

Criminalized Survivors and the Promise of Abolition Feminism¹

The criminal legal system routinely punishes imperfect victims of gender-based violence. Sometimes that punishment is imposed on factually innocent people, as Professor Valena Beety explores in her powerful new book, *Manifesting Justice: Wrongly Convicted Women Reclaim Their Rights*. Sometimes punishment is imposed on someone who has refused to conform to what the criminal legal expects of them as victims or as witnesses. And sometimes punishment is imposed on those whose crimes cannot be disentangled from the gender-based violence they have experienced, as I document in my book, *Imperfect Victims: Criminalized Survivors and the Promise of Abolition Feminism*. That punishment begins when victims are children, continues when victims seek protection from the state or are compelled to participate in prosecution, and is at its apex when victims become defendants in criminal cases. Victims are detained, arrested, prosecuted, sentenced, and incarcerated. They are placed on sex offender registries and live under draconian conditions of parole. Criminalization was intended to benefit victims of gender-based violence, to keep them safe and ensure that those who harmed them were held accountable. Instead, the criminal legal system has done immeasurable damage to those it was meant to protect.

For some, the answer to this problem is reform: to fix the parts of the system that are harming victims of violence while leaving the apparatus of state punishment intact. But reforms cannot and will not prevent the punishment of survivors of gender-based violence. Abolition feminism is the only politics and practice that can do that work.

¹ This article is excerpted from LEIGH GOODMARK, *IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM* (2023).

The Limits of Reform

Fixing the Juvenile System

Advocates for girls and TGNC (transgender and gender-nonconforming) youth have suggested several reforms to mitigate or avoid the harms of criminalization. Gender-informed programming, for example, is frequently cited as a fix for the problems in the juvenile system.² The 1992 [reauthorization of the] federal Juvenile Justice and Delinquency Prevention Act provided funding for states to improve their responses to girls.³ The Office of Juvenile Justice and Delinquency Prevention has led several initiatives exploring gender-responsive programming for girls. But a 2008 review of gender-responsive programs for girls found that few had been properly evaluated and none were effective.⁴ Similarly, in 2001, Connecticut legislators required juvenile agencies to implement gender-specific services. Seven years after that mandate, the Connecticut Office of the Child Advocate declared that “girls in Connecticut are in serious trouble,” documenting the system’s failure to adequately serve incarcerated girls.⁵

Some jurisdictions have tried “Girls’ Courts,” “an alternative track for female offenders within the juvenile justice court that recognize that young women enter the system with unique and gender-specific traits.”⁶ Such courts sometimes provide programming including “parenting

² OFF. OF THE CHILD ADVOC., FROM TRAUMA TO TRAGEDY 9–10 (2008).

³ Pub. L. No. 102-586, 106 Stat. 4982 (1992) (codified at 42 U.S.C. § 5601 et seq.).

⁴ Liz Watson & Peter Edelman, *Improving the Juvenile Justice System for Girls: Lessons from the States*, 20 GEO. J. ON POVERTY L. & POL’Y 215, 220–24 (2013).

⁵ OFF. OF THE CHILD ADVOC., FROM TRAUMA TO TRAGEDY 9–10 (2008).

⁶ Wendy S. Heipt, *Girl’s Court: A Gender Responsive Juvenile Court Alternative*, 13 SEATTLE J. FOR SOC. JUST. 803, 834–37 (2015).

classes, yoga, community service, and therapy.”⁷ These courts raise several concerns. Such courts might expand the involvement of the juvenile system in girls’ lives, increase the number of girls in detention, keep girls under the supervision of the courts for longer than necessary, and decrease community-based resources for girls by siting services in courts.⁸

Reformers sometimes use the term “diversion” to describe schemes that are essentially “criminalization lite.” In New York, for example, children engaging in commercial sexual activity are referred to the child welfare system for services.⁹ But if children come back before the court because they fail to comply with services or engage in commercial sexual activity again, the court can adjudicate them delinquent.¹⁰ In Florida, rather than arrest girls for domestic violence, police can issue civil citations and place them in domestic violence respite programs.¹¹ If the girls successfully complete services, the domestic violence charges are dropped.¹² Florida legislators also approved a law creating “secure safe houses” for victims of trafficking where victims could be held for up to ten months.¹³ As a retired juvenile judge observed, however, “the term ‘secure safe house’ may sound comforting and reassuring to adults. . . . But to a traumatized child who has spent a lot of time on the streets and in juvenile detention, it’s a

⁷ *Id.*

⁸ FRANCINE T. SHERMAN & ANNIE BALCK, GENDER INJUSTICE: SYSTEM-LEVEL JUVENILE REFORMS FOR GIRLS 10 (Nat’l Crittenton Found. 2015).

⁹ Tamar R. Birkhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1111 (2011).

¹⁰ *Id.*

¹¹ GENE SIEGEL AND GREGG HALEMBA, PROMISING PRACTICES IN THE DIVERSION OF JUVENILE DOMESTIC VIOLENCE CASES 13-14 (Nat’l Ctr. for Juv. Just. 2015).

¹² *Id.*

¹³ Margie Menzel, *Sex Trafficking Bill Gets OK: Detention Questions Remain*, CBS MIAMI (Apr. 8, 2014), <https://www.cbsnews.com/amp/miami/news/sex-trafficking-bill-gets-ok-detention-questions-remain/#app>.

jail.”¹⁴ In some states girls can be released from detention, placed on house arrest, and required to wear electronic monitors.¹⁵ But house arrest presupposes a secure and stable place to live, electronic monitoring is invasive and expensive, and one study found that most released girls were rearrested while being monitored.¹⁶

Diversion programs are not keeping girls out of the juvenile system. In Florida, for example, 75 percent of the girls who were arrested for domestic violence from June 2018 to May 2019 were not diverted out of the criminal legal system using civil citations or some other alternative.¹⁷ Some 256 girls who could have gone to respite programs were placed in secure detention, more than half of the time because of the lack of space in respite programs.¹⁸ Diversion also raises concerns about who receives the benefit of such decisions. As law professor Priscilla Ocen has noted, discretionary decisions like whether to divert girls and TGNC youth away from prosecution are “driven more by the characteristics of the child or the biases of the law enforcement official than the conduct of the child or the elements of the offense” and often disadvantage Black youth.¹⁹

As of 2017, thirty-five states had passed safe harbor laws intended to prevent trafficked minors from being prosecuted for crimes related to their own trafficking, including but not

¹⁴ *Id.*

¹⁵ JERRY FLORES, *CAUGHT UP: GIRLS, SURVEILLANCE, AND WRAPAROUND INCARCERATION*, 48–49 (Univ. Cal. Press ed., 2016).

¹⁶ *Id.*

¹⁷ VANESSA PATINO LYDIA & CAROLINE GLESMANN, *ADDRESSING BARRIERS TO USING RESPITE BEDS FOR GIRLS CHARGED WITH DOMESTIC VIOLENCE* 7 (Delores Barr Weaver Pol’y Ctr. & Nat’l Ctr. on Crime & Delinq. 2019).

¹⁸ *Id.*

¹⁹ Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586, 1625 (2015).

always limited to prostitution.²⁰ The research is mixed as to the effectiveness of these laws. Early research found that in many states safe harbor laws did not generally result in fewer arrests of juveniles; a later study found that safe harbor laws did decrease the number of juveniles arrested for prostitution.²¹ Although some judges believed that safe harbor laws changed judicial attitudes about prostitution cases involving juveniles, others expressed concern that the laws provided the illusion of effort with little real change and, while acknowledging that the juveniles were victims, suggested they would still hold those victims in secure detention to prevent them from running away or to secure their testimony in their traffickers' prosecutions.²² The existence of safe harbor laws did not change law enforcement's treatment of juveniles engaged in commercial sexual activity or the interactions of those youth with law enforcement.²³

Courts have declined to apply safe harbor laws to crimes related to a juvenile's commercial sexual exploitation. Alexis Martin asked a juvenile court to find that she was a victim of trafficking and apply Ohio's safe harbor law in her case, which could have paused the

²⁰ STEPHEN GIES ET AL., *SAFE HARBOR LAWS: CHANGING THE LEGAL RESPONSE TO MINORS INVOLVED IN COMMERCIAL SEX*, PHASE 1. *THE LEGAL REVIEW* 17–19 (2018) [hereinafter *SAFE HARBOR PHASE 1*].

²¹ *Id.* at 10; STEPHEN GIES ET AL., *SAFE HARBOR LAWS: CHANGING THE LEGAL RESPONSE TO MINORS INVOLVED IN COMMERCIAL SEX*, PHASE 2. *THE QUANTITATIVE ANALYSIS* 24 (2018).

²² Ginny Sprang et al., *The Impact of Safe Harbor Legislation on Court Proceedings Involving Sex Trafficked Youth: A Qualitative Investigation of Judicial Perspectives*, 58 *FAM. CT. REV.* 816, 820–24 (2020).

²³ Stephanie R. Fahy, *Safe Harbor of Minors Involved in Prostitution: Understanding How Criminal Justice Officials Perceive and Respond to Minors Involved in Prostitution in a State with a Safe Harbor Law* 154 (December 2015) (Ph.D. dissertation, Northeastern University); *SAFE HARBOR PHASE 1*, *supra* note 20, at 10.

criminal proceeding while she complied with a court order regarding services.²⁴ Prosecutors argued that Martin was not a victim of trafficking but a “manipulator” who exploited her relationship with Angelo Kerney to facilitate his murder.²⁵ Despite the court’s finding that Martin had been trafficked repeatedly, her case was transferred to adult court.²⁶ Martin was sentenced to twenty-one years to life for Kerney’s murder.²⁷ On appeal, the Ohio Supreme Court found that Martin’s offenses were not closely enough related to her trafficking to warrant overturning the conviction.²⁸ Prosecutor Rick Raley told the Ohio Parole Board that “the Safe Harbor law is not ‘well, just say you have a pimp and you get out of any sort of criminal responsibility.’”²⁹ Martin’s sentence was commuted in April 2020.³⁰ She will be on parole until at least 2034, a condition she referred to as a “mental prison.”³¹ Martin is required to wear a GPS monitoring device and may be placed on a violent offender registry.³²

Relief is potentially available after a minor’s conviction. Pending federal legislation would allow judges to impose lighter sentences on trafficked minors convicted of violent offenses against their traffickers, a bill inspired by the case of Sara Kruzan, who was sentenced

²⁴ Brief for Human Trafficking Pro Bono Legal Center as Amicus Curiae Supporting Appellant, *Ohio v. Martin*, 116 N.E.3d 127 (Ohio 2018) (No. 2016-1891).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Ohio v. Martin*, 116 N.E.3d 127, 130 (Ohio 2018).

²⁸ *Id.* at 134; Brief for Human Trafficking Pro Bono Legal Center as Amicus Curiae Supporting Appellant, *Ohio v. Martin*, 116 N.E.3d 127 (Ohio 2018) (No. 2016-1891).

²⁹ Jessica Contrera, *The State of Ohio vs. a Sex-Trafficked Teenager*, THE WASHINGTON POST (June 1, 2021), <https://www.washingtonpost.com/dc-md-va/interactive/2021/child-sex-trafficking-alexis-martin-ohio/>.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

to life without parole after killing her trafficker when she was sixteen.³³ All but six states have vacatur laws, which allow judges to set aside previously obtained convictions and provide relief to those convicted of crimes related to their own trafficking.³⁴ New York courts have vacated the prostitution-related convictions of trafficked minors who were prosecuted as adults in several cases.³⁵ But most state laws fail to provide easily accessible, timely, comprehensive, and confidential relief.³⁶ Moreover, vacatur laws only become operative after victims of trafficking have already been prosecuted, convicted, and in some cases, incarcerated. While eliminating a criminal history has clear and tangible benefits, by the time a victim seeks vacatur, much damage has already been done.

Reforming the Adult System

Reforms at the front end of the criminal legal system are designed to bring fewer victims of gender-based violence into that system. Court-based diversion programs, like the Human Trafficking Intervention Courts (HTICs) in New York City, empower judges to order victims of trafficking into services including drug treatment, education, shelter, and job training.³⁷ But even in cities with diversion programs, trafficking victims are being incarcerated. In response,

³³ Sara Kruzan, *Congress Needs to Pass Sara's Law so the Next Sara Kruzan is Met with Empathy, Fairness*, THE HILL (Apr. 16, 2019), <https://thehill.com/blogs/congress-blog/politics/439011-congress-needs-to-pass-saras-law-so-the-next-sara-kruzan-is-met/>.

³⁴ ERIN MARSH ET AL., STATE REPORT CARDS: GRADING CRIMINAL RECORD RELIEF LAWS FOR SURVIVORS OF HUMAN TRAFFICKING 10 (2019).

³⁵ See, e.g., *People v. C.C.*, 7 N.Y.S.3d 244 (N.Y. Crim. Ct. 2014); *People v. L.G.*, 972 N.Y.S.2d 418 (N.Y. Crim. Ct. 2013); *People v. Doe*, 935 N.Y.S.2d 481 (N.Y. Sup. Ct. 2011).

³⁶ MARSH ET AL., *supra* note 34 at 7-8.

³⁷ Aya Gruber et al., *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333 (2016).

some “progressive” prosecutors, like Eric Gonzalez in Brooklyn and Marilyn Mosby in Baltimore, have pledged not to prosecute prostitution cases. As Gonzalez has explained, “The current way of handling sex workers is dangerous. It drives them underground, it doesn’t keep us safe, and it’s not really getting to the issue of trafficking.”³⁸ Gonzalez has recognized that his decision not to prosecute might undermine the work of the HTICs. But, Gonzalez has argued, “to arrest a sex worker . . . and prosecute in the name of giving them assistance just isn’t right. Forcing people through the criminal justice system is not a way to get them help.”³⁹

Adding or amending defenses is another popular reform. At least thirty states allow victims of trafficking to use their victimization as an affirmative defense to crimes they were forced to commit by their traffickers.⁴⁰ The crimes to which those laws apply vary considerably. In some states trafficking is an affirmative defense to prostitution and prostitution-related charges, but not to more serious crimes.⁴¹ At the back end of the system, reformers have tackled sentencing, arguing for legislation like the DVSJA and other provisions enabling judges to reexamine sentences imposed years ago. Similarly, some prosecutors have created sentencing review units to reconsider long sentences in old cases.⁴² Those reforms have had some success in freeing or decreasing the sentences of criminalized survivors. States are also

³⁸ Otilla Steadman, *More than 1,000 Open Prostitution Cases in Brooklyn Are Going to Be Wiped From the Files*, BUZZFEED NEWS (Jan. 28 2021), <https://www.buzzfeednews.com/article/otillisteadman/prostitution-loitering-cases-brooklyn>.

³⁹ *Id.*

⁴⁰ *Human Trafficking State Laws*, NATIONAL CONFERENCE OF STATE LEGISLATORS, <https://www.ncsl.org/civil-and-criminal-justice/human-trafficking-state-laws> (last visited Jan. 8, 2023).

⁴¹ *Id.*

⁴² See, e.g., *Sentencing Review Unit*, OFFICE OF THE STATE’S ATTORNEY FOR BALTIMORE CITY, <https://www.stateattorney.org/office/bureaus-units/sentencing-review> (last visited Dec. 15, 2022); *Conviction and Sentencing Integrity*, OFFICE OF THE STATE’S ATTORNEY FOR PRINCE GEORGE’S COUNTY, <https://www.pgsao.org/copy-of-guns-and-drugs> (last visited Dec. 15, 2022).

considering legislation that would cap sentences for particular crimes, which could benefit criminalized survivors.⁴³

Reformers are working to improve prison conditions. The latest version of VAWA includes the Ramona Brant Improvement of Conditions for Women in Federal Custody Act.⁴⁴ The act requires that incarcerated people with children be housed in facilities as close to their children as possible. The Bureau of Prisons is tasked with determining whether transgender people should be placed in male or female prisons on a case-by-case basis. The act forbids placing pregnant or postpartum people in segregation, restricts opposite-sex strip searches and bathroom monitoring, and requires that correctional officers receive trauma-informed training. The act guarantees that all incarcerated people receive “adequate” health care and hygienic products at no charge. Correctional officers are precluded from examining a person “for the sole purpose of determining the prisoner’s genital status or sex.” The act pilots a program allowing incarcerated women who give birth while in prison to live with their children for as long as thirty months and requires the development of a gender-responsive reentry model.⁴⁵

The development of gender-responsive (usually meaning responsive to the needs of women), trauma-informed programming has long been a priority for reformers. Although some correctional officials have pushed for equity in the conditions of imprisonment in men’s and women’s institutions, others have argued that incarcerated women should be treated differently, in large part because of their histories of trauma. As a correctional officer explained

⁴³ German Lopez, *The Case for Capping All Prison Sentences at 20 Years*, Vox (Feb. 12, 2019), <https://www.vox.com/future-perfect/2019/2/12/18184070/maximum-prison-sentence-cap-mass-incarceration>.

⁴⁴ 18 U.S.C. § 4051 et seq.

⁴⁵ Violence Against Women Reauthorization Act of 2021, H.R. 1620, 117th Congress, Title XI (2021).

to sociologist Jill McCorkel, “In the short time I’m here, I know we can’t treat them like regular inmates, like men. . . . In some ways, it’s like these girls are more fucked up than men and less fucked up than men, you know? There’s a whole lot going on—a lot of abuse and bad stuff—but they can’t really be thought of as dangerous.” Others in the prison shared this perspective: “We’re talking about women who’ve suffered years of abuse, from the time they were little girls. Most of them are in trouble because of abusive men, you think they just went out and pulled off some carjacking on their own?” Another staff member concluded, “You can’t ‘get tough’ with them. I mean, you can, but that’s not going to fix anything in terms of whether they reoffend when they get out of here. In fact, if you do . . . more of them is gonna end up back in here. Why? ‘Cause they were abused before they got in here and they committed crimes.”⁴⁶

In theory, gender-responsive programs foster “safety, respect, and dignity,” using “policies, practices and programs that are relational.”⁴⁷ Gender-responsive institutions are designed to recognize and address the specific challenges faced by incarcerated women: mental health, substance abuse, gender-based violence, poverty. Gender-responsive programs aspire to transform carceral settings into empowering spaces where treatment is the norm—a “nurturing prison.”⁴⁸ What that means in practice varies significantly: configuring prison spaces to look more like dormitories than cells, allowing incarcerated people to have jewelry or

⁴⁶ JILL A. MCCORKEL, *BREAKING WOMEN: GENDER, RACE, AND THE NEW POLITICS OF IMPRISONMENT* 37–38 (N.Y. Univ. Press ed., 2013).

⁴⁷ Jodie M. Lawston & Erica R. Meiners, *Ending Our Expertise: Feminists, Scholarship, and Prison Abolition*, 26 *FEMINIST FORMATIONS* 1, 8 (2014).

⁴⁸ David Tereshchuk & Laura Fong, *U.S. Jail Populations Drop But Not for Women*, PBS NEWS WEEKEND (June 30, 2019), <https://www.pbs.org/newshour/show/u-s-jail-populations-drop-but-not-for-women>.

makeup, building nurseries in prisons, or providing gender-specific vocational programming, including cosmetology, culinary, and sewing programs.⁴⁹

Safety, trustworthiness, choice, collaboration, and empowerment are the principles undergirding trauma-informed correctional institutions.⁵⁰ Those principles are meant to be manifested through trauma-informed practice, infused in the physical layout of the prison, the language used by correctional officers and others in the prison, the prison's procedures, the treatment provided to those who have experienced trauma, and the general environment of the facility.⁵¹ Trauma-informed programs say they use these principles to inform their intake and other processes, interpersonal interactions with incarcerated people, programming, and disciplinary procedures.⁵² In a trauma-informed facility, for example, correctional officials should move quietly and respectfully interact with incarcerated people rather than yelling and refer to incarcerated people by name rather than number. Physical contact is supposed to be explained before being used.⁵³

Preventing sexual abuse by law enforcement is another priority for reformers. Although most states continue to allow police officers to have sex with people they have detained so long as the sexual activity is consensual (leading to credibility contests between officers and the people they detain), there is a growing movement to make all such sexual activity illegal.⁵⁴ The

⁴⁹ *Id.*

⁵⁰ Sheryl P. Kubiak et al., *Trauma-Informed Corrections*, in *SOCIAL WORK IN JUVENILE AND CRIMINAL JUSTICE SYSTEMS* 92 (David W. Springer & Albert R. Roberts eds., 4th ed. 2017).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See, e.g., Katherine Bodde & Erika Lorshbough, *There's No Such Thing as 'Consensual Sex' When a Person is in Police Custody*, ACLU (Feb. 23, 2018), <https://www.aclu.org/news/criminal-law-reform/theres-no-such-thing-consensual-sex-when-person>.

Prison Rape Elimination Act (PREA), enacted in 2003, prohibits correctional officers from engaging in sexual behavior with or sexually harassing incarcerated people, limits cross-gender searches and supervision in certain circumstances (like showering), and requires prisons to have procedures for handling sexual abuse complaints and preventing retaliation.⁵⁵ PREA’s focus is process, not outcomes. Compliance with PREA’s provisions is not mandated and the consequences of violating PREA are minimal.⁵⁶ And several states—including California, Connecticut, Massachusetts, New Jersey, and Rhode Island—now place transgender people in prisons consistent with their gender identity, a change meant to protect them from emotional, physical, and sexual abuse.⁵⁷

Reformers have pushed for restrictions on the use of solitary confinement. The ACLU has argued that solitary confinement should only be used “in exceptional cases as a last resort,” never for longer than fifteen days, and never on those who are particularly vulnerable, including pregnant and postpartum people, people with medical or mental health issues, children, and people over age fifty-five.⁵⁸ New York recently passed the Humane Alternatives to Long-Term Solitary Confinement Act, which largely follows those guidelines.⁵⁹ Rather than housing transgender people in solitary confinement, some reformers have suggested creating

⁵⁵ 34 U.S.C. § 30301 et seq.

⁵⁶ Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. L. REV. 51 (2012)

⁵⁷ Jaclyn Diaz, *New Jersey Prisoners Will Be Placed Based on Gender Identity Under a New Policy*, NPR (June 29, 2021), <https://www.npr.org/2021/06/29/1011181718/new-jersey-prisoners-will-be-placed-based-on-gender-identity-under-a-new-policy>.

⁵⁸ AMERICAN CIVIL LIBERTIES UNION, *STILL WORSE THAN SECOND-CLASS: SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES* 17 (2019).

⁵⁹ Mary Buser, *New York Abolished Long-Term Solitary. Will Guards Get With the Program?*, FILTER (May 6, 2021), <https://filtermag.org/new-york-abolish-solitary/>.

trans-only or LGB/TGNC units or facilities. In the Los Angeles County Jail, for example, people were admitted to the K6G unit if they could convince deputies of their knowledge of “gay subcultural terminology” and the neighborhood where white gay men in Los Angeles congregated. Once admitted to the unit, people were given different colored uniforms to identify them.⁶⁰

The clemency process could also be reformed. Parole boards could include members with experience beyond law enforcement and corrections. Risk assessments could be validated and available to those seeking parole. People seeking parole could have the right to present their cases at hearings where they are represented by counsel. Parole decisions could be reviewable. Victim statements could be limited to concerns about future risk, rather than rehashing the crime itself. Prosecutors could be excluded from the parole process altogether. Supporters of incarcerated people could be allowed to speak at parole hearings. The conditions of parole could be less onerous, and terms could be shorter. Parole could meet the treatment needs of those released into the community, and terms could be reduced for compliance with the conditions of parole.⁶¹ The federal clemency process could be streamlined and could

⁶⁰ Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons is to End Prisons: A Response to Russell Robinson’s ‘Masculinity as Prison,’* 3 CAL. L. REV. CIR. 182, 184 (2012).

⁶¹ MEREDITH HUEY DYE & RON H. ADAY, *WOMEN LIFERS: LIVES BEFORE, BEHIND, AND BEYOND BARS* 208 (Rowman & Littlefield 2019); Edward E. Rhine et al., *Improving Parole Release in America*, 28 FED. SENT’G REP. 96 (2015); Angela Wolf et al., *The Incarceration of Women in California*, 43 U. S.F. L. REV. 139 (2008).

incorporate the input of people outside the Department of Justice.⁶² And in preparation for release, prisons could make gender-specific reentry services available.⁶³

The Pitfalls of Reform

These reforms may be well-intentioned, and many respond to real problems in the criminal legal system. But because they largely accept the intervention of the criminal legal system as a given, they have the potential to do serious harm and to preempt the kind of change needed to prevent survivors from being criminalized in the first place. Prostitution diversion programs, for example, rely on police to make arrests to bring victims of trafficking (and others) into the system. Prosecutors decide who is eligible for diversion into the program and what services they must accept.⁶⁴ These programs use incarceration as both a carrot (the incentive to enter the program) and a stick (for those who do not complete the program or, in some cases, because the court believes incarceration will keep them safer).⁶⁵ Describing such interventions as victim-centered doesn't change their essence. "Progressive" prosecutors are still prosecutors, and, as *Survived & Punished New York* has argued, even when progressive prosecutors claim to "support survivors," "we know that it will be poor people of color,

⁶² Rachel Barkow et al., *The Clemency Process Is Broken. Trump Can Fix It*, THE ATLANTIC (Jan. 15, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/the-first-step-act-isnt-enoughwe-need-clemency-reform/580300/>.

⁶³ HOLLY VENTURA MILLER, FEMALE REENTRY AND GENDER-RESPONSIVE PROGRAMMING (2021).

⁶⁴ Aya Gruber et al., *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333 (2016).

⁶⁵ *Id.*

including survivors fighting for their literal survival, who will be warehoused in cages rife with sexual and physical violence.”⁶⁶

Gender-responsive and trauma-informed prisons are still prisons. As Amber Rose Howard, statewide coordinator for Californians United for a Responsible Budget, has explained, “It’s ridiculous to think that ‘gender-responsive’ facilities are somehow better, or to think that women are going to be in a setting where they can somehow grow or be cared for and nurtured. My experience [of] being in jail is that it is completely abusive.”⁶⁷ Reforming these systems does not undo the damage they cause, both while people are incarcerated and after they are released. Upon leaving prison, criminalized survivors have to completely rebuild their lives—find housing and jobs, repair relationships with children and families—“in a society that does not easily forgive convicted felons.”⁶⁸ Decreasing the collateral consequences of conviction can make some of this easier, but the stigma of incarceration and negative public perception of formerly incarcerated people remains, even if those convictions are vacated.

Reforms that involve making and changing laws will not, on their own, transform how the criminal system sees and treats survivors of gender-based violence. The legal rules may change, but the system actors remain the same. Changing laws will not uproot the stereotypes and misconceptions people hold about gender-based violence. To the extent that reforms

⁶⁶ SURVIVED & PUNISHED NY, NO GOOD PROSECUTORS NOW OR EVER: HOW THE MANHATTAN DISTRICT ATTORNEY HOARDS MONEY, PERPETUATES ABUSE OF SURVIVORS, AND GAGS THEIR ADVOCATES 4 (2021).

⁶⁷ Jacob Kang-Brown & Olive Lu, *America’s Growing Gender Jail Gap*, THE NEW YORK REVIEW (May 7, 2019), <https://www.nybooks.com/online/2019/05/07/americas-growing-gender-jail-gap/>.

⁶⁸ PATRICIA GAGNÉ, BATTERED WOMEN’S JUSTICE: THE MOVEMENT FOR CLEMENCY AND THE POLITICS OF SELF-DEFENSE 170 (Twayne Publishers 1998).

require the exercise of discretion, those reforms will always be problematic. Primary aggressor provisions, meant to mitigate the harms of mandatory arrest laws, allow police to use discretion in ways that continue to ensnare criminalized survivors in the legal system.⁶⁹ Pledges not to prosecute certain crimes (like prostitution) rely entirely on the priorities of the individual in the prosecutor's office and that person's willingness to withstand pressure to prosecute.

Such pledges do not preclude police from continuing to arrest for those crimes. Pledges not to prosecute certain individuals (like criminalized survivors) are meaningful only to the extent that prosecutors and survivors see these cases the same way. In the 2021 election several of the candidates for Manhattan district attorney pledged that they would not prosecute survivors of gender-based violence who act to protect themselves.⁷⁰ But district attorneys often disagree with survivors about whether they are in fact survivors. In Tracy McCarter's case, for example, the Manhattan District Attorney's Office consistently denied that McCarter was a survivor, describing her as jealous and abusive.⁷¹ Prosecutors withheld information about James Murray's violence toward McCarter from the grand jury because they did not believe McCarter's story that Murray was violent on the evening of his death; therefore, they contended, "any prior history of violence toward the defendant or otherwise is irrelevant."⁷² Despite a 2020 tweet in which he claimed to "#StandWithTracy," and his contention that "prosecuting a domestic violence survivor who acted in self-defense is

⁶⁹ Jacquie Andreano, *The Disproportionate Effect of Mutual Restraining Orders on Same-Sex Domestic Violence Victims*, 108 CAL. L. REV. 1047 (2020).

⁷⁰ Lauren Gill, *Prosecutors Ignored Evidence of Her Estranged Husband's Abuse. She Faces 25 Years in Prison for Murder*, THE INTERCEPT (May 24, 2021), <https://theintercept.com/2021/05/24/manhattan-district-attorney-domestic-violence-tracey-mccarter/>.

⁷¹ *Id.*

⁷² *Id.*

unjust,”⁷³ Manhattan district attorney Alvin Bragg took two years to ask the court to dismiss the charges against Tracy McCarter and only did so after significant public pressure.⁷⁴

In the prison system reforms rely on administrators to institute and fund and staff to embrace them. While the federal Bureau of Prisons gives lip service to the idea of trauma-informed prisons, a September 2018 report documented the Bureau of Prisons’ failure to adequately resource the trauma treatment program and provide training to executive staff, who are tasked with making policy decisions.⁷⁵ Similarly, the Department of Justice has used its discretion to certify a pool of PREA auditors made up largely of former correctional officials who have issued glowing reports on prisons that incarcerated people and their advocates describe quite differently.⁷⁶

Resentencing and clemency rely on exercises of discretionary power as well. Under New York’s Domestic Violence Survivors Justice Act, for example, prosecutors can oppose resentencing requests.⁷⁷ Judges decide whether the abuse is substantial enough and sufficiently tied to the crime that led to incarceration, whether the sentence was unduly harsh, and whether a person is a threat to public safety.⁷⁸ Discretion is built into these choices. In

⁷³ Alvin Bragg (@AlvinBraggNYC), TWITTER (Sept. 10, 2020, 8:29 PM), <https://twitter.com/alvinbraggNYC/status/1304215413761413120?lang=en>.

⁷⁴ Victoria Law, *A Judge Dismisses the Murder Charge Against a Domestic Violence Survivor*, THE NATION (Dec. 2, 2022), <https://www.thenation.com/article/society/murder-charge-dismissed-tracy-mccarter/>.

⁷⁵ U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MANAGEMENT OF ITS FEMALE INMATE POPULATION (2018).

⁷⁶ Victoria Law, *Blind Spots: Sexual Assault Allegation Exposes Self-Policing Prison System*, THE INTERCEPT (Nov. 3, 2022), <https://theintercept.com/2022/11/03/new-york-prison-sexual-assault-prea/>.

⁷⁷ Chris Horvatits, *DA Unhappy that Convicted Murderer Will Walk out of Prison After Judge’s Order*, WIVB4 (Sept. 9, 2020), <https://www.wivb.com/news/local-news/da-unhappy-that-convicted-murderer-will-walk-out-of-prison-after-judges-order/>.

⁷⁸ See, e.g., Transcript of Sentencing Hearing, *People v. Nicole Addimando*, No. 2021-04364 (Feb. 11, 2020).

clemency, discretion is vested in the executive: the governor or the president.⁷⁹ Many executives have chosen to use that power sparingly at best. In Michigan, for example, only five women convicted of first-degree murder and sentenced to life in prison have been granted clemency in the past thirty years.⁸⁰ Over his ten years in office, former New York governor Andrew Cuomo granted commutations to just four criminalized survivors—despite the COVID-19 pandemic.⁸¹ For survivors with “bad facts”—histories of substance abuse, fighting back, being unfaithful in relationships, being angry, jealous, or “less than perfect ladies”—the likelihood of having a sentence commuted plunges.⁸²

Discretion enables police, prosecutors, courts, and executives to rely on stereotypes to dismiss the victimization claims of imperfect victims. Discretion allows law enforcement to blame victims who do not turn to the criminal legal system for assistance. Discretion creates space for judgments that the failure to leave or call police or assist with prosecution means that a victim’s story of violence is not credible. Discretion can mask implicit bias and outright racism in how police, prosecutorial, and executive power is exercised.

By leaving the basic structure of the criminal punishment system intact, reform legitimates that system and stymies more radical change. As law professor Paul Butler has argued in the context of policing, “‘successful’ reform efforts substantially improve community

⁷⁹ Ronald S. Everett & Deborah Periman, “*The Governor’s Court of Last Resort: An Introduction to Executive Clemency in Alaska*,” 28 AK. L. REV. 57, 64 (2011).

⁸⁰ Personal communication from Carol Jacobson.

⁸¹ Survived & Punished, *Cuomo, Be Accountable to Incarcerated Survivors and Grant Clemency Now*, CHANGE.ORG, <https://www.change.org/p/andrew-m-cuomo-cuomo-be-accountable-to-incarcerated-survivors-and-grant-clemency-now-9a0809dd-a4cb-4c8b-9965-9981179e358c> (last visited Jan. 8, 2023).

⁸² Mary Becker, *The Passions of Battered Women: Cognitive Links Between Passion, Empathy, and Power*, 8 WM. & MARY J. WOMEN & L. 1, 20 (2001).

perceptions about the police without substantially improving police practices. The improved perceptions remove the impetus for the kinds of change that would actually benefit the community.”⁸³ Reform expands the reach of the criminal legal system. As community organizer Woods Ervin has noted, “the prison-industrial complex—both prisons, policing, surveillance—they feed off of reform. With each iteration, they’ve gotten bigger, more deeply entrenched into our communities, and more powerful.”⁸⁴

Criminologist Jennifer Musto has argued that the growth of anti-trafficking efforts in the United States has “stretched the bounds of the carceral state in new gendered and punitive-protective dimensions.”⁸⁵ Reforms focus time, resources, and attention on the criminal legal system. Massachusetts estimates that to replace MCI-Framingham, the oldest women’s prison in the country, will cost \$50 million, in addition to the \$162,000 it costs to incarcerate one woman for one year.⁸⁶ Investing in new prisons increases dependence on the carceral system and makes the development of alternatives more difficult—money spent on prisons is not put into communities or services. Reforms are used to justify doubling down on incarceration.

⁸³ Paul Butler, *The System is Working the Way It Is Supposed To”: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75, 81 (2020).

⁸⁴ Gabriella Paiella, *How Would Prison Abolition Actually Work?*, GQ (June 11, 2020), https://www.gq.com/story/what-is-prison-abolition?mbid=synd_yahoo_rss.

⁸⁵ JENNIFER MUSTO, CONTROL AND PROTECT: COLLABORATION, CARCERAL PROTECTION, AND DOMESTIC SEX TRAFFICKING IN THE UNITED STATES 14 (Univ. Cal. Press 2016).

⁸⁶ REBECCA STONE ET AL., WOMEN, INCARCERATION AND VIOLENT CRIME: A BRIEFING IN RESPONSE TO PLANS FOR BUILDING A NEW WOMEN’S PRISON IN MASSACHUSETTS (2021)..

As Angela Y. Davis has argued, prison reform has often led to the creation of “bigger, and what are considered ‘better,’ prisons.”⁸⁷ Proposals to create gender-responsive prisons and separate prisons for transgender people—what Critical Resistance’s Rose Braz has referred to as “boutique prisons”—follow this pattern.⁸⁸ A proposal to build a gender-responsive prison in California, for example, would have meant creating the capacity to cage an additional forty-five hundred people.⁸⁹ Prison construction, in turn, feeds increased criminalization—once prisons are built, they must be filled. And, as law professor Kate Levine has observed, “if we make prisons pretty enough, people may believe that they’re something other than cages.”⁹⁰

Reforms express confidence that the criminal legal system is working—that it is creating safety, preventing violence, holding people accountable—and that it needs only a few tweaks. But there is no evidence that the criminalization of gender-based violence is doing that work.⁹¹ Policing, prosecution, and incarceration do not prevent crime and are particularly ineffective in preventing the kinds of survival-based actions taken by victims of violence.⁹² Fear and violence

⁸⁷ Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST. 212, 217 (2000).

⁸⁸ Liz Samuels & David Stein, *Perspectives on Critical Resistance*, in ABOLITION NOW! TEN YEARS OF STRATEGY AND STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX 7 (The CR10 Publications Collective ed., AK Press 2008).

⁸⁹ Morgan Bassichis et al., *Building an Abolitionist Trans and Queer Movement with Everything We’ve Got*, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 31–32 (Eric A. Stanley & Nat Smith eds., AK Press 2015).

⁹⁰ Kathryn Miller et al., *Changing the Way We See Modern Policing: Abolition or Reform*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 435, 449 (2021).

⁹¹ LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* (Univ. Cal. Press 2018).

⁹² DAVID H. BAYLEY, *POLICE FOR THE FUTURE* 3 (Oxford Univ. Press 1999); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1201 (2015).

do not prevent violence. As organizer and educator Mariame Kaba has written, “a safe world is not one in which the police keep Black and other marginalized people in check through threats of arrest, incarceration, violence and death.”⁹³ What the criminal system does efficiently and effectively is deploy violence to exert control—criminalization is “violence work.”⁹⁴ The criminal system’s violence shores up powerful economic and social interests and marginalizes communities of color, particularly poor Black communities. Reform efforts are “doomed,” Butler has argued, because “they are trying to fix a system that is not actually broken.”⁹⁵ As organizer Nadja Eisenberg-Guyot has explained, “the dehumanization and violence is the point.”⁹⁶

Preventing the punishment of survivors of gender-based violence requires that we radically reconsider our response to harms. Abolition, and specifically abolition feminism, can help us get there.

Abolition

Abolition imagines a world where the solution to social problems, including violence, is not police, punishment, and prison. Although sometimes referred to as prison abolition, closing

⁹³ Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html>.

⁹⁴ MICOL SEIGEL, *VIOLENCE WORK: STATE POWER AND THE LIMITS OF POLICE* (Duke Univ. Press 2018).

⁹⁵ Paul Butler, *The System is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75, 81 (2020).

⁹⁶ Anakwa Dwamena, *Closing Rikers: Competing Visions for the Future of New York City’s Jails*, NEW YORK REVIEW (Oct. 4, 2019), <https://www.nybooks.com/online/2019/10/04/closing-rikers-competing-visions-for-the-future-of-new-york-citys-jails/>.

prisons is only one plank of the abolitionist platform.⁹⁷ Abolition also requires moving away from a mind-set that equates punishment with justice and abandoning the tools the state uses to exercise punitive control (police, electronic surveillance, probation, parole) and those that substitute for prisons (child welfare systems, mental health facilities, civil commitment)—what journalists Maya Schenwar and Victoria Law have called “prison by any other name.”⁹⁸

Abolition contemplates the dismantling of broader structural factors—racism, heteropatriarchy, transphobia, capitalism—that contribute to oppression both within and outside of carceral systems.⁹⁹ Rather than continuing to tinker with the existing system, abolition challenges us to envision a different world entirely, a world where, Kaba has explained, “we have everything we need: food, shelter, education, health, art, beauty, clean water, and more things that are foundational to our personal and community safety.”¹⁰⁰ Most abolitionists see abolition as a process—both a goal to reach and a politics to guide our work today.

Abolition is necessarily about building.¹⁰¹ Without giving people access to the things that they need not only to survive but to thrive, abolition is impossible. That building is not just

⁹⁷ Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 U.C.L.A. L. REV. 1156, 1161 (2015).

⁹⁸ MAYA SCHENWAR & VICTORIA LAW, *PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS* (N.Y. Press 2021).

⁹⁹ ANGELA Y. DAVIS ET AL., *ABOLITION. FEMINISM. NOW.* 65 (Haymarket Books 2022).

¹⁰⁰ MARIAME KABA, *WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 2* (Haymarket Books 2021).

¹⁰¹ See, e.g., Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617 (2019) (quoting Mariame Kaba: “Prison abolition is about two things: It’s the complete and utter dismantling of prisons, policing, and surveillance as they currently exist within our culture. And it’s also the building up of new ways of relating with each other.”); *What are we talking about when we talk about “a police-free future?”*, MPD 150, <https://www.mpd150.com/what-are-we-talking-about-when-we-talk-about-a-police-free-future/#:~:text=%E2%80%9CAbolition%20is%20about%20presence%2C%20not,when%20we're%20feeling%20unc>

individual—it must be structural as well, investing in health, education, and safety, creating new and resilient institutions that deliver justice without relying on state violence. As Ervin has noted, the process of abolition is not always linear: “One shorthand we use at Critical Resistance is ‘dismantle, change, build.’ . . . They have to be happening simultaneously because they’re happening in relationship with each other, and the processes inform each other so that what you are able to build is actually in direct relationship to the community that is building it.”¹⁰² Abolition, then, is not an event but a process, where the development of alternatives to the carceral system eventually eliminates any justification for maintaining that system, what Critical Resistance has called “shrink[ing] the system into non-existence.”¹⁰³ Abolition requires that we change as well. “Our imagination of what a different world can be is limited,” Kaba has written. “We are deeply entangled in the very systems we are organizing to change. . . . We have all so thoroughly internalized these logics of oppression that if oppression were to end tomorrow, we would be likely to reproduce previous structures.”¹⁰⁴

In an abolitionist world, law professor Allegra McLeod has observed, justice “involves at once exposing the violence, hypocrisy, and dissembling entrenched in existing legal practices, while attempting to achieve peace, make amends, and distribute resources more equitably.”¹⁰⁵

[ertain](#) (last visited Jan. 8, 2023) (quoting Ruth Wilson Gilmore: “Abolition is about presence, not absence. It’s about building life-affirming institutions.”)

¹⁰² Gabriella Paiella, *How Would Prison Abolition Actually Work?*, GQ (June 11, 2020), https://www.gq.com/story/what-is-prison-abolition?mbid=synd_yahoo_rss.

¹⁰³ CRITICAL RESISTANCE, WHAT IS ABOLITION?, <http://criticalresistance.org/wp-content/uploads/2012/06/What-is-Abolition.pdf> (last visited Jan. 8, 2023).

¹⁰⁴ MARIAME KABA, *WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 4* (Haymarket Books 2021).

¹⁰⁵ Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1615 (2019).

Justice is achieved not through punishment, but by severing the relationship between harm and carceral punishment and enacting policies and practices that ensure equitable distribution of resources, repair relationships, and transform the conditions that enable harms to occur. Law can be used to create structures that enable justice to flourish, just as law now facilitates punishment and undergirds punitive institutions. Abolition requires a leap of faith. It asks us to reject the carceral system without being ready to plunk an alternative down in its place.

Abolition Feminism

Abolition feminism is, quite simply, “feminism that opposes, rather than legitimates, oppressive state systems.”¹⁰⁶ As Kaba frequently says, “Prison is not feminist.”¹⁰⁷ Abolition feminists understand the violence inherent in the carceral system and share the abolitionist commitment to rejecting punitive structures and building institutions that will facilitate safety, health, and well-being.

The abolitionist movement has deep ties to the movement to end gender-based violence. Several prominent abolitionists, including Kaba and Beth Richie, began their work in the antiviolence movement.¹⁰⁸ It was through that work that they came to appreciate the damage done by the antiviolence movement’s collusion with the state in building repressive systems to police and punish gender-based violence. They saw that intervention by the criminal legal system did not prevent harm or change society’s perception of gender-based violence.

¹⁰⁶ ALISON PHIPPS, *ME, NOT YOU THE TROUBLE WITH MAINSTREAM FEMINISM* 163 (Manchester Univ. Press 2021).

¹⁰⁷ John Duda, *Towards the Horizon of Abolition: A Conversation with Mariame Kaba*, TRANSFORM HARM (Nov. 10, 2017), https://transformharm.org/ab_resource/towards-the-horizon-of-abolition-a-conversation-with-mariame-kaba/.

¹⁰⁸ *Id.*; 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).

State intervention managed violence but did not end it.¹⁰⁹ They questioned how systems that regularly did violence to women and queer and trans people, particularly Black people, could be expected to keep victims of gender-based violence safe. They recognized the state as a serial perpetrator of gender-based violence, through policing, imprisonment, the child welfare system, and the drug treatment system.

Abolition feminists reframed the work to end gender violence, Richie has written, as “work against the patriarchal carceral state, and the architecture of racism and related forms of oppression upon which that patriarchal carceral state is built.”¹¹⁰ They agreed with abolitionist and geography professor Ruth Wilson Gilmore that “where life is precious, life is precious,”¹¹¹ which meant looking for solutions to gender-based violence that valued those who were harmed and those who did harm, held those who did harm accountable, and incorporated community responses to harm that affirmed those values.¹¹² For Richie and others it is impossible to be an antiviolence feminist without also being an abolition feminist.¹¹³

Abolition feminism demands that we end the criminalization of survival, that we no longer arrest, prosecute, convict, or cage victims of gender-based violence. While the goal is to restructure society, abolition feminism recognizes that we will have to dismantle, change, and

¹⁰⁹ ANN RUSSO, *FEMINIST ACCOUNTABILITY: DISRUPTING VIOLENCE AND TRANSFORMING POWER* 86 (N.Y. Univ. Press 2019).

¹¹⁰ 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, 262 (2015).

¹¹¹ Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAGAZINE, (April 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html>.

¹¹² *Id.*

¹¹³ Webinar: *Abolition Feminism: The Heart and Soul of Transformative Justice* (Beth E. Richie Oct. 22, 2020),

<https://nnev.zoom.us/rec/play/IR6hyv5qq-2YsxLpdzYqGWtIPb98n9b8mDLlvqVhbK6ss31hfZFjHODnuRBTk6JhUXdfbApVcMdhVVjt.Qg5SOPKQtpP6o3a7>.

build as we go. As Angela Y. Davis, Gina Dent, Erica R. Meiners, and Richie write: “Holding on to this both/and, we can and do support our collective immediate and everyday needs for safety, support, and resources while simultaneously working to dismantle carceral systems. . . . Campaigns to close jails and prisons can move forward as we continue to teach classes inside prisons and as we support restorative justice processes and organize around parole hearings.”¹¹⁴

Defunding the structures that drive criminalization—police, prosecutors, criminal courts, prisons, probation, parole—and dedicating that funding to services, programs, and people to prevent harm and ensure that all human needs are met is the core abolitionist demand. As Critical Resistance noted, the real work of abolition is done not in prisons but in battles over federal, state, and local budgets.¹¹⁵ As of 2017, the United States spent approximately \$100 billion on policing and \$80 billion on incarceration.¹¹⁶ Government funding is a zero-sum game; over time the “public safety” budgets of most cities have grown, while money for social services is increasingly scarce. Dollars that are dedicated to police and prisons are not spent on housing, education, youth programs, health care, mental health services, transportation, cash assistance for survivors of violence, economic development, community centers and green spaces, and noncarceral crisis responses.

¹¹⁴ ANGELA Y. DAVIS ET AL., *ABOLITION. FEMINISM. NOW.* 5 (Haymarket Books 2022).

¹¹⁵ Alexander Lee, *Prickly Coalitions: Moving Prison Abolitionism Forward*, in *ABOLITION NOW! TEN YEARS OF STRATEGY AND STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX* 109, 111 (The CR10 Publications Collective ed., AK Press 2008).

¹¹⁶ KATE HAMAJI ET AL., *FREEDOM TO THRIVE: REIMAGINING SAFETY & SECURITY IN OUR COMMUNITIES* 3 (Ctr. for Popular Democracy, Law for Black Lives & Black Youth Project 2017).

Shifting funding also shifts power—away from the carceral state, toward the communities who distribute those funds. Taking money away from police, prosecutors, and prisons—money that is often given to them in the name of survivors—means not arresting, coercing participation in prosecution, prosecuting, or incarcerating survivors (as victims or defendants). Putting those funds into the community would prevent the violence that ultimately leads survivors to become entrapped in the criminal system and increase the options available to those experiencing gender-based violence. Criminalized survivors have much to gain in a defunded world.

Until full defunding happens, and the criminal system is dismantled, abolition feminism instructs us to pursue “nonreformist reforms” and to use whatever tools are available to free criminalized survivors.¹¹⁷ “Reformist reforms” tinker around the edges of the criminal legal system without challenging its legitimacy.¹¹⁸ Nonreformist reforms move society closer to abolition and do not make it more difficult to dismantle oppressive systems and create replacements. Nonreformist reforms shrink the criminal legal system, free people from cages, and diminish the state’s capacity for violence.¹¹⁹ Decreasing budgets for carceral systems, ending cash bail, disarming the police, and creating community-based interventions are all examples of nonreformist reforms.¹²⁰

Abolition feminists should oppose new criminal laws that purport to make society safer while increasing the reach of the carceral state. Both in the United States and internationally,

¹¹⁷ MARIAME KABA, *WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* 13, 96 (Haymarket Books 2021).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

for example, many in the antiviolence movement are advocating for criminalizing coercive control.¹²¹ “Coercive control” refers to a constellation of behaviors used to restrain a person’s liberty and autonomy.¹²² Proponents of coercive control laws argue that the criminal law does not presently reach many forms of coercively controlling behavior, including isolation, surveillance, and emotional and economic abuse.¹²³ They contend that enacting laws criminalizing coercive control would enable the criminal legal system to respond to patterns of abuse rather than isolated incidents and increase community awareness of coercive control.¹²⁴ But criminalizing coercive control would also increase the reach of the criminal legal system, and just as previous reforms, like mandatory arrest, have been used against survivors of violence, coercive control laws are likely to be misused as well, particularly against people of color.¹²⁵

An abolition feminist response to criminalized survivors also requires the repeal of existing laws that bring survivors into the criminal legal system. For example, exempting girls and TGNC youth from prosecution for domestic violence and prostitution would prevent their criminalization. Six states have set a minimum age for enforcing laws on domestic violence.¹²⁶ The Texas Supreme Court has clarified that those younger than fourteen cannot be held

¹²¹ Julia R. Tolmie, *Coercive Control: To Criminalize or Not to Criminalize?*, 18 CRIMINOLOGY & CRIM. J. 50 (2018).

¹²² EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE* (Oxford Univ. Press 2007).

¹²³ Marilyn McMahon & Paul McGorrery, *Criminalising Controlling and Coercive Behaviour: The Next Step in the Prosecution of Family Violence?*, 41 Alt. L. J. 98, 98 (2016).

¹²⁴ Sandra Walklate & Kate Fitz-Gibbon, *Why Criminalise Coercive Control? The Complicity of the Criminal Law in Punishing Women Through Furthering the Power of the State*, 10 INT’L J. FOR CRIME, JUST. & SOCIAL DEMOCRACY 1, 3 (2021).

¹²⁵ *Id.*

¹²⁶ Iowa Code § 236.2 ; N.C. Gen. Stat. § 50B-1 ; N.J. Rev. Stat. § 2C:25-19; Okla. Stat. tit. 22 § 60.1 ; Utah Code § 78B-7-102 ; Wash. Stat. 10.99.020.

criminally liable for prostitution.¹²⁷ Five other states have passed legislation setting a minimum age for prostitution prosecution.¹²⁸ Decriminalizing sex work for everyone would prevent victims of trafficking from being arrested for prostitution and related crimes, like loitering (referred to in New York as the “Walking While Trans Ban”—“a targeted Stop & Frisk program for trans folks of color in particular”¹²⁹).

Abolition feminism supports meaningful pretrial reform. Courts make decisions in every criminal case about whether to hold people pending trial or allow them to return to the community, sometimes on their own recognizance, sometimes only if they can post cash bail or pay for electronic monitoring. Bail was meant to ensure that people would return to court; the failure to return would mean forfeiting a substantial monetary sum.¹³⁰ But in the context of gender-based violence, pretrial incarceration has become the norm.¹³¹ Particularly for those accused of intimate partner violence, judges assume that release is dangerous and either deny bail or set bail at ridiculously high levels. Although several states are considering or have

¹²⁷ *In re B.W.*, 313 S.W.3d 818 (Tex. 2010).

¹²⁸ Tamar R. Birckhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1067-68 (2011).

¹²⁹ SURVIVED & PUNISHED NEW YORK, PRESERVING PUNISHMENT POWER: A GRASSROOTS ABOLITIONIST ASSESSMENT OF NEW YORK REFORMS 27 (n.d.).

¹³⁰ Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589 (2018).

¹³¹ COLIN STARGER, *THE ARGUMENT THAT CRIES WOLFISH* (2020), [https://law.mit.edu/pub/theargumentcrieswolfish/release/2#:~:text=The%20presumption%20of%20innocence%20\(POI\),The%20Argument%20that%20Cries%20%F0%9D%98%9E%F0%9D%98%B0%F0%9D%98%AD%F0%9D%98%A7%F0%9D%98%AA%F0%9D%98%B4%F0%9D%98%A9.%22](https://law.mit.edu/pub/theargumentcrieswolfish/release/2#:~:text=The%20presumption%20of%20innocence%20(POI),The%20Argument%20that%20Cries%20%F0%9D%98%9E%F0%9D%98%B0%F0%9D%98%AD%F0%9D%98%A7%F0%9D%98%AA%F0%9D%98%B4%F0%9D%98%A9.%22).

implemented bail reform, many exclude crimes that victims of violence are frequently charged with, including domestic violence, from those reforms.¹³²

Moreover, several states are using electronic monitoring as an alternative to pretrial detention in domestic violence cases, which, while it enables people to avoid lengthy stays in jail pending trial, needlessly increases the reach of the carceral state into their day-to-day lives.¹³³ Pretrial reforms that abolish cash bail without carve-outs for certain kinds of crimes and which don't substitute e-carceration for decarceration are abolition feminist reforms. Until such reforms happen, abolition feminists should partner with organizations like the National Bail Out, which coordinates the Black Mama's Bail Out, a yearly effort to post cash bail for Black women and femmes around Mother's Day, to free criminalized survivors pending trial.¹³⁴

Survivor defense work is another component of an abolition feminist strategy. Such defense work goes back to the early days of the feminist antiviolence movement.¹³⁵ Defense campaigns tell the stories of individual survivors both to raise awareness of the individual's plight and to educate the public about how the criminal legal system stereotypes and punishes survivors, particularly people of color, low-income people, and LGB and TGNC people. Defense campaigns can include letter writing, financial support, and visits to the incarcerated person, fundraising to support the incarcerated person, public art, rallies and other organizing events, social media outreach, recruiting lawyers, court watching, pressuring prosecutors to drop

¹³² Deborah Weissman, *Gender Violence, the Carceral State, and the Politics of Solidarity*, 55 U.C. DAVIS L. REV. 801 (2021).

¹³³ Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641 (2019).

¹³⁴ NATIONAL BAIL OUT, <https://www.nationalbailout.org/> (last visited Dec. 21, 2022).

¹³⁵ EMILY THUMA, *ALL OUR TRIALS: PRISONS, POLICING, AND THE FEMINIST FIGHT TO END VIOLENCE* (Univ. Ill. Press 2019).

charges, and showing community support for an accused survivor through letters and testimony.¹³⁶

Repealing laws that disproportionately punish criminalized survivors, like felony murder and mandatory minimum sentence statutes, should be on the abolition feminist agenda. While many countries have long since abandoned felony murder (and some never had it at all), most states in the United States continue to extend liability for a death that occurs during the commission of another felony to anyone involved in that incident.¹³⁷ Felony murder “is a convenient tool for prosecutors that makes it much easier to yield convictions, since they do not have to prove the mental intent required for murder.”¹³⁸ A handful of states have either abolished or restricted the application of the felony murder doctrine in recent years.¹³⁹ Repealing felony murder laws would significantly decrease the number of criminalized survivors incarcerated for murder. A California study found that 72 percent of women serving life sentences for murder were not the killers; in almost 66 percent of cases, the woman’s partner was the actual killer, and many of those partners had been abusive.¹⁴⁰ States should also repeal their failure-to-protect laws¹⁴¹ given how those laws are used to punish criminalized survivors for the actions of their abusive partners.

¹³⁶ ALISA BIERRIA ET AL., #SURVIVEDANDPUNISHED: SURVIVOR DEFENSE AS ABOLITIONIST PRAXIS (2018).

¹³⁷ MARC MORJÉ HOWARD, UNUSUALLY CRUEL: PRISONS, PUNISHMENT, AND THE REAL AMERICAN EXCEPTIONALISM 47 (2017).

¹³⁸ *Id.*

¹³⁹ NAZGOL GHANDNOOSH ET AL., FELONY MURDER: AN ON-RAMP FOR EXTREME SENTENCING (Sentencing Project 2022).

¹⁴⁰ Lara Bazelon, *Anissa Jordan Took Part in a Robbery. She Went to Prison for Murder*, THE ATLANTIC (Feb. 16, 2021), <https://www.theatlantic.com/politics/archive/2021/02/what-makes-a-murderer/617819/>. California repealed its felony murder law in 2019 and made the law retroactive, meaning that people convicted before 2019 under the felony murder law can ask to have their sentences decreased pursuant to the new law.

¹⁴¹ Failure to protect laws hold non-abusive parents responsible for the abuse that others inflict on their children. Several failure to protect cases involving criminalized survivors, including the case of Tondalao Hall in Oklahoma,

States should roll back mandatory minimum sentence laws. Mandatory minimums disproportionately affect Black women. In Oregon, for example, Black women were three times as likely as white women to be indicted for crimes carrying mandatory minimums.¹⁴² Although some states have moved to eliminate mandatory minimums, that movement has largely been restricted to “nonviolent” offenses.¹⁴³ As with bail reform, such changes would exclude many crimes for which survivors are convicted.

Clemency is a cornerstone of abolition feminist organizing. “Some might suggest that it is a mistake to focus on freeing individuals when all prisons need to be dismantled,” Kaba has argued. “But this argument renders the people who are currently in prison invisible, and thus disposable, while we are organizing toward an abolitionist future.”¹⁴⁴ Clemency campaigns prevent people from disappearing into prisons. Parole boards and governors have the power to grant clemency to criminalized survivors but have used it sparingly.¹⁴⁵ As of 2020, Survived & Punished California estimated that there were at least 150 applications for commutation

have received significant media attention in recent years. Mark Strassmann, *Oklahoma Woman Imprisoned for Child Abuse Committed by her Boyfriend Freed After 15 Years*, CBS EVENING NEWS (Nov. 9, 2019), <https://www.cbsnews.com/news/tondalao-hall-oklahoma-woman-imprisoned-for-child-abuse-committed-by-boyfriend-freed-after-15-years-2019-11-09/>.

¹⁴² KELLY OFFICER ET AL., UPDATED MEASURE 11 INDICTMENTS, CONVICTIONS, AND SENTENCING TRENDS: 2013-2018, at 4 (Or. Crim. Just. Comm’n 2021).

¹⁴³ Elizabeth Weill-Greenberg, “It Tears Families Apart”: Lawmakers Nationwide Are Moving to End Mandatory Sentencing, THE APPEAL (April 15, 2021), <https://theappeal.org/it-tears-families-apart-lawmakers-nationwide-are-moving-to-end-mandatory-sentencing/>.

¹⁴⁴ MARIAME KABA, WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 110 (Haymarket Books 2021).

¹⁴⁵ See, e.g., Christina Greer, *Cuomo, It’s Time to Represent New York and Free Criminalized Survivors of Domestic Violence!*, NEW YORK AMSTERDAM NEWS (Nov. 21, 2019), <https://amsterdamnews.com/news/2019/11/21/cuomo-its-time-represent-new-york-and-free-crimina/>; Chris McKenna, *Supporters Urge Hochul to Free Mother of Two, in Prison for Killing her Alleged Abuser*, TIMES HERALD-RECORD (Dec. 20, 2022), <https://www.recordonline.com/story/news/state/2022/12/20/hochul-urged-to-release-poughkeepsie-mother-nikki-addimando/69734944007/>.

pending before Governor Gavin Newsome that involved victims of intimate partner violence, including Tomiekia Johnson, a former California highway patrol officer whose husband was shot and killed after he assaulted Johnson and they struggled over a gun.¹⁴⁶ Other governors have been similarly restrained. Abolition feminists should demand that they use that power.

Abolition feminists concerned about criminalized survivors should join movements to decrease the collateral consequences of conviction. In 2019 forty-three states and the District of Columbia removed a variety of penalties associated with convictions, including restoring the right to vote, serve on juries, and hold public office.¹⁴⁷ States also expanded the reach of expungement and shielding statutes (which allow people to remove some criminal charges from public records), limited the use of criminal records in occupational licensure, employment, and housing, and eliminated driver's license penalties unrelated to driving.¹⁴⁸ But obstacles remain. The process of applying for these remedies can be complicated, costly, and time intensive. Streamlined systems for accessing benefits, petitioning for restoration of rights, and eliminating convictions from the public record are essential. Abolition feminists should advocate for ending the registration of and removal of the onerous conditions placed on people convicted of sex offenses upon release. And abolition feminists should work to develop abolitionist reentry services—services that engage formerly incarcerated people in their design and delivery, understand and are attentive to the structural factors undergirding mass

¹⁴⁶ Sam Levin, "Governor, Let Me See My Kids before I Die": Pressure Mounts to Release Elderly Women from Prisons, THE GUARDIAN (June 3, 2020), <https://www.theguardian.com/us-news/2020/jun/03/california-prisons-elderly-women-clemency-coronavirus>.

¹⁴⁷ MARGARET LOVE & DAVID SCHLUSSEL, PATHWAYS TO REINTEGRATION: CRIMINAL RECORD REFORMS IN 2019 (Collateral Consequences Resource Center 2020).

¹⁴⁸ *Id.*

incarceration and how those structural factors continue to make life difficult for formerly incarcerated people after their release, are community-based, and are not entangled with carceral systems.¹⁴⁹

Closing jails and prisons is an abolitionist goal. Organizing led by directly impacted people can stop the construction of new jails and prisons. In Travis County, Texas, county commissioners were close to paying \$4.3 million for a new women’s jail. But organizers like Annette Price, a formerly incarcerated woman and the director of Grassroots Leadership in Texas, argued that the money could be spent differently, “invested in re-entry programs, mental health and behavioral health, as well as substance abuse, housing, job training, shelters for domestic violence and programs that could help support a safe community.”¹⁵⁰ After hearing from more than one hundred formerly incarcerated women and advocates, county commissioners voted to table the project for a year.¹⁵¹

In California people incarcerated in women’s prisons banded together to protest plans to build gender-responsive prisons, understanding that constructing new prisons would only expand the state’s capacity to cage people without changing the day-to-day conditions of their lives.¹⁵² Recognizing that the facilities in which people are currently held are abusive at best and inhumane at worst, abolition feminists should resist the construction of new facilities and focus

¹⁴⁹ Marina Bell, *Abolition: A New Paradigm for Reform*, 46 L. & SOC. INQUIRY 32, 45–49 (2021).

¹⁵⁰ Andrew Weber & Jerry Quijano, *Activists Call on Travis County to Say No to New Women’s Jail*, KUT 90.5 (June 7, 2021), <https://www.kut.org/crime-justice/2021-06-07/activists-call-on-travis-county-to-say-no-to-new-womens-jail?fbclid=IwAR1Xr09usyXxWV06sAqUKvmSvl4mQVEjkuk4gbEJP9pOplw545HBx7u-dTo>.

¹⁵¹ Lina Fisher, *Commissioners Court Puts Women’s Jail on Ice*, AUSTIN CHRONICLE (June 18, 2021), <https://www.austinchronicle.com/news/2021-06-18/commissioners-court-puts-womens-jail-on-ice/>.

¹⁵² CURB, HOW “GENDER RESPONSIVE PRISONS” HARM WOMEN, CHILDREN, AND FAMILIES 5 (2007).

their efforts on helping criminalized survivors get free. Abolition feminists should champion the construction of projects like Home Free, a housing complex in San Francisco designed specifically for criminalized survivors leaving prison, that can provide the stability and autonomy that people leaving prison frequently find elusive.¹⁵³

Preventing gender-based violence and offering alternatives to police, prosecution, and prison when harm occurs are also essential. Preventing violence starts by making sure everyone has what they need to live: housing, employment with a living wage, physical and mental health care, safe quality childcare, transportation. Offering alternatives to the carceral system means identifying and supporting noncarceral first responders and developing accountability processes that take harm seriously without relying on the carceral system.¹⁵⁴ Transformative justice provides a theoretical framework for these efforts. Transformative justice, Kaba has explained,

is a community process developed by antiviolenace activists of color, in particular, who wanted to create responses to violence that do what the criminal punishment systems fail to do: build support and more safety for the person harmed, figure out how the broader context was set up for this harm to happen, and how that context can be changed so that this harm is less likely to happen again.¹⁵⁵

¹⁵³ Patricia Leigh Brown, *After Lives Fraught with Pain, Housing That Says "You're Worthy,"* N.Y. TIMES (Oct. 8, 2021), <https://www.nytimes.com/2021/10/08/arts/design/san-francisco-home-free-apartments.html>.

¹⁵⁴ JUSTICE TEAMS NETWORK, *INTERRUPTING INTIMATE PARTNER VIOLENCE* (2022), https://static1.squarespace.com/static/5cf978a41393e70001434b2f/t/63688ee4f13a464e73fbbe06/1667796736528/Interrupting+IPV+%28A+PTP-JTN_FINAL-WEB%29.pdf.

¹⁵⁵ MARIAME KABA, *WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* 59 (Haymarket Books 2021).

Transformative justice recognizes the stake that each community member should have in creating and maintaining a peaceful community and builds on community experiences and strengths to create processes and institutions to support that work. Transformative justice is hard work. It requires much more from the community than deferring to the carceral state to punish. But the returns on that investment of time, effort, and other resources can be huge: prevention of violence through transforming the conditions that create violence, meaningful active accountability rather than passive punishment, people engaged in communities instead of caged in prisons.

Only abolition feminism can prevent the continued caging of criminalized survivors. But abolition feminists cannot be focused solely on survivors. Exceptionalism—asking that one group’s needs be privileged over others—confers benefits on some groups while abandoning others. As Gilmore has written, arguing that one group of people (like criminalized survivors) “don’t belong” in the carceral system “establishes as a hard fact that some people *should* be in cages. . . . And it does so by distinguishing degrees of innocence such that there are people, inevitably, who will become permanently not innocent, no matter what they say or do.”¹⁵⁶ There are no deserving and undeserving incarcerated people—almost everyone is an imperfect victim in one way or another.¹⁵⁷

¹⁵⁶ Ruth Wilson Gilmore, *Abolition Geography and the Problem of Innocence*, in *FUTURES OF BLACK RADICALISM* 234 (Gay Theresa Johnson & Alex Lubin eds., Verso 2017).

¹⁵⁷ Morgan Bassichis et al., *Building an Abolitionist Trans and Queer Movement with Everything We’ve Got*, in *CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX* 39 (Eric A. Stanley & Nat Smith eds., AK Press 2015).

Angela Y. Davis has long argued that those who work to end gender-based violence should be “on the front line of abolitionist struggle.”¹⁵⁸ Abolition is a big ask, particularly for an antiviolence movement founded on the belief that only carceral punishment would save lives and hold those who did harm accountable. There will be—there already have been—consequences for those in the antiviolence movement who question the role of policing and prosecution. Embrace, a community-based antiviolence program in rural Wisconsin, lost significant funding after posting Black Lives Matter signs at its offices; local law enforcement led the charge to defund the organization.¹⁵⁹ Several state domestic violence coalitions faced similar backlash for signing on to a statement calling for diversion of funds from the criminal legal system into communities.¹⁶⁰

Working toward abolition will take a sustained effort over a long period of time, and change may be hard to see in the short term. But preventing criminalized survivors (and others) from being harmed by the criminal legal system justifies the work. The only way to ensure that criminalized survivors are no longer punished by the criminal legal system is to eliminate that system. People created the carceral system. We can dismantle it and build something healing and liberatory in its place.

¹⁵⁸ ANGELA Y. DAVIS, *FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT* 106 (Haymarket Books 2016).

¹⁵⁹ Leah Asmelash, *A Wisconsin County Cut Funding to a Domestic Violence Shelter that Showed Support for Black Lives Matter*, CNN.COM (Oct. 20, 2020), <https://www.cnn.com/2020/10/20/us/wisconsin-embrace-police-funding-cut-trnd/index.html>.

¹⁶⁰ See, e.g., Tommy Simmons, *Law Enforcement Groups Withdraw Support of Idaho Coalition over Letter Calling for Racial Justice*, IDAHO STATE JOURNAL (Oct. 21, 2020), https://www.idahostatejournal.com/news/local/law-enforcement-groups-withdraw-support-of-idaho-coalition-over-letter-calling-for-racial-justice/article_cef47a44-5de3-55f7-9998-3f17ef458777.html.

