

# Introduction

For the last thirty years, the United States has relied primarily on one tool to combat intimate partner violence—the criminal legal system.<sup>1</sup> But that system has been ineffective in deterring intimate partner violence and has had problematic, sometimes destructive, consequences for people subjected to abuse, people who use violence, and their communities.<sup>2</sup> This book argues for taking a different path, one that incorporates economic, public health, community, and human rights policies. Decriminalizing domestic violence—deemphasizing the criminal legal system’s role in responding to intimate partner violence—will enable the United States to develop a multifaceted and, ultimately, more effective policy approach.

This story begins with women like this one:

I said “no more” when I got punched and had hair pulled out; there were big clumps in my hands. He threw chairs at me. I remember being on the floor screaming. It was a nightmare. . . .

I ran to my neighbor. She let me in which is amazing. He banged and screamed on her door until the police came twenty minutes later. . . .

The police arrived and said, “Did anything happen?” The house was in pieces; chairs were broken everywhere, and my hair was out of my head, hanging on my shoulder, and the cop said, “It looks like nothing happened.”<sup>3</sup>

Criminal laws that could have been used to address intimate partner violence had always existed, but by the 1970s those laws were inconsistently enforced in the context of intimate relationships. As one woman recounted, “[E]verytime I went to the authorities, they laughed at me stating that they, the law, would have to see my husband kill one of us before they could help.”<sup>4</sup> Rather than make futile appeals for help to police and prosecutors, antiviolence advocates created shelters and community-based services for

people subjected to abuse. In the 1980s, however, the antiviolence movement began to publicly question why intimate partner violence was not treated like other crimes and to enlist police and prosecutors in their efforts to change law enforcement policy. The turn to the criminal legal system began in earnest in 1984, when the United States Attorney General's Task Force on Domestic Violence called for strengthening the criminal legal response to intimate partner violence. Former prosecutor Jeanine Pirro, a member of the task force, explained, "We believe [intimate partner violence] is a criminal problem and the way to handle it is with criminal justice intervention."<sup>5</sup>

Since that time, enhancing the criminal legal system's response has been the primary aim of intimate partner violence law and policy. Focusing on the criminal legal response resulted from a number of factors, including the historical failure of the criminal legal system to respond to intimate partner violence, the belief that intimate partner violence is a public problem requiring a state response (rather than a private family matter), and a tendency to address all social problems by "governing through crime."<sup>6</sup> Some police officers and prosecutors were slow to accept their new roles in responding to intimate partner violence, despite the enthusiasm of the antiviolence movement for increased intervention. Recalcitrant law enforcement officers were forced to act, however, by mandatory policies adopted by states and localities. Those policies were driven by research (later questioned) on the impact of arrest on intimate partner violence, lawsuits brought by antiviolence advocates, funding incentives through the Violence against Women Act (VAWA), and the active lobbying of the antiviolence movement. Over time, police officers and prosecutors in many jurisdictions have come to embrace their role in combating intimate partner violence and often lead interdisciplinary efforts to address the issue.

Originally housed in the Violent Crime Control and Law Enforcement Act, funding through VAWA, first enacted in 1994 and reauthorized several times since, created powerful incentives for police, prosecutors, and courts to invest their time and energy in developing and implementing criminal legal interventions. Since VAWA's passage, the Office on Violence against Women has awarded \$5.7 billion in grants. The majority of that funding has been dedicated to the criminal legal system, and over time the disparity in funding between grants to the criminal legal system and those to social services has grown substantially. In 1994 62 percent of VAWA funds were dedicated to the criminal legal system and 38 percent went to social services. By 2013 social services authorizations made up only about 15 percent of VAWA grants. Fewer total dollars were devoted to social services in the

2013 iteration of VAWA than in the original 1994 legislation.<sup>7</sup> In fiscal year 2017, VAWA's two largest grant programs combined to provide \$266 million to the criminal legal system. By contrast, VAWA allocated \$30 million to housing, despite repeated studies showing that housing is the single greatest need identified by people subjected to abuse. VAWA also encouraged antiviolenace nonprofit organizations to collaborate with the criminal legal system as a condition of funding, diverting staff, resources, and attention away from other facets of the response to intimate partner violence. As a result of these law and policy initiatives, the criminal legal system is the primary response to intimate partner violence in the United States today.

Since 1984 the United States has steadfastly committed to the criminalization of intimate partner violence. That dogged persistence might be justified if the criminal legal response had proved successful. But there is reason to question whether criminal legal interventions are having an appreciable impact on intimate partner violence. Since 1994 rates of intimate partner violence in the United States have fallen—but so has the overall crime rate. From 1994 to 2000 rates of intimate partner violence and the overall crime rate decreased by the same amount. From 2000 to 2010 rates of intimate partner violence dropped less than the overall crime rate. No reliable social science data ties the drop in the rates of intimate partner violence to criminalization or to increases in funding and criminal legal system activity spurred by VAWA. Crime has declined and the funding to address intimate partner violence has increased, but the problem persists.

The turn to the criminal legal system to address intimate partner violence coincided with the rise of mass incarceration in the United States. As criminologist Beth Richie explains, "Right alongside of our evolution as an antiviolenace movement came the conservative apparatus that was deeply committed to building a prison nation. That buildup fell right into the open arms, as if we were waiting for it, of the anti-violence movement that had aligned itself with the criminal legal system."<sup>8</sup> Incarceration rates have multiplied by five times during the life of the antiviolenace movement. The United States incarcerates approximately 2.3 million people, with another 5 million under the scrutiny of parole and probation officers. While the criminalization of intimate partner violence may not have been the primary cause of the increase in incarceration in the United States, scholars have argued that the turn to criminal law to address intimate partner violence contributed to mass incarceration. Richie notes, "They took our words, they took our work, they took our people, they took our money and said, 'You girls doing your anti-violence work are right, it is a crime, and we have got something for that.'"<sup>9</sup> The numbers of people incarcerated for

intimate partner violence are substantial. In Vermont, for example, an estimated 20 percent of the state's prison population as of 2014 was incarcerated as a result of intimate partner violence.

In 2014 and 2015 criminal justice reform was at the top of the policy agenda for both progressives and conservatives. Efforts to reduce the prison population focused on releasing nonviolent criminals, primarily drug users. To make a significant dent in the prison population, however, the United States must confront the prosecution and punishment of violent criminals. About half of all prisoners are serving sentences for committing violent offenses, including murder, rape, kidnapping, sexual assault, and other forms of assault. As Marc Mauer and David Cole have explained, "Even if we released everyone imprisoned for drugs tomorrow, the United States would still have 1.7 million people behind bars, and an incarceration rate four times that of many Western European nations."<sup>10</sup>

Policymakers have been willing to discuss cutting sentences for violent offenses or paroling those convicted of violent offenses in order to shrink the prison population. But intimate partner violence is rarely part of those conversations. For example, the Sentencing Reform and Corrections Act, a bill intended to address the problem of mass incarceration in the United States, would have decreased mandatory minimum sentences for a number of crimes—but created new mandatory minimums for some crimes of interstate intimate partner violence. While mandatory minimum sentences were decreased for a number of crimes in Iowa in 2016, mandatory minimums for crimes of intimate partner violence increased. In the context of intimate partner violence, advocates and policymakers continue to be more concerned about underenforcement—how law enforcement's failure to adequately police or prosecute crimes of intimate partner violence undermines the use of criminal law to prevent or deter instances of violence. These are arguments for more criminal legal intervention, not less. And underenforcement of the criminal law, particularly in low-income communities and communities of color, is a significant concern. As law professor Alexandra Natapoff has argued, both underenforcement and overenforcement are "twin symptoms of a deeper democratic failure of the criminal justice system: its non-responsiveness to the needs of the poor, racial minorities, and the otherwise politically vulnerable."<sup>11</sup>

But activists and scholars concerned about the disproportionate impact of law enforcement interventions on marginalized communities, and skeptical about the achievements of thirty years of prioritizing the criminal legal response in the United States, have begun to consider what role the criminal legal system should play in responding to intimate partner

violence. That reassessment is driven by concerns that the criminal legal system is ineffective, focuses disproportionately on people of color and low-income people, ignores the larger structural issues that drive intimate partner violence, robs people subjected to abuse of autonomy, and fails to meet the pressing economic and social needs of people subjected to abuse. While the criminal legal system may serve some of the needs of some people subjected to abuse, it does not provide a comprehensive or effective response to the multifaceted problem of intimate partner violence.

Is the criminal legal response “working”? Working can be measured in a number of ways. Working might mean that rates of violence are decreasing, that people are being deterred from committing violence, or that deploying the criminal system has changed community norms on violence. A system can be said to work only when its response is helpful in some way and when people are willing to use that system. If people subjected to abuse are harmed rather than helped by turning to the legal system for assistance, it is not working well. When the justice needs of those the system was meant to benefit go unmet, a justice system is not fulfilling its purpose.

Intimate partner violence is a complex problem requiring a multidimensional solution. Crime is only one facet of intimate partner violence. Intimate partner violence has economic, public health, community, and human rights dimensions as well, all of which affect the experiences of people subjected to abuse. Criminalization has negative economic consequences for individuals and communities. Criminalization implicates questions of human rights and squanders funding that could be spent on public health prevention measures. Myopically pursuing criminalization as the answer to intimate partner violence undermines and diverts time, attention, and resources from untested but potentially successful strategies for deterring and responding to intimate partner violence. The failure to address any one facet of the problem complicates and magnifies the damage that intimate partner violence can do. The criminal legal response cannot address all of the facets of intimate partner violence—indeed, no one solution could do so. But relying primarily on the criminal legal system to respond to intimate partner violence has displaced serious policy attention to and funding for these other dimensions of the problem.

What kind of problem, then, is intimate partner violence? Both demographically and conceptually, intimate partner violence is a gender problem. According to the United States Centers for Disease Control and Prevention, 36 percent of women and 29 percent of men experience rape, stalking, or physical assault at the hands of a partner during their lifetimes. These statistics (and studies on men’s and women’s use of violence) have bolstered

the claim that intimate partner violence is gender symmetrical: that women and men are violent and experience violence in roughly equal measures. But intimate partner violence is quite different for men and women. Women are much more likely than men to experience overlapping forms of abuse (stalking, sexual violence, and physical violence); most men experience only physical violence. Women are almost twice as likely as men to be subjected to severe physical violence. While men are most often hit with a fist or kicked, women experience a range of violent victimizations, including having their hair pulled, being strangled or suffocated, beaten, or attacked with a knife or a gun, in addition to being hit with a fist or kicked. Moreover, intimate partner violence has a more significant impact on women's daily lives. Twenty-nine percent of women report that intimate partner violence has caused them to be fearful or concerned for their safety, experience posttraumatic stress disorder (PTSD), miss more than a day of work, or has created a need for services including health care, housing, or legal assistance. Nine percent of men are similarly affected.<sup>12</sup> Treating intimate partner violence as a crime has also had gendered consequences (for example, the increase in arrests of women following the adoption of mandatory arrest policies described in chapter 2).

Conceptually, intimate partner violence has long been seen as a gender problem. The earliest theories on intimate partner violence held that the unions of masochistic women and abusive men produced intimate partner violence. The antiviolence movement of the 1970s and 1980s (originally called the battered women's movement) began as a response to violence against women, and early law and policy initiatives were specifically intended to benefit women. The movement characterized intimate partner violence as a means of "reinforc[ing] male dominance and female subordination within the home and outside it. In other words, violence against women . . . is a part of male control. It is not gender neutral any more than the economic division of labor or the institution of marriage is gender neutral."<sup>13</sup> The state's failure to intervene to prevent intimate partner violence bolstered those patriarchal norms. More recent scholarship argues that intimate partner violence by men reflects the impact of toxic masculinity on the socialization of men. The use of violence in intimate relationships (and other contexts) is a predictable occurrence in a society in which stereotypical masculinity is highly valued and in which violence is strongly associated with masculinity.

Gender is also at play when intimate partner violence occurs in the relationships of lesbian, gay, bisexual, and transgender (LGBT) people. Intimate partner violence is a significant problem in the relationships of LGBT

individuals. Law professor Adele Morrison has argued that victimization is gendered female and violence is gendered male, regardless of the biological sex of the person who is victimized or uses violence.<sup>14</sup> But law enforcement officers often dismiss violence between same-sex partners as mutual, regardless of the elements of coercive control that may be at play in the relationship. In those cases, violence against gay men is seen as a fight among equals; lesbian battering is dismissed as a “cat fight.”

For transgender individuals, violence is gendered along a number of dimensions. Violence against transwomen or by transmen can serve to reinforce traditional notions of patriarchal power within trans relationships. Violence can also be used to police binary gender roles and to punish “transgressions” of gender norms. For example, offenders rape transmen to send the message that despite identifying and presenting as men, because they can be raped, they are still vulnerable to violence, and therefore, considered female. Finally, violence can reinforce stereotyped renditions of gender identity, with transmen using violence to assert their masculinity and transwomen perceiving themselves as more feminine because they are being abused.

But the fact that intimate partner violence is gendered, and in many ways gendered female, does not mean that it affects all women the same way. Women’s experiences of violence vary tremendously by race, ethnicity, socioeconomic status, and disability. The interplay of women’s identities creates and reinforces the oppression that they experience as a function of intimate partner violence, a concept known as intersectionality. Intersectionality transformed the discourse of the antiviolence movement. The early battered women’s movement was largely driven by and built around the norms and needs of white middle-class women. Their faith in the deterrent power of criminal law spurred the drive to treat intimate partner violence as a criminal matter. From the beginning of the antiviolence movement women of color foresaw the problems that criminalization would create for their communities, but those concerns went largely unheeded in the rush to institutionalize criminalization in law and policy.

While the antiviolence movement has embraced the language of intersectionality, it has failed to work to change laws and policies on criminalization that disproportionately negatively impact low-income people, people of color, lesbians, transwomen, and other marginalized communities. Women of color and other representatives of marginalized communities have repeatedly questioned whether the policy choices made by the antiviolence movement contemplated or comprehended their unique needs, identities, and positions. Reconsidering criminalization could help us to

better understand the ways in which policy choices around intimate partner violence affect various communities and, ultimately, could transform law and policy so that it better meets the needs of the most marginalized people subjected to violence.

As questions are raised about how best to address the problem of mass incarceration and as criticism of the criminal legal response to intimate partner violence increases, the time is ripe to seek alternatives to the criminalization of intimate partner violence. Some antiviolence advocates are asking whether decriminalizing intimate partner violence might be not only possible but necessary if other responses to intimate partner violence are to be explored. As law professor Angela Harris has asked, "If reliance on the criminal justice system to address violence against women and sexual minorities has reached the end of its usefulness, to where should advocates turn next?"<sup>15</sup> The conversation about alternatives to criminalization in the context of intimate partner violence could also be part of the solution to mass incarceration. Decriminalizing domestic violence might provide a starting point for rethinking incarceration as the default response to violent crime in the United States.

This book will argue that existing research does not justify the United States' continued investment in criminalization as the primary response to intimate partner violence. Criminalization does little to prevent intimate partner violence. What it accomplishes comes at a substantial cost. Criminalization has failed to deter intimate partner violence. The criminal legal system harms some of those it was meant to protect and exacerbates the conditions that contribute to intimate partner violence.

Chapter 1 offers a brief history of the criminalization of intimate partner violence. After considering the benefits and critiques of criminalization, the chapter asks whether criminal law theory justifies the criminalization of intimate partner violence. Chapter 1 concludes that the theoretical basis for criminalizing intimate partner violence is weak at best, and that a persuasive case could be made for decriminalizing intimate partner violence.

If not primarily a problem for the criminal system, what kind of problem is intimate partner violence? Chapter 2 argues that intimate partner violence is an economic problem, imposing substantial costs on the economy, on people subjected to abuse, and on people who perpetrate violence. The chapter examines the relationship between economics and intimate partner violence, explains how impeding access to economic resources limits the autonomy of people subjected to abuse, and explores the link between economics and perpetration of violence. Finally, the chapter considers the structural economic factors that exacerbate intimate partner violence.



Chapter 3 looks at intimate partner violence from a public health perspective. Because intimate partner violence is associated with a host of adverse health consequences, eradicating that violence has clear health benefits. The public health approach views intimate partner violence as a preventable problem and sites prevention efforts at multiple levels across the social ecology—individual, relationship, community, and societal. Chapter 3 documents primary, secondary, and tertiary prevention efforts involving engagement with men and adolescents and explains how preventing adverse childhood experiences could significantly decrease intimate partner violence. Chapter 3 concludes with a look at how population level interventions could also prevent intimate partner violence.

Chapter 4 views intimate partner violence through the lens of community, surveying the research on the relationship between community characteristics and intimate partner violence. The chapter examines the links between social supports and collective efficacy and intimate partner violence. The chapter discusses a range of community-based responses to intimate partner violence, including community organizing, community accountability, and community-based justice, and argues that community-based responses could shift societal norms around intimate partner violence and provide meaningful justice for people subjected to abuse.

In chapter 5 intimate partner violence is cast as a human rights problem. The chapter explains the legal framework of international and regional agreements governing state responses to intimate partner violence and the specific rights safeguarded by those documents. The chapter introduces the concept of due diligence, which requires governments to intervene positively to prevent, protect, prosecute, punish, and provide redress in cases of intimate partner violence and explores how that concept has been actualized in case law and policy. The chapter also considers the relationship between human rights and the criminalization of intimate partner violence and looks at how international human rights norms have been applied to intimate partner violence in the United States. Finally, the chapter argues that using a human rights lens would foster the development of multidimensional solutions to the problem of intimate partner violence.

Intimate partner violence is an economic problem, a public health problem, a community problem, and a human rights problem. And despite the fact that a strong argument can be made for decriminalizing intimate partner violence, intimate partner violence remains a criminal problem as well. Policies seeking to curb intimate partner violence must, therefore, address each of these areas (and more). Chapter 6 offers a vision of what a balanced policy approach to intimate partner violence would look like. Chapter 6

suggests new laws addressing economic abuse and programs designed to put financial power into the hands of people subjected to abuse. Using a public health framework, it argues for a shift in focus from punishment to prevention and considers the laws and policies that would undergird such a shift. Chapter 6 calls for the development of community-based alternatives both to prevent and confront intimate partner violence, reallocating responsibility for redressing violence from the state to the community. The chapter considers what tools will be necessary to inculcate human rights norms against intimate partner violence in the United States. It also advocates for a diminished role for the criminal legal system in responding to intimate partner violence, making the criminal system the response of last resort in those cases where no other measure can meet the justice needs of the person subjected to abuse and rejecting criminal policies that exacerbate intimate partner violence. Chapter 6 concludes with suggestions for starting the movement toward decriminalization.

Because intimate partner violence is a multifaceted problem, sometimes the strategies to respond to it will overlap. Economic and community-based solutions are important in and of themselves, but may also act as a form of primary prevention in the public health sense of that term. Strategies will also be mutually reinforcing. The existence of (more limited and less brutal) criminal legal interventions serves as a backstop for community accountability and community justice strategies; the criminal system should be available in situations where no other policy intervention will prevent further violence. Community-based strategies are unlikely to successfully stem intimate partner violence in low-income communities if persistent poverty and neighborhood disadvantage, which mitigate the impact of community interventions, are not addressed. Therefore, economic justice is an essential component of empowering communities. Moreover, the policy prescriptions for confronting intimate partner violence are not simple. Promising interventions will have downsides and drawbacks. Before embracing any policy initiative, we need to have a clear understanding of its benefits and detriments and assess who is helped and who is harmed by the policy.

There is no one-size-fits-all solution to the problem of intimate partner violence. Intimate partner violence law and policy should expand the range of options and solutions available to people subjected to abuse and to people who use violence, enabling them to access the supports and programs that meet their individual needs. The overreliance on criminalization tips the programmatic and policy scales in ways that are harmful to people subjected to abuse, their partners, their families, and their communities and

prevents the development of a menu of options. A balanced policy approach, one that is attuned to the needs of the most marginalized people subjected to abuse and creates a range of alternatives, might achieve what criminalization has failed to provide—a meaningful reduction in intimate partner violence in the United States.