

Response to *Prisoners of Politics*: Decarceration Will Cost Women's Lives

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INTRODUCTION

In *Prisoners of Politics*, Professor Rachel Barkow argues that the mass incarceration of large swaths of criminals is the product of misguided reactionary public policies that fail to consider research showing that incarceration is ineffective and even harmful to society. She has a point, especially for crimes such as the sale of illegal drugs when people become involved because they struggle with addiction or simply because there is no alternative legal way for them to earn a living wage.¹ It makes sense not to incarcerate people who are sick or just need a good job. But applying a non-carceral approach to all crimes and all criminals conflicts with research showing that tough prosecution policies work well to reduce violent crime.² Regardless of the efficacy of non-carceral policies in some cases, Professor

* Adjunct Professor of Sexual Violence & Law Reform and Director of the Women's and Children's Advocacy Project at New England Law | Boston. I am grateful to my family for their patience when I became immersed in writing this article, and to Amanda Bray, Jessica Landry, Brooke Tideman, and Danielle Commisso for their support and research help. I also want to thank all the advocates, academics, researchers, and victims who bravely resist enormous political pressure to support the idea that abused women should want a weaker law enforcement response. As I discuss below, since the founding of our nation, women have been denied full Equal Protection rights under the Fourteenth Amendment, which means they are not yet entitled to equal treatment by police or prosecutors, or equal enforcement of the laws in court. This constitutionally authorized second-class citizenship is the primary reason women experience such high rates of violence and abuse. Before women can endorse the idea of decarceration, or any other policy that would weaken law enforcement's response to domestic violence, they have a right to experience the benefits of fully equal protection and enforcement of all laws that are supposed to protect them from harm.

¹ See generally ALYSSA STRYKER, RETHINKING THE "DRUG DEALER" 45 (2019), <https://perma.cc/58CQ-XSEH>.

² See Elizabeth Glazer, *Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime*, 26 FORDHAM URB. L. J. 573, 580 (1999).

Barkow herself would probably resist applying a non-carceral policy to police who unlawfully shoot unarmed Black men even if research showed that an alternative to incarceration would protect public safety and deter similar offenses in the future. I feel similarly about applying a non-carceral policy to violence against women.

My review is not a criticism of the idea that public officials should consider alternatives to incarceration when methodologically valid science shows that a different approach will protect public safety and deter crime. I agree that alternatives are a good idea for some cases, but Professor Barkow ignores a wealth of scholarly research showing that incarceration and other strong law enforcement responses *are* effective—often life-saving—solutions for domestic violence crimes.³ Thus, my review focuses on the impact of non-carceral policies in the context of violence against women.

I. Violence Against Women Is Fueled by Women’s Inequality and Deserves Special Attention

A simple review of Professor Barkow’s index suggests a lack of concern for abused women. It has no categories for “women,” “rape,” or “domestic violence.” In fact, when Professor Barkow mentions victimized women in certain places in the book, it is sometimes with derision. For example, she writes that “victims’ groups tend to focus on certain subgroups, such as women and children, and they often highlight cases involving white victims instead of the far more frequently victimized communities of color.”⁴ This derogatory sentence stands without citation and suggests, curiously, that victims’ groups should not focus on women and children as “subgroups.” I find this odd. As I establish later in this paper, women suffer violent harm *because* they are women. Pejorative labeling of groups that seek to recognize the class-based nature of their suffering as needless “subgrouping” is like criticizing the Anti-Defamation League for focusing on violence against Jews. People who are targeted for violence because of who they are in society have a right and a need to unite, politically and otherwise, in support of one another, and in opposition to the social and legal conditions that produce their suffering.⁵

³ See BARRY GOLDSTEIN, *THE QUINCY SOLUTION: STOP DOMESTIC VIOLENCE AND SAVE \$500 BILLION* 47–50 (2014) (discussing that the “major elements of the Quincy Model that led to a dramatic reduction in domestic violence and other crimes were strict enforcement of criminal laws and protective orders, practices that made it easier for victims to leave their abusers”).

⁴ RACHEL BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 114 (2019).

⁵ See generally CRESSIDA HEYES, *Identity Politics*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*

In another section on “Policing Prosecutors,” Professor Barkow bemoans the fact that police in the fifty-two largest cities in America arrested fewer homicide suspects when the victim was Black compared to when the victim was white.⁶ This is a worthy observation, and it would have been a perfect place for Professor Barkow to also point out that police arrest fewer crime suspects when the victim is a woman,⁷ but she says nothing about the way the criminal justice system discriminates against women by failing to address sex-based crimes fairly and effectively. Professor Barkow should care that every day in the United States an average of five females are killed by males,⁸ a number almost twice as high as it was thirty years ago.⁹ On the same page, Professor Barkow compares police “solve” rates on murder, rape, and robbery, and writes that “more than 59% of murders are solved, [but] only about 37% of rapes and 30% of robberies are [solved].”¹⁰ This statement suggests that some form of justice occurred for the 37% of rapes that were “solved,” and that rape is successfully addressed by law enforcement 37% of the time. In fact, one study found that only around 12% of rapes led to arrest and only 10% to prosecution.¹¹ The RAINN organization estimates that less than 3% of rapists serve even one day behind bars—¹² a number that has not changed in decades.

Professor Barkow even expresses concern about non-carceral restraints on the liberty of convicted sex offenders as a result of laws that restrict where

(Edward N. Zalta ed., 2020 ed.), <https://perma.cc/X2CT-3XRL>.

⁶ BARKOW, *supra* note 4, at 161.

⁷ See MELISSA MORABITO ET AL., DECISION MAKING IN SEXUAL ASSAULT CASES: REPLICATION RESEARCH ON SEXUAL VIOLENCE CASE ATTRITION IN THE U.S. 17 (2019), <https://perma.cc/V327-AEY6> (summarizing that only 12% of rape cases reported by female victims to the Los Angeles Police Department from 2005 to 2009 led to arrests, and only 10% resulted in the filing of criminal charges).

⁸ See Dawn Wilcox, *2018 Women & Girls Allegedly Killed by Men & Boys*, WOMEN COUNT USA: FEMICIDE ACCOUNTABILITY PROJECT (2018), <https://perma.cc/PY2J-9S3V> (identifying 1,864 women and girls allegedly killed by men and boys in the U.S. in 2018; 1,841 divided by 365 is 5.10).

⁹ But see James Alan Fox & Emma E. Fridel, *Gender Differences in Patterns and Trends in U.S. Homicide, 1976-2015*, 4 VIOLENCE AND GENDER 37, 39–40 (2017) (“[H]omicides involving females have been much more stable over time, exhibiting a general decline with relatively minor fluctuations since the late 1970s.”).

¹⁰ BARKOW, *supra* note 4, at 161.

¹¹ See MORABITO ET AL., *supra* note 7, at 17.

¹² See *The Criminal Justice System: Statistics*, RAINN, <https://perma.cc/KH3H-XU9V> (last visited Apr. 11, 2022) (noting that for every 1,000 sexual assault cases, only 310 are reported to the police, and only 25 perpetrators will be incarcerated).

they live and require them to register with the state as sex offenders.¹³ But she says nothing about the serious restraints on liberty suffered by thousands of battered women living in secret shelters because the men who pose a threat to their lives are walking free in society. Is it not worth mentioning in a book about unjust restraints on liberty that battered women who have committed no crimes are forced to live in conditions of incarceration *because* the men who pose a risk to their lives are *not* incarcerated?

In another section entitled “The Constitution in Waiting,” Professor Barkow writes at length about the various ways that courts have interpreted the Constitution such that it inadequately protects the rights of the accused.¹⁴ Again, this is an important topic, but she never mentions the profoundly significant way that the Constitution authorizes inadequate protection of women in all areas of life by denying them full Equal Protection of the laws under the Fourteenth and Fifth Amendments. Women were excluded as “persons” from the Fourteenth Amendment’s guarantee of Equal Protection when the Amendment was adopted in 1868,¹⁵ which left courts free to treat women as second-class citizens subject to different and worse treatment under all laws, including laws against sexual and domestic violence. When women were finally recognized as persons for Equal Protection purposes in 1971, the Supreme Court qualified its ruling and held that the Equal Protection clause would provide lesser rights for women compared to other people in that sex discrimination claims would be subject to mere “rational basis” review by courts, while others would have their discrimination claims reviewed under the more protective standard of “strict scrutiny.”¹⁶ Things improved slightly for women in 1976, when the Supreme Court elevated the judicial review standard for women to “intermediate scrutiny,” which was

¹³ BARKOW, *supra* note 4, at 179.

¹⁴ BARKOW, *supra* note 4, at 187–91.

¹⁵ See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (ruling that Fourteenth Amendment’s Equal Protection guarantee extended to “race, color, or nationality,” but not sex); *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879) (holding that the Fourteenth Amendment’s Equal Protection guarantee was “primarily designed” for the “colored race”), *abrogated by* *Taylor v. Louisiana*, 419 U.S. 522 (1975). Note that the Supreme Court eagerly embraced, discussed, and applied the Equal Protection Clause to *Strauder’s* and *Yick Wo’s* discrimination cases, but completely ignored it and applied only the Privileges and Immunities Clause a few years earlier when addressing two women’s claims of sex discrimination in *Bradwell v. Illinois*, 83 U.S. 130 (1873) and *Minor v. Happersett*, 88 U.S. 162 (1874). This different and worse treatment of women by the Supreme Court made clear that women were intentionally denied Equal Protection rights under the Fourteenth Amendment, even though such rights were granted to “persons.”

¹⁶ See *Reed v. Reed*, 404 U.S. 71, 76 (1971).

better than “rational basis” review,¹⁷ but much less protective than “strict scrutiny.”

“Strict scrutiny” requires courts to strike as unconstitutional laws and policies that do not serve a “compelling” government interest, that are not “narrowly tailored” to serve that interest, and that fail to use the “least restrictive means” to accomplish the government’s goal.¹⁸ Under “intermediate scrutiny,” the government’s interest need only be “important,” not compelling, and the “narrow tailoring” and “least restrictive means” tests do not apply.¹⁹ The “narrow tailoring” and “least restrictive means” tests are crucial aspects of “strict scrutiny,” but because they do not apply to sex discrimination, the government may enact laws and adopt policies that subject women to different and worse treatment.²⁰ This

¹⁷ See *Craig v. Boren*, 429 U.S. 190, 197–99 (1976).

¹⁸ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 529 (1997).

¹⁹ *Id.*; see *Craig*, 429 U.S. at 197–99.

²⁰ “Intermediate scrutiny” applies to sex/gender and illegitimate children (and LGBTQ persons according to some courts, though this is unsettled). In 1996, *Craig’s* intermediate standard was described by the Supreme Court as an “exacting” standard that requires the government to demonstrate an “exceedingly persuasive justification” for sex-discriminatory laws or policies. *U.S. v. Virginia*, 518 U.S. 515, 524, 533 (1996). While “exceedingly persuasive” was thought to be better than *Craig’s* “substantially related” test (*but see* National Org. for Marriage v. McKee, 649 F.3d 34, 56 (1st Cir. 2011) (holding that “exacting scrutiny” only requires proof of “substantial relation” not “exceedingly persuasive justification”), *abrogation recognized by* Gaspee Project v. Mederos, 13 F.4th 79, 84–85 (1st Cir. 2021)), there remain no requirements of “narrow tailoring” and “least restrictive means” (*but see* Americans for Prosperity Found. v. Bonta, 141 S.Ct. 2373, 2384 (2021) holding that “narrow tailoring”—but not “least restrictive means”—is required under “exacting scrutiny” in First Amendment disclosure law cases), and the government’s interest still need only be “important” rather than “compelling,” which leaves a lot of room for discrimination. Moreover, the “exceedingly persuasive justification” rule did not last long in Supreme Court jurisprudence after *Virginia*, because the Supreme Court ignored it entirely only a few years later in *Nguyen v. INS*, 533 U.S. 53, 58–59 (2001), where it required no proof from the government of “exceedingly persuasive justification” in a sex classification case. More recently, the Supreme Court decided *Sessions v. Morales-Santana*, 137 S.Ct. 1678 (2017), in which the “exceedingly persuasive justification” language reappeared, but the Court did not overturn *Nguyen*; it simply distinguished *Nguyen* on the grounds that the type of sex classification at issue in *Morales-Santana* was different. *Id.* at 1698. Because the Court in *Morales-Santana* denied relief, the reintroduction of *Virginia’s* “exceedingly persuasive justification” language is mere dictum. Regardless of whether “exceedingly persuasive justification” is presently a requirement under “intermediate scrutiny,” the “exacting scrutiny” modification of “intermediate scrutiny” that women “won” in *Virginia* afforded women very little in terms of improved protections for their Equal Protection rights because *Virginia* added no requirement that the government “narrowly tailor” laws and policies and use the “least restrictive means” to achieve its goal.

means government officials—including lawmakers, police, prosecutors, and even the courts—have constitutional permission to subject women to second class treatment.

Women today remain second class persons under the Equal Protection clause because the Supreme Court has yet to grant them “strict scrutiny” review, and the Equal Rights Amendment, which would require “strict scrutiny” for women,²¹ has yet to be adopted and validated.²² A book about constitutionally unfair and inadequate treatment of human beings should include this vital information about half the population in the United States.

II. The Prevalence of Violence Against Women and the Failure of the Criminal Justice System

It is axiomatic that denying women full Equal Protection rights causes them to suffer high rates of violence and abuse.²³ Approximately ten million people per year experience domestic violence.²⁴ Women are much more likely to be victims of serious domestic violence than men.²⁵ Among the five females estimated to be killed each day by males in the United States in 2018, 92% were killed by males they knew.²⁶ The rate of male homicidal violence against females has increased since 2014.²⁷ Since many battered women are also raped by their batterers, it is significant that 90% of adult rape victims

²¹ See *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring) (noting that adoption of the ERA would require courts to treat sex as a suspect classification subject to strict scrutiny review by the courts).

²² Chris Marr, *Equal Rights Amendment Backers Sue to Void Deadline*, BLOOMBERG LAW (Jan. 7, 2020, 10:34 AM), <https://perma.cc/HW4Z-E5DP>.

²³ See In-Depth Study on All Forms of Violence Against Women, GAOR, 61st Session No. 122 (Add. 1), at 14, 27, 102, U.N. Doc. A/61/122/Add. 1 (2006), <https://perma.cc/T6XY-HVEK> (arguing that inequality is the root cause of violence against women); see also *Mobilizing Greater Global Investment in Gender Equality and Women’s Empowerment*, U.N. WOMEN (Apr. 17, 2015), <https://perma.cc/V3F5-X6NV>.

²⁴ *National Coalition Against Domestic Violence*, NCADV, <https://perma.cc/ARG7-F93U> (last visited Apr. 11, 2022).

²⁵ See SHARON G. SMITH ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010-2012 STATE REPORT 126–27 (2017), <https://perma.cc/BT5R-43Q2> (noting that more than 1 in 4 women experienced violence or stalking by an intimate partner during their lifetime as compared to 1 in 9 men); Irene Hanson Frieze & Angela Browne, *Violence in Marriage*, 11 CRIME & JUST. 163, 181 (1989).

²⁶ VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2018 HOMICIDE DATA 3 (2020), <https://perma.cc/6TJZ-GQM2>; see Wilcox, *supra* note 8.

²⁷ VIOLENCE POLICY CTR., *supra* note 22, at 2.

are female,²⁸ and males account for most of those arrested for forcible rape.²⁹ In line with these data, the United States is ranked among the ten most dangerous nations on earth for women, and third most dangerous for sexual violence, tied with Syria.³⁰

Without full Equal Protection rights, women do not receive effective response or redress from the state when they report domestic violence. In one study on family violence incidents involving children, only half of the domestic violence cases reported led to arrest, and only one in four of those arrested was convicted.³¹ Overall, only 2% of the cases led to incarceration.³² Approximately less than 3% of sexual assault perpetrators spend even one day behind bars.³³

Given the woeful systemic response to violence against women, it is not surprising that women are reluctant to call police, and when they do, recantation is common, occurring in 80% of cases.³⁴ While victims recant for many reasons, a typical explanation is that they believe it is their safest option³⁵ and that the courts will take no effective steps to protect them.³⁶ In turn, reporting rates go down and rates of violence go up.³⁷ Not surprisingly, some victims of domestic violence take matters into their own hands, even killing their abusers and ending up incarcerated themselves, because they see no meaningful alternative.³⁸ It is a cruel irony that women are being

²⁸ *Victims of Sexual Violence: Statistics*, RAINN, <https://perma.cc/6TKG-CJQC> (last visited Apr. 11, 2022).

²⁹ See U.S. Dep't of Justice, Fed. Bureau of Investigation, *Crime in the United States 2011*, FBI: UCR, <https://perma.cc/L3V6-ZY5S> (last visited Apr. 11, 2022) (noting in 2011, males accounted for 98.9% of those arrested for forcible rape).

³⁰ Belinda Goldsmith et al., *Exclusive: India Most Dangerous Country for Women with Sexual Violence Rife – Global Poll*, REUTERS (June 25, 2018, 8:39 PM), <https://perma.cc/MX2L-NSF6>.

³¹ See Sherry Hamby et al., *Intervention Following Family Violence: Best Practices and Help Seeking Obstacles in a Nationally Representative Sample of Families with Children*, 5 PSYCHOL. OF VIOLENCE 325, 330 (2015), <https://perma.cc/4FMG-2R5A> (noting that of the 130 incidents known to police in the study, 61 arrests were made, resulting in 16 convictions).

³² *Id.*

³³ See *The Criminal Justice System: Statistics*, *supra* note 12.

³⁴ Joan S. Meier, Davis/Hammon, *Domestic Violence, and the Supreme Court: The Case for Cautious Optimism*, 105 MICH. L. REV. FIRST IMPRESSIONS 22, 25 (2006).

³⁵ See LUNDY BANCROFT ET AL., *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 99 (2d ed. 2011).

³⁶ See DONNA COKER ET AL., *RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING* 2, 7–8 (2015), <https://perma.cc/QF66-54WK>.

³⁷ Cf. Emma Keith et al., *Lack of Trust in Law Enforcement Hinders Reporting of LGBTQ Crimes*, CENTER FOR PUB. INTEGRITY (Aug. 24, 2018), <https://perma.cc/37G8-DVNG>.

³⁸ See Starre Vartan, *Killing Your Husband to Save Yourself*, PAC. STANDARD (Oct. 16, 2014),

incarcerated for killing their abusers as a direct result of the men who abused them not being held accountable.

III. The Importance of Law Enforcement

The criminal justice system's pervasively inadequate response to violence against women is profoundly important, and while some of the data that demonstrates the benefits of tough prosecution policies in battering cases is not new, recent data from Russia makes clear that decarceration is a dangerous idea for the crime of domestic violence. In 2017, Russia passed a law decriminalizing domestic violence for offenses that result in bleeding or bruising, but do not cause substantial bodily harm such as broken bones or a concussion.³⁹ Such crimes are now considered administrative offenses and are subject to no more than fifteen days behind bars, or a fine, where previously such offenses were designated as crimes that carried up to two years of incarceration.⁴⁰ This decriminalization of domestic violence was followed by an increase in domestic violence,⁴¹ and was cited as a key basis for an action filed against the Russian Government, on behalf of a domestic violence victim, with the European Court of Human Rights ("ECHR") under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms.⁴² The ECHR agreed that the 2017 law caused a sharp drop in reporting⁴³ and was a move "in the wrong direction" that has led to "impunity for perpetrators," and the ECHR concluded that the legislation has failed to protect women from "widespread violence and discrimination."⁴⁴ The 2017 law was also cited as a reason why one abuser chopped off his wife's hands only days after police responded to her reports of abuse by merely admonishing the man,⁴⁵ and three sisters killed their abusive father in 2018.⁴⁶ In 2018, Russia's top human rights official called decriminalization a "mistake" and said new legislation was needed to

<https://perma.cc/BW5A-R3ST>.

³⁹ Madeline Roache, *What Happened After Russia Decriminalised Domestic Abuse*, NEW HUMANIST (June 11, 2018), <https://perma.cc/R7LJ-UXKS>.

⁴⁰ Shaun Walker, *Putin Approves Legal Change That Decriminalizes Some Domestic Violence*, GUARDIAN (Feb. 7, 2017, 11:18 AM EST), <https://perma.cc/PQH8-PX2R>.

⁴¹ U.N. Committee Sides Against Russia in First Domestic Violence Ruling, MOSCOW TIMES (Apr. 12, 2019), <https://perma.cc/2PU9-8M9F>.

⁴² *Volodina v. Russia*, no. 41261/17, ¶¶49–50, ECHR 2019, <https://perma.cc/7ZNM-458E>.

⁴³ *Id.* ¶120.

⁴⁴ *Id.* ¶131.

⁴⁵ *Id.* ¶45.

⁴⁶ Anastasia Clark, *Russian Court Orders Tighter Laws to Stem Domestic Violence*, MOSCOW TIMES, <https://perma.cc/M3GV-BDFA> (last updated Apr. 9, 2021).

combat domestic violence.⁴⁷ The experience in Russia is consistent with other data including a major multinational study that found the mere existence of criminal laws that carry punitive sanctions has strengthened women's rights and helped to combat all forms of violence against women.⁴⁸

Professor Barkow nowhere mentions what happened in Russia after 2017, and nothing in her book acknowledges the following research and scholarship that demonstrate why a strong law enforcement response to domestic violence, including incarceration, is vital to women's safety and literally saves lives:

A. *Arrests, Strong Law Enforcement Policies, and Recidivism*

1. The prevalence of re-offending for arrested offenders is half as frequent compared to non-arrested offenders.⁴⁹
2. A meta-analysis of the findings from six studies found a deterrent effect from arresting batterers.⁵⁰
3. A study of 3,495 incidents from 1987 to 2003 found a statistically significant deterrent effect from arresting batterers.⁵¹
4. A study of 5,466 couples in Seattle, Washington, found that arresting batterers was associated with statistically significant reductions in both the prevalence and frequency of future incidents of physical abuse.⁵²
5. A study of sanctions for batterers between 1984 and 2005 found that more severe sanctions for batterers were associated with lower rates of recidivism.⁵³
6. When police intervene in domestic violence cases, regardless of

⁴⁷ *Decriminalization of Domestic Violence Was a "Mistake," Russian Official Admits*, MOSCOW TIMES (Dec. 3, 2018), <https://perma.cc/AY8C-NAWB>.

⁴⁸ See Andrew Morrison et al., *Addressing Gender-Based Violence: A Critical Review of Interventions*, 22 WORLD BANK OBSERVER 25, 33, 35 (2007).

⁴⁹ See LAWRENCE W. SHERMAN & RICHARD A. BERK, THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT 1, 6 (1984), <https://perma.cc/L3YQ-KTHW>.

⁵⁰ David B. Sugarman & Sue Boney-McCoy, *Research Synthesis in Family Violence: The Art of Reviewing the Research*, 4 J. AGGRESSION, MALTREATMENT & TRAUMA 55, 66–69 (2000).

⁵¹ Hyunkag Cho & Dina J. Wilke, *Does Police Intervention in Intimate Partner Violence Work? Estimating the Impact of Batterer Arrest in Reducing Revictimization*, 11 ADVANCES SOC. WORK 283, 290–92 (2010).

⁵² Vivian H. Lyons et al., *Use of Multiple Failure Models in Injury Epidemiology: A Case Study of Arrest and Intimate Partner Violence Recidivism in Seattle, WA*, 6 INJ. EPIDEMIOLOGY, no. 36, 2019, at 1, 3–6.

⁵³ Joel G. Garner & Christopher D. Maxwell, *Crime Control Effects of Criminal Sanctions for Intimate Partner Violence*, 3 PARTNER ABUSE 469, 484–85 (2012).

the victim's wishes, the impact is positive, and arrest of the batterer is an effective deterrent.⁵⁴

7. Arresting perpetrators of domestic violence deters recidivism.⁵⁵
8. "Arrest of the batterer is the central element of an effective police response."⁵⁶
9. Arresting domestic violence perpetrators resulted in substantially less future violence than advising or counseling.⁵⁷
10. Arrest has a dramatic deterrent effect on reoffending.⁵⁸
11. More aggressive law enforcement policies, including arrest and incarceration of batterers, increases victim reporting.⁵⁹
12. Arresting batterers and employing firmer prosecutorial protocol prevents recidivism and saves women's lives.⁶⁰
13. Arresting batterers deters recidivism and makes clear that domestic violence is a crime against society.⁶¹
14. In order to deter batterers, more severe sanctions must be imposed.⁶²
15. "Civil protection orders coupled with strong enforcement provisions have played a key role in reducing violence against

⁵⁴ See generally J. ZORZA & L. WOODS, ANALYSIS AND POLICY IMPLICATIONS OF THE NEW DOMESTIC VIOLENCE POLICE STUDIES (1994), <https://perma.cc/7QJR-7FUR> (noting in the abstract for the report that "domestic violence, if left unchecked, usually escalates in severity and frequency" and that arrest "allows the victim a window of opportunity to secure safety").

⁵⁵ See Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 315 (1993).

⁵⁶ Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problems, Forging the Solutions*, 60 WASH. L. REV. 267, 309 (1985).

⁵⁷ LAWRENCE W. SHERMAN ET AL., POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS 16, 16 (1992).

⁵⁸ See Richard A. Berk & Phyllis J. Newton, *Does Arrest Really Deter Wife Battery? An Effort to Replicate the Findings of the Minneapolis Spouse Abuse Experiment*, 50 AM. SOC. REV. 253, 261-62 (1985).

⁵⁹ See Donald P. Van Blaricom, *Domestic Violence*, 52 THE POLICE CHIEF, no. 6, 1985, at 64-65.

⁶⁰ ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING & HOW TO STOP IT 5 (rev. ed. 2000).

⁶¹ Esta Soler, *Domestic Violence Is a Crime: A Case Study—San Francisco Family Violence Project*, in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 21, 22, 26 (Daniel Jay Sonkin ed. 1987); see Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 874 (1994) (noting that no-drop policies prevent recidivism).

⁶² See Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 66 (1992).

women.”⁶³

B. *Pro- and Mandatory Arrests*

1. “Mandatory arrest substantially reduces the number of domestic assaults and murders.”⁶⁴
2. “Mandatory arrest is an essential step toward ending domestic violence, but without more—including prosecution and penalties commensurate with the nature of the offense—it may not significantly diminish the domestic violence epidemic.”⁶⁵
3. To date, society’s response to domestic violence has focused almost exclusively on providing services to victims. While this is helpful, it has not reduced domestic violence, and this approach ignores the root of the problem. Mandatory arrest is a crucial step toward criminalizing and preventing domestic violence.⁶⁶
4. Mandatory arrest statutes are an effective way to enable domestic violence victims to leave their abusers by offering a network of support, which will empower victims to end the cycle of violence. Mandatory arrest can also ensure a victim’s safety by reducing the possibility of retaliatory abuse. Most importantly, mandatory arrest laws demonstrate that domestic violence and the exploitation of women will not be tolerated by our society.”⁶⁷
5. “Mandatory arrest will provide proper punishment for batterers, enhance awareness of domestic abuse in society in general, and, most importantly, help victims of domestic abuse to obtain safety and establish lives free from the violent attacks of their loved ones.”⁶⁸

⁶³ Kathleen Curtis, Comment, *The Supreme Court’s Attack on Domestic Violence Legislation—Discretion, Entitlement, and Due Process in Town of Castle Rock v. Gonzales*, 32 WM. MITCHELL L. REV. 1181, 1214 (2006).

⁶⁴ Sarah M. Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN’S L.J. 213, 215–16 (1988).

⁶⁵ Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but Is It Enough?*, 1996 U. ILL. L. REV. 533, 569 (1996).

⁶⁶ See Kathleen Waits, *The Criminal Justice System’s Response to Battering: Understanding the Problems, Forging the Solutions*, 60 WASH. L. REV. 267, 303–04 (1985).

⁶⁷ Allison J. Cambria, Note, *Defying a Dead End: The Ramifications of Town of Castle Rock v. Gonzales on Domestic Violence Law and How the States Can Ensure Police Enforcement of Mandatory Arrest Statutes*, 59 RUTGERS L. REV. 155, 189 (2006).

⁶⁸ Machaela M. Hoctor, Comment, *Domestic Violence as a Crime Against the State: The Need for*

6. “[Mandatory arrest laws] [s]end a message that domestic violence shall not be treated as a less serious crime than violence between strangers, and thus they transform the private nature of domestic violence into a public matter. Otherwise, by refusing to intervene under a rationale that domestic violence is a private family matter, the state not only condones beating but in fact promotes it.”⁶⁹
7. “A pro-arrest policy is a less dogmatic alternative which, coupled with a coordinated program, has the potential to alter the cost/benefit ratio associated with battering without mandating the imposition of risks on the victim.”⁷⁰
8. “Research indicates that mandatory arrests by police and court-granted restraining orders are among the interventions taken for the protection of victims.”⁷¹
9. Law enforcement protocol that included pro-arrest and no-drop policies led to reduction in recidivism.⁷²
10. “[T]he law must acknowledge that police officers traditionally have failed to arrest batterers, and hence mandatory arrest laws are necessary. Arrest alone will not curb domestic violence[;] thus strong prosecution policies are needed.”⁷³
11. “[P]resumptive arrest and non-coercive no-drop policies may do more to respect the needs of victims while still sending the message that domestic violence will not be tolerated.”⁷⁴
12. “To ensure that victims obtain the full relief to which they are now entitled, prosecutors, judges, and the court system must implement extensive reforms. Such reforms are beginning to emerge in the criminal justice field, where an increasing number

Mandatory Arrest in California, 85 CALIF. L. REV. 643, 700 (1997).

⁶⁹ Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 CARDOZO WOMEN’S L.J. 303, 313 n.41 (2005) (quoting ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 186 (2000)).

⁷⁰ Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1164 (1994).

⁷¹ Cindy S. Lederman & Neena M. Malik, *Family Violence: A Report on the State of the Research*, 73 FLA. B.J., December 1999, at 58, 62.

⁷² See Richard M. Tolman & Arlene Weisz, *Coordinated Community Intervention for Domestic Violence: The Effects of Arrest and Prosecution on Recidivism of Woman Abuse Perpetrators*, 41 CRIME & DELINQ. 481, 489 (1995).

⁷³ Lanae L. Monera, Note, *Michigan’s Domestic Violence Laws: A Critique and Proposals for Reform*, 42 WAYNE L. REV. 227, 258 (1995).

⁷⁴ Anna Rousseve, *Domestic Violence and the States*, 6 GEO. J. GENDER & L. 431, 458 (2005).

of jurisdictions police are operating under mandatory arrest laws and prosecutors are adopting no-drop prosecution policies."⁷⁵

C. No-Drop Policies

1. In San Diego, homicides related to domestic violence fell from thirty in 1985 to seven in 1994 after successful implementation of a no-drop policy that prohibited prosecutors from dismissing domestic violence cases at the victim's request.⁷⁶
2. When prosecutors maintain strong prosecution policies by refusing to drop the charges at a victim's request, batterers are less likely to intimidate and threaten their victims because they realize that victims cannot control the prosecutorial process.⁷⁷
3. Aggressive prosecution policies lower recidivism rates by communicating a strong message that domestic violence will not be tolerated.⁷⁸
4. Assaultants who went through an initial court hearing were less likely to commit later violent acts against the same victims than those who did not; women who had the opportunity to drop the charges, but did not, were less likely to be assaulted six months later compared to cases where charges were dropped at the request of the victim.⁷⁹
5. "This policy of aggressive prosecution adopts the wisdom that '[t]here is no excuse for domestic violence.' It tells batterers that violence against intimate partners is criminal, that offenders can and will go to jail, and that their victim's refusal to press charges

⁷⁵ Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 49 (1999).

⁷⁶ Gena L. Durham, Note, *The Domestic Violence Dilemma: How Our Ineffective and Varied Responses Reflect Our Conflicted Views of the Problem*, 71 S. CAL. L. REV. 641, 651 (1998); see Mark Hansen, *New Strategy in Battering Cases*, ABA J., Aug. 1995, at 14, 14.

⁷⁷ See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1865 (1996). See generally Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 929 (1994) (finding that arrest is a "superior method of deterring future violence").

⁷⁸ Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 150 (1991); Gwinn & O'Dell, *supra* note 51, at 303-04.

⁷⁹ See generally D. A. Ford & M. J. Regoli, *Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 127-64 (N. Zoe Hilton ed., 1993).

is not a 'get out of jail free' card."⁸⁰

6. "No-drop policies benefit victims by reducing the chance that an offender would intimidate the victim, since it is the prosecutor who controls whether a criminal case progresses, and not the victim. As an additional benefit, the assistant district attorneys in no-drop jurisdictions are able to monitor a large number of offenders, since virtually all of them are involved in ongoing prosecutions. A policy of prosecuting and sentencing domestic violence offenders signals to the community and to offenders that the criminal justice system takes domestic abuse seriously and will intervene to stop it."⁸¹

There are other strong policy reasons to support an aggressive law enforcement response to domestic violence:

1. Law enforcement policies that require police to treat non-stranger violence against women with the same seriousness as crimes against strangers help to ensure the state does not discriminate against women.⁸²
2. Arresting batterers represents a better distribution of justice between men and women.⁸³
3. "The legal achievements of the battered women's movement—including mandatory arrest, no-drop prosecution, and the Model Code on Domestic and Family Violence—have dramatically improved victims' access to justice and the likelihood that perpetrators will be held accountable."⁸⁴

⁸⁰ Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 182 (1997).

⁸¹ Jonathan Lippman, *Ensuring Victim Safety and Abuser Accountability: Reforms and Revisions in New York Courts' Response to Domestic Violence*, 76 ALB. L. REV. 1417, 1427 (2013); see also M. Seymore, *Against the Peace and Dignity of the State: Spousal Violence and Spousal Privilege*, 2 TEX. WESLEYAN L. REV. 239, 256 (1995) (arguing that allowing domestic violence victims to drop the charges invites intimidation tactics).

⁸² See *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527, 1531 (D. Conn. 1984) (denying defendant's motion to dismiss a woman's Fourteenth Amendment claim that police provided less protection to women abused by boyfriends or spouses than to victims of nondomestic violence).

⁸³ See Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, 36 AM. BEHAVIORAL SCIENTISTS 651, 680 (1993).

⁸⁴ Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1904–05 (2002).

4. “There are several legislative, administrative, and prosecutorial changes that can be adopted to strengthen cases. . . . The adoption of these changes will not eliminate domestic violence. They will, however, lead to successful prosecutions, [and] take batterers off the streets”⁸⁵
5. “Failure to critically evaluate procedures and systems currently in place and to at least attempt improvements will create a dangerous complacency, which effectively sanctions the life-threatening dangers for many Americans in their own homes and most intimate relationships.”⁸⁶
6. Mandatory law enforcement policies against domestic violence help reduce racism in law enforcement by ensuring that all offenders and victims are treated alike, regardless of race, social status, etc.⁸⁷
7. “[T]he presence of mandatory and preferred arrest laws tended to mediate [racist] effects, such as by increasing the likelihood of arrest in intimidation cases and by making the likelihood of arrest less dependent on where the incident took place or on the race of the offender.”⁸⁸

CONCLUSION

Professor Barkow’s argument in favor of decarceration may make sense for some criminals, and some crimes, in certain cases, but systemic application of such a rule without regard for how it will impact women’s lives is dangerously irresponsible. Constitutionally authorized male supremacy already fuels a terroristic epidemic of sexual and domestic violence. This space between full equality and women’s inequality is where men’s violence against women occurs with impunity under the law. The least we can do is insist that police and prosecutors help fill in the constitutional gap by respecting abundant research amply demonstrating that an aggressive law enforcement response to domestic violence, including incarceration, reduces incidence rates and saves women’s lives.

⁸⁵ Ed Furman, Note, *Addressing Evidentiary Problems in Prosecuting Domestic Violence Cases Post-Crawford*, 25 TEMP. POL. & C.R. L. REV. 143, 169 (2016).

⁸⁶ Lynn A. Combs, Note, *Between A Rock and A Hard Place: The Legacy of Castle Rock v. Gonzales*, 58 HASTINGS L.J. 387, 412 (2006).

⁸⁷ Hoctor, *supra* note 64, at 688–90.

⁸⁸ David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIMINOLOGY 255, 296 (2007).