and other vulnerable family members is spread to an ever-thinning group of individuals. Social networks that might otherwise provide a buffer against extreme poverty and loss become more frayed.<sup>140</sup> “[Poor] mothers rely on regular, substantial financial help from people in their personal networks, because neither welfare nor low-paying jobs provide sufficient income to cover expenses.”<sup>141</sup> The removal of significant numbers of people from the small, thinly resourced networks through mass incarceration makes those fragile networks even less dependable.

There is a diminishment in the social controls for children, especially adolescents, as single-parents or grandparents take on increasing responsibilities.<sup>142</sup> As Dorothy Roberts writes, “The mass movement of adults between the neighborhood and prison impedes the ability of families and other socializing groups, such as churches, social clubs, and neighborhood associations, to enforce informal social norms.”<sup>143</sup> The

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<sup>137</sup> *Id.* at 282. (concluding that despite contrary findings of some researchers, there are as yet “no reliable statistical estimates of the unique effect of the spatial concentration of incarceration on the continuing or worsening social and economic problems” of the targeted neighborhoods.)

<sup>138</sup> See, e.g., Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 *FORDHAM URB. L.J.* 1551 (2002); TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007).

<sup>139</sup> Fagan et al., *supra* note 138, at 1591.

<sup>140</sup> CLEAR, *supra* note 138; GUSTAFSON, *supra* note 68, at 160. The diminishment of social networks through mass incarceration makes those fragile networks even less dependable.

<sup>141</sup> CLEAR, *supra* note 138, at 149.

<sup>142</sup> Fagan et al., *supra* note 138, at 27; Dorothy Roberts describes the “normalization of prison in community life,” which renders incarceration as a “rite of passage” for some African American adolescents. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *STAN. L. REV.* 1271, 1288 (2004).

<sup>143</sup> *Id.* at 1275–76.

transience created when a significant number of people have unstable housing, infrequent employment, and fewer social supports, likely weakens other social controls, as well.<sup>144</sup> People are less likely to monitor or interfere with others. Hyper-incarceration likely leads to more criminal offending. As Michelle Alexander notes,

What a growing number of sociologists have found ought to be common sense: by locking up millions of people out of the mainstream legal economy; by making it difficult or impossible for people to find housing or feed themselves; and by destroying family bonds by warehousing millions for minor crimes, we make crime more—not less—likely in the most vulnerable communities.<sup>145</sup>

But what may be more surprising is that hyper-incarceration leads to more arrests that are not related to actual increases in actual criminal conduct. In this way, hyper-incarceration becomes a one-way ratchet. As more arrests occur and as more ex-felons return to their home neighborhoods, police are further incentivized to engage in ever-increasing invasive surveillance of the neighborhood, thus ensuring that yet more drug arrests will follow. Parole and probation conditions that require, for example, frequent meetings with a parole officer or no contact with other ex-felons, criminalize categories of otherwise non-criminal conduct, broadening the opportunities for further incarceration.<sup>146</sup>

In addition, hyper-incarceration (and racial bias in policing) results in the conviction of innocent people.<sup>147</sup> State allocations for public defenders have in no way kept pace with the sheer volume of cases, with dire effects on the quality of legal representation. Furthermore, simply being arrested once—even if not convicted—makes it more likely that an individual's face will show up in a photo lineup for a subsequent crime. The Innocence Project finds that mistaken eyewitness identification, a particular problem for cross-racial identification, is the leading cause of wrongful conviction, playing a role in 75% of convictions overturned as

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<sup>144</sup> CLEAR, *supra* note 138.

<sup>145</sup> ALEXANDER, *supra* note 4, at 237.

<sup>146</sup> *Id.* at 94.

<sup>147</sup> See Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339 (2006) (describing the negative impact of mass incarceration on adequate public defender representation).

a result of DNA testing.<sup>148</sup> Finally, as Michelle Alexander describes, harsh sentencing for drug crimes encourages innocent people to accept a plea bargain rather than risk a lengthy jail sentence.<sup>149</sup>

### III. THE CONNECTIONS: HOW HYPER-INCARCERATION INCREASES THE RISK FOR DOMESTIC VIOLENCE

#### A. *The Economic and Neighborhood Connection*

As we have described, hyper-incarceration creates devastating economic consequences at the individual, family, and community level. A significant body of research finds that economic deprivation and subjectively perceived economic strain is strongly correlated with increases in a male-to-female domestic violence. As Deborah Weissman notes, “[s]imply put, the likelihood of partner violence increases in structurally disadvantaged households and communities.”<sup>150</sup>

Poor women suffer significantly higher rates of domestic violence. Data from the National Crime Victimization Survey finds, for example, that women with annual household incomes of less than \$7,500 suffer nearly seven times higher rates of domestic violence than do households with incomes of \$75,000 or greater.<sup>151</sup> This relationship holds at every income level. For example, a review of 2008 to 2012 data finds domestic

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<sup>148</sup> See *Eyewitness Misidentification*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction/eyewitness-misidentification> (last visited Apr. 11, 2015).

<sup>149</sup> ALEXANDER *supra* note 4, at 88.

<sup>150</sup> Weissman, *supra* note 39, at 235.

<sup>151</sup> CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, BJS, NCJ 178247, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: INTIMATE PARTNER VIOLENCE (May 2000, rev. Jan. 31, 2002), [http://www.popcenter.org/problems/domestic\\_violence/PDFs/Rennison%26Welchans\\_2000.pdf](http://www.popcenter.org/problems/domestic_violence/PDFs/Rennison%26Welchans_2000.pdf). The study found no relationship between household income and intimate partner violence directed at *men*. *Id.* at 4. Other research finds similar disparities for intimate partner violence against women. See, e.g., NAT'L CTR. FOR INJURY PREVENTION AND CONTROL ET AL., INTIMATE PARTNER VIOLENCE IN THE UNITED STATES—2010 32 (2014), [http://www.cdc.gov/violenceprevention/pdf/cdc\\_nisvs\\_ipv\\_report\\_2013\\_v17\\_single\\_a.pdf](http://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_ipv_report_2013_v17_single_a.pdf) (9.7% of women in households making less than \$25,000 annual income, and 5.9% of those with \$25,000 to \$50,000 income, reported intimate partner violence compared to 2.8% of women in households making over \$75,000); SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, BJS, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES (2007), *available at* <http://www.bjs.gov/content/pub/pdf/ipvus.pdf> (drawing from National Crime Victimization Survey (NCVS) data for 2001-2005, intimate partner violence rates for women increased significantly with negative changes in household income. Households with \$7,500 annual income having significantly higher rates). NCVS measures rates of intimate partner violence defined as relationships between spouses, boyfriends, or girlfriends, including same sex relationships.

violence rates for those living at or below the federal poverty level (FPL) to be nearly *double* the rates of those living at 101% to 200% of FPL, just one rung higher, while mid-income households (201% to 400% of FPL) and high income households (401% of FPL) had rates of 2.1 and 2.8, respectively.<sup>152</sup> Relatedly, research finds that women with less than a high school education have rates of domestic violence six times that of those with a college education.<sup>153</sup>

Michael Benson and Greer Fox's review of National Families and Households data for heterosexual households found that male-on-female domestic violence rates were linked to unstable male employment: the more occurrences of male unemployment, the higher the domestic violence rates.<sup>154</sup> Men who experienced a single episode of unemployment during the years studied had domestic violence rates of 7.5%, compared to a 4.7% rate for those who remained steadily employed. With two or more periods of unemployment, the rate jumped to 12.3%.<sup>155</sup> Further, couples who reported that they felt high levels of financial strain had levels of domestic violence more than three times higher than did other couples.<sup>156</sup>

Household measures of economic well-being may not tell the complete story. A number of researchers find significantly higher rates of domestic violence in neighborhoods that are characterized by "concentrated disadvantage."<sup>157</sup> These neighborhood differences are not

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<sup>152</sup> ERIKA HARRELL ET AL., U.S. DEP'T OF JUSTICE, BJS, NCJ 248384, HOUSEHOLD POVERTY AND NONFATAL VIOLENT VICTIMIZATION, 2008-2010 3 (2014), <http://www.bjs.gov/content/pub/pdf/hpnnv0812.pdf>; see also CATALANO, *supra* note 151.

<sup>153</sup> See, e.g., Shelley D. Golden, Krista M. Perreira & Christine Piette Durrance, *Troubled Times, Troubled Relationships: How Economic Resources, Gender Beliefs, and Neighborhood Disadvantage Influence Intimate Partner Violence*, 28 J. INTERPERSONAL VIOLENCE 2134, 2142 (2013) (women with less than a high school education were 9.8 times more likely than college-educated women to experience intimate physical assault, 18.5 times more likely to experience intimate emotional abuse, and 6.2 times more likely to experience intimate coercion.).

<sup>154</sup> Michael L. Benson & Greer L. Fox, NCJ 199709, *Concentrated Disadvantage, Economic Distress, and Violence Against Women in Intimate Relationships* II-3-5 (2004).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at II-3-6.

<sup>157</sup> See, e.g., *id.* at II-3-5 (finding rates of 8.7% in disadvantaged neighborhoods compared to only 4.3% in advantaged neighborhoods); Judy A. Van Wyk, Michael L. Benson, Greer Litton Fox, & Alfred DeMaris, *Detangling Individual-, Partner-, and Community-Level Correlates of Partner Violence*, 49 CRIME & DELINQUENCY 412, 426 (2003) (finding male-to-female partner violence was lowest for couples in less disadvantaged neighborhoods (3.5%), higher in neighborhoods in the middle on disadvantage (4.9%), and much higher in highly disadvantaged neighborhoods (7.9%)); Christopher R. Browning, *The Span of Collective Efficacy: Extending Social Disorganization Theory to Partner Violence*, 64 J. MARRIAGE & FAMILY 833, 843-47 (2002) (concentrated disadvantage is associated with higher rates of intimate partner

explained by neighborhood composition: the effects remain after controlling for individual variables known to be correlated to rates of domestic violence.<sup>158</sup> Relying on social disorganization theories,<sup>159</sup> researchers believe that these differences are a product of the loss of social controls in a community and the weakening of social ties.<sup>160</sup> When residents have weak ties with their neighbors, they are unlikely to effectively shape social norms in the neighborhood.<sup>161</sup>

The worsening of neighborhood economic conditions and the terrible economic consequences to individuals and families of hyper-incarceration increase risks for domestic violence. The weakening of social supports and community cohesion creates the very conditions that the social disorganization research finds to be strongly correlated with increased rates of domestic violence.

### B. *The Trauma and Mental Health Connection*

It is likely that many of the outcomes of prison trauma deepen the risk of male violence against women. As described above, significant numbers of prisoners are exposed to traumatic events while in prison, increasing their risk for PTSD and other major psychological disorders. This is particularly true for those who enter prison having already been exposed to trauma. PTSD is strongly correlated with increased risks for the perpetration of domestic violence. A significant body of research on military veterans finds, for example, that those who suffer from PTSD perpetuate more frequent and more severe domestic violence than do other veterans.<sup>162</sup> Similarly, studies in the general population have

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homicide as well as intimate partner non-homicidal violence); Emily M. Wright, *The Relationship Between Social Support and Intimate Partner Violence in Neighborhood Context*, XX CRIME & DELINQUENCY 1, 16 (2012) (“higher levels of concentrated disadvantage were associated with higher prevalence and frequency rates of partner violence against women”).

<sup>158</sup> See, e.g., Benson & Fox, *supra* note 154.

<sup>159</sup> See, e.g., Browning, *supra* note 157; Benson and Fox, *supra* note 154.

<sup>160</sup> Benson and Fox define disadvantage as percentage of single parents, percentage nonwhite, percentage unemployed, percentage of families on public assistance, and percentage below the poverty line. Benson and Fox, *supra* note 154, at II-3-5. Van Wyk et al. measures the similar concept “social disorganization” as the combination of the percentage of overcrowded households, percentage of single parent households, percentage non-white, racial heterogeneity, percentage with low education, percentage on public assistance, percentage below the poverty line, percentage unemployed, high residential mobility, vacant buildings, urbanization, percentage young men, and number of visible street people. Van Wyk et al., *supra* note 157, at 421.

<sup>161</sup> Van Wyk et al., *supra* note 157.

<sup>162</sup> See, e.g., Christina A. Byrne and David S. Riggs, *The Cycle of Trauma: Relationship Aggression in Male Vietnam Veterans with Symptoms of Posttraumatic Stress Disorder*, 11 VIOLENCE & VICTIMS 213 (1996) (in sample of veterans suffering

consistently found that PTSD is associated with high levels of intimate relationship problems, physical aggression, and psychological aggression.<sup>163</sup>

A significant number of prisoners suffer from substance abuse—a condition largely left untreated. Substance abuse is also strongly correlated with the perpetration of domestic violence<sup>164</sup> and some research finds that men who suffer from *both* PTSD and substance abuse have significantly higher rates of using physical violence against intimate

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from PTSD, 42% had engaged in physical aggression against their partner by their own or their partner's report); Michelle D. Sherman, Fred Sautter, M. Hope Jackson, Judy A. Lyons & Xiaotong Han, *Domestic Violence in Veterans with Posttraumatic Stress Disorder Who Seek Couples Therapy*, 32 J. MARITAL & FAMILY THERAPY 479 (2006) (comparison of violence rates between couples where the veteran member had a PTSD diagnosis with those where the veteran was diagnosed as depressed or with partner relational problem found much higher rates of domestic violence perpetration in the PTSD group, with 80% having committed at least one act of domestic violence within the prior year and 50% having committed severe violence); B. Kathleen Jordan, Charles R. Marmar, John A. Fairbank & William E. Schlenger, Richard A. Kulka, Richard L. Hough & Daniel S. Weiss, *Problems in Families of Male Vietnam Veterans with Posttraumatic Stress Disorder* 60(6) J. CONSULTING & CLINICAL PSYCHOL. 916 (1992) (based on self-reports of veterans and spouse, the mean score for family violence for veterans with PTSD was 2.08 compared to 0.54 for veterans without PTSD; the mean number of violent acts committed in the last year by veterans with PTSD was 4.86 compared to only 1.32 for veterans without PTSD.)

<sup>163</sup> A meta-analysis of nineteen military and twelve civilian studies found PTSD was positively associated with intimate relationship discord, relationship physical aggression, and intimate relationship psychological aggression. See Casey T. Taft et al., *Posttraumatic Stress Disorder and Intimate Relationship Problems: A Meta-Analysis*, 79 J. CONSULTING & CLINICAL PSYCHOL. 22 (2011).

<sup>164</sup> See, e.g., Edward W. Gondolf, *Characteristics of Court-Mandated Batterers in Four Cities: Diversity and Dichotomies*, 5(11) VIOLENCE AGAINST WOMEN 1277 (1999) (over half of the sample of men in batterer's treatment programs had alcoholic tendencies); Caroline Easton, Suzanne Swan & Rajita Sinha, *Motivation to Change Substance Use Among Offenders of Domestic Violence*, 19 J. SUBSTANCE ABUSE TREATMENT 1 (2000) (substance dependence among domestic violence offenders ranges from 33 to 50%, while substance abuse ranges from 60 to 75%).

partners.<sup>165</sup> Despite these risks, few prisoner rehabilitation programs<sup>166</sup> and few reentry programs address domestic violence.<sup>167</sup>

“Criminologists have long maintained that men who are victimized by sexual assault in prison often leave more violent and anti-social than when they went inside.”<sup>168</sup> But the harms of rape, degradation, and violence in men’s prisons are not limited to those who are the direct recipients of prison violence. As we describe above, prison culture reinforces a destructive masculinity that creates a violent place “inside” and likely increases in violence against women “outside.” Nor are the direct harms of prison violence limited to male prisoners. The harms of imprisonment are equally – perhaps *especially* – felt by women prisoners who are physically and sexually victimized in higher numbers, who may be forced to give birth in shackles, and who are more likely to lose their children to foster care.

#### IV. CONCLUSION: HOPEFUL SIGNS AND NEXT STEPS

There are numerous opportunities for anti-domestic violence service providers and activists to be a part of the movement to end hyper-incarceration. The last few years have seen significant sentencing reform, albeit focused nearly exclusively on “low-level non-violent” offenders. In November, 2014, California became the latest state to join a growing number of states to lessen penalties and provide alternative sentencing for low-level non-violent offenders. “The Safe Neighborhood and Schools Act” (Proposition 47), adopted by California voters, requires that “non-serious, non-violent property and drug crimes” be made misdemeanors rather than felonies, permits re-sentencing for anyone

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<sup>165</sup> Gina P. Owens, Philip Held, Laura Blackburn, John S. Auerbach, Allison A. Clark, Catherine J. Herrera, Jerome Cook & Gregory L. Stuart, *Differences in Relationship Conflict, Attachment, and Depression in Treatment-Seeking Veterans with Hazardous Substance Use, PTSD, or PTSD and Hazardous Substance Use*, 29(7) J. INTERPERSONAL VIOLENCE 1318, 1327 (2014).

<sup>166</sup> In addition, research indicates that a significant number of incarcerated men have committed domestic violence against a female partner. See White, et al., *supra* note 111 (sample of male federal prisoners in low-security prison found that 33% reported that they recently used violence against an intimate female partner and 10% acknowledged the recent use of severe violence against a female partner; these rates are considerably higher than is true of the general population, 16% and 6%, respectively).

<sup>167</sup> See, Mike Bobbitt, Robin Campbell, & Gloria L. Tate, *Safe Return: Working Toward Preventing Domestic Violence When Men Return from Prison*, available at [www.safereturn.info](http://www.safereturn.info). The Safe Return project is a collaboration between the DOJ Office on Violence Against Women and the Institute on Domestic Violence in the African Community.

<sup>168</sup> M. Dyan McGuire, *The Impact of Prison Rape on Public Health*, 3 CAL. J. HEALTH PROMOTION 72, 76 (2005).

-serving a prison sentence for an offense that the initiative reduces to a misdemeanor, and creates a Safe Neighborhoods and Schools Fund from the savings generated by the initiative to be used for education programs, victim services, and drug/mental health treatment. The measure had bipartisan and far-ranging support including from prosecutors; victims/survivors organizations; labor unions; religious organizations; notable individuals such as Jay Z, Michelle Alexander, and Olivia Wilde; and Republican leaders, Senator Rand Paul and Newt Gingrich. The California Legislative Analyst's Office projects an ongoing reduction in state prison populations of several thousand a year and a savings of \$100-\$200 million a year beginning in 2016 to 2017.<sup>169</sup>

There are some hopeful signs at the federal level, as well. In 2014, former Attorney General Eric Holder established new federal prosecution guidelines requiring that prosecutors decline to charge drug crimes at the quantity level required to trigger mandatory minimum sentences if the accused was a low-level non-violent offender with no significant criminal history or ties to a large-scale drug trafficking organization. The Smarter Sentencing Act (SSA), introduced with bi-partisan sponsors in 2013, 2014, and again in 2015,<sup>170</sup> would direct federal courts to disregard statutory minimum sentence requirements for defendants who have less significant criminal histories, allow courts to lower sentences for those convicted of crack cocaine charges prior to changes that made penalties for crack possession and sale commensurate with penalties for powder cocaine, and reduce mandatory minimums for certain drug charges. The Act has drawn significant opposition, including from former top federal law enforcement officials.<sup>171</sup>

The Smarter Sentencing Act is supported by two important national anti-domestic violence organizations—The National Task Force to End Sexual and Domestic Violence Against Women (NTF)<sup>172</sup> and the

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<sup>169</sup> Mac Taylor, *The 2015-16 Budget: Implementation of Proposition 47*, LEGISLATIVE ANALYST'S OFFICE 3 & 9 (Feb. 2015), <http://www.lao.ca.gov/Publications/Detail/3175>.

<sup>170</sup> H.R. 920, 114th Cong. (2015).

<sup>171</sup> GOTTSCHALK, *infra* note 175, at 263.

<sup>172</sup> See Letter from National Task Force to End Sexual and Domestic Violence Against Women, to Senators Leahy, Durbin, and Lee, in support of the Smarter Sentencing Act (Dec. 11, 2013), available at <http://famm.org/wp-content/uploads/2013/07/NTF-SSA-letter.pdf> [hereinafter Letter Supporting Smarter Sentencing]. The support letter regards the identical legislation first introduced in 2013. For a description of NTF, see *About NTF*, <http://4vawa.org/about/> (NTF is "focused on the development, passage and implementation of effective public policy to address domestic violence, dating violence, sexual assault and stalking. The full membership of the NTF is comprised of a large and diverse group of national, tribal, state, territorial and local organizations, as well as individuals, committed to securing an end to violence against women. Included are civil rights organizations, labor unions, advocates for children and youth, anti-poverty groups,



National Network to End Domestic Violence (NNEDV).<sup>173</sup> Their support centers on the need to free up federal funding for more criminal justice responses to address domestic violence, sexual assault, and stalking, particularly on Tribal lands, and to replace funding cuts in victim services,<sup>174</sup> but they also note the harms of mandatory drug sentencing policies on communities of color. In 2014, NTF *opposed* an amendment to SSA that would have added new mandatory minimums for domestic violence, sex crimes, and terrorism.<sup>175</sup>

There have been a number of successful private prison divestment campaigns.<sup>176</sup> A number of communities are working to get rid of felon disenfranchisement laws,<sup>177</sup> to adopt “ban the box” legislation to curb

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immigrant and refugee rights organizations, women’s rights leaders, education groups, and others focusing on a wide range of social, economic and racial justice issues.”).

<sup>173</sup> For a description of NNEDV, see <http://nnedv.org/news/4444-25th-anniv.html> (describing of NNEDV as “The National Network to End Domestic Violence (NNEDV) was the ambitious idea of a small but mighty group of state domestic violence coalition leaders who identified the need for a national, unified voice for survivors of domestic violence and their advocates.”).

<sup>174</sup> See Letter Supporting Smarter Sentencing, *supra* note 172.

<sup>175</sup> MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 263 (2014) (describing the amendments as last ditch efforts to win sufficient Republican support for passage and NTF’s opposition to the amendments). NTF has also been a strong supporter of comprehensive immigration reform, noting that expanded immigration detention makes immigrant victims of violence “more vulnerable to abuse and exploitation.” *Id.* See also Letter from 301 organizations “committed to ending domestic violence, sexual assault and human trafficking” to John A. Boehner, Speaker of the House, Eric Cantor, House Majority Leader, and Kevin McCarthy, House Majority Leader Elect (June 27, 2014), <http://origin.library.constantcontact.com/download/get/file/1102350617540-408/National+DV-SA+sign-on+LTR+in+support+of+Immigration+Reform-6-27-14.pdf> (urging the adoption of comprehensive immigration reform because it will “significantly enhance prevention and intervention efforts, by providing an opportunity for millions of immigrants to pursue a pathway to safety, stability, and economic self-sufficiency”); Letter Opposing the Gandy bill and similar measures that would expand local and state participation in the enforcement of immigration laws (Mar. 3, 2015), <http://www.nationallatinonetwork.org/images/NTFGowdyHR1148letter332015FINAL.pdf>.

<sup>176</sup> See, e.g., ENLACE: ORGANIZING FOR RACIAL AND ECONOMIC JUSTICE, <http://www.enlaceintl.org/#!/prison-divestment/cq8g>; Cealia Brannan & Sarah Pruzansky, *Faculty Senate Votes on Resolution Opposing FAU Stadium Rename*, UNIVERSITY PRESS: FAU’S FINEST NEWS SOURCE (4/2/2013), <http://www.upressonline.com/2013/04/faculty-senate-votes-on-a-resolution-opposing-fau-stadium-rename/> (students and faculty opposed naming the FAU stadium after the GEO group, a corporation that runs private prisons).

<sup>177</sup> See, e.g., FLORIDA RIGHTS RESTORATION COALITION, <http://www.restorerights.org/>

employment discrimination against ex-felons,<sup>178</sup> and on increasing funding for prisoner reentry programs that address domestic violence.<sup>179</sup>

Michelle Alexander's book, *THE NEW JIM CROW*,<sup>180</sup> popularized an understanding of the racist character of hyper-incarceration. Those themes were echoed in the former Attorney General Eric Holder's memorable speech to the American Bar Association denouncing racial disparities in sentencing.<sup>181</sup> The horrifying police killings of unarmed African American men Michael Brown,<sup>182</sup> Eric Garner,<sup>183</sup> Freddie Gray,<sup>184</sup> and Walter Scott<sup>185</sup> have broadened awareness of police violence to African American men and the *#BlackLivesMatter*<sup>186</sup> campaign has reached a large audience. While much of this national focus has been on African American men, organizations such as FREE MARISSA NOW!<sup>187</sup> and INCITE!<sup>188</sup> emphasize the intersection of the violent victimization of women of color and their disproportionate incarceration. Organizations such as New York City's Anti-Violence Project, which "empowers lesbian, gay, bisexual, transgender, queer, and HIV-affected communities

<sup>178</sup> See, e.g., BAN THE BOX CAMPAIGN, <http://bantheboxcampaign.org/>.

<sup>179</sup> See, e.g., MIKE BOBBITT, GLORIA TATE, AND MITCHELL DAVIS, *DOMESTIC VIOLENCE AND PRISONER REENTRY: EXPERIENCES OF AFRICAN AMERICAN WOMEN AND MEN* (2006), <http://www.idvaac.org/media/pubs/SafeReturnDomesticViolenceAndPrisonReentry.pdf> (research with African American returning male prisoners and women whose partners/former male partners were returning from prison indicate the need for additional attention to the risks for domestic violence).

<sup>180</sup> ALEXANDER, *supra* note 4.

<sup>181</sup> Eric Holder, Att'y Gen., U.S. DOJ, *Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates* (Aug. 12, 2013), available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.

<sup>182</sup> See Davey, *supra* note 9.

<sup>183</sup> J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES, Dec. 3, 2014, [http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?\\_r=0](http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0).

<sup>184</sup> Alan Blinder & Richard Pérez-Peña, *6 Baltimore Police Officers Charged in Freddie Gray Death*, N.Y. TIMES, May 1, 2015, <http://www.nytimes.com/2015/05/02/us/freddie-gray-autopsy-report-given-to-baltimore-prosecutors.html>.

<sup>185</sup> Mark Berman, Wesley Lowery & Kimberly Kindy, *South Carolina Police Officer Charged with Murder After Shooting Man During Traffic Stop*, WASH. POST, Apr. 7, 2015, <http://www.washingtonpost.com/news/post-nation/wp/2015/04/07/south-carolina-police-officer-will-be-charged-with-murder-after-shooting/>.

<sup>186</sup> See *#BLACKLIVESMATTER*, <http://blacklivesmatter.com/> (last visited May 17, 2015).

<sup>187</sup> See FREE MARISSA NOW, <http://www.freemariissanow.org/October-action.html> (last visited May 17, 2015).

<sup>188</sup> See INCITE!, *About INCITE!*, <http://www.incite-national.org/page/about-incite> (last visited Jan. 31, 2015) ("INCITE! Women, Gender Non-Conforming, and Trans people of Color Against Violence is a national activist organization of radical feminists of color advancing a movement to end violence against women of color and their communities through direct action, critical dialogue and grassroots organizing.").

and allies to end all forms of violence,” focus on the violence of police as well as intimate partner violence and hate violence.<sup>189</sup>

With some notable exceptions, anti-domestic violence activists and service providers have not been at the forefront of the work to stop hyper-incarceration. As Deborah Weissman describes, they have been absent from challenges to racial profiling and, in some instances, been *supporters* of draconian extensions of police power.<sup>190</sup> This needs to change. Anti-domestic violence activists and service providers have a unique opportunity to make the connection for the public and for policy makers between the devastating violence of mass incarceration and the interpersonal violence that affects so many.

The time to act is now.

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<sup>189</sup> See ANTI-VIOLENCE PROJECT, *Mission, Vision, & Goals*, <http://www.avp.org/about-avp/mission-vision-a-goals>; See Andrea Ritchie’s remarks in Andrea Ritchie et al., *Plenary 2—Redefining Gender Violence*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 289 (2015).

<sup>190</sup> See Weissman *supra* note 12 (describing the support of domestic violence and sexual assault organizations for the DNA Fingerprint Act).